Corporations Act 2001

Act No. 50 of 2001 as amended

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The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
affected by application provisions that are set out in the Notes section

Contents

Chapter 7—Financial services and markets 1

Part 7.1—Preliminary 1

Division 1—Object of Chapter and outline of Chapter 1

760A Object of Chapter 1

760B Outline of Chapter 1

Division 2—Definitions 3

761A Definitions 3

761B Meaning of *arrangement*—2 or more arrangements that together form a derivative or other financial product 15

761C Meaning of *carry on* a financial services business 16

761CA Meaning of *class* and *kind* of financial products and financial services 16

761D Meaning of *derivative* 16

761E Meaning of *issued*, *issuer*, *acquire* and *provide* in relation to financial products 18

761EA Meaning of *margin lending facility*, *margin call* and associated expressions 20

761F Meaning of *person*—generally includes a partnership 24

761FA Meaning of *person*—generally includes multiple trustees 24

761G Meaning of retail client and wholesale client 26

761GA Meaning of *retail client*—sophisticated investors 31

761H References to this Chapter include references to regulations or other instruments made for the purposes of this Chapter 32

Division 3—What is a financial product? 33

Subdivision A—Preliminary 33

762A Overview of approach to defining what a financial product is 33

762B What if a financial product is part of a broader facility? 33

762C Meaning of *facility* 34

Subdivision B—The general definition 34

763A General definition of *financial product* 34

763B When a person makes a financial investment 35

763C When a person manages financial risk 36

763D When a person makes non-cash payments 36

763E What if a financial product is only incidental? 37

Subdivision C—Specific inclusions 38

764A Specific things that are financial products (subject to Subdivision D) 38

Subdivision D—Specific exclusions 41

765A Specific things that are not financial products 41

Division 4—When does a person provide a financial service? 44
766A When does a person provide a *financial service*? 44
766B Meaning of financial product advice 45
766C Meaning of *dealing* 48
766D Meaning of *makes a market* for a financial product 49
766E Meaning of provide a custodial or depository service 50
Division 5—What is a financial market? 52
767A What is a *financial market*? 52
Division 6—What is a clearing and settlement facility? 53
768A What is a clearing and settlement facility? 53
Division 7—General provisions relating to civil and criminal liability 55
769A Part 2.5 of *Criminal Code* does not apply 55
769B People are generally responsible for the conduct of their agents, employees etc. 55
769C Representations about future matters taken to be misleading if made without reasonable grounds 58
Part 7.2—Licensing of financial markets 59
Division 1—Preliminary 59
790A Definition 59
Division 2—Requirement to be licensed 60
791A Need for a licence 60
791B Other prohibitions on holding out 60
791C Exemptions 60
791D When a market is taken to be operated in this jurisdiction 61
Division 3—Regulation of market licensees 62
Subdivision A—Licensee's obligations 62
792A General obligations 62
792B Obligation to notify ASIC of certain matters 63
792C Giving ASIC information about a listed disclosing entity 65
792D Obligation to assist ASIC 65
792E Obligation to give ASIC access to market facilities 65
792F Annual report 65
792G Obligations to notify people about clearing and settlement arrangements in certain circumstances 66
792H Change of country by foreign licensee 67
792I Making information about compensation arrangements publicly available 68
Subdivision B—The market's operating rules and procedures 68
793A Content of the operating rules and procedures 68

793B Legal effect of operating rules 69
793C Enforcement of operating rules 69
793D Changing the operating rules 70
793E Disallowance of changes to operating rules 71

Subdivision C—Powers of the Minister and ASIC 72
794A Minister's power to give directions 72
794B Minister's power to require special report 72
794C ASIC to assess licensee's compliance 72
794D ASIC's power to give directions 73
794E Additional directions to clearing and settlement facilities 75

Division 4—The Australian market licence 76

Subdivision A—How to get a licence 76
795A How to apply for a licence 76
795B When a licence may be granted 76
795C Publication of notice of licence grant 78
795D More than one licence in the same document 78
795E More than one market covered by the same licence 79

Subdivision B—The conditions on the licence 79
796A The conditions on the licence 79

Subdivision C—When a licence can be varied, suspended or cancelled 80
797A Varying licences 80
797B Immediate suspension or cancellation 81
797C Suspension or cancellation following hearing and report 81
797D Effect of suspension 82
797E Variation or revocation of suspension 82
797F Publication of notice of licence suspension or cancellation 82
797G Suspension and cancellation only in accordance with this Subdivision 83

Division 5—Other matters 84
798A Matters to be taken into account by the Minister 84
798B ASIC may give advice to Minister 85
798C Market licensee or related body corporate etc. listing on market 85
798D Exemptions and modifications for self-listing licensees or related bodies corporate etc. 87
798DA Market licensee, related body corporate etc. or competitor participating in market 88
798E Other potential conflict situations 89

Part 7.2A—Supervision of financial markets 91
798F ASIC to supervise financial markets 91
798G Market integrity rules 91

798H Complying with market integrity rules 92
798J Directions by ASIC 92
798K Alternatives to civil proceedings 93
798L Exemptions and modifications by regulations 94

Part 7.3—Licensing of clearing and settlement facilities 95

Division 1—Requirement to be licensed 95
820A Need for a licence 95
820B Other prohibitions on holding out 95
820C Exemptions 96
820D When a clearing and settlement facility is taken to be operated in this jurisdiction 96

Division 2—Regulation of CS facility licensees 97

Subdivision A—Licensee's obligations 97
821A General obligations 97
821B Obligation to notify ASIC of certain matters 98
821BA Obligation to notify Reserve Bank of certain matters 99
821C Obligation to assist 100
821D Obligation to give ASIC access to the facility 100
821E Annual report 101
821F Change of country by foreign licensee 101

Subdivision B—The facility's operating rules and procedures 102
822A Content of the operating rules and procedures 102
822B Legal effect of operating rules 103
822C Enforcement of operating rules 103
822D Changing the operating rules 104
822E Disallowance of changes to operating rules 105

Subdivision C—Powers of the Minister, ASIC and the Reserve Bank in relation to licensees 105
823A Minister's power to give directions 105
823B Minister's power to require special report 106
823C ASIC to assess licensee's compliance 106
823CA Reserve Bank to assess licensee's compliance 107
823D Directions power—protecting dealings in financial products and ensuring fair and effective provision of services by CS facilities 108
823E Directions power—reduction of systemic risk 110

Division 3—The Australian CS facility licence 111

Subdivision A—How to get a licence 111
824A How to apply for a licence 111
824B When a licence may be granted 111
824C Publication of notice of licence grant 113

824D More than one licence in the same document 113
824E More than one CS facility covered by the same licence 113

Subdivision B—The conditions on the licence 114
825A The conditions on the licence 114

Subdivision C—When a licence can be varied, suspended or cancelled 115
826A Varying licences 115
826B Immediate suspension or cancellation 116
826C Suspension or cancellation following hearing and report 116
826D Effect of suspension 117
826E Variation or revocation of suspension 117
826F Publication of notice of licence suspension or cancellation 117
826G Suspension and cancellation only in accordance with this Subdivision 117

Division 4—Other matters 118
827A Matters to be taken into account by the Minister 118
827B ASIC may give advice to Minister 119
827C Reserve Bank may give advice to Minister 119
827D Reserve Bank may determine financial stability standards 119

Part 7.4—Limits on involvement with licensees 122

Division 1—Limit on control of certain licensees 122

Subdivision A—15% voting power limit 122
850A Scope of Division 122
850B Meaning of unacceptable control situation 122
850C Acquisitions of shares 123
850D Remedial orders 123
850E Injunctions 124

Subdivision B—Approval to exceed 15% voting power limit 124
851A Application for approval to exceed 15% voting power limit 124
851B Approval of application 125
851C Duration of approval 126
851D Conditions of approval 126
851E Varying percentage approved 127
851F Revoking an approval 129
851G Further information about applications 129
851H Time limit for Minister's decision 129
851I Preservation of voting power in relation to bodies specified in regulations made for section 850A 130

Subdivision C—Other matters 131
852A Acquisition of property 131
852B Anti-avoidance 131

Division 2—Individuals who are not fit and proper are disqualified 133
853A Who is disqualified 133
853B When an individual is *involved in* an operator 133
853C Declaration by ASIC 133
853D Procedure for declaration 134
853E Revoking a declaration 135
853F Obligations on disqualified individuals 135
853G Notification by ASIC 136
Division 3—Miscellaneous 137
854A Record-keeping and giving of information 137
854B Exemptions and modifications by regulations 138
Part 7.5—Compensation regimes for financial markets 139
Division 1—Preliminary 139
880A Part does not apply to markets licensed under special provisions about overseas markets 139
880B Definitions 139
Division 2—When there must be a compensation regime 141
881A Licensed markets through which participants provide services for retail clients must generally have a compensation regime 141
881B Additional requirements for the licence application 141
881C What happens if an application contains information in accordance with paragraph 881B(2)(c) 142
881D What happens if an application contains a statement in accordance with paragraph 881B(2)(d) 142
Division 3—Approved compensation arrangements 143
Subdivision A—Approval of compensation arrangements 143
882A How to get compensation arrangements approved with grant of licence 143
882B How to get compensation arrangements approved after licence is granted 143
882C Revocation of approval 144
882D Minister's power to give directions 144
Subdivision B—Effect of compensation rules forming part of Division 3 arrangements 145
883A Legal effect of compensation rules 145
883B Enforcement of compensation rules 145
883C Other sources of funds for compensation 146
883D Payment of levies 146
Subdivision C—Changing Division 3 arrangements 147

884A Division 3 arrangements must generally only be changed in accordance with this Subdivision 147
884B Changing Division 3 arrangements—matters required to be dealt with in the compensation rules 148
884C Changing Division 3 arrangements—matters not required to be dealt with in the compensation rules 149

Subdivision D—Are compensation arrangements adequate? 150
885A Purpose of this Subdivision 150
885B Requirements to be complied with for arrangements to be adequate 150
885C The losses to be covered 151
885D Certain losses that are not Division 3 losses 152
885E The amount of compensation 153
885F Method of payment of compensation 154
885G Making and determination of claims 154
885H The source of funds—general 155
885I Administration and monitoring 155
885J The losses to be covered—other matters to be taken into account 156

Subdivision E—Other provisions about Division 3 arrangements 156
886A Only one claim in respect of the same loss 156
886B Regulations relating to fidelity funds 156

Division 4—NGF Compensation regime 157

Subdivision A—Application of Division 157
887A Markets to which this Division applies 157

Subdivision B—Claims for and payment of compensation 157
888A The situations in which compensation may be claimed 157
888B Kinds of compensation available 157
888C Amount of compensation payable 157
888D Payment of compensation 158
888E Making and determination of claims 158
888F The SEGC has power to determine claims 159
888G Allowing a claim does not constitute an admission of any other liability 159
888H Claimant may apply to Court if claim disallowed 159
888I Non-NGF property of the SEGC not available to meet claims 160
888J The SEGC may enter into contracts of insurance or indemnity 160
888K NGF may be used to acquire financial products to be transferred as compensation 161

Subdivision C—The NGF 161
889A Continuation of the National Guarantee Fund 161
889B Compensation to be provided out of the NGF 161

889C The SEGC to keep the NGF 161
889D What the NGF consists of 162
889E Power to borrow etc. for purposes of the NGF 162
889F Money borrowed and paid to the SEGC 163
889G Money borrowed and not paid to the SEGC 163
889H Payments out of the NGF 163
889I Minimum amount of the NGF 164
889J Levy by the SEGC 165
889K Levy by market operator 166

Subdivision D—The SEGC 168
890A Minister to nominate the SEGC 168
890B The SEGC's functions and powers 169
890C Delegation 169
890D Operating rules of the SEGC 170
890E Legal effect of the SEGC's operating rules 170
890F Enforcement of the SEGC's operating rules 170
890G Changing the SEGC's operating rules 171
890H Disallowance of changes to the SEGC's operating rules 171

Subdivision E—Other provisions relating to compensation under this Division 171
891A Payment out of the NGF to prescribed body with arrangements covering clearing and settlement facility support 171
891B Markets operated by bodies corporate that become members of the SEGC—regulations may deal with transitional provisions and other matters 172
891C Regulations may make different provision in respect of different markets etc. 173

Division 5—Provisions common to both kinds of compensation arrangements 174
892A Definitions 174
892B How regulated funds are to be kept 174
892C Money in regulated funds may be invested 175
892D Powers of relevant authority to require production or delivery of documents or statements 176
892E Power to require assistance for purpose of dealing with a claim 177
892F Relevant authority's right of subrogation if compensation is paid 178
892G Excess money in compensation funds 178
892H Accounting and reporting for regulated funds 178
892I Division 3 arrangements—reporting in situations where compensation does not come out of a regulated fund 180

892J Regulations may provide for qualified privilege in respect of certain matters 180
892K Risk assessment report 181

Division 6—Miscellaneous 182
893A Exemptions and modifications by regulations 182

Part 7.5A—Regulation of derivative transactions and derivative trade repositories 183

Division 1—Application of Part 183
900A Derivatives and transactions etc. to which this Part applies 183

Division 2—Regulation of derivative transactions: derivative transaction rules 184

Subdivision A—Power to make derivative transaction rules 184
901A ASIC may make derivative transaction rules 184
901B Derivatives in relation to which rules may impose requirements 187
901C Regulations may limit the transactions in relation to which rules may impose requirements 189
901D Regulations may limit the persons on whom requirements may be imposed 189

Subdivision B—Compliance with derivative transaction rules 190
901E Obligation to comply with derivative transaction rules 190
901F Alternatives to civil proceedings 190
901G Failure to comply with derivative transaction rules does not invalidate transaction etc. 191

Subdivision C——The process of making of derivative transaction rules 191
901H Matters to which ASIC must have regard when making rules 191
901J ASIC to consult before making rules 192
901K Ministerial consent to rules required 192
901L Emergency rules: consultation and consent not required 192
901M Amendment and revocation of derivative transaction rules 193

Division 3—Regulation of licensed derivative trade repositories: supervision by ASIC 194
902A ASIC to supervise licensed derivative trade repositories 194

Division 4—Regulation of licensed derivative trade repositories: derivative trade repository rules 195

Subdivision A—Power to make derivative trade repository rules 195
903A ASIC may make derivative trade repository rules 195
903B Rules may only impose requirements on operators and officers of licensed derivative trade repositories 197

903C Regulations may limit how rules may deal with matters related to derivative trade data 198

Subdivision B—Compliance with derivative trade repository rules 198

903D Obligation to comply with derivative trade repository rules 198

903E Alternatives to civil proceedings 198

Subdivision C—The process of making derivative trade repository rules 199

903F Matters to which ASIC has regard when making rules 199

903G ASIC to consult before making rules 199

903H Ministerial consent to rules required 200

903J Emergency rules: consultation and consent not required 200

903K Amendment and revocation of derivative trade repository rules 201

Division 5—Regulation of licensed derivative trade repositories: other obligations and powers 202

Subdivision A—Obligations 202

904A General obligations 202

904B Obligations relating to derivative trade data 202

904C Obligation to notify ASIC of certain matters 204

904D Obligation to assist ASIC, APRA and the Reserve Bank 205

904E Obligation to give ASIC access to derivative trade repository facilities 205

Subdivision B—Powers of Minister and ASIC to give directions etc. 205

904F Minister's power to give directions to licensee not complying with obligations 205

904G ASIC's power to give directions to licensee not complying with obligations 206

904H ASIC's power to give directions requiring special reports 207

904J ASIC may assess licensee's compliance 207

904K Directions relating to derivative trade data if repository ceases to be licensed 208

Division 6—Regulation of licensed derivative trade repositories: licensing 210

Subdivision A—Requirement for some trade repositories to be licensed 210

905A Regulations may identify derivative trade repositories as being required to be licensed 210

Subdivision B—Granting of licences 210

905B How to apply for a licence 210

905C When a licence may be granted 211

905D Publication of notice of licence grant 211

905E More than one derivative trade repository covered by the same licence 212

Subdivision C—The conditions on a licence 212

905F The conditions on the licence 212

Subdivision D—When a licence can be varied, suspended or cancelled 213

905G Varying licences 213

905H Immediate suspension or cancellation 214

905J Suspension or cancellation following hearing and report 214

905K Effect of suspension 215

905L Variation or revocation of suspension 215

905M Publication of notice of licence suspension or cancellation 215

905N Suspension and cancellation only in accordance with this Subdivision 215

Subdivision E—Other matters 216

905P Matters to be taken into account by ASIC 216

Division 7—Regulation of prescribed derivative trade repositories 217

906A Regulations may impose obligations and confer powers 217

Division 8—Other matters 218

907A Other prohibitions on holding out 218

907B Making provision by reference to instruments as in force from time to time 218

907C Compliance with requirements to provide derivative trade data or other information: protection from liability 219

907D Exemptions by ASIC 219

907E Exemptions and modifications by regulations 220

Part 7.6—Licensing of providers of financial services 222

Division 1—Preliminary 222

910A Definitions 222

Division 2—Requirement to be licensed or authorised 223

911A Need for an Australian financial services licence 223

911B Providing financial services on behalf of a person who carries on a financial services business 228

911C Prohibition on holding out 230

911D When a financial services business is taken to be carried on in this jurisdiction 230

Division 3—Obligations of financial services licensees 231

912A General obligations 231

912B Compensation arrangements if financial services provided to persons as retail clients 232

912C Direction to provide a statement 233
912CA Regulations may require information to be provided 234
912D Obligation to notify ASIC of certain matters 234
912E Surveillance checks by ASIC 236
912F Obligation to cite licence number in documents 236

Division 4—Australian financial services licences 237

Subdivision A—How to get a licence 237
913A Applying for a licence 237
913B When a licence may be granted 237
913C Licence numbers 239

Subdivision B—The conditions on the licence 239
914A The conditions on the licence 239

Subdivision C—When a licence can be varied, suspended or cancelled 241
915A Varying licences 241
915B Immediate suspension or cancellation 242
915C Suspension or cancellation after offering a hearing 244
915D Effect of suspension 245
915E Revocation of suspension 245
915F Date of effect and publication of cancellation or suspension 245
915G Statement of reasons 245
915H ASIC may allow licence to continue in effect 245
915I Special procedures for APRA-regulated bodies 246
915J Variation, suspension and cancellation only under this Subdivision 247

Division 5—Authorised representatives 248
916A How representatives are authorised 248
916B Sub-authorisations 248
916C Authorised representative of 2 or more licensees 249
916D Licensees cannot authorise other licensees 250
916E Licensees acting under a binder 251
916F Obligation to notify ASIC etc. about authorised representatives 251
916G ASIC may give licensee information about representatives 253

Division 6—Liability of financial services licensees for representatives 255
917A Application of Division 255
917B Responsibility if representative of only one licensee 256
917C Representatives of multiple licensees 256
917D Exception if lack of authority is disclosed to client 257
917E Responsibility extends to loss or damage suffered by client 257
917F Effect of Division 258

Division 8—Banning or disqualification of persons from providing financial services 259

Subdivision A—Banning orders 259

920A ASIC's power to make a banning order ... 259
920B What is a *banning order*? ... 260
920C Effect of banning orders ... 261
920D Variation or cancellation of banning orders ... 261
920E Date of effect and publication of banning order, variation or cancellation ... 262
920F Statement of reasons ... 262

Subdivision B—Disqualification by the Court 262

921A Disqualification by the Court ... 262

Division 9—Registers relating to financial services 264

922A Registers relating to financial services ... 264
922B Inspection of Registers ... 264

Division 10—Restrictions on use of terminology 265

923A Restriction on use of certain words or expressions ... 265
923B Restriction on use of certain words or expressions unless authorised in licence conditions ... 267

Division 11—Agreements with unlicensed persons relating to the provision of financial services 270

Subdivision A—Agreements affected 270

924A Agreements with certain unlicensed persons ... 270

Subdivision B—Effect on agreements 270

925A Client may give notice of rescission ... 270
925B Effect of notice under section 925A ... 271
925C Client may apply to Court for partial rescission ... 271
925D Court may make consequential orders ... 272
925E Agreement unenforceable against client ... 272
925F Non-licensee not entitled to recover commission ... 273
925G Onus of establishing non-application of section 925E or 925F ... 273
925H Client may recover commission paid to non-licensee ... 273
925I Remedies under this Division additional to other remedies ... 274

Division 12—Miscellaneous 275

926A Exemptions and modifications by ASIC ... 275
926B Exemptions and modifications by regulations ... 276

Part 7.7—Financial services disclosure 277

Division 1—Preliminary 277

940A How Part applies if a financial services licensee is acting as authorised representative 277

940B What if there is no reasonable opportunity to give a document, information or statement required by this Part? 277

940C How documents, information and statements are to be given 278

940D General approach to offence provisions 280

Division 2—Person provided with financial service as retail client to be given a Financial Services Guide 281

Subdivision A—Requirement for a Financial Services Guide to be given 281

941A Obligation on financial services licensee to give a Financial Services Guide if financial service provided to person as a retail client 281

941B Obligation on authorised representative to give a Financial Services Guide if financial service provided to person as a retail client 281

941C Situations in which a Financial Services Guide is not required 282

941D Timing of giving Financial Services Guide 283

941E Information must be up to date 284

941F Obligation to give updated Financial Services Guide 284

Subdivision B—Content and authorisation of Financial Services Guide 285

942A Title of Financial Services Guide 285

942B Financial Services Guide given by financial services licensee—main requirements 285

942C Financial Services Guide given by authorised representative—main requirements 288

942D Financial Services Guide may consist of 2 or more separate documents given at same time 291

942DA Combining a Financial Services Guide and a Product Disclosure Statement in a single document 293

942E Altering a Financial Services Guide after its preparation and before giving it to a person 293

Subdivision C—Supplementary Financial Services Guides 294

943A What a Supplementary Financial Services Guide is 294

943B Title of Supplementary Financial Services Guide 294

943C Form of Supplementary Financial Services Guide 294

943D Effect of giving a person a Supplementary Financial Services Guide 295

943E Situation in which only a Supplementary Financial Services Guide need be given 295

943F Altering a Supplementary Financial Services Guide after its preparation and before giving it to a person 295

Division 3—Additional requirements for personal advice provided to a retail client 297

Subdivision A—When this Division applies 297

944A Situation in which Division applies 297

Subdivision C—Requirement for a Statement of Advice to be given 297

946A Obligation to give client a Statement of Advice 297

946AA Small investments—Statement of Advice not required 297

946B Other situations in which a Statement of Advice is not required 299

946C Timing of giving Statement of Advice 304

Subdivision D—Content of Statement of Advice 305

947A Title of Statement of Advice 305

947B Statement of Advice given by financial services licensee—main requirements 305

947C Statement of Advice given by authorised representative—main requirements 306

947D Additional requirements when advice recommends replacement of one product with another 308

947E Statement of Advice not to be combined with Financial Services Guide or Product Disclosure Statement 310

Subdivision E—Other matters 310

948A Qualified privilege if providing entity complies with this Division 310

Division 4—Other disclosure requirements 311

949A General advice provided to retail client—obligation to warn client that advice does not take account of client's objectives, financial situation or needs 311

949B Regulations may impose disclosure requirements in certain situations 312

Division 6—Miscellaneous 314

951A Part cannot be contracted out of 314

951B Exemptions and modifications by ASIC 314

951C Exemptions and modifications by regulations 315

Division 7—Enforcement 316

Subdivision A—Offences 316

952A Overview 316

952B Definitions 316

952C Offence of failing to give a disclosure document or statement 318

952D Offence of giving a disclosure document or statement knowing it to be defective 319
952E Offence of giving a defective disclosure document or statement (whether or not known to be defective) 320
952F Offences of financial services licensee knowingly providing defective disclosure material to an authorised representative 322
952G Offences of financial services licensee providing disclosure material to an authorised representative (whether or not known to be defective) 323
952H Offence of financial services licensee failing to ensure authorised representative gives disclosure documents or statements as required 326
952I Offences if a Financial Services Guide (or Supplementary FSG) does not comply with certain requirements 326
952J Offence if a Statement of Advice does not comply with certain requirements 328
952K Offence if authorised representative gives out unauthorised Financial Services Guide (or Supplementary FSG) 328
952L Offences if financial services licensee or authorised representative becomes aware that a Financial Services Guide (or Supplementary FSG) is defective 329
952M Offence of unauthorised alteration of Financial Services Guide or Supplementary Financial Services Guide 330

Subdivision B—Civil liability 330
953A Definitions 330
953B Civil action for loss or damage 332
953C Additional powers of court to make orders 334

Part 7.7A—Best interests obligations and remuneration 336

Division 1—Preliminary 336
960 Definitions 336
960A No contracting out 337
960B Obligations under this Part in addition to other obligations 337

Division 2—Best interests obligations 338

Subdivision A—Preliminary 338
961 Application of this Division 338
961A Application to a financial services licensee acting as an authorised representative 338

Subdivision B—Provider must act in the best interests of the client 339
961B Provider must act in the best interests of the client 339
961C When is something *reasonably apparent*? 341
961D What is a *reasonable investigation*? 341
961E What would reasonably be regarded as in the best interests of the client? 341
961F What is a *basic banking product*? 342

Subdivision C—Resulting advice must be appropriate to the client 342
961G Resulting advice must be appropriate to the client 342
Subdivision D—Where resulting advice still based on incomplete or inaccurate information 342
961H Resulting advice still based on incomplete or inaccurate information 342
Subdivision E—Provider to give priority to the client's interests 343
961J Conflict between client's interests and those of provider, licensee, authorised representative or associates 343
Subdivision F—Responsibilities of licensees under this Division 344
961K Civil penalty provision—sections 961B, 961G, 961H and 961J 344
961L Licensees must ensure compliance 345
961M Civil action for loss or damage 345
961N Additional powers of Court to make orders 346
961P *Responsible licensee* 346
Subdivision G—Responsibilities of authorised representatives under this Division 347
961Q Civil penalty provision—sections 961B, 961G, 961H and 961J 347
Division 3—Charging ongoing fees to clients 348
Subdivision A—Preliminary 348
962 Application of this Division 348
962A Ongoing fee arrangements 348
962B Ongoing fees 350
962C Fee recipients 350
962CA Exemption from application of opt-in requirement 350
Subdivision B—Termination, disclosure and renewal 351
962D Application of this Subdivision 351
962E Client may terminate arrangement at any time 352
962F Arrangement terminates if this Subdivision not complied with 352
962G Fee recipient must give fee disclosure statement 352
962H Fee disclosure statements 353
962J *Disclosure day* 354
962K Fee recipient must give renewal notice 354
962L *Renewal notice day* and *renewal period* 355
962M If client notifies fee recipient that client does not wish to renew 355
962N If client does not notify fee recipient that client wishes to renew 355
962P Civil penalty provision—charging ongoing fees after arrangement terminated 355

962Q Effect of termination....356

Subdivision C—Disclosure for arrangements to which Subdivision B does not apply 356

962R Application of this Subdivision....356

962S Fee recipient must give fee disclosure statement....357

Division 4—Conflicted remuneration 358

Subdivision A—Preliminary 358

963 Application to a financial services licensee acting as an authorised representative....358

Subdivision B—What is conflicted remuneration? 358

963A *Conflicted remuneration*....358

963B Monetary benefit given in certain circumstances not *conflicted remuneration*....358

963C Non-monetary benefit given in certain circumstances not *conflicted remuneration*....360

963D Benefits for recommending basic banking products not *conflicted remuneration*....361

Subdivision C—Ban on conflicted remuneration 361

963E Licensee must not accept conflicted remuneration....361

963F Licensee must ensure compliance....362

963G Authorised representative must not accept conflicted remuneration....362

963H Other representatives must not accept conflicted remuneration....362

963J Employer must not give employees conflicted remuneration....362

963K Product issuer or seller must not give conflicted remuneration....363

963L Volume-based benefits presumed to be conflicted remuneration....363

Division 5—Other banned remuneration 364

Subdivision A—Volume-based shelf-space fees 364

964 Application....364

964A Platform operator must not accept volume-based shelf-space fees....364

Subdivision B—Asset-based fees on borrowed amounts 365

964B Application....365

964C Application to a financial services licensee acting as an authorised representative....365

964D Financial services licensees must not charge asset-based fees on borrowed amounts....366

964E Authorised representatives must not charge asset-based fees on borrowed amounts....366

964F What is an *asset-based fee*?....367

964G Meaning of *borrowed* 367
964H When is something *reasonably apparent*? 367

Division 6—Anti-avoidance 368
965 Anti-avoidance [*see* Note 2] 368

Division 7—Transition 369
966 *Transition period* 369
967 Best interests obligations and remuneration provisions to apply during transition period 369
968 Notice to clients in transition period 370

Part 7.8—Other provisions relating to conduct etc. connected with financial products and financial services, other than financial product disclosure 372

Division 1—Preliminary 372
980A Matters covered by this Part 372
980B General approach to offence provisions 372

Division 2—Dealing with clients' money 373

Subdivision A—Money other than loans 373
981A Money to which Subdivision applies 373
981B Obligation to pay money into an account 374
981C Regulations may deal with various matters relating to accounts maintained for the purposes of section 981B 375
981D Money related to derivatives may be used for general margining etc. purposes 375
981E Protection of money from attachment etc. 376
981F Regulations may deal with how money to be dealt with if licensee ceases to be licensed etc. 376
981G Account provider not liable merely because of licensee's contravention 377
981H Money to which Subdivision applies taken to be held in trust 377

Subdivision B—Loan money 377
982A Money to which this Subdivision applies 377
982B Obligation to pay money into an account 378
982C Licensee to give client statement setting out terms of loan etc. 378
982D Permitted use of loan 379

Subdivision C—Powers of Court 379
983A Court may freeze certain accounts 379
983B Interim order freezing accounts 380
983C Duty of person to whom order directed to make full disclosure 380
983D Further orders and directions 381

983E Power of Court to make order relating to payment of money 381

Division 3—Dealing with other property of clients 383

984A Property to which Division applies 383

984B How property to which this Division applies is to be dealt with 383

Division 4—Special provisions relating to insurance 385

985A Definitions etc. 385

985B Status of amounts paid to financial services licensees in respect of contracts of insurance 385

985C Regulations may impose other requirements etc. if financial services licensee is not the insurer 386

985D Financial services licensees etc. not to deal in general insurance products from unauthorised insurers etc. 387

Division 4A—Special provisions relating to margin lending facilities 388

Subdivision A—Responsible lending conduct for margin lending facilities 388

985EA Application of this Subdivision 388

985E Requirements before issuing etc. margin lending facility 388

985F Assessment of unsuitability of margin lending facility 389

985G Reasonable inquiries etc. about the retail client 389

985H When margin lending facility must be assessed as unsuitable 390

985J Giving the retail client the assessment 391

985K Unsuitable margin lending facilities 393

Subdivision B—Notice of margin calls under margin lending facilities 394

985L Issue of margin lending facility must not be conditional on agreement to receive communications through agent 394

985M Notification of margin calls 395

Division 5—Obligations to report 397

986A Reporting in relation to money to which Subdivision A or B of Division 2 applies or property to which Division 3 applies 397

986B Reporting in relation to dealings in derivatives 397

Division 6—Financial records, statements and audit 398

Subdivision A—Preliminary 398

987A Application of Division 398

Subdivision B—Financial records of financial services licensees 398

988A Obligation to keep financial records 398

988B Records to be kept so that profit and loss statements and balance sheet can be prepared and audited 399

988C Language of records 399

988D Location of records 399

988E Particular categories of information to be shown in records 399
988F Regulations may impose additional requirements 400
988G Records taken to be made with licensee's authority 400

Subdivision C—Financial statements of financial services licensees 401
989A Meaning of *financial year* 401
989B Financial services licensee to prepare and lodge annual profit and loss statement and balance sheet 401
989C Requirements as to contents and applicable accounting principles 401
989CA Audit to be conducted in accordance with auditing standards 402
989D Time of lodgment 402

Subdivision D—Appointment etc. of auditors 403
990A Sections 990B to 990H not to apply to public companies 403
990B Appointment of auditor by licensee 403
990C When a person or firm is ineligible to act as auditor 405
990D Ineligible person or firm must not consent to act or disqualify themselves etc. 405
990E Duration of appointment of auditors 405
990F Removal of auditors 406
990G Resignation of auditors—requirements for resignation 406
990H Resignation of auditors—when resignation takes effect 407
990I Auditor's right of access to records, information etc. 407
990J Auditor's fees and expenses 408
990K Auditor to report on certain matters 408
990L Qualified privilege for auditor etc. 409

Division 7—Other rules about conduct 411
991A Financial services licensee not to engage in unconscionable conduct 411
991B Financial services licensee to give priority to clients' orders 411
991C Regulations may deal with various matters relating to instructions to deal through licensed markets 412
991D Regulations may require records to be kept in relation to instructions to deal on licensed markets and foreign markets 412
991E Obligations of financial services licensee in relation to dealings with non-licensees 413
991F Dealings involving employees of financial services licensees 414

Division 8—Miscellaneous 416
992A Prohibition on hawking of certain financial products 416
992AA Prohibition of hawking of managed investment products 418
992B Exemptions and modifications by ASIC 419
992C Exemptions and modifications by regulations 420

Division 9—Enforcement 421
993A Overview 421

993B Offence of failing to pay client money into an account as required ... 421
993C Offence of failing to comply with requirements relating to client money account ... 422
993D Offence of failing to pay loan money into an account as required ... 422

Part 7.9—Financial product disclosure and other provisions relating to issue, sale and purchase of financial products 423

Division 1—Preliminary 423
1010A Part generally does not apply to securities ... 423
1010B Part does not apply to financial products not issued in the course of a business ... 423
1010BA Part does not apply to contribution plans ... 423
1010C Special provisions about meaning of *sale* and *offer* ... 424
1010D General approach to offence provisions ... 424

Division 2—Product Disclosure Statements 425

Subdivision A—Preliminary 425
1011A Jurisidictional scope of Division ... 425
1011B Definitions ... 425
1011C Treatment of offers of options over financial products ... 426

Subdivision B—Requirement for a Product Disclosure Statement to be given 426
1012A Obligation to give Product Disclosure Statement—personal advice recommending particular financial product ... 426
1012B Obligation to give Product Disclosure Statement—situations related to issue of financial products ... 427
1012C Obligation to give Product Disclosure Statement—offers related to sale of financial products ... 429
1012D Situations in which Product Disclosure Statement is not required ... 433
1012DAA Rights issues for which Product Disclosure Statement is not required 438
1012DA Product Disclosure Statement not required for sale amounting to indirect issue ... 441
1012E Small scale offerings of managed investment and other prescribed financial products (20 issues or sales in 12 months) ... 446
1012F Product Disclosure Statement for certain superannuation products may be provided later ... 448
1012G Product Disclosure Statement may sometimes be provided later ... 449
1012H Obligation to take reasonable steps to ensure that Product Disclosure Statement is given to person electing to be covered by group financial product ... 450

1012I Obligation to give employer a Product Disclosure Statement in relation to certain superannuation products and RSA products 451
1012IA Treatment of arrangements under which a person can instruct another person to acquire a financial product 453
1012J Information must be up to date 457
1012K Anti-avoidance determinations 457

Subdivision C—Preparation and content of Product Disclosure Statements 458

1013A Who must prepare Product Disclosure Statement 458
1013B Title of Product Disclosure Statement 458
1013C Product Disclosure Statement content requirements 459
1013D Product Disclosure Statement content—main requirements 460
1013DA Information about ethical considerations etc. 463
1013E General obligation to include other information that might influence a decision to acquire 463
1013F General limitations on extent to which information is required to be included 463
1013FA Information not required to be included in PDS for continuously quoted securities 464
1013G Product Disclosure Statement must be dated 465
1013H Requirements if Product Disclosure Statement states or implies that financial product will be able to be traded 465
1013I Extra requirements if Product Disclosure Statement relates to managed investment products that are ED securities 466
1013J Requirements if Statement has been lodged with ASIC 467
1013K Requirements relating to consents to certain statements 467
1013L Product Disclosure Statement may consist of 2 or more separate documents given at same time 467
1013M Combining a Product Disclosure Statement and a Financial Services Guide in a single document 469

Subdivision D—Supplementary Product Disclosure Statements 469

1014A What a Supplementary Product Disclosure Statement is 469
1014B Title of Supplementary Product Disclosure Statement 469
1014C Form of Supplementary Product Disclosure Statement 469
1014D Effect of giving person a Supplementary Product Disclosure Statement 470
1014E Situation in which only a Supplementary Product Disclosure Statement need be given 470
1014F Application of other provisions in relation to Supplementary Product Disclosure Statements 470

Subdivision DA—Replacement Product Disclosure Statements 471

1014G Application of this Subdivision—stapled securities 471
1014H What a Replacement Product Disclosure Statement is 471

1014J Consequences of lodging a Replacement Product Disclosure Statement 471
1014K Form, content and preparation of Replacement Product Disclosure Statements 472
1014L Giving, lodgment and notice of Replacement Product Disclosure Statements 472

Subdivision E—Other requirements relating to Product Disclosure Statements and Supplementary Product Disclosure Statements 473

1015A Subdivision applies to Product Disclosure Statements and Supplementary Product Disclosure Statements 473
1015B Some Statements must be lodged with ASIC 473
1015C How a Statement is to be given 474
1015D Notice, retention and access requirements for Statement that does not need to be lodged 475
1015E Altering a Statement after its preparation and before giving it to a person 476

Subdivision F—Other rights and obligations related to Product Disclosure Statements 476

1016A Provisions relating to use of application forms 476
1016B If Statement lodged with ASIC, financial product is not to be issued or sold before specified period 481
1016C Minimum subscription condition must be fulfilled before issue or sale 481
1016D Condition about ability to trade on a market must be fulfilled before issue or sale 482
1016E Choices open to person making the offer if disclosure condition not met or Product Disclosure Statement defective 484
1016F Remedies for person acquiring financial product under defective Product Disclosure Document 489

Division 3—Other disclosure obligations of the issuer of a financial product 491

1017A Obligation to give additional information on request 491
1017B Ongoing disclosure of material changes and significant events 493
1017C Information for existing holders of superannuation products and RSA products 495
1017D Periodic statements for retail clients for financial products that have an investment component 500
1017DA Trustees of superannuation entities—regulations may specify additional obligations to provide information 502
1017E Dealing with money received for financial product before the product is issued 503
1017F Confirming transactions 506

1017G Certain product issuers and regulated persons must meet appropriate dispute resolution requirements 511

Division 4—Advertising for financial products 513

1018A Advertising or other promotional material for financial product must refer to Product Disclosure Statement 513

1018B Prohibition on advertising personal offers covered by section 1012E 516

Division 5—Cooling-off periods 517

1019A Situations in which this Division applies 517

1019B Cooling-off period for return of financial product 518

Division 5A—Unsolicited offers to purchase financial products off-market 520

1019C Definitions 520

1019D Offers to which this Division applies 520

1019E How offers are to be made 521

1019F Prohibition on inviting offers to sell 521

1019G Duration and withdrawal of offers 522

1019H Terms of offer cannot be varied 522

1019I Contents of offer document 522

1019J Obligation to update market value 523

1019K Rights if requirements of Division not complied with 525

Division 5B—Disclosure etc. in relation to short sales covered by securities lending arrangement of listed section 1020B products 528

1020AA Definitions 528

1020AB Seller disclosure 529

1020AC Licensee disclosure 530

1020AD Public disclosure of information 531

1020AE Licensee's obligation to ask seller about short sale 532

1020AF Regulations 533

Division 5C—Information about CGS depository interests 534

1020AG Jurisdictional scope of Division 534

1020AH Definitions 534

1020AI Requirement to give information statements for CGS depository interest if recommending acquisition of interest 535

1020AJ Information statement given must be up to date 537

1020AK How an information statement is to be given 537

1020AL Civil action for loss or damage 538

Division 6—Miscellaneous 541

1020A Offers etc. relating to certain managed investment schemes not to be made in certain circumstances 541

1020B Prohibition of certain short sales of securities, managed investment products and certain other financial products 541
1020D Part cannot be contracted out of 543
1020E Stop orders by ASIC 543
1020F Exemptions and modifications by ASIC 545
1020G Exemptions and modifications by regulations 547

Division 7—Enforcement 548

Subdivision A—Offences 548
1021A Overview 548
1021B Definitions 548
1021C Offence of failing to give etc. a disclosure document or statement 550
1021D Offence of preparer of defective disclosure document or statement giving the document or statement knowing it to be defective 552
1021E Offence of preparer of defective disclosure document or statement giving the document or statement (whether or not known to be defective) 553
1021F Offence of regulated person (other than preparer) giving disclosure document or statement knowing it to be defective 554
1021FA Paragraph 1012G(3)(a) obligation—offences relating to communication of information 554
1021FB Paragraph 1012G(3)(a) obligation—offences relating to information provided by product issuer for communication by another person 555
1021G Offence of financial services licensee failing to ensure authorised representative gives etc. disclosure documents or statements as required 558
1021H Offences if a Product Disclosure Statement (or Supplementary PDS) does not comply with certain requirements 558
1021I Offence of giving disclosure document or statement that has not been prepared by the appropriate person 559
1021J Offences if preparer etc. of disclosure document or statement becomes aware that it is defective 560
1021K Offence of unauthorised alteration of Product Disclosure Statement (or Supplementary PDS) 561
1021L Offences of giving, or failing to withdraw, consent to inclusion of defective statement 562
1021M Offences relating to keeping and providing copies of Product Disclosure Statements (or Supplementary PDSs) 563
1021N Offence of failing to provide additional information requested under section 1017A 564
1021O Offences of issuer or seller of financial product failing to pay money into an account as required 564
1021P Offences relating to offers to which Division 5A applies 565

Subdivision B—Civil liability 567
1022A Definitions 567
1022B Civil action for loss or damage 569
1022C Additional powers of court to make orders 574

Part 7.10—Market misconduct and other prohibited conduct relating to financial products and financial services 575

Division 1—Preliminary 575
1040A Content of Part 575

Division 2—The prohibited conduct (other than insider trading prohibitions) 576
1041A Market manipulation 576
1041B False trading and market rigging—creating a false or misleading appearance of active trading etc. 576
1041C False trading and market rigging—artificially maintaining etc. trading price 578
1041D Dissemination of information about illegal transactions 579
1041E False or misleading statements 579
1041F Inducing persons to deal 580
1041G Dishonest conduct 581
1041H Misleading or deceptive conduct (civil liability only) 582
1041I Civil action for loss or damage for contravention of sections 1041E to 1041H 583
1041J Sections of this Division have effect independently of each other 585
1041K Division applies to certain conduct to the exclusion of State Fair Trading Acts provisions 585

Division 2A—Proportionate liability for misleading and deceptive conduct 586
1041L Application of Division 586
1041M Certain concurrent wrongdoers not to have benefit of apportionment 586
1041N Proportionate liability for apportionable claims 587
1041O Defendant to notify plaintiff of concurrent wrongdoer of whom defendant aware 588
1041P Contribution not recoverable from defendant 588
1041Q Subsequent actions 589
1041R Joining non-party concurrent wrongdoer in the action 589
1041S Application of Division 589

Division 3—The insider trading prohibitions 590

Subdivision A—Preliminary 590
1042A Definitions 590
1042B Application of Division 591

1042C When information is *generally available* 591
1042D When a reasonable person would take information to have a *material effect* on price or value of Division 3 financial products 592
1042E Division 3 financial products taken to be *able to be traded* despite suspensions or section 794D directions 592
1042F Inciting, inducing or encouraging an act or omission constitutes *procuring* the omission 592
1042G Information in possession of officer of body corporate 593
1042H Information in possession of partner or employee of partnership 593

Subdivision B—The prohibited conduct 594

1043A Prohibited conduct by person in possession of inside information 594
1043B Exception for withdrawal from registered scheme 595
1043C Exception for underwriters 596
1043D Exception for acquisition pursuant to legal requirement 596
1043E Exception for information communicated pursuant to a legal requirement 596
1043F Chinese wall arrangements by bodies corporate 597
1043G Chinese wall arrangements by partnerships etc. 597
1043H Exception for knowledge of person's own intentions or activities 598
1043I Exception for bodies corporate 598
1043J Exception for officers or agents of body corporate 599
1043K Transactions by holder of financial services licence or a representative of the holder of such a licence 599
1043L A specific situation in which a compensation order under section 1317HA may be made 600
1043M Defences to prosecution for an offence 604
1043N Relief from civil liability 605
1043O Powers of Court 606

Division 4—Defences, relief and limits on liability 607

1044A General defence or relief for publishers 607
1044B Limit on liability for misleading or deceptive conduct 607

Division 5—Miscellaneous 609

1045A Exemptions and modifications by regulations 609

Part 7.11—Title and transfer 610

Division 1—Title to certain securities 610

1070A Nature of shares and certain other interests in a company or registered scheme 610
1070B Numbering of shares 611
1070C Matters to be specified in share certificate 612

1070D Loss or destruction of title documents for certain securities 612

Division 2—Transfer of certain securities 615

Subdivision A—General provisions 615

1071A Application of the Subdivision to certain securities 615
1071B Instrument of transfer 615
1071C Occupation need not appear in transfer document, register etc. 617
1071D Registration of transfer at request of transferor 618
1071E Notice of refusal to register transfer 619
1071F Remedy for refusal to register transfer or transmission 619
1071G Certification of transfers 620
1071H Duties of company with respect to issue of certificates 621

Subdivision B—Special provisions for shares 623

1072A Transmission of shares on death *(replaceable rule—see section 135)* 623
1072B Transmission of shares on bankruptcy *(replaceable rule—see section 135)* 624
1072C Rights of trustee of estate of bankrupt shareholder 625
1072D Transmission of shares on mental incapacity *(replaceable rule—see section 135)* 626
1072E Trustee etc. may be registered as owner of shares 627
1072F Registration of transfers *(replaceable rule—see section 135)* 629
1072G Additional general discretion for directors of proprietary companies to refuse to register transfers *(replaceable rule—see section 135)* 630
1072H Notices relating to non-beneficial and beneficial ownership of shares 630

Division 3—Transfer of certain securities effected otherwise than through a prescribed CS facility 634

1073A Application of the Division to certain securities 634
1073B Definitions 634
1073C Application of Division to certain bodies as if they were companies 635
1073D Regulations may govern transfer of certain securities 635
1073E ASIC may extend regulations to securities not otherwise covered 637
1073F Operation of this Division and regulations made for its purposes 638

Division 4—Transfer of financial products effected through prescribed CS facility 640

1074A Financial products to which this Division applies 640
1074B Definitions 640

1074C Operating rules of prescribed CS facility may deal with transfer of title 640
1074D Valid and effective transfer if operating rules complied with 641
1074E Regulations may govern transfer of financial products in accordance with operating rules of prescribed CS facility 641
1074F Issuer protected from civil liability for person's contravention of prescribed CS facility's certificate cancellation rules 644
1074G Operation of this Division and regulations made for its purposes 644

Division 5—Exemptions and modifications 646
1075A ASIC's power to exempt and modify 646

Part 7.12—Miscellaneous 648

Division 1—Qualified privilege 648
1100A Qualified privilege for information given to ASIC 648
1100B Qualified privilege for the conduct of market licensees and CS facility licensees 648
1100C Qualified privilege for information given to market licensees and CS facility licensees etc. 650
1100D Extension of protections given by this Division 650

Division 2—Other matters 651
1101A Approved codes of conduct 651
1101B Power of Court to make certain orders 652
1101C Preservation and disposal of records etc. 656
1101D Destruction of records by ASIC 657
1101E Concealing etc. of books 657
1101F Falsification of records 658
1101G Precautions against falsification of records 659
1101GA How Part 9.3 applies to books required to be kept by this Chapter etc. 659
1101H Contravention of Chapter does not generally affect validity of transactions etc. 660
1101I Gaming and wagering laws do not affect validity of contracts relating to financial products 660
1101J Delegation 661

Chapter 8—Mutual recognition of securities offers 662

Part 8.1—Preliminary 662
1200A Definitions 662

Part 8.2—Foreign offers that are recognised in this jurisdiction 664

Division 1—Recognised offers 664
1200B When an offer is a recognised offer 664

1200C Conditions that must be met to be a recognised offer 664
1200D Required documents and information 665
1200E Warning statement 667

Division 2—Effect of a recognised offer 668
1200F Effect of a recognised offer 668

Division 3—Ongoing conditions for recognised offers 670
1200G Offering conditions 670
1200H Address for service condition 673
1200J Dispute resolution condition 674

Division 4—Modification of provisions of this Act 676
1200K Additional operation of section 675 (continuous disclosure) 676
1200L Pre-offer advertising 676
1200M Modification by the regulations 677

Division 5—ASIC's powers in relation to recognised offers 678
1200N Stop orders 678
1200P Ban on making subsequent recognised offers 682
1200Q Offence of breaching an ongoing condition 683

Division 6—Miscellaneous 684
1200R Service of documents 684

Part 8.3—Offers made under foreign recognition schemes 685
1200S Notice to ASIC 685
1200T Extension of this Act to recognised jurisdictions 685
1200U ASIC stop order for advertising in a recognised jurisdiction 686

Chapter 7—Financial services and markets

Part 7.1—Preliminary

Division 1—Object of Chapter and outline of Chapter

760A Object of Chapter

The main object of this Chapter is to promote:

(a) confident and informed decision making by consumers of financial products and services while facilitating efficiency, flexibility and innovation in the provision of those products and services; and

(b) fairness, honesty and professionalism by those who provide financial services; and

(c) fair, orderly and transparent markets for financial products; and

(d) the reduction of systemic risk and the provision of fair and effective services by clearing and settlement facilities.

760B Outline of Chapter

An outline of this Chapter is set out in the table below.

Part-by-Part outline of Chapter 7

	Part...	Covers...
1	7.1	definitions of key concepts and of commonly occurring expressions
2	7.2	licensing of financial markets other matters relating to financial markets
2A	7.2A	supervision of financial markets
3	7.3	licensing of clearing and settlement facilities other matters relating to clearing and settlement facilities
4	7.4	limitation on ownership of certain licensees individuals who are disqualified from being involved in certain licensees
5	7.5	compensation regimes for financial markets

Part-by-Part outline of Chapter 7

	Part...	Covers...
5A	7.5A	regulation of derivative transactions and derivative trade repositories
6	7.6	licensing of providers of financial services other related matters (e.g. restrictions on use of terminology; agreements with unlicensed persons relating to provision of financial services)
7	7.7	disclosure requirements for financial services licensees and their authorised representatives disclosure requirements for certain people who are not required to be licensed
7A	7.7A	best interests obligations charging ongoing fees to clients ban on conflicted remuneration and other remuneration
8	7.8	other conduct requirements for financial services licensees (e.g. dealing with client money and property; financial records, statements and audit) special provisions relating to insurance special provisions relating to margin lending facilities
9	7.9	financial product disclosure requirements other requirements relating to issue, sale and purchase of financial products
10	7.10	market misconduct and other prohibited conduct relating to financial products and services
11	7.11	title to, and transfer of, certain securities and other financial products
12	7.12	qualified privilege in certain situations other miscellaneous matters

Division 2—Definitions

761A Definitions

In this Chapter:

able to be traded, in relation to a market, includes (but is not limited to) admitted to quotation on the market.

acquire, in relation to a financial product, has a meaning affected by section 761E.

annual turnover, of a body corporate during a 12-month period, means the sum of the values of all the supplies that the body corporate, and any body corporate related to the body corporate, have made, or are likely to make, during the 12-month period, other than:

(a) supplies made from any of those bodies corporate to any other of those bodies corporate; or

(b) supplies that are input taxed; or

(c) supplies that are not for consideration (and are not taxable supplies under section 72-5 of the *A New Tax System (Goods and Services Tax) Act 1999*); or

(d) supplies that are not made in connection with an enterprise that the body corporate carries on; or

(e) supplies that are not connected with Australia.

Expressions used in this definition that are also used in the *A New Tax System (Goods and Services Tax) Act 1999* have the same meaning as in that Act.

arrangement means, subject to section 761B, a contract, agreement, understanding, scheme or other arrangement (as existing from time to time):

(a) whether formal or informal, or partly formal and partly informal; and

(b) whether written or oral, or partly written and partly oral; and

(c) whether or not enforceable, or intended to be enforceable, by legal proceedings and whether or not based on legal or equitable rights.

Australian CS facility licence means a licence under section 824B that authorises a person to operate a clearing and settlement facility.

Australian derivative trade repository licence: see section 905B.

Australian financial services licence means a licence under section 913B that authorises a person who carries on a financial services business to provide financial services.

Australian market licence means a licence under section 795B that authorises a person to operate a financial market.

authorised representative of a financial services licensee means a person authorised in accordance with section 916A or 916B to provide a financial service or financial services on behalf of the licensee.

basic deposit product means a deposit product that is a facility in relation to which the following conditions are satisfied:

(a) the terms applicable to the facility (the ***governing terms***) do not permit the amount from time to time standing to the credit of the facility to be reduced otherwise than in consequence of one or more of the following:
  (i) a withdrawal, transfer or debit on the instruction of, or by authority of, the depositor, not being on account of entry fees, exit fees or charges for the management of the funds (but this does not exclude charges for the maintenance of the facility itself);
  (ii) a payment of charges or duties on deposits into, or withdrawals from, the facility that are payable under a law of the Commonwealth or of a State or Territory;
  (iii) a payment that a law of the Commonwealth, or of a State or Territory, requires to be made out of the facility;
  (iv) a payment that an order of a court requires to be made out of the facility;
  (v) the exercise of a right to combine accounts;
  (vi) the correction of an error;
  (vii) any other circumstances specified in regulations made for the purposes of this subparagraph; and

(b) any return to be generated for the depositor on the amount from time to time standing to the credit of the facility is an amount that is set out in, or that is calculated by reference to a rate or rates that are set out in, the governing terms; and

(c) either:

(i) there is no minimum period before which funds cannot be withdrawn or transferred from the facility without a reduction in the return generated for the depositor; or

(ii) if there is such a period, it expires on or before the end of the period of 5 years starting on the day on which funds were first deposited in the facility; and

(d) unless subparagraph (c)(ii) applies and the period referred to in that subparagraph expires on or before the end of the period of 2 years starting on the day on which funds were first deposited in the facility—funds are able to be withdrawn or transferred from the facility on the instruction of, or by authority of, the depositor:

(i) without any prior notice to the ADI that makes the facility available; or

(ii) if the ADI that makes the facility available is included in a class of ADIs specified in regulations made for the purposes of this subparagraph—subject to a prior notice requirement that does not exceed the period specified in those regulations in relation to that class of ADIs;

whether or not the withdrawal or transfer will attract a reduction in the return generated for the depositor as mentioned in subparagraph (c)(i); and

(da) the facility is not an FHSA product; and

(e) any other conditions specified in regulations made for the purposes of this paragraph.

binder means an authorisation given to a person by a financial services licensee who is an insurer to do either or both of the following:

(a) enter into contracts that are risk insurance products on behalf of the insurer as insurer; or

(b) deal with and settle, on behalf of the insurer, claims relating to risk insurance products against the insurer as insurer;

but does not include an authorisation of a kind referred to in paragraph (a) that is limited to effecting contracts of insurance by

way of interim cover unless there is also in existence an authority given by the insurer to the person to enter into, on behalf of the insurer and otherwise than by way of interim cover, contracts of insurance.

carried on in this jurisdiction, in relation to a financial services business, has a meaning affected by section 911D.

certificate cancellation provisions, in relation to a prescribed CS facility, means the provisions of the facility's operating rules that deal with:

(a) the cancellation of documents of title to financial products transferred through the facility; and

(b) matters incidental to the cancellation of those documents.

CGS depository interest means a depository interest, as defined in the *Commonwealth Inscribed Stock Act 1911*, that can be transferred through a licensed CS facility.

class, in relation to financial products or financial services, has a meaning affected by regulations made for the purposes of section 761CA.

clearing and settlement facility has the meaning given by Division 6.

clearing requirements (in relation to derivative transactions): see subsection 901A(7).

CS facility licensee means a person who holds an Australian CS facility licence.

current LVR:

(a) in relation to a standard margin lending facility—has the meaning given by subsection 761EA(3); and

(b) in relation to a non-standard margin lending facility—has the meaning given by subsection 761EA(6).

custodial or depository service that a person provides has the meaning given by section 766E.

dealing in a financial product has the meaning given by section 766C (and ***deal*** has a corresponding meaning).

deposit product means a financial product described in paragraph 764A(1)(i).

derivative has the meaning given by section 761D.

derivative trade data means:

(a) information about derivative transactions, or about positions relating to derivative transactions; or

(b) information (including statistical data) that is created or derived from information referred to in paragraph (a).

derivative trade repository means a facility to which information about derivative transactions, or about positions relating to derivative transactions, can be reported (whether or not other information or data can also be reported to the facility).

derivative trade repository licensee means a person who holds an Australian derivative trade repository licence.

derivative trade repository rules: see subsection 903A(1).

derivative transaction means:

(a) the entry into of an arrangement that is a derivative; or

(b) the modification or termination of such an arrangement; or

(c) the assignment, by a party to such an arrangement, of some or all of the party's rights and obligations under the arrangement; or

(d) any other transaction that relates to a derivative and that is in a class of transactions prescribed by the regulations for the purpose of this paragraph.

derivative transaction rules: see subsection 901A(1).

dispose, in relation to a financial product, includes terminate or close out the legal relationship that constitutes the financial product.

disqualified individual means an individual who is disqualified within the meaning given by section 853A.

employer-sponsor has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*.

execution requirements (in relation to derivative transactions): see subsection 901A(5).

FHSA product means an FHSA (within the meaning of the *First Home Saver Accounts Act 2008*).

financial market has the meaning given by Division 5.

financial product has the meaning given by Division 3.

Note: References in this Chapter to financial products have effect subject to particular express exclusions for particular purposes—see e.g. sections 1010A and 1074A.

financial product advice has the meaning given by section 766B.

financial product advice law means:

(a) a provision of Chapter 7 that covers conduct relating to the provision of financial product advice (whether or not it also covers other conduct), but only in so far as it covers conduct relating to the provision of financial product advice; or

(b) a provision of Chapter 9 as it applies in relation to a provision referred to in paragraph (a); or

(c) a provision of Division 2 of Part 2 of the ASIC Act that covers conduct relating to the provision of financial product advice (whether or not it also covers other conduct), but only in so far as it covers conduct relating to the provision of financial product advice; or

(d) any other Commonwealth, State or Territory legislation that covers conduct relating to the provision of financial product advice (whether or not it also covers other conduct), but only in so far as it covers conduct relating to the provision of financial product advice.

financial service has the meaning given by Division 4.

financial services business means a business of providing financial services.

Note: The meaning of ***carry on*** a financial services business is affected by section 761C.

Financial Services Guide means a Financial Services Guide required by section 941A or 941B to be given in accordance with Division 2 of Part 7.7.

financial services law means:

(a) a provision of this Chapter or of Chapter 5C, 5D, 6, 6A, 6B, 6C or 6D; or

(b) a provision of Chapter 9 as it applies in relation to a provision referred to in paragraph (a); or

(c) a provision of Division 2 of Part 2 of the ASIC Act; or

(d) any other Commonwealth, State or Territory legislation that covers conduct relating to the provision of financial services (whether or not it also covers other conduct), but only in so far as it covers conduct relating to the provision of financial services; or

(e) in relation to a financial services licensee that is a licensed trustee company (in addition to paragraphs (a) to (d))—any rule of common law or equity that covers conduct relating to the provision of financial services that are traditional trustee company services (whether or not it also covers other conduct), but only in so far as it covers conduct relating to the provision of such services.

financial services licensee means a person who holds an Australian financial services licence.

foreign exchange contract means a contract:

(a) to buy or sell currency (whether Australian or not); or

(b) to exchange one currency (whether Australian or not) for another (whether Australian or not).

funeral benefit means a benefit that consists of the provision of funeral, burial or cremation services, with or without the supply of goods connected with such services.

further market-related advice means advice to which subsection 946B(1) applies.

general advice has the meaning given by subsection 766B(4).

general insurance product means a financial product described in paragraph 764A(1)(d).

holder, in relation to a financial product, means the person to whom the financial product was issued, or if it has (since issue) been disposed of to another person who has not themselves

disposed of it, that other person (and ***hold*** has a corresponding meaning).

insurance product means a financial product described in paragraph 764A(1)(d), (e) or (f).

investment life insurance product means a financial product described in paragraph 764A(1)(f).

involved in a market licensee, CS facility licensee or derivative trade repository licensee, or in an applicant for such a licence, has the meaning given by section 853B.

issue, in relation to a financial product, has a meaning affected by section 761E.

issuer, in relation to a financial product, has a meaning affected by section 761E.

kind, in relation to financial products or financial services, has a meaning affected by regulations made for the purposes of section 761CA.

licensed CS facility means a clearing and settlement facility the operation of which is authorised by an Australian CS facility licence.

licensed derivative trade repository means a derivative trade repository the operation of which is authorised by an Australian derivative trade repository licence.

licensed market means a financial market the operation of which is authorised by an Australian market licence.

licensed trustee company has the same meaning as in Chapter 5D.

life risk insurance product means a financial product described in paragraph 764A(1)(e).

limit, in relation to a margin lending facility, has the meaning given by subsection 761EA(11).

listing rules of a financial market, or proposed financial market, means any rules (however described) that are made by the operator of the market, or contained in the operator's constitution, and that deal with:

(a) admitting entities to, or removing entities from, the market's official list, whether for the purpose of enabling financial products of those entities to be traded on the market or for other purposes; or

(b) the activities or conduct of entities that are included on that list.

lodge with ASIC, when used in a provision of this Chapter in relation to which regulations made for the purposes of this definition state that the lodgment is to be in a prescribed form, means lodge with ASIC in a prescribed form.

Note: See section 350 for the meaning of ***lodge in a prescribed form***.

makes a market for a financial product has the meaning given by section 766D.

managed investment product means a financial product described in paragraph 764A(1)(b).

margin call:

(a) in relation to a standard margin lending facility—has the meaning given by subsection 761EA(4); and

(b) in relation to a non-standard margin lending facility—has the meaning given by subsection 761EA(7); and

(c) in relation to a facility that ASIC has declared to be a margin lending facility under subsection 761EA(8)—has the meaning given in the declaration.

margin lending facility has the meaning given by subsection 761EA(1).

market integrity rules means the rules made by ASIC under section 798G.

market licensee means a person who holds an Australian market licence.

non-standard margin lending facility has the meaning given by subsection 761EA(5).

operated in this jurisdiction:

(a) in relation to a financial market, has a meaning affected by section 791D; and

(b) in relation to a clearing and settlement facility, has a meaning affected by section 820D.

operating rules:

(a) of a clearing and settlement facility, or proposed clearing and settlement facility, means any rules (however described) made by the operator of the facility, or contained in the operator's constitution, that deal with:

(i) the activities or conduct of the facility; or

(ii) the activities or conduct of persons in relation to the facility;

but does not include any such rules that deal with matters in respect of which licensed CS facilities must have written procedures under regulations made for the purposes of subsection 822A(2); or

(b) of a financial market, or proposed financial market, means any rules (however described), including the market's listing rules (if any), that are made by the operator of the market, or contained in the operator's constitution, and that deal with:

(i) the activities or conduct of the market; or

(ii) the activities or conduct of persons in relation to the market;

but does not include:

(iii) any such rules that deal with matters in respect of which licensed markets must have written procedures under regulations made for the purposes of subsection 793A(2); or

(iv) compensation rules within the meaning of Part 7.5.

participant:

(a) in relation to a clearing and settlement facility, means a person who is allowed to directly participate in the facility under the facility's operating rules and, when used in any of the following provisions, also includes a recognised affiliate in relation to the facility:

(i) paragraph 821B(2)(b);

(ii) section 822B;

(iii) subsection 915F(2);

(iv) any other provisions prescribed by regulations made for the purposes of this subparagraph; and

(b) in relation to a financial market, means a person who is allowed to directly participate in the market under the market's operating rules and, when used in any of the following provisions, also includes a recognised affiliate in relation to the market:

(i) paragraph 792B(2)(b);

(ii) section 793B;

(iii) section 883A;

(iv) subsection 915F(2);

(v) paragraphs 923B(3)(a) and (b);

(vi) any other provisions prescribed by regulations made for the purposes of this subparagraph.

person has a meaning affected by section 761F (which deals with partnerships) and section 761FA (which deals with multiple trustees).

personal advice has the meaning given by subsection 766B(3).

prescribed CS facility means a licensed CS facility that is prescribed by regulations made for the purposes of this definition.

prescribed derivative trade repository means a facility that is (or that is in a class that is) prescribed by the regulations for the purpose of paragraph 901A(6)(b).

Product Disclosure Statement means a Product Disclosure Statement:

(a) required by section 1012A, 1012B, 1012C or 1012I to be given in accordance with Division 2 of Part 7.9; or

(b) that section 1012H requires an issuer of a financial product to take reasonable steps to ensure is given to a new group member in accordance with Division 2 of Part 7.9.

Note: For the effect of the lodgment of a Replacement Product Disclosure Statement, see section 1014J.

provide, in relation to a financial product, has a meaning affected by section 761E.

recognised affiliate, in relation to a clearing and settlement facility or a financial market, means a person who is:

(a) recognised by the operating rules of the facility or market as a suitably qualified affiliate of the facility or market; and

(b) involved in the carrying on of a financial services business (including as an employee, director or in some other capacity).

relevant personal circumstances, in relation to advice provided or to be provided to a person in relation to a matter, are such of the person's objectives, financial situation and needs as would reasonably be considered to be relevant to the advice.

Replacement Product Disclosure Statement has the meaning given by section 1014H.

reporting requirements (in relation to derivative transactions): see subsection 901A(6).

retail client has the meaning given by sections 761G and 761GA.

risk insurance product means a financial product described in paragraph 764A(1)(d) or (e).

RSA product means a financial product described in paragraph 764A(1)(h).

security means:

(a) a share in a body; or

(b) a debenture of a body; or

(c) a legal or equitable right or interest in a security covered by paragraph (a) or (b); or

(d) an option to acquire, by way of issue, a security covered by paragraph (a), (b) or (c); or

(e) a right (whether existing or future and whether contingent or not) to acquire, by way of issue, the following under a rights issue:

(i) a security covered by paragraph (a), (b), (c) or (d);

(ii) an interest or right covered by paragraph 764A(1)(b) or (ba); or

(f) a CGS depository interest;

but does not include an excluded security. In Part 7.11, it also includes a managed investment product.

self-managed superannuation fund has the same meaning as in the *Superannuation Industry (Supervision) Act 1993.*

standard margin lending facility has the meaning given by subsection 761EA(2).

Statement of Advice means a Statement of Advice required by section 946A to be given in accordance with Subdivisions C and D of Division 3 of Part 7.7.

superannuation entity has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*.

superannuation product means a financial product described in paragraph 764A(1)(g).

Supplementary Financial Services Guide has the meaning given by section 943A.

Supplementary Product Disclosure Statement has the meaning given by section 1014A.

title document, for a financial product, means a certificate or other document evidencing ownership of the financial product.

traditional trustee company services has the same meaning as in Chapter 5D.

trustee company has the same meaning as in Chapter 5D.

wholesale client has the meaning given by section 761G.

761B Meaning of *arrangement*—2 or more arrangements that together form a derivative or other financial product

If:

(a) an arrangement, when considered by itself, does not constitute a derivative, or some other kind of financial product; and

(b) that arrangement, and one or more other arrangements, if they had instead been a single arrangement, would have constituted a derivative or other financial product; and

(c) it is reasonable to assume that the parties to the arrangements regard them as constituting a single scheme;

the arrangements are, for the purposes of this Part, to be treated as if they together constituted a single arrangement.

761C Meaning of *carry on* a financial services business

In working out whether someone carries on a financial services business, Division 3 of Part 1.2 needs to be taken into account. However, paragraph 21(3)(e) does not apply for the purposes of this Chapter.

761CA Meaning of *class* and *kind* of financial products and financial services

The regulations may include provisions identifying, or providing for the identification of, what constitutes a ***class*** or ***kind*** of financial products or financial services for the purposes of a provision or provisions of this Chapter.

761D Meaning of *derivative*

(1) For the purposes of this Chapter, subject to subsections (2), (3) and (4), a ***derivative*** is an arrangement in relation to which the following conditions are satisfied:

(a) under the arrangement, a party to the arrangement must, or may be required to, provide at some future time consideration of a particular kind or kinds to someone; and

(b) that future time is not less than the number of days, prescribed by regulations made for the purposes of this paragraph, after the day on which the arrangement is entered into; and

(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.

(2) Without limiting subsection (1), anything declared by the regulations to be a derivative for the purposes of this section is a

derivative for the purposes of this Chapter. A thing so declared is a derivative despite anything in subsections (3) and (4).

(3) Subject to subsection (2), the following are not derivatives for the purposes of this Chapter even if they are covered by the definition in subsection (1):

(a) an arrangement in relation to which subparagraphs (i), (ii) and (iii) are satisfied:

(i) a party has, or may have, an obligation to buy, and another party has, or may have, an obligation to sell, tangible property (other than Australian or foreign currency) at a price and on a date in the future; and

(ii) 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

(iii) 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;

but only to the extent that the arrangement deals with that purchase and sale;

(b) a contract for the future provision of services;

(c) anything that is covered by a paragraph of subsection 764A(1), other than paragraph (c) of that subsection;

(d) anything declared by the regulations not to be a derivative for the purposes of this Chapter.

(4) Subject to subsection (2), an arrangement under which one party has an obligation to buy, and the other has an obligation to sell, property is not a derivative for the purposes of this Chapter merely because the arrangement provides for the consideration to be varied by reference to a general inflation index such as the Consumer Price Index.

761E Meaning of *issued, issuer, acquire* and *provide* in relation to financial products

General

(1) This section defines when a financial product is ***issued*** to a person. It also defines who the ***issuer*** of a financial product is. If a financial product is issued to a person:

(a) the person ***acquires*** the product from the issuer; and

(b) the issuer ***provides*** the product to the person.

Note: Some financial products can also be acquired from, or provided by, someone other than the issuer (e.g. on secondary trading in financial products).

Issuing a financial product

(2) Subject to this section, a financial product is ***issued*** to a person when it is first issued, granted or otherwise made available to a person.

(3) Subject to this section, a financial product specified in the table is issued to a person when the event specified for that product occurs:

When particular financial products are issued

Item	Financial product	Event
1	superannuation product	the person becomes a member of the fund concerned
2	RSA product	the account concerned is opened in the person's name
2A	FHSA product	the person becomes the holder (within the meaning of the *First Home Saver Accounts Act 2008*) of the FHSA product
3	derivative	the person enters into the legal relationship that constitutes the financial product
4	margin lending facility	the person enters into the legal relationship that constitutes the margin lending facility, as the client under the facility

(3A) For the avoidance of doubt, none of the following are taken to give rise to the issue of a financial product to a person (the ***client***):

(a) the client making a further contribution to a superannuation fund of which the client is already a member;

(aa) an employer of the client making a further contribution, for the benefit of the client, to a superannuation fund of which the client is already a member;

(b) the client making a further deposit into an RSA maintained in the client's name;

(ba) the client making a further contribution (within the meaning of the *First Home Saver Accounts Act 2008*) into an FHSA product maintained in the client's name;

(c) the client making a further payment under a life insurance investment product;

(d) the client making a further deposit into a deposit product;

(e) the client engaging in conduct specified in regulations made for the purposes of this paragraph in relation to a financial product already held by the client.

Issuer of a financial product

(4) Subject to this section, the ***issuer***, in relation to a financial product issued to a person (the ***client***), is the person responsible for the obligations owed, under the terms of the facility that is the product:

(a) to, or to a person nominated by, the client; or

(b) if the product has been transferred from the client to another person and is now held by that person or another person to whom it has subsequently been transferred—to, or to a person nominated by, that person or that other person.

Note: For example, the issuer of a direct debit facility is the financial institution with which the account to be debited is held, rather than the persons to whom payments can be made using the facility.

(5) Subject to subsection (7), each person who is a party to a financial product that:

(a) is a derivative; and

(b) is not entered into, or acquired, on a financial market;

is taken to be an issuer of the product.

Note 1: Under paragraph (1)(a), each person who is a party to the derivative will also acquire the financial product at the time of its issue as specified in subsection (3).

Note 2: Although each party to the derivative is an issuer, whether any particular party has disclosure or other obligations under this Chapter will depend on the circumstances (e.g. whether the issue occurs in the course of a business of issuing financial products and whether any of the other parties is a retail client).

(6) Subject to subsection (7), the issuer of a financial product that:

(a) is a derivative; and

(b) is entered into, or acquired, on a financial market;

is taken to be:

(c) if the product is entered into, or acquired, on the market through an arrangement made by a financial services licensee acting on behalf of another person—the financial services licensee; or

(d) if the product is entered into, or acquired, on the market through an arrangement made by an authorised representative of a financial services licensee acting on behalf of another person (not being the licensee)—the financial services licensee; or

(e) if neither paragraph (c) nor (d) applies—the market operator.

(7) The regulations may make provision determining all or any of the following for the purposes of this Chapter:

(a) the meaning of ***issue*** (and/or related parts of speech, including ***issuer***) in relation to a class of financial products;

(b) the meaning of ***acquire*** (and/or related parts of speech) in relation to a class of financial products;

(c) the meaning of ***provide*** (and/or related parts of speech) in relation to a class of financial products.

Regulations made for the purposes of this subsection have effect despite anything else in this section.

761EA Meaning of *margin lending facility*, *margin call* and associated expressions

(1) A ***margin lending facility*** is:

(a) a standard margin lending facility; or

(b) a non-standard margin lending facility; or

(c) a facility of a kind that has been declared by ASIC to be a margin lending facility under subsection (8);

unless the facility is of a kind that has been declared by ASIC not to be a margin lending facility under subsection (9).

Standard margin lending facilities

(2) A ***standard margin lending facility*** is a facility under the terms of which:

(a) credit is, or may be, provided by a person (the ***provider***) to a natural person (the ***client***); and

(b) the credit provided is, or must be, applied wholly or partly:

(i) to acquire one or more financial products, or a beneficial interest in one or more financial products; or

(ii) to repay, wholly or partly, another credit facility (within the meaning of subparagraph 765A(1)(h)(i)), the credit provided under which was applied, wholly or partly, to acquire one or more financial products, or a beneficial interest in one or more financial products; and

(c) the credit provided is, or must be, secured by property (the ***secured property***); and

(d) the secured property consists, or must consist, wholly or partly of one or more marketable securities, or a beneficial interest in one or more marketable securities; and

(e) if the current LVR of the facility exceeds a ratio, percentage, proportion or level (however described) determined under the terms of the facility, then:

(i) the client becomes required to take action; or

(ii) the provider becomes entitled to take action; or

(iii) another person becomes required or entitled to take action;

in accordance with the terms of the facility to reduce the current LVR of the facility.

(3) The ***current LVR*** of a standard margin lending facility at a particular time is the ratio, percentage, proportion or level (however described) that:

(a) is determined under the terms of the facility; and

(b) under the terms of the facility, represents a particular relationship between:

(i) the amount of the debt owing by the client, or credit provided by the provider, or both, under the facility at that time; and

(ii) the value of the secured property determined at that time under the terms of the facility.

(4) A standard margin lending facility is in ***margin call*** when paragraph (2)(e) applies in relation to the facility.

Non-standard margin lending facilities

(5) A ***non-standard margin lending facility*** is a facility under the terms of which:

(a) a natural person (the ***client***) transfers one or more marketable securities, or a beneficial interest in one or more marketable securities (the ***transferred securities***) to another person (the ***provider***); and

(b) the provider transfers property to the client (the ***transferred property***) as consideration or security for the transferred securities; and

(c) the transferred property is, or must be, applied wholly or partly to acquire one or more financial products, or a beneficial interest in one or more financial products; and

(d) the client has a right, in the circumstances determined under the terms of the facility, to be given marketable securities equivalent to the transferred securities; and

(e) if the current LVR of the facility exceeds a ratio, percentage, proportion or level (however described) determined under the terms of the facility, then:

(i) the client becomes required to take action; or

(ii) the provider becomes entitled to take action; or

(iii) another person becomes required or entitled to take action;

in accordance with the terms of the facility to reduce the current LVR of the facility.

(6) The ***current LVR*** of a non-standard margin lending facility at a particular time is the ratio, percentage, proportion or level (however described) that:

(a) is determined under the terms of the facility; and

(b) under the terms of the facility, represents a particular relationship between:

(i) an amount determined at that time under the terms of the facility by reference to the value of the transferred property and any amount owing by the client to the provider; and

(ii) the value of the transferred securities determined at that time under the terms of the facility.

(7) A non-standard margin lending facility is in ***margin call*** when paragraph (5)(e) applies in relation to the facility.

ASIC declarations in relation to margin lending facilities

(8) ASIC may declare that a particular kind of facility is a ***margin lending facility***. The declaration must give the meanings of ***margin call*** and ***limit*** in relation to that kind of facility.

(9) ASIC may declare that a particular kind of facility is not a ***margin lending facility***.

(10) A declaration made under subsection (8) or (9):

(a) must be in writing; and

(b) is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

*Meaning of **limit** of a margin lending facility*

(11) The ***limit*** of a margin lending facility:

(a) in relation to a standard margin lending facility—means the maximum amount of credit that may be provided by the provider to the client under the facility; and

(b) in relation to a non-standard margin lending facility—means the maximum amount of property that may be transferred by the provider to the client under the facility; and

(c) in relation to a facility of a kind that ASIC has declared to be a margin lending facility under subsection (8)—has the meaning given in the declaration.

761F Meaning of *person*—generally includes a partnership

(1) This Chapter applies to a partnership as if the partnership were a person, but it applies with the following changes:

(a) obligations that would be imposed on the partnership are imposed instead on each partner, but may be discharged by any of the partners;

(b) any contravention of a provision of this Chapter, or a provision of this Act that relates to a requirement in a provision of this Chapter, that would otherwise be a contravention by the partnership is taken (whether for the purposes of criminal or civil liability) to have been a contravention by each partner who:

(i) aided, abetted, counselled or procured the relevant act or omission; or

(ii) was in any way knowingly concerned in, or party to, the relevant act or omission (whether directly or indirectly and whether by any act or omission of the partner).

(2) For the purposes of this Chapter, a change in the composition of a partnership does not affect the continuity of the partnership.

(3) Subsections (1) and (2) have effect subject to:

(a) an express or implied contrary intention in a provision or provisions of this Chapter; and

(b) the regulations, which may exclude or modify the effect of those subsections in relation to specified provisions.

761FA Meaning of *person*—generally includes multiple trustees

(1) This section applies in relation to a trust while the trust continues to have:

(a) 2 or more trustees; or

(b) a single trustee who was a trustee of the trust at a time when it had 2 or more trustees.

(2) Subject to subsections (3) and (4), during a period while this section applies to a trust, this Chapter applies to the trust as if the trustee or trustees of the trust from time to time during the period constituted a single legal entity (the ***notional entity***) that remained the same for the duration of that period.

Note: So, for example, while this section applies to a trust, a licence granted under this Chapter to the trustees of the trust will continue in force, despite a change in the persons who are the trustees.

(3) During any period or part of a period while this section applies to a trust and the trust has 2 or more trustees, this Chapter applies to the trustees as mentioned in subsection (2), but it applies with the following changes:

(a) obligations that would be imposed on the notional entity are imposed instead on each trustee, but may be discharged by any of the trustees;

(b) any contravention of a provision of this Chapter, or a provision of this Act that relates to a requirement in a provision of this Chapter, that would otherwise be a contravention by the notional entity is taken (whether for the purposes of criminal or civil liability) to have been a contravention by each trustee who:

(i) aided, abetted, counselled or procured the relevant act or omission; or

(ii) was in any way knowingly concerned in, or party to, the relevant act or omission (whether directly or indirectly and whether by any act or omission of the trustee).

(4) During any period or part of a period while this section applies to a trust and the trust has only one trustee, this Chapter applies to the trustee as mentioned in subsection (2), but it applies with the following changes:

(a) obligations that would be imposed on the notional entity are imposed instead on that single trustee;

(b) any contravention of a provision of this Chapter, or a provision of this Act that relates to a requirement in a provision of this Chapter, that would otherwise be a contravention by the notional entity is taken (whether for the purposes of criminal or civil liability) to have been a contravention by that single trustee.

(5) Subsections (2), (3) and (4) have effect subject to:

(a) an express or implied contrary intention in a provision or provisions of this Chapter; and

(b) the regulations, which may exclude or modify the effect of those subsections in relation to specified provisions.

761G Meaning of retail client and wholesale client

Providing a financial product or financial service to a person as a retail client

(1) For the purposes of this Chapter, a financial product or a financial service is provided to a person as a ***retail client*** unless subsection (5), (6), (6A) or (7), or section 761GA, provides otherwise.

Note: The references in this section to providing a financial product to a person are not to be taken to imply that the provision of a financial product is not also the provision of a financial service (see the meaning of ***dealing*** in section 766C).

Acquiring a financial product or financial service as a retail client

(2) For the purposes of this Chapter, a person to whom a financial product or financial service is provided as a retail client is taken to acquire the product or service as a retail client.

Disposing of a financial product as a retail client

(3) If a financial product is provided to a person as a retail client, any subsequent disposal of all or part of that product by the person is, for the purposes of this Chapter, a disposal by the person as a retail client.

Wholesale clients

(4) For the purposes of this Chapter, a financial product or a financial service is provided to, or acquired by, a person as a ***wholesale client*** if it is not provided to, or acquired by, the person as a retail client.

General insurance products

(5) For the purposes of this Chapter, if a financial product is, or a financial service provided to a person relates to, a general insurance product, the product or service is provided to the person as a retail client if:

(a) either:

(i) the person is an individual; or

(ii) the insurance product is or would be for use in connection with a small business (see subsection (12)); and

(b) the general insurance product is:

(i) a motor vehicle insurance product (as defined in the regulations); or

(ii) a home building insurance product (as defined in the regulations); or

(iii) a home contents insurance product (as defined in the regulations); or

(iv) a sickness and accident insurance product (as defined in the regulations); or

(v) a consumer credit insurance product (as defined in the regulations); or

(vi) a travel insurance product (as defined in the regulations); or

(vii) a personal and domestic property insurance product (as defined in the regulations); or

(viii) a kind of general insurance product prescribed by regulations made for the purposes of this subparagraph.

In any other cases, the provision to a person of a financial product that is, or a financial service that relates to, a general insurance product does not constitute the provision of a financial product or financial service to the person as a retail client.

Superannuation products and RSA products

(6) For the purposes of this Chapter:

(a) if a financial product provided to a person is a superannuation product or an RSA product, the product is provided to the person as a retail client; and

(aa) however, if a trustee of a pooled superannuation trust (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) provides a financial product that is an interest in the trust to a person covered by subparagraph (c)(i), the product is not provided to the person as a retail client; and

(b) if a financial service (other than the provision of a financial product) provided to a person who is not covered by subparagraph (c)(i) or (ii) relates to a superannuation product

or an RSA product, the service is provided to the person as a retail client; and

(c) if a financial service (other than the provision of a financial product) provided to a person who is:

(i) the trustee of a superannuation fund, an approved deposit fund, a pooled superannuation trust or a public sector superannuation scheme (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) that has net assets of at least $10 million; or

(ii) an RSA provider (within the meaning of the *Retirement Savings Accounts Act 1997*);

relates to a superannuation product or an RSA product, that does not constitute the provision of a financial service to the person as a retail client.

Traditional trustee company services

(6A) For the purpose of this Chapter, if a financial service provided to a person is a traditional trustee company service, the service is provided to the person as a retail client unless regulations made for the purpose of this subsection provide otherwise.

Other kinds of financial product

(7) For the purposes of this Chapter, if a financial product is not, or a financial service (other than a traditional trustee company 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 one or more of the following paragraphs apply:

(a) 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 this paragraph as being applicable in the circumstances (but see also subsection (10)); or

(b) the financial product, or the financial service, is provided for use in connection with a business that is not a small business (see subsection (12));

(c) the financial product, or the financial service, is not provided for use in connection with a business, and 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 (as defined in section 9) that states that the person:

(i) has net assets of at least the amount specified in regulations made for the purposes of this subparagraph; 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 this subparagraph a year;

(d) the person is a professional investor.

Offence proceedings—defendant bears evidential burden in relation to matters referred to in paragraphs (7)(a) to (d)

(8) In a prosecution for an offence based on a provision of this Chapter, a defendant bears an evidential burden in relation to the matters in paragraphs (7)(a) to (d) as if those matters were exceptions for the purposes of subsection 13.3(3) of the *Criminal Code*.

Other proceedings relating to subsection (7) products—presumption in non-criminal proceedings of retail client unless contrary established

(9) If:

(a) it is alleged in a proceeding under this Chapter (not being a prosecution for an offence), or in any other proceeding (not being a prosecution for an offence) in respect of a matter arising under this Chapter, that a particular financial product or financial service was provided to a person as a retail client; and

(b) the product or the service is one to which subsection (7) applies;

it is presumed that the product or service was provided to the person as a retail client unless the contrary is established.

Note 1: There is no such presumption in relation to the provision of a product or service that is or relates to a general insurance product, a superannuation product or an RSA product. Whether or not such a product, or a service relating to such a product, was provided to a person as a retail client is to be resolved as provided in subsection (5) or (6), as the case requires.

Note 2: In criminal proceedings, a defendant bears an evidential burden in relation to the matters in paragraphs (7)(a) to (d) (see subsection (8)).

Regulations and paragraph (7)(a)

(10) In addition to specifying an amount or amounts for the purposes of paragraph (7)(a), the regulations may do either or both of the following:

(a) 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;

(b) modify the way in which that paragraph applies in particular circumstances.

Regulations and paragraph (7)(c)

(10A) In addition to specifying amounts for the purposes of subparagraphs (7)(c)(i) and (ii), the regulations may do either or both of the following:

(a) deal with how net assets referred to in subparagraph (7)(c)(i) are to be determined and valued, either generally or in specified circumstances;

(b) deal with how gross income referred to in subparagraph (7)(c)(ii) is to be calculated, either generally or in specified circumstances.

What happens if a package of general insurance products and other kinds of financial products is provided?

(11) If:

(a) either:

(i) in a single transaction, 2 or more financial products are provided to a person; or

(ii) a single financial service provided to a person relates to 2 or more financial products; and

(b) one or more, but not all, of the financial products are general insurance products;

subsection (5) applies to the transaction or service so far as it relates to the general insurance products, and subsection (6) or (7), as the case requires, applies to the transaction or service so far as it relates to other financial products.

Definition

(12) In this section:

small business means a business employing less than:

(a) if the business is or includes the manufacture of goods—100 people; or

(b) otherwise—20 people.

761GA Meaning of *retail client*—sophisticated investors

For the purposes of this Chapter, a financial product, or a financial service (other than a traditional trustee company service) in relation to a financial product, is not provided by one person to another person as a ***retail client*** if:

(a) the first person (the ***licensee***) is a financial services licensee; and

(b) the financial product is not a general insurance product, a superannuation product or an RSA product; and

(c) the financial product or service is not provided for use in connection with a business; and

(d) the licensee is satisfied on reasonable grounds that the other person (the ***client***) has previous experience in using financial services and investing in financial products that allows the client to assess:

(i) the merits of the product or service; and

(ii) the value of the product or service; and

(iii) the risks associated with holding the product; and

(iv) the client's own information needs; and

(v) the adequacy of the information given by the licensee and the product issuer; and

(e) the licensee gives the client before, or at the time when, the product or advice is provided a written statement of the licensee's reasons for being satisfied as to those matters; and

(f) the client signs a written acknowledgment before, or at the time when, the product or service is provided that:

(i) the licensee has not given the client a Product Disclosure Statement; and

(ii) the licensee has not given the client any other document that would be required to be given to the client under

this Chapter if the product or service were provided to the client as a retail client; and

(iii) the licensee does not have any other obligation to the client under this Chapter that the licensee would have if the product or service were provided to the client as a retail client.

761H References to this Chapter include references to regulations or other instruments made for the purposes of this Chapter

(1) A reference in a provision of this Chapter to this Chapter, or to a particular provision or group of provisions of this Chapter, includes (unless a contrary intention appears) a reference to regulations, or other instruments, made for the purposes of this Chapter, or for the purposes of that provision or any of those provisions, as the case requires.

(2) Subsection (1) has effect as if provisions in Part 10.2 (transitional provisions) that relate to matters dealt with in this Chapter were part of this Chapter.

Division 3—What is a financial product?

Subdivision A—Preliminary

762A Overview of approach to defining what a financial product is

General definition

(1) Subdivision B sets out a general definition of ***financial product***. Subject to subsections (2) and (3), a facility is a financial product if it falls within that definition.

Specific inclusions

(2) Subdivision C identifies, or provides for the identification of, kinds of facilities that, subject to subsection (3), are financial products (whether or not they are within the general definition).

Overriding exclusions

(3) Subdivision D identifies, or provides for the identification of, kinds of facilities that are not financial products. These facilities are not financial products:
  (a) even if they are within the general definition; and
  (b) even if they are within a class of facilities identified as mentioned in subsection (2).

762B What if a financial product is part of a broader facility?

If a financial product is a component of a facility that also has other components, this Chapter, in applying to the financial product, only applies in relation to the facility to the extent it consists of the component that is the financial product.

Note: So, e.g., Part 7.9 does not require disclosures to be made in relation to those other components.

762C Meaning of *facility*

In this Division:

facility includes:

(a) intangible property; or

(b) an arrangement or a term of an arrangement (including a term that is implied by law or that is required by law to be included); or

(c) a combination of intangible property and an arrangement or term of an arrangement.

Note: 2 or more arrangements may be taken to constitute a single arrangement—see section 761B.

Subdivision B—The general definition

763A General definition of *financial product*

(1) For the purposes of this Chapter, a ***financial product*** is a facility through which, or through the acquisition of which, a person does one or more of the following:

(a) makes a financial investment (see section 763B);

(b) manages financial risk (see section 763C);

(c) makes non-cash payments (see section 763D).

This has effect subject to section 763E.

(2) For the purposes of this Chapter, a particular facility that is of a kind through which people commonly make financial investments, manage financial risks or make non-cash payments is a ***financial product*** even if that facility is acquired by a particular person for some other purpose.

(3) A facility does not cease to be a financial product merely because:

(a) the facility has been acquired by a person other than the person to whom it was originally issued; and

(b) that person, in acquiring the product, was not making a financial investment or managing a financial risk.

763B When a person makes a financial investment

For the purposes of this Chapter, a person (the ***investor***) ***makes a financial investment*** if:

(a) the investor gives money or money's worth (the ***contribution***) to another person and any of the following apply:

(i) the other person uses the contribution to generate a financial return, or other benefit, for the investor;

(ii) the investor intends that the other person will use the contribution to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated);

(iii) the other person intends that the contribution will be used to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated); and

(b) the investor has no day-to-day control over the use of the contribution to generate the return or benefit.

Note 1: Examples of actions that constitute making a financial investment under this subsection are:

(a) a person paying money to a company for the issue to the person of shares in the company (the company uses the money to generate dividends for the person and the person, as a shareholder, does not have control over the day-to-day affairs of the company); or

(b) a person contributing money to acquire interests in a registered scheme from the responsible entity of the scheme (the scheme uses the money to generate financial or other benefits for the person and the person, as a member of the scheme, does not have day-to-day control over the operation of the scheme).

Note 2: Examples of actions that do not constitute making a financial investment under this subsection are:

(a) a person purchasing real property or bullion (while the property or bullion may generate a return for the person, it is not a return generated by the use of the purchase money by another person); or

(b) a person giving money to a financial services licensee who is to use it to purchase shares for the person (while the purchase of the shares will be a financial investment made by the person, the mere act of giving the money to the licensee will not of itself constitute making a financial investment).

763C When a person manages financial risk

For the purposes of this Chapter, a person ***manages financial risk*** if they:

(a) manage the financial consequences to them of particular circumstances happening; or

(b) avoid or limit the financial consequences of fluctuations in, or in the value of, receipts or costs (including prices and interest rates).

Note 1: Examples of actions that constitute managing a financial risk are:

(a) taking out insurance; or

(b) hedging a liability by acquiring a futures contract or entering into a currency swap.

Note 2: An example of an action that does not constitute managing a financial risk is employing a security firm (while that is a way of managing the risk that thefts will happen, it is not a way of managing the financial consequences if thefts do occur).

763D When a person makes non-cash payments

(1) For the purposes of this Chapter, a person ***makes non-cash payments*** if they make payments, or cause payments to be made, otherwise than by the physical delivery of Australian or foreign currency in the form of notes and/or coins.

Note: Examples of actions that constitute making non-cash payments are:

(a) making payments by means of a facility for direct debit of a deposit account; or

(b) making payments by means of a facility for the use of cheques; or

(c) making payments by means of a purchased payment facility within the meaning of the Payment Systems (Regulation) Act 1998, such as a smart card; or

(d) making payments by means of traveller's cheques (whether denominated in Australian or foreign currency).

(2) For the purposes of this Chapter, the following are not ***making non-cash payments***, even if they might otherwise be covered by subsection (1):

(a) making payments by means of a facility in relation to which one of the following applies:

(i) there is only one person to whom payments can be made by means of the facility;

(ii) the facility is, or is of a kind, specified in the regulations as being a facility that is not to be covered by this section because of restrictions relating to the number of people to whom payments can be made by means of the facility, or relating to the number of persons who can use the facility to make payments;

(b) making payments by means of:

(i) a letter of credit from a financial institution; or

(ii) a cheque drawn by a financial institution on itself; or

(iii) a guarantee given by a financial institution.

763E What if a financial product is only incidental?

(1) If:

(a) something (the ***incidental product***) that, but for this section, would be a financial product because of this Subdivision is:

(i) an incidental component of a facility that also has other components; or

(ii) a facility that is incidental to one or more other facilities; and

(b) it is reasonable to assume that the main purpose of:

(i) if subparagraph (a)(i) applies—the facility referred to in that subparagraph, when considered as a whole; or

(ii) if subparagraph (a)(ii) applies—the incidental product, and the other facilities referred to in that subparagraph, when considered as a whole;

is not a financial product purpose;

the incidental product is not a financial product because of this Subdivision (however, it may still be a financial product because of Subdivision C).

(2) In this section:

financial product purpose means a purpose of:

(a) making a financial investment; or

(b) managing financial risk; or

(c) making non-cash payments.

Subdivision C—Specific inclusions

764A Specific things that are financial products (subject to Subdivision D)

(1) Subject to Subdivision D, the following are ***financial products*** for the purposes of this Chapter:

(a) a security;

(b) any of the following in relation to a registered scheme:

(i) an interest in the scheme;

(ii) a legal or equitable right or interest in an interest covered by subparagraph (i);

(iii) an option to acquire, by way of issue, an interest or right covered by subparagraph (i) or (ii);

(ba) any of the following in relation to a managed investment scheme that is not a registered scheme, other than a scheme (whether or not operated in this jurisdiction) in relation to which none of paragraphs 601ED(1)(a), (b) and (c) are satisfied:

(i) an interest in the scheme;

(ii) a legal or equitable right or interest in an interest covered by subparagraph (i);

(iii) an option to acquire, by way of issue, an interest or right covered by subparagraph (i) or (ii);

(c) a derivative;

(d) a contract of insurance that is not a life policy, or a sinking fund policy, within the meaning of the *Life Insurance Act 1995*, but not including such a contract of insurance:

(i) to the extent that it provides for a benefit to be provided by an association of employees that is registered as an organisation, or recognised, under the *Fair Work (Registered Organisations) Act 2009* for a member of the association or a dependant of a member; or

(ii) to the extent that it provides for benefits, pensions or payments described in paragraph 11(3)(c) of the *Life Insurance Act 1995*; or

(iii) to the extent that it provides for the provision of a funeral benefit; or

(iv) issued by an employer to an employee of the employer;

(e) a life policy, or a sinking fund policy, within the meaning of the *Life Insurance Act 1995*, that is a contract of insurance, but not including such a policy:

(i) to the extent that it provides for a benefit to be provided by an association of employees that is registered as an organisation, or recognised, under the *Fair Work (Registered Organisations) Act 2009* for a member of the association or a dependant of a member; or

(ii) to the extent that it provides for benefits, pensions or payments described in paragraph 11(3)(c) of the *Life Insurance Act 1995*; or

(iii) to the extent that it provides for the provision of a funeral benefit; or

(iv) issued by an employer to an employee of the employer;

(f) a life policy, or a sinking fund policy, within the meaning of the *Life Insurance Act 1995*, that is not a contract of insurance, but not including such a policy:

(i) to the extent that it provides for a benefit to be provided by an association of employees that is registered as an organisation, or recognised, under the *Fair Work (Registered Organisations) Act 2009* for a member of the association or a dependant of a member; or

(ii) to the extent that it provides for benefits, pensions or payments described in paragraph 11(3)(c) of the *Life Insurance Act 1995*; or

(iii) to the extent that it provides for the provision of a funeral benefit; or

(iv) issued by an employer to an employee of the employer;

(g) a superannuation interest within the meaning of the *Superannuation Industry (Supervision) Act 1993*;

(h) an RSA (retirement savings account) within the meaning of the *Retirement Savings Accounts Act 1997*;

(ha) an FHSA (short for first home saver account) within the meaning of the *First Home Saver Accounts Act 2008*;

(i) any deposit-taking facility made available by an ADI (within the meaning of the *Banking Act 1959*) in the course of its banking business (within the meaning of that Act), other than an RSA (RSAs are covered by paragraph (h));

(j) a debenture, stock or bond issued or proposed to be issued by a government;

(k) a foreign exchange contract that is not:
  (i) a derivative (derivatives are covered by paragraph (c)); or
  (ii) a contract to exchange one currency (whether Australian or not) for another that is to be settled immediately;

(kaa) a carbon unit;

(ka) an Australian carbon credit unit;

(kb) an eligible international emissions unit;

(l) a margin lending facility;

(m) anything declared by the regulations to be a financial product for the purposes of this section.

Note: Even though something is expressly excluded from one of these paragraphs, it may still be a financial product (subject to Subdivision D) either because:
(a) it is covered by another of these paragraphs; or
(b) it is covered by the general definition in Subdivision B.

(1A) If a single contract of insurance provides 2 or more kinds of cover, paragraph (1)(d) applies separately in relation to that contract, in relation to each of those kinds of cover, as if the contract only provided that kind of cover.

Note: Because of this subsection (including as it is affected by subsection (1B)), a single contract of insurance may constitute 2 or more separate general insurance products.

(1B) If a contract of insurance provides a kind of cover in relation to 2 or more kinds of asset, subsection (1A) applies to the contract, in relation to each of those kinds of asset, as if the cover provided by the contract in relation to that kind of asset constituted a separate kind of cover.

(2) For the purpose of paragraphs (1)(d), (e) and (f) and subsections (1A) and (1B), ***contract of insurance*** includes:
  (a) a contract that would ordinarily be regarded as a contract of insurance even if some of its provisions are not by way of insurance; and
  (b) a contract that includes provisions of insurance in so far as those provisions are concerned, even if the contract would not ordinarily be regarded as a contract of insurance.

Subdivision D—Specific exclusions

765A Specific things that are not financial products

(1) Despite anything in Subdivision B or Subdivision C, the following are not ***financial products*** for the purposes of this Chapter:

(a) an excluded security;

(b) an undertaking by a body corporate to pay money to a related body corporate;

(c) health insurance provided as part of a health insurance business (as defined in Division 121 of the *Private Health Insurance Act 2007*);

(ca) insurance provided as part of a health-related business (as defined by section 131-15 of that Act) that is conducted through a health benefits fund (as defined by section 131-10 of that Act);

(d) insurance provided by the Commonwealth;

(e) State insurance or Northern Territory insurance, including insurance entered into by:

(i) a State or the Northern Territory; and

(ii) some other insurer;

as joint insurers;

(f) insurance entered into by the Export Finance and Insurance Corporation, other than a short-term insurance contract within the meaning of the *Export Finance and Insurance Corporation Act 1991*;

(g) reinsurance;

(h) any of the following:

(i) a credit facility within the meaning of the regulations (other than a margin lending facility);

(ii) a facility for making non-cash payments (see section 763D), if payments made using the facility will all be debited to a credit facility covered by subparagraph (i);

(i) a facility:

(i) that is an approved RTGS system within the meaning of the *Payment Systems and Netting Act 1998*; or

(ii) for the transmission and reconciliation of non-cash payments (see section 763D), and the establishment of

final positions, for settlement through an approved RTGS system within the meaning of the *Payment Systems and Netting Act 1998*;

(j) a facility that is a designated payment system for the purposes of the *Payment Systems (Regulation) Act 1998*;

(k) a facility for the exchange and settlement of non-cash payments (see section 763D) between providers of non-cash payment facilities;

(l) a facility that is:

(i) a financial market; or

(ii) a clearing and settlement facility; or

(iii) a payment system operated as part of a clearing and settlement facility; or

(iv) a derivative trade repository;

(m) a contract to exchange one currency (whether Australian or not) for another that is to be settled immediately;

(n) so much of an arrangement as is not a derivative because of paragraph 761D(3)(a);

(p) an arrangement that is not a derivative because of subsection 761D(4);

(q) an interest in a superannuation fund of a kind prescribed by regulations made for the purposes of this paragraph;

(r) any of the following:

(i) an interest in something that is not a managed investment scheme because of paragraph (c), (e), (f), (k), (l) or (m) of the definition of ***managed investment scheme*** in section 9;

(ii) a legal or equitable right or interest in an interest covered by subparagraph (i);

(iii) an option to acquire, by way of issue, an interest or right covered by subparagraph (i) or (ii);

(s) any of the following in relation to a managed investment scheme (whether or not operated in this jurisdiction) in relation to which none of paragraphs 601ED(1)(a), (b) and (c) are satisfied and that is not a registered scheme:

(i) an interest in the scheme;

(ii) a legal or equitable right or interest in an interest covered by subparagraph (i);

(iii) an option to acquire, by way of issue, an interest or right covered by subparagraph (i) or (ii);

(t) a deposit-taking facility that is, or is used for, State banking;

(u) a benefit provided by an association of employees that is registered as an organisation, or recognised, under the *Fair Work (Registered Organisations) Act 2009* for a member of the association or a dependant of a member;

(v) either of the following:

(i) a contract of insurance; or

(ii) a life policy or a sinking fund policy, within the meaning of the *Life Insurance Act 1995*, that is not a contract of insurance;

issued by an employer to an employee of the employer;

(w) a funeral benefit;

(x) physical equipment or physical infrastructure by which something else that is a financial product is provided;

(y) a facility, interest or other thing declared by regulations made for the purposes of this subsection not to be a financial product;

(z) a facility, interest or other thing declared by ASIC under subsection (2) not to be a financial product.

(2) ASIC may declare that a specified facility, interest or other thing is not a financial product for the purposes of this Chapter. The declaration must be in writing and ASIC must publish notice of it in the *Gazette*.

Division 4—When does a person provide a financial service?

766A When does a person provide a *financial service*?

General

(1) For the purposes of this Chapter, subject to paragraph (2)(b), a person provides a ***financial service*** if they:

(a) provide financial product advice (see section 766B); or

(b) deal in a financial product (see section 766C); or

(c) make a market for a financial product (see section 766D); or

(d) operate a registered scheme; or

(e) provide a custodial or depository service (see section 766E); or

(f) engage in conduct of a kind prescribed by regulations made for the purposes of this paragraph.

Provision of traditional trustee company services by trustee company

(1A) Subject to paragraph (2)(b), the provision by a trustee company of a traditional trustee company service constitutes the provision, by the company, of a ***financial service***.

Note: Trustee companies may also provide other kinds of financial service mentioned in subsection (1).

(1B) The regulations may, in relation to a traditional trustee company service of a particular class, prescribe the person or persons to whom a service of that class is taken to be provided. This subsection does not limit (and is not limited by) subsection (2).

Note: A traditional trustee company service is provided to a person as a retail client unless regulations provide otherwise (see subsection 761G(6A)).

Regulations may deal with various matters

(2) The regulations may set out:

(a) the circumstances in which persons facilitating the provision of a financial service (for example, by publishing information) are taken also to provide that service; or

(b) the circumstances in which persons are taken to provide, or are taken not to provide, a financial service.

Exception for work ordinarily done by clerks or cashiers

(3) To avoid doubt, a person's conduct is not the provision of a ***financial service*** if it is done in the course of work of a kind ordinarily done by clerks or cashiers.

Meaning of ***operating a registered scheme***

(4) For the purposes of this section, a person is not ***operating a registered scheme*** merely because:

(a) they are acting as an agent or employee of another person; or

(b) they are taking steps to wind up the scheme.

766B Meaning of financial product advice

(1) For the purposes of this Chapter, ***financial product advice*** means a recommendation or a statement of opinion, or a report of either of those things, that:

(a) is intended to influence a person or persons in making a decision in relation to a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or

(b) could reasonably be regarded as being intended to have such an influence.

(1A) However, subject to subsection (1B), the provision or giving of an exempt document or statement does not constitute the provision of financial product advice.

(1B) Subsection (1A) does not apply for the purpose of determining whether a recommendation or statement of opinion made by an outside expert, or a report of such a recommendation or statement of opinion, that is included in an exempt document or statement is financial product advice provided by the outside expert.

(2) There are 2 types of financial product advice: personal advice and general advice.

(3) For the purposes of this Chapter, ***personal advice*** is financial product advice that is given or directed to a person (including by electronic means) in circumstances where:

(a) the provider of the advice has considered one or more of the person's objectives, financial situation and needs (otherwise than for the purposes of compliance with the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* or with regulations, or AML/CTF Rules, under that Act); or

(b) a reasonable person might expect the provider to have considered one or more of those matters.

(4) For the purposes of this Chapter, ***general advice*** is financial product advice that is not personal advice.

(5) The following advice is not financial product advice:

(a) advice given by a lawyer in his or her professional capacity, about matters of law, legal interpretation or the application of the law to any facts;

(b) except as may be prescribed by the regulations—any other advice given by a lawyer in the ordinary course of activities as a lawyer, that is reasonably regarded as a necessary part of those activities;

(c) except as may be prescribed by the regulations—advice given by a registered tax agent or BAS agent (within the meaning of the *Tax Agent Services Act 2009*), that is given in the ordinary course of activities as such an agent and that is reasonably regarded as a necessary part of those activities.

(6) If:

(a) in response to a request made by a person (the ***inquirer***) to another person (the ***provider***), the provider tells the inquirer the cost, or an estimate of the likely cost, of a financial product (for example, an insurance product); and

(b) that cost or estimate is worked out, or said by the provider to be worked out, by reference to a valuation of an item (for example, a house or car to which an insurance policy would relate), being a valuation that the provider suggests or recommends to the inquirer;

the acts of telling the inquirer the cost, or estimated cost, and suggesting or recommending the valuation, do not, of themselves, constitute the making of a recommendation (or the provision of any other kind of financial product advice) relating to the financial product.

(7) If:

(a) in response to a request made by a person (the ***inquirer***) to another person (the ***provider***), the provider tells the inquirer information about:

(i) the cost of a financial product; or

(ii) the rate of return on a financial product; or

(iii) any other matter identified in regulations made for the purposes of this subparagraph; and

(b) the request could also have been complied with (but was not also so complied with) by telling the inquirer equivalent information about one or more other financial products;

the act of telling the inquirer the information does not, of itself, constitute the making of a recommendation (or the provision of any other kind of financial product advice) in relation to the financial product referred to in paragraph (a).

(8) Subsections (5), (6) and (7) are not intended to affect, in any way, the determination of whether situations not covered by those subsections do, or do not, constitute the provision of financial product advice.

(9) In this section:

exempt document or statement means:

(a) a document prepared, or a statement given, in accordance with requirements of this Chapter, other than:

(i) a Statement of Advice; or

(ii) a document or statement of a kind prescribed by regulations made for the purposes of this subparagraph; or

(b) any other document or statement of a kind prescribed by regulations made for the purposes of this paragraph.

outside expert, in relation to an exempt document or statement, means an expert who is not:

(a) the person by whom, or on whose behalf, the exempt document or statement was prepared; or

(b) an employee or director of that person.

766C Meaning of *dealing*

(1) For the purposes of this Chapter, the following conduct (whether engaged in as principal or agent) constitutes ***dealing*** in a financial product:

(a) applying for or acquiring a financial product;

(b) issuing a financial product;

(c) in relation to securities or managed investment interests—underwriting the securities or interests;

(d) varying a financial product;

(e) disposing of a financial product.

(2) Arranging for a person to engage in conduct referred to in subsection (1) is also ***dealing*** in a financial product, unless the actions concerned amount to providing financial product advice.

(3) A person is taken not to ***deal*** in a financial product if the person deals in the product on their own behalf (whether directly or through an agent or other representative), unless:

(a) the person is an issuer of financial products; and

(b) the dealing is in relation to one or more of those products.

(3A) For the purposes of subsection (3), a person (the ***agent***) who deals in a product as an agent or representative of another person (the ***principal***) is not taken to deal in the product on the agent's own behalf, even if that dealing, when considered as a dealing by the principal, is a dealing by the principal on the principal's own behalf.

(4) Also, a transaction entered into by a person who is, or who encompasses or constitutes in whole or in part, any of the following entities:

(a) a government or local government authority;

(b) a public authority or instrumentality or agency of the Crown;

(c) a body corporate or an unincorporated body;

is taken not to be ***dealing*** in a financial product by that person if the transaction relates only to:

(d) securities of that entity; or

(e) if the entity is a government—debentures, stocks or bonds issued or proposed to be issued by that government.

(5) Paragraph (4)(c) does not apply if the entity:

(a) carries on a business of investment in securities, interests in land or other investments; and

(b) in the course of carrying on that business, invests funds subscribed, whether directly or indirectly, after an offer or invitation to the public (within the meaning of section 82) made on terms that the funds subscribed would be invested.

(6) A transaction entered into by a sub-underwriter of an issue of securities that relates only to the sub-underwriting is taken not to be ***dealing*** in a financial product.

(7) The regulations may prescribe conduct that is taken to be, or not to be, ***dealing*** in a financial product. Regulations made for the purposes of this subsection have effect despite anything else in this section.

766D Meaning of *makes a market* for a financial product

(1) For the purposes of this Chapter, a person ***makes a market*** for a financial product if:

(a) either through a facility, at a place or otherwise, the person regularly states the prices at which they propose to acquire or dispose of financial products on their own behalf; and

(b) other persons have a reasonable expectation that they will be able to regularly effect transactions at the stated prices; and

(c) the actions of the person do not, or would not if they happened through a facility or at a place, constitute operating a financial market because of the effect of paragraph 767A(2)(a).

(2) Paragraph (1)(a) does not apply to a person stating prices at which they propose to acquire or dispose of financial products if:

(a) the person is the issuer of the products; and

(b) the products are superannuation products, managed investment products or financial products referred to in paragraph 764A(1)(ba) (which relates to unregistered managed investment schemes).

766E Meaning of provide a custodial or depository service

(1) For the purposes of this Chapter, a person (the ***provider***) provides a ***custodial or depository service*** to another person (the ***client***) if, under an arrangement between the provider and the client, or between the provider and another person with whom the client has an arrangement, (whether or not there are also other parties to any such arrangement), a financial product, or a beneficial interest in a financial product, is held by the provider in trust for, or on behalf of, the client or another person nominated by the client.

(2) The following provisions apply in relation to a custodial or depository service:

(a) subject to paragraph (b), for the purposes of this Chapter, the time at which a custodial or depository service is provided is the time when the financial product or beneficial interest concerned is first held by the provider as mentioned in subsection (1);

(b) for the purposes of Part 7.6, and of any other provisions of this Act prescribed by regulations made for the purposes of this paragraph, the continued holding of the financial product or beneficial interest concerned by the provider as mentioned in subsection (1) also constitutes the provision of a custodial or depository service.

Note: Because of paragraph (a) (subject to regulations made for the purposes of paragraph (b)), the requirements of Part 7.7 relating to financial services disclosure need only be complied with before the product or interest is first held by the provider. However, because of paragraph (b), the provider will be subject to the licensing and related requirements of Part 7.6 for so long as they continue to hold the product or interest.

(3) However, the following conduct does not constitute providing a ***custodial or depository service***:

(a) the operation of a clearing and settlement facility;

(b) the operation of a registered scheme, or the holding of the assets of a registered scheme;

(c) the operation of a regulated superannuation fund, an approved deposit fund or a pooled superannuation trust (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) by the trustees of that fund or trust;

(ca) the operation of a statutory fund by a life company (within the meaning of the *Life Insurance Act 1995*);

(cb) the operation of an FHSA trust (within the meaning of the *First Home Saver Accounts Act 2008*) by an FHSA provider (within the meaning of that Act);

(d) the provision of services to a related body corporate;

(e) any other conduct of a kind prescribed by regulations made for the purposes of this paragraph.

Division 5—What is a financial market?

767A What is a *financial market*?

(1) For the purposes of this Chapter, a ***financial market*** is a facility through which:

(a) offers to acquire or dispose of financial products are regularly made or accepted; or

(b) offers or invitations are regularly made to acquire or dispose of financial products that are intended to result or may reasonably be expected to result, directly or indirectly, in:

(i) the making of offers to acquire or dispose of financial products; or

(ii) the acceptance of such offers.

(2) However, the following conduct does not constitute operating a ***financial market*** for the purposes of this Chapter:

(a) 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, unless the regulations specify circumstances in which such conduct does constitute operating a financial market and the person's conduct occurs in circumstances so specified;

(b) conducting treasury operations between related bodies corporate;

(c) a person, being the holder of a licence under an Australian law relating to the licensing of auctioneers, conducting an auction of forfeited shares;

(d) any other conduct of a kind prescribed by regulations made for the purposes of this paragraph.

Division 6—What is a clearing and settlement facility?

768A What is a clearing and settlement facility?

(1) For the purposes of this Chapter, a ***clearing and settlement facility*** is a facility that provides a regular mechanism for the parties to transactions relating to financial products to meet obligations to each other that:

(a) arise from entering into the transactions; and

(b) are of a kind prescribed by regulations made for the purposes of this paragraph.

Example 1: A facility that provides a regular mechanism for stockbrokers to pay for the shares they buy and to be paid for the shares they sell, and for records of those transactions to be processed to facilitate registration of the new ownership of the shares, would be a ***clearing and settlement facility*** (assuming that the relevant obligations are of a kind prescribed by regulations made for the purposes of this section).

Example 2: A facility that provides a regular mechanism for registering trade in derivatives on a futures market and that enables the calculation of payments that market participants owe by way of margins would also be a ***clearing and settlement facility*** (assuming that the relevant obligations are of a kind prescribed by regulations made for the purposes of this section).

(2) However, the following conduct does not constitute operating a ***clearing and settlement facility*** for the purposes of this Chapter:

(a) an ADI (within the meaning of the *Banking Act 1959*) acting in the ordinary course of its banking business;

(b) a person acting on their own behalf, or on behalf of one party to a transaction only;

(c) a person who provides financial services to another person dealing with the other person's accounts in the ordinary course of the first person's business activities;

(d) the actions of a participant in a clearing and settlement facility who has taken on the delivery or payment obligations, in relation to a particular financial product, of another person who is a party to a transaction relating to a financial product;

(e) conducting treasury operations between related bodies corporate;

(h) operating a facility for the exchange and settlement of non-cash payments (see section 763D) between providers of non-cash payment facilities;

(i) any other conduct of a kind prescribed by regulations made for the purposes of this paragraph.

Division 7—General provisions relating to civil and criminal liability

769A Part 2.5 of *Criminal Code* does not apply

Despite section 1308A, Part 2.5 of the *Criminal Code* does not apply to any offences based on the provisions of this Chapter.

Note: For the purposes of offences based on provisions of this Chapter, corporate criminal responsibility is dealt with by section 769B, rather than by Part 2.5 of the *Criminal Code*.

769B People are generally responsible for the conduct of their agents, employees etc.

(1) Subject to subsections (7) and (8), conduct engaged in on behalf of a body corporate:

(a) by a director, employee or agent of the body, within the scope of the person's actual or apparent authority; or

(b) by any other person at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of the body, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;

is taken, for the purposes of a provision of this Chapter, or a proceeding under this Chapter, to have been engaged in also by the body corporate.

(2) Conduct engaged in by a person (for example, the giving of money or property) in relation to:

(a) a director, employee or agent of a body corporate, acting within the scope of their actual or apparent authority; or

(b) any other person acting at the direction or with the consent or agreement (whether express or implied) of a director, employee or agent of a body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the director, employee or agent;

is taken, for the purposes of a provision of this Chapter, or a proceeding under this Chapter, to have been engaged in also in relation to the body corporate.

(3) If, in a proceeding under this Chapter in respect of conduct engaged in by a body corporate, it is necessary to establish the state of mind of the body, it is sufficient to show that a director, employee or agent of the body, being a director, employee or agent by whom the conduct was engaged in within the scope of the person's actual or apparent authority, had that state of mind. For this purpose, a person acting as mentioned in paragraph (1)(b) is taken to be an agent of the body corporate concerned.

(4) Subject to subsections (7) and (8), conduct engaged in on behalf of a person other than a body corporate:

(a) by an employee or agent of the person, acting within the scope of the actual or apparent authority of the employee or agent; or

(b) by any other person acting at the direction or with the consent or agreement (whether express or implied) of an employee or agent of the first-mentioned person, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the employee or agent;

is taken, for the purposes of a provision of this Chapter, or of a proceeding under this Chapter, to have been engaged in also by the first-mentioned person.

(5) Conduct engaged in by a person (for example, the giving of money or property) in relation to:

(a) an employee or agent of a person (the ***principal***) other than a body corporate, acting within the scope of their actual or apparent authority; or

(b) any other person acting at the direction or with the consent or agreement (whether express or implied) of an employee or agent of a person (the ***principal***) other than a body corporate, where the giving of the direction, consent or agreement is within the scope of the actual or apparent authority of the employee or agent;

is taken, for the purposes of a provision of this Chapter, or of a proceeding under this Chapter, to have been engaged in also in relation to the principal.

(6) If, in a proceeding under this Chapter in respect of conduct engaged in by a person other than a body corporate, it is necessary to establish the state of mind of the person, it is sufficient to show that an employee or agent of the person, being an employee or agent by whom the conduct was engaged in within the scope of the employee's or agent's actual or apparent authority, had that state of mind. For this purpose, a person acting as mentioned in paragraph (4)(b) is taken to be an agent of the person first referred to in subsection (4).

(7) Nothing in this section, or in any other law (including the common law), has the effect that, for the purposes of a provision of Part 7.7 or 7.7A, or a proceeding under this Chapter that relates to a provision of Part 7.7 or 7.7A, a financial service provided by person in their capacity as an authorised representative of a financial services licensee is taken, or taken also, to have been provided by that financial services licensee.

(8) Nothing in this section, or in any other law (including the common law), has the effect that, for the purposes of a provision of Division 2 of Part 7.9, or a proceeding under this Chapter that relates to a provision of Division 2 of Part 7.9, conduct engaged in by a person in their capacity as a regulated person (within the meaning of section 1011B) is taken, or taken also, to have been engaged in by another such regulated person.

(8A) Nothing in this section, other than subsections (7) and (8), excludes or limits the operation of subsection 601FB(2) in relation to the provisions of this Chapter or to proceedings under this Chapter.

(9) The regulations may provide that this section, or a particular provision of this section, has effect for specified purposes subject to modifications specified in the regulations. The regulations have effect accordingly.

(10) In this section:

(a) a reference to a proceeding ***under*** this Chapter includes a reference to:

(i) a prosecution for an offence based on a provision of this Chapter; and

(ii) a proceeding under a provision of Part 9.4B that relates to a provision of this Chapter; and

(iii) any other proceeding under any other provision of Chapter 9 that relates to a provision of this Chapter; and

(b) a reference to ***conduct*** is a reference to an act, an omission to perform an act, or a state of affairs; and

(c) a reference to the ***state of mind*** of a person includes a reference to the knowledge, intention, opinion, belief or purpose of the person and the person's reasons for the person's intention, opinion, belief or purpose.

Note: For the meaning of ***offence based on*** a provision, see the definition in section 9.

769C Representations about future matters taken to be misleading if made without reasonable grounds

(1) For the purposes of this Chapter, or of a proceeding under this Chapter, if:

(a) a person makes a representation with respect to any future matter (including the doing of, or refusing to do, any act); and

(b) the person does not have reasonable grounds for making the representation;

the representation is taken to be misleading.

(2) Subsection (1) does not limit the circumstances in which a representation may be misleading.

(3) In this section:

proceeding under this Chapter has the same meaning as it has in section 769B.

Part 7.2—Licensing of financial markets

Division 1—Preliminary

790A Definition

In this Part:

clearing and settlement arrangements, for transactions effected through a financial market, means arrangements for the clearing and settlement of those transactions. The arrangements may be part of the market's operating rules or be separate from those operating rules.

Division 2—Requirement to be licensed

791A Need for a licence

(1) A person must only operate, or hold out that the person operates, a financial market in this jurisdiction if:

(a) the person has an Australian market licence that authorises the person to operate the market in this jurisdiction; or

(b) the market is exempt from the operation of this Part.

Note 1: A market licensee may also provide financial services incidental to the operation of the market: see paragraph 911A(2)(d).

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) For the purposes of an offence based on subsection (1), strict liability applies to paragraph (1)(b).

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

791B Other prohibitions on holding out

A person must not hold out:

(a) that the person has an Australian market licence; or

(b) that the operation of a financial market by the person in this jurisdiction is authorised by an Australian market licence; or

(c) that a financial market is exempt from the operation of this Part; or

(d) that the person is a participant in a licensed market;

if that is not the case.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

791C Exemptions

(1) The Minister may, by publishing a notice in the *Gazette*, exempt from the operation of this Part a particular financial market or type of financial market.

(2) The Minister may, at any time, by publishing a notice in the *Gazette*:

(a) impose conditions, or additional conditions, on an exemption; or

(b) vary or revoke the conditions on an exemption; or

(c) revoke an exemption.

(3) However, the Minister may only take action under subsection (2) after:

(a) giving notice, and an opportunity to make submissions on the proposed action, to the operator of each financial market known by the Minister to be covered by the exemption; and

(b) if the exemption covers a type of financial market—causing a notice to be published in a newspaper or newspapers circulating generally in each State and internal Territory allowing a reasonable time within which the operator of each financial market covered by the exemption may make submissions on the proposed action.

This subsection does not apply to the Minister imposing conditions when an exemption is made.

791D When a market is taken to be operated in this jurisdiction

(1) For the purposes of this Chapter, a financial market is taken to be operated ***in this jurisdiction*** if it is operated by a body corporate that is registered under Chapter 2A.

(2) Subsection (1) does not limit the circumstances in which a financial market is operated ***in this jurisdiction*** for the purposes of this Chapter.

Division 3—Regulation of market licensees

Subdivision A—Licensee's obligations

792A General obligations

A market licensee must:

(a) to the extent that it is reasonably practicable to do so, do all things necessary to ensure that the market is a fair, orderly and transparent market; and

(b) comply with the conditions on the licence; and

(c) have adequate arrangements (which may involve the appointment of an independent person or related entity) for operating the market, including arrangements for:

(i) handling conflicts between the commercial interests of the licensee and the need for the licensee to ensure that the market operates in the way mentioned in paragraph (a); and

(ii) monitoring and enforcing compliance with the market's operating rules; and

(d) have sufficient resources (including financial, technological and human resources) to operate the market properly; and

(e) if section 881A requires there to be compensation arrangements in relation to the market that are approved in accordance with Division 3 of Part 7.5—ensure that there are such approved compensation arrangements in relation to the market; and

(f) if the licensee is a foreign body corporate—be registered under Division 2 of Part 5B.2; and

(g) if the licence was granted under subsection 795B(2) (overseas markets)—both:

(i) remain authorised to operate a financial market in the foreign country in which the licensee's principal place of business is located; and

(ii) get the Minister's approval under section 792H before that principal place of business becomes located in any other foreign country; and

(h) if the licensee, or a holding company of the licensee, is a widely held market body (within the meaning of Division 1 of Part 7.4)—take all reasonable steps to ensure that an unacceptable control situation (within the meaning of that Division) does not exist in relation to the body; and

(i) take all reasonable steps to ensure that no disqualified individual becomes, or remains, involved in the licensee (see Division 2 of Part 7.4).

792B Obligation to notify ASIC of certain matters

(1) A market licensee must give written notice to ASIC, as soon as practicable, if it becomes aware that it may no longer be able to meet, or has breached, an obligation under section 792A. If ASIC considers it appropriate to do so, ASIC may give the Minister advice about the matter.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) A market licensee must give written notice to ASIC, as soon as practicable, as required by the following paragraphs:

(a) if the licensee provides a new class of financial service incidental to the operation of the market, the licensee must give notice that includes details of the new class;

(b) if the licensee takes any kind of disciplinary action against a participant in the market, the licensee must give notice that includes:

(i) the participant's name; and

(ii) the reason for and nature of the action taken;

(c) if the licensee has reason to suspect that a person has committed, is committing, or is about to commit a significant contravention of the market's operating rules or this Act, the licensee must give notice that includes:

(i) the person's name; and

(ii) details of the contravention or impending contravention; and

(iii) the licensee's reasons for that belief.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(3) If a market licensee becomes aware of:

(a) a matter that the licensee considers has adversely affected, is adversely affecting, or may adversely affect the ability of a participant in the market, who is a financial services licensee, to meet the participant's obligations as a financial services licensee; or

(b) a matter, concerning a participant in the market who is a financial services licensee, that is of a kind prescribed by regulations made for the purposes of this paragraph;

the market licensee must give a written report to ASIC on the matter and send a copy of it to the participant.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(4) A market licensee whose licence was granted under subsection 795B(2) (overseas markets) must, as soon as practicable, give written notice to ASIC if:

(a) the licensee ceases to be authorised to operate a financial market in the foreign country in which the licensee's principal place of business is located; or

(b) there is a significant change to the regulatory regime applying in relation to the market in the foreign country in which the licensee's principal place of business is located.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(5) As soon as practicable after:

(a) a person becomes or ceases to be a director, secretary or senior manager of a market licensee or of a holding company of a market licensee (including when a person changes from one of those positions to another); or

(b) 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 licensee or in a holding company of the licensee;

the licensee must give written notice of this to ASIC. The notice must include such other information about the matter as is prescribed by regulations made for the purposes of this subsection.

Note 1: To the extent that the licensee is required to give the notice and information under any other provision of this Act, the licensee may comply with this subsection by doing so. It need not provide the same information twice.

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

792C Giving ASIC information about a listed disclosing entity

(1) If a market licensee makes information about a listed disclosing entity available to participants in the market (whether or not the licensee also makes the information available to anyone else), the licensee must give ASIC the same information as soon as practicable.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) However, the licensee is not required to give ASIC any information of a kind that is excluded by the regulations.

(3) ASIC may require the information to be given in a particular form.

792D Obligation to assist ASIC

(1) A market licensee must give such assistance to ASIC, or a person authorised by ASIC, as ASIC or the authorised person reasonably requests in relation to the performance of ASIC's functions.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) Such assistance may include showing ASIC the licensee's books or giving ASIC other information.

792E Obligation to give ASIC access to market facilities

A market licensee must give a person authorised by ASIC such reasonable access to the market's facilities as the person requests for any of the purposes of this Chapter.

Note: Failure to comply with this section is an offence (see subsection 1311(1)).

792F Annual report

(1) A market licensee must, within 3 months after the end of its financial year, give ASIC an annual report on the extent to which the licensee complied with its obligations as a market licensee under this Chapter.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) The licensee must ensure that the annual report is accompanied by any information and statements prescribed by regulations made for the purposes of this subsection.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(3) The licensee must also ensure that the annual report is accompanied by any audit report that the Minister requires under subsection (4).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(4) The Minister may, by giving written notice to a market licensee, require the licensee to obtain an audit report on the annual report and on any information or statements accompanying it. The Minister must nominate to prepare the audit report:

(a) ASIC; or

(b) a specified person or body that is suitably qualified.

(5) ASIC must give the annual report and accompanying material to the Minister.

792G Obligations to notify people about clearing and settlement arrangements in certain circumstances

(1) If, in relation to a category of transactions, being all transactions or a class of transactions effected through a licensed market, the market licensee:

(a) does not have any clearing and settlement arrangements for transactions in that category; or

(b) has clearing and settlement arrangements for transactions in that category, but they are not arrangements with the operator of a clearing and settlement facility for the clearing and settlement of such transactions through the facility;

the market licensee must, before a person becomes a participant in the market, give the person written advice:

(c) if paragraph (a) applies—that the licensee does not have any clearing and settlement arrangements for transactions in that category, and that it is the responsibility of the parties to such

transactions to make their own arrangements for the clearing and settlement of such transactions; or

(d) if paragraph (b) applies—setting out particulars of the clearing and settlement arrangements for transactions in that category.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) Within a reasonable time before a market licensee ceases, in relation to a category of transactions, being all transactions or a class of transactions effected through a licensed market, to have clearing and settlement arrangements (the ***terminating arrangements***) with the operator of a particular clearing and settlement facility for the clearing and settlement of such transactions through the facility, the market licensee must give the participants in the market written advice:

(a) if the terminating arrangements are not being replaced by any other clearing and settlement arrangements—that the licensee will no longer have clearing and settlement arrangements for that category of transactions, and that it will be the responsibility of the parties to such transactions to make their own arrangements for the clearing and settlement of such transactions; or

(b) if the terminating arrangements are being replaced by new clearing and settlement arrangements—setting out particulars of the new arrangements.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

792H Change of country by foreign licensee

(1) In the case of a licence granted under subsection 795B(2), the Minister may approve the location of the licensee's principal place of business in a new country only if:

(a) the new country is not Australia; and

(b) the operation of the market in that country will be subject to requirements and supervision that are sufficiently equivalent, in relation to the degree of investor protection and market integrity they achieve, to the requirements and supervision to which financial markets are subject under this Act in relation to those matters.

(2) If, in relation to a licence granted under subsection 795B(2), the licensee's principal place of business changes to become a place in Australia:

(a) the licence ceases to be in force from the time of the change; and

(b) if the licensee wishes the market to continue to be licensed, the licensee may apply for the grant of a new licence under subsection 795B(1); and

(c) the application must be assessed in accordance with Subdivision A of Division 4, subject to such modifications (if any) of that Subdivision as are set out in regulations made for the purposes of this paragraph.

(3) An application referred to in paragraph (2)(b) may be made in advance of the change of location of the principal place of business, and a decision on the application may be made before that time. However, any licence granted pursuant to the application does not come into force until the change occurs.

792I Making information about compensation arrangements publicly available

A market licensee must take reasonable steps to ensure that information about the compensation arrangements that are in place under Part 7.5 is available to the public free of charge.

Note: Failure to comply with this section is an offence (see subsection 1311(1)).

Subdivision B—The market's operating rules and procedures

793A Content of the operating rules and procedures

(1) The operating rules of a licensed market must deal with the matters prescribed by regulations made for the purposes of this subsection.

(2) The regulations may also prescribe matters in respect of which a licensed market must have written procedures.

(3) However, subsections (1) and (2) do not apply if the licensee is also authorised to operate the market in the foreign country in which its principal place of business is located and the licence was granted under subsection 795B(2) (overseas markets).

(4) In a subsection (3) case, ASIC may determine, by giving written notice to the licensee, matters in respect of which the licensed market must have written procedures.

793B Legal effect of operating rules

(1) The operating rules (other than listing rules) of a licensed market have effect as a contract under seal:

(a) between the licensee and each participant in the market; and

(b) between a participant and each other participant;

under which each of those persons agrees to observe the operating rules to the extent that they apply to the person and to engage in conduct that the person is required by the operating rules to engage in.

(2) However, if there is an inconsistency between the operating rules of a financial market, and any of the following other rules:

(a) the market integrity rules;

(b) the derivative transaction rules;

(c) the derivative trade repository rules;

those other rules prevail over the operating rules to the extent of the inconsistency.

Note 1: If there is an inconsistency between the market integrity rules and the derivative transaction rules or the derivative trade repository rules, the market integrity rules prevail: see subsection 798H(3).

Note 2: If there is an inconsistency between the derivative transaction rules and the derivative trade repository rules, the derivative transaction rules prevail: see subsection 901E(2).

(3) Subsection (2) does not apply in relation to a financial market the operator of which is licensed under subsection 795B(2) (overseas markets).

793C Enforcement of operating rules

(1) If a person who is under an obligation to comply with or enforce any of a licensed market's operating rules fails to meet that obligation, an application to the Court may be made by:

(a) ASIC; or

(b) the licensee; or

(c) the operator of a clearing and settlement facility with which the licensee has clearing and settlement arrangements; or

(d) a person aggrieved by the failure.

(2) After giving an opportunity to be heard to the applicant and the person against whom the order is sought, the Court may make an order giving directions to:

(a) the person against whom the order is sought; or

(b) if that person is a body corporate—the directors of the body corporate;

about compliance with, or enforcement of, the operating rules.

(3) For the purposes of this section, a body corporate that is, with its acquiescence, included in the official list of a licensed market, or an associate of such a body corporate, is taken to be under an obligation to comply with the operating rules of that market to the extent to which those rules purport to apply to the body corporate or associate.

(4) For the purposes of this section, if a disclosing entity that is an undertaking to which interests in a registered scheme relate is, with the responsible entity's acquiescence, included in the official list of a licensed market, the responsible entity, or an associate of the responsible entity, is taken to be under an obligation to comply with the operating rules of that market to the extent to which those rules purport to apply to the responsible entity or associate.

(5) For the purposes of this section, if a body corporate fails to comply with or enforce provisions of the operating rules of a licensed market, a person who holds financial products of the body corporate that are able to be traded on the market is taken to be a person aggrieved by the failure.

(6) There may be other circumstances in which a person may be aggrieved by a failure for the purposes of this section.

793D Changing the operating rules

Licensed markets other than subsection 795B(2) markets

(1) As soon as practicable after a change is made to the operating rules of a licensed market, other than a market licensed under subsection

795B(2) (overseas markets), the licensee must lodge with ASIC written notice of the change. The notice must:

(a) set out the text of the change; and

(b) specify the date on which the change was made; and

(c) contain an explanation of the purpose of the change.

(2) If no notice is lodged as required by subsection (1) with ASIC within 21 days after the change is made, the change ceases to have effect at the end of that period.

Subsection 795B(2) markets

(3) As soon as practicable after a change is made to the operating rules of a market the operation of which is licensed under subsection 795B(2) (overseas markets), the licensee must lodge with ASIC written notice of the change. The notice must:

(a) set out the text of the change; and

(b) specify the date on which the change was made; and

(c) contain an explanation of the purpose of the change.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

793E Disallowance of changes to operating rules

(1) This section does not apply in respect of an Australian market licence granted under subsection 795B(2) (overseas markets).

(2) As soon as practicable after receiving a notice under section 793D from a market licensee, ASIC must send a copy of the notice to the Minister.

(3) Within 28 days after ASIC receives the notice from the licensee, the Minister may disallow all or a specified part of the change to the operating rules.

(4) In deciding whether to do so, the Minister must have regard to the consistency of the change with the licensee's obligations under this Part (including in particular the obligation mentioned in paragraph 792A(a)).

Note: The Minister must also have regard to the matters in section 798A.

(5) As soon as practicable after all or a part of a change is disallowed, ASIC must give notice of the disallowance to the licensee. The

change ceases to have effect, to the extent of the disallowance, when the licensee receives the notice.

Subdivision C—Powers of the Minister and ASIC

794A Minister's power to give directions

(1) If the Minister considers that a market licensee is not complying with its obligations as a market licensee under this Chapter, the Minister may give the licensee a written direction to do specified things that the Minister believes will promote compliance by the licensee with those obligations.

(2) The licensee must comply with the direction.

(3) If the licensee fails to comply with the direction, ASIC may apply to the Court for, and the Court may make, an order that the licensee comply with the direction.

(4) The Minister may vary or revoke a direction at any time by giving written notice to the licensee.

794B Minister's power to require special report

(1) The Minister may give a market licensee a written notice requiring the licensee to give ASIC a special report on specified matters. ASIC must give the report to the Minister.

(2) The notice may also require the licensee to give ASIC an audit report on the special report. The Minister must nominate to prepare the audit report:

(a) ASIC; or

(b) a specified person or body that is suitably qualified.

(3) The licensee must give the special report, and audit report (if any), to ASIC within the time required by the notice.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

794C ASIC to assess licensee's compliance

(1) ASIC may do an assessment of how well a market licensee is complying with any or all of its obligations as a market licensee

under this Chapter. In doing the assessment, ASIC may take account of any information and reports that it thinks appropriate, including information and reports from an overseas regulatory authority.

(2) In respect of the obligation in paragraph 792A(c), ASIC must do such an assessment at least once a year for each market licensee.

(3) As soon as practicable after doing an assessment under this section, ASIC must give a written report on the assessment to the licensee and to the Minister.

(4) If an assessment, or part of an assessment, relates to any other person's affairs to a material extent, ASIC may, at the person's request or of its own motion, give the person a copy of the written report on the assessment or the relevant part of the report.

(5) If an assessment, or part of an assessment, relates to a serious contravention of a law of the Commonwealth or of a State or Territory, ASIC may give a copy of the written report on the assessment, or the relevant part of the report, to:

(a) the Australian Federal Police; or

(b) the Chief Executive Officer of the Australian Crime Commission or a member of the staff of the ACC (within the meaning of the *Australian Crime Commission Act 2002*); or

(c) the Director of Public Prosecutions; or

(d) an agency prescribed by regulations made for the purposes of this paragraph.

(6) Either the Minister or ASIC may cause the written report on an assessment, or part of the report on an assessment, to be printed and published.

794D ASIC's power to give directions

(1) If ASIC is of the opinion that it is necessary, or in the public interest, to protect people dealing in a financial product or class of financial products by:

(a) giving a direction to a market licensee to suspend dealings in the financial product or class of financial products; or

(b) giving some other direction in relation to those dealings;

ASIC may give written advice to the licensee of that opinion and the reasons for it.

Example: Under paragraph (b), ASIC could give a direction to limit the kinds of dealings that are allowed in the financial product or class of financial products or to require a participant in the market to act in a specified manner in relation to dealings in the financial product or class of financial products.

(2) If, after receiving ASIC's advice and reasons, the licensee does not take:

(a) in the case of a proposed direction to suspend dealings in the financial products—action to prevent such dealings; or

(b) in any other case—such other action as in ASIC's view is adequate to address the situation raised in the advice;

and ASIC still considers that it is appropriate to give the direction to the licensee, ASIC may give the licensee the written direction with a statement setting out its reasons for making the direction.

(3) The direction has effect for the period specified in it (which may be up to 21 days). During that period, the licensee must comply with the direction and must not allow any dealings to take place contrary to it.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(4) If the licensee fails to comply with the direction, ASIC may apply to the Court for, and the Court may make, an order that the licensee comply with the direction.

(5) As soon as practicable after making or varying (see subsection (7)) a direction, ASIC must:

(a) give a copy of the direction or variation to the operator of each clearing and settlement facility with which the market licensee has clearing and settlement arrangements for transactions effected through the market; and

(b) give a written report to the Minister setting out ASIC's reasons for making the direction or variation; and

(c) give a copy of the report to the licensee.

(6) If, at any time after the licensee receives ASIC's advice under subsection (1), the licensee requests in writing that ASIC refer the matter to the Minister, ASIC must do so immediately. In that event, the Minister may, if he or she considers it appropriate, require

ASIC not to make, or to revoke, the direction. ASIC must immediately comply with such a requirement.

(7) ASIC may vary a direction by giving written notice to the licensee if ASIC is of the opinion that the variation is necessary, or in the public interest, to protect people dealing in a financial product or class of financial products.

(8) ASIC may revoke a direction by giving written notice to the licensee. ASIC must also give written notice of the revocation to the operator of each clearing and settlement facility with which the market licensee has clearing and settlement arrangements for transactions effected through the market.

794E Additional directions to clearing and settlement facilities

(1) If ASIC gives a direction under section 794D, it may also give a written direction to the operator of each clearing and settlement facility with which the market licensee has clearing and settlement arrangements for transactions effected through the market:

(a) prohibiting the operator from acting in a manner inconsistent with the section 794D direction; and

(b) requiring the operator to do all that the operator is reasonably capable of doing to give effect to the section 794D direction.

(2) The operator must comply with the direction given to it under this section.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(3) If the operator fails to comply with the direction, ASIC may apply to the Court for, and the Court may make, an order that the operator comply with the direction.

Division 4—The Australian market licence

Subdivision A—How to get a licence

795A How to apply for a licence

(1) A body corporate may apply for an Australian market licence by lodging with ASIC an application that:

(a) includes the information required by regulations made for the purposes of this paragraph; and

(b) is accompanied by the documents (if any) required by regulations made for the purposes of this paragraph; and

(c) complies with the requirements of section 881B (relating to compensation arrangements).

Note: For fees in respect of lodging applications, see Part 9.10.

(2) ASIC must, within a reasonable time, give the application to the Minister with advice about the application.

795B When a licence may be granted

General

(1) The Minister may grant an applicant an Australian market licence if the Minister is satisfied that:

(a) the application was made in accordance with section 795A; and

(b) the applicant will comply with the obligations that will apply if the licence is granted; and

(c) the applicant has adequate operating rules, and procedures, (see Subdivision B of Division 3) to ensure, as far as is reasonably practicable, that the market will operate as mentioned in paragraph 792A(a); and

(d) the applicant has adequate arrangements (which may involve the appointment of an independent person or related entity) for operating the market, including arrangements for:

(i) handling conflicts between the commercial interests of the licensee and the need for the licensee to ensure that

the market operates in the way mentioned in paragraph 792A(a); and

(ii) monitoring and enforcing compliance with the market's operating rules; and

(e) the applicant has adequate clearing and settlement arrangements for transactions effected through the market, if the Minister considers that the applicant should have such arrangements; and

(f) neither subsection 881D(2) nor 882A(2) (relating to compensation arrangements) requires the Minister to reject the application; and

(g) no unacceptable control situation (see Division 1 of Part 7.4) is likely to result if the licence is granted; and

(h) no disqualified individual appears to be involved in the applicant (see Division 2 of Part 7.4).

This subsection has effect subject to subsections (3) and (4).

Note: The Minister must also have regard to the matters in section 798A in deciding whether to grant a licence.

Alternative criteria for granting licence for overseas market

(2) If an applicant is authorised to operate a financial market in the foreign country in which its principal place of business is located, the Minister may grant the applicant an Australian market licence authorising the applicant to operate the same market in this jurisdiction. The Minister must be satisfied that:

(a) the application was made in accordance with section 795A; and

(b) the applicant will comply with the obligations that will apply if the licence is granted; and

(c) the operation of the market in that country is subject to requirements and supervision that are sufficiently equivalent, in relation to the degree of investor protection and market integrity they achieve, to the requirements and supervision to which financial markets are subject under this Act in relation to those matters; and

(d) the applicant undertakes to cooperate with ASIC by sharing information and in other appropriate ways; and

(e) no unacceptable control situation (see Division 1 of Part 7.4) is likely to result if the licence is granted; and

(f) no disqualified individual appears to be involved in the applicant (see Division 2 of Part 7.4); and

(g) any other requirements that are prescribed by regulations made for the purposes of this paragraph are satisfied.

This subsection has effect subject to subsections (3) and (4).

Note: The Minister must also have regard to the matters in section 798A in deciding whether to grant a licence.

Foreign bodies

(3) If the applicant is a foreign body corporate, the Minister:

(a) must not grant the applicant a licence unless the applicant is registered under Division 2 of Part 5B.2; and

(b) may otherwise grant a licence under either subsection (1) or (2) (if the relevant criteria are satisfied).

Disqualified individuals

(4) The Minister must not grant the applicant a licence unless:

(a) ASIC has notified the Minister that, as far as ASIC is aware, no disqualified individual is involved in the applicant (see Division 2 of Part 7.4); or

(b) 42 days have passed since the application was made and ASIC has not given a notice under subsection 853D(2) to the applicant within that 42 days.

795C Publication of notice of licence grant

If the Minister grants an Australian market licence, the Minister must publish a notice in the *Gazette* stating:

(a) the name of the licensee; and

(b) when the licence was granted; and

(c) the conditions on the licence.

795D More than one licence in the same document

If the Minister grants a person 2 or more of the following:

(a) an Australian market licence;

(b) an Australian CS facility licence;

they may be included in the same document.

795E More than one market covered by the same licence

(1) The same Australian market licence may authorise the licensee to operate 2 or more financial markets.

(2) In that case, a reference in this Chapter to the market to which an Australian market licence relates is taken instead to be a reference to each of those financial markets severally.

(3) Before varying the conditions on an Australian market licence so as to add another market that the licensee is authorised to operate, the Minister must be satisfied of the matters listed in subsection 795B(1) or (2) (as appropriate) in relation to the market.

(4) An Australian market licence that authorises the licensee to operate 2 or more financial markets may be suspended or cancelled under Subdivision C in respect of one or some of those markets only, as if the licensee held a separate licence for each of the markets.

Subdivision B—The conditions on the licence

796A The conditions on the licence

(1) The Minister may, at any time:

(a) impose conditions, or additional conditions, on an Australian market licence; or

(b) vary or revoke conditions imposed on such a licence;

by giving written notice to the licensee. The Minister must also publish a notice in the *Gazette* with details of the action and when it took effect.

Note: As well as the requirements in this section, the Minister must also have regard to the matters in section 798A.

(2) The Minister may do so:

(a) on his or her own initiative, subject to subsection (3); or

(b) if the licensee lodges with ASIC an application for the Minister to do so, which is accompanied by the prescribed documents, if any.

Note: For fees in respect of lodging applications, see Part 9.10.

(3) The Minister may only impose conditions or additional conditions, or vary the conditions, on the licence on his or her own initiative if:

(a) he or she considers it appropriate to do so having regard to:
(i) the licensee's obligations as a market licensee under this Chapter; and
(ii) any change in market operations or the conditions in which the market is operating; and
(b) the Minister gives the licensee written notice of the proposed action and an opportunity to make a submission before it takes effect.

This subsection does not apply to the Minister imposing conditions when a licence is granted.

(4) The Minister must ensure that each Australian market licence is subject to conditions that specify:
(a) the particular market that the licensee is authorised to operate; and
(b) the class or classes of financial products that can be dealt with on the market; and
(c) if the Minister considers that the licensee should have clearing and settlement arrangements for transactions effected through the market—the type of clearing and settlement arrangements that are adequate.

Note: If compensation arrangements in relation to the market are approved under Division 3 of Part 7.5, there must also be conditions as required by subsection 882A(4) or paragraph 882B(4)(b).

(6) ASIC must give the Minister any application and documents lodged under subsection (2).

Subdivision C—When a licence can be varied, suspended or cancelled

797A Varying licences

(1) The Minister may vary an Australian market licence to take account of a change in the licensee's name if the licensee lodges with ASIC an application for the variation, accompanied by the prescribed documents, if any.

Note 1: The conditions on the licence can be varied under section 796A.

Note 2: For fees in respect of lodging applications, see Part 9.10.

(2) The Minister must give written notice of the variation to the licensee.

(3) ASIC must give the Minister any application and documents lodged under subsection (1).

797B Immediate suspension or cancellation

The Minister may, by giving written notice to a market licensee, suspend the licence for a specified period, or cancel it, if:

(a) the licensee ceases to carry on the business of operating the market; or

(b) the licensee becomes an externally-administered body corporate; or

(c) the licensee asks the Minister to do so; or

(d) in the case of a licence granted under subsection 795B(2) (overseas markets):

(i) the licensee ceases to be authorised to operate a financial market in the foreign country in which the licensee's principal place of business is located; or

(ii) there is a change to the regulatory regime applying in relation to the market to which the licence relates in the country in which the licensee's principal place of business is located, and, because of that change, the Minister is no longer satisfied as mentioned in paragraph 795B(2)(c).

797C Suspension or cancellation following hearing and report

(1) If the Minister considers that a market licensee has breached, or is in breach of, one or more of its obligations as a market licensee under this Chapter, the Minister may give the licensee a written notice that requires the licensee to show cause, at a hearing before a specified person, why the licence should not be suspended or cancelled.

(2) The notice must specify:

(a) the grounds on which it is proposed to suspend or cancel the licence; and

(b) a reasonable time and place at which the hearing is to be held.

However, if the licensee consents, the person conducting the hearing may fix a different time or place.

(3) The person conducting the hearing must:

(a) give the licensee an opportunity to be heard at the hearing; and

(b) give the Minister:

(i) a report about the hearing; and

(ii) a recommendation about the grounds in the notice on which it is proposed to suspend or cancel the licence.

(4) After considering the report and recommendation, the Minister may:

(a) decide to take no further action in relation to the matter and give written advice of that decision to the licensee; or

(b) suspend the licence for a specified period, or cancel the licence, by giving written notice to the licensee.

Note: The Minister must also have regard to the matters in section 798A.

797D Effect of suspension

(1) A person whose Australian market licence is suspended is taken not to hold that licence while it is suspended.

(2) However, the Minister may specify in the written notice to the licensee that subsection (1) does not apply for specified purposes.

797E Variation or revocation of suspension

The Minister may at any time vary or revoke a suspension of an Australian market licence by giving written notice to the licensee.

797F Publication of notice of licence suspension or cancellation

(1) If the Minister:

(a) suspends, or varies or revokes a suspension of, an Australian market licence; or

(b) cancels an Australian market licence;

the Minister must publish a notice in the *Gazette* to that effect.

(2) The notice must state when the action took effect.

797G Suspension and cancellation only in accordance with this Subdivision

An Australian market licence cannot be varied, suspended or cancelled otherwise than in accordance with this Subdivision.

Note: The conditions on the licence can be varied under section 796A.

Division 5—Other matters

798A Matters to be taken into account by the Minister

(1) The Minister must have regard to certain matters in deciding whether to:

(a) grant an applicant an Australian market licence under section 795B; or

(b) impose, vary or revoke conditions on such a licence under section 796A; or

(c) suspend or cancel such a licence under section 797C; or

(d) disallow a change to the operating rules of a licensed market under section 793E.

(2) These are the matters the Minister must have regard to:

(a) the structure, or proposed structure, of the market;

(b) the nature of the activities conducted, or proposed to be conducted, on the market;

(c) the size, or proposed size, of the market;

(d) the nature of the financial products dealt with, or proposed to be dealt with, on the market;

(e) the participants, or proposed participants, in the market and:

(i) whether those participants, in effecting transactions through the market, are, or will be, providing financial services to other persons; and

(ii) whether those participants acquire or dispose, or will acquire or dispose, of financial products through the market as retail clients or as wholesale clients; and

(iii) whether those participants are also, or will also be, participants in any other financial markets;

(f) the technology used, or proposed to be used, in the operation of the market;

(g) whether it would be in the public interest to take the action referred to in subsection (1);

(h) any relevant advice received from ASIC.

The Minister may also have regard to any other matter that the Minister considers relevant.

(3) If the Minister is deciding whether to take the action referred to in paragraph (1)(a), (b) or (c) in respect of an Australian market licence granted under subsection 795B(2) (overseas markets), the Minister must also have regard to:

(a) the criteria that the licensee or applicant satisfied to obtain an authorisation to operate the same market in the foreign country in which their principal place of business is located; and

(b) the obligations they must continue to satisfy to keep the authorisation; and

(c) the level of supervision to which the operation of the market in that country is subject; and

(d) whether adequate arrangements exist for cooperation between ASIC and the authority that is responsible for that supervision.

798B ASIC may give advice to Minister

ASIC may give advice to the Minister in relation to:

(a) any matter in respect of which the Minister has a discretion under this Part; or

(b) any other matter concerning financial markets.

Note: In some cases, the Minister must have regard to ASIC's advice: see paragraph 798A(2)(h).

798C Market licensee or related body corporate etc. listing on market

(1) Any of the following kinds of entity or scheme (the ***listed entity***) may be included in a market's official list:

(a) the market licensee for the market;

(b) a related body corporate of the market licensee;

(c) a managed investment scheme whose responsible entity is a related body corporate of the market licensee;

(d) a trust whose trustee is a related body corporate of the market licensee.

Note: There are certain matters that must be included in the market's listing rules before such an entity or scheme is included in the official list (see subsection (4)).

(2) In such a case, the financial products of the listed entity may be traded on the market, if either or both the listed entity and the market licensee have entered into such arrangements as ASIC requires:

(a) for dealing with possible conflicts of interest that might arise from the listed entity's financial products being able to be traded on the market; and

(b) for the purposes of ensuring the integrity of trading in the listed entity's financial products.

Note: For fees in respect of ASIC performing functions under such arrangements, see Part 9.10.

(3) The listed entity, and the market licensee (if applicable), with whom ASIC has entered into arrangements for the purposes of subsection (2) must comply with the arrangements.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(4) Before, and at all times while, the listed entity is included in the market's official list, the market's listing rules must provide for ASIC, instead of the market licensee, to make decisions and to take action (or to require the market licensee to take action on ASIC's behalf) in relation to these matters, and matters related to these matters:

(a) the admission of the listed entity to the market's official list; and

(b) the removal of the listed entity from that list; and

(c) allowing, stopping or suspending the trading on the market of the listed entity's financial products.

Note: For fees in respect of ASIC performing this function, see Part 9.10.

(5) ASIC has the powers and functions that are provided for it in any listing rules or arrangements made for the purposes of this section.

(6) The products of an entity or scheme referred to in subsection (1) must not be traded on the market licensee's market otherwise than as allowed by this section.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(7) This section does not apply if the licence of the market licensee was granted under subsection 795B(2) (overseas markets). Instead,

the law of the country in which the market licensee's principal place of business is located applies for all purposes connected with the inclusion of the listed entity in the market's official list.

798D Exemptions and modifications for self-listing licensees or related bodies corporate etc.

(1) ASIC may:

(a) exempt an entity or scheme referred to in subsection 798C(1) whose financial products are able to be traded on the market from a modifiable provision (see subsection (7)); or

(b) declare that a modifiable provision applies to an entity or scheme referred to in subsection 798C(1) whose financial products are able to be traded on the market as if specified provisions were omitted, modified or varied as specified in the declaration.

(2) An exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.

(3) An exemption may apply unconditionally or subject to specified conditions.

(4) If an exemption is granted subject to specified conditions, the entity or scheme must comply with those conditions.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(5) If an exemption is granted subject to specified conditions, the Court may, on ASIC's application, order the entity or scheme to comply with one or more of those conditions in a specified way.

(6) If conduct (including an omission) of a person would not have constituted an offence if:

(a) a particular condition had not been imposed on an exemption under paragraph (1)(a); or

(b) a particular declaration under paragraph (1)(b) had not been made;

that conduct does not constitute an offence unless, before the conduct occurred (in addition to complying with the gazettal requirement of subsection (2)), ASIC gave written notice setting out the text of the condition or the declaration to the person. In a prosecution for an offence to which this subsection applies, the

prosecution must prove that this additional notification requirement was complied with before the conduct occurred.

(7) In this section:

modifiable provision means:

(a) section 205G and any of the provisions of Chapter 6, 6A, 6B, 6C, 6CA or 7; or

(b) regulations made for the purposes of that section or any of those provisions.

798DA Market licensee, related body corporate etc. or competitor participating in market

(1) This section applies if any of the following is a participant (the ***participant***) in a market:

(a) the market licensee;

(b) a related body corporate of the market licensee;

(c) a partnership if a partner in the partnership is a related entity of the market licensee;

(d) an entity if:

(i) the entity conducts, or participates in, a business that is in competition with a business conducted by the market licensee, or by a related body corporate of the market licensee; and

(ii) the entity requests that ASIC make decisions and take action in relation to the matters referred to in subsection (2).

(2) Before, and at all times while, the participant is participating in the market, the market's operating rules must provide for ASIC, instead of the market licensee, to make decisions and to take action (or to require the market licensee to take action on ASIC's behalf) in relation to these matters, and matters related to these matters:

(a) the admission of the participant to the market; and

(b) the expulsion and suspension of the participant from the market; and

(c) the disciplining of the participant; and

(d) the participant's compliance with the operating rules or this Act, including:

(i) the method of determining whether the participant has complied with those rules or this Act; and

(ii) any action (including the imposition of a fine or penalty) to be taken in respect of contraventions of those rules or this Act.

Note: For fees in respect of ASIC performing this function, see Part 9.10.

(3) ASIC has the powers and functions that are provided for it in any operating rules made for the purposes of this section.

(4) A participant referred to in subsection (1) must not participate in the market licensee's market otherwise than as allowed by this section.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(5) This section does not apply if the licence of the market licensee was granted under subsection 795B(2) (overseas markets). Instead, the law of the country in which the market licensee's principal place of business is located applies for all purposes connected with the participation of the participant in the market.

(6) To avoid doubt, subsection (1) does not authorise a market licensee to participate in its own market.

798E Other potential conflict situations

(1) The regulations may make provision in relation to the rules and procedures that are to apply in the case of conflicts, or potential conflicts, between the commercial interests of the licensee and the need for the licensee to ensure that the market operates in the way mentioned in paragraph 792A(a).

(2) In particular, such regulations may deal with the following:

(a) identifying when such a conflict, or potential conflict, is taken to arise;

(b) empowering ASIC, instead of the licensee, to make decisions and to take action under the market's operating rules in relation to such a conflict or potential conflict;

(c) empowering ASIC to require the licensee to take action under the market's operating rules (whether or not on ASIC's behalf) in relation to such a conflict or potential conflict.

Note: For fees in respect of ASIC performing this function, see Part 9.10.

(3) Subsection (2) does not limit the generality of subsection (1).

Part 7.2A—Supervision of financial markets

798F ASIC to supervise financial markets

ASIC has the function of supervising financial markets the operators of which are licensed under subsection 795B(1).

798G Market integrity rules

(1) ASIC may, by legislative instrument, make rules (the ***market integrity rules***) that deal with the following:

(a) the activities or conduct of licensed markets;

(b) the activities or conduct of persons in relation to licensed markets;

(c) the activities or conduct of persons in relation to financial products traded on licensed markets.

Note: The market integrity rules will not apply in relation to all licensed markets: see subsection 798H(2).

(2) The market integrity rules may include a penalty amount for a rule. A penalty amount must not exceed $1,000,000.

(3) ASIC must not make a market integrity rule unless the Minister has consented, in writing, to the making of the rule.

Emergency rules

(4) Despite subsection (3), ASIC may make a market integrity rule without the consent of the Minister if ASIC is of the opinion that it is necessary, or in the public interest, to protect people dealing in a financial product or class of financial products.

(5) However, if ASIC does so, ASIC must:

(a) provide the Minister, on the following day, with a written explanation of the need for the rule; and

(b) amend or revoke the rule in accordance with any written directions of the Minister.

Minister's instruments are not legislative instruments

(6) None of the following is a legislative instrument:
  (a) a consent given under subsection (3);
  (b) a direction given under paragraph (5)(b).

798H Complying with market integrity rules

(1) The following entities must comply with the market integrity rules:
  (a) operators of licensed markets;
  (b) participants in licensed markets;
  (c) entities prescribed by the regulations for the purposes of this paragraph.

Note: This subsection is a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

(2) Subsection (1) does not apply in relation to a financial market the operator of which is licensed under subsection 795B(2) (overseas markets).

(3) If there is an inconsistency between the market integrity rules and the derivative transaction rules or the derivative trade repository rules, the market integrity rules prevail to the extent of the inconsistency.

798J Directions by ASIC

(1) If ASIC is of the opinion that it is necessary, or in the public interest, to protect people dealing in a financial product or class of financial products by:
  (a) giving a direction to an entity to suspend dealings in the financial product or class of financial products; or
  (b) giving some other direction in relation to those dealings;

ASIC may give written advice to the entity of that opinion and the reasons for it.

Note: ASIC may also give directions to entities that are market licensees under section 794D. A failure to comply with a direction under that section is an offence (see subsection 1311(1)).

(2) If, after receiving ASIC's advice and reasons, the entity does not take:

(a) in the case of a proposed direction to suspend dealings in the financial products—action to prevent such dealings; or

(b) in any other case—such other action as in ASIC's view is adequate to address the situation raised in the advice;

and ASIC still considers that it is appropriate to give the direction to the entity, ASIC may give the entity the written direction with a statement setting out its reasons for making the direction.

(3) The direction has effect for the period specified in it (which may be up to 21 days). During that period, the entity must comply with the direction and must not allow any dealings to take place contrary to it.

(4) If the entity fails to comply with the direction, ASIC may apply to the Court for, and the Court may make, an order that the entity comply with the direction.

(5) If, at any time after the entity receives ASIC's advice under subsection (1), the entity requests in writing that ASIC refer the matter to the Minister, ASIC must do so immediately. In that event, the Minister may, if he or she considers it appropriate, require ASIC not to make, or to revoke, the direction. ASIC must immediately comply with such a requirement.

(6) ASIC may vary a direction by giving written notice to the entity if ASIC is of the opinion that the variation is necessary, or in the public interest, to protect people dealing in a financial product or class of financial products.

(7) ASIC may revoke a direction by giving written notice to the entity.

(8) A direction given under subsection (2) is not a legislative instrument.

798K Alternatives to civil proceedings

(1) The regulations may provide for a person who is alleged to have contravened subsection 798H(1) (complying with market integrity rules) to 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;

(d) enter into a legally enforceable undertaking.

(2) The penalty payable under regulations made under paragraph (1)(a) in relation to a market integrity rule must not exceed three-fifths of the penalty amount set out in the market integrity rules for the rule.

(3) Without limiting regulations that may be made under paragraph (1)(d), those regulations may provide for one or more of the following kinds of undertakings:

(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.

798L Exemptions and modifications by regulations

(1) The regulations may:

(a) exempt a person or class of persons from all or specified provisions of this Part; or

(b) exempt a financial market or class of financial markets from all or specified provisions of this Part; or

(c) provide that this Part applies in relation to a person or a financial market, or a class of persons or financial markets, as if specified provisions were omitted, modified or varied as specified in the regulations.

(2) For the purpose of this section, the provisions of this Part include definitions in this Act, or in the regulations, as they apply to references in this Part.

Part 7.3—Licensing of clearing and settlement facilities

Division 1—Requirement to be licensed

820A Need for a licence

(1) A person must only operate, or hold out that the person operates, a clearing and settlement facility in this jurisdiction if:

(a) the person has an Australian CS facility licence that authorises the person to operate the facility in this jurisdiction; or

(b) the facility is exempt from the operation of this Part.

Note 1: A CS facility licensee may also provide financial services incidental to the operation of the facility: see paragraph 911A(2)(d).

Note 2: Failure to comply with this subsection is an offence: see subsection 1311(1).

(2) For the purposes of an offence based on subsection (1), strict liability applies to paragraph (1)(b).

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

820B Other prohibitions on holding out

A person must not hold out:

(a) that the person has an Australian CS facility licence; or

(b) that the operation of a clearing and settlement facility by the person in this jurisdiction is authorised by an Australian CS facility licence; or

(c) that a clearing and settlement facility is exempt from the operation of this Part;

if that is not the case.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

820C Exemptions

(1) The Minister may, by publishing a notice in the *Gazette*, exempt from the operation of this Part a particular clearing and settlement facility or type of clearing and settlement facility.

(2) The Minister may, at any time, by publishing a notice in the *Gazette*:

(a) impose conditions, or additional conditions, on an exemption; or

(b) vary or revoke the conditions on an exemption; or

(c) revoke an exemption.

(3) However, the Minister may only take action under subsection (2) after:

(a) giving notice, and an opportunity to make submissions on the proposed action, to the operator of each clearing and settlement facility known by the Minister to be covered by the exemption; and

(b) if the exemption covers a type of clearing and settlement facility—causing a notice to be published in a newspaper or newspapers circulating generally in each State and internal Territory allowing a reasonable time within which the operator of each facility covered by the exemption may make submissions on the proposed action.

This subsection does not apply to the Minister imposing conditions when an exemption is made.

820D When a clearing and settlement facility is taken to be operated in this jurisdiction

(1) For the purposes of this Chapter, a clearing and settlement facility is taken to be operated ***in this jurisdiction*** if it is operated by a body corporate that is registered under Chapter 2A.

(2) Subsection (1) does not limit the circumstances in which a clearing and settlement facility is operated ***in this jurisdiction*** for the purposes of this Chapter.

Division 2—Regulation of CS facility licensees

Subdivision A—Licensee's obligations

821A General obligations

A CS facility licensee must:

(aa) to the extent that it is reasonably practicable to do so:
  (i) comply with standards determined under section 827D; and
  (ii) do all other things necessary to reduce systemic risk; and

(a) to the extent that it is reasonably practicable to do so, do all things necessary to ensure that the facility's services are provided in a fair and effective way; and

(b) comply with the conditions on the licence; and

(c) have adequate arrangements (whether they involve a self-regulatory structure or the appointment of an independent person or related entity) for supervising the facility, including arrangements for:
  (i) handling conflicts between the commercial interests of the licensee and the need for the licensee to ensure that the facility's services are provided in a fair and effective way; and
  (ii) enforcing compliance with the facility's operating rules; and

(d) have sufficient resources (including financial, technological and human resources) to operate the facility properly and for the required supervisory arrangements to be provided; and

(e) if the licensee is a foreign body corporate—be registered under Division 2 of Part 5B.2; and

(f) if the licence was granted under subsection 824B(2) (overseas clearing and settlement facilities)—both:
  (i) remain authorised to operate a clearing and settlement facility in the foreign country in which the licensee's principal place of business is located; and

(ii) get the Minister's approval under section 821F before that principal place of business becomes located in any other foreign country; and

(g) if the licensee, or a holding company of the licensee, is a widely held market body (within the meaning of Division 1 of Part 7.4)—take all reasonable steps to ensure that an unacceptable control situation (within the meaning of that Division) does not exist in relation to the body; and

(h) take all reasonable steps to ensure that no disqualified individual becomes, or remains, involved in the licensee (see Division 2 of Part 7.4).

821B Obligation to notify ASIC of certain matters

(1) A CS facility licensee must give written notice to ASIC, as soon as practicable, if it becomes aware that it may no longer be able to meet, or has breached, an obligation under section 821A. If ASIC considers it appropriate to do so, ASIC may give the Minister advice about the matter.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) A CS facility licensee must give written notice to ASIC, as soon as practicable, as required by the following paragraphs:

(a) if the licensee provides a new class of financial service incidental to the operation of the facility, the licensee must give notice that includes details of the new class;

(b) if the licensee takes any kind of disciplinary action against a participant in the facility, the licensee must give notice that includes:

(i) the participant's name; and

(ii) the reason for and nature of the action taken;

(c) if the licensee has reason to suspect that a person has committed, is committing, or is about to commit a significant contravention of the facility's operating rules or this Act, the licensee must give notice that includes:

(i) the person's name; and

(ii) details of the contravention or impending contravention; and

(iii) the licensee's reasons for that belief.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(3) A CS facility licensee whose licence was granted under subsection 824B(2) (overseas clearing and settlement facilities) must, as soon as practicable, give written notice to ASIC if:

(a) the licensee ceases to be authorised to operate a clearing and settlement facility in the foreign country in which the licensee's principal place of business is located; or

(b) there is a significant change to the regulatory regime applying in relation to the facility in the foreign country in which the licensee's principal place of business is located.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(4) As soon as practicable after:

(a) a person becomes or ceases to be a director, secretary or senior manager of a CS facility licensee or of a holding company of a CS facility licensee (including when a person changes from one of those positions to another); or

(b) 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 licensee or in a holding company of the licensee;

the licensee must give written notice of this to ASIC. The notice must include such other information about the matter as is prescribed by regulations made for the purposes of this subsection.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: To the extent that the licensee is required to give the notice and information under any other provision of this Act, the licensee may comply with this subsection by doing so. It need not provide the same information twice.

821BA Obligation to notify Reserve Bank of certain matters

(1) A CS facility licensee must give written notice to the Reserve Bank of Australia (the ***Reserve Bank***), as soon as practicable, if:

(a) the licensee becomes aware that it has failed to comply with standards determined under section 827D, or is likely to fail to comply with such standards; or

(b) the licensee becomes aware that it may no longer be able to meet, or has breached, its obligation under subparagraph 821A(aa)(ii).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) If the Reserve Bank considers it appropriate to do so, the Reserve Bank may give the Minister advice about the matter.

821C Obligation to assist

ASIC

(1) A CS facility licensee must give such assistance to ASIC, or a person authorised by ASIC, as ASIC or the authorised person reasonably requests in relation to the performance of ASIC's functions.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) Such assistance may include showing ASIC the licensee's books or giving ASIC other information.

Reserve Bank

(3) A CS facility licensee must give such assistance to the Reserve Bank of Australia (the ***Reserve Bank***), or a person authorised by the Reserve Bank, as the Reserve Bank or the authorised person reasonably requests in relation to the performance of the Reserve Bank's functions under this Part.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(4) Such assistance may include showing the Reserve Bank the licensee's books or giving the Reserve Bank other information.

821D Obligation to give ASIC access to the facility

A CS facility licensee must give a person authorised by ASIC such reasonable access to the facility as the person requests for any of the purposes of this Chapter.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

821E Annual report

(1) A CS facility licensee must, within 3 months after the end of its financial year, give ASIC an annual report on the extent to which the licensee complied with its obligations as a CS facility licensee under this Chapter.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) The licensee must ensure that the annual report is accompanied by any information and statements prescribed by regulations made for the purposes of this subsection.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(3) The licensee must also ensure that the annual report is accompanied by any audit report that the Minister requires under subsection (4).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(4) The Minister may, by giving written notice to a CS facility licensee, require the licensee to obtain an audit report on the annual report and on any information or statements accompanying it. The Minister must nominate to prepare the audit report:

(a) ASIC; or

(b) a specified person or body that is suitably qualified.

(5) ASIC must give the annual report and accompanying material to the Minister.

821F Change of country by foreign licensee

(1) In the case of a licence granted under subsection 824B(2), the Minister may approve the location of the licensee's principal place of business in a new country only if:

(a) the new country is not Australia; and

(b) the operation of the facility in that country will be subject to requirements and supervision that are sufficiently equivalent, in relation to the degree of protection from systemic risk and the level of effectiveness and fairness of services they achieve, to the requirements and supervision to which

clearing and settlement facilities are subject under this Act in relation to those matters.

(2) If, in relation to a licence granted under subsection 824B(2), the licensee's principal place of business changes to become a place in Australia:

(a) the licence ceases to be in force from the time of the change; and

(b) if the licensee wishes the facility to continue to be licensed, the licensee may apply for the grant of a new licence under subsection 824B(1); and

(c) the application must be assessed in accordance with Subdivision A of Division 3, subject to such modifications (if any) of that Subdivision as are set out in regulations made for the purposes of this paragraph.

(3) An application referred to in paragraph (2)(b) may be made in advance of the change of location of the principal place of business, and a decision on the application may be made before that time. However, any licence granted pursuant to the application does not come into force until the change occurs.

Subdivision B—The facility's operating rules and procedures

822A Content of the operating rules and procedures

(1) The operating rules of a licensed CS facility must deal with the matters prescribed by regulations made for the purposes of this subsection.

(2) The regulations may also prescribe matters in respect of which a licensed CS facility must have written procedures.

(3) However, subsections (1) and (2) do not apply if the licensee is also authorised to operate the facility in the foreign country in which its principal place of business is located and the licence was granted under subsection 824B(2) (overseas clearing and settlement facilities).

(4) In a subsection (3) case, ASIC may determine, by giving written notice to the licensee, matters in respect of which the licensed CS facility must have written procedures.

822B Legal effect of operating rules

(1) The operating rules of a licensed CS facility have effect as a contract under seal:

(a) between the licensee and each issuer of financial products in respect of which the facility provides its services; and

(b) between the licensee and each participant in the facility; and

(c) between each issuer of financial products in respect of which the facility provides its services and each participant in the facility; and

(d) between a participant in the facility and each other participant in the facility;

under which each of those persons agrees to observe the operating rules to the extent that they apply to the person and to engage in conduct that the person is required by the operating rules to engage in.

(2) However, if there is an inconsistency between the operating rules of a licensed CS facility and any of the following other rules:

(a) the derivative transaction rules;

(b) the derivative trade repository rules;

those other rules prevail over the operating rules to the extent of the inconsistency.

Note: If there is an inconsistency between the derivative transaction rules and the derivative trade repository rules, the derivative transaction rules prevail: see subsection 901E(2).

822C Enforcement of operating rules

(1) If a person who is under an obligation to comply with or enforce any of a licensed CS facility's operating rules fails to meet that obligation, an application to the Court may be made by:

(a) ASIC; or

(b) the licensee; or

(c) the operator of a financial market with which the facility has arrangements to provide services for transactions effected through the market; or

(d) a person aggrieved by the failure.

(2) After giving an opportunity to be heard to the applicant and the person against whom the order is sought, the Court may make an order giving directions to:

(a) the person against whom the order is sought; or

(b) if that person is a body corporate—the directors of the body corporate;

about compliance with, or enforcement of, the operating rules.

822D Changing the operating rules

Licensed CS facilities other than subsection 824B(2) facilities

(1) As soon as practicable after a change is made to the operating rules of a licensed CS facility, other than a facility licensed under subsection 824B(2) (overseas clearing and settlement facilities), the licensee must lodge with ASIC written notice of the change. The notice must:

(a) set out the text of the change; and

(b) specify the date on which the change was made; and

(c) contain an explanation of the purpose of the change.

(2) If no notice is lodged with ASIC, as required by subsection (1), within 21 days after the change is made, the change ceases to have effect at the end of that period.

Subsection 824B(2) facilities

(3) As soon as practicable after a change is made to the operating rules of a clearing and settlement facility the operation of which is licensed under subsection 824B(2) (overseas clearing and settlement facilities), the licensee must lodge with ASIC written notice of the change. The notice must:

(a) set out the text of the change; and

(b) specify the date on which the change was made; and

(c) contain an explanation of the purpose of the change.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

822E Disallowance of changes to operating rules

(1) This section does not apply in respect of an Australian CS facility licence granted under subsection 824B(2) (overseas clearing and settlement facilities).

(2) As soon as practicable after receiving a notice under section 822D from a CS facility licensee, ASIC must send a copy of the notice to the Minister.

(3) Within 28 days after ASIC receives the notice from the licensee, the Minister may disallow all or a specified part of the change to the operating rules.

(4) In deciding whether to do so, the Minister must have regard to the consistency of the change with the licensee's obligations under this Part (including in particular the obligations mentioned in paragraphs 821A(aa) and (a)).

Note: The Minister must also have regard to the matters in section 827A.

(5) As soon as practicable after all or a part of a change is disallowed, ASIC must give notice of the disallowance to the licensee. The change ceases to have effect, to the extent of the disallowance, when the licensee receives the notice.

Subdivision C—Powers of the Minister, ASIC and the Reserve Bank in relation to licensees

823A Minister's power to give directions

(1) If the Minister considers that a CS facility licensee is not complying with its obligations as a CS facility licensee under this Chapter, the Minister may give the licensee a written direction to do specified things that the Minister believes will promote compliance by the licensee with those obligations.

(2) The licensee must comply with the direction.

(3) If the licensee fails to comply with the direction, ASIC may apply to the Court for, and the Court may make, an order that the licensee comply with the direction.

(4) The Minister may vary or revoke a direction at any time by giving written notice to the licensee.

823B Minister's power to require special report

(1) The Minister may give a CS facility licensee a written notice requiring the licensee to give ASIC a special report on specified matters. ASIC must give the report to the Minister.

(2) The notice may also require the licensee to give ASIC an audit report on the special report. The Minister must nominate to prepare the report:

(a) ASIC; or

(b) a specified person or body that is suitably qualified.

(3) The licensee must give the special report, and audit report (if any), to ASIC within the time required by the notice.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

823C ASIC to assess licensee's compliance

(1) ASIC may do an assessment of how well a CS facility licensee is complying with its obligations as a CS facility licensee under this Chapter (other than its obligation under paragraph 821A(aa)). In doing the assessment, ASIC may take account of any information and reports that it thinks appropriate, including information and reports from an overseas regulatory authority.

(2) In respect of the obligation in paragraph 821A(c), ASIC must do such an assessment at least once a year for each CS facility licensee.

(3) As soon as practicable after doing an assessment under this section, ASIC must give a written report on the assessment to the Minister and a copy of the written report to the Reserve Bank of Australia.

(4) If an assessment, or part of an assessment, relates to any other person's affairs to a material extent, ASIC may, at the person's request or of its own motion, give the person a copy of the written report on the assessment or the relevant part of the report.

(5) If an assessment, or part of an assessment, relates to a serious contravention of a law of the Commonwealth or of a State or Territory, ASIC may give a copy of the written report on the assessment, or the relevant part of the report, to:

(a) the Australian Federal Police; or
(b) the Chief Executive Officer of the Australian Crime Commission or a member of the staff of the ACC (within the meaning of the *Australian Crime Commission Act 2002*); or
(c) the Director of Public Prosecutions; or
(d) an agency prescribed by regulations made for the purposes of this paragraph.

(6) Either the Minister or ASIC may cause the written report on an assessment, or part of the report on an assessment, to be printed and published.

823CA Reserve Bank to assess licensee's compliance

(1) At least once each year, the Reserve Bank of Australia (the ***Reserve Bank***) must do an assessment of how well each CS facility licensee is complying with its obligation under paragraph 821A(aa). In doing the assessment, the Reserve Bank may take account of any information and reports that it thinks appropriate, including information and reports from an overseas regulatory authority.

(2) As soon as practicable after doing an assessment under this section, the Reserve Bank must give a written report on the assessment to the Minister and a copy of the written report to ASIC.

(3) If an assessment, or part of an assessment, relates to any other person's affairs to a material extent, the Reserve Bank may, at the person's request or of its own motion, give the person a copy of the written report on the assessment or the relevant part of the report.

(4) If an assessment, or part of an assessment, relates to a serious contravention of a law of the Commonwealth or of a State or Territory, the Reserve Bank may give a copy of the written report on the assessment, or the relevant part of the report, to:
(a) the Australian Federal Police; or
(b) the Chief Executive Officer of the Australian Crime Commission or a member of the staff of the ACC (within the meaning of the *Australian Crime Commission Act 2002*); or
(c) the Director of Public Prosecutions; or
(d) an agency prescribed by regulations made for the purposes of this paragraph.

(5) Either the Minister or the Reserve Bank may cause the written report on an assessment, or part of the report on an assessment, to be printed and published.

823D Directions power—protecting dealings in financial products and ensuring fair and effective provision of services by CS facilities

(1) If ASIC:

(a) considers that it is necessary, or in the public interest, to protect people dealing in a financial product or class of financial products; or

(b) considers that a CS facility licensee has not done all things reasonably practicable to ensure the facility's services are provided in a fair and effective way;

ASIC may give the licensee written advice that it intends to give the licensee a specified direction under this section. The advice must include the reasons for ASIC's intention to give the direction.

(2) As soon as practicable after giving the advice to the licensee, ASIC must give notice of the advice to the operator of each financial market with which the facility has arrangements to provide services for transactions effected through the market.

(3) For the purpose of remedying the matter mentioned in subsection (1), ASIC may give the following directions to the licensee under this section:

(a) a direction not to provide the licensee's services in relation to any transactions, of which the licensee receives notice after the direction takes effect, that relate to a specified financial product or class of financial products;

(b) any other direction concerning dealings with transactions that relate to a specified financial product or class of financial products.

(4) If, after receiving ASIC's advice and reasons:

(a) the licensee does not take steps that in ASIC's view are adequate to address the situation; and

(b) ASIC still considers that it is appropriate to give the direction to the licensee;

ASIC may give the licensee the direction, in writing, with a statement setting out the reasons for giving the direction.

(5) The direction has effect until the earlier of the following times:

(a) the time ASIC revokes the direction in accordance with subsection (10);

(b) the end of the period (which may be up to 21 days) specified in the direction as the period during which the direction is effective ends.

While the direction has effect, the licensee must comply with the direction and must not provide any services contrary to it.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(6) If the licensee fails to comply with the direction, ASIC may apply to the Court for, and the Court may make, an order that the licensee comply with the direction.

(7) As soon as practicable after making or varying (see subsection (9)) a direction, ASIC must:

(a) give a copy of the direction or variation to:

(i) if the direction relates to a specified financial product—the issuer of that product; and

(ii) each of the operators mentioned in subsection (2); and

(b) give a written report to the Minister setting out ASIC's reasons for making the direction or variation; and

(c) give a copy of the report to the licensee.

(8) If, at any time after the licensee receives ASIC's advice under subsection (1), the licensee requests in writing that ASIC refer the matter to the Minister, ASIC must do so immediately. In that event, the Minister may, if he or she considers it appropriate, require ASIC not to make, or to revoke, the direction. ASIC must immediately comply with such a requirement.

(9) ASIC may vary a direction by giving written notice to the licensee.

(10) ASIC may revoke a direction by giving written notice to the licensee. ASIC must also give written notice of the revocation to each of the operators mentioned in subsection (2).

823E Directions power—reduction of systemic risk

(1) If ASIC considers that a CS facility licensee has not done all things reasonably practicable to reduce systemic risk in the provision of the facility's services, ASIC may give the licensee a direction, in writing, to take:

(a) specified measures to comply with the whole or a part of a standard determined under section 827D; or

(b) any other action that ASIC considers will reduce systemic risk in the provision of the facility's services.

(2) The direction may deal with the time by which, or period during which, it is to be complied with. The time or period must be reasonable.

(3) The licensee must comply with the direction.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(3A) If the licensee fails to comply with the direction, ASIC may apply to the Court for, and the Court may make, an order that the licensee comply with the direction.

(4) ASIC may vary the direction by giving written notice to the licensee.

(5) The direction has effect until ASIC revokes it by giving written notice to the licensee.

(6) ASIC may revoke the direction if, at the time of revocation, it considers that the direction is no longer necessary or appropriate.

(7) Before giving, varying or revoking the direction, ASIC must consult the Reserve Bank of Australia. However, a failure to consult the Reserve Bank of Australia does not invalidate the direction, variation or revocation.

(8) The Reserve Bank of Australia may at any time request ASIC to make a direction under this section. However, ASIC is not required to comply with the request.

Division 3—The Australian CS facility licence

Subdivision A—How to get a licence

824A How to apply for a licence

(1) A body corporate may apply for an Australian CS facility licence by lodging with ASIC an application that:

(a) includes the information required by regulations made for the purposes of this paragraph; and

(b) is accompanied by the documents (if any) required by regulations made for the purposes of this paragraph.

Note: For fees in respect of lodging applications, see Part 9.10.

(2) ASIC must, within a reasonable time, give the application to the Minister with advice about the application.

824B When a licence may be granted

General

(1) The Minister may grant an applicant an Australian CS facility licence if the Minister is satisfied that:

(a) the application was made in accordance with section 824A; and

(b) the applicant will comply with the obligations that will apply if the licence is granted; and

(c) the applicant has adequate operating rules, and procedures, (see Subdivision B of Division 2) for the facility to ensure, as far as is reasonably practicable, that systemic risk is reduced and the facility is operated in a fair and effective way; and

(d) the applicant has adequate arrangements (whether they involve a self-regulatory structure or the appointment of an independent person or related entity) for supervising the facility, including arrangements for:

(i) handling conflicts between the commercial interests of the licensee and the need for the licensee to reduce systemic risk and ensure that the facility's services are provided in a fair and effective way; and

(ii) enforcing compliance with the facility's operating rules; and

(e) no unacceptable control situation (see Division 1 of Part 7.4) is likely to result if the licence is granted; and

(f) no disqualified individual appears to be involved in the applicant (see Division 2 of Part 7.4).

This subsection has effect subject to subsections (3) and (4).

Note: The Minister must also have regard to the matters in section 827A in deciding whether to grant a licence.

Alternative criteria for granting licence to overseas clearing and settlement facility

(2) If an applicant is authorised to operate a clearing and settlement facility in the foreign country in which its principal place of business is located, the Minister may grant the applicant an Australian CS facility licence authorising the applicant to operate the same facility in this jurisdiction. The Minister must be satisfied that:

(a) the application was made in accordance with section 824A; and

(b) the applicant will comply with the obligations that will apply if the licence is granted; and

(c) the operation of the facility in that country is subject to requirements and supervision that are sufficiently equivalent, in relation to the degree of protection from systemic risk and the level of effectiveness and fairness of services they achieve, to the requirements and supervision to which clearing and settlement facilities are subject under this Act in relation to those matters; and

(d) the applicant undertakes to cooperate with ASIC and the Reserve Bank of Australia by sharing information and in other ways; and

(e) no unacceptable control situation (see Division 1 of Part 7.4) is likely to result if the licence is granted; and

(f) no disqualified individual appears to be involved in the applicant (see Division 2 of Part 7.4); and

(g) any other requirements that are prescribed by regulations made for the purposes of this subsection are satisfied.

This subsection has effect subject to subsections (3) and (4).

Note: The Minister must also have regard to the matters in section 827A in deciding whether to grant a licence.

Foreign bodies

(3) If the applicant is a foreign body corporate, the Minister:
  (a) must not grant the applicant a licence unless the applicant is registered under Division 2 of Part 5B.2; and
  (b) may otherwise grant a licence under either subsection (1) or (2) (subject to the relevant criteria being satisfied).

Disqualified individuals

(4) The Minister must not grant the applicant a licence unless:
  (a) ASIC has notified the Minister that, as far as ASIC is aware, no disqualified individual is involved in the applicant (see Division 2 of Part 7.4); or
  (b) 42 days have passed since the application was made and ASIC has not given a notice under subsection 853D(2) to the applicant within that 42 days.

824C Publication of notice of licence grant

If the Minister grants an Australian CS facility licence, the Minister must publish a notice in the *Gazette* stating:
  (a) the name of the licensee; and
  (b) the date on which the licence was granted; and
  (c) the conditions on the licence.

824D More than one licence in the same document

If the Minister grants a person 2 or more of the following:
  (a) an Australian CS facility licence;
  (b) an Australian market licence;

they may be included in the same document.

824E More than one CS facility covered by the same licence

(1) The same Australian CS facility licence may authorise the licensee to operate 2 or more clearing and settlement facilities.

(2) In that case, a reference in this Chapter to the clearing and settlement facility to which an Australian CS facility licence relates is taken instead to be a reference to each of those facilities severally.

(3) Before varying the conditions on an Australian CS facility licence so as to add another facility that the licensee is authorised to operate, the Minister must be satisfied of the matters listed in subsection 824B(1) or (2) (as appropriate) in relation to the facility.

(4) An Australian CS facility licence that authorises the licensee to operate 2 or more clearing and settlement facilities may be suspended or cancelled under Subdivision C in respect of one or some of those facilities only, as if the licensee held a separate licence for each of the facilities.

Subdivision B—The conditions on the licence

825A The conditions on the licence

(1) The Minister may, at any time:

(a) impose conditions, or additional conditions, on an Australian CS facility licence; or

(b) vary or revoke conditions imposed on such a licence;

by giving written notice to the licensee. The Minister must also publish a notice in the *Gazette* with details of the action and when it took effect.

Note: As well as the requirements in this section, the Minister must also have regard to the matters in section 827A.

(2) The Minister may do so:

(a) on the Minister's own initiative, subject to subsection (3); or

(b) if the licensee lodges with ASIC an application for the Minister to do so, which is accompanied by the documents, if any, required by regulations made for the purposes of this paragraph.

Note: For fees in respect of lodging applications, see Part 9.10.

(3) The Minister may only impose conditions or additional conditions, or vary the conditions, on the licence on his or her own initiative if:

(a) he or she considers it appropriate to do so having regard to:

(i) the licensee's obligations as a CS facility licensee under this Chapter; and

(ii) any change in the facility's operations or the conditions in which the facility is operating; and

(b) the Minister gives the licensee written notice of the proposed action and an opportunity to make a submission before it takes effect.

This subsection does not apply to the Minister imposing conditions when a licence is granted.

(4) The Minister must ensure that each Australian CS facility licence is subject to conditions that specify:

(a) the particular facility that the licensee is authorised to operate; and

(b) the class or classes of financial products in respect of which the facility can provide services.

(5) ASIC must give the Minister any application and documents lodged under subsection (2).

Subdivision C—When a licence can be varied, suspended or cancelled

826A Varying licences

(1) The Minister may vary an Australian CS facility licence to take account of a change in the licensee's name if the licensee lodges with ASIC an application for the variation, accompanied by the documents, if any, required by regulations made for the purposes of this subsection.

Note 1: The conditions on the licence can be varied under section 825A.

Note 2: For fees in respect of lodging applications, see Part 9.10.

(2) The Minister must give written notice of the variation to the licensee.

(3) ASIC must give the Minister any application and documents lodged under subsection (1).

826B Immediate suspension or cancellation

The Minister may, by giving written notice to a CS facility licensee, suspend the licence for a specified period, or cancel it, if:

(a) the licensee ceases to carry on the business of operating the facility; or

(b) the licensee becomes an externally-administered body corporate; or

(c) the licensee asks the Minister to do so; or

(d) in the case of a licence granted under subsection 824B(2) (overseas clearing and settlement facilities):

(i) the licensee ceases to be authorised to operate a clearing and settlement facility in the foreign country in which the licensee's principal place of business is located; or

(ii) there is a change to the regulatory regime applying in relation to the facility to which the licence relates in the country in which the licensee's principal place of business is located, and, because of that change, the Minister is no longer satisfied as mentioned in paragraph 824B(2)(c).

826C Suspension or cancellation following hearing and report

(1) If the Minister considers that a CS facility licensee has breached one or more of its obligations as a CS facility licensee under this Chapter, the Minister may give the licensee a written notice that requires the licensee to show cause, at a hearing before a specified person, why the licence should not be suspended or cancelled.

(2) The notice must specify:

(a) the grounds on which it is proposed to suspend or cancel the licence; and

(b) a reasonable time and place at which the hearing is to be held.

However, if the licensee consents, the person conducting the hearing may fix a different time or place.

(3) The person conducting the hearing must:

(a) give the licensee an opportunity to be heard at the hearing; and

(b) give the Minister:

(i) a report about the hearing; and

(ii) a recommendation about the grounds in the notice on which it is proposed to suspend or cancel the licence.

(4) After considering the report and recommendation, the Minister may:

(a) decide to take no further action in relation to the matter and give written advice of that decision to the licensee; or

(b) suspend the licence for a specified period, or cancel the licence, by giving written notice to the licensee.

Note: The Minister must have regard to the matters in section 827A.

826D Effect of suspension

(1) A person whose Australian CS facility licence is suspended is taken not to hold that licence while it is suspended.

(2) However, the Minister may specify in the written notice to the licensee that subsection (1) does not apply for specified purposes.

826E Variation or revocation of suspension

The Minister may at any time vary or revoke a suspension of an Australian CS facility licence by giving written notice to the licensee.

826F Publication of notice of licence suspension or cancellation

(1) If the Minister:

(a) suspends, or varies or revokes a suspension of, an Australian CS facility licence; or

(b) cancels an Australian CS facility licence;

the Minister must publish a notice in the *Gazette* to that effect.

(2) The notice must state when the action took effect.

826G Suspension and cancellation only in accordance with this Subdivision

An Australian CS facility licence cannot be varied, suspended or cancelled otherwise than in accordance with this Subdivision.

Note: The conditions on the licence can be varied under section 825A.

Division 4—Other matters

827A Matters to be taken into account by the Minister

(1) The Minister must have regard to certain matters in deciding whether to:

(a) grant an applicant an Australian CS facility licence under section 824B; or

(b) impose, vary or revoke conditions on such a licence under section 825A; or

(c) suspend or cancel such a licence under section 826C; or

(d) disallow a change to the operating rules of a licensed CS facility under section 822E.

(2) These are the matters the Minister must have regard to:

(a) the structure, or proposed structure, of the facility;

(b) the nature of the services provided, or proposed to be provided, by the facility;

(c) the size, or proposed size, of the facility;

(d) the nature of the financial products in respect of which the facility provides services or proposes to provide services;

(e) the participants, or proposed participants, in the facility and whether those participants:

(i) in using the facility's services, are, or will be, providing financial services to other persons; or

(ii) use, or will use, the facility's services in respect of financial products they acquire or dispose of as retail clients or as wholesale clients; or

(iii) are, or will be, participants in a financial market, or other clearing and settlement facilities, as well;

(f) the technology used, or proposed to be used, in the operation of the facility;

(g) whether it would be in the public interest to take the action referred to in subsection (1);

(h) any relevant advice received from ASIC or the Reserve Bank of Australia.

The Minister may also have regard to any other matter that the Minister considers relevant.

(3) If the Minister is deciding whether to take the action mentioned in paragraph (1)(a), (b) or (c) in respect of an Australian CS facility licence granted under subsection 824B(2) (overseas clearing and settlement facilities), the Minister must also have regard to:

(a) the criteria that the licensee or applicant satisfied to obtain an authorisation to operate the same facility in the foreign country in which their principal place of business is located; and

(b) the obligations they must continue to satisfy to keep the authorisation; and

(c) the level of supervision to which the facility is subject in that country; and

(d) whether adequate arrangements exist for cooperation between ASIC, the Reserve Bank of Australia and the authority, or authorities, that are responsible for that supervision.

827B ASIC may give advice to Minister

ASIC may give advice to the Minister in relation to:

(a) any matter in respect of which the Minister has a discretion under this Part; or

(b) any other matter concerning clearing and settlement facilities.

Note: In some cases, the Minister must have regard to ASIC's advice: see paragraph 827A(2)(h).

827C Reserve Bank may give advice to Minister

The Reserve Bank of Australia may give advice to the Minister in relation to any matter concerning clearing and settlement facilities.

Note: In some cases, the Minister must have regard to the Reserve Bank's advice: see paragraph 827A(2)(h).

827D Reserve Bank may determine financial stability standards

(1) The Reserve Bank of Australia (the ***Reserve Bank***) may, in writing, determine standards for the purposes of ensuring that CS facility licensees conduct their affairs in a way that causes or promotes overall stability in the Australian financial system.

(2) The standards are to be complied with by:
(a) all CS facility licensees; or
(b) a specified class of CS facility licensees, in the case of a standard that is expressed to apply only in relation to that class.

(2A) If there is an inconsistency between the standards and the derivative transaction rules or the derivative trade repository rules, the standards prevail to the extent of the inconsistency.

(3) Before the Reserve Bank determines a standard, it must consult with:
(a) the CS facility licensees that will be required to comply with the standard; and
(b) ASIC.

(4) A standard may impose different requirements to be complied with in different situations or in respect of different activities.

(5) A standard:
(a) comes into force:
(i) unless subparagraph (ii) applies—on the day on which the determination of the standard is made; or
(ii) if that determination specifies a later day as the day on which the standard comes into force—on the day so specified; and
(b) continues in force until it is revoked.

(6) The Reserve Bank may vary a standard in writing. Before it does so, it must consult with:
(a) the CS facility licensees that will be required to comply with the standard if it is varied as proposed; and
(b) ASIC.

(7) If the Reserve Bank determines or varies a standard, it must, as soon as practicable:
(a) cause a notice advising of the determination of the standard, or of the variation of the standard, and summarising the purpose and effect of the standard or variation, to be published in the *Gazette*; and
(b) make the text of the notice available on the internet; and

(c) give a copy of the standard, or of the variation, to the following:
  (i) each CS facility licensee to which the standard applies;
  (ii) the Minister;
  (iii) ASIC.

(8) The Reserve Bank may revoke a standard in writing. Before it does so, it must consult with ASIC.

(9) If the Reserve Bank revokes a standard, it must, as soon as practicable:
  (a) cause a notice advising of the revocation of the standard to be published in the *Gazette*; and
  (b) make the text of the notice available on the internet; and
  (c) give notice of the revocation of the standard to the following:
    (i) each CS facility licensee to which the standard applied;
    (ii) the Minister;
    (iii) ASIC.

(10) The Reserve Bank must take reasonable steps to ensure that copies of the current text of the standards are available for inspection and purchase.

Part 7.4—Limits on involvement with licensees

Division 1—Limit on control of certain licensees

Subdivision A—15% voting power limit

850A Scope of Division

(1) This Division applies in relation to a body corporate that:

(a) has an Australian market licence or an Australian CS facility licence; or

(b) is the holding company of a body corporate that has an Australian market licence or an Australian CS facility licence;

and that is specified in regulations made for the purposes of this section.

(2) In this Division, such a body is called a ***widely held market body***.

850B Meaning of unacceptable control situation

(1) For the purposes of this Division, an ***unacceptable control situation*** exists in relation to a widely held market body and in relation to a particular person if the person's voting power in the body is more than:

(a) 15%; or

(b) in relation to a body other than the Australian Stock Exchange Limited—if an approval of a higher percentage is in force under Subdivision B in relation to the body and in relation to the person, that higher percentage; or

(c) in relation to the Australian Stock Exchange Limited—if the regulations prescribe a higher percentage in relation to the Australian Stock Exchange Limited in relation to the person, that higher percentage.

(2) Regulations made for the purposes of paragraph (1)(c) may not take effect earlier than the day after the last day on which the regulations may be disallowed under Part 5 of the *Legislative Instruments Act 2003*.

850C Acquisitions of shares

If:

(a) a person, or 2 or more persons under an arrangement, acquire shares in a body corporate; and

(b) the acquisition has the result, in relation to a widely held market body, that:

(i) an unacceptable control situation comes into existence in relation to the body and in relation to a person; or

(ii) if an unacceptable control situation already exists in relation to the body and in relation to a person—there is an increase in the voting power of the person in the body;

the person or persons mentioned in paragraph (a) contravene this section.

Note: A contravention of this section is an offence (see subsection 1311(1)).

850D Remedial orders

(1) If an unacceptable control situation exists in relation to a widely held market body, the Court may make such orders as the Court considers appropriate for the purpose of ensuring that the unacceptable control situation ceases to exist.

(2) However, the Court may only make orders under this section on application by:

(a) the Minister; or

(b) ASIC; or

(c) the body; or

(d) a person who has any voting power in the body.

(3) The Court's orders may include:

(a) an order directing the disposal of shares; or

(b) an order restraining the exercise of any rights attached to shares; or

(c) an order prohibiting or deferring the payment of any sums due to a person in respect of shares held by the person; or

(d) an order that any exercise of rights attached to shares be disregarded; or

(e) an order directing any person to do or refrain from doing a specified act, for the purpose of securing compliance with any other order made under this section; or

(f) an order containing such ancillary or consequential provisions as the Court thinks just.

(4) Subsection (3) does not, by implication, limit subsection (1).

(5) Before making an order under this section, the Court may direct that notice of the application be given to such persons as the Court thinks fit or be published in such manner as the Court thinks fit, or both.

(6) The Court may, by order:

(a) rescind, vary or discharge an order made by the Court under this section; or

(b) suspend the operation of such an order.

850E Injunctions

(1) If any conduct (including a refusal or failure to act) amounts or would amount to a contravention of this Division in relation to a particular widely held market body, the body is taken, for the purposes of section 1324, to be a person whose interests are affected by the conduct.

(2) Subsection (1) does not, by implication, limit the class of persons whose interests are affected by the conduct.

(3) The Minister has the same powers as ASIC to apply for an injunction under section 1324 in relation to a contravention of this Division.

(4) The powers in sections 850D and 1324 do not, by implication, limit each other.

Subdivision B—Approval to exceed 15% voting power limit

851A Application for approval to exceed 15% voting power limit

(1) A person may apply for approval to have voting power of more than 15% in a particular widely held market body (other than the

Australian Stock Exchange Limited) by lodging with ASIC an application that:

(a) specifies the percentage of voting power (if any) the person currently has in the widely held market body; and

(b) specifies the percentage of voting power the person is seeking approval to have in the body; and

(c) sets out the person's reasons for making the application.

Note: For fees in respect of lodging applications, see Part 9.10.

(2) ASIC must give the application to the Minister as soon as possible.

851B Approval of application

(1) If the Minister is satisfied that it is in the national interest to approve the applicant having voting power in the widely held market body of more than 15%, the Minister may grant the application.

(2) If the Minister grants the application, the Minister must:

(a) give written notice of the approval to the applicant; and

(b) specify the percentage of the voting power the Minister approves the applicant having in the widely held market body (which may or may not be the percentage the applicant applied for); and

(c) either:

(i) specify the period during which the approval remains in force; or

(ii) specify that the approval remains in force indefinitely.

(3) If the Minister refuses the application, the Minister must give written notice of the refusal to the applicant.

(4) As soon as practicable, the Minister must arrange for a copy of a notice of approval under this section to be:

(a) published in the *Gazette*; and

(b) given to the body concerned.

851C Duration of approval

(1) An approval under section 851B remains in force:

(a) if the notice of approval specifies a period during which the approval remains in force—until the end of that period, or if the Minister extends that period, until the end of that extended period; or

(b) otherwise—indefinitely.

Extension of approval

(2) A person who holds an approval under section 851B that is in force for a specified period may apply to extend that period by lodging with ASIC an application that sets out the person's reasons for making the application.

Note: For fees in respect of lodging applications, see Part 9.10.

(3) ASIC must give the application to the Minister as soon as possible.

(4) If the Minister is satisfied that it is in the national interest to grant the extension, the Minister may grant the application.

(5) If the Minister grants the application, the Minister must:

(a) give written notice of the extension to the applicant; and

(b) specify the extended period during which the approval remains in force (which may or may not be the period the applicant applied for).

(6) If the Minister refuses the application, the Minister must give written notice of the refusal to the applicant.

(7) As soon as practicable, the Minister must arrange for a copy of a notice of extension under this section to be:

(a) published in the *Gazette*; and

(b) given to the widely held market body concerned.

851D Conditions of approval

(1) An approval under section 851B is subject to such conditions (if any) as are specified in the notice of approval.

(2) The Minister may, by written notice given to a person who holds an approval under section 851B:

(a) impose one or more conditions or further conditions to which the approval is subject; or

(b) revoke or vary any condition:

(i) imposed under paragraph (a); or

(ii) specified in the notice of approval.

(3) The Minister's power under subsection (2) may be exercised:

(a) on the Minister's own initiative; or

(b) on application by the person who holds the approval.

(4) An application made by a person under paragraph (3)(b) must be lodged with ASIC and must set out the person's reasons for making the application.

Note: For fees in respect of lodging applications, see Part 9.10.

(5) ASIC must give the application to the Minister as soon as possible.

(6) If the Minister refuses an application under paragraph (3)(b), the Minister must give written notice of the refusal to the applicant.

(7) As soon as practicable, the Minister must arrange for a copy of a notice under subsection (2) to be:

(a) published in the *Gazette*; and

(b) given to the widely held market body concerned.

(8) A person who holds an approval under section 851B must give written notice to ASIC if they become aware that they have breached a condition to which the approval is subject.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

851E Varying percentage approved

Application by holder of approval

(1) A person who holds an approval under section 851B may apply to vary the percentage specified in the approval by lodging with ASIC an application that:

(a) specifies the percentage of the voting power the person currently has in the widely held market body concerned; and

(b) specifies the percentage of the voting power the person is seeking approval to have in the body; and

(c) sets out the person's reasons for making the application.

Note: For fees in respect of lodging applications, see Part 9.10.

(2) ASIC must give the application to the Minister as soon as possible.

(3) If the Minister is satisfied that it is in the national interest to vary the percentage, the Minister may grant the application.

(4) If the Minister grants the application, the Minister must:
(a) give written notice of the variation to the applicant; and
(b) specify the variation granted (which may or may not be the variation the applicant applied for).

(5) If the Minister refuses an application, the Minister must give written notice of the refusal to the applicant.

Minister's own initiative

(6) The Minister may, by written notice given to a person who holds an approval under section 851B, vary the percentage specified in the approval if the Minister is satisfied that it is in the national interest to do so.

Percentage varied upwards

(7) If the Minister varies a percentage upwards, the variation takes effect on the day the notice of variation is given.

Percentage varied downwards

(8) If the Minister varies a percentage downwards, the variation takes effect on the day specified in the notice of variation. The specified day must be a day at least 90 days after the day on which the notice is given.

Notification of variation

(9) As soon as practicable, the Minister must arrange for a copy of a notice of variation under this section to be:
(a) published in the *Gazette*; and
(b) given to the widely held market body concerned.

851F Revoking an approval

(1) The Minister may, by written notice given to a person who holds an approval under section 851B in relation to a widely held market body, revoke the approval if the Minister is satisfied that:

(a) it is in the national interest to do so; or

(b) an unacceptable control situation exists in relation to the widely held market body and in relation to the person; or

(c) there has been a contravention of a condition to which the approval is subject.

(2) The revocation takes effect on the day specified in the notice of revocation. The specified day must be a day at least 90 days after the day on which the notice is given.

(3) If a person who holds an approval under section 851B requests the Minister to revoke the approval, the Minister must, by written notice given to the person, revoke the approval. The revocation takes effect on the day specified in the notice of revocation.

(4) As soon as practicable, the Minister must arrange for a copy of a notice of revocation under this section to be:

(a) published in the *Gazette*; and

(b) given to the widely held market body concerned.

851G Further information about applications

(1) This section applies to an application under this Subdivision.

(2) The Minister may, by written notice given to the applicant, require the applicant to give the Minister, within a specified period, further information about the application.

(3) The Minister may refuse to consider the application until the applicant gives the Minister the information.

851H Time limit for Minister's decision

(1) The Minister must make a decision on an application under this Subdivision within 30 days after receiving the application.

(2) However, before the end of the 30 days, the Minister may decide to extend the period for considering the application until the end of 60 days after the application was received.

(3) If the Minister has not made a decision within the 30 days (or the 60 days, if subsection (2) applies), the Minister is taken to have granted whatever was applied for. As soon as practicable after that happens, the Minister must arrange for a notice to that effect to be:
   (a) published in the *Gazette*; and
   (b) given to the widely held market body concerned.

(4) The time for making the decision stops running if the Minister gives a notice under section 851G in relation to the application, and does not start again until the notice is complied with.

(5) The time limit in this section does not apply to an application under section 851A or 851E if an unacceptable control situation exists in relation to the applicant and in relation to the relevant widely held market body at any time before the Minister makes a decision.

851I Preservation of voting power in relation to bodies specified in regulations made for section 850A

(1) A person holding a particular percentage of voting power in a body at its specification time (see subsection (3)) is taken at that time to be granted an approval under section 851B to hold that percentage of voting power in the body if:
   (a) in a case where the body's specification time occurs at the same time as the commencement of this section—the person holding the percentage of voting power in the body immediately before the specification time did not, to any extent, constitute a contravention of previous law (see subsection (3)); and
   (b) whether the body's specification time occurs at the same time as, or after, the commencement of this section—on the body's specification time, the person holding that percentage of voting power in the body would (apart from this section) constitute an unacceptable control situation.

Note: Conditions can be imposed on the approval under section 851D and then varied or revoked in accordance with that section.

(2) The Minister is taken to have complied with the Minister's obligations under section 851B in relation to the granting of the approval to the person.

(3) In this section:

contravention of previous law means a contravention of a provision of Part 7.1A of this Act as in force immediately before the commencement of this section.

specification time, in relation to a body, means the time a body first becomes specified in regulations made for the purposes of section 850A.

Subdivision C—Other matters

852A Acquisition of property

(1) The Court must not make an order under section 850D if:

(a) the order would result in the acquisition of property from a person otherwise than on just terms; and

(b) the order would be invalid because of paragraph 51(xxxi) of the Constitution.

(2) Section 1350 does not apply in relation to the making of an order under section 850D.

(3) In this section:

acquisition of property has the same meaning as in paragraph 51(xxxi) of the Constitution.

just terms has the same meaning as in paragraph 51(xxxi) of the Constitution.

852B Anti-avoidance

(1) If:

(a) one or more persons enter into, begin to carry out or carry out a scheme; and

(b) it would be concluded that the person, or any of the persons, who entered into, began to carry out or carried out the scheme or any part of the scheme did so for the sole or

dominant purpose of avoiding the application of any provision of Subdivision A in relation to any person or persons (whether or not mentioned in paragraph (a)); and

(c) as a result of the scheme or a part of the scheme, a person (the ***controller***) increases the controller's voting power in a widely held market body;

the Minister may give the controller a written direction to cease having that voting power within a specified time.

(2) A person who is subject to a written direction under subsection (1) must comply with the direction.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(3) In this section:

increase voting power includes increasing it from a starting point of nil.

Division 2—Individuals who are not fit and proper are disqualified

853A Who is disqualified

For the purposes of this Division, an individual is ***disqualified*** if:

(a) a declaration by ASIC that the individual is disqualified is in effect under section 853C; or

(b) the individual is disqualified from managing a corporation under section 206B; or

(c) the individual is on the Register that ASIC must keep under section 1274AA.

853B When an individual is *involved in* an operator

For the purposes of this Division, an individual is ***involved in*** a market licensee, a CS facility licensee or a derivative trade repository licensee, or an applicant for such a licence, if:

(a) the individual is a director, secretary or senior manager of the licensee or applicant, or in a holding company of the licensee or applicant; or

(b) the individual has more than 15% of the total voting power in the licensee or applicant, or in a holding company of the licensee or applicant.

853C Declaration by ASIC

(1) ASIC may declare in writing that an individual who is involved in a market licensee, a CS facility licensee or a derivative trade repository licensee, or in an applicant for a licence of any of those kinds, is ***disqualified*** for the purposes of this Division.

(2) ASIC may make such a declaration only if ASIC is satisfied that, because the individual is unfit to be involved in the licensee or applicant, there is a risk that the licensee or applicant will breach its obligations under this Chapter if the declaration is not made.

(3) In deciding whether an individual is unfit as mentioned in subsection (2), ASIC must take into account such matters as the

individual's fame, character and integrity, rather than his or her competence, experience, knowledge or other such attributes.

(4) A declaration may be expressed to remain in effect for a specified period or until a specified event occurs. Otherwise, it remains in effect indefinitely (unless it is revoked under section 853E).

853D Procedure for declaration

(1) ASIC must not make a declaration under section 853C unless it has followed the procedure in this section.

(2) Within 42 days after:

(a) a body corporate applies for an Australian market licence, an Australian CS facility licence or an Australian derivative trade repository licence; or

(b) ASIC receives other information that may be relevant to deciding whether to make a declaration under section 853C about an individual who is involved in an applicant for an Australian market licence, an Australian CS facility licence or an Australian derivative trade repository licence, or in an existing licensee;

ASIC may give the applicant or licensee written notice that ASIC proposes to make a declaration under section 853C about the individual in question.

(3) ASIC must give a copy of the notice to the individual and to the Minister.

(4) The notice must:

(a) state the grounds on which ASIC proposes to make the declaration; and

(b) require the applicant or licensee, and the individual, to show, at a hearing before a specified person, why the declaration should not be made; and

(c) specify a reasonable time and place at which the hearing is to be held.

However, if the applicant or licensee, and the individual, consent, the person conducting the hearing may fix a different time or place.

(5) The person conducting the hearing must:

(a) give the applicant or licensee, and the individual, an opportunity to be heard at the hearing; and

(b) give ASIC:

(i) a report about the hearing; and

(ii) a recommendation about the grounds in the notice on which it is proposed to make the declaration.

(6) As soon as practicable after the hearing, ASIC must:

(a) decide whether to make the declaration; and

(b) give each of the following persons a copy of the declaration, or a written notice of its decision not to make the declaration:

(i) the applicant or licensee;

(ii) the individual;

(iii) the Minister.

853E Revoking a declaration

(1) ASIC may, in writing, revoke a declaration under section 853C if it is no longer satisfied as mentioned in subsection 853C(2) in relation to the individual in question.

(2) ASIC must give a copy of the revocation to the relevant applicant or licensee, the individual and the Minister.

853F Obligations on disqualified individuals

(1) A disqualified individual must not become involved in a market licensee, a CS facility licensee or a derivative trade repository licensee.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) A disqualified individual who is involved in a market licensee, a CS facility licensee or a derivative trade repository licensee must take all reasonable steps to ensure that he or she ceases to be involved in the licensee.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

853G Notification by ASIC

If ASIC becomes aware that an individual who is involved in a market licensee, a CS facility licensee or a derivative trade repository licensee is disqualified because of paragraph 853A(b) or (c), ASIC must notify the individual, the licensee and the Minister as soon as practicable.

Division 3—Miscellaneous

854A Record-keeping and giving of information

(1) The regulations may make provision for and in relation to requiring a person:

(a) to keep and retain records that are relevant to whether a person has voting power in a widely held market body and, if so, how much; and

(b) to keep and retain records that are relevant to determining whether any disqualified individual is involved in a market licensee, a CS facility licensee or a derivative trade repository licensee; and

(c) to give the Minister or ASIC information that is relevant to the matters mentioned in paragraphs (a) and (b); and

(d) to give a widely held market body information that is relevant to the matter mentioned in paragraph (a).

(2) The regulations may provide that information given in accordance with a requirement covered by paragraph (1)(c) or (d) must be verified by statutory declaration.

(3) However, an individual is not required to give information in accordance with a requirement covered by paragraph (1)(c) or (d) if the information might tend to incriminate the individual or expose the individual to a penalty.

(4) A person contravenes this section if:

(a) the person makes or keeps a record in compliance, or purported compliance, with a requirement covered by subsection (1); and

(b) the person does so knowing that the record:

(i) is false or misleading; or

(ii) omits any matter or thing without which the record is misleading.

Note: A contravention of this subsection is an offence (see subsection 1311(1)).

(5) Regulations made for the purposes of this section may make provision for or in relation to a matter by conferring a power on the Minister.

854B Exemptions and modifications by regulations

(1) The regulations may:

(a) exempt a person or class of persons from all or specified provisions of this Part; or

(b) provide that this Part applies as if specified provisions were omitted, modified or varied as specified in the regulations.

(3) For the purpose of this section, the ***provisions of this Part*** include:

(a) definitions in this Act, or in the regulations, as they apply to references in this Part; and

(b) any provisions of Part 10.2 (transitional provisions) that relate to provisions of this Part.

Part 7.5—Compensation regimes for financial markets

Division 1—Preliminary

880A Part does not apply to markets licensed under special provisions about overseas markets

Nothing in this Part applies in relation to:

(a) a financial market the operation of which is licensed under subsection 795B(2); or

(b) an application for the grant of a licence under that subsection.

880B Definitions

(1) In this Part:

adequate has a meaning affected by subsection (2).

borrowing includes obtaining credit.

compensation arrangements are arrangements that consist of:

(a) a set of rules about compensation; and

(b) a source of funds from which compensation is payable; and

(c) associated administrative and monitoring arrangements.

compensation rules means rules referred to in paragraph (a) of the definition of ***compensation arrangements***.

Division 3 arrangements means compensation arrangements approved under Division 3.

Division 3 loss means a loss described in section 885C, other than a loss that section 885D provides is to be taken not to be a Division 3 loss.

Division 4 arrangements means the arrangements constituted by Division 4.

fidelity fund, in relation to a financial market, means a fund consisting principally of contributions made by:

(a) participants and past participants in the market; or

(b) participants and past participants in:

(i) the market; and

(ii) one or more other financial markets;

the purpose, or the main purpose, of which is to provide a source of funds for the payment of compensation to clients of participants. Any investments made using money in the fund are taken to form part of the fund.

NGF means the National Guarantee Fund that continues in existence under section 889A.

operating rules, in relation to the SEGC, means the rules referred to in section 890D.

Part 7.5 arrangements means Division 3 arrangements or Division 4 arrangements.

pay compensation includes provide compensation in a form other than money.

SEGC means the body corporate in relation to which a nomination as the Securities Exchanges Guarantee Corporation is in force under section 890A.

(2) For the purposes of this Part, the question whether proposed compensation arrangements, compensation arrangements as proposed to be changed, or compensation arrangements that have been approved, are ***adequate*** is to be determined in accordance with Subdivision D of Division 3.

Division 2—When there must be a compensation regime

881A Licensed markets through which participants provide services for retail clients must generally have a compensation regime

(1) If:

(a) any of the participants in a licensed market, in effecting transactions through the market, provide financial services for persons as retail clients; and

(b) in connection with the provision of those financial services, those persons will or may give money or other property, or authority over property, to those participants; and

(c) the market is not a financial market to which Division 4 applies;

there must be compensation arrangements in relation to the market that are approved in accordance with Division 3.

(2) The compensation regime applicable in relation to financial markets to which Division 4 applies is as constituted by that Division.

881B Additional requirements for the licence application

(1) A person who is applying for an Australian market licence must state in their application:

(a) whether any of the participants in the market, in effecting transactions through the market, will provide financial services for persons as retail clients; and

(b) if any participants will so provide financial services to persons as retail clients—whether, in connection with the provision of those financial services, those persons will or may give money or other property, or authority over property, to those participants.

(2) If:

(a) participants in the market will provide financial services to persons as retail clients as mentioned in paragraph (1)(a); and

(b) in connection with the provision of those financial services, those persons will or may give money or property, or authority over property, to those participants;

the application must:

(c) contain the information, in relation to the proposed compensation arrangements, required by regulations made for the purposes of this paragraph and be accompanied by a copy of the proposed compensation rules; or

(d) state that the market is or will be covered by Division 4, and set out evidence, in accordance with the requirements (if any) of the regulations, in support of that statement.

881C What happens if an application contains information in accordance with paragraph 881B(2)(c)

If a licence application contains information in relation to proposed compensation arrangements as required by paragraph 881B(2)(c), the Minister must deal with the application in accordance with section 882A.

881D What happens if an application contains a statement in accordance with paragraph 881B(2)(d)

(1) If a licence application contains a statement in accordance with paragraph 881B(2)(d), the Minister must consider whether he or she is satisfied that the market will be covered by Division 4.

(2) If the Minister is not so satisfied, the application for the licence must be rejected.

(3) If the Minister is so satisfied, the Minister may (subject to the other provisions about granting licences) grant the licence.

Note: The other provisions about granting licences are in Subdivision A of Division 4 of Part 7.2.

Division 3—Approved compensation arrangements

Subdivision A—Approval of compensation arrangements

882A How to get compensation arrangements approved with grant of licence

(1) If an application for an Australian market licence contains information in relation to proposed compensation arrangements in accordance with paragraph 881B(2)(c), the Minister must treat the application as also being an application for approval of the compensation arrangements and, for that purpose, must consider whether the proposed arrangements are adequate.

(2) If the Minister does not consider that the proposed compensation arrangements are adequate, the application for the licence must be rejected.

(3) If the Minister considers that the proposed compensation arrangements are adequate, the Minister may (subject to the other provisions about granting licences) grant the licence. On the granting of the licence, the Minister is taken to have approved the compensation arrangements.

Note: The other provisions about granting licences are in Subdivision A of Division 4 of Part 7.2.

(4) In the conditions of the licence, the Minister must:

(a) deal with the minimum amount of cover required in relation to the compensation arrangements in such manner as the Minister thinks appropriate; and

(b) identify the source of funds available to cover claims, on the basis of which the Minister approves the arrangements (see section 885H).

882B How to get compensation arrangements approved after licence is granted

(1) If the operator of a licensed market wants to have compensation arrangements for the market approved after the licence has been granted, the operator must apply for approval in accordance with this section.

(2) The application must:

(a) contain the information, in relation to the proposed compensation arrangements, required by regulations made for the purposes of this paragraph and be accompanied by a copy of the proposed compensation rules; and

(b) be made to the Minister by lodging the application with ASIC.

Note: For fees in respect of lodging applications, see Part 9.10.

(3) If the Minister does not consider that the proposed compensation arrangements are adequate, the application for approval must be rejected.

(4) If the Minister considers that the proposed compensation arrangements are adequate, the Minister must:

(a) approve the compensation arrangements in writing; and

(b) vary the conditions of the operator's licence so as to:

(i) deal with the minimum amount of cover required in relation to the compensation arrangements in such manner as the Minister thinks appropriate; and

(ii) identify the source of funds available to cover claims, on the basis of which the Minister approves the arrangements (see section 885H).

(5) In varying licence conditions as mentioned in paragraph (4)(b), the Minister must proceed under section 796A as though the licensee had applied for the variation to be made.

882C Revocation of approval

The Minister may at any time revoke an approval of compensation arrangements if the Minister considers that the arrangements are not adequate.

882D Minister's power to give directions

(1) If the Minister considers that a market licensee's approved compensation arrangements are no longer adequate, the Minister may give the licensee a written direction to do specified things that the Minister believes will ensure that the arrangements become adequate once more.

(2) The licensee must comply with the direction.

(3) If the licensee fails to comply with the direction, ASIC may apply to the Court for, and the Court may make, an order that the licensee comply with the direction.

(4) The Minister may vary or revoke a direction at any time by giving written notice to the licensee.

Subdivision B—Effect of compensation rules forming part of Division 3 arrangements

883A Legal effect of compensation rules

Compensation rules forming part of Division 3 arrangements for a financial market have effect as a contract under seal between the operator of the market and each participant in the market under which each of those persons agrees to observe the rules to the extent that they apply to the person and engage in conduct that the person is required by the rules to engage in.

883B Enforcement of compensation rules

(1) If a person who is under an obligation to comply with or enforce any of the compensation rules forming part of Division 3 arrangements for a financial market fails to meet that obligation, an application to the Court may be made by:
  (a) ASIC; or
  (b) the operator of the market; or
  (c) the operator of a clearing and settlement facility, if:
    (i) there are clearing and settlement arrangements (as defined in section 790A) for some or all transactions effected through the market; and
    (ii) those arrangements are with the operator of the facility; or
  (d) a person aggrieved by the failure.

(2) After giving an opportunity to be heard to the applicant and the person against whom the order is sought, the Court may make an order giving directions to:
  (a) the person against whom the order is sought; or

(b) if that person is a body corporate—the directors of the body corporate;

about compliance with, or enforcement of, the compensation rules.

(3) For the purposes of this section, if the operator of the market fails to comply with or enforce provisions of the compensation rules, a person who is, under the rules, entitled to make a claim for compensation is (whether or not they have actually made a claim) taken to be a person aggrieved by the failure.

(4) There may be other circumstances in which a person may be aggrieved by a failure for the purposes of this section.

883C Other sources of funds for compensation

Nothing in this Division makes the operator of a financial market liable to pay compensation from any source of funds other than the source identified in the licence conditions under paragraph 882A(4)(b) or subparagraph 882B(4)(b)(ii).

883D Payment of levies

(1) This section applies if, under the compensation rules forming part of Division 3 arrangements for a particular financial market, a levy is payable by all or some of the participants in the market in order to ensure that adequate funds are available for the purposes of the arrangements.

(2) The levy is payable to the operator of the market, as agent for the Commonwealth, by each of the participants affected.

Note: For the imposition and amount of the levy, see the *Corporations (Compensation Arrangements Levies) Act 2001*.

(3) An amount of levy payable under subsection (2) must be paid within the time and in the manner specified by the operator either generally or in relation to a particular case.

(4) Whenever an amount of levy (the ***levy amount***) is paid under this section, or under section 6 of the *Corporations (Compensation Arrangements Levies) Act 2001*, to the operator of a market as agent for the Commonwealth:

(a) the operator must pay an amount equal to the levy amount to the Commonwealth; and

(b) the Consolidated Revenue Fund is appropriated by that amount for the purpose of payment to the operator; and

(c) the Commonwealth must pay the amount so appropriated to the operator; and

(d) the operator must deal with the amount it receives under paragraph (c) in accordance with the compensation rules.

(5) A payment of an amount to the operator of a market as required by paragraph (4)(c) in respect of a particular levy amount is subject to a condition that, if the Commonwealth becomes liable to refund the whole or a part of the levy amount, the operator must pay the Commonwealth an amount equal to the amount that the Commonwealth is liable to refund.

(6) The *Financial Management and Accountability Act 1997* does not apply in relation to the payment of an amount of levy under this section to the operator of a market as agent for the Commonwealth. However, the operation of that Act in relation to the following payments is not affected:

(a) the payment of an amount to the Commonwealth as required by paragraph (4)(a); or

(b) the payment of an amount by the Commonwealth as required by paragraph (4)(c).

The operator must, in accordance with the regulations, notify the Commonwealth of payments of levy it receives as agent for the Commonwealth.

(7) An amount payable by an operator as required by paragraph (4)(a) may be set off against an amount payable to the operator as required by paragraph (4)(c).

Subdivision C—Changing Division 3 arrangements

884A Division 3 arrangements must generally only be changed in accordance with this Subdivision

(1) The operator of a financial market in relation to which there are Division 3 arrangements must not change those arrangements except in accordance with this Subdivision.

(2) However, a change may be made to Division 3 arrangements otherwise than in accordance with this Subdivision if:

(a) the change is not to a matter required by section 885B to be dealt with in the compensation rules; and

(b) the change is merely a minor administrative change.

884B Changing Division 3 arrangements—matters required to be dealt with in the compensation rules

(1) If the proposed change is to a matter required by section 885B to be dealt with in the compensation rules, the change may only be made by changing the rules.

(2) As soon as practicable after the change is made, the operator must lodge with ASIC written notice of the change.

(3) The notice must:

(a) set out the text of the change; and

(b) specify the date on which the change was made; and

(c) contain an explanation of the purpose of the change.

(4) If no notice is lodged with ASIC within 21 days after the change is made, the change ceases to have effect.

(5) As soon as practicable after receiving a notice under subsection (2), ASIC must send a copy of the notice to the Minister.

(6) Within 28 days after receiving the copy of the notice, the Minister may disallow all or a specified part of the change to the compensation rules.

(7) The Minister must not disallow all or part of the change unless the Minister considers that, because of the change, or that part of the change, the compensation arrangements are not adequate.

(8) As soon as practicable after all or part of a change is disallowed, ASIC must give notice of the disallowance to the operator of the market concerned. The change ceases to have effect, to the extent of the disallowance, when the operator receives the notice.

884C Changing Division 3 arrangements—matters not required to be dealt with in the compensation rules

(1) If:

(a) the proposed change is to a matter that is not required by section 885B to be dealt with in the compensation rules (including a matter that is dealt with in the compensation rules even though it is not required to be dealt with in those rules); and

(b) the change is not merely a minor administrative change;

the operator must not make the change unless:

(c) the operator has applied for approval of the change; and

(d) the change has been approved by the Minister.

(2) The application for approval must:

(a) include the information, required by regulations made for the purposes of this paragraph, in relation to the proposed change; and

(b) be made to the Minister by lodging the application with ASIC.

Note: For fees in respect of lodging applications, see Part 9.10.

(3) If the Minister does not consider that the compensation arrangements as proposed to be changed are adequate, the application for approval must be rejected.

(4) If the Minister considers that the compensation arrangements as proposed to be changed are adequate, the Minister must approve the change.

(5) If:

(a) the proposed change is to a matter that is dealt with in the compensation rules even though it is not required to be dealt with in those rules; and

(b) the change is approved;

the operator may make any change to the compensation rules that is necessary to give effect to the change that has been approved or that is incidental to giving effect to that change.

(6) If a change to the compensation rules is made as permitted by subsection (5), the operator must, as soon as practicable after the change is made, give ASIC written notice of the change.

(7) A notice required by subsection (6) must:
  (a) set out the text of the change; and
  (b) specify the date on which it was made; and
  (c) contain an explanation of why it is a change that is permitted to be made by subsection (5).

Subdivision D—Are compensation arrangements adequate?

885A Purpose of this Subdivision

(1) This Subdivision applies for the purpose of determining, for the purposes of a provision of this Division:
  (a) whether:
    (i) proposed compensation arrangements are adequate; or
    (ii) compensation arrangements as proposed to be changed are adequate; or
  (b) whether compensation arrangements that have been approved are adequate.

(2) A reference in this Subdivision to the ***arrangements*** is a reference to the proposed arrangements, the arrangements as proposed to be changed, or the arrangements that have been approved, as the case requires.

(3) A reference in this Subdivision to the ***compensation rules*** is a reference to the compensation rules, or the proposed compensation rules, forming part of the arrangements under consideration.

885B Requirements to be complied with for arrangements to be adequate

(1) The arrangements are ***adequate*** if, and only if, the Minister is satisfied that:
  (a) the compensation rules provide adequate coverage for Division 3 losses (see sections 885C and 885D); and
  (b) the compensation rules provide for adequate compensation to be paid in respect of Division 3 losses (see section 885E); and
  (c) the compensation rules deal adequately with how compensation in respect of Division 3 losses is to be paid (see section 885F); and

(d) the compensation rules deal adequately with the making and determination of claims in respect of Division 3 losses, and with the notification of the outcome of such claims (see section 885G); and

(e) the arrangements provide for an adequate source of funds for paying compensation in respect of Division 3 losses and in respect of any other losses covered by the arrangements (see section 885H); and

(f) the arrangements include adequate arrangements for administration and monitoring (see section 885I); and

(g) under the arrangements, potential claimants have reasonable and timely access to the compensation regime; and

(h) if the licensee ceases (for whatever reason) to be required to have Division 3 arrangements, the rights of people to seek compensation under the arrangements, being rights that accrued while the licensee was required to have such arrangements, will be adequately protected.

(2) In considering the matters mentioned in subsection (1), the Minister must also have regard to the matters mentioned in section 885J.

(3) The matters that may be dealt with in compensation rules are not limited to matters mentioned in this section.

885C The losses to be covered

(1) Subject to section 885D, the compensation rules must cover losses (***Division 3 losses***) of a kind described in the following paragraphs:

(a) a person (the ***client***) gave money or other property, or authority over property, to a person (the ***participant***):

(i) who was a participant in the market at that time; or

(ii) who the client reasonably believed to be a participant in the market at that time and who was a participant in the market at some earlier time; and

(b) the money or other property, or the authority, was given to the participant in connection with effecting a transaction, or proposed transaction, covered by provisions of the operating rules of the market relating to transactions effected through the market; and

(c) the effecting of the transaction through the market constitutes or would constitute the provision of a financial service to the client as a retail client; and

(d) the client suffers a loss because of:

(i) if the client gave the participant money or other property—the defalcation or fraudulent misuse of the money or other property by the participant; or

(ii) if the client gave the participant authority over property—the fraudulent misuse of that authority by the participant.

(2) The compensation rules must provide that a claim relating to an alleged loss caused by defalcation or fraudulent misuse may be allowed even if:

(a) the person against whom the defalcation or misuse is alleged has not been convicted or prosecuted; and

(b) the evidence on which the claim is allowed would not be sufficient to establish the guilt of that person on a criminal trial in respect of the defalcation or fraudulent misuse.

(3) The compensation rules may exclude losses of a kind described above that occur in specified situations. However, the compensation arrangements will not be adequate unless the Minister is satisfied that those exclusions are appropriate.

885D Certain losses that are not Division 3 losses

(1) If, in relation to a loss suffered by a person:

(a) the requirements of subsection 885C(1) are satisfied in relation to a participant and 2 or more financial markets; and

(b) the person did not (expressly or impliedly) instruct the participant to use a particular one of those markets; and

(c) it is not reasonably apparent from the usual business practice of the participant which of those markets the participant would use when acting for the person;

the loss is taken not to be a ***Division 3 loss***.

(2) If, in relation to a loss suffered by a person:

(a) the requirements of subsection 885C(1) are satisfied in relation to a participant and a financial market; and

(b) the loss is also connected (see section 888A) with a financial market to which Division 4 applies; and

(c) the person did not (expressly or impliedly) instruct the participant to use a particular one of those markets; and

(d) it is not reasonably apparent from the usual business practice of the participant which of those markets the participant would use when acting for the person;

the loss is taken not to be a ***Division 3 loss***.

(3) If, in relation to a loss suffered by a person:

(a) the transaction referred to in paragraph 885C(1)(b) could have been effected otherwise than through a financial market; and

(b) the person did not (expressly or impliedly) instruct the participant concerned to effect the transaction through a financial market; and

(c) it is not reasonably apparent from the usual business practice of the participant that the transaction would be effected through a financial market;

the loss is taken not to be a ***Division 3 loss***.

885E The amount of compensation

(1) Subject to this section, the compensation rules must provide that the amount of compensation to be paid in respect of a Division 3 loss is to be not less than the sum of:

(a) the actual pecuniary loss suffered by the claimant, calculated by reference to the market value of any relevant assets or liabilities as at the date on which the loss was suffered; and

(b) the claimant's reasonable costs of, and disbursements incidental to, the making and proof of the claim.

(2) The compensation rules may provide for the amount of compensation payable in respect of a Division 3 loss to be reduced by reference to a right of set-off available to the claimant.

(3) The compensation rules may impose an upper limit on the amount of compensation to which a person is entitled in respect of a claim in particular circumstances, or an upper limit on the total amount of compensation to which persons are entitled in respect of claims referable to a particular event or circumstance.

(4) That upper limit may be specified in the compensation rules or determined by a method specified in the rules.

(5) The compensation rules must also provide for the payment to the claimant of interest at the rate applicable under the regulations on the amount of the actual pecuniary loss, or so much of that loss as from time to time has not been compensated by an instalment or instalments of compensation, in respect of the period starting on the day when the loss was suffered and ending on the day when the compensation, or the last instalment of compensation, is paid.

(6) The compensation rules may provide for what is to happen if there are insufficient funds to meet claims in respect of Division 3 losses and in respect of any other losses covered by the arrangements. For example, they may provide for the prioritisation of claims, or the apportionment of available funds between claims.

(7) In other provisions of this Division a reference to ***compensation in respect of a Division 3 loss*** includes (unless the contrary intention appears) a reference to interest referred to in subsection (5).

885F Method of payment of compensation

(1) The compensation rules must deal with how compensation in respect of Division 3 losses is to be paid.

(2) Without limiting subsection (1), the compensation rules may provide for compensation to be paid in a lump sum or by instalments.

885G Making and determination of claims

(1) The compensation rules must provide for how claims in respect of Division 3 losses are to be made and determined, and for how claimants are notified of the outcome of their claims.

(2) Without limiting subsection (1), the compensation rules may:
  (a) require a person making a claim to pay money, or transfer other property, in support of a claim; and
  (b) provide for claims to be disallowed unless persons exercise rights of set-off; and
  (c) set time limits for the making of claims; and

(d) provide for claims to be partially allowed (including, for example, in a case where the operator considers that the claimant's conduct contributed to the loss).

885H The source of funds—general

There must be an adequate source of funds available to cover claims made under the compensation arrangements in respect of Division 3 losses and in respect of any other losses covered by the arrangements.

Note 1: For example, the source of funds may consist of:
(a) a fidelity fund; or
(b) insurance arrangements; or
(c) an irrevocable letter of credit.

Note 2: The source of funds does not have to consist of a single thing. It may consist of a combination of different things.

885I Administration and monitoring

(1) The arrangements must include arrangements for:
(a) the administration of the compensation arrangements; and
(b) monitoring compliance with the compensation arrangements and reporting breaches of the arrangements to the board of the operator of the market; and
(c) monitoring the adequacy of the arrangements and reporting to the board of the operator of the market on the need for, or desirability of, changes to the compensation arrangements.

(2) Without limiting subsection (1), the arrangements may give responsibilities to:
(a) the operator of the market, or a related company, or a director or employee of the operator or a related company; or
(b) a committee; or
(c) another person acting under an arrangement with the operator.

(3) The people who may be members of a committee referred to in paragraph (2)(b) include, but are not limited to:
(a) participants in the market, or representatives of such participants; and
(b) members of the board of the operator of the market.

885J The losses to be covered—other matters to be taken into account

(1) In considering whether the arrangements are adequate, the Minister must also have regard to:

(a) the services provided by the market and by the participants in the market; and

(b) any risk assessment report in relation to the market given to the Minister under section 892K.

(2) The Minister may take into account such other matters as the Minister thinks appropriate.

Subdivision E—Other provisions about Division 3 arrangements

886A Only one claim in respect of the same loss

If:

(a) a claim by a person for compensation in respect of a particular Division 3 loss suffered by the person has been allowed under Division 3 arrangements; and

(b) the person makes or has made another claim under those Division 3 arrangements, or under other Division 3 arrangements, in respect of the same loss;

that other claim must not be allowed.

886B Regulations relating to fidelity funds

The regulations may include provisions relating to how a fidelity fund, or part of a fidelity fund, is to be dealt with if:

(a) the operator of a financial market becomes insolvent, within the meaning of the regulations; or

(b) a financial market merges with another financial market; or

(c) a financial market ceases to operate (otherwise than because of a merger), or ceases to be required by subsection 881A(1) to have approved compensation arrangements.

Division 4—NGF Compensation regime

Subdivision A—Application of Division

887A Markets to which this Division applies

This Division applies to a financial market that is operated by:

(a) a body corporate that is a member of the SEGC; or

(b) a body corporate that is a subsidiary of such a member;

other than any such market that the regulations state is not covered by this Division.

Subdivision B—Claims for and payment of compensation

888A The situations in which compensation may be claimed

(1) The situations in which compensation may be claimed in respect of a loss that is connected with a financial market to which this Division applies are as specified in the regulations.

(2) Without limiting subsection (1), a loss is connected with a financial market if it is caused by a participant, or past participant, in the market.

888B Kinds of compensation available

The regulations may provide that compensation under this Division is to take the form of a payment of money or some other form (for example, a transfer of financial products).

888C Amount of compensation payable

(1) The amount of compensation (including the value of any non-monetary compensation) to which a person is entitled in respect of a claim that is allowed is to be as determined in accordance with the regulations.

(2) Without limiting subsection (1), the regulations may do all or any of the following:

(a) provide for the amount of compensation to be determined by agreement with the claimant, or by arbitration if agreement cannot be reached; and

(b) provide for the payment of interest on the amount of the claimant's loss; and

(c) provide for the amount of compensation to be reduced by reference to a right of set-off available to the claimant or by reference to the extent to which the claimant was responsible for causing the loss; and

(d) impose an upper limit on the amount of compensation to which a person is entitled in respect of a claim in particular circumstances, or an upper limit on the total amount of compensation to which persons are entitled in respect of claims referable to a particular event or circumstance.

(3) An upper limit referred to in paragraph (2)(d) may be specified in the regulations or determined by a method specified in the regulations.

(4) The regulations may also provide for a claimant to be paid an amount in respect of the claimant's reasonable costs of, and disbursements incidental to, the making and proof of the claim (whether or not the claim is allowed in whole or in part).

(5) The regulations may also provide for a claimant to be paid an amount in respect of the claimant's reasonable costs of, and disbursements incidental to, attempting to recover the loss (whether or not the claim is allowed in whole or in part).

888D Payment of compensation

(1) The regulations may provide for the compensation to be paid in a lump sum or by instalments.

(2) The regulations may make other provisions in relation to how compensation is to be paid.

888E Making and determination of claims

(1) Claims are to be made and determined in accordance with:

(a) the regulations; and

(b) any relevant provisions of the SEGC's operating rules.

(2) Without limiting subsection (1), the regulations, or the SEGC's operating rules, may do all or any of the following:

(a) require a person making a claim to pay money, or transfer other property, to the SEGC in support of a claim;

(b) provide for claims to be disallowed unless persons exercise rights of set-off;

(c) set time limits for the making of claims;

(d) provide for claims to be partially allowed (including, for example, in a case where the SEGC considers that the claimant's conduct contributed to the loss).

(3) The regulations, or the SEGC's operating rules, may impose other requirements to be complied with by the SEGC in relation to claims (including, for example, requirements to notify claimants whether their claims have been allowed).

(4) If a provision of the SEGC's operating rules is wholly or partly inconsistent with regulations made for the purposes of this section, the provision of the SEGC's operating rules is, to the extent of the inconsistency, of no effect.

888F The SEGC has power to determine claims

The SEGC has power to determine claims in accordance with this Division.

888G Allowing a claim does not constitute an admission of any other liability

If the SEGC allows a claim, neither the allowance of the claim, nor any other act done by SEGC as a result of allowing the claim, constitutes an admission (by anyone) of any liability, other than the liability to provide compensation in respect of the claim in accordance with this Division.

888H Claimant may apply to Court if claim disallowed

(1) If the SEGC has disallowed a claim, the claimant may bring proceedings in the Court to establish the claim. The proceedings

must be brought within 3 months of notice of the disallowance of the claim.

(2) If the SEGC has neither allowed nor disallowed a claim within a reasonable period after it was made, the claimant may bring proceedings in the Court to establish the claim.

(3) If, in proceedings under subsection (1) or (2), the Court is satisfied that the claim should be allowed, the Court:

(a) must, by order, make a declaration accordingly and direct the SEGC to allow the claim and deal with it in accordance with this Division; and

(b) may, at any time after the order is made, on application made (whether before or after the order is made) by the claimant or the SEGC, give such directions relating to the claim as the Court thinks just and reasonable.

(4) In proceedings to establish a claim, all questions of costs are in the discretion of the Court.

888I Non-NGF property of the SEGC not available to meet claims

Money or other property of the SEGC that is not part of the NGF is not available to be applied in respect of a claim that has been allowed by the SEGC, whether or not under an order of the Court.

888J The SEGC may enter into contracts of insurance or indemnity

(1) The SEGC may enter into a contract with a person (the ***insurer***) carrying on a fidelity insurance business under which the SEGC will be insured or indemnified against liability in respect of claims to the extent and in the manner provided by the contract.

(2) The contract may relate to all claims or only to certain claims as specified in the contract. The contract may, for example, exclude claims relating to the conduct of a particular financial services licensee.

(3) The following persons each have qualified privilege in respect of the publication of a statement that the contract does not apply with respect to claims relating to the conduct of a particular financial services licensee:

(a) the SEGC and the members of its board;

(b) any body corporate that is a member of the SEGC;
(c) any subsidiary of such a member;
(d) any employee of a body covered by paragraph (a), (b) or (c).

(4) A person who has made a claim does not have a right of action against the insurer in respect of the contract or a right or claim in respect of money paid by the insurer in accordance with the contract.

888K NGF may be used to acquire financial products to be transferred as compensation

The SEGC may pay money out of the NGF to acquire financial products for the purpose of providing compensation (in accordance with the regulations) that takes the form of a transfer of financial products.

Subdivision C—The NGF

889A Continuation of the National Guarantee Fund

The National Guarantee Fund that continued to exist under section 928B of this Act before the repeal of that section by the *Financial Services Reform Act 2001* continues in existence as the National Guarantee Fund for the purposes of this Part.

889B Compensation to be provided out of the NGF

Compensation payable under this Division is to be paid out of the NGF.

889C The SEGC to keep the NGF

(1) The SEGC must keep and administer the NGF.

(2) The assets of the NGF are the property of SEGC, but must be kept separate from all other property and must be held on trust by the SEGC for the purposes of this Division.

889D What the NGF consists of

The NGF consists of:

(a) money and other property constituting the NGF before the commencement of this Chapter; and

(b) money paid into the NGF in accordance with section 889J or 889K; and

(c) money paid to the SEGC in accordance with regulations referred to in section 888E in support of a claim; and

(d) money paid to the SEGC under a contract of insurance or indemnity referred to in section 888J; and

(e) money paid into the NGF under subsection 889F(2); and

(f) the interest and profits from time to time accruing from the investment of the NGF; and

(g) money recovered by or on behalf of the SEGC in the exercise of a right of action that the SEGC has by virtue of a provision of this Part; and

(h) money and other property paid or transferred to the SEGC for inclusion in the NGF in accordance with regulations referred to in section 891B; and

(i) all other money and other property lawfully paid into, or forming part of, the NGF.

889E Power to borrow etc. for purposes of the NGF

(1) If the SEGC considers that, in the interests of the sound financial management of the NGF, money should be borrowed for the purpose of meeting a payment due out of the NGF, the SEGC may borrow money for that purpose on such terms and conditions as the SEGC thinks appropriate.

(2) The SEGC may give security, including over the assets of the NGF, in respect of the SEGC's obligations in relation to a borrowing under subsection (1).

(3) If:

(a) money borrowed under subsection (1) is a loan from a body corporate that is a member of the SEGC; and

(b) the body corporate borrowed money for the purpose of making the loan to the SEGC;

the SEGC may give security, including over the assets of the NGF, in relation to the body corporate's obligations in respect of the borrowing referred to in paragraph (b).

889F Money borrowed and paid to the SEGC

(1) This section applies if money borrowed by the SEGC under subsection 889E(1) is paid to the SEGC.

(2) The SEGC must pay the money into the NGF.

(3) If:

(a) the money was borrowed for the purpose of meeting a payment due out of the NGF; and

(b) the borrowed money has been paid into the NGF; and

(c) the payment due out of the NGF has not yet been made;

then, for the purposes of section 889J, the amount in the NGF is taken to be reduced by the amount of the borrowed money.

889G Money borrowed and not paid to the SEGC

(1) This section applies if money borrowed by the SEGC under subsection 889E(1) is not paid to the SEGC but is payable to other persons at the direction of the SEGC.

(2) The SEGC must not direct that any of the money be paid to a person unless the payment is of a kind that can, under section 889H, be made out of the NGF.

889H Payments out of the NGF

Subject to regulations made for the purposes of this section, the following are to be paid out of the NGF, in such order as the SEGC considers appropriate:

(a) amounts, including costs, disbursements and interest, that any provision of this Part requires to be paid in connection with claims;

(b) all legal and other expenses incurred:

(i) in investigating or defending claims; or

(ii) in relation to the NGF; or

(iii) in the exercise by the SEGC of the rights and powers vested in it by any provision of this Part in relation to the NGF;

(c) money payable out of the NGF under regulations referred to in subsection 892G(2);

(d) amounts to be paid to acquire financial products as mentioned in section 888K;

(e) premiums payable in respect of contracts of insurance or indemnity entered into by the SEGC under section 888J;

(f) payments of principal, interest and other amounts payable by the SEGC in respect of money borrowed, and security given, under section 889E;

(g) the expenses incurred in the administration of the NGF, including the salaries and wages of persons employed by the SEGC in relation to the NGF;

(h) amounts to be paid to a body corporate in accordance with a direction of the Minister under section 891A;

(i) any other money payable out of the NGF in accordance with a provision of this Part.

889I Minimum amount of the NGF

(1) The ***minimum amount*** in relation to the NGF is:

(a) unless paragraph (b) applies—$80,000,000; or

(b) if a determination is in force under subsection (2)—the amount specified in the determination.

(2) The SEGC may, in writing, determine an amount (whether greater than, or less than, $80,000,000) to be the minimum amount in relation to the NGF. The determination does not come into force until it has been approved by the Minister.

(3) The SEGC must publish in the *Gazette* notice of a determination that has come into force under subsection (2). The notice must specify the date when the determination came into force.

(4) If the amount in the NGF falls below the minimum amount, the SEGC must consider what action needs to be taken.

889J Levy by the SEGC

(1) If the amount in the NGF is less than the minimum amount applicable under section 889I, the SEGC may determine in writing that:

(a) the operators of all, or a class, of the financial markets to which this Division applies; or

(b) all, or a class, of the participants in any of these markets;

must pay a levy to the SEGC.

(2) The levy is payable to the SEGC, as agent for the Commonwealth, in accordance with this section.

Note: For the imposition and amount of the levy, see the *Corporations (National Guarantee Fund Levies) Act 2001*. There is a limit on the amount of levy that is payable to the SEGC in a financial year under that Act.

(3) A levy payable under this section must be paid within the period and in the manner determined in writing by the SEGC.

(4) Whenever an amount of levy (the ***levy amount***) is paid under this section, or under subsection 6(2) of the *Corporations (National Guarantee Fund Levies) Act 2001*, to the SEGC as agent for the Commonwealth:

(a) the SEGC must pay an amount equal to the levy amount to the Commonwealth; and

(b) the Consolidated Revenue Fund is appropriated by that amount for the purpose of payment to the SEGC; and

(c) the Commonwealth must pay the amount so appropriated to the SEGC; and

(d) the SEGC must pay the amount it receives under paragraph (c) into the NGF.

(5) Whenever an amount of levy (the ***levy amount***) is paid under subsection 6(1) of the *Corporations (National Guarantee Fund Levies) Act 2001*, to the operator of a financial market as agent for the Commonwealth:

(a) the operator must pay an amount equal to the levy amount to the SEGC; and

(b) the SEGC must pay an amount equal to the amount so paid to it to the Commonwealth; and

(c) the Consolidated Revenue Fund is appropriated by that amount for the purpose of payment to the SEGC; and

(d) the Commonwealth must pay the amount so appropriated to the SEGC; and

(e) the SEGC must pay the amount it receives under paragraph (d) into the NGF.

(6) A payment of an amount to the SEGC as required by paragraph (4)(c) or (5)(d) in respect of a particular levy amount is subject to a condition that, if the Commonwealth becomes liable to refund the whole or a part of the levy amount, the SEGC must pay the Commonwealth an amount equal to the amount that the Commonwealth is liable to refund. The SEGC may pay, out of the NGF, any amount so required to be paid to the Commonwealth.

(7) The *Financial Management and Accountability Act 1997* does not apply in relation to the payment of an amount of levy under this section to the SEGC, or the operator of a financial products market, as agent for the Commonwealth. However, the operation of that Act in relation to the following payments is not affected:

(a) the payment of an amount to the Commonwealth as required by paragraph (4)(a) or (5)(b); or

(b) the payment of an amount by the Commonwealth as required by paragraph (4)(c) or (5)(d).

The SEGC must, in accordance with the regulations, notify the Commonwealth of payments of levy it receives as agent for the Commonwealth, and the operator of a financial market must, in accordance with the regulations, notify the Commonwealth of payments it receives as agent for the Commonwealth as mentioned in paragraph (5)(a).

(8) An amount payable by the SEGC as required by paragraph (4)(a) may be set off against an amount payable to the SEGC as required by paragraph (4)(c), and an amount payable by the SEGC as required by paragraph (5)(b) may be set off against an amount payable to the SEGC as required by paragraph (5)(d).

889K Levy by market operator

(1) An operator of a financial market who must pay an amount of levy (the ***primary levy amount***) under section 889J may determine in writing that participants in the market must pay a levy (the

contributory levy). The determination must be such that the total of the amounts of contributory levy payable by the participants does not exceed the primary levy amount. The contributory levy is payable to the operator as agent for the Commonwealth.

Note: For the imposition and amount of the levy, see the *Corporations (National Guarantee Fund Levies) Act 2001*.

(2) If a determination is made under subsection (1), the contributory levy is payable by each participant in the market who, when the determination is made, is in a class of participants in the market determined in writing by the operator for the purposes of the levy.

(3) The amount of contributory levy payable by a participant under a determination under subsection (1) must be paid within the period, and in the manner, specified in writing by the operator either generally or in relation to particular participants or classes of participants.

(4) Whenever an amount of levy (the ***levy amount***) is paid under this section, or under subsection 6(3) of the *Corporations (National Guarantee Fund Levies) Act 2001*, to the operator of a financial market as agent for the Commonwealth:

(a) the operator must pay an amount equal to the levy amount to the Commonwealth; and

(b) the Consolidated Revenue Fund is appropriated by that amount for the purpose of payment to the SEGC; and

(c) the Commonwealth must pay the amount so appropriated to the SEGC; and

(d) the SEGC must pay the amount it receives under paragraph (c) into the NGF; and

(e) the operator's liability to pay the primary levy amount is reduced by the amount paid into the NGF under paragraph (d).

(5) A payment of an amount to the SEGC as required by paragraph (4)(c) in respect of a particular contributory levy amount is subject to a condition that, if the Commonwealth becomes liable to refund the whole or a part of the contributory levy amount, the SEGC must pay the Commonwealth an amount equal to the amount that the Commonwealth is liable to refund. The SEGC may pay, out of the NGF, any amount so required to be paid to the Commonwealth.

(6) The *Financial Management and Accountability Act 1997* does not apply in relation to the payment of an amount of levy under this section to the operator of a financial market as agent for the Commonwealth. However, the operation of that Act in relation to the following payments is not affected:

(a) the payment of an amount to the Commonwealth as required by paragraph (4)(a); or

(b) the payment of an amount by the Commonwealth as required by paragraph (4)(c).

The operator must, in accordance with the regulations, notify the Commonwealth of payments of levy it receives as agent for the Commonwealth.

Subdivision D—The SEGC

890A Minister to nominate the SEGC

(1) Subject to subsection (3), the Minister may nominate in writing as the ***Securities Exchanges Guarantee Corporation*** a body corporate (whenever incorporated) that is, for the purposes of the national corporate laws, a company limited by guarantee.

(2) ASIC must cause a copy of a nomination by the Minister under subsection (1) to be published in the *Gazette*.

(3) The Minister may only nominate a body corporate under subsection (1) if he or she is satisfied that:

(a) the Australian Stock Exchange Limited is a member of the body corporate; and

(b) each of the other members of the body corporate is a market licensee; and

(c) the body corporate's constitution provides that only market licensees may become or remain members of the body corporate; and

(d) the body corporate will, if nominated under subsection (1), be able to perform and exercise the SEGC's functions and powers under this Division adequately and with due regard to the interests of the public; and

(e) the body corporate has obtained, or will within a reasonable period after being nominated under subsection (1) obtain, indemnity insurance in respect of its liabilities for:

(i) negligence in; and

(ii) defalcation, or fraudulent misuse of property, by an officer, employee or agent of the body corporate in connection with;

the performance or exercise of the SEGC's functions or powers under this Division, or has made or will make other satisfactory provisions for meeting those liabilities; and

(f) the body corporate's business rules make satisfactory provision:

(i) for ensuring the safety of property received by the body corporate; and

(ii) generally for the protection of the interests of the public.

890B The SEGC's functions and powers

(1) In addition to the legal capacity and powers it has because of section 124, the SEGC has such functions and powers as are conferred, or expressed to be conferred, on it by or under this Part.

(2) Section 125 does not apply in relation to a function or power conferred, or expressed to be conferred, as mentioned in subsection (1) of this section.

(3) The SEGC is to perform the functions, and may exercise the powers, that are conferred on it by or under this Part.

(4) The SEGC is to administer the arrangements constituted by this Division.

890C Delegation

(1) Subject to this section, all decisions of the SEGC in relation to the performance of its functions, and the exercise of its powers, under this Part must be made by the board of the SEGC.

(2) The board of the SEGC must not delegate any of the following powers of the SEGC:

(a) the power to borrow under section 889E;

(b) the power to determine the order of payments under section 889H;

(c) the power to determine a minimum amount under section 889I;

(d) the power to make operating rules under section 890D;
(e) the power (or duty) to make a payment under section 891A.

(3) Otherwise, the board of the SEGC may delegate any of their powers under this Part in accordance with section 198D.

890D Operating rules of the SEGC

The SEGC may make rules (***operating rules***) relating to the performance or exercise of its powers or duties under this Part, or relating to matters permitted by this Part to be dealt with in its operating rules.

890E Legal effect of the SEGC's operating rules

The SEGC's operating rules have effect as a contract under seal between the SEGC and each member of the SEGC under which each of those persons agrees to observe the operating rules to the extent that they apply to the person and engage in conduct that the person is required by the operating rules to engage in.

890F Enforcement of the SEGC's operating rules

(1) If a person who is under an obligation to comply with or enforce any of the SEGC's operating rules fails to meet that obligation, an application to the Court may be made by:
(a) ASIC; or
(b) the SEGC; or
(c) a member of the SEGC; or
(d) a person aggrieved by the failure.

(2) After giving an opportunity to be heard to the applicant and the person against whom the order is sought, the Court may make an order giving directions to:
(a) the person against whom the order is sought; or
(b) if that person is a body corporate—the directors of the body corporate;
about compliance with, or enforcement of, the operating rules.

890G Changing the SEGC's operating rules

(1) As soon as practicable after a change is made to the SEGC's operating rules, the SEGC must lodge with ASIC written notice of the change.

(2) The notice must:
  (a) set out the text of the change; and
  (b) specify the date on which the change was made; and
  (c) contain an explanation of the purpose of the change.

(3) If no notice is lodged with ASIC within 21 days after the change is made, the change ceases to have effect.

890H Disallowance of changes to the SEGC's operating rules

(1) As soon as practicable after receiving a notice under section 890G, ASIC must send a copy of the notice to the Minister.

(2) Within 28 days after ASIC received the notice under section 890G, the Minister may disallow all or a specified part of the change to the SEGC's operating rules.

(3) As soon as practicable after all or part of a change is disallowed, ASIC must give notice of the disallowance to the SEGC. The change ceases to have effect, to the extent of the disallowance, when the SEGC receives the notice.

Subdivision E—Other provisions relating to compensation under this Division

891A Payment out of the NGF to prescribed body with arrangements covering clearing and settlement facility support

(1) If the Minister is satisfied that a body corporate specified in regulations made for the purposes of this section has made adequate arrangements covering all or part of the clearing and settlement system support that this Division provides for, the Minister may, in writing, direct the SEGC to pay a specified amount to that body corporate out of the NGF.

(2) The Minister may, in writing, impose conditions to be complied with by the SEGC or the body corporate, or both, in relation to the payment.

(3) The SEGC and the body corporate must comply with the direction and with any applicable conditions to which the direction is subject.

(4) Before giving a direction under subsection (1), the Minister must be satisfied that, after the payment is made, the NGF will still have an adequate amount of assets to meet claims.

891B Markets operated by bodies corporate that become members of the SEGC—regulations may deal with transitional provisions and other matters

(1) In this section:

joining market means a financial market that:

(a) is operated by a body corporate that becomes a member of the SEGC after the commencement of this Division, or by a subsidiary of such a body corporate; and

(b) is a financial market to which this Division applies.

(2) The regulations may make provisions of a transitional or saving nature dealing with the transition, in relation to a joining market, from the compensation regime previously applicable in relation to the market to the arrangements constituted by this Division.

(3) Without limiting subsection (2), the regulations may require money or other property (including money or other property in a fidelity fund) to be paid or transferred to the SEGC for inclusion in the NGF.

(4) The regulations may also provide for the allocation of part of the NGF as being for use for the purposes of claims arising in connection with the joining market.

(5) The regulations may make modifications of provisions of this Division and Division 5 that are necessary or convenient to take account of allocations of a kind referred to in subsection (4).

891C Regulations may make different provision in respect of different markets etc.

Regulations made for the purposes of a provision of this Division may make different provision in respect of different financial markets to which this Division applies and in respect of different circumstances.

Division 5—Provisions common to both kinds of compensation arrangements

892A Definitions

In this Division:

regulated fund means:

(a) a fidelity fund that is the source, or a source, of funds under Division 3 arrangements; or

(b) the NGF; or

(c) an account kept as required by subsection 892B(3).

relevant authority, in relation to Part 7.5 arrangements, means:

(a) if the arrangements are Division 3 arrangements of a financial market—the operator of the market; or

(b) if the arrangements are Division 4 arrangements—the SEGC.

892B How regulated funds are to be kept

(1) Money in:

(a) a fidelity fund that is the source, or a source, of funds under Division 3 arrangements; or

(b) the NGF;

must, until applied in paying claims or otherwise spent for the purposes of this Part, or invested in accordance with section 892C, be kept by the relevant authority in an account or accounts:

(c) with an Australian ADI; or

(d) of a kind prescribed by regulations made for the purposes of this paragraph;

separate from any account or accounts in which other money is kept.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) The regulations may impose additional requirements to be complied with in relation to the keeping of a regulated fund that covers 2 or more financial markets.

(3) If:

(a) a source of funds under Division 3 arrangements for a financial market is something other than a fidelity fund; and

(b) the operator of the market, or a person involved in the administration of the arrangements, receives money from that source of funds;

the money received must, until applied in paying claims or otherwise spent for the purposes of this Part, or invested in accordance with section 892C, be kept by the relevant authority in an account or accounts:

(c) with an Australian ADI; or

(d) of a kind prescribed by regulations made for the purposes of this paragraph;

separate from any account or accounts in which other money is kept.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

892C Money in regulated funds may be invested

(1) Money in a regulated fund that is not immediately required for the purposes of meeting claims may be invested in any way in which trustees are for the time being authorised by law in force in a State or Territory in this jurisdiction to invest trust funds.

(2) The relevant authority may, with the approval of ASIC, appoint a person to invest on behalf of the relevant authority money to which subsection (1) applies.

(3) ASIC must not grant approval to the appointment of a person under subsection (2) unless it is satisfied that:

(a) the person has appropriate qualifications and expertise to perform the duties of the appointment; and

(b) the relevant authority has adequate indemnity insurance in respect of its liabilities for any negligence, or any defalcation or fraudulent misuse of property, by the person in the performance of those duties, or has made other satisfactory provisions for meeting those liabilities.

(4) A person appointed under subsection (2) must perform the duties of the appointment in accordance with the directions of the relevant authority and subject to such conditions (if any) as the relevant authority imposes.

892D Powers of relevant authority to require production or delivery of documents or statements

(1) The relevant authority in relation to Part 7.5 arrangements may require a person:

(a) to deliver to the relevant authority documents or copies of documents, including documents of, or evidencing, title to financial products; or

(b) to make out and deliver to the relevant authority a statement of evidence;

that the relevant authority considers will assist it in determining a claim for compensation that has been made, or that the relevant authority considers are necessary for the purpose of exercising the subrogated rights and remedies it has in relation to a claim (see section 892F).

(2) The requirement must be made by notice in writing given to the person. The notice must:

(a) so far as it requires documents or copies referred to in paragraph (1)(a)—identify or describe the documents or copies that are required; and

(b) so far as it requires a statement referred to in paragraph (1)(b)—describe the matters in relation to which the person's evidence is required, and set out any requirements to be complied with in relation to how the statement is made out.

(3) The person must comply with the requirement.

(4) If the person fails, without reasonable excuse, to comply with the requirement, the relevant authority may apply to the Court for, and the Court may make, an order that the person comply with the direction.

(5) If the person fails, without reasonable excuse, to comply with the requirement, the relevant authority may disallow a claim made by the person.

Note: This subsection would not apply if the person subject to the requirement were someone other than a claimant.

(6) The relevant authority may, in writing, delegate the power given by this section to a person involved in the administration of the Part 7.5 arrangements.

(7) The relevant authority must return any documents (other than copies of documents) provided to it under this section as soon as practicable after the claim referred to in subsection (1) has been determined, and any proceedings relating to the determination of the claim (including any arising from the subrogation of the relevant authority for the claimant) have been completed.

(8) Subsection (7) does not apply if:
  (a) another law prohibits or prevents the return of the documents; or
  (b) the documents are no longer in the custody of the relevant authority; or
  (c) the person tells the relevant authority that the person does not want the documents back.

892E Power to require assistance for purpose of dealing with a claim

(1) If Division 3 arrangements give responsibilities (as mentioned in paragraph 885I(2)(c)) to a person acting under an arrangement with the operator of the market concerned, the person may give the operator a written request to give such assistance as the person requires for the purpose of fulfilling the person's responsibilities under the arrangement.

(2) The SEGC may give a member of the SEGC, or a subsidiary of a member of the SEGC, a written request to give such assistance as the SEGC requires for the purpose of:
  (a) dealing with a claim; or
  (b) the assessment of risks to the NGF.

(3) A requirement for assistance under subsection (1) or (2) must be reasonable.

(4) A person who is required under this section to give assistance must give the assistance.

(5) If the person fails to give the assistance, the person who required the assistance may apply to the Court for, and the Court may make, an order that the other person give the assistance.

892F Relevant authority's right of subrogation if compensation is paid

(1) If compensation in respect of a claim is paid under Part 7.5 arrangements, the relevant authority in relation to the arrangements is subrogated, to the extent of that payment, to all the claimant's rights and remedies in relation to the loss to which the claim relates.

(2) The relevant authority may also recover from the participant or participants who caused the loss the costs it incurred in determining the claim.

892G Excess money in compensation funds

(1) The regulations may determine, or provide a method for determining, when there is excess money in a regulated fund.

(2) The regulations may make provision in relation to how excess money in a regulated fund may be, or is to be, dealt with. The regulations may make different provision in relation to different funds.

892H Accounting and reporting for regulated funds

(1) The relevant authority in relation to Part 7.5 arrangements must, in relation to each regulated fund established in connection with the arrangements, keep written financial records that:

(a) correctly record and explain the fund's transactions and financial position and performance; and

(b) would enable true and fair financial statements to be prepared and audited;

and must retain the financial records for 7 years after the transactions covered by the records are completed.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) Within 2 months after the end of each financial year of the relevant authority, the authority must cause financial statements and notes to those financial statements (within the meaning of section 295) for the regulated fund to be made out as at the end of that financial year.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(3) A registered company auditor, or authorised audit company, must be appointed to audit the accounts of the regulated fund in accordance with whichever of the following paragraphs applies:

(a) if there is only one relevant authority for the fund, that relevant authority must appoint a registered company auditor, or authorised audit company, to audit the fund's accounts;

(b) if there is more than one relevant authority for the fund:

(i) each of those relevant authorities must ensure that a registered company auditor, or authorised audit company, is appointed in accordance with subparagraph (ii) to audit the fund's accounts; and

(ii) the appointment is to be made by one or more of the relevant authorities, with the consent of such of the relevant authorities (if any) as do not make the appointment; and

(iii) a relevant authority must not purport to appoint a person to audit the fund's accounts unless each other relevant authority (if any) who has not also made the appointment has consented to the appointment.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(4) If there is more than one relevant authority for a fund and they cannot agree on which auditor to appoint, ASIC may, on the written application of any of the authorities, appoint an auditor who consents to being so appointed.

(5) The auditor must:

(a) audit the accounts of the regulated fund and the financial statements; and

(b) do the things required by sections 307 and 308 in relation to those documents, as if the audit were being done under Chapter 2M.

(6) The relevant authority for the regulated fund must, within 14 days after receiving the auditor's report, lodge with ASIC a copy of the report and a copy of the financial statements. If there is more than one relevant authority for the regulated fund, the copy must be given to ASIC by at least one of those authorities, or else they all contravene this subsection.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(7) If the regulated fund is the NGF, the relevant authority (being the SEGC) must:

(a) give a copy of the audited financial statements to each member of the SEGC; and

(b) cause a copy of the audited financial statements to be laid before the annual general meeting of each member of the SEGC next following the making of that report.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

892I Division 3 arrangements—reporting in situations where compensation does not come out of a regulated fund

The regulations may impose reporting requirements to be complied with by the relevant authority in relation to Division 3 arrangements in relation to situations in which compensation under the arrangements is provided otherwise than out of a regulated fund.

892J Regulations may provide for qualified privilege in respect of certain matters

The regulations may provide for specified persons to have qualified privilege in respect of specified things done:

(a) under compensation rules forming part of Division 3 arrangements; or

(b) under regulations made for the purposes of a provision or provisions of Subdivision B of Division 4.

892K Risk assessment report

(1) For the purposes of monitoring compliance with, and the operation of, this Part, the Minister may, by giving the operator of a financial market written notice, require the operator:

(a) to cause a risk assessment report to be prepared in relation to the market in accordance with the requirements specified in the notice; and

(b) to give that report to the Minister by the time specified in the notice.

(2) The operator must comply with the notice.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Division 6—Miscellaneous

893A Exemptions and modifications by regulations

(1) The regulations may:

(a) exempt a person or class of persons from all or specified provisions of this Part; or

(b) exempt a financial market or class of financial markets from all or specified provisions of this Part; or

(c) provide that this Part applies in relation to a person or a financial market, or a class of persons or financial markets, as if specified provisions were omitted, modified or varied as specified in the regulations.

(2) For the purpose of this section, the ***provisions of this Part*** include:

(a) definitions in this Act, or in the regulations, as they apply to references in this Part; and

(b) any provisions of Part 7.2 that refer to provisions of this Part; and

(c) any provisions of Part 10.2 (transitional provisions) that relate to provisions of this Part.

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

Division 1—Application of Part

900A Derivatives and transactions etc. to which this Part applies

(1) Unless an express contrary intention appears, this Part applies, on the basis specified in section 3, to derivatives, derivative transactions, facilities, persons, bodies and other matters located in or otherwise connected with:

(a) a referring State; or

(b) the Northern Territory or the Capital Territory; or

(c) a place outside Australia.

(2) This section does not, by implication, affect the interpretation of provisions of this Act outside this Part (except to the extent appropriate for any provisions outside this Part apply or relate to matters covered by this Part).

Division 2—Regulation of derivative transactions: derivative transaction rules

Subdivision A—Power to make derivative transaction rules

901A ASIC may make derivative transaction rules

Power to make derivative transaction rules

(1) Subject to this Division, ASIC may, by legislative instrument, make rules (***derivative transaction rules***) dealing with matters as permitted by this section.

Note: Subdivision C deals with the process of making derivative transaction rules.

Main matters that may be dealt with in derivative transaction rules

(2) The derivative transaction rules may (subject to this Division) impose any of the following kinds of requirements:

(a) execution requirements (see subsection (5));

(b) reporting requirements (see subsection (6));

(c) clearing requirements (see subsection (7));

(d) requirements that are incidental or related to execution requirements, reporting requirements or clearing requirements.

Note: Paragraph (2)(d): the derivative transaction rules may (for example) impose requirements on the operator of a licensed derivative trade repository to facilitate compliance, by other persons, with reporting requirements.

Other matters that may be dealt with in derivative transaction rules

(3) The derivative transaction rules may also (subject to this Division) deal with matters incidental or related to requirements referred to in subsection (2), including any of the following:

(a) specifying the classes of derivative transactions in relation to which particular requirements apply;

(b) for execution requirements—specifying the licensed market or prescribed facility (or the class of licensed market or

prescribed facility) on which derivative transactions in a particular class must be entered into;

(c) for reporting requirements:

(i) specifying the licensed derivative trade repository or prescribed derivative trade repository (or the class of licensed derivative trade repository or prescribed derivative trade repository), to which information about derivative transactions, or positions, in a particular class must be reported; and

(ii) specifying the information that is required to be reported;

(d) for clearing requirements:

(i) specifying the licensed CS facility or prescribed facility (or the class of licensed CS facility or prescribed facility) through which derivative transactions in a particular class must be cleared; and

(ii) specifying a period within which transactions must be cleared;

(e) specifying the persons who are required to comply with requirements imposed by the rules;

(f) the manner and form in which persons must comply with requirements imposed by the rules;

(g) the circumstances in which persons are, or may be, relieved from complying with requirements in the rules that would otherwise apply to them;

(h) the keeping of records, or the provision of records or other information, relating to compliance with (or determining whether there has been compliance with) the rules;

(i) any other matters that the provisions of this Act provide may be dealt with in the derivative transaction rules.

Note: Paragraph (e): subject to section 901D, the persons who are required to comply with requirements imposed by the rules may (for example) be:

(a) persons who are parties to derivative transactions, or who are intermediaries or agents who facilitate or are otherwise involved in derivative transactions; or

(b) operators of financial markets on which derivative transactions are entered into; or

(c) operators of clearing and settlement facilities through which derivative transactions are cleared; or

(d) operators of licensed or prescribed derivative trade repositories.

Penalty amounts

(4) The derivative transaction rules may specify a penalty amount for a rule. A penalty amount must not exceed 1,000 penalty units.

*Meaning of **execution requirements***

(5) For the purpose of this Chapter, ***execution requirements*** are requirements for derivative transactions not to be entered into otherwise than on:

(a) a licensed market, the licence for which authorises a class of financial products that includes the derivatives to which the transactions relate to be dealt with on the market; or

(b) a facility that is (or that is in a class of facilities that is) prescribed by the regulations for the purpose of this paragraph in relation to a class of derivatives that includes the derivatives to which the transactions relate.

*Meaning of **reporting requirements***

(6) For the purpose of this Chapter, ***reporting requirements*** are requirements for information about derivative transactions, or about positions relating to derivative transactions, to be reported to:

(a) a licensed derivative trade repository, the licence for which authorises the repository to provide services in respect of a class of derivatives that includes the derivatives to which the transactions relate; or

(b) a facility that is (or that is in a class of facilities that is) prescribed by the regulations for the purpose of this paragraph in relation to a class of derivatives that includes the derivatives to which the transactions relate.

*Meaning of **clearing requirements***

(7) For the purpose of this Chapter, ***clearing requirements*** are requirements for derivative transactions to be cleared through:

(a) a licensed CS facility, the licence for which authorises the facility to provide services in respect of a class of financial products that includes the derivatives to which the transactions relate; or

(b) a facility that is (or that is in a class of facilities that is) prescribed by the regulations for the purpose of this

paragraph in relation to a class of derivatives that includes the derivatives to which the transactions relate.

Rules cannot generally impose requirements retrospectively

(8) The derivative transaction rules:

(a) cannot impose an execution requirement on a person in relation to a derivative transaction entered into before the requirement started to apply to the person; and

(b) cannot impose a reporting requirement on a person in relation to a derivative transaction entered into before the requirement started to apply to the person, or in relation to a position as it was at a time before the requirement started to apply to the person; and

(c) cannot impose a clearing requirement on a person in relation to a derivative transaction entered into before the requirement started to apply to the person, unless the transaction has not been cleared by the time the requirement starts to apply to the person.

901B Derivatives in relation to which rules may impose requirements

Requirements can only be imposed in relation to derivatives covered by a determination under this section

(1) The derivative transaction rules cannot impose execution requirements, reporting requirements, or clearing requirements, in relation to derivative transactions unless the derivatives to which the transactions relate are covered by a determination under this section that relates to requirements of that kind.

Minister may determine classes of derivatives in relation to which requirements may be imposed

(2) The Minister may, by legislative instrument, determine one or more classes of derivatives in relation to which execution requirements, reporting requirements, or clearing requirements, may be imposed.

Note 1: Different determinations may be made in relation to the different kinds of requirements.

Note 2: A class of derivatives can be described by reference to any matter, including (for example):

(a) the kind of asset, rate, index or commodity to which the derivatives relate; or

(b) the time when the derivatives were issued, or their date of maturity.

Making determinations: matters to which the Minister has regard

(3) In considering whether to make a determination under subsection (2) that would have the effect of allowing the derivative transaction rules to impose requirements of a particular kind in relation to certain derivatives, the Minister:

(a) must have regard to:

(i) the likely effect on the Australian economy, and on the efficiency, integrity and stability of the Australian financial system, of allowing the derivative transaction rules to impose requirements of that kind in relation to those derivatives; and

(ii) the likely regulatory impact of allowing the derivative transaction rules to impose requirements of that kind in relation to those derivatives; and

(iii) if those derivatives are or include commodity derivatives—the likely impact, on any Australian market or markets on which the commodities concerned may be traded, of allowing the derivative transaction rules to impose requirements of that kind in relation to those commodity derivatives; and

(b) may have regard to any other matters that the Minister considers relevant.

Note: Matters that the Minister may have regard to under paragraph (b) may, for example, include:

(a) any relevant international standards and international commitments; and

(b) matters raised in consultations under subsection (4), or in advice under subsection (6).

Making determinations: obligation to consult

(4) The Minister must not make a determination under subsection (2) unless the Minister has consulted ASIC, APRA and the Reserve Bank of Australia about the proposed determination.

(5) A failure to consult as required by subsection (4) does not invalidate a determination.

ASIC, APRA or Reserve Bank may advise Minister

(6) ASIC, APRA or the Reserve Bank of Australia may (on its own initiative or at the request of the Minister):
  (a) consider whether a determination should be made under subsection (2) that would have the effect of allowing the derivative transaction rules to impose requirements of a particular kind in relation to certain derivatives; and
  (b) advise the Minister accordingly.

Amendment and revocation of determinations

(7) The Minister may amend or revoke a determination under subsection (2) in like manner and subject to like conditions (see subsections 33(3) and (3AA) of the *Acts Interpretation Act 1901*).

901C Regulations may limit the transactions in relation to which rules may impose requirements

The regulations may provide that the derivative transaction rules:
  (a) cannot impose requirements (or certain kinds of requirements) in relation to certain classes of derivative transactions; or
  (b) can only impose requirements (or certain kinds of requirements) in relation to certain classes of derivative transactions in certain circumstances.

Note: A class of derivative transactions can be described by reference to any matter, including (for example):
  (a) the derivatives to which transactions relate; or
  (b) the circumstances in which transactions were entered into; or
  (c) the time when, or place where, transactions were entered into; or
  (d) the parties to transactions.

901D Regulations may limit the persons on whom requirements may be imposed

The regulations may provide that the derivative transaction rules:
  (a) cannot impose requirements (or certain kinds of requirements) on certain classes of persons; or

(b) can only impose requirements (or certain kinds of requirements) on certain classes of persons in certain circumstances.

Note: A class of persons may be described by reference to any matter, including (for example):
(a) the volume of derivative transactions entered into by persons over a period; or
(b) the characteristics or nature of persons or of their businesses; or
(c) the place of residence or business of persons.

Subdivision B—Compliance with derivative transaction rules

901E Obligation to comply with derivative transaction rules

(1) A person must comply with provisions of the derivative transaction rules that apply to the person.

Note: This section is a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this section, see section 1317S.

(2) If there is an inconsistency between the derivative transaction rules and the derivative trade repository rules, the derivative transaction rules prevail to the extent of the inconsistency.

Note 1: If there is an inconsistency between the market integrity rules and the derivative transaction rules, the market integrity rules prevail: see subsection 798H(3).

Note 2: If there is an inconsistency between the standards determined under section 827D and the derivative transaction rules, the standards prevail: see subsection 827D(2A).

901F Alternatives to civil proceedings

(1) The regulations may provide for a person who is alleged to have contravened section 901E to 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;
(d) enter into a legally enforceable undertaking.

(2) The penalty payable under regulations made under paragraph (1)(a) in relation to a derivative transaction rule must not exceed one-fifth of the penalty amount specified for the rule in the derivative transaction rules.

(3) Without limiting regulations that may be made for the purpose of paragraph (1)(d), those regulations may provide for one or more of the following kinds of undertakings:

(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.

901G Failure to comply with derivative transaction rules does not invalidate transaction etc.

A failure, in relation to a derivative transaction, to comply with a requirement of the derivative transaction rules does not invalidate the transaction or affect any rights or obligations arising under, or relating to, the transaction.

Subdivision C——The process of making of derivative transaction rules

901H Matters to which ASIC must have regard when making rules

In considering whether to make a derivative transaction rule, ASIC:

(a) must have regard to:

(i) the likely effect of the proposed rule on the Australian economy, and on the efficiency, integrity and stability of the Australian financial system; and

(ii) the likely regulatory impact of the proposed rule; and

(iii) if the transactions to which the proposed rule would relate would be or include transactions relating to commodity derivatives—the likely impact of the proposed rule on any Australian market or markets on which the commodities concerned may be traded; and

(b) may have regard to any other matters that ASIC considers relevant.

Note: Matters that ASIC may have regard to under paragraph (b) may, for example, include:

(a) any relevant international standards and international commitments; and

(b) matters raised in consultations (if any) under section 901J.

901J ASIC to consult before making rules

(1) ASIC must not make a derivative transaction rule unless ASIC:

(a) has consulted the public about the proposed rule; and

(b) has also consulted the following about the proposed rule:

(i) APRA;

(ii) the Reserve Bank of Australia;

(iii) any other person or body as required by regulations made for the purpose of this subparagraph.

Note: In some situations, consultation is not required: see section 901L.

(2) Without limiting the ways in which ASIC may comply with the obligation in paragraph (1)(a) to consult the public about a proposed rule, ASIC is taken to comply with that obligation if ASIC, on its website:

(a) makes the proposed rule, or a description of the content of the proposed rule, available; and

(b) invites the public to comment on the proposed rule.

(3) A failure to consult as required by subsection (1) does not invalidate a derivative transaction rule.

901K Ministerial consent to rules required

(1) ASIC must not make a derivative transaction rule unless the Minister has consented, in writing, to the making of the rule.

Note: In some situations, consent is not required: see section 901L.

(2) A consent under subsection (1) is not a legislative instrument.

901L Emergency rules: consultation and consent not required

(1) ASIC may make a derivative transaction rule without consulting as required by section 901J, and without the consent of the Minister

as required by section 901K, if ASIC is of the opinion that it is necessary, or in the public interest, to do so in order to protect:

(a) the Australian economy; or

(b) the efficiency, integrity and stability of the Australian financial system.

(2) However, if ASIC does so, ASIC must:

(a) provide the Minister, on the following day, with a written explanation of the need for the rule; and

(b) amend or revoke the rule in accordance with any written directions of the Minister.

(3) A direction under paragraph (2)(b) is not a legislative instrument.

901M Amendment and revocation of derivative transaction rules

(1) ASIC may amend or revoke a derivative transaction rule in like manner and subject to like conditions (see subsections 33(3) and (3AA) of the *Acts Interpretation Act 1901*).

(2) However, the requirements of sections 901H, 901J and 901K do not apply in relation to an amendment or revocation pursuant to a direction by the Minister under paragraph 901L(2)(b).

Division 3—Regulation of licensed derivative trade repositories: supervision by ASIC

902A ASIC to supervise licensed derivative trade repositories

(1) ASIC has the function of supervising licensed derivative trade repositories.

(2) If a licensed derivative trade repository is wholly or partly operated in a foreign country, ASIC may, to such extent as ASIC considers appropriate, perform the function of supervising the repository by satisfying itself:

(a) that the regulatory regime that applies in relation to the repository in that country provides for adequate supervision of the repository; or

(b) that adequate cooperative arrangements are in place with an appropriate authority of that country to ensure that the repository will be adequately supervised by that authority.

Division 4—Regulation of licensed derivative trade repositories: derivative trade repository rules

Subdivision A—Power to make derivative trade repository rules

903A ASIC may make derivative trade repository rules

Power to make derivative trade repository rules

(1) Subject to this Division, ASIC may, by legislative instrument, make rules (***derivative trade repository rules***) dealing with matters as permitted by this section.

Note: Subdivision C deals with the process of making derivative trade repository rules.

Main matters that may be dealt with in derivative trade repository rules

(2) The derivative trade repository rules may (subject to this Division) deal with all or any of the following matters (including by imposing requirements for or relating to any of the following matters):

(a) the manner in which licensed derivative trade repositories provide their services;

(b) the handling or use of derivative trade data by licensed derivative trade repositories and their officers and employees, including the following:

(i) the acceptance and retention of derivative trade data;

(ii) the creation of statistical data from derivative trade data;

(iii) the use and disclosure of, and provision of access to, derivative trade data (including statistical data referred to in subparagraph (ii));

(c) the governance, management and resources (including financial, technological and human resources) of licensed derivative trade repositories, including the following:

(i) the handling of conflicts of interest;

(ii) the monitoring and enforcement of compliance with obligations;

(iii) the resources that licensed derivative trade repositories should have (including requirements relating to the experience, qualifications or fitness for office of operators and their officers and employees);

(iv) the integrity and security of computer systems and other systems;

(v) operational reliability;

(vi) business continuity planning;

(vii) the operational separation of functions;

(viii) the outsourcing of functions to other entities;

(d) the disclosure of conditions (including fees) on which licensed derivative trade repositories provide their services;

(e) the reporting to ASIC or other regulators of matters related to licensed derivative trade repositories.

Note: Paragraph (a): the rules may (for example) require licensed derivative trade repositories to provide open and non-discriminatory access to their services.

Other matters that may be dealt with in derivative trade repository rules

(3) The derivative trade repository rules may also (subject to this Division) deal with matters incidental or related to matters referred to in subsection (2), including any of the following:

(a) specifying the persons (being persons referred to in section 903B) who are required to comply with requirements imposed by the rules;

(b) the manner and form in which persons must comply with requirements imposed by the rules;

(c) the circumstances in which persons are, or may be, relieved from complying with requirements in the rules that would otherwise apply to them;

(d) the keeping of records, or the provision of records or other information, relating to compliance with (or determining whether there has been compliance with) the rules;

(e) any other matters that the provisions of this Act provide may be dealt with in the derivative trade repository rules.

Penalty amounts

(4) The derivative trade repository rules may specify a penalty amount for a rule. A penalty amount must not exceed 1,000 penalty units.

Rules may provide that derivative trade data is taken to be given to ASIC in confidence

(5) The derivative trade repository rules may provide, either generally or in circumstances specified in the rules, that information given to ASIC, by the operator (or an officer of the operator) of a licensed derivative trade repository, under a provision of:

(a) this Part; or

(b) regulations made for the purpose of this Part; or

(c) the derivative transaction rules or the derivative trade repository rules;

is to be 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 this Act.

(6) Derivative trade repository rules that provide as mentioned in subsection (5) have effect accordingly for the purpose of section 127 of the ASIC Act.

Note: Subsections (5) and (6) do not limit the circumstances in which information given to ASIC by a licensed derivative trade repository may, for the purpose of section 127 of the ASIC Act, be regarded as having been given to ASIC in confidence in connection with the performance of ASIC's functions under this Act.

903B Rules may only impose requirements on operators and officers of licensed derivative trade repositories

The only persons on whom the derivative trade repository rules may impose requirements are:

(a) operators of licensed derivative trade repositories; and

(b) officers of licensed derivative trade repositories.

Note: Requirements may also be imposed on these persons by the derivative transaction rules.

903C Regulations may limit how rules may deal with matters related to derivative trade data

The regulations may prescribe limits on the extent to which, or the way in which, the derivative trade repository rules may deal with matters referred to in paragraph 903A(2)(b).

Subdivision B—Compliance with derivative trade repository rules

903D Obligation to comply with derivative trade repository rules

A person must comply with provisions of the derivative trade repository rules that apply to the person.

Note 1: This section is a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this section, see section 1317S.

Note 2: The only persons on whom derivative trade repository rules may impose requirements are operators of licensed derivative trade repositories, and officers of such operators (see section 903B).

Note 3: If there is an inconsistency between the market integrity rules and the derivative trade repository rules, the market integrity rules prevail: see subsection 798H(3).

Note 4: If there is an inconsistency between the standards determined under section 827D and the derivative trade repository rules, the standards prevail: see subsection 827D(2A).

Note 5: If there is an inconsistency between the derivative transaction rules and the derivative trade repository rules, the derivative transaction rules prevail: see subsection 901E(2).

903E Alternatives to civil proceedings

(1) The regulations may provide for a person who is alleged to have contravened section 903D to 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;

(d) enter into a legally enforceable undertaking.

(2) The penalty payable under regulations made under paragraph (1)(a) in relation to a derivative trade repository rule must not exceed one-fifth of the penalty amount specified for the rule in the derivative trade repository rules.

(3) Without limiting regulations that may be made for the purpose of paragraph (1)(d), those regulations may provide for one or more of the following kinds of undertakings:

(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.

Subdivision C—The process of making derivative trade repository rules

903F Matters to which ASIC has regard when making rules

In considering whether to make a derivative trade repository rule, ASIC:

(a) must have regard to:

(i) the likely effect of the proposed rule on the Australian economy, and on the efficiency, integrity and stability of the Australian financial system; and

(ii) the likely regulatory impact of the proposed rule; and

(b) may have regard to any other matters that ASIC considers relevant.

Note: Matters that ASIC may have regard to under paragraph (b) may, for example, include:

(a) any relevant international standards and international commitments; and

(b) matters raised in consultations (if any) under section 903G.

903G ASIC to consult before making rules

(1) ASIC must not make a derivative trade repository rule unless ASIC:

(a) has consulted the public about the proposed rule; and

(b) has also consulted any other person or body as required by regulations made for the purpose of this paragraph.

Note: In some situations, consultation is not required: see section 903J.

(2) Without limiting the ways in which ASIC may comply with the obligation in paragraph (1)(a) to consult the public about a proposed rule, ASIC is taken to comply with that obligation if ASIC, on its website:

(a) makes the proposed rule, or a description of the content of the proposed rule, available; and

(b) invites the public to comment on the proposed rule.

(3) A failure to consult as required by subsection (1) does not invalidate a derivative trade repository rule.

903H Ministerial consent to rules required

(1) ASIC must not make a derivative trade repository rule unless the Minister has consented, in writing, to the making of the rule.

Note: In some situations, consent is not required: see section 903J.

(2) A consent under subsection (1) is not a legislative instrument.

903J Emergency rules: consultation and consent not required

(1) ASIC may make a derivative trade repository rule without consulting as required by section 903G, and without the consent of the Minister as required by section 903H, if ASIC is of the opinion that it is necessary, or in the public interest, to do so in order to protect:

(a) the Australian economy; or

(b) the efficiency, integrity and stability of the Australian financial system; or

(c) the security or confidentiality of derivative trade data.

(2) However, if ASIC does so, ASIC must:

(a) provide the Minister, on the following day, with a written explanation of the need for the rule; and

(b) amend or revoke the rule in accordance with any written directions of the Minister.

(3) A direction under paragraph (2)(b) is not a legislative instrument.

903K Amendment and revocation of derivative trade repository rules

(1) ASIC may amend or revoke a derivative trade repository rule in like manner and subject to like conditions (see subsections 33(3) and (3AA) of the *Acts Interpretation Act 1901*).

(2) However, the requirements of sections 903F, 903G and 903H do not apply in relation to an amendment or revocation pursuant to a direction by the Minister under paragraph 903J(2)(b).

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

Subdivision A—Obligations

904A General obligations

A derivative trade repository licensee must:

(a) comply with the conditions on the licence; and

(b) if the licensee is a foreign body corporate—be registered under Division 2 of Part 5B.2; and

(c) take all reasonable steps to ensure that no disqualified individual becomes, or remains, involved in the operator (see Division 2 of Part 7.4).

Note: Derivative trade repository licensees must also comply with other provisions of this Part that apply to them.

904B Obligations relating to derivative trade data

Obligation relating to use or disclosure of derivative trade data

(1) A derivative trade repository licensee, or an officer or employee of a derivative trade repository licensee, may use or disclose derivative trade data only if:

(a) the use or disclosure:

(i) is for the purpose of, or occurs in the course of, the provision of the repository's services, or the performance of the duties of the officer or employee as an officer or employee of the licensee; and

(ii) is not excluded by regulations made for the purpose of this subparagraph; or

(b) the use or disclosure is required or permitted by any of the following:

(i) another provision of this Act;

(ii) the derivative transaction rules or the derivative trade repository rules;

(iii) another law of the Commonwealth, or a law of a State or Territory.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Obligation to comply with requests from regulators for derivative trade data

(2) Any of the following persons or bodies 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:

(a) ASIC;

(b) APRA;

(c) the Reserve Bank of Australia;

(d) a person or body prescribed by the regulations for the purpose of this paragraph;

(e) another derivative trade repository licensee.

(3) Regulations must not be made prescribing a person or body for the purpose of paragraph (2)(d) unless the Minister is satisfied that there are adequate controls on the use or disclosure of any derivative trade data provided to the person or body pursuant to requests under subsection (2).

(4) The regulations may require that certain information must not be included in derivative trade data provided pursuant to requests, or a class of requests, under subsection (2).

(5) If:

(a) a derivative trade repository licensee receives a request for derivative trade data under subsection (2); and

(b) the licensee is not excused or prohibited from complying with the request by:

(i) regulations made for the purpose of this subparagraph; or

(ii) the derivative trade repository rules or the derivative transaction rules;

the licensee must comply with the request, subject to any requirements of regulations made for the purpose of subsection (4).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Obligations relating to the creation of statistical data

(6) The regulations may:

(a) impose obligations on operators of licensed derivative trade repositories to:

(i) create statistical information from derivative trade data; and

(ii) to provide that statistical information to a person or persons, or to make it available, in accordance with the regulations; and

(b) provide for offences in relation to those obligations.

Note: For the limit on penalties for offences against the regulations, see paragraph 1364(2)(w).

904C Obligation to notify ASIC of certain matters

Notification of inability to meet obligations under 904A

(1) A derivative trade repository licensee must give written notice to ASIC, as soon as practicable, if the licensee becomes aware that it may no longer be able to meet, or has breached, an obligation under section 904A.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) If ASIC receives a notice under subsection (1), ASIC may give the Minister advice about the matter to which the notice relates.

Notification of changes to directors, secretaries or senior managers

(3) As soon as practicable after a person becomes or ceases to be a director, secretary or senior manager of a derivative trade repository licensee or of a holding company of a derivative trade repository licensee (including when a person changes from one of those positions to another), the licensee must give written notice of this to ASIC. The notice must include such other information about the matter as is prescribed by the regulations for the purpose of this subsection.

Note 1: To the extent that the licensee is required to give the notice and information under any other provision of this Act, the licensee may

comply with this subsection by doing so. It need not provide the same information twice.

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

904D Obligation to assist ASIC, APRA and the Reserve Bank

(1) Each of the following is a regulator to which this section applies:
  (a) ASIC;
  (b) APRA;
  (c) the Reserve Bank of Australia.

(2) A derivative trade repository licensee must give such assistance to a regulator to which this section applies as the regulator reasonably requests in relation to the performance of the regulator's functions.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(3) Such assistance may include showing the regulator the licensee's books or giving the regulator derivative trade data or other information.

904E Obligation to give ASIC access to derivative trade repository facilities

A derivative trade repository licensee must give ASIC such reasonable access to the repository's facilities as ASIC requests for any of the purposes of this Part.

Note: Failure to comply with this section is an offence (see subsection 1311(1)).

Subdivision B—Powers of Minister and ASIC to give directions etc.

904F Minister's power to give directions to licensee not complying with obligations

(1) If the Minister considers that a derivative trade repository licensee is not complying with its obligations as a derivative trade repository licensee under this Part, the Minister may give the licensee a written direction to do specified things that the Minister

believes will promote compliance by the licensee with those obligations.

(2) The licensee must comply with the direction.

(3) If the licensee fails to comply with the direction, ASIC may apply to the Court for, and the Court may make, an order that the licensee comply with the direction.

(4) The Minister may vary or revoke a direction at any time by giving written notice to the licensee.

904G ASIC's power to give directions to licensee not complying with obligations

(1) If ASIC considers that a derivative trade repository licensee is not complying with its obligations as a derivative trade repository licensee under this Part, ASIC may give the licensee written advice that it intends to give the licensee a specified direction to do specified things that ASIC believes will promote compliance by the licensee with those obligations. The advice must include the reasons for ASIC's intention to give the direction.

(2) As soon as practicable after giving the advice to the licensee, ASIC must give notice of the advice to the operator of each financial market, and of each clearing and settlement facility, with which the licensed derivative trade repository has arrangements to provide services relating to derivative trade data.

(3) If:

(a) after receiving ASIC's advice and reasons, the licensee does not take steps that in ASIC's view are adequate to address the situation; and

(b) ASIC still considers that it is appropriate to give the direction to the licensee;

ASIC may give the licensee the direction, in writing, with a statement setting out the reasons for giving the direction.

(4) The direction has effect until the earlier of the following times:

(a) the time ASIC revokes the direction under subsection (9);

(b) the end of the period (which may be up to 21 days) specified in the direction as the period during which the direction is effective.

(5) While the direction has effect, the licensee must comply with the direction.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(6) If the licensee fails to comply with the direction, ASIC may apply to the Court for, and the Court may make, an order that the licensee comply with the direction.

(7) As soon as practicable after making or varying (see subsection (8)) the direction, ASIC must give a copy of the direction or variation to each of the operators referred to in subsection (2).

(8) ASIC may vary the direction by giving written notice to the licensee.

(9) ASIC may revoke the direction by giving written notice to the licensee. ASIC must also give written notice of the revocation to each of the operators mentioned in subsection (2).

904H ASIC's power to give directions requiring special reports

(1) ASIC may give a derivative trade repository licensee a written direction requiring the licensee to give ASIC a special report on specified matters. ASIC may give a copy of the report to the Minister.

(2) The direction may also require the licensee to give ASIC an audit report on the special report. ASIC must nominate a specified person or body that is suitably qualified to prepare the audit report.

(3) The licensee must give the special report, and audit report (if required), to ASIC within the time required by the direction.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

904J ASIC may assess licensee's compliance

(1) ASIC may do an assessment of how well a derivative trade repository licensee is complying with any or all of its obligations as a derivative trade repository licensee under this Part. In doing the assessment, ASIC may take account of any information and reports that it thinks appropriate.

(2) As soon as practicable after doing an assessment under this section, ASIC must give a written report on the assessment to the licensee. ASIC may give a copy of the report to the Minister.

(3) If an assessment, or part of an assessment, relates to any other person's affairs to a material extent, ASIC may, at the person's request or on its own initiative, give the person a copy of the report on the assessment or the relevant part of the report.

(4) If an assessment, or part of an assessment, relates to a serious contravention of a law of the Commonwealth or of a State or Territory, ASIC may give a copy of the report on the assessment, or the relevant part of the report, to:

(a) the Australian Federal Police; or

(b) the Chief Executive Officer of the Australian Crime Commission or a member of the staff of the ACC (within the meaning of the *Australian Crime Commission Act 2002*); or

(c) the Director of Public Prosecutions; or

(d) a person or body prescribed by the regulations for the purpose of this paragraph.

(5) The written report on an assessment, or part of the report, may be published in any way that ASIC thinks appropriate.

(6) A report on an assessment is not a legislative instrument.

904K Directions relating to derivative trade data if repository ceases to be licensed

(1) This section applies to derivative trade data that was being retained in a derivative trade repository before the repository ceased to be a licensed derivative trade repository.

(2) ASIC may give a written direction to a person referred to in subsection (3):

(a) requiring the person to deal, in a specified way, with derivative trade data to which this section applies; or

(b) imposing limitations on the use or disclosure by the person of derivative trade data to which this section applies.

Note: A direction could, for example, require the person:

(a) to destroy all records of the data over which the person has control; or

(b) to transfer all records of the data over which the person has control to a licensed derivative trade repository or a prescribed derivative trade repository.

(3) The direction may be given to:

(a) the operator, or former operator, of the repository; or

(b) an officer or employee, or a former officer or employee, of the operator, or former operator, of the repository.

(4) While the direction has effect, the person to whom the direction is given must comply with the direction.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(5) If the person to whom the direction is given fails to comply with the direction, ASIC may apply to the Court for, and the Court may make, an order that the person comply with the direction.

(6) The direction has effect until it is revoked under subsection (7).

(7) ASIC may vary or revoke the direction by giving written notice to the person to whom the direction was given.

Division 6—Regulation of licensed derivative trade repositories: licensing

Subdivision A—Requirement for some trade repositories to be licensed

905A Regulations may identify derivative trade repositories as being required to be licensed

(1) The regulations may identify one or more classes of derivative trade repositories as being required to be licensed under this Part.

Note: Subject to this Part, derivative trade repositories may be licensed under this Part even if they are not required to be licensed.

(2) If the regulations identify a class of derivative trade repositories as being required to be licensed under this Part, a person must not operate, or hold out that the person operates, a repository in the class if the person does not have an Australian derivative trade repository licence that authorises the person to operate the repository.

Note 1: Failure to comply with this subsection is an offence: see subsection 1311(1).

Note 2: For other offences dealing with holding out, see section 907A.

Subdivision B—Granting of licences

905B How to apply for a licence

A body corporate may, by lodging an application with ASIC in the prescribed form, apply for a licence (an ***Australian derivative trade repository licence***) authorising the body corporate to operate a derivative trade repository.

Note 1: See section 350 for how to lodge an application in the prescribed form.

Note 2: For fees in respect of lodging applications, see Part 9.10.

905C When a licence may be granted

General

(1) ASIC may grant an applicant an Australian derivative trade repository licence if ASIC is satisfied that:

(a) the application was made in accordance with section 905B; and

(b) the applicant will comply with the obligations that will apply if the licence is granted; and

(c) no disqualified individual appears to be involved in the applicant (see Division 2 of Part 7.4).

This subsection has effect subject to subsections (2) and (3).

Note: ASIC must also have regard to the matters in section 905P in deciding whether to grant a licence.

Foreign bodies

(2) If the applicant is a foreign body corporate, ASIC must not grant the applicant a licence unless the applicant is registered under Division 2 of Part 5B.2.

Disqualified individuals

(3) ASIC must not grant the applicant a licence unless 42 days have passed since the application was made and ASIC has not given a notice under subsection 853D(2) to the applicant within that 42 days.

905D Publication of notice of licence grant

If ASIC grants an Australian derivative trade repository licence, ASIC must publish a notice in the *Gazette* stating:

(a) the name of the licensee; and

(b) when the licence was granted; and

(c) the conditions on the licence.

905E More than one derivative trade repository covered by the same licence

(1) The same Australian derivative trade repository licence may authorise the licensee to operate 2 or more derivative trade repositories.

(2) In that case, a reference in this Chapter to the derivative trade repository to which an Australian derivative trade repository licence relates is taken instead to be a reference to each of those derivative trade repositories severally.

(3) Before varying the conditions on an Australian derivative trade repository licence so as to add another derivative trade repository that the licensee is authorised to operate, ASIC must be satisfied of the matters listed in subsection 905C(1) in relation to the repository.

(4) An Australian derivative trade repository licence that authorises the licensee to operate 2 or more derivative trade repositories may be suspended or cancelled under Subdivision D in respect of one or some of those repositories only, as if the licensee held a separate licence for each of the repositories.

Subdivision C—The conditions on a licence

905F The conditions on the licence

(1) ASIC may, at any time:

(a) impose conditions, or additional conditions, on an Australian derivative trade repository licence; or

(b) vary or revoke conditions imposed on such a licence;

by giving written notice to the licensee. ASIC must also publish a notice in the *Gazette* with details of the action and when it took effect.

Note: As well as the requirements in this section, ASIC must also have regard to the matters in section 905P.

(2) ASIC may do so:

(a) on its own initiative, subject to subsection (3); or

(b) if the licensee lodges an application with ASIC in the prescribed form, seeking the imposition of the conditions or

additional conditions, or seeking the variation or revocation of conditions.

Note 1: See section 350 for how to lodge an application in the prescribed form.

Note 2: For fees in respect of lodging applications, see Part 9.10.

(3) ASIC may only impose conditions or additional conditions, or vary or revoke conditions, on the licence on ASIC's own initiative if:

(a) ASIC considers it appropriate to do so having regard to:

(i) the licensee's obligations as a derivative trade repository licensee under this Part; and

(ii) any change in the operations of the derivative trade repository, or in the conditions in which the repository is operating; and

(b) ASIC gives the licensee written notice of the proposed action and an opportunity to make a submission before it takes effect.

This subsection does not apply to ASIC imposing conditions when a licence is granted.

(4) ASIC must ensure that each Australian derivative trade repository licence is subject to conditions that specify:

(a) the particular derivative trade repository that the licensee is authorised to operate; and

(b) the class or classes of derivatives in respect of which the repository can provide services for the purposes of this Part.

Note: The licence condition required by paragraph (b) does not apply to services that a licensed derivative trade repository provides otherwise than for the purposes of this Part.

Subdivision D—When a licence can be varied, suspended or cancelled

905G Varying licences

ASIC may vary an Australian derivative trade repository licence to take account of a change in the licensee's name if the licensee lodges an application with ASIC in the prescribed form, seeking the variation.

Note 1: The conditions on the licence can be varied under section 905F.

Note 2: See section 350 for how to lodge an application in the prescribed form.

Note 3: For fees in respect of lodging applications, see Part 9.10.

905H Immediate suspension or cancellation

ASIC may, by giving written notice to a derivative trade repository licensee, suspend the licence for a specified period, or cancel it, if:

(a) the licensee ceases to carry on the business of operating the derivative trade repository; or

(b) the licensee becomes an externally-administered body corporate; or

(c) the licensee asks ASIC to do so.

905J Suspension or cancellation following hearing and report

(1) If ASIC considers that a derivative trade repository licensee has breached, or is in breach of, one or more of its obligations as a derivative trade repository licensee under this Part, ASIC may give the licensee a written notice that requires the licensee to show cause, at a hearing before a specified person, why the licence should not be suspended or cancelled.

(2) The notice must specify:

(a) the grounds on which it is proposed to suspend or cancel the licence; and

(b) a reasonable time and place at which the hearing is to be held.

However, if the licensee consents, the person conducting the hearing may fix a different time or place.

(3) The person conducting the hearing must:

(a) give the licensee an opportunity to be heard at the hearing; and

(b) give ASIC:

(i) a report about the hearing; and

(ii) a recommendation about the grounds in the notice on which it is proposed to suspend or cancel the licence.

(4) After considering the report and recommendation, ASIC may:

(a) decide to take no further action in relation to the matter and give written advice of that decision to the licensee; or

(b) suspend the licence for a specified period, or cancel the licence, by giving written notice to the licensee.

Note: ASIC must also have regard to the matters in section 905P.

(5) None of the following is a legislative instrument:

(a) a notice under subsection (1);

(b) a report under subsection (3) (if it is in writing).

905K Effect of suspension

(1) A person whose Australian derivative trade repository licence is suspended is taken not to hold that licence while it is suspended.

(2) However, ASIC may specify in the written notice to the licensee under section 905H, or paragraph 905J(4)(b), that subsection (1) of this section does not apply for specified purposes.

905L Variation or revocation of suspension

ASIC may at any time vary or revoke a suspension of an Australian derivative trade repository licence by giving written notice to the licensee.

905M Publication of notice of licence suspension or cancellation

(1) If ASIC:

(a) suspends, or varies or revokes a suspension of, an Australian derivative trade repository licence; or

(b) cancels an Australian derivative trade repository licence;

ASIC must publish a notice in the *Gazette* to that effect.

(2) The notice must state when the action took effect.

905N Suspension and cancellation only in accordance with this Subdivision

An Australian derivative trade repository licence cannot be varied, suspended or cancelled otherwise than in accordance with this Subdivision.

Note: The conditions on the licence can be varied under section 905F.

Subdivision E—Other matters

905P Matters to be taken into account by ASIC

(1) ASIC must have regard to certain matters in deciding whether to:

(a) grant an applicant an Australian derivative trade repository licence under section 905C; or

(b) impose, vary or revoke conditions on such a licence under section 905F; or

(c) suspend or cancel such a licence under section 905J.

(2) The matters ASIC must have regard to are as follows:

(a) the structure, or proposed structure, of the derivative trade repository;

(b) the nature of the activities conducted, or proposed to be conducted, by the derivative trade repository;

(c) the size, or proposed size, of the derivative trade repository;

(d) the persons who are, or may be, required to report derivative trade data to the derivative trade repository;

(e) the technology used, or proposed to be used, in the operation of the derivative trade repository;

(f) whether it would be in the public interest to take the action referred to in subsection (1).

ASIC may also have regard to any other matter that ASIC considers relevant.

Division 7—Regulation of prescribed derivative trade repositories

906A Regulations may impose obligations and confer powers

(1) The regulations may:

(a) impose obligations on operators of prescribed derivative trade repositories, and on their officers and employees; and

(b) confer powers on ASIC in relation to prescribed derivative trade repositories; and

(c) provide for offences in relation to those obligations and powers.

Note: For the limit on penalties for offences against the regulations, see paragraph 1364(2)(w).

(2) Without limiting the obligations and powers that may be conferred or imposed, they may include obligations and powers of similar kinds to those that apply under the derivative trade repository rules, or under Division 5, in relation to licensed derivative trade repositories.

(3) The regulations may provide, either generally or in circumstances specified in the regulations, that information given to ASIC, by the operator (or an officer of the operator) of a prescribed derivative trade repository, under a provision of the regulations is to be 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 this Act.

(4) Regulations that provide as mentioned in subsection (3) have effect accordingly for the purpose of section 127 of the ASIC Act.

Note: Subsections (3) and (4) do not limit the circumstances in which information given to ASIC by a prescribed derivative trade repository may, for the purpose of section 127 of the ASIC Act, be regarded as having been given to ASIC in confidence in connection with the performance of ASIC's functions under this Act.

Division 8—Other matters

907A Other prohibitions on holding out

A person must not hold out:

(a) that the person has an Australian derivative trade repository licence; or

(b) that the operation of a derivative trade repository by the person is authorised by an Australian derivative trade repository licence; or

(c) that a facility is prescribed by the regulations for the purpose of paragraph 901A(5)(b); or

(d) that a facility is prescribed by the regulations for the purpose of paragraph 901A(6)(b); or

(e) that a facility is prescribed by the regulations for the purpose of paragraph 901A(7)(b);

if that is not the case.

Note 1: Failure to comply with this subsection is an offence: see subsection 1311(1).

Note 2: Section 905A contains other offences relating to derivative trade repositories that are required to be licensed.

907B Making provision by reference to instruments as in force from time to time

(1) This section applies to the following instruments:

(a) determinations made by the Minister under section 901B;

(b) regulations made for the purpose of a provision of this Part;

(c) derivative transaction rules;

(d) derivative trade repository rules.

(2) An instrument to which this section applies may make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing:

(a) as in force or existing at a particular time; or

(b) as in force or existing from time to time.

(3) Subsection (2) has effect despite subsection 14(2) of the *Legislative Instruments Act 2003*.

907C Compliance with requirements to provide derivative trade data or other information: protection from liability

If:

(a) a person (the ***protected person***):

(i) provides derivative trade data, or other information, to another person; or

(ii) otherwise allows another person access to derivative trade data, or other information; and

(b) the protected person does so, in good faith, in compliance with a requirement imposed by or under:

(i) a provision of this Part, or of regulations made for the purpose of a provision of this Part; or

(ii) a provision of the derivative transaction rules or the derivative trade repository rules;

the protected person is not liable to an action or other proceeding, whether civil or criminal, for or in relation to that conduct.

907D Exemptions by ASIC

(1) The ***provisions covered by this section*** are:

(a) the following provisions:

(i) the provisions of this Part;

(ii) the provisions of regulations made for the purposes of the provisions of this Part;

(iii) the provisions of the derivative transaction rules and the derivative trade repository rules; and

(b) definitions in this Act, or in the regulations, as they apply to references in provisions referred to in paragraph (a).

(2) ASIC may:

(a) exempt a person or class of persons from all or specified provisions covered by this section; or

(b) exempt a facility or class of facilities from all or specified provisions covered by this section; or

(c) exempt a derivative transaction or class of derivative transactions from all or specified provisions covered by this section.

(3) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.

(4) An exemption is a legislative instrument if the exemption is expressed to apply in relation to a class of persons, a class of facilities or a class of derivative transactions (whether or not it is also expressed to apply in relation to one or more persons, facilities or transactions identified otherwise than by reference to membership of a class).

(5) If subsection (4) does not apply to an exemption, the exemption must be in writing and ASIC must publish notice of it in the *Gazette*.

907E Exemptions and modifications by regulations

(1) The ***provisions covered by this section*** are:
  (a) the following provisions:
    (i) the provisions of this Part;
    (ii) the provisions of regulations made for the purposes of the provisions of this Part;
    (iii) the provisions of the derivative transaction rules and the derivative trade repository rules; and
  (b) definitions in this Act, or in the regulations, as they apply to references in provisions referred to in paragraph (a).

(2) The regulations may:
  (a) exempt a person or class of persons from all or specified provisions covered by this section; or
  (b) exempt a facility or class of facilities from all or specified provisions covered by this section; or
  (c) exempt a derivative transaction or class of derivative transactions from all or specified provisions covered by this section; or
  (d) declare that provisions covered by this section apply in relation to a person, facility or derivative transaction, or a class of persons, facilities or derivative transactions, as if

specified provisions were omitted, modified or varied as specified in the declaration.

Part 7.6—Licensing of providers of financial services

Division 1—Preliminary

910A Definitions

In this Part, unless the contrary intention appears:

representative of a person means:

(a) if the person is a financial services licensee:
  (i) an authorised representative of the licensee; or
  (ii) an employee or director of the licensee; or
  (iii) an employee or director of a related body corporate of the licensee; or
  (iv) any other person acting on behalf of the licensee; or

(b) in any other case:
  (i) an employee or director of the person; or
  (ii) an employee or director of a related body corporate of the person; or
  (iii) any other person acting on behalf of the person.

Division 2—Requirement to be licensed or authorised

911A Need for an Australian financial services licence

(1) Subject to this section, a person who carries on a financial services business in this jurisdiction must hold an Australian financial services licence covering the provision of the financial services.

Note 1: Also, a person must not provide a financial service contrary to a banning order or disqualification order under Division 8.

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) However, a person is exempt from the requirement to hold an Australian financial services licence for a financial service they provide in any of the following circumstances:

(a) the person provides the service as representative of a second person who carries on a financial services business and who:

(i) holds an Australian financial services licence that covers the provision of the service; or

(ii) is exempt under this subsection from the requirement to hold an Australian financial services licence that covers the provision of the service;

Note: However, representatives must still comply with section 911B even if they are exempted from this section by this paragraph.

(b) the service is the issue, variation or disposal of a financial product by the person (the ***product provider***) pursuant to an arrangement (an ***intermediary authorisation***) between the product provider and a financial services licensee under which:

(i) the financial services licensee, or their authorised representatives, may make offers to people to arrange for the issue, variation or disposal of financial products by the product provider; and

(ii) the product provider is to issue, vary or dispose of financial products in accordance with such offers, if they are accepted;

provided that the offer pursuant to which the issue, variation or disposal is made was covered by the financial services licensee's Australian financial services licence;

(ba) the service is the entry into of an intermediary authorisation referred to in paragraph (b);

(c) all of the following apply:

(i) the service is the variation or disposal of a financial product by the person;

(ii) the same person issued the original product;

(iii) the person provides the service at the direct request of the person to whom it is provided (rather than through an intermediary);

(d) the service is, or is provided incidentally to, the operation of a licensed market, or a licensed CS facility, operated by the person;

(ea) the service is the provision of general advice and all of the following apply:

(i) the advice is provided in a newspaper or periodical of which the person is the proprietor or publisher;

(ii) the newspaper or periodical is generally available to the public otherwise than only on subscription;

(iii) the sole or principal purpose of the newspaper or periodical is not the provision of financial product advice;

(eb) the service is the provision of general advice and all of the following apply:

(i) the advice is provided in the course of, or by means of, transmissions that the person makes by means of an information service (see subsection (6)), or that are made by means of an information service that the person owns, operates or makes available;

(ii) the transmissions are generally available to the public;

(iii) the sole or principal purpose of the transmissions is not the provision of financial product advice;

(ec) the service is the provision of general advice and all of the following apply:

(i) the advice is provided in sound recordings, video recordings, or data recordings;

(ii) the person makes the recordings available to the public by supplying copies of them to the public and/or by causing the recordings (if they are sound recordings) to be heard by the public, causing the recordings (if they

are video recordings) to be seen and heard by the public, or the contents of the recordings (if they are data recordings) to be displayed or reproduced for the public;

(iii) the sole or principal purpose of the recordings is not the provision of financial product advice;

(ed) both of the following apply:

(i) the service is the provision of general advice by the person in connection with an offer of financial products under an eligible employee share scheme;

(ii) the person is the corporation whose financial products are being issued or sold under the scheme, or an entity that that corporation controls;

(ee) all of the following apply:

(i) the service is dealing in a financial product by the person in connection with an offer of the financial product under an eligible employee share scheme;

(ii) the scheme requires that any purchase or disposal of the financial product under the scheme occurs through a person who holds an Australian financial services licence to deal in financial products, or a person outside this jurisdiction who is licensed or otherwise authorised to deal in financial products in that jurisdiction;

(iii) the person is the corporation whose financial products are being issued or sold under the scheme, or an entity that that corporation controls;

(ef) both of the following apply:

(i) the service is, or is provided incidentally to, a custodial or depository service that is provided by the person in connection with an eligible employee share scheme;

(ii) the person is the corporation whose financial products are being issued or sold under the scheme, or an entity that that corporation controls;

(eg) both of the following apply:

(i) the service is dealing in an interest in a contribution plan operated by the person in relation to an eligible employee share scheme;

(ii) the person is the corporation whose financial products are being issued or sold under the scheme, or an entity that that corporation controls;

(f) the person provides the service while performing functions, or exercising powers, in any of the following capacities or circumstances:
  (i) as an official receiver or trustee within the meaning of the *Bankruptcy Act 1966*;
  (ii) as a receiver, receiver and manager, or liquidator (whether appointed by a court or otherwise);
  (iii) as a person appointed by a court to carry on a financial services business;
  (iv) as the Public Trustee acting under a law, prescribed by regulations made for the purposes of this paragraph, of a State or Territory;
  (v) as an administrator of a body corporate;
  (vi) as an administrator of a deed of company arrangement executed by a body corporate;
  (vii) as a trustee or person administering a compromise or arrangement between a body corporate and another person or persons;
  (viii) as a personal representative of a deceased person other than a deceased financial services licensee;
  (ix) subject to subsection (3), as a personal representative of a deceased financial services licensee;
  (x) in the administration of a bankrupt estate or in the winding up of a body corporate or partnership;

(g) all of the following apply:
  (i) the person is a body regulated by APRA;
  (ii) the service is one in relation to which APRA has regulatory or supervisory responsibilities;
  (iii) the service is provided only to wholesale clients;

(h) all of the following apply:
  (i) the person is regulated by an overseas regulatory authority;
  (ii) the provision of the service by the person is covered by an exemption specified by ASIC in writing under this subparagraph and published in the *Gazette*; and
  (iii) the service is provided only to wholesale clients;

(i) the person provides the service only to related bodies corporate of the person;

(j) the person provides the service in the person's capacity as trustee of a self-managed superannuation fund;

(k) the provision of the service is covered by an exemption prescribed in regulations made for the purposes of this paragraph;

(l) the provision of the service is covered by an exemption specified by ASIC in writing and published in the *Gazette*.

Note: A defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code*.

(3) Subparagraph (2)(f)(ix) only applies until whichever of these happens first:

(a) the end of 6 months after the death of the licensee;

(b) the removal or discharge of the personal representative;

(c) the final distribution of the licensee's estate.

(4) A person is not exempt under any paragraph of subsection (2) for a financial service they provide if the service is:

(a) the operation of a registered scheme; or

(b) a traditional trustee company service.

(5) The exemption under paragraph (2)(ea), (eb) or (ec), or an exemption under subparagraph (2)(h)(ii) or under paragraph (2)(k) or (l), may apply unconditionally or subject to conditions:

(a) in the case of the exemption under paragraph (2)(ea), (eb) or (ec), or an exemption under paragraph (2)(k)—specified in regulations made for the purposes of this paragraph; or

(b) in the case of an exemption under subparagraph (2)(h)(ii) or under paragraph (2)(l)—specified by ASIC in writing published in the *Gazette*.

(5A) Despite paragraph (2)(b), the regulations may provide that the exemption under that paragraph does not apply in relation to:

(a) a particular financial product or a particular kind of financial product; or

(b) a particular financial product or a particular kind of financial product that is issued, varied or disposed of by a particular person, or a particular kind of person.

(6) In this section:

information service means:

(a) a broadcasting service; or

(b) an interactive or broadcast videotext or teletext service or a similar service; or

(c) an online database service or a similar service; or

(d) any other service identified in regulations made for the purposes of this paragraph.

911B Providing financial services on behalf of a person who carries on a financial services business

(1) A person (the ***provider***) must only provide a financial service in this jurisdiction on behalf of another person (the ***principal***) who carries on a financial services business if one or more of the following paragraphs apply:

(a) these conditions are satisfied:

(i) the principal holds an Australian financial services licence covering the provision of the service; and

(ii) the provider is an employee or director of the principal or of a related body corporate of the principal; and

(iii) the provider is not an employee or director, or authorised representative, of any other person who carries on a financial services business and who is not a related body corporate of the principal; and

(iv) the provider is not an employee or director, or authorised representative, of a related body corporate of a person of the kind mentioned in subparagraph (iii);

(b) these conditions are satisfied:

(i) the principal holds an Australian financial services licence covering the provision of the service; and

(ii) the provider is an authorised representative of the principal; and

(iii) the authorisation covers the provision of the service by the provider; and

(iv) in the case of a provider who is an employee or director of any other person (the ***second principal***) who carries on a financial services business, or of a related body corporate of such a second principal—if the provider

provides any financial services in this jurisdiction on behalf of the second principal, the provider does so as an authorised representative of the second principal;

(c) these conditions are satisfied:

(i) the principal holds an Australian financial services licence covering the provision of the service; and

(ii) the provider is an employee of an authorised representative of the principal; and

(iii) the authorisation covers the provision of the service by the authorised representative; and

(iv) the service is the provision of a basic deposit product or of a facility for making non-cash payments (see section 763D) that is related to a basic deposit product, or is the provision of a financial product of a kind prescribed by regulations made for the purposes of this subparagraph;

(d) the provider holds their own Australian financial services licence covering the provision of the service;

Note: However, in general a financial services licensee cannot be the authorised representative of another financial services licensee: see sections 916D and 916E.

(e) if the principal (rather than the provider) provided the service, the principal would not need an Australian financial services licence because the provision of the service would be exempt under subsection 911A(2).

Note 1: Also, a person must not provide a financial service on behalf of another person contrary to a banning order or disqualification order under Division 8.

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) Paragraphs (1)(a), (b) and (c) do not apply if the provider is a financial services licensee, unless the principal is an insurer and the provider is acting under a binder given by the principal.

(3) If, as mentioned in paragraph (1)(d), the provider holds their own Australian financial services licence covering the provision of the service, then, for the purposes of the other provisions of this Chapter, the service is taken to be provided by the provider (and not by the principal) unless regulations made for the purposes of this subsection provide otherwise.

911C Prohibition on holding out

A person must not hold out:

(a) that the person has an Australian financial services licence; or

(b) that a financial service provided by the person or by someone else is exempt from the requirement to hold an Australian financial services licence; or

(c) that, in providing a financial service, the person acts on behalf of another person; or

(d) that conduct, or proposed conduct, of the person is within authority (within the meaning of Division 6) in relation to a particular financial services licensee;

if that is not the case.

Note: Failure to comply with this section is an offence (see subsection 1311(1)).

911D When a financial services business is taken to be carried on in this jurisdiction

(1) For the purposes of this Chapter, a financial services business is taken to be carried on ***in this jurisdiction*** by a person if, in the course of the person carrying on the business, the person engages in conduct that is:

(a) intended to induce people in this jurisdiction to use the financial services the person provides; or

(b) is likely to have that effect;

whether or not the conduct is intended, or likely, to have that effect in other places as well.

(2) This section does not limit the circumstances in which a financial services business is carried on ***in this jurisdiction*** for the purposes of this Chapter.

Division 3—Obligations of financial services licensees

912A General obligations

(1) A financial services licensee must:

(a) do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly; and

(aa) have in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee or a representative of the licensee in the provision of financial services as part of the financial services business of the licensee or the representative; and

(b) comply with the conditions on the licence; and

(c) comply with the financial services laws; and

(ca) take reasonable steps to ensure that its representatives comply with the financial services laws; and

(d) unless the licensee is a body regulated by APRA—have available adequate resources (including financial, technological and human resources) to provide the financial services covered by the licence and to carry out supervisory arrangements; and

(e) maintain the competence to provide those financial services; and

(f) ensure that its representatives are adequately trained, and are competent, to provide those financial services; and

(g) if those financial services are provided to persons as retail clients—have a dispute resolution system complying with subsection (2); and

(h) unless the licensee is a body regulated by APRA—have adequate risk management systems; and

(j) comply with any other obligations that are prescribed by regulations made for the purposes of this paragraph.

(2) To comply with this subsection, a dispute resolution system must consist of:

(a) an internal dispute resolution procedure that:

(i) complies with standards, and requirements, made or approved by ASIC in accordance with regulations made for the purposes of this subparagraph; and

(ii) covers complaints against the licensee made by retail clients in connection with the provision of all financial services covered by the licence; and

(b) membership of one or more external dispute resolution schemes that:

(i) is, or are, approved by ASIC in accordance with regulations made for the purposes of this subparagraph; and

(ii) covers, or together cover, complaints (other than complaints that may be dealt with by the Superannuation Complaints Tribunal established by section 6 of the *Superannuation (Resolution of Complaints) Act 1993*) against the licensee made by retail clients in connection with the provision of all financial services covered by the licence.

(3) Regulations made for the purposes of subparagraph (2)(a)(i) or (2)(b)(i) may also deal with the variation or revocation of:

(a) standards or requirements made by ASIC; or

(b) approvals given by ASIC.

912B Compensation arrangements if financial services provided to persons as retail clients

(1) If a financial services licensee provides a financial service to persons as retail clients, the licensee must have arrangements for compensating those persons for loss or damage suffered because of breaches of the relevant obligations under this Chapter by the licensee or its representatives. The arrangements must meet the requirements of subsection (2).

(2) The arrangements must:

(a) if the regulations specify requirements that are applicable to all arrangements, or to arrangements of that kind—satisfy those requirements; or

(b) be approved in writing by ASIC.

(3) Before approving arrangements under paragraph (2)(b), ASIC must have regard to:

(a) the financial services covered by the licence; and

(b) whether the arrangements will continue to cover persons after the licensee ceases carrying on the business of providing financial services, and the length of time for which that cover will continue; and

(c) any other matters that are prescribed by regulations made for the purposes of this paragraph.

(4) Regulations made for the purposes of paragraph (3)(c) may, in particular, prescribe additional details in relation to the matters to which ASIC must have regard under paragraphs (3)(a) and (b).

912C Direction to provide a statement

(1) ASIC may, by giving written notice to a financial services licensee, direct the licensee to give to ASIC a written statement containing the 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.

(1A) Notices under subsection (1):

(a) may be sent out at any time; and

(b) may be sent to one or more particular licensees, or to each licensee in one or more classes of licensee, or to all licensees; and

(c) may all require the same information, or may contain differences as to the information they require; and

(d) may require a statement containing information to be provided on a periodic basis, or each time a particular event or circumstance occurs, without ASIC having to give a further written notice.

(2) ASIC may also, by giving written notice to the licensee, direct the licensee to obtain an audit report, prepared by a suitably qualified person specified in the notice, on a statement, or each statement in a class of statements, under subsection (1) before the statement is given to ASIC.

(3) The licensee must comply with a direction given under this section:

(a) within the time specified in the direction if that is a reasonable time; or

(b) in any other case—within a reasonable time.

ASIC may extend the time within which the licensee must comply with the direction by giving written notice to the licensee.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

912CA Regulations may require information to be provided

The regulations may require a financial services licensee, or each financial services licensee in a class of financial services licensees, to provide ASIC 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.

912D Obligation to notify ASIC of certain matters

(1) A financial services licensee must comply with subsection (1B) if:

(a) the licensee breaches, or is likely to breach:

(i) any of the obligations under section 912A or 912B, other than the obligation under paragraph 912A(1)(c); or

(ii) the obligation under paragraph 912A(1)(c), so far as it relates to provisions of this Act or the ASIC Act referred to in paragraphs (a), (b) and (c) of the definition of ***financial services law*** in section 761A; or

(iii) in relation to financial services, other than traditional trustee company services provided by a licensed trustee company—the obligation under paragraph 912A(1)(c), so far as it relates to Commonwealth legislation that is covered by paragraph (d) of that definition and that is specified in regulations made for the purposes of this subparagraph; or

(iv) in relation to traditional trustee company services provided by a licensed trustee company—the obligation under paragraph 912A(1)(c), so far as it relates to Commonwealth, State or Territory legislation, or a rule

of common law or equity, that is covered by paragraph (d) or (e) of that definition; and

(b) the breach, or likely breach, is significant, having regard to the following:

(i) the number or frequency of similar previous breaches;

(ii) the impact of the breach or likely breach on the licensee's ability to provide the financial services covered by the licence;

(iii) the extent to which the breach or likely breach indicates that the licensee's arrangements to ensure compliance with those obligations is inadequate;

(iv) the actual or potential financial loss to clients of the licensee, or the licensee itself, arising from the breach or likely breach;

(v) any other matters prescribed by regulations made for the purposes of this paragraph.

(1A) For the purposes of subsection (1), a financial services licensee is ***likely to breach*** an obligation referred to in that subsection if, and only if, the person is no longer able to comply with the obligation.

(1B) The financial services licensee must, as soon as practicable and in any case within 10 business days after becoming aware of the breach or likely breach mentioned in subsection (1), lodge a written report on the matter with ASIC.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(1C) A report that a licensee is required to lodge under subsection (1B) is taken to have been lodged with ASIC if:

(a) the licensee is a body regulated by APRA; and

(b) the report is received by APRA in accordance with the terms of an agreement between APRA and ASIC under which APRA is to act as ASIC's agent in relation to such reports.

(1D) Subsection (1B) does not apply to a financial services licensee that is a body regulated by APRA in relation to a breach if:

(a) the auditor or actuary of the licensee gives APRA a written report about the breach; and

(b) the report is given before, or within 10 business days after, the licensee becomes aware of the breach.

(2) A financial services licensee must give written notice to ASIC, as soon as practicable, if the licensee becomes a participant in a licensed market or a licensed CS facility, or ceases to be such a participant. The notice must say when this happened and identify the market or facility.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

912E Surveillance checks by ASIC

(1) A financial services licensee and its representatives must give such assistance to ASIC, or a person authorised by ASIC, as ASIC or the authorised person reasonably requests in relation to whether the licensee and its representatives are complying with the financial services laws, and in relation to the performance of ASIC's other functions.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) Such assistance may include showing ASIC the licensee's books or giving ASIC other information.

912F Obligation to cite licence number in documents

(1) Whenever a financial services licensee identifies itself in a document of a kind specified in regulations made for the purposes of this subsection, the document must include the licensee's licence number (see section 913C).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) An offence based on subsection (1) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

Division 4—Australian financial services licences

Subdivision A—How to get a licence

913A Applying for a licence

A person may apply for an Australian financial services licence by lodging an application with ASIC that:

(a) includes the information required by regulations made for the purposes of this paragraph; and

(b) is accompanied by the documents (if any) required by regulations made for the purposes of this paragraph.

Note: For fees in respect of lodging applications, see Part 9.10.

913B When a licence may be granted

(1) ASIC must grant an applicant an Australian financial services licence if (and must not grant such a licence unless):

(a) the application was made in accordance with section 913A; and

(b) ASIC has no reason to believe that the applicant is likely to contravene the obligations that will apply under section 912A if the licence is granted; and

(c) the requirement in whichever of subsection (2) or (3) of this section applies is satisfied; and

(ca) the applicant has provided ASIC with any additional information requested by ASIC in relation to matters that, under this section, can be taken into account in deciding whether to grant the licence; and

(d) the applicant meets any other requirements prescribed by regulations made for the purposes of this paragraph.

Note: ASIC must not grant an Australian financial services licence to a person contrary to a banning order or disqualification order (see Division 8).

(2) If the applicant is a natural person, ASIC must be satisfied that there is no reason to believe that the applicant is not of good fame or character.

(3) If the applicant is not a single natural person, ASIC must be satisfied:

(a) that:

(i) if the applicant is a body corporate—there is no reason to believe that any of the applicant's responsible officers are not of good fame or character; or

(ii) if the applicant is a partnership or the trustees of a trust—there is no reason to believe that any of the partners or trustees who would perform duties in connection with the holding of the licence are not of good fame or character; or

(b) if ASIC is not satisfied of the matter in paragraph (a)—that the applicant's ability to provide the financial services covered by the licence would nevertheless not be significantly impaired.

(4) In considering whether there is reason to believe that a person is not of good fame or character, ASIC must (subject to Part VIIC of the *Crimes Act 1914*) have regard to:

(a) any conviction of the person, within 10 years before the application was made, for an offence that involves dishonesty and is punishable by imprisonment for at least 3 months; and

(b) whether the person has held an Australian financial services licence that was suspended or cancelled; and

(c) whether a banning order or disqualification order under Division 8 has previously been made against the person; and

(d) any other matter ASIC considers relevant.

Note: Part VIIC of the *Crimes Act 1914* includes provisions that, in certain circumstances, relieve persons from the requirement to disclose spent convictions and require persons aware of such convictions to disregard them.

(5) However, ASIC may only refuse to grant a licence after giving the applicant 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 matter.

913C Licence numbers

(1) ASIC must give each Australian financial services licence a unique licence number when it is granted, and must notify the licensee of that number.

(2) If:

(a) a person is granted an Australian financial services licence; and

(b) the person holds an Australian credit licence (within the meaning of the *National Consumer Credit Protection Act 2009*);

the licence number that ASIC gives to the Australian financial services licence held by that person must be the same number as the person's Australian credit licence number (within the meaning of that Act).

Subdivision B—The conditions on the licence

914A The conditions on the licence

(1) Subject to this section, ASIC may, at any time, by giving written notice to a financial services licensee:

(a) impose conditions, or additional conditions, on the licence; and

(b) vary or revoke conditions imposed on the licence.

Note: Subsection 923B(3) restricts the circumstances in which ASIC can impose a condition authorising a person to assume or use a restricted word or expression under that section.

(2) ASIC may do so:

(a) on its own initiative; or

(b) if the licensee lodges with ASIC an application for ASIC to do so, which is accompanied by the documents, if any, required by regulations made for the purposes of this paragraph.

Note: For fees in respect of lodging applications, see Part 9.10.

(3) ASIC may only impose conditions or additional conditions, or vary the conditions, on the licence after giving the licensee an opportunity:

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

(b) to make submissions to ASIC in relation to the matter.

This subsection does not apply to ASIC imposing conditions when a licence is granted.

(4) If the licensee, or a related body corporate, is a body (the ***APRA body***) regulated by APRA, other than an ADI (within the meaning of the *Banking Act 1959*), then the following provisions apply:

(a) ASIC cannot:

(i) impose, vary or revoke a condition on the licence that, in ASIC's opinion, has or would have the result of preventing the APRA body from being able to carry on all or any of its usual activities (being activities in relation to which APRA has regulatory or supervisory responsibilities); or

(ii) vary a condition so that it would, in ASIC's opinion, become a condition that would have a result as described in subparagraph (i);

unless ASIC has first consulted APRA about the proposed action;

(b) if ASIC imposes, varies or revokes a condition on the licence and paragraph (a) does not apply to that action, ASIC must, within one week, inform APRA of the action that has been taken.

(5) If the licensee, or a related body corporate, is an ADI (within the meaning of the *Banking Act 1959*), then the following provisions apply:

(a) subject to paragraphs (b) and (c), the powers that ASIC would otherwise have under this section:

(i) to impose, vary or revoke a condition on the licence that, in ASIC's opinion, has or would have the result of preventing the ADI from being able to carry on all or any of its banking business (within the meaning of the *Banking Act 1959*); or

(ii) to vary a condition so that it would, in ASIC's opinion, become a condition that would have a result as described in subparagraph (i);

are instead powers of the Minister;

(b) the following provisions apply in relation to a power to which paragraph (a) applies:

(i) the procedures for the exercise of the power are the same as would apply if ASIC could exercise the power, except that the Minister must not exercise the power unless he or she has first considered advice from ASIC on the proposed action, being advice given after ASIC has consulted APRA about the proposed action;

(ii) ASIC (rather than the Minister) must still conduct any hearing required under paragraph (3)(a) and receive any submissions under paragraph (3)(b);

(c) if ASIC imposes, varies or revokes a condition on the licence and paragraph (a) does not apply to that action, ASIC must, within one week, inform APRA of the action that has been taken.

(5A) A failure to comply with a requirement of subsection (4) or (5) to consult or inform APRA about, or to consider advice from ASIC about, an imposition, variation or revocation of a condition does not invalidate the action taken.

(6) ASIC must ensure that the licence is subject to a condition that specifies the particular financial services or class of financial services that the licensee is authorised to provide.

(7) The financial services or class of financial services may be specified by reference to particular financial products, or classes of financial products.

(8) The licence is subject to such other conditions as are prescribed by regulations made for the purposes of this subsection. However, ASIC cannot vary or revoke those conditions.

Subdivision C—When a licence can be varied, suspended or cancelled

915A Varying licences

(1) ASIC may vary an Australian financial services licence to take account of a change in the licensee's name if the licensee lodges with ASIC an application for the variation, accompanied by the documents, if any, required by regulations made for the purposes of this subsection.

Note 1: The conditions on the licence can be varied under section 914A.

Note 2: For fees in respect of lodging applications, see Part 9.10.

(2) ASIC must give written notice of the variation to the licensee.

915B Immediate suspension or cancellation

Licence held by a natural person

(1) ASIC may suspend or cancel an Australian financial services licence held by a natural person, by giving written notice to the person, if the person:

(a) ceases to carry on the financial services business; or

(b) becomes an insolvent under administration; or

(c) is convicted of serious fraud; or

(d) becomes incapable of managing their affairs because of mental or physical incapacity; or

(e) lodges with ASIC an application for ASIC to do so, which is accompanied by the documents, if any, required by regulations made for the purposes of this paragraph.

Note: For fees in respect of lodging applications, see Part 9.10.

Licence held by a partnership

(2) ASIC may suspend or cancel an Australian financial services licence held by a partnership, by giving written notice to the partnership, if:

(a) the partnership ceases to carry on the financial services business; or

(b) 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 the partnership; or

(c) one or more of the partners is convicted of serious fraud; or

(d) the partnership lodges with ASIC an application for ASIC to do so, which is accompanied by the documents, if any, required by regulations made for the purposes of this paragraph.

Note: For fees in respect of lodging applications, see Part 9.10.

Licence held by a body corporate

(3) ASIC may suspend or cancel an Australian financial services licence held by a body corporate, by giving written notice to the body, if the body:

(a) ceases to carry on the financial services business; or

(b) becomes an externally-administered body corporate; or

(c) is a responsible entity of a registered scheme whose members have suffered, or are likely to suffer, loss or damage because the body has breached this Act; or

(ca) is a trustee company whose clients have suffered, or are likely to suffer, loss or damage because the company has breached:

(i) this Act; or

(ii) a financial services law referred to in paragraph (e) of the definition of ***financial services law*** in section 761A; or

(d) lodges with ASIC an application for ASIC to do so, which is accompanied by the documents, if any, required by regulations made for the purposes of this paragraph.

Note: For fees in respect of lodging applications, see Part 9.10.

(4) ASIC may suspend or cancel an Australian financial services licence held by the trustees of a trust, by giving written notice to the trustees, if:

(a) the trustees of the trust cease to carry on the financial services business; or

(b) a trustee who is a natural person:

(i) becomes an insolvent under administration; or

(ii) is convicted of serious fraud; or

(iii) becomes incapable of managing their affairs because of physical or mental incapacity; or

(c) a trustee that is a body corporate becomes an externally-administered body corporate; or

(d) the trustees lodge with ASIC an application for ASIC to do so, which is accompanied by the documents, if any, required by regulations made for the purposes of this paragraph.

Note 1: For fees in respect of lodging applications, see Part 9.10.

Note 2: If there is only one trustee, subsection (1) will apply (if the trustee is a natural person), and subsection (3) will apply (if the trustee is a body corporate).

915C Suspension or cancellation after offering a hearing

(1) ASIC may suspend or cancel an Australian financial services licence (subject to complying with subsection (4)) in any of the following cases:

(a) the licensee has not complied with their obligations under section 912A;

(aa) ASIC has reason to believe that the licensee is likely to contravene their obligations under section 912A;

(b) ASIC is no longer satisfied of the matter in whichever of subsection 913B(2) or (3) applied at the time the licence was granted (about whether the licensee, or the licensee's representatives, are of good fame or character);

(c) a banning order or disqualification order under Division 8 is made against the licensee;

(d) a banning order or disqualification order under Division 8 is made against a representative of the licensee and ASIC considers that the representative's involvement in the provision of the licensee's financial services will significantly impair the licensee's ability to meet its obligations under this Chapter.

(2) ASIC may also cancel an Australian financial services licence (subject to complying with subsection (4)) if:

(a) the application for the licence was false in a material particular or materially misleading; or

(b) there was an omission of a material matter from the application.

(3) An Australian financial services licence is suspended or cancelled by ASIC giving written notice to the licensee.

(4) However, ASIC may only suspend or cancel an Australian financial services licence under this section after giving the licensee an opportunity:

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

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

915D Effect of suspension

(1) A suspended Australian financial services licence has no effect while it remains suspended.

(2) Subsection (1) has effect subject to section 915H.

915E Revocation of suspension

ASIC may at any time revoke the suspension of an Australian financial services licence by giving written notice to the licensee.

915F Date of effect and publication of cancellation or suspension

(1) A variation, suspension, revocation of a suspension, or cancellation, of an Australian financial services licence takes effect when the written notice of that action is given to the licensee.

(2) As soon as practicable after the notice is given to the licensee, ASIC must:

(a) publish a notice of the action in the *Gazette*; and

(b) if the licensee is a participant in a licensed market or a licensed CS facility—give written notice of the action to the operator of the market or facility.

A notice under this subsection must state when the action took effect.

915G Statement of reasons

A notice of suspension or cancellation given to a licensee under this Subdivision must be accompanied by a statement of reasons for the action taken.

915H ASIC may allow licence to continue in effect

In the written notice of suspension or cancellation that ASIC gives to the licensee, ASIC may specify that the licence continues in effect as though the suspension or cancellation had not happened for the purposes of specified provisions of this Act in relation to specified matters, a specified period, or both.

915I Special procedures for APRA-regulated bodies

(1) If a financial services licensee, or a related body corporate, is a body (the ***APRA body***) regulated by APRA, other than an ADI (within the meaning of the *Banking Act 1959*), the following provisions apply:

(a) ASIC cannot suspend or cancel the licensee's licence if doing so would, in ASIC's opinion, have the result of preventing the APRA body from being able to carry on all or any of its usual activities (being activities in relation to which APRA has regulatory or supervisory responsibilities), unless ASIC has first consulted APRA about the proposed action;

(b) if ASIC suspends or cancels the licensee's licence and paragraph (a) does not apply to that action, ASIC must, within one week, inform APRA of the action that has been taken.

(2) If:

(a) a financial services licensee is an ADI (within the meaning of the *Banking Act 1959*); or

(b) a related body corporate of a financial services licensee is an ADI (within the meaning of the *Banking Act 1959*), and cancellation or suspension of the licensee's licence would, in ASIC's opinion, have the result of preventing the ADI from being able to carry on all or any of its banking business (within the meaning of the *Banking Act 1959*);

the following provisions have effect:

(c) subject to paragraph (d), the powers that ASIC would otherwise have under this Subdivision to cancel or suspend the licensee's licence, or to subsequently revoke a suspension to which this subsection applied, are instead powers of the Minister;

(d) the procedures for the exercise of a power to which paragraph (c) applies are the same as would apply if ASIC could exercise the power, except that the Minister must not exercise the power unless he or she has first considered advice from ASIC on the proposed action, being advice given after ASIC has consulted APRA about the proposed action;

(e) ASIC (rather than the Minister) must still conduct any hearing required under paragraph 915C(4)(a) and receive any submissions under paragraph 915C(4)(b).

(3) A failure to comply with a requirement of subsection (1) or (2) to consult or inform APRA about, or to consider advice from ASIC about, a cancellation or suspension, or a revocation of a suspension, of a licence does not invalidate the action taken.

915J Variation, suspension and cancellation only under this Subdivision

An Australian financial services licence cannot be varied, suspended or cancelled otherwise than under this Subdivision.

Note: The conditions on the licence can be varied under section 914A.

Division 5—Authorised representatives

916A How representatives are authorised

(1) A financial services licensee may give a person (the ***authorised representative***) a written notice authorising the person, for the purposes of this Chapter, to provide a specified financial service or financial services on behalf of the licensee.

(2) The financial services specified may be some or all of the financial services covered by the licensee's licence.

(3) An authorisation under subsection (1) is void to the extent that it purports to authorise a person to provide a financial service:

(a) that is not covered by the licensee's licence; or

(b) contrary to a banning order or disqualification order under Division 8.

(3A) A person must not give a purported authorisation if that purported authorisation is void to any extent under subsection (3).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(4) An authorisation may be revoked at any time by the licensee giving written notice to the authorised representative.

916B Sub-authorisations

(1) Subject to subsection (3), an authorised representative of a financial services licensee cannot, in that capacity, make a person their authorised representative or an authorised representative of the licensee.

(2) A purported authorisation contrary to this section is void.

(2A) A person must not give a purported authorisation if that purported authorisation is contrary to this section.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(3) A body corporate that is an authorised representative of a financial services licensee may, in that capacity, give an individual a written notice authorising that individual, for the purposes of this Chapter, to provide a specified financial service or financial services on behalf of the licensee, but only if the licensee consents in writing given to the body corporate.

(4) The financial services specified may be some or all of the financial services covered by the licensee's licence.

(5) The licensee may give consent under subsection (3) in respect of either a specified individual or a specified class of individuals (the membership of which might change from time to time).

(5A) If a licensee gives consent under subsection (3) to a body corporate, the licensee must keep a copy of the consent for 5 years after the day on which it ceases to have effect.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(6) An individual who is authorised as mentioned in subsection (3) is an ***authorised representative*** of the relevant licensee.

(7) An authorisation of an individual as mentioned in subsection (3) may be revoked at any time by:

(a) the licensee; or

(b) the body corporate that gave the individual the authorisation;

giving written notice to the individual.

(8) If a person revokes the authorisation of an individual under subsection (7), that person must inform, in writing, the other person who could have revoked the authorisation.

(9) To avoid doubt, an authorisation given as mentioned in subsection (3) is taken, for the purposes of sections 916C to 916F, to be given by the body corporate, not the licensee.

916C Authorised representative of 2 or more licensees

(1) One person can be the authorised representative of 2 or more financial services licensees, but only if:

(a) each of those licensees has consented to the person also being the authorised representative of each of the other licensees; or

(b) each of those licensees is a related body corporate of each of the other licensees.

(2) A purported authorisation given in breach of this requirement is void.

(3) A person must not give a purported authorisation if that purported authorisation is in breach of this requirement.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

916D Licensees cannot authorise other licensees

(1) A financial services licensee cannot be the authorised representative of another financial services licensee.

Note 1: Instead, the first licensee could use their own licence to provide financial services on behalf of the second licensee (assuming that the first licensee's licence covered the provision of those services). See paragraph 911B(1)(d).

Note 2: There is an exception to this rule in section 916E.

(2) A purported authorisation given in breach of this requirement is void.

(2A) A person must not give a purported authorisation if that purported authorisation is given in breach of this requirement.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2B) The requirement in subsection (1) does not prohibit a financial services licensee from being an authorised representative in circumstances covered by section 916E.

Note: In a prosecution for an offence based on subsection (2A), a defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code*.

(3) As well, an authorisation that starts to breach this requirement, because the person authorised is subsequently granted an Australian financial services licence, is void.

916E Licensees acting under a binder

(1) Despite section 916D, a financial services licensee (the ***authorised licensee***) may be the authorised representative of another financial services licensee who is an insurer, if the authorised licensee acts under a binder given by the insurer.

(2) For all purposes connected with contracts that are risk insurance products, or with claims against the insurer, in respect of which the authorised licensee acts under the binder:

(a) the authorised licensee is taken to act on behalf of the insurer and not the insured; and

(b) if the insured in fact relied in good faith on the conduct of the authorised licensee, the authorised licensee is taken to act on behalf of the insurer regardless of the fact that the authorised licensee did not act within the scope of the binder.

916F Obligation to notify ASIC etc. about authorised representatives

(1) A person must lodge with ASIC a written notice (in accordance with subsection (2)), within 15 business days, if the person authorises a representative to provide a financial service as mentioned in section 916A or 916B.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(1AA) Subsection (1) does not apply to an authorisation of a representative if:

(a) the authorisation is by a body corporate and 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 body corporate; and

(d) the only financial services that the representative is authorised to provide are either or both 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.

Note 1: Regulations made for the purposes of paragraph (d) may be expressed to cover all financial products, or only one 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*.

(1A) A person who authorises an individual to provide a financial service on behalf of a financial services licensee as mentioned in section 916B must give the licensee written notice (in accordance with subsection (2)), within 15 business days of the individual being authorised to provide the financial service, if the licensee's consent to the authorisation was given in respect of a specified class of individuals.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) The notice must include the following details:

(a) the name and business address of the representative;

(b) details of the authorisation, including the date on which it was made and what the representative is authorised to do on behalf of the relevant licensee;

(c) details of each other financial services licensee on behalf of whom the representative is an authorised representative.

(3) A person must notify ASIC, by lodging a written notice, within 10 business days if:

(a) the person authorised a representative under section 916A or 916B and there is a change in any details relating to the representative that are required to be included under subsection (2); or

(b) the person revokes an authorisation to which subsection (1) applied.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(4) For the purposes of an offence based on subsection (3), strict liability applies to the physical element of circumstance of the offence, that the details mentioned in subsection (3) changed.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

916G ASIC may give licensee information about representatives

(1) If ASIC considers it appropriate to do so, it may give information to a financial services licensee about a person who ASIC believes is, or will be, a representative of the licensee. However, ASIC may only do so if it believes, on reasonable grounds, that the information is true.

(2) A financial services licensee to whom the information is given may only make use of, make a record of, or give to another person, the information for a purpose connected with:

(a) the licensee making a decision about what action (if any) to take in relation to the representative, as a consequence of receiving the information; or

(b) the licensee taking action pursuant to such a decision.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(3) A person to whom information has been given for a purpose or purposes under subsection (2) or this subsection, may only make use of, make a record of, or give to another person, that information for that purpose or any of those purposes.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(4) A person has qualified privilege in respect of an act done by the person under subsection (2) or (3).

(5) A person to whom information is given in accordance with this section must not give any of the information to a court, or produce in a court a document that sets out some or all of the information, except:

(a) for a purpose connected with:

(i) a financial services licensee making a decision about what action (if any) to take in relation to the representative, as a consequence of receiving some or all of the information; or

(ii) a financial services licensee taking action pursuant to that decision; or

(iii) proving in a proceeding in that court that particular action taken by a financial services licensee in relation to the representative was taken pursuant to that decision; or

(b) in a proceeding in that court, in so far as the proceeding relates to an alleged breach of this section; or

(c) in a proceeding in respect of an ancillary offence relating to an offence based on this section; or

(d) in a proceeding about giving to a court false information some, at least, of which was the information given under this section.

(6) A reference in this section to a financial services licensee taking action in relation to a representative is a reference to the licensee:

(a) taking action by way of making, terminating or varying the terms and conditions of an agreement; or

(b) otherwise taking action in relation to an agreement;

to the extent that the agreement relates to the representative acting on behalf of the licensee.

(7) Subsection (5) also has the effect it would have if:

(a) a reference in it to a court were a reference to a court of an external Territory or of a country outside Australia and the external Territories; and

(b) paragraphs (5)(b) and (c) were omitted.

Division 6—Liability of financial services licensees for representatives

917A Application of Division

(1) This Division applies to any conduct of a representative of a financial services licensee:

(a) that relates to the provision of a financial service; and

(b) on which a third person (the ***client***) could reasonably be expected to rely; and

(c) on which the client in fact relied in good faith.

(2) In this Division, a reference to a representative's conduct being ***within authority*** in relation to a particular financial services licensee is, subject to subsection (3), a reference to:

(a) if the representative is an employee of the licensee or of a related body corporate of the licensee—conduct being within the scope of the employee's employment; or

(b) if the representative is a director of the licensee or of a related body corporate of the licensee—conduct being within the scope of the director's duties as director; or

(c) in any other case—conduct being within the scope of the authority given by the licensee.

(3) If:

(a) a person is the representative of more than one financial services licensee in respect of a particular class of financial service; and

(b) the person engages in conduct relating to that class of service; and

(ba) the conduct relates to a particular kind of financial product prescribed by regulations made for the purposes of paragraph 917C(3)(ba); and

(c) any one or more of the licensees issues or transfers a financial product of that kind as a result of the conduct;

then, for the purposes of this Division:

(d) the person is taken, in respect of the conduct, to have acted ***within authority*** in relation to the licensee or to each licensee

who issued or transferred a financial product of that kind as a result of the conduct; and

(e) the person is, in respect of the conduct, taken not to have acted ***within authority*** in relation to any licensee who did not issue or transfer a financial product of that kind as a result of the conduct.

917B Responsibility if representative of only one licensee

If the representative is the representative of only one financial services licensee, the licensee is responsible, as between the licensee and the client, for the conduct of the representative, whether or not the representative's conduct is within authority.

917C Representatives of multiple licensees

(1) This section applies if the representative is the representative of more than one financial services licensee.

Financial service covered by only one authority

(2) If:

(a) the representative is the representative of one of the licensees only in respect of a particular class of financial service; and

(b) the conduct relates to that class of service;

that licensee is responsible for the conduct, as between that licensee and the client, whether or not the conduct is within authority.

Financial service covered by multiple authorities: conduct within authority for one or more of them

(3) If:

(a) the representative is the representative of more than one of the licensees in respect of a particular class of financial service; and

(b) the conduct relates to that class of service; and

(ba) the conduct relates to a particular kind of financial product prescribed by regulations made for the purposes of this paragraph; and

(c) the conduct is within authority in relation to:

(i) only one of those licensees (the ***authorising licensee***); or

(ii) two or more of those licensees (the ***authorising licensees***);

then:

(d) if subparagraph (c)(i) applies—the authorising licensee is responsible for the conduct, as between that licensee and the client; or

(e) if subparagraph (c)(ii) applies—the authorising licensees are jointly and severally responsible for the conduct, as between themselves and the client.

All other cases

(4) In any other case, all of the licensees are jointly and severally responsible for the conduct, as between themselves and the client, whether or not the representative's conduct is within authority in relation to any of them.

917D Exception if lack of authority is disclosed to client

A financial services licensee is not responsible under section 917B or 917C for the conduct of their representative if:

(a) the conduct is not within authority in relation to the licensee (or in relation to any of the licensees, if there were more than one); and

(b) the representative disclosed that fact to the client before the client relied on the conduct; and

(c) the clarity and the prominence of the disclosure was such as a person would reasonably require for the purpose of deciding whether to acquire the relevant financial service.

Note: A person must not hold out that conduct, or proposed conduct, of the person is within authority in relation to a particular financial services licensee, unless that is the case. See section 911C.

917E Responsibility extends to loss or damage suffered by client

The responsibility of a financial services licensee under this Division extends so as to make the licensee liable to the client in

respect of any loss or damage suffered by the client as a result of the representative's conduct.

917F Effect of Division

(1) If a financial services licensee is responsible for the conduct of their representative under this Division, the client has the same remedies against the licensee that the client has against the representative.

(2) The licensee and the representative (along with any other licensees who are also responsible) are all jointly and severally liable to the client in respect of those remedies.

(3) However, nothing in this Division imposes:

(a) any criminal responsibility; or

(b) any civil liability under a provision of this Act apart from this Division;

on a financial services licensee that would not otherwise be imposed on the licensee.

(4) This Division does not relieve a representative of a financial services licensee of any liability they have to the client or the licensee.

(5) An agreement is void in so far as it purports to alter or restrict the operation of section 917B, 917C, 917D or 917E.

(6) However, subsection (5) does not apply to the extent that the agreement:

(a) provides for a representative of a financial services licensee to indemnify the licensee for a liability of the licensee in respect of the representative; or

(b) provides for a financial services licensee, for whom a representative acts, to indemnify another financial services licensee for a liability in respect of the representative.

(7) A financial services licensee must not make, or offer to make, an agreement that is, or would be, void under subsection (5).

Division 8—Banning or disqualification of persons from providing financial services

Subdivision A—Banning orders

920A ASIC's power to make a banning order

(1) ASIC may make a banning order against a person, by giving written notice to the person, if:

(a) ASIC suspends or cancels an Australian financial services licence held by the person; or

(b) the person has not complied with their obligations under section 912A; or

(ba) ASIC has reason to believe that the person is likely to contravene their obligations under section 912A; or

(bb) the person becomes an insolvent under administration; or

(c) the person is convicted of fraud; or

(d) ASIC has reason to believe that the person is not of good fame or character; or

(da) ASIC has reason to believe that the person is not adequately trained, or is not competent, to provide a financial service or financial services; or

(e) the person has not complied with a financial services law; or

(f) ASIC has reason to believe that the person is likely to contravene a financial services law; or

(g) the person has been involved in the contravention of a financial services law by another person; or

(h) ASIC has reason to believe that the person is likely to become involved in the contravention of a financial services law by another person.

(1A) In considering whether, at a particular time, there is reason to believe that a person is not of good fame or character, ASIC must (subject to Part VIIC of the *Crimes Act 1914*) have regard to:

(a) any conviction of the person, within 10 years before that time, for an offence that involves dishonesty and is punishable by imprisonment for at least 3 months; and

(b) whether the person has held an Australian financial services licence that was suspended or cancelled; and

(c) whether a banning order or disqualification order under Division 8 has previously been made against the person; and

(d) any other matter ASIC considers relevant.

Note: Part VIIC of the *Crimes Act 1914* includes provisions that, in certain circumstances, relieve persons from the requirement to disclose spent convictions and require persons aware of such convictions to disregard them.

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

(2) However, ASIC may only make a banning order against a person after giving the person an opportunity:

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

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

(3) Subsection (2) does not apply in so far as ASIC's grounds for making the banning order are or include the following:

(a) that the suspension or cancellation of the relevant licence took place under section 915B;

(b) that the person has been convicted of serious fraud.

920B What is a *banning order*?

(1) A ***banning order*** is a written order that prohibits a person from providing any financial services or specified financial services in specified circumstances or capacities.

(2) The order may prohibit the person against whom it is made from providing a financial service:

(a) permanently; or

(b) for a specified period, unless ASIC has reason to believe that the person is not of good fame or character.

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

(a) to do specified acts; or

(b) to do specified acts in specified circumstances;

that the order would otherwise prohibit them from doing.

920C Effect of banning orders

(1) A person against whom a banning order is made cannot be granted an Australian financial services licence contrary to the banning order.

(2) A person contravenes this subsection if:

(a) the person engages in conduct; and

(b) the conduct breaches a banning order that has been made against the person.

Note: A contravention of this subsection is an offence (see subsection 1311(1)).

920D Variation or cancellation of banning orders

(1) ASIC may vary or cancel a banning order, by giving written notice to the person against whom the order was made, if ASIC is satisfied that it is appropriate to do so because of a change in any of the circumstances based on which ASIC made the order.

(2) ASIC may do so:

(a) on its own initiative; or

(b) if the person against whom the order was made lodges with ASIC an application for ASIC to do so, which is accompanied by the documents, if any, required by regulations made for the purposes of this paragraph.

Note: For fees in respect of lodging applications, see Part 9.10.

(3) If ASIC proposes not to vary or cancel a banning order in accordance with an application lodged by a person under paragraph (2)(b), ASIC must give the person an opportunity:

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

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

920E Date of effect and publication of banning order, variation or cancellation

(1) A banning order, or variation or cancellation of a banning order, takes effect when it is given to the person against whom the order is or was made.

(2) ASIC must publish a notice in the *Gazette* as soon as practicable after making, varying or cancelling a banning order. The notice must state when the action took effect and:

(a) in the case of the making of a banning order—set out a copy of the banning order; or

(b) in the case of the variation of a banning order—set out a copy of the banning order as varied.

(3) However, if the banning order contains a provision of the kind referred to in subsection 920B(3) and ASIC considers that the *Gazette* notice would be unreasonably long if that provision were included, the notice may instead set out a summary of the provision's effect.

(4) If ASIC makes a banning order against a person who is a participant in a licensed market or a licensed CS facility, or varies a banning order against such a person, ASIC must give the operator of the market or facility written notice of the making of the order or the variation.

920F Statement of reasons

(1) A banning order given to a person must be accompanied by a statement of reasons for the order.

(2) If ASIC varies a banning order made against a person, ASIC must, on request by the person, give the person a statement of reasons for the variation.

Subdivision B—Disqualification by the Court

921A Disqualification by the Court

(1) ASIC may apply to the Court for an order or orders under this section in relation to a person if ASIC:

(a) cancels an Australian financial services licence held by the person; or

(b) makes a banning order against the person that is to operate permanently.

(2) The Court may make:

(a) an order disqualifying the person, permanently or for a specified period, from providing any financial services, or specified financial services, in specified circumstances or capacities; or

(b) any other order the Court considers appropriate.

(3) The Court may revoke or vary an order made under subsection (2).

(4) A person against whom such an order is made cannot be granted an Australian financial services licence contrary to the order.

(5) If the Court makes or varies an order under this section in relation to a person who is a participant in a licensed market or a licensed CS facility, ASIC must give the operator of the market or facility written notice of the making of the order or the variation.

Division 9—Registers relating to financial services

922A Registers relating to financial services

(1) ASIC must establish and maintain one or more registers relating to financial services.

(2) The regulations may prescribe the way in which the register or registers must be established or maintained, including the details that ASIC must enter in the register or registers in respect of the following persons or bodies:

(a) financial services licensees;

(b) authorised representatives of financial services licensees;

(c) persons against whom a banning order or disqualification order under Division 8 is made;

(e) any other persons or bodies that are prescribed by regulations made for the purposes of this paragraph.

922B Inspection of Registers

(1) A person may inspect the register or registers relating to financial services established under this Division and may make copies of, or take extracts from, the register or registers.

(2) The regulations may prescribe the fees that a person must pay ASIC to do the things mentioned in subsection (1).

(3) Any disclosure necessary for the purposes of this section is authorised by this section.

Division 10—Restrictions on use of terminology

923A Restriction on use of certain words or expressions

(1) A person contravenes this subsection if:

(a) either:

(i) the person carries on a financial services business or provides a financial service (whether or not on behalf of another person); or

(ii) another person (the ***provider***) provides a financial service on behalf of the first person; and

(b) the first person assumes or uses, in this jurisdiction, a restricted word or expression in relation to that business or service.

Note 1: For the meanings of ***restricted word or expression*** and ***assume or use***, see subsection (5).

Note 2: A contravention of this subsection is an offence (see subsection 1311(1)).

(2) However, it is not a contravention of subsection (1) for a person to assume or use a restricted word or expression if:

(a) the person does not receive any of the following:

(i) commissions (apart from commissions that are rebated in full to the person's clients);

(ii) forms of remuneration calculated on the basis of the volume of business placed by the person with an issuer of a financial product;

(iii) other gifts or benefits from an issuer of a financial product which may reasonably be expected to influence the person; and

(b) none of the following persons receives any of the things covered by paragraph (a):

(i) the person's employer (if any);

(ii) if the person provides the financial service on behalf of another person (as mentioned in subparagraph (1)(a)(i))—that other person;

(iii) any other person identified (whether by reference to a class of person or otherwise) in regulations made for the purposes of this subparagraph; and

(c) if subparagraph (1)(a)(ii) applies in relation to a financial service—the provider mentioned in that subparagraph does not receive any of the things mentioned in paragraph (a) of this subsection in respect of the provision of that service; and

(d) in carrying on a financial services business, or providing financial services, the person operates free from direct or indirect restrictions relating to the financial products in respect of which they provide financial services; and

(e) in carrying on that business, or providing those services, the person operates without any conflicts of interest that might:

(i) arise from their associations or relationships with issuers of financial products; and

(ii) reasonably be expected to influence the person in carrying on the business or providing the services.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2). See subsection 13.3(3) of the *Criminal Code*.

(3) The reference in paragraph (2)(d) to direct or indirect restrictions does not include a reference to restrictions imposed on a person by:

(a) the conditions on an Australian financial services licence; or

(b) this Chapter or regulations made for the purposes of this Chapter.

(4) If a person assumes or uses a word or expression in circumstances that give rise to the person committing an offence based on subsection (1) of this section, the person is guilty of such an 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).

(5) In this section:

(a) a reference to a restricted word or expression is a reference to:

(i) the word ***independent***, ***impartial*** or ***unbiased***; 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 word or expression being assumed or used includes a reference to the 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.

923B Restriction on use of certain words or expressions unless authorised in licence conditions

(1) A person contravenes this subsection if:

(a) the person carries on a financial services business or provides a financial service (whether or not on behalf of another person); and

(b) the person assumes or uses, in this jurisdiction, a restricted word or expression in relation to that business or service; and

(c) the person is not authorised, by the conditions on an Australian financial services licence held by the person, or by a person in relation to whom they are a representative, to assume or use that word or expression (see subsection (3)).

Note 1: For the meanings of ***restricted word or expression*** and ***assume or use***, see subsection (4).

Note 2: A contravention of this subsection is an offence (see subsection 1311(1)).

(2) If a person assumes or uses a word or expression in circumstances that give rise to the person committing an offence based on subsection (1), the person is guilty of such an 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).

(3) ASIC can only impose a condition on an Australian financial services licence authorising a person to assume or use a restricted word or expression in these circumstances:

(a) in the case of a word or expression covered by subparagraph (4)(a)(i)—if the person:
  (i) can, under the licence, provide a financial service relating to securities (whether or not the person can provide other financial services under the licence as well); and
  (ii) is a participant in a licensed market whose licence covers dealings in securities;

(b) in the case of a word or expression covered by subparagraph (4)(a)(ii)—if the person:
  (i) can, under the licence, provide a financial service relating to derivatives (whether or not the person can provide other financial services under the licence as well); and
  (ii) is a participant in a licensed market whose licence covers dealings in derivatives;

(c) in the case of a word or expression covered by subparagraph (4)(a)(iii)—if the person:
  (i) can, under the licence, provide a financial service relating to contracts of insurance (whether or not the person can provide other financial services under the licence as well); and
  (ii) in providing that service, acts on behalf of intending insureds;

(d) in the case of a word or expression covered by subparagraph (4)(a)(iv)—if the person:
  (i) can, under the licence, provide a financial service relating to contracts of general insurance (whether or not the person can provide other financial services under the licence as well); and
  (ii) in providing that service, acts on behalf of intending insureds;

(e) in the case of a word or expression covered by subparagraph (4)(a)(v)—if the person:
  (i) can, under the licence, provide a financial service relating to contracts of life insurance (whether or not the person can provide other financial services under the licence as well); and
  (ii) in providing that service, acts on behalf of intending insureds;

(f) in the case of a word or expression covered by subparagraph (4)(a)(vi)—in the circumstances (if any) that are prescribed by regulations made for the purposes of this paragraph, or after ASIC has considered the matters (if any) that are so prescribed.

(4) In this section:

(a) a reference to a restricted word or expression is a reference to:

(i) the expression ***stockbroker*** or ***sharebroker***, or any other word or expression (whether or not in English) that is of like import to that expression; or

(ii) the expression ***futures broker***, or any other word or expression (whether or not in English) that is of like import to that expression; or

(iii) the expression ***insurance broker*** or ***insurance broking***, or any other word or expression (whether or not in English) that is of like import to that expression; or

(iv) the expression ***general insurance broker***, or any other word or expression (whether or not in English) that is of like import to that expression; or

(v) the expression ***life insurance broker***, or any other word or expression (whether or not in English) that is of like import to that expression; or

(vi) any other expression or word specified in the regulations as a restricted word or expression for the purposes of this section, or any other word or expression (whether or not in English) that is of like import to such a word or expression; and

(b) a reference to a word or expression being assumed or used includes a reference to the 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; and

(c) ***contract of insurance*** and ***insured*** have the same meanings as in Division 4 of Part 7.8.

Division 11—Agreements with unlicensed persons relating to the provision of financial services

Subdivision A—Agreements affected

924A Agreements with certain unlicensed persons

(1) Subdivision B applies to an agreement entered into by a person (in this section and Subdivision B called the ***non-licensee***) and another person (in this section and Subdivision B called the ***client***) (not being a financial services licensee) that constitutes, or relates to, the provision of a financial service by the non-licensee if:

(a) the agreement is entered into in the course of a financial services business carried on by the non-licensee; and

(b) the non-licensee does not hold an Australian financial services licence covering the provision of the financial service, and is not exempt from the requirement to hold such a licence.

Note: It does not matter whether the financial service is provided to the client as a wholesale client or as a retail client.

(2) Subdivision B applies to the agreement whether or not anyone else is a party to the agreement.

Subdivision B—Effect on agreements

925A Client may give notice of rescission

(1) Subject to this section, the client may, whether before or after completion of the agreement, give to the non-licensee a written notice stating that the client wishes to rescind the agreement.

(2) The client may only give a notice under this section within a reasonable period after becoming aware of the facts entitling the client to give the notice.

(3) The client is not entitled to give a notice under this section if the client engages in conduct by engaging in which the client would, if the entitlement so to give a notice were a right to rescind the

agreement for misrepresentation by the non-licensee, be taken to have affirmed the agreement.

(4) The client is not entitled to give a notice under this section if, within a reasonable period before the agreement was entered into, the non-licensee informed the client (whether or not in writing) that the non-licensee did not hold an Australian financial services licence.

(5) If, at a time when an Australian financial services licence held by the non-licensee was suspended, the non-licensee informed the client that the licence was suspended, the non-licensee is to be taken for the purposes of subsection (4) to have informed the client at that time that the non-licensee did not hold the licence.

(6) None of subsections (2), (3) and (4) limits the generality of either of the others.

(7) Subject to this section, the client may give a notice under this section whether or not:

(a) the notice will result under section 925B in rescission of the agreement; or

(b) the Court will, if the notice so results, be empowered to make a particular order, or any order at all, under section 925D.

925B Effect of notice under section 925A

A notice given under section 925A rescinds the agreement unless rescission of the agreement would prejudice a right, or an estate in property, acquired by a person (other than the non-licensee) in good faith, for valuable consideration and without notice of the facts entitling the client to give the notice.

925C Client may apply to Court for partial rescission

(1) If the client gives a notice under section 925A but the notice does not rescind the agreement because rescission of it would prejudice a right or estate of the kind referred to in section 925B, the client may, within a reasonable period after giving the notice, apply to the Court for an order under subsection (4) of this section.

(2) The Court may extend the period for making an application under subsection (1).

(3) If an application is made under subsection (1), the Court may make such orders expressed to have effect until the determination of the application as it would have power to make if the notice had rescinded the agreement under section 925B and the application were for orders under section 925D.

(4) On an application under subsection (1), the Court may make an order:

(a) varying the agreement in such a way as to put the client in the same position, as nearly as can be done without prejudicing such a right or estate acquired before the order is made, as if the agreement had not been entered into; and

(b) declaring the agreement to have had effect as so varied at and after the time when it was originally made.

(5) If the Court makes an order under subsection (4), the agreement is to be taken for the purposes of section 925D to have been rescinded under section 925B.

(6) An order under subsection (4) does not affect the application of section 925F or 925H in relation to the agreement as originally made or as varied by the order.

925D Court may make consequential orders

(1) Subject to subsection (2), on rescission of the agreement under section 925B, the Court, on the application of the client or the non-licensee, may make such order or orders as it would have power to make if the client had duly rescinded the agreement because of misrepresentation by the non-licensee.

(2) The Court is not empowered to make a particular order under subsection (1) if the order would prejudice a right, or an estate in property, acquired by a person (other than the non-licensee) in good faith, for valuable consideration and without notice of the facts entitling the client to give the notice.

925E Agreement unenforceable against client

(1) This section:

(a) applies while both of the following are the case:

(i) the client is entitled to give a notice under section 925A;

(ii) a notice so given will result under section 925B in rescission of the agreement; and

(b) applies after the agreement is rescinded under section 925B;

but does not otherwise apply.

(2) The non-licensee is not entitled, as against the client:

(a) to enforce the agreement, whether directly or indirectly; or

(b) to rely on the agreement, whether directly or indirectly and whether by way of defence or otherwise.

925F Non-licensee not entitled to recover commission

(1) Without limiting the generality of section 925E, this section:

(a) applies while the client is entitled to give a notice under section 925A; and

(b) applies after the client so gives a notice, even if the notice does not result under section 925B in rescission of the agreement;

but does not otherwise apply.

(2) The non-licensee is not entitled to recover by any means (including, for example, set-off or a claim on a *quantum meruit*) any brokerage, commission or other fee for which the client would, but for this section, have been liable to the non-licensee under or in connection with the agreement.

925G Onus of establishing non-application of section 925E or 925F

For the purposes of determining, in a proceeding in a court, whether or not the non-licensee is, or was at a particular time, entitled as mentioned in subsection 925E(2) or 925F(2), it is to be presumed, unless the contrary is proved, that section 925E or 925F, as the case may be, applies, or applied at that time, as the case may be.

925H Client may recover commission paid to non-licensee

(1) Without limiting the generality of section 925D, if the client gives a notice under section 925A, the client may, even if the notice does not result under section 925B in rescission of the agreement, recover from the non-licensee as a debt the amount of any

brokerage, commission or other fee that the client has paid to the non-licensee under or in connection with the agreement.

(2) ASIC may, if it considers that it is in the public interest to do so, bring an action under subsection (1) in the name of, and for the benefit of, the client.

925I Remedies under this Division additional to other remedies

The client's rights and remedies under this Division are additional to, and do not prejudice, any other right or remedy of the client.

Division 12—Miscellaneous

926A Exemptions and modifications by ASIC

(1) The ***provisions to which this section applies*** are all provisions of this Part other than Divisions 4 and 8.

(2) ASIC may:

(a) exempt a person or class of persons from all or specified provisions to which this section applies; or

(b) exempt a financial product or class of financial products from all or specified provisions to which this section applies; or

(c) declare that provisions to which this section applies apply in relation to a person or financial product, or a class of persons or financial products, as if specified provisions were omitted, modified or varied as specified in the declaration.

(3) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.

(4) An exemption or declaration is a legislative instrument if the exemption or declaration is expressed to apply in relation to a class of persons or a class of financial products (whether or not it is also expressed to apply in relation to one or more persons or products identified otherwise than by reference to membership of a class).

(4A) If subsection (4) does not apply to an exemption or declaration, the exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.

(5) If conduct (including an omission) of a person would not have constituted an offence if a particular declaration under paragraph (2)(c) had not been made, that conduct does not constitute an offence unless, before the conduct occurred (in addition to complying with the requirements of the *Legislative Instruments Act 2003* (if the declaration is of a kind referred to in subsection (4)), or with the gazettal requirement of subsection (4A), as the case may be):

(a) the text of the declaration was made available by ASIC on the internet; or

(b) ASIC gave written notice setting out the text of the declaration to the person.

In a prosecution for an offence to which this subsection applies, the prosecution must prove that paragraph (a) or (b) was complied with before the conduct occurred.

(6) For the purpose of this section, the ***provisions to which this section applies*** include:

(a) definitions in this Act, or in the regulations, as they apply to references in those provisions; and

(b) any provisions of Part 10.2 (transitional provisions) that relate to those provisions.

Note: Because of section 761H, a reference to the provisions to which this section applies, or to provisions of Part 10.2, also includes a reference to regulations or other instruments made for the purposes of those provisions.

926B Exemptions and modifications by regulations

(1) The regulations may:

(a) exempt a person or class of persons from all or specified provisions of this Part; or

(b) exempt a financial product or a class of financial products from all or specified provisions of this Part; or

(c) provide that this Part applies as if specified provisions were omitted, modified or varied as specified in the regulations.

(2) For the purpose of this section, the ***provisions of this Part*** include:

(a) definitions in this Act, or in the regulations, as they apply to references in this Part; and

(b) any provisions of Part 10.2 (transitional provisions) that relate to provisions of this Part.

Part 7.7—Financial services disclosure

Division 1—Preliminary

940A How Part applies if a financial services licensee is acting as authorised representative

If a financial services licensee is, in providing a financial service, acting as the authorised representative of another financial services licensee (see section 916E), this Part applies to the first-mentioned licensee, in relation to the service, in the capacity of authorised representative (rather than the capacity of licensee).

940B What if there is no reasonable opportunity to give a document, information or statement required by this Part?

(1) If:

(a) apart from this section, a person (the ***providing entity***) would be required by a provision of this Part to give another person (the ***client***) a particular document (for example, a Financial Services Guide or a Statement of Advice), or particular information or a particular statement; and

(b) the providing entity has not had a reasonable opportunity to give (in accordance with section 940C) the client the document, information or statement by the time they are required by this Part to give it to the client;

the fact that the providing entity has not given the document, information or statement to the client as required by the provision is not a contravention of the provision.

Note: In a prosecution for an offence, a defendant bears an evidential burden in relation to the matters in this section (see subsection 13.3(3) of the *Criminal Code*).

(2) For the purposes of subsection (1), the providing entity is not taken not to have had a reasonable opportunity to provide the document, information or statement if:

(a) section 940C (or regulations made for the purposes of that section) permit the document, information or statement to be sent to an address (including an electronic address) or fax number nominated by the client; and

(b) the client has not given the providing entity an address (including an electronic address) or fax number to which the document, information or statement can be sent; but

(c) the providing entity has had a reasonable opportunity to make, but has not made, reasonable enquiries of the client to obtain such an address or fax number.

940C How documents, information and statements are to be given

(1) For the purposes of this Part (unless a contrary intention appears), a Financial Services Guide, a Supplementary Financial Services Guide or a Statement of Advice is given by a person (the ***providing entity***) to another person (the ***client***) if (and only if):

(a) it is:

(i) given to the client, or to the client's agent, personally; or

(ii) sent to the client, or the client's agent, at an address (including an electronic address) or fax number nominated by the client or the client's agent; or

(iii) otherwise made available to the client, or the client's agent, as agreed between the client, or the client's agent, and the providing entity; and

(b) it is in printed or electronic form.

(2) For the purposes of this Part (unless a contrary intention appears), information that subsection 941C(7) or 946B(6) requires to be given by a person (the ***providing entity***) to another person (the ***client***) is given by the providing entity to the client if (and only if):

(a) it is given to the client, or the client's agent, orally; or

(b) it is in printed or electronic form and is:

(i) given to the client, or the client's agent, personally; or

(ii) sent to the client, or the client's agent, at an address (including an electronic address) or fax number nominated by the client or the client's agent; or

(iii) otherwise made available to the client, or the client's agent, as agreed between the client or the client's agent and the providing entity; or

(c) it is given by some other method permitted by regulations made for the purposes of this paragraph.

(3) For the purposes of this Part (unless a contrary intention appears), information that subsection 941C(5), paragraph 946AA(5)(b) or subsection 946B(3) or (8) requires to be given by a person (the ***providing entity***) to another person (the ***client***) is given by the providing entity to the client if (and only if) it is given to the client, or the client's agent, in accordance with the applicable requirements of regulations made for the purposes of this subsection.

(4) For the purposes of this Part (unless a contrary intention appears), a statement that subsection 941D(2) or 946C(2) requires to be given by a person (the ***providing entity***) to another person (the ***client***) is given by the providing entity to the client if (and only if) it is given orally to the client or the client's agent.

(5) For the purposes of this section, a document, information or statement to which this section applies is sent to a person at an address if, and only if:

(a) the document, information or statement is sent to the address; and

(b) either:

(i) the envelope or other container in which it is sent; or

(ii) the message that accompanies it;

is addressed to the person.

(6) A document, information or statement to which this section applies may be given or sent to a person's agent only if the agent is not acting as the person's agent in one of the following capacities:

(a) a financial services licensee;

(b) an authorised representative of a financial services licensee;

(d) a person who is not required to hold an Australian financial services licence because the person is covered by:

(i) paragraph 911A(2)(j); or

(ii) an exemption in regulations made for the purposes of paragraph 911A(2)(k); or

(iii) an exemption specified by ASIC for the purposes of paragraph 911A(2)(l);

(e) a person who is required to hold an Australian financial services licence but who does not hold such a licence;

(f) an employee, director or other representative of a person referred to in paragraph (a), (b), (c), (d) or (e).

(7) The regulations may specify requirements as to:

(a) the manner in which a document, information or statement may be given to a person; and

(b) the presentation, structure and format for a document, information or statement that is to be given in electronic form.

The giving of the document, information or statement is not effective unless those requirements are satisfied.

940D General approach to offence provisions

Subdivision A of Division 7 contains provisions creating offences by reference to various rules contained in Divisions of this Part. However, it does not create all the offences relating to those rules, as some offences are created by subsection 1311(1). Where offences are created by subsection 1311(1) in relation to a rule, this is indicated by a note at the end of the provision containing the rule.

Division 2—Person provided with financial service as retail client to be given a Financial Services Guide

Subdivision A—Requirement for a Financial Services Guide to be given

941A Obligation on financial services licensee to give a Financial Services Guide if financial service provided to person as a retail client

(1) A financial services licensee (the ***providing entity***) must give a person a Financial Services Guide in accordance with this Division if the providing entity provides a financial service to the person (the ***client***) as a retail client.

(2) This section has effect subject to section 941C.

941B Obligation on authorised representative to give a Financial Services Guide if financial service provided to person as a retail client

(1) An authorised representative (the ***providing entity***) of a financial services licensee (the ***authorising licensee***), or of 2 or more financial services licensees (the ***authorising licensees***), must give a person a Financial Services Guide in accordance with this Division if the providing entity, as a representative of the authorising licensee, or one or more of the authorising licensees, provides a financial service to the person (the ***client***) as a retail client.

Note: If the providing entity is the authorised representative of 2 or more financial services licensees, each of those licensees is, for the purposes of this Division, an authorising licensee in relation to the financial service provided to the client, even though the providing entity may not have been acting as representative of each of those licensees in providing the service to the client.

(2) A Financial Services Guide must not be given to the person by the providing entity unless the authorising licensee, or each of the authorising licensees, has authorised its distribution by the providing entity.

(3) This section has effect subject to section 941C.

941C Situations in which a Financial Services Guide is not required

Client has already received the information

(1) The providing entity does not have to give the client a Financial Services Guide (the ***new FSG***) if the client has already received a Financial Services Guide that contains all of the information that the new FSG is required to contain.

Providing entity is product issuer dealing in own products

(2) The providing entity does not have to give the client a Financial Services Guide if:

(a) the providing entity is an issuer of financial products; and

(b) the financial service is a dealing (see section 766C) in financial products, other than derivatives able to be traded on a licensed market, issued by the providing entity, and does not also relate to financial products issued by someone else.

Note: The issuer will however have to comply with the Product Disclosure Statement requirements (see Division 2 of Part 7.9).

Providing entity is merely operating a registered scheme

(3) The providing entity does not have to give the client a Financial Services Guide if:

(a) the providing entity is the responsible entity of a registered scheme; and

(b) the financial service consists only of the operation of that scheme by the providing entity.

Financial product advice given to the public

(4) The providing entity does not have to give the client a Financial Services Guide if the financial service is general advice provided to the public, or a section of the public, in the manner prescribed by regulations made for the purposes of this subsection.

(5) However, if subsection (4) applies and the client is not given a Financial Services Guide before the advice is provided, the client must instead, before the advice is provided, be given the information that would be required to be in the Financial Services Guide by paragraphs 942B(2)(a), (e) and (f), or paragraphs 942C(2)(a), (c), (f) and (g), as the case requires.

Certain basic deposit and other products

(6) The providing entity does not have to give the client a Financial Services Guide if the financial service is a dealing (see section 766C) in, is the provision of financial product advice (see section 766B) about, or in any other way relates to, any of the following:

(a) a basic deposit product;

(b) a facility for making non-cash payments (see section 763D) that is related to a basic deposit product;

(c) a financial product of a kind prescribed by regulations made for the purposes of this paragraph.

(7) However, if subsection (6) applies and the client is not given a Financial Services Guide before the service is provided, the client must instead, before the service is provided, be given the information that would be required to be in the Financial Services Guide by paragraphs 942B(2)(a) and (h), or paragraphs 942C(2)(a) and (i), as the case requires.

Regulations may specify other exemptions

(8) A Financial Services Guide does not have to be given to the client in circumstances specified in regulations made for the purposes of this subsection.

941D Timing of giving Financial Services Guide

General rule

(1) Subject to this section, the Financial Services Guide must be given to the client as soon as practicable after it becomes apparent to the providing entity that the financial service will be, or is likely to be, provided to the client, and must in any event be given to the client before the financial service is provided.

Time critical cases

(2) If:

(a) the client expressly instructs that they require the financial service to be provided immediately, or by a specified time; and

(b) it is not reasonably practicable to give the Financial Services Guide to the client before the service is provided as so instructed;

the providing entity must instead give the client a statement that complies with subsection (3) before the service is provided.

(3) The statement must contain:

(a) the information that would be required to be in the Financial Services Guide by paragraphs 942B(2)(e), (f) and (i), or paragraphs 942C(2)(f), (g) and (j), as the case requires; and

(b) such other information as would be required to be in the Financial Services Guide as is particularly relevant to the financial service to be provided.

(4) The client must then be given the Financial Services Guide within 5 days after being given the statement, or sooner if practicable.

941E Information must be up to date

The information in the Financial Services Guide must be up to date as at the time when it is given to the client.

Note: A Supplementary Financial Services Guide containing updated information may be given with a Financial Services Guide that has become out of date. The updated information is taken to be included in the Financial Services Guide (see section 943D.)

941F Obligation to give updated Financial Services Guide

If:

(a) the Financial Services Guide is given to the client before the financial service is provided; and

(b) the following conditions are satisfied:

(i) there is a change in circumstances before the service is provided, and the Financial Services Guide does not contain the information it would be required to contain if it were given to a person immediately after that change;

(ii) the fact that the Financial Services Guide does not contain the up to date information is materially adverse from the point of view of a reasonable person deciding, as a retail client, whether to proceed to be provided with the financial service;

the providing entity must, before the service is provided, give the client:

(c) another Financial Services Guide that contains the up to date information before the service is provided; or

(d) a Supplementary Financial Services Guide (see Subdivision C) that updates the information in the Financial Services Guide.

Subdivision B—Content and authorisation of Financial Services Guide

942A Title of Financial Services Guide

(1) The title "Financial Services Guide" must be used on the cover of, or at or near the front of, a Financial Services Guide.

(2) In any other part of a Financial Services Guide, "Financial Services Guide" may be abbreviated to "FSG".

942B Financial Services Guide given by financial services licensee—main requirements

(1) This section applies if the providing entity is a financial services licensee.

(2) Subject to subsection (3) and to the regulations (see subsection (4)), the Financial Services Guide must include the following statements and information:

(a) a statement setting out the name and contact details of the providing entity; and

(b) a statement setting out any special instructions about how the client may provide instructions to the providing entity; and

(c) information about the kinds of financial services (the ***authorised services***) that the providing entity is authorised by its licence to provide, and the kinds of financial products to which those services relate; and

(d) information about who the providing entity acts for when providing the authorised services; and

(e) information about the remuneration (including commission) or other benefits that any of the following is to receive in

respect of, or that is attributable to, the provision of any of the authorised services:

(i) the providing entity;

(ii) a related body corporate of the providing entity;

(iii) a director or employee of the providing entity or a related body corporate;

(iv) an associate of any of the above;

(v) any other person in relation to whom the regulations require the information to be provided;

(f) information about any associations or relationships between the providing entity, or any related body corporate, and the issuers of any financial products, being associations or relationships that might reasonably be expected to be capable of influencing the providing entity in providing any of the authorised services; and

(g) if the providing entity provides further market-related advice (see subsection 946B(1)) or advice to which subsection 946B(7) applies—a statement in relation to which the following requirements are satisfied:

(i) the statement must indicate that the client may request a record of that advice, if they have not already been provided with a record of that advice;

(ii) the statement must set out particulars of how the client may request such a record;

(iii) any limitations in those particulars on the time within which the client may request such a record must be consistent with any applicable requirements in regulations made for the purposes of this subparagraph or, if there are no such applicable requirements, must be such as to allow the client a reasonable opportunity to request a record of the advice; and

(h) information about the dispute resolution system that covers complaints by persons to whom the providing entity provides financial services, and about how that system may be accessed; and

(i) if the providing entity acts under a binder in providing any of the authorised services—a statement that:

(i) identifies the services provided under the binder; and

(ii) states that they are provided under a binder; and

(iii) explains the significance of the services being provided under a binder; and

(j) if the providing entity is a participant in a licensed market or a licensed CS facility—a statement that the providing entity is a participant in that market or facility; and

(k) any other statements or information required by the regulations.

Note: A Supplementary Financial Services Guide containing additional information may be given with a Financial Services Guide that does not contain all the required information. The additional information is taken to be included in the Financial Services Guide (see section 943D.)

(3) Subject to subsection (4), the level of information about a matter that is required is such as a person would reasonably require for the purpose of making a decision whether to acquire financial services from the providing entity as a retail client.

(4) The regulations may provide all or any of the following:

(a) that a provision of subsection (2) does not apply in a particular situation;

(b) that particular information is not required by a provision of subsection (2), either in a particular situation or generally;

(c) a more detailed statement of the information that is required by a provision of subsection (2), either in a particular situation or generally;

(d) that certain supplementary information must be given or made available to the client in some other way.

(5) The Financial Services Guide must be dated. The date must be the date on which the Financial Services Guide was prepared or its preparation was completed.

(6) The Financial Services Guide may also contain other information.

(6A) The information included in the Financial Services Guide must be worded and presented in a clear, concise and effective manner.

(7) The regulations may require the providing entity, in circumstances specified in the regulations, to provide the client, on request, with more detailed information about remuneration (including commission) or other benefits of a kind referred to in paragraph (2)(e).

(8) If:

(a) the Financial Services Guide includes a statement to the effect that a client may request a record of further market-related advice or advice to which subsection 946B(7) applies; and

(b) the client is provided with advice to which that statement applies; and

(c) the client has not already been provided with a record of that advice;

the providing entity must comply with a request made in accordance with that statement for a record of that advice.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

942C Financial Services Guide given by authorised representative—main requirements

(1) This section applies if the providing entity is an authorised representative.

(2) Subject to subsection (3) and to the regulations (see subsection (4)), the Financial Services Guide must include the following statements and information:

(a) a statement setting out the name and contact details of the providing entity; and

(b) a statement setting out any special instructions about how the client may provide instructions to the providing entity; and

(c) a statement:

(i) setting out the name and contact details of the authorising licensee, or of each of the authorising licensees; and

(ii) stating that the providing entity is the authorised representative of that licensee or those licensees; and

(d) information, in relation to the authorising licensee or each of the authorising licensees, about the kinds of financial services (the ***authorised services***) that the providing entity provides as representative of the authorising licensee, and the kinds of financial products to which those services relate; and

(e) information about who the authorising licensee, or each of the authorising licensees, acts for when financial services are provided on their behalf by the providing entity; and

(f) information about the remuneration (including commission) or other benefits that any of the following is to receive in respect of, or that is attributable to, the provision of any of the authorised services:

(i) the providing entity;

(ii) an employer of the providing entity;

(iii) the authorising licensee, or any of the authorising licensees;

(iv) an employee or director of the authorising licensee, or of any of the authorising licensees;

(v) an associate of any of the above;

(vi) any other person in relation to whom the regulations require the information to be provided; and

(g) information about any associations or relationships between:

(i) the providing entity, or any employer of the providing entity, and the issuers of any financial products; or

(ii) the authorising licensee, or any of the authorising licensees, or any related body corporate of the authorising licensee or any of the authorising licensees, and the issuers of any financial products;

being associations or relationships that might reasonably be expected to be capable of influencing the providing entity in providing any of the authorised services; and

(h) if the providing entity, when acting as representative of the authorising licensee or any of the authorising licensees, provides further market-related advice (see subsection 946B(1)) or advice to which subsection 946B(7) applies—a statement in relation to which the following requirements are satisfied:

(i) the statement must indicate that the client may request a record of that advice, if they have not already been provided with a record of that advice;

(ii) the statement must set out particulars of how the client may request such a record;

(iii) any limitations in those particulars on the time within which the client may request such a record must be

consistent with any applicable requirements in regulations made for the purposes of this subparagraph or, if there are no such applicable requirements, must be such as to allow the client a reasonable opportunity to request a record of the advice; and

(i) information about the dispute resolution system that covers complaints by persons to whom the providing entity provides financial services when acting as representative of the authorising licensee or any of the authorising licensees, and about how that system may be accessed; and

(j) if the providing entity acts under a binder in providing any of the authorised services—a statement that:

(i) identifies the services provided under the binder; and

(ii) states that they are provided under a binder; and

(iii) explains the significance of the services being provided under a binder; and

(k) if the providing entity, or the authorising licensee or any of the authorising licensees, is a participant in a licensed market or a licensed CS facility—a statement that the providing entity or authorising licensee is a participant in that market or facility; and

(l) a statement to the effect that the distribution of the Financial Services Guide by the providing entity has been authorised by the authorising licensee, or by each of the authorising licensees; and

(m) any other statements or information required by the regulations.

Note: A Supplementary Financial Services Guide containing additional information may be given with a Financial Services Guide that does not contain all the required information. The additional information is taken to be included in the Financial Services Guide (see section 943D.)

(3) Subject to subsection (4), the level of detail of information about a matter that is required is such as a person would reasonably require for the purpose of making a decision whether to acquire financial services from the providing entity as a retail client.

(4) The regulations may provide all or any of the following:

(a) that a provision of subsection (2) does not apply in a particular situation;

(b) that particular information is not required by a provision of subsection (2), either in a particular situation or generally;

(c) a more detailed statement of the information that is required by a provision of subsection (2), either in a particular situation or generally;

(d) that certain supplementary information must be given or made available to the client in some other way.

(5) The Financial Services Guide must be dated. The date must be the date on which the Financial Services Guide was prepared or its preparation was completed.

(6) The Financial Services Guide may also contain other information.

(6A) The information included in the Financial Services Guide must be worded and presented in a clear, concise and effective manner.

(7) The regulations may require the providing entity, in circumstances specified in the regulations, to provide the client, on request, with more detailed information about remuneration (including commission) or other benefits of a kind referred to in paragraph (2)(f).

(8) If:

(a) the Financial Services Guide includes a statement to the effect that a client may request a record of further market-related advice or advice to which subsection 946B(7) applies; and

(b) the client is provided with advice to which that statement applies; and

(c) the client has not already been provided with a record of that advice;

the providing entity must comply with a request made in accordance with that statement for a record of that advice.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

942D Financial Services Guide may consist of 2 or more separate documents given at same time

(1) Subject to this section, a Financial Services Guide may be made up of 2 or more separate documents that are given at the same time.

(2) Each of the documents must have on the cover of the document, or at or near the front of the document, a statement:

(a) to the effect that the document is part of a Financial Services Guide; and

(b) that (subject to subsection (3)) identifies the other documents that make up the Financial Services Guide.

(3) If there are or may be different versions of a document referred to in paragraph (2)(b), the statement required by subsection (2) does not have to identify any particular one of those versions and may instead identify the document generically.

Note: For example, if a Financial Services Guide is made up of a core document that is not updated very frequently, and a separate document providing information about remuneration that is updated more frequently:

(a) the statement in the core document need only refer to the fact that it, and a separate document about remuneration, make up the Financial Services Guide; and

(b) the statement in the document about remuneration need only refer to the fact that it, and a separate document about all other required matters, make up the Financial Services Guide.

(4) The requirement of section 942A (title of Financial Services Guide) is taken to be satisfied if the title "Financial Services Guide" is used on the cover of, or at or near the front of, at least one of the documents that make up the Financial Services Guide.

(5) The requirement of subsection 942B(5) or 942C(5) (dating of Financial Services Guide) must be separately complied with in relation to each of the documents. If, for any purpose, a single date needs to be determined as the date of the Financial Services Guide as a whole, that date is the most recent of the dates of those documents.

(6) Section 942E applies to an alteration to one of the documents as though the reference in that section to the date specified in the Financial Services Guide were a reference to the date specified in the document.

(7) The regulations may impose additional requirements to be complied with if a Financial Services Guide is made up of 2 or more documents.

942DA Combining a Financial Services Guide and a Product Disclosure Statement in a single document

(1) A Financial Services Guide and a Product Disclosure Statement may be combined in a single document (a ***combined FSG and PDS***) in circumstances specified in regulations made for the purposes of this section.

(2) Those regulations may also provide that this Chapter applies in relation to a combined FSG and PDS as if specified provisions were omitted, modified or varied as specified in the regulations.

(3) A Financial Services Guide and a Product Disclosure Statement must not be combined in a single document except as permitted under subsection (1).

942E Altering a Financial Services Guide after its preparation and before giving it to a person

A financial services licensee, or an authorised representative of a financial services licensee, must not, in purported compliance with a provision of this Part, give a person a Financial Services Guide (the ***FSG***) that has been altered (otherwise than pursuant to paragraph (b)) after the date specified in the FSG as required by subsection 942B(5) or 942C(5) unless:

(a) the alteration was made by, or with the authority of:

(i) if section 942B applies to the FSG—the financial services licensee to which the FSG relates; or

(ii) if section 942C applies to the FSG—the financial services licensees, who authorised the distribution of the FSG; and

(b) if the alteration is a material alteration—the date of the FSG has been changed to the date on which the alteration was made.

Note: Failure to comply with this section is an offence (see subsection 1311(1)).

Subdivision C—Supplementary Financial Services Guides

943A What a Supplementary Financial Services Guide is

(1) A ***Supplementary Financial Services Guide*** is a document by which a person who has prepared a Financial Services Guide (the ***FSG***) can:

(a) correct a misleading or deceptive statement in the FSG; or

(b) correct an omission from the FSG of information it is required to contain; or

(c) update the information contained in the FSG.

(2) A Supplementary Financial Services Guide must not be given to a person by an authorised representative of a financial services licensee unless the licensee has authorised its distribution by the authorised representative.

943B Title of Supplementary Financial Services Guide

(1) The title "Supplementary Financial Services Guide" must be used on the cover of, or at or near the front of, a Supplementary Financial Services Guide.

(2) In any other part of a Supplementary Financial Services Guide, "Supplementary Financial Services Guide" may be abbreviated to "SFSG".

943C Form of Supplementary Financial Services Guide

(1) At the beginning of a Supplementary Financial Services Guide there must be:

(a) a statement that it is a Supplementary Financial Services Guide; and

(b) an identification of the Financial Services Guide that it supplements; and

(c) a statement that it is to be read together with that Financial Services Guide and any other specified Supplementary Financial Services Guides.

(2) The Supplementary Financial Services Guide must be dated. The date must be the date on which the Supplementary Financial Services Guide was prepared or its preparation was completed.

(3) If the Supplementary Financial Services Guide will or may be distributed by an authorised representative of a financial services licensee, it must contain a statement to the effect that its distribution by the authorised representative has been authorised by the licensee.

943D Effect of giving a person a Supplementary Financial Services Guide

If:

(a) a person is given a Financial Services Guide (the ***FSG***); and

(b) at the same time, or later, they are given a Supplementary Financial Services Guide (the ***SFSG***) that supplements the FSG;

the FSG is taken, from when the SFSG is given to the person, to include the information and statements contained in the SFSG.

943E Situation in which only a Supplementary Financial Services Guide need be given

If:

(a) apart from this section, a person (the ***providing entity***) would be required to give another person (the ***client***) a Financial Services Guide (the ***new FSG***); and

(b) the client has, because of some previous conduct, already been given a Financial Services Guide (the ***earlier FSG***) containing some, but not all, of the information that the new FSG is required to contain;

the provider may, instead of giving the client the new FSG, give the client a Supplementary Financial Services Guide that contains the additional information.

943F Altering a Supplementary Financial Services Guide after its preparation and before giving it to a person

A financial services licensee, or an authorised representative of a financial services licensee, must not, in purported compliance with a provision of this Part, give a person a Supplementary Financial Services Guide (the ***SFSG***) that has been altered (otherwise than pursuant to paragraph (b)) after the date specified in the SFSG as required by subsection 943C(2) unless:

(a) the alteration was made by, or with the authority of:

(i) if section 942B applies to the Financial Services Guide that the SFSG supplements—the financial services licensee to which the Guide relates; or

(ii) if section 942C applies to the Financial Services Guide that the SFSG supplements—the financial services licensee, or each of the financial services licensees, who authorised the distribution of the SFSG; and

(b) if the alteration is a material alteration—the date of the SFSG has been changed to the date on which the alteration was made.

Note: Failure to comply with this section is an offence (see subsection 1311(1)).

Division 3—Additional requirements for personal advice provided to a retail client

Subdivision A—When this Division applies

944A Situation in which Division applies

This Division applies in relation to the provision of personal advice (the ***advice***) in the following circumstances:

(a) the advice is provided:

(i) by a financial services licensee (the ***providing entity***); or

(ii) by a person (the ***providing entity***) in their capacity as authorised representative of a financial services licensee (the ***authorising licensee***), or of 2 or more financial services licensees (the ***authorising licensees***); and

(b) the advice is provided to a person (the ***client***) as a retail client.

Subdivision C—Requirement for a Statement of Advice to be given

946A Obligation to give client a Statement of Advice

(1) The providing entity must give the client a Statement of Advice in accordance with this Subdivision and Subdivision D.

(2) The Statement of Advice may be:

(a) the means by which the advice is provided; or

(b) a separate record of the advice.

(3) This section has effect subject to sections 946AA and 946B.

946AA Small investments—Statement of Advice not required

Small investments generally

(1) The providing entity does not have to give the client a Statement of Advice for particular advice (the ***small investment advice***) if:

(a) both of the following apply:

(i) an amount (the ***threshold amount***) has been prescribed by regulations made for the purposes of this paragraph;

(ii) the total value of all financial investments in relation to which the advice is provided, as worked out under subsection (2), does not exceed the threshold amount; and

(b) the advice does not relate to any of the following:

(i) a derivative;

(ii) a general insurance product;

(iii) a life risk insurance product (except to the extent that advice about a superannuation product relates to a life risk insurance product); and

(c) the advice does not relate to any superannuation product or RSA product, unless the client already has an interest in the product.

(1A) The providing entity does not have to give the client a Statement of Advice as mentioned in subsection (1) if:

(a) the advice relates to an FHSA product; and

(b) both subparagraphs (1)(a)(i) and (ii) apply.

Total value of investments

(2) For the purposes of paragraph (1)(a), the total value of investments in relation to which the small investment advice is provided is:

(a) if the advice solely relates to the acquisition of all (or part) of one or more financial products, or of an increased interest in one or more financial products—the sum of the values (the ***total acquisition value***) of each acquisition; or

(b) if the advice solely relates to the disposal of all (or part) of one or more financial products, or of a part of an interest in one or more financial products—the sum of the values (the ***total disposal value***) of each disposal; or

(c) if the advice relates to both an acquisition, and a disposal, mentioned in paragraphs (a) and (b):

(i) the total acquisition value; or

(ii) if the total disposal value exceeds the total acquisition value—the total disposal value.

Method for working out threshold amount

(3) Regulations made for the purposes of paragraph (1)(a) may prescribe how the threshold amount is to be worked out in relation to particular kinds of financial products.

Record of advice

(4) The providing entity must keep a record of the small investment advice and, in doing so, must comply with any applicable requirements of regulations made for the purposes of this subsection.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(5) The providing entity must, at the applicable time, give the client:
(a) a copy of the record of the small investment advice; and
(b) the information that would, if a Statement of Advice were to be given, be required to be in the Statement by paragraphs 947B(2)(d) and (e), or 947C(2)(e) and (f), as the case requires.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(6) For the purposes of subsection (5), the ***applicable time*** for something to be given relating to the small investment advice is the time:
(a) when, or as soon as practicable after, the advice is provided; and
(b) in any event—before the providing entity provides the client with any further financial service arising out of, or connected with, the advice.

946B Other situations in which a Statement of Advice is not required

Further market-related advice

(1) The providing entity does not have to give the client a Statement of Advice for particular advice (the ***further market-related advice***) if:

(a) the providing entity is a participant in a licensed market, or is an authorised representative of a participant in a licensed market; and

(b) the providing entity has previously given the client a Statement of Advice that set out the client's relevant personal circumstances in relation to the advice (the ***previous advice***) set out in that Statement; and

(c) the further market-related advice recommends that the client:

(i) acquire or dispose of, or not acquire or dispose of; or

(ii) accept or refuse an offer or invitation which, if accepted, would result in the client acquiring or disposing of, or offering to acquire or dispose of;

securities, managed investment products or derivatives that are able to be traded on a licensed market; and

(d) the following conditions are satisfied:

(ia) the providing entity has, either immediately before the further market-related advice is given, or within the preceding 12 months, checked with the client whether the client's objectives, financial situation and needs have changed since the last time the providing entity checked with the client about those matters; and

(i) the client's relevant personal circumstances in relation to the further market-related advice (determined having regard to the client's objectives, financial situation and needs as currently known to the providing entity) are not significantly different from the client's relevant personal circumstances in relation to the previous advice; and

(ii) so far as the basis on which advice is given relates to other matters—the basis on which the further market-related advice is given is not significantly different from the basis on which the previous advice was given; and

(e) the providing entity has a reasonable belief that:

(i) the client requires the further market-related advice to be provided promptly; or

(ii) it is in the client's interests that the further market-related advice be provided promptly; and

(f) either:

(i) the further market-related advice does not contain any other kind of financial product advice; or

(ii) the only other kind of financial product advice contained in the further market-related advice is cash management facility advice; and

(g) the further market-related advice is given:

(i) by telephone; or

(ii) by fax; or

(iii) by e-mail; or

(iv) by another kind of electronic communication specified in regulations made for the purposes of this subparagraph.

Note: Paragraphs 947B(2)(b) and 947C(2)(b) require a Statement of Advice to include information about the basis on which the advice is or was given, which may include the client's relevant personal circumstances, in which case paragraph (b) of this subsection would be satisfied.

(2) For the purposes of subsection (1):

able to be traded on a licensed market means:

(a) in relation to securities or managed investment products—either:

(i) the securities or products are admitted to quotation on a licensed market and their admission to quotation is not suspended; or

(ii) the securities or products are not admitted to quotation on a licensed market, but are further securities or products of a kind that are already admitted to quotation on the market and whose admission to quotation is not suspended; and

(b) in relation to derivatives:

(i) the standard terms of the arrangement that constitutes the derivative are set out in the operating rules of a licensed market; and

(ii) under the operating rules of that market, the derivatives are able to be dealt with on the market.

cash management facility means:

(a) an interest in a registered scheme of a kind commonly known as a cash common fund or a cash management trust; or

(b) a basic deposit product; or

(c) a bank accepted bill.

cash management facility advice means advice about the use (but not the establishment) of a cash management facility in connection with an acquisition or disposal of securities, managed investment products or derivatives to which the further market-related advice relates.

(3) However, in the same communication as is used to provide the further market-related advice to the client, the client must be given the information that would, if a Statement of Advice were to be given, be required to be in the Statement by paragraphs 947B(2)(d) and (e), or 947C(2)(e) and (f), as the case requires.

(3A) The providing entity must keep a record of the further market-related advice and, in doing so, must comply with any applicable requirements of regulations made for the purposes of this subsection.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: For the client's right to a record of the advice, see subsections 942B(8) and 942C(8).

Certain basic deposit and other products

(5) The providing entity does not have to give the client a Statement of Advice if the advice relates to any or all of the following:

(a) a basic deposit product;

(b) a facility for making non-cash payments (see section 763D) that is related to a basic deposit product;

(c) a financial product of a kind prescribed by regulations made for the purposes of this paragraph.

(6) However, if subsection (5) applies and the client is not given a Statement of Advice, the client must instead, when, or as soon as practicable after, the advice is provided, be given the information that would be required to be in the Statement of Advice by paragraphs 947B(2)(d) and (e), or 947C(2)(e) and (f), as the case requires.

Where advice does not recommend the purchase or sale of products

(7) The providing entity does not have to give the client a Statement of Advice for particular advice if:

(a) the advice does not recommend or state an opinion in respect of:

(i) the acquisition or disposal of any specific financial product, or the products of a specific issuer; nor

(ii) a modification to an investment strategy or a contribution level in relation to a financial product held by the client; and

(b) the following persons do not directly receive any remuneration (other than remuneration that is currently being received for an earlier acquisition of a product) or other benefit for, or in relation to, the advice:

(i) the providing entity;

(ii) an employer of the providing entity;

(iii) the authorising licensee, or any of the authorising licensees;

(iv) an employee or director of the authorising licensee, or of any of the authorising licensees;

(v) an associate of any of the above;

(vi) any other person prescribed by regulations made for the purposes of this paragraph.

(8) However, in the same communication as is used to provide to the client the advice referred to in subsection (7), the client must be given the information that would, if a Statement of Advice were to be given, be required to be in the Statement by paragraphs 947B(2)(d) and (e), or 947C(2)(e) and (f), as the case requires.

(9) The providing entity must keep a record of the advice and, in doing so, must comply with any applicable requirements of regulations made for the purposes of this subsection.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: For the client's right to a record of the advice, see subsections 942B(8) and 942C(8).

946C Timing of giving Statement of Advice

General rule

(1) Subject to this section, if the Statement of Advice is not the means by which the advice is provided, the Statement of Advice must be given to the client when, or as soon as practicable after, the advice is provided and, in any event, before the providing entity provides the client with any further financial service that arises out of or is connected with that advice.

Statement of certain information if Statement of Advice not given when advice provided

(2) If the Statement of Advice is not given to the client when the advice is provided, the providing entity must, when the advice is provided, give the client a statement that contains the information that would be required to be in a Statement of Advice by paragraphs 947B(2)(d) and (e), or 947C(2)(e) and (f), as the case requires, and by section 947D, if applicable.

Time critical cases

(3) If:

(a) the client expressly instructs that they require a further financial service that arises out of, or is connected with, the advice to be provided immediately, or by a specified time; and

(b) it is not reasonably practicable to give the Statement of Advice to the client before that further service is provided as so instructed;

the providing entity must give the client the Statement of Advice:

(c) unless paragraph (d) applies—within 5 days after providing that further service, or sooner if practicable; or

(d) if that further service is the provision to the person of a financial product and section 1019B (cooling-off period) will apply to the acquisition of the product by the person—before the start of the period applicable under subsection 1019B(3), or sooner if practicable.

Subdivision D—Content of Statement of Advice

947A Title of Statement of Advice

(1) The title "Statement of Advice" must be used on the cover of, or at or near the front of, a Statement of Advice.

(2) In any other part of a Statement of Advice, "Statement of Advice" may be abbreviated to "SoA".

947B Statement of Advice given by financial services licensee—main requirements

(1) This section applies if the providing entity is a financial services licensee.

(2) Subject to subsection (3) and to the regulations (see subsection (4)), the Statement of Advice must include the following statements and information:

(a) a statement setting out the advice; and

(b) information about the basis on which the advice is or was given; and

(c) a statement setting out the name and contact details of the providing entity; and

(d) information about any remuneration (including commission) or other benefits that any of the following is to receive that might reasonably be expected to be or have been capable of influencing the providing entity in providing the advice:

(i) the providing entity;

(ii) a related body corporate of the providing entity;

(iii) a director or employee of the providing entity or a related body corporate;

(iv) an associate of any of the above;

(v) any other person in relation to whom the regulations require the information to be provided; and

(e) information about:

(i) any other interests, whether pecuniary or not and whether direct or indirect, of the providing entity or of any associate of the providing entity; and

(ii) any associations or relationships between the providing entity or any associate of the providing entity and the issuers of any financial products;

that might reasonably be expected to be or have been capable of influencing the providing entity in providing the advice; and

(f) if section 961H requires a warning to be given to the client in relation to the advice—a statement setting out, or recording, the warning required by that section; and

(g) any other statements or information required by the regulations; and

(h) unless in accordance with the regulations, for information to be disclosed in accordance with paragraph (d) and subparagraph (e)(i), any amounts are to be stated in dollars.

(3) Subject to subsection (4), the level of detail about a matter that is required is such as a person would reasonably require for the purpose of deciding whether to act on the advice as a retail client.

(4) The regulations may provide all or any of the following:

(a) that a provision of subsection (2) does not apply in a particular situation;

(b) that particular information is not required by a provision of subsection (2), either in a particular situation or generally;

(c) a more detailed statement of the information that is required by a provision of subsection (2), either in a particular situation or generally.

(5) The Statement of Advice:

(a) must also include any information required by section 947D, if applicable; and

(b) may also include other information.

(6) The statements and information included in the Statement of Advice must be worded and presented in a clear, concise and effective manner.

947C Statement of Advice given by authorised representative—main requirements

(1) This section applies if the providing entity is an authorised representative.

(2) Subject to subsection (3) and to the regulations (see subsection (4)), the Statement of Advice must include the following statements and information:

(a) a statement setting out the advice; and

(b) information about the basis on which the advice is or was given; and

(c) a statement setting out the name and contact details of the providing entity; and

(d) a statement

(i) setting out the name and contact details of the authorising licensee, or of each of the authorising licensees; and

(ii) stating that the providing entity is the authorised representative of that licensee or those licensees; and

(e) information about the remuneration (including commission) or other benefits that any of the following is to receive that might reasonably be expected to be or have been capable of influencing the providing entity in providing the advice:

(i) the providing entity;

(ii) an employer of the providing entity;

(iii) the authorising licensee, or any of the authorising licensees;

(iv) an employee or director of the authorising licensee, or of any of the authorising licensees;

(v) an associate of any of the above;

(vi) any other person in relation to whom the regulations require the information to be provided; and

(f) information about:

(i) any other interests, whether pecuniary or not and whether direct or indirect, of the providing entity, any employer of the providing entity, the authorising licensee or any of the authorising licensees, or of any associate of any of those persons; and

(ii) any associations or relationships between the providing entity, any employer of the providing entity, the authorising licensee or any of the authorising licensees, or any associate of any of those persons, and the issuers of any financial products;

that might reasonably be expected to be or have been capable of influencing the providing entity in providing the advice; and

(g) if section 961H requires a warning to be given to the client in relation to the advice—a statement setting out, or recording, the warning required by that section; and

(h) any other statements or information required by the regulations; and

(i) unless in accordance with the regulations, for information to be disclosed in accordance with paragraph (e) and subparagraph (f)(i), any amounts are to be stated in dollars.

(3) Subject to subsection (4), the level of detail about a matter that is required is such as a person would reasonably require for the purpose of deciding whether to act on the advice as a retail client.

(4) The regulations may provide all or any of the following:

(a) that a provision of subsection (2) does not apply in a particular situation;

(b) that particular information is not required by a provision of subsection (2), either in a particular situation or generally;

(c) a more detailed statement of the information that is required by a provision of subsection (2), either in a particular situation or generally.

(5) The Statement of Advice:

(a) must also include any information required by section 947D, if applicable; and

(b) may also include other information.

(6) The statements and information included in the Statement of Advice must be worded and presented in a clear, concise and effective manner.

947D Additional requirements when advice recommends replacement of one product with another

(1) This section applies (subject to subsection (4)) if the advice is or includes a recommendation that the client dispose of, or reduce the client's interest in, all or part of a particular financial product and instead acquire all or part of, or increase the client's interest in, another financial product.

(2) The following additional information must be included in the Statement of Advice:

(a) information about the following, to the extent that the information is known to, or could reasonably be found out by, the providing entity:

(i) any charges the client will or may incur in respect of the disposal or reduction;

(ii) any charges the client will or may incur in respect of the acquisition or increase;

(iii) any pecuniary or other benefits that the client will or may lose (temporarily or otherwise) as a result of taking the recommended action;

(b) information about any other significant consequences for the client of taking the recommended action that the providing entity knows, or ought reasonably to know, are likely;

(c) any other information required by regulations made for the purposes of this paragraph;

(d) unless in accordance with the regulations, for information to be disclosed in accordance with paragraph (a), any amounts are to be stated in dollars.

(3) If:

(a) the providing entity knows that, or is reckless as to whether:

(i) the client will or may incur charges as mentioned in subparagraph (2)(a)(i) or (ii); or

(ii) the client will or may lose benefits as mentioned in subparagraph (2)(a)(iii); or

(iii) there will or may be consequences for the client as mentioned in paragraph (2)(b); but

(b) the providing entity does not know, and cannot reasonably find out, what those charges, losses or consequences are or will be;

the Statement of Advice must include a statement to the effect that there will or may be such charges, losses or consequences but the providing entity does not know what they are.

(4) The regulations may provide either or both of the following:

(a) that this section does not apply in relation to a financial product or a class of financial products;

(b) that this section does not require the provision of information of a particular kind, whether generally or in relation to a particular situation, financial product or class of financial products.

947E Statement of Advice not to be combined with Financial Services Guide or Product Disclosure Statement

A Statement of Advice must not be combined in a single document with a Financial Services Guide or a Product Disclosure Statement.

Subdivision E—Other matters

948A Qualified privilege if providing entity complies with this Division

The providing entity has qualified privilege in respect of a statement made to the client, whether orally or in writing, in the course of, or in connection with, providing the advice if the providing entity has complied with all material requirements of this Division in relation to the advice.

Division 4—Other disclosure requirements

949A General advice provided to retail client—obligation to warn client that advice does not take account of client's objectives, financial situation or needs

(1) This section applies in relation to the provision of general advice if:

(a) the advice is provided:

(i) by a financial services licensee (the ***providing entity***); or

(ii) by an authorised representative (the ***providing entity***) of a financial services licensee, or of 2 or more financial services licensees; and

(b) the advice is provided to a person (the ***client***) as a retail client; and

(c) the advice is not provided in circumstances specified in regulations made for the purposes of this paragraph.

(2) The providing entity must, in accordance with subsection (3), warn the client that:

(a) the advice has been prepared without taking account of the client's objectives, financial situation or needs; and

(b) because of that, 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; and

(c) if the advice relates to the acquisition, or possible acquisition, of a particular financial product—the client should:

(i) if the product is not a CGS depository interest—obtain a Product Disclosure Statement (see Division 2 of Part 7.9) relating to the product and consider the Statement before making any decision about whether to acquire the product; or

(ii) if the product is a CGS depository interest—obtain each information statement (see Division 5C of Part 7.9) for the class of CGS depository interests that includes the product and consider the statement before making any decision about whether to acquire the product.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(3) The warning must be given to the client at the same time as the advice is provided and by the same means as the advice is provided.

(4) In any proceedings against an authorised representative of a financial services licensee for an offence based on subsection (1), it is a defence if:

(a) the licensee had provided the authorised representative with information or instructions about the requirements to be complied with in relation to the giving of personal advice; and

(b) the representative's failure to comply with subsection (1) occurred because the representative was acting in reliance on that information or those instructions; and

(c) the representative's reliance on that information or those instructions was reasonable.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4). See subsection 13.3(3) of the *Criminal Code*.

(5) A financial services licensee must take reasonable steps to ensure that an authorised representative of the licensee complies with subsection (2).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

949B Regulations may impose disclosure requirements in certain situations

(1) The regulations may impose disclosure requirements, or additional disclosure requirements, to be complied with in any of the following situations:

(a) a financial service related to a risk insurance product or an investment life insurance product is provided to a person as a retail client by a financial services licensee, or an authorised representative of a financial services licensee, acting under a binder;

(b) a financial services licensee, or an authorised representative of a financial services licensee, arranges for a person's instructions to be carried out through a financial market or a clearing and settlement facility (whether inside or outside Australia) that is not a licensed market or a licensed CS facility;

(d) a financial service is provided by a person who does not need an Australian financial services licence because the person is covered by an exemption under paragraph 911A(2)(k) or (l);

(e) a financial service is provided to a person as a wholesale client.

(2) A person to whom regulations made for the purposes of subsection (1) apply must comply with any applicable requirements in those regulations.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(3) In any proceedings against an authorised representative of a financial services licensee for an offence based on subsection (2), it is a defence if:

(a) the licensee had provided the authorised representative with information or instructions about the requirements to be complied with in relation to the matter dealt with in the requirement in the regulations; and

(b) the representative's failure to comply with the requirement in the regulations occurred because the representative was acting in reliance on that information or those instructions; and

(c) the representative's reliance on that information or those instructions was reasonable.

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) A financial services licensee must take reasonable steps to ensure that an authorised representative of the licensee complies with subsection (2).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Division 6—Miscellaneous

951A Part cannot be contracted out of

A condition of a contract for the acquisition of a financial product, or for the provision of a financial service, is void if it provides that a party to the contract is:

(a) required or bound to waive compliance with any requirement of this Part; or

(b) taken to have notice of any contract, document or matter not specifically referred to in a Financial Services Guide, Statement of Advice or other document given to the party.

951B Exemptions and modifications by ASIC

(1) ASIC may:

(a) exempt a person or a class of persons from all or specified provisions of this Part; or

(b) exempt a financial product or class of financial products from all or specified provisions of this Part; or

(c) declare that this Part applies in relation to a person or a financial product, or a class of persons or financial products, as if specified provisions of this Part were omitted, modified or varied as specified in the declaration.

(3) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.

(4) An exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.

(5) If conduct (including an omission) of a person would not have constituted an offence if a particular declaration under paragraph (1)(c) had not been made, that conduct does not constitute an offence unless, before the conduct occurred (in addition to complying with the gazettal requirement of subsection (4)):

(a) the text of the declaration was made available by ASIC on the internet; or

(b) ASIC gave written notice setting out the text of the declaration to the person.

In a prosecution for an offence to which this subsection applies, the prosecution must prove that paragraph (a) or (b) was complied with before the conduct occurred.

(6) For the purpose of this section, the ***provisions of this Part*** include:

(a) definitions in this Act, or in the regulations, as they apply to references in this Part; and

(b) any provisions of Part 10.2 (transitional provisions) that relate to provisions of this Part.

Note: Because of section 761H, a reference to this Part or Part 10.2 also includes a reference to regulations or other instruments made for the purposes of this Part or Part 10.2 (as the case requires).

951C Exemptions and modifications by regulations

(1) The regulations may:

(a) exempt a person or class of persons from all or specified provisions of this Part; or

(b) exempt a financial product or a class of financial products from all or specified provisions of this Part; or

(c) provide that this Part applies as if specified provisions were omitted, modified or varied as specified in the regulations.

(2) For the purpose of this section, the ***provisions of this Part*** include:

(a) definitions in this Act, or in the regulations, as they apply to references in this Part; and

(b) any provisions of Part 10.2 (transitional provisions) that relate to provisions of this Part.

Division 7—Enforcement

Subdivision A—Offences

952A Overview

This Subdivision contains provisions creating offences by references to various rules contained in preceding Divisions of this Part. However, it does not create all the offences relating to those rules, as some offences are created by subsection 1311(1). Where offences are created by subsection 1311(1) in relation to a rule, this is indicated by a note at the end of the provision containing the rule.

952B Definitions

(1) In this Subdivision:

defective, in relation to a disclosure document or statement, means:

(a) if the disclosure document or statement is a Financial Services Guide, a Supplementary Financial Services Guide, or is information or a statement required by subsection 941C(5), 941C(7) or 941D(2):

(i) there is a misleading or deceptive statement in the disclosure document or statement; or

(ii) if it is a Financial Services Guide—there is an omission from the Financial Services Guide of material required by section 942B or 942C; or

(iii) if it is a Supplementary Financial Services Guide that is given for the purposes of paragraph 941F(d)—there is an omission from the Supplementary Financial Services Guide of material required by that paragraph; or

(iv) if it is information or a statement required by subsection 941C(5), 941C(7) or 941D(2)—there is an omission from the document or statement of material required by that subsection;

being a statement, or an omission, that is or would be materially adverse from the point of view of a reasonable person considering whether to proceed to be provided with the financial service concerned; or

(b) if the disclosure document or statement is a Statement of Advice, or is information, a statement or a copy of a record required by subsection 946AA(5), 946B(3), (6) or (8) or 946C(2):

(i) there is a misleading or deceptive statement in the disclosure document or statement; or

(ii) if it is a Statement of Advice—there is an omission from the Statement of advice of material required by section 947B, 947C or 947D; or

(iii) if it is information, a statement or a copy of a record required by subsection 946AA(5), 946B(3), (6) or (8) or 946C(2)—there is an omission from the information, statement or copy of material required by that subsection or section;

being a statement, or an omission, that is or would be materially adverse from the point of view of a reasonable person considering whether to act in reliance on the advice concerned.

Note: In determining whether a Financial Services Guide is defective, the effect of section 943D must be taken into account (section 943D takes information and statements in a Supplementary Financial Services Guide to be included in the Financial Services Guide it supplements).

disclosure document or statement means:

(a) a Financial Services Guide; or

(b) a Supplementary Financial Services Guide; or

(c) a Statement of Advice; or

(d) information, a statement or a copy of a record required by subsection 941C(5) or (7), 941D(2), 946AA(5), 946B(3), (6) or (8) or 946C(2).

(1A) For the avoidance of doubt, if section 941E (information must be up to date) is not complied with in relation to a Financial Services Guide, then, for the purposes of the definition of ***defective*** in subsection (1):

(a) if the circumstance constituting the non-compliance is that particular information included in the Financial Services Guide is not as up to date as section 941E requires it to be—the information so included constitutes a misleading statement in the Financial Services Guide; and

(b) if the circumstance constituting the non-compliance is a failure to include particular information that was not previously required to be included in the Financial Services Guide—the failure to include the information constitutes an omission from the Statement of material required by section 942B or 942C.

Note 1: The effect of section 943D (information in a Supplementary Financial Services Guide is taken to be contained in the Financial Services Guide it supplements) must be taken into account in determining whether section 941E is complied with in relation to a Financial Services Guide.

Note 2: Whether the inclusion of out of date information, or the failure to include information, results in the Financial Services Guide being ***defective*** as defined in subsection (1) depends on whether the materiality test set out in that definition is satisfied.

(2) In this Subdivision, a reference (including in the definitions in subsection (1)) to a document or statement of a kind referred to in a paragraph of the definition of ***disclosure document or statement*** in subsection (1) includes a reference to something purporting to be a document or statement of that kind.

952C Offence of failing to give a disclosure document or statement

Strict liability offence

(1) A person (the ***providing entity***) commits an offence if:

(a) the providing entity is required by a provision of this Part to give another person a disclosure document or statement (the ***required disclosure document or statement***); and

(b) the providing entity does not give (within the meaning of section 940C) the other person anything purporting to be the required disclosure document or statement by the time they are required to do so.

Note: A defendant bears an evidential burden in relation to the matters in subsections 941C(1), (2) and (3). See subsection 13.3(3) of the *Criminal Code*.

(2) An offence based on subsection (1) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

Ordinary offence

(3) A person (the ***providing entity***) commits an offence if:

(a) the providing entity is required by a provision of this Part to give another person a disclosure document or statement (the ***required disclosure document or statement***); and

(b) the providing entity does not give (within the meaning of section 940C) the other person anything purporting to be the required disclosure document or statement by the time they are required to do so.

Note: A defendant bears an evidential burden in relation to the matters in subsections 941C(1), (2) and (3). See subsection 13.3(3) of the *Criminal Code*.

Defence for authorised representative

(4) In any proceedings against an authorised representative of a financial services licensee for an offence based on subsection (1) or (3), it is a defence if:

(a) the licensee had provided the representative with information or instructions about the giving of disclosure documents or statements; and

(b) the representative's failure to give the required disclosure document or statement occurred because the representative was acting in reliance on that information or those instructions; and

(c) the representative's reliance on that information or those instructions was reasonable.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4). See subsection 13.3(3) of the *Criminal Code*.

952D Offence of giving a disclosure document or statement knowing it to be defective

(1) A person (the ***providing entity***), being a financial services licensee, commits an offence if:

(a) the providing entity:

(i) gives (see subsection (3)) another person a disclosure document or statement in circumstances in which the document or statement is required by a provision of this Part to be given to the other person; or

(ii) is a financial services licensee and gives (see subsection (3)), or makes available to, another person a disclosure document or statement, being a Financial Services Guide or a Supplementary Financial Services Guide, reckless as to whether the other person will or may rely on the information in it; and

(b) the providing entity knows that the disclosure document or statement is defective.

Note: A defendant bears an evidential burden in relation to the matters in subsections 941C(1), (2) and (3). See subsection 13.3(3) of the *Criminal Code*.

(2) An authorised representative of a financial services licensee commits an offence if:

(a) the representative:

(i) gives (see subsection (3)) a person a disclosure document or statement in circumstances in which the document or statement is required by a provision of this Part to be given to the person; or

(ii) gives (see subsection (3)), or makes available to, a person a disclosure document or statement, being a Financial Services Guide or a Supplementary Financial Services Guide, reckless as to whether the person will or may rely on the information in it; and

(b) the representative knows that the disclosure document or statement is defective.

Note: A defendant bears an evidential burden in relation to the matters in subsections 941C(1), (2) and (3). See subsection 13.3(3) of the *Criminal Code*.

(3) In this section, ***give*** means give by any means (including orally), and is not limited to the meaning it has because of section 940C.

952E Offence of giving a defective disclosure document or statement (whether or not known to be defective)

(1) A person (the ***providing entity***), being a financial services licensee, commits an offence if:

(a) the providing entity:

(i) gives (see subsection (7)) another person a disclosure document or statement in circumstances in which the

document or statement is required by a provision of this Part to be given to the other person; or

(ii) is a financial services licensee and gives (see subsection (7)), or makes available to, another person a disclosure document or statement, being a Financial Services Guide or a Supplementary Financial Services Guide, reckless as to whether the other person will or may rely on the information in it; and

(b) the disclosure document or statement is defective.

Note: A defendant bears an evidential burden in relation to the matters in subsections 941C(1), (2) and (3). See subsection 13.3(3) of the *Criminal Code*.

(2) For the purposes of an offence based on subsection (1), strict liability applies to the physical element of the offence specified in paragraph (1)(b).

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(3) An authorised representative of a financial services licensee commits an offence if:

(a) the representative gives (see subsection (7)) a person a disclosure document or statement, being a Statement of Advice, or information, a statement or a copy of a record required by subsection 941C(5) or (7), 941D(2), 946AA(5), 946B(3), (6) or (8) or 946C(2), in circumstances in which the document or statement is required by a provision of this Part to be given to the person; and

(b) the disclosure document or statement is defective.

Note: A defendant bears an evidential burden in relation to the matters in subsections 941C(1), (2) and (3). See subsection 13.3(3) of the *Criminal Code*.

(4) For the purposes of an offence based on subsection (3), strict liability applies to the physical element of the offence specified in paragraph (3)(b).

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(5) In any proceedings against a person for an offence based on subsection (1) or (3), it is a defence if the person took reasonable steps to ensure that the disclosure document or statement would not be defective.

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) In any proceedings against a person for an offence based on subsection (3), it is a defence if the disclosure document or statement:

(a) was provided to the person by a financial services licensee for whom they were, at that time, an authorised representative; or

(b) was defective because of information, or an omission from information, provided to them by a financial services licensee for whom they were, at that time, an authorised representative.

Note: A defendant bears an evidential burden in relation to the matters in subsection (6). See subsection 13.3(3) of the *Criminal Code*.

(7) In this section, ***give*** means give by any means (including orally), and is not limited to the meaning it has because of section 940C.

952F Offences of financial services licensee knowingly providing defective disclosure material to an authorised representative

(1) For the purposes of this section, a financial services licensee ***provides disclosure material*** to an authorised representative of the licensee if:

(a) the licensee authorises the distribution by the representative of a disclosure document or statement, being a Financial Services Guide or a Supplementary Financial Services Guide; or

(b) the licensee provides the representative with a disclosure document or statement, being a Statement of Advice, or information, a statement or a copy of a record required by subsection 941C(5) or (7), 941D(2), 946AA(5), 946B(3), (6) or (8) or 946C(2); or

(c) the licensee provides the representative with information:

(i) for the purpose of it being included by the representative in a disclosure document or statement, being a Statement of Advice, or information, a statement or a copy of a record required by subsection 941C(5) or (7), 941D(2), 946AA(5), 946B(3), (6) or (8) or 946C(2); or

(ii) knowing that it is likely that it will be so included in such a document.

(2) A financial services licensee commits an offence if:

(a) the licensee provides disclosure material (being a disclosure document or statement) to an authorised representative of the licensee as mentioned in paragraph (1)(a) or (b); and

(b) the licensee knows that the disclosure document or statement is defective.

(3) A financial services licensee commits an offence if:

(a) the licensee provides disclosure material (being information) to an authorised representative of the licensee as mentioned in paragraph (1)(c); and

(b) the licensee knows that, if the information is included by the representative as mentioned in that paragraph, the disclosure document or statement concerned will be defective.

(4) A financial services licensee commits an offence if:

(a) the licensee provides disclosure material (being information) to an authorised representative of the licensee as mentioned in paragraph (1)(c); and

(b) the information relates to a matter or matters, but the licensee knows that it is only some of the information relating to the matter or matters that the disclosure document or statement concerned is required to contain; and

(c) the licensee is reckless as to whether the representative will or may prepare the disclosure document or statement on the basis that the information is all the information relating to the matter or matters that the disclosure document or statement is required to contain.

952G Offences of financial services licensee providing disclosure material to an authorised representative (whether or not known to be defective)

(1) For the purposes of this section, a financial services licensee ***provides disclosure material*** to an authorised representative of the licensee if:

(a) the licensee authorises the distribution by the representative of a disclosure document or statement, being a Financial

Services Guide or a Supplementary Financial Services Guide; or

(b) the licensee provides the representative with a disclosure document or statement, being a Statement of Advice, or information, a statement or a copy of a record required by subsection 941C(5) or (7), 941D(2), 946AA(5), 946B(3), (6) or (8) or 946C(2); or

(c) the licensee provides the representative with information:

(i) for the purpose of it being included by the representative in a disclosure document or statement, being a Statement of Advice, or information, a statement or a copy of a record required by subsection 941C(5) or (7), 941D(2), 946AA(5), 946B(3), (6) or (8) or 946C(2); or

(ii) knowing that it is likely that it will be so included in such a document.

(2) A financial services licensee commits an offence if:

(a) the licensee provides disclosure material (being a disclosure document or statement) to an authorised representative of the licensee as mentioned in paragraph (1)(a) or (b); and

(b) the disclosure document or statement is defective in a respect that does not relate to material required to be in the document or statement only because the representative is also the authorised representative of another financial services licensee.

(3) For the purposes of an offence based on subsection (2), strict liability applies to the physical element of the offence specified in paragraph (2)(b).

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(4) A financial services licensee commits an offence if:

(a) the licensee provides disclosure material (being information) to an authorised representative of the licensee as mentioned in paragraph (1)(c); and

(b) the authorised representative includes the information in the disclosure document or statement concerned; and

(c) the disclosure document or statement is defective because it includes that information (whether or not it is also defective for other reasons).

(5) For the purposes of an offence based on subsection (4), strict liability applies to the physical element of the offence specified in paragraph (4)(c).

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(6) A financial services licensee commits an offence if:

(a) the licensee provides disclosure material (being information) to an authorised representative of the licensee as mentioned in paragraph (1)(c); and

(b) the information relates to a matter or matters, but it is only some of the information relating to the matter or matters that the disclosure document or statement concerned is required to contain; and

(c) the representative prepares the disclosure document or statement on the basis that the information is all the information relating to the matter or matters that the disclosure document or statement is required to contain; and

(d) the disclosure document or statement is defective because it includes only that information about the matter or matters (whether or not it is also defective for other reasons).

(7) For the purposes of an offence based on subsection (6), strict liability applies to the physical elements of the offence specified in paragraphs (6)(b) and (d).

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(8) In any proceedings against a person for an offence based on subsection (2), it is a defence if the person took reasonable steps to ensure that the disclosure document or statement would not be defective.

Note: A defendant bears an evidential burden in relation to the matters in subsection (8). See subsection 13.3(3) of the *Criminal Code*.

(9) In any proceedings against a person for an offence based on subsection (4), it is a defence if the person took reasonable steps to ensure that the information they provided would not be such as to make the disclosure document or statement defective.

Note: A defendant bears an evidential burden in relation to the matters in subsection (9). See subsection 13.3(3) of the *Criminal Code*.

(10) In any proceedings against a person for an offence based on subsection (6), it is a defence if the person took reasonable steps to ensure that the information they provided about the matter or matters would be all the information about the matter or matters that the disclosure document or statement would be required to contain.

Note: A defendant bears an evidential burden in relation to the matters in subsection (10). See subsection 13.3(3) of the *Criminal Code*.

952H Offence of financial services licensee failing to ensure authorised representative gives disclosure documents or statements as required

A financial services licensee commits an offence if the licensee does not take reasonable steps to ensure that an authorised representative of the licensee:

(a) complies with their obligations under this Part to give disclosure documents or statements as and when required; and

(b) without limiting paragraph (a), does not, in purported compliance with obligations under this Part, give disclosure documents or statements that are defective.

952I Offences if a Financial Services Guide (or Supplementary FSG) does not comply with certain requirements

(1) A financial services licensee commits an offence if:

(a) the licensee:

(i) gives (see subsection (6)) a person a Financial Services Guide in circumstances in which it is required by a provision of this Part to be given to the person; or

(ii) gives (see subsection (6)), or makes available to, a person a Financial Services Guide, reckless as to whether the person will or may rely on the information in it; and

(b) the Financial Services Guide does not comply with section 942A, subsection 942B(5) or 942DA(3) or paragraph 942E(b).

Note: A defendant bears an evidential burden in relation to the matters in subsections 941C(1), (2) and (3). See subsection 13.3(3) of the *Criminal Code*.

(2) A financial services licensee commits an offence if:

(a) the financial services licensee authorises the distribution of a Financial Services Guide by an authorised representative of the licensee; and

(b) the Financial Services Guide does not comply with section 942A, subsection 942B(5) or 942DA(3) or paragraph 942E(b).

(3) A financial services licensee commits an offence if:

(a) the licensee:

(i) gives (see subsection (6)) a person a Supplementary Financial Services Guide in circumstances in which it is required by a provision of this Part to be given to the person; or

(ii) gives (see subsection (6)), or makes available to, a person a Supplementary Financial Services Guide, reckless as to whether the person will or may rely on the information in it; and

(b) the Supplementary Financial Services Guide does not comply with section 943B or 943C.

Note: A defendant bears an evidential burden in relation to the matters in subsections 941C(1), (2) and (3). See subsection 13.3(3) of the *Criminal Code*.

(4) A financial services licensee commits an offence if:

(a) the financial services licensee authorises the distribution of a Supplementary Financial Services Guide by an authorised representative of the licensee; and

(b) the Supplementary Financial Services Guide does not comply with section 943B or 943C.

(5) For the purposes of an offence based on subsection (1), (2), (3) or (4), strict liability applies to paragraph (b) of that subsection.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(6) In this section, ***give*** means give by any means (including orally), and is not limited to the meaning it has because of section 940C.

952J Offence if a Statement of Advice does not comply with certain requirements

(1) A financial services licensee, or an authorised representative of a financial services licensee, commits an offence if:

(a) the licensee or representative gives (see subsection (3)) a person a Statement of Advice in circumstances in which it is required by a provision of this Part to be given to the person; and

(b) the Statement of Advice does not comply with section 947A or 947E.

Note: A defendant bears an evidential burden in relation to the matters in subsections 941C(1), (2) and (3). See subsection 13.3(3) of the *Criminal Code*.

(2) For the purposes of an offence based on subsection (1), strict liability applies to paragraph (b) of that subsection.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(3) In this section, ***give*** means give by any means (including orally), and is not limited to the meaning it has because of section 940C.

952K Offence if authorised representative gives out unauthorised Financial Services Guide (or Supplementary FSG)

An authorised representative of a financial services licensee commits an offence if:

(a) the representative:

(i) gives a person a Financial Services Guide, or a Supplementary Financial Services Guide, in circumstances in which it is required by a provision of this Part to be given to the person; or

(ii) gives, or makes available to, a person a Financial Services Guide, or a Supplementary Financial Services Guide, reckless as to whether the person will or may rely on the information in it; and

(b) the licensee has not authorised the distribution by the representative of the Financial Services Guide or the Supplementary Financial Services Guide.

Note: A defendant bears an evidential burden in relation to the matters in subsections 941C(1), (2) and (3). See subsection 13.3(3) of the *Criminal Code*.

952L Offences if financial services licensee or authorised representative becomes aware that a Financial Services Guide (or Supplementary FSG) is defective

(1) A financial services licensee commits an offence if:

(a) the licensee has authorised an authorised representative of the licensee to distribute a Financial Services Guide or a Supplementary Financial Services Guide; and

(b) the licensee becomes aware that the Financial Services Guide, or the Supplementary Financial Services Guide, is defective; and

(c) the licensee does not, as soon as practicable, give the representative a direction that satisfies one or more of the following subparagraphs:

(i) a direction not to distribute the Financial Services Guide or the Supplementary Financial Services Guide;

(ii) a direction not to distribute the Financial Services Guide unless it is accompanied by a Supplementary Financial Services Guide that corrects the deficiency;

(iii) a direction not to distribute the Financial Services Guide or the Supplementary Financial Services Guide without first altering it in a way that is specified in the direction, being a way that corrects the deficiency and that complies with section 942E or 943F.

(2) An authorised representative commits an offence if:

(a) the representative is given a direction under subsection (1); and

(b) the representative does not comply with the direction.

(3) An authorised representative of a financial services licensee commits an offence if:

(a) the licensee has authorised the representative to distribute a Financial Services Guide or a Supplementary Financial Services Guide; and

(b) the representative becomes aware that the Financial Services Guide, or the Supplementary Financial Services Guide, is defective; and

(c) the representative does not, as soon as practicable, notify the licensee of the particulars of the deficiency.

(4) In this section, a reference to ***distributing*** a Financial Services Guide or a Supplementary Financial Services Guide includes (but is not limited to) giving or reading the document or statement to another person in purported compliance with a requirement of this Part.

952M Offence of unauthorised alteration of Financial Services Guide or Supplementary Financial Services Guide

A person commits an offence if:

(a) the person engages in conduct that results in an alteration of a Financial Services Guide or a Supplementary Financial Services Guide that:

(i) has been prepared by or on behalf of a particular financial services licensee; or

(ii) the distribution of which by the person has been authorised by a particular financial services licensee; and

(b) the alteration results in the Financial Services Guide or Supplementary Financial Services Guide becoming defective, or more defective than it previously was; and

(c) the alteration is not made with the authority of the licensee; and

(d) the person, in purported compliance with a provision of this Part, gives the altered Financial Services Guide or Supplementary Financial Services Guide to another person.

Subdivision B—Civil liability

953A Definitions

(1) In this Subdivision:

defective, in relation to a disclosure document or statement, means:

(a) if the disclosure document or statement is a Financial Services Guide, a Supplementary Financial Services Guide, or is information or a statement required by subsection 941C(5), 941C(7) or 941D(2):

(i) there is a misleading or deceptive statement in the disclosure document or statement; or

(ii) if it is a Financial Services Guide—there is an omission from the Financial Services Guide of material required by section 942B or 942C; or

(iii) if it is a Supplementary Financial Services Guide that is given for the purposes of paragraph 941F(d)—there is an omission from the Supplementary Financial Services Guide of material required by that paragraph; or

(iv) if it is information or a statement required by subsection 941C(5), 941C(7) or 941D(2)—there is an omission from the document or statement of material required by that subsection; or

(b) if the disclosure document or statement is a Statement of Advice, or is information, a statement or a copy of a record required by subsection 946AA(5), 946B(3), (6) or (8) or 946C(2):

(i) there is a misleading or deceptive statement in the disclosure document or statement; or

(ii) if it is a Statement of Advice—there is an omission from the Statement of Advice of material required by section 947B, 947C or 947D; or

(iii) if it is information, a statement or a copy of a record required by subsection 946AA(5), 946B(3), (6) or (8) or 946C(2)—there is an omission from the information, statement or copy of material required by that subsection or section.

Note: In determining whether a Financial Services Guide is defective, the effect of section 943D must be taken into account (section 943D takes information and statements in a Supplementary Financial Services Guide to be included in the Financial Services Guide it supplements).

disclosure document or statement means:

(a) a Financial Services Guide; or

(b) a Supplementary Financial Services Guide; or

(c) a Statement of Advice; or

(d) information, a statement or a copy of a record required by subsection 941C(5) or (7), 941D(2), 946AA(5), 946B(3), (6) or (8) or 946C(2).

(1A) For the avoidance of doubt, if section 941E (information must be up to date) is not complied with in relation to a Financial Services

Guide, then, for the purposes of the definition of ***defective*** in subsection (1):

(a) if the circumstance constituting the non-compliance is that particular information included in the Financial Services Guide is not as up to date as section 941E requires it to be—the information so included constitutes a misleading statement in the Financial Services Guide; and

(b) if the circumstance constituting the non-compliance is a failure to include particular information that was not previously required to be included in the Financial Services Guide—the failure to include the information constitutes an omission from the Statement of material required by section 942B or 942C.

Note: The effect of section 943D (information in a Supplementary Financial Services Guide is taken to be contained in the Financial Services Guide it supplements) must be taken into account in determining whether section 941E is complied with in relation to a Financial Services Guide.

(2) In this Subdivision, a reference (including in the definitions in subsection (1)) to a document or statement of a kind referred to in a paragraph of the definition of ***disclosure document or statement*** in subsection (1) includes a reference to something purporting to be a document or statement of that kind.

953B Civil action for loss or damage

(1) This section applies in the following situations:

(a) a person:

(i) is required by a provision of this Part to give another person (the ***client***) a disclosure document or statement (the ***required disclosure document or statement***); and

(ii) does not give (within the meaning of section 940C) the client anything purporting to be the required disclosure document or statement by the time they are required to do so; or

(b) a person:

(i) gives another person (the ***client***) a disclosure document or statement that is defective in circumstances in which a disclosure document or statement is required by a provision of this Part to be given to the client; or

(ii) is a financial services licensee and gives, or makes available to, another person (the ***client***) a disclosure document or statement, being a Financial Services Guide or a Supplementary Financial Services Guide, that is defective, reckless as to whether the client will or may rely on the information in it; or

(c) a person contravenes section 949A or 949B.

In paragraph (b), ***give*** means give by any means (including orally), and is not limited to the meaning it has because of section 940C.

(2) In a situation to which this section applies, if a person suffers loss or damage:

(a) if paragraph (1)(a) applies—because the client was not given the disclosure document or statement that they should have been given; or

(b) if paragraph (1)(b) applies—because the disclosure document or statement the client was given was defective; or

(c) if paragraph (1)(c) applies—because of the contravention referred to in that paragraph;

the person may, subject to subsection (6), recover the amount of the loss or damage by action against the, or a, liable person (see subsections (3) and (4)), whether or not that person (or anyone else) has been convicted of an offence in respect of the matter referred to in paragraph (a), (b) or (c).

(3) For the purposes of subsection (2), the, or a, ***liable person*** is:

(a) if the person first-referred to in paragraph (1)(a), (b) or (c) is a financial services licensee—subject to subsection (4), that person; or

(b) if the person first-referred to in paragraph (1)(a), (b) or (c) is an authorised representative of only one financial services licensee—that financial services licensee; or

(c) if the person first-referred to in paragraph (1)(a), (b) or (c) is an authorised representative of more than one financial services licensee:

(i) if, under the rules in section 917C, one of those licensees is responsible for the person's conduct—that licensee; or

(ii) if, under the rules in section 917C, 2 or more of those licensees are jointly and severally responsible for the person's conduct—each of those licensees.

(3A) For the purposes of paragraph (3)(c):

(a) section 917C is taken to apply, despite section 917F; and

(b) section 917D is taken not to apply.

(4) If:

(a) paragraph (1)(b) applies; and

(b) an alteration was made to the disclosure document or statement before it was given to the client; and

(c) the alteration made the disclosure document or statement defective, or more defective than it would otherwise have been; and

(d) the alteration was not made by, or with the authority of, the person who would, but for this subsection, be the liable person because of paragraph (3)(a);

then, so far as a person has suffered loss or damage because the disclosure document or statement was defective because of the alteration, the liable person is the person who made the alteration, rather than the person referred to in paragraph (d).

(5) An action under subsection (2) may be begun at any time within 6 years after the day on which the cause of action arose.

(6) A person is not liable under subsection (2) in a situation described in paragraph (1)(b) if the person took reasonable steps to ensure that the disclosure document or statement would not be defective.

(7) This section does not affect any liability that a person has under any other law.

953C Additional powers of court to make orders

(1) The court dealing with an action under subsection 953B(2) may, in addition to awarding loss or damage under that subsection and if it thinks it necessary in order to do justice between the parties:

(a) make an order declaring void a contract entered into by the client referred to in that subsection for or relating to a financial product or a financial service; and

(b) if it makes an order under paragraph (a)—make such other order or orders as it thinks are necessary or desirable because of that order.

(2) Without limiting paragraph (1)(b), an order under that paragraph may include an order for the return of money paid by a person, and/or an order for payment of an amount of interest specified in, or calculated in accordance with, the order.

Part 7.7A—Best interests obligations and remuneration

Division 1—Preliminary

960 Definitions

In this Part:

asset-based fee has the meaning given by section 964F.

basic banking product has the meaning given by section 961F.

conflicted remuneration has the meaning given by section 963A, as affected by sections 963B, 963C and 963D.

custodian, in relation to a registrable superannuation entity, has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*.

disclosure day has the meaning given by section 962J.

fee disclosure statement has the meaning given by subsection 962H(1).

fee recipient has the meaning given by section 962C.

group life policy for members of a superannuation entity has the meaning given by subsection 963B(2).

life policy for a member of a default superannuation fund has the meaning given by subsection 963B(3).

ongoing fee has the meaning given by section 962B.

ongoing fee arrangement has the meaning given by section 962A.

reasonable investigation has a meaning affected by section 961D.

reasonably apparent:

(a) in Division 2—has the meaning given by section 961C; and

(b) in Subdivision B of Division 5—has the meaning given by section 964H.

registrable superannuation entity has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*.

renewal notice has the meaning given by subsection 962K(2).

renewal notice day has the meaning given by subsection 962L(1).

renewal period has the meaning given by subsection 962L(2).

representative of a financial services licensee has the same meaning as in Part 7.6 (see section 910A).

responsible licensee, in relation to a contravention of a provision of this Part, has the meaning given by section 961P.

RSE licensee has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*.

volume-based shelf-space fee has a meaning affected by section 964A.

960A No contracting out

A condition of a contract or other arrangement is void if it provides that a party to the contract is required or bound to waive any right under this Part, or waive the compliance with any requirement of this Part.

960B Obligations under this Part in addition to other obligations

The obligations imposed on a person under this Part are in addition to any other obligations to which the person is subject under this Act or any other law.

Division 2—Best interests obligations

Subdivision A—Preliminary

961 Application of this Division

(1) This Division applies in relation to the provision of personal advice (the ***advice***) to a person (the ***client***) as a retail client.

(2) The individual who is to provide the advice is referred to in this Division as the ***provider***.

(3) If 2 or more individuals are to provide the advice, each of those individuals is referred to in this Division as the ***provider***.

(4) An individual is a ***provider*** for the purposes of this Division even if the individual is a representative of a financial services licensee and is to provide the advice on behalf of that licensee.

(5) If it is not reasonably possible to identify the individual who is to, or individuals who are to, provide the advice, the person who is to provide the advice is the ***provider*** for the purposes of this Division.

(6) A person who offers personal advice through a computer program is taken to be the person who is to provide the advice, and is the ***provider*** for the purposes of this Division.

961A Application to a financial services licensee acting as an authorised representative

If a financial services licensee is acting as an authorised representative of another financial services licensee in relation to the advice, this Division applies to the first licensee in relation to the advice in that licensee's capacity as an authorised representative (rather than in the capacity of licensee).

Subdivision B—Provider must act in the best interests of the client

961B Provider must act in the best interests of the client

(1) The provider must act in the best interests of the client in relation to the advice.

(2) The provider satisfies the duty in subsection (1), if the provider proves that the provider has done each of the following:

(a) identified the objectives, financial situation and needs of the client that were disclosed to the provider by the client through instructions;

(b) identified:

(i) the subject matter of the advice that has been sought by the client (whether explicitly or implicitly); and

(ii) the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter (the ***client's relevant circumstances***);

(c) where it was reasonably apparent that information relating to the client's relevant circumstances was incomplete or inaccurate, made reasonable inquiries to obtain complete and accurate information;

(d) assessed whether the provider has the expertise required to provide the client advice on the subject matter sought and, if not, declined to provide the advice;

(e) if, in considering the subject matter of the advice sought, it would be reasonable to consider recommending a financial product:

(i) conducted a reasonable investigation into the financial products that might achieve those of the objectives and meet those of the needs of the client that would reasonably be considered as relevant to advice on that subject matter; and

(ii) assessed the information gathered in the investigation;

(f) based all judgements in advising the client on the client's relevant circumstances;

(g) taken any other step that, at the time the advice is provided, would reasonably be regarded as being in the best interests of the client, given the client's relevant circumstances.

Note: The matters that must be proved under subsection (2) relate to the subject matter of the advice sought by the client and the circumstances of the client relevant to that subject matter (the client's relevant circumstances). That subject matter and the client's relevant circumstances may be broad or narrow, and so the subsection anticipates that a client may seek scaled advice and that the inquiries made by the provider will be tailored to the advice sought.

Basic banking products—best interests duty satisfied if certain steps are taken

(3) If:

(a) the subject matter of the advice sought by the client is solely a basic banking product; and

(b) the provider is an agent or employee of an Australian ADI, or otherwise acting by arrangement with an Australian ADI under the name of the Australian ADI;

the provider satisfies the duty in subsection (1) if the provider takes the steps mentioned in paragraphs (2)(a), (b) and (c).

General insurance products—best interests duty satisfied if certain steps are taken

(4) If the subject matter of the advice sought by the client is solely a general insurance product, the provider satisfies the duty in subsection (1) if the provider takes the steps mentioned in paragraphs (2)(a), (b) and (c).

Note: A responsible licensee or an authorised representative may contravene a civil penalty provision if a provider fails to comply with this section (see sections 961K and 961Q). The provider may be subject to a banning order (see section 920A).

Regulations

(5) The regulations may prescribe:

(a) a step, in addition to or substitution for the steps mentioned in subsection (2), that the provider must, in prescribed circumstances, prove that the provider has taken, to satisfy the duty in subsection (1); or

(b) that the provider is not required, in prescribed circumstances, to prove that the provider has taken a step mentioned in subsection (2), to satisfy the duty in subsection (1); or

(c) circumstances in which the duty in subsection (1) does not apply.

961C When is something *reasonably apparent*?

Something is ***reasonably apparent*** if it would be apparent to a person with a reasonable level of expertise in the subject matter of the advice that has been sought by the client, were that person exercising care and objectively assessing the information given to the provider by the client.

961D What is a *reasonable investigation*?

(1) A ***reasonable investigation*** into the financial products that might achieve those of the objectives and meet those of the needs of the client that would reasonably be considered relevant to advice on the subject matter sought by the client does not require an investigation into every financial product available.

(2) However, if the client requests the provider to consider a specified financial product, a reasonable investigation into the financial products that might achieve those of the objectives and meet those of the needs of the client that would reasonably be considered relevant to advice on the subject matter sought by the client includes an investigation into that financial product.

961E What would reasonably be regarded as in the best interests of the client?

It would reasonably be regarded as in the best interests of the client to take a step, if a person with a reasonable level of expertise in the subject matter of the advice that has been sought by the client, exercising care and objectively assessing the client's relevant circumstances, would regard it as in the best interests of the client, given the client's relevant circumstances, to take that step.

961F What is a *basic banking product*?

Each of the following is a ***basic banking product***:

(a) a basic deposit product;

(b) a facility for making non-cash payments (see section 763D) that is related to a basic deposit product;

(c) an FHSA product of a kind mentioned in subparagraph (c)(i) of the meaning of ***FHSA*** in section 8 of the *First Home Saver Accounts Act 2008* (first home saver accounts);

(d) a facility for providing traveller's cheques;

(e) any other product prescribed by regulations for the purposes of this paragraph.

Subdivision C—Resulting advice must be appropriate to the client

961G Resulting advice must be appropriate to the client

The provider must only provide the advice to the client if it would be reasonable to conclude that the advice is appropriate to the client, had the provider satisfied the duty under section 961B to act in the best interests of the client.

Note: A responsible licensee or an authorised representative may contravene a civil penalty provision if a provider fails to comply with this section (see sections 961K and 961Q). The provider may be subject to a banning order (see section 920A).

Subdivision D—Where resulting advice still based on incomplete or inaccurate information

961H Resulting advice still based on incomplete or inaccurate information

(1) If it is reasonably apparent that information relating to the objectives, financial situation and needs of the client on which the advice is based is incomplete or inaccurate, the provider must, in accordance with subsections (2) and (3), warn the client that:

(a) the advice is, or may be, based on incomplete or inaccurate information relating to the client's relevant personal circumstances; and

(b) because of that, 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.

(2) The warning must be given to the client at the same time as the advice is provided and, subject to subsection (3), by the same means as the advice is provided.

(3) If a Statement of Advice is the means by which the advice is provided, or is given to the client at the same time as the advice is provided, the warning may be given by including it in the Statement of Advice.

Note: The Statement of Advice must at least contain a record of the warning (see paragraphs 947B(2)(f) and 947C(2)(g)).

(4) If 2 or more individuals provide the advice and one of those individuals provides a warning in accordance with this section, the other individuals are taken to have complied with this section.

(5) Nothing in this section affects the duty of the provider under section 961B to make reasonable inquiries to obtain complete and accurate information.

Note: A responsible licensee or an authorised representative may contravene a civil penalty provision if a provider fails to comply with this section (see sections 961K and 961Q). The provider may be subject to a banning order (see section 920A).

Subdivision E—Provider to give priority to the client's interests

961J Conflict between client's interests and those of provider, licensee, authorised representative or associates

(1) If the provider knows, or reasonably ought to know, that there is a conflict between the interests of the client and the interests of:

(a) the provider; or

(b) an associate of the provider; or

(c) a financial services licensee of whom the provider is a representative; or

(d) an associate of a financial services licensee of whom the provider is a representative; or

(e) an authorised representative who has authorised the provider, under subsection 916B(3), to provide a specified financial

service or financial services on behalf of a financial services licensee; or

(f) an associate of an authorised representative who has authorised the provider, under subsection 916B(3), to provide a specified financial service or financial services on behalf of a financial services licensee;

the provider must give priority to the client's interests when giving the advice.

Note: A responsible licensee or an authorised representative may contravene a civil penalty provision if a provider fails to comply with this section (see sections 961K and 961Q). The provider may be subject to a banning order (see section 920A).

(2) Subsection (1) does not apply if:

(a) the subject matter of the advice sought by the client is solely a basic banking product; and

(b) the provider is an agent or employee of an Australian ADI, or otherwise acting by arrangement with an Australian ADI under the name of the Australian ADI.

(3) Subsection (1) does not apply if the subject matter of the advice sought by the client is solely a general insurance product.

Subdivision F—Responsibilities of licensees under this Division

961K Civil penalty provision—sections 961B, 961G, 961H and 961J

(1) A financial services licensee contravenes this section if the licensee contravenes section 961B, 961G, 961H or 961J.

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

(2) A financial services licensee contravenes this section if:

(a) a representative, other than an authorised representative, of the licensee contravenes section 961B, 961G, 961H or 961J; and

(b) the licensee is the, or a, responsible licensee in relation to that contravention.

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

961L Licensees must ensure compliance

A financial services licensee must take reasonable steps to ensure that representatives of the licensee comply with sections 961B, 961G, 961H and 961J.

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

961M Civil action for loss or damage

(1) This section applies if the client suffers loss or damage because of a contravention of a provision of this Division.

(2) A Court may order that one or more of the following persons compensate the client for the amount of the loss or damage:
  (a) if the person who contravenes the provision is a financial services licensee—that licensee;
  (b) if the person who contravenes the provision is a representative of a financial services licensee, or 2 or more financial services licensees—the, or a, responsible licensee in relation to the contravention.

(3) The Court may make the order under this section:
  (a) on its own initiative, during proceedings before the Court; or
  (b) on the application of ASIC; or
  (c) on the application of the client.

(4) In determining the damage suffered by the client, the Court may include profits resulting from the contravention that are made by:
  (a) if the person who contravenes the provision is a financial services licensee—the licensee; or
  (b) if the person who contravenes the provision is a representative of a financial services licensee, or 2 or more financial services licensees:
    (i) the representative; and
    (ii) where the Court's order under subsection (2) relates to a financial services licensee that is the, or a, responsible licensee in relation to the contravention—the licensee.

(5) An order under this section may be made whether or not the licensee against whom the order is made (or anyone else) has been convicted of an offence, or been the subject of a civil penalty order, in respect of the matter.

(6) An action to recover the amount of the loss or damage may be begun at any time within 6 years after the contravention.

(7) An order under this section may be enforced as if it were a judgement of the Court.

(8) This section does not affect any liability that a person has under any other law.

961N Additional powers of Court to make orders

(1) The Court dealing with an action under subsection 961M(2) may, in addition to awarding loss or damage under that subsection and if it thinks it necessary in order to do justice between the parties:
  (a) make an order declaring void a contract entered into by the client for or relating to a financial product or a financial service; and
  (b) if it makes an order under paragraph (a)—make such other order or orders as it thinks are necessary or desirable because of that order.

(2) Without limiting paragraph (1)(b), an order under that paragraph may include either or both of the following:
  (a) an order for the return of money paid by a person;
  (b) an order for the payment of an amount of interest specified in, or calculated in accordance with, the order.

961P *Responsible licensee*

For the purposes of this Part, the, or a, ***responsible licensee***, in relation to a contravention of a provision of this Part, is:
  (a) if the person who contravenes the provision is a representative of only one financial services licensee—that financial services licensee; or
  (b) if the person who contravenes the provision is a representative of more than one financial services licensee:
    (i) if, under the rules in section 917C, one of those licensees is responsible for the person's conduct—that licensee; or
    (ii) if, under the rules in section 917C, 2 or more of those licensees are jointly and severally responsible for the person's conduct—each of those licensees.

Subdivision G—Responsibilities of authorised representatives under this Division

961Q Civil penalty provision—sections 961B, 961G, 961H and 961J

(1) An authorised representative of a financial services licensee contravenes this section if the authorised representative contravenes section 961B, 961G, 961H or 961J.

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

(2) Subsection (1) does not apply if:

(a) the licensee had provided the authorised representative with information or instructions about the requirements to be complied with in relation to the giving of personal advice; and

(b) the authorised representative's failure to comply with section 961B, 961G, 961H or 961J occurred because the representative was acting in reliance on that information or those instructions; and

(c) the representative's reliance on that information or those instructions was reasonable.

Division 3—Charging ongoing fees to clients

Subdivision A—Preliminary

962 Application of this Division

(1) This Division applies in a case where:

(a) a financial services licensee, or a representative of a financial services licensee, enters into an ongoing fee arrangement with another person (the ***client***); and

(b) the arrangement has not terminated for any reason.

(2) This Division also applies in a case where:

(a) the rights of a financial services licensee, or a representative of a financial services licensee, under an ongoing fee arrangement are assigned to another person; and

(b) the arrangement has not terminated for any reason.

962A Ongoing fee arrangements

Ongoing fee arrangements

(1) If:

(a) a financial services licensee gives personal advice to a person as a retail client; and

(b) that person enters into an arrangement with the financial services licensee, or a representative of the financial services licensee; and

(c) under the terms of the arrangement, a fee (however described or structured) is to be paid during a period of more than 12 months;

the arrangement is an ***ongoing fee arrangement***.

(2) If:

(a) a representative of a financial services licensee gives personal advice to a person as a retail client; and

(b) that person enters into an arrangement with the representative or the financial services licensee; and

(c) under the terms of the arrangement, a fee (however described or structured) is to be paid during a period of more than 12 months;

the arrangement is an ***ongoing fee arrangement***.

Paying for advice by instalments

(3) Despite subsections (1) and (2), an arrangement is not an ***ongoing fee arrangement*** if each of the following is satisfied:

(a) the total of the fees payable under the terms of the arrangement is fixed at the time the arrangement is entered into;

(b) the total of the fees payable under the terms of the arrangement is specified in the arrangement;

(c) the fees payable under the terms of the arrangement are to be paid by instalments over a fixed period specified in the arrangement;

(d) the fees payable under the terms of the arrangement can reasonably be characterised as relating to personal advice given to the person before the arrangement is entered into;

(e) under the terms of the arrangement, there is no fee payment of which, or the amount of which, is dependent on the amount invested by the person, or the amount in relation to which personal advice is given;

(f) the person cannot opt out of payment of any of the fees payable under the terms of the arrangement.

Insurance premiums

(4) Despite subsections (1) and (2), an arrangement is not an ***ongoing fee arrangement*** if the only fee payable under the arrangement is an insurance premium.

Other prescribed arrangements

(5) Despite subsections (1) and (2), an arrangement is not an ***ongoing fee arrangement*** if it is an arrangement of a prescribed kind that relates to a fee that is prescribed as a product fee.

962B Ongoing fees

A fee that is payable under an ongoing fee arrangement is referred to in this Division as an ***ongoing fee***.

962C Fee recipients

(1) Where:

(a) a financial services licensee enters into an ongoing fee arrangement; and

(b) the rights of the licensee under the arrangement have not been assigned to another person;

the licensee is the ***fee recipient*** in relation to the arrangement.

(2) Where:

(a) a representative of a financial services licensee enters into an ongoing fee arrangement; and

(b) the rights of the representative under the arrangement have not been assigned to another person;

the representative is the ***fee recipient*** in relation to the arrangement.

(3) Where the rights of a financial services licensee, or a representative of a financial services licensee, under an ongoing fee arrangement have been assigned to another person, the person who currently holds those rights is the ***fee recipient*** in relation to the arrangement.

962CA Exemption from application of opt-in requirement

(1) ASIC may exempt a person, or a class of persons, from section 962K (the ***opt-in requirement***), if ASIC is satisfied that the person is, or persons of that class are, bound by a code of conduct approved by ASIC for the purposes of this section.

(2) A code of conduct is approved by ASIC for the purposes of this section if:

(a) the code of conduct is approved by ASIC under section 1101A; and

(b) ASIC is satisfied that the code of conduct obviates the need for persons bound by the code to be bound by the opt-in requirement; and

(c) ASIC is satisfied of any other matters prescribed by the regulations.

(3) The exemption must be in writing and ASIC must publish notice of it in the *Gazette*.

Subdivision B—Termination, disclosure and renewal

962D Application of this Subdivision

(1) This Subdivision only applies where:

(a) the client has not been provided with personal advice as a retail client before the application day by:

(i) in a case where the client has entered into an ongoing fee arrangement with a financial services licensee—the financial services licensee or a person acting as a representative of the financial services licensee; or

(ii) in a case where the client has entered into an ongoing fee arrangement with a person acting as a representative of a financial services licensee—the representative or the financial services licensee; and

(b) the client enters into the ongoing fee arrangement on or after the application day.

(2) In this section:

application day means:

(a) where:

(i) the client enters into the ongoing fee arrangement with a financial services licensee, or a person acting as a representative of a financial services licensee; and

(ii) the financial services licensee has lodged notice with ASIC in accordance with subsection 967(1) that the obligations and prohibitions under this Part are to apply to the licensee and persons acting as representatives of the licensee, on and from a day specified in the notice;

the day specified in the notice; or

(b) in any other case—1 July 2013.

962E Client may terminate arrangement at any time

(1) It is a condition of the ongoing fee arrangement that the client may terminate the arrangement at any time.

(2) Any condition of the ongoing fee arrangement, or any other arrangement, that requires the client to pay an amount on terminating the ongoing fee arrangement is void to the extent that the amount exceeds the sum of:

(a) any liability that the client has accrued but not satisfied under the ongoing fee arrangement before the termination; and

(b) the costs of the current fee recipient incurred solely and directly because of the termination.

962F Arrangement terminates if this Subdivision not complied with

(1) It is a condition of the ongoing fee arrangement that the arrangement terminates if section 962G (the disclosure obligation) or section 962K (the renewal notice obligation) has not been complied with in relation the arrangement, whether by the current or a previous fee recipient.

(2) The client is not taken to have waived the client's rights under the condition (subject to subsection (3)), or to have entered into a new ongoing fee arrangement, if the client makes a payment of an ongoing fee after a failure to comply with section 962G or section 962K in relation to the ongoing fee arrangement.

(3) However, if the client makes a payment of an ongoing fee after a failure to comply with section 962G or section 962K in relation to the ongoing fee arrangement, the fee recipient is not obliged to refund the payment.

Note: A Court may order that the fee recipient refund the amount (see section 1317GA).

962G Fee recipient must give fee disclosure statement

(1) The current fee recipient in relation to an ongoing fee arrangement must, before the end of a period of 30 days beginning on the disclosure day for the arrangement, give the client a fee disclosure statement in relation to the arrangement.

(2) The regulations may provide that subsection (1) does not apply in a particular situation.

962H Fee disclosure statements

(1) A ***fee disclosure statement***, in relation to an ongoing fee arrangement, is a statement in writing that:

(a) includes the information required under this section; and

(b) relates to:

(i) a period of 12 months (the ***previous year***) that ends on a day that is no more than 30 days before that on which the statement is given; and

(ii) any other period prescribed by the regulations.

(2) The following information is required for a fee disclosure statement in relation to an ongoing fee arrangement, subject to subsection (3):

(a) the amount of each ongoing fee paid under the arrangement by the client in the previous year, expressed in Australian dollars unless an alternative is provided in the regulations;

(c) information about the services that the client was entitled to receive from the current and any previous fee recipient under the arrangement during the previous year;

(d) information about the services that the client received from the current and any previous fee recipient under the arrangement during the previous year;

(f) information about any other prescribed matters, including information that relates to a period that begins after the previous year.

(3) The regulations may provide either or both of the following:

(a) that particular information is not required for a fee disclosure statement, either in a particular situation or generally;

(b) a more detailed statement of the information that is required for a fee disclosure statement, either in a particular situation or generally.

962J *Disclosure day*

The ***disclosure day*** for an ongoing fee arrangement is:

(a) if no fee disclosure statement has been given to the client in relation to the arrangement since the arrangement was entered into—the anniversary of the day on which the arrangement was entered into; and

(b) if a fee disclosure statement in relation to the arrangement has been given to the client since the arrangement was entered into—the anniversary of the day immediately after the end of the earliest period of 12 months to which the last fee disclosure statement given to the client related.

962K Fee recipient must give renewal notice

(1) The current fee recipient in relation to an ongoing fee arrangement must, before the end of a period of 30 days beginning on the renewal notice day for the arrangement, give the client a renewal notice and a fee disclosure statement in relation to the arrangement.

(2) A ***renewal notice***, in relation to an ongoing fee arrangement, is a notice in writing that includes:

(a) a statement that the client may renew the arrangement by giving the current fee recipient notice in writing of the election; and

(b) a statement that the arrangement will terminate, and no further advice will be provided or fee charged under it, if the client does not elect to renew the arrangement; and

(c) a statement that the client will be taken to have elected not to renew the arrangement if the client does not give the current fee recipient notice in writing of an election to renew before the end of the renewal period; and

(d) a statement that the renewal period is a period of 30 days beginning on the day on which the renewal notice and fee disclosure statement is given to the client.

(3) The regulations may provide that subsection (1) does not apply in a particular situation.

962L *Renewal notice day* and *renewal period*

(1) The ***renewal notice day*** for an ongoing fee arrangement means:

(a) if the arrangement has not previously been renewed—the second anniversary of the day on which the arrangement was entered into; and

(b) if the arrangement has previously been renewed—the second anniversary of the last day on which the arrangement was renewed.

(2) The ***renewal period*** for an ongoing fee arrangement is a period of 30 days beginning on the day on which the current fee recipient in relation to the arrangement gives the client a renewal notice and a fee disclosure statement in relation to the arrangement.

962M If client notifies fee recipient that client does not wish to renew

If the client notifies the current fee recipient in relation to the ongoing fee arrangement in writing within the renewal period for the arrangement that the client does not wish to renew the arrangement, the arrangement terminates on the day on which the notification is given.

962N If client does not notify fee recipient that client wishes to renew

If the client does not notify the current fee recipient in relation to the ongoing fee arrangement in writing within the renewal period for the arrangement that the client wishes to renew the arrangement, the arrangement terminates at the end of a further period of 30 days after the end of the renewal period for the arrangement.

962P Civil penalty provision—charging ongoing fees after arrangement terminated

If an ongoing fee arrangement terminates for any reason, the current fee recipient in relation to the arrangement must not continue to charge an ongoing fee.

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

962Q Effect of termination

To avoid doubt, if, under an ongoing fee arrangement, the continued provision of a service to the client by the fee recipient in relation to the arrangement is dependent on the continued payment of an ongoing fee, on termination of the arrangement, the obligation to continue to provide the service also terminates.

Subdivision C—Disclosure for arrangements to which Subdivision B does not apply

962R Application of this Subdivision

(1) This Subdivision applies, on and from the application day, to an ongoing fee arrangement to which Subdivision B does not apply.

(2) In this section:

application day means:

(a) where:

(i) the client has entered into the ongoing fee arrangement with a financial services licensee, or a person acting as a representative of a financial services licensee; and

(ii) that licensee or representative is the fee recipient in relation to the arrangement on 1 July 2012; and

(iii) the financial services licensee has lodged notice with ASIC in accordance with subsection 967(1) that the obligations and prohibitions under this Part are to apply to the licensee and persons acting as representatives of the licensee, on and from a day specified in the notice;

the day specified in the notice; or

(b) where:

(i) the client has entered into the ongoing fee arrangement with a financial services licensee, or a person acting as a representative of a financial services licensee; and

(ii) because the rights of the licensee or representative under the arrangement have been assigned, another person is the fee recipient in relation to the arrangement on 1 July 2012; and

(iii) a notice has been lodged with ASIC in accordance with subsection 967(1) or (3) that the obligations and prohibitions under this Part are to apply to the other person, on and from a day specified in the notice;

the day specified in the notice; or

(c) in any other case—1 July 2013.

962S Fee recipient must give fee disclosure statement

(1) The current fee recipient in relation to the ongoing fee arrangement must, within a period of 30 days beginning on the disclosure day for the arrangement, give the client a fee disclosure statement in relation to the arrangement.

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

(2) The regulations may provide that subsection (1) does not apply in a particular situation.

Division 4—Conflicted remuneration

Subdivision A—Preliminary

963 Application to a financial services licensee acting as an authorised representative

If a financial services licensee is acting as an authorised representative of another financial services licensee in relation to financial product advice, this Division applies to the first licensee in relation to the advice in that licensee's capacity as an authorised representative (rather than in the capacity of licensee).

Subdivision B—What is conflicted remuneration?

963A *Conflicted remuneration*

Conflicted remuneration means any benefit, whether monetary or non-monetary, given to a financial services licensee, or a representative of a financial services licensee, who provides financial product advice to persons as retail clients that, because of the nature of the benefit or the circumstances in which it is given:

(a) could reasonably be expected to influence the choice of financial product recommended by the licensee or representative to retail clients; or

(b) could reasonably be expected to influence the financial product advice given to retail clients by the licensee or representative.

963B Monetary benefit given in certain circumstances not *conflicted remuneration*

(1) Despite section 963A, a monetary benefit given to a financial services licensee, or a representative of a financial services licensee, who provides financial product advice to persons as retail clients is not ***conflicted remuneration*** in the circumstances set out in any of the following paragraphs:

(a) the benefit is given to the licensee or representative solely in relation to a general insurance product;

(b) the benefit is given to the licensee or representative solely in relation to a life risk insurance product, other than:
  (i) a group life policy for members of a superannuation entity (see subsection (2)); or
  (ii) a life policy for a member of a default superannuation fund (see subsection (3));
(c) each of the following is satisfied:
  (i) the benefit is given to the licensee or representative in relation to the issue or sale of a financial product to a person;
  (ii) financial product advice in relation to the product, or products of that class, has not been given to the person as a retail client by the licensee or representative in the 12 months immediately before the benefit is given;
(d) the benefit is given to the licensee or representative by a retail client in relation to:
  (i) the issue or sale of a financial product by the licensee or representative to the client; or
  (ii) financial product advice given by the licensee or representative to the client;
(e) the benefit is a prescribed benefit or is given in prescribed circumstances.

(2) A life risk insurance product is a ***group life policy for members of a superannuation entity*** if the product is issued to an RSE licensee of a registrable superannuation entity, or a custodian in relation to a registrable superannuation entity, for the benefit of a class of members of the entity.

(3) A life risk insurance product is a ***life policy for a member of a default superannuation fund*** if:
(a) the product is issued to an RSE licensee of a registrable superannuation entity, or a custodian in relation to a registrable superannuation entity, for the benefit of a person who is a member of the entity; and
(b) the person has not given written notice to an employer of the person that the fund is the person's chosen fund, but the employer of the person makes contributions to the fund for the benefit of the person.

Note: Superannuation guarantee surcharge may be imposed on an employer if the employer does not make contributions to a superannuation fund for the benefit of its employees. If an employee does not notify the employer of the employee's chosen fund, the employer is still able to satisfy its obligations by making contributions to certain funds (see the *Superannuation Guarantee (Administration) Act 1992*).

963C Non-monetary benefit given in certain circumstances not *conflicted remuneration*

Despite section 963A, a non-monetary benefit given to a financial services licensee, or a representative of a financial services licensee, who provides financial product advice to persons as retail clients is not ***conflicted remuneration*** in the circumstances set out in any of the following paragraphs:

(a) the benefit is given to the licensee or representative solely in relation to a general insurance product;

(b) each of the following is satisfied:

(i) the benefit is of less than an amount prescribed;

(ii) identical or similar benefits are not given on a frequent or regular basis;

(c) the benefit satisfies each of the following:

(i) the benefit has a genuine education or training purpose;

(ii) the benefit is relevant to the provision of financial product advice to persons as retail clients;

(iii) the benefit complies with regulations made for the purposes of this subparagraph;

(d) the benefit satisfies each of the following:

(i) the benefit is the provision of information technology software or support;

(ii) the benefit is related to the provision of financial product advice to persons as retail clients in relation to the financial products issued or sold by the benefit provider;

(iii) the benefit complies with regulations made for the purposes of this subparagraph;

(e) the benefit is given to the licensee or representative by a retail client in relation to:

(i) the issue or sale of a financial product by the licensee or representative to the client; or

(ii) financial product advice given by the licensee or representative to the client;

(f) the benefit is a prescribed benefit or is given in prescribed circumstances.

963D Benefits for recommending basic banking products not *conflicted remuneration*

Despite section 963A, a monetary or non-monetary benefit given to a financial services licensee, or a representative of a financial services licensee, is not ***conflicted remuneration*** if:

(a) the benefit is remuneration for work carried out, or to be carried out, by the licensee or representative as an agent or an employee of an Australian ADI, or in otherwise acting by arrangement with an Australian ADI under the name of the Australian ADI; and

(b) access to the benefit, or the amount of the benefit, is solely dependent on the licensee or representative recommending a basic banking product; and

(c) the licensee or representative does not, in the course of recommending that basic banking product, give other financial product advice that does not relate to a basic banking product.

Subdivision C—Ban on conflicted remuneration

963E Licensee must not accept conflicted remuneration

(1) A financial services licensee must not accept conflicted remuneration.

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

(2) A financial services licensee contravenes this section if:

(a) a representative, other than an authorised representative, of the licensee accepts conflicted remuneration; and

(b) the licensee is the, or a, responsible licensee in relation to the contravention.

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

963F Licensee must ensure compliance

A financial services licensee must take reasonable steps to ensure that representatives of the licensee do not accept conflicted remuneration.

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

963G Authorised representative must not accept conflicted remuneration

(1) An authorised representative of a financial services licensee must not accept conflicted remuneration.

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

(2) Subsection (1) does not apply if:

(a) the licensee had provided the authorised representative with information about the nature of the benefit to be accepted by the authorised representative; and

(b) at the time the authorised representative accepted the benefit, the representative was not aware that the benefit was conflicted remuneration because the representative was acting in reliance on that information; and

(c) the representative's reliance on that information was reasonable.

963H Other representatives must not accept conflicted remuneration

A representative, other than an authorised representative, of a financial services licensee must not accept conflicted remuneration unless it is in circumstances for which an employer of the licensee or representative is liable under section 963J.

Note: A representative who contravenes this section may be subject to a banning order (see section 920A).

963J Employer must not give employees conflicted remuneration

An employer of a financial services licensee, or a representative of a financial services licensee, must not give the licensee or representative conflicted remuneration for work carried out, or to

be carried out, by the licensee or representative as an employee of the employer.

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

963K Product issuer or seller must not give conflicted remuneration

An issuer or seller of a financial product must not give a financial services licensee, or a representative of a financial services licensee, conflicted remuneration.

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

963L Volume-based benefits presumed to be conflicted remuneration

It is presumed for the purposes of this Division that a benefit of one of the following kinds is conflicted remuneration, unless the contrary is proved:

(a) a benefit access to which, or the value of which, is wholly or partly dependent on the total value of financial products of a particular class, or particular classes:
  (i) recommended by a financial services licensee, or a representative of a financial services licensee, to retail clients, or a class of retail clients; or
  (ii) acquired by retail clients, or a class of retail clients, to whom a financial services licensee, or a representative of a financial services licensee, provides financial product advice;

(b) a benefit access to which, or the value of which, is wholly or partly dependent on the number of financial products of a particular class, or particular classes:
  (i) recommended by a financial services licensee, or a representative of a financial services licensee, to retail clients, or a class of retail clients; or
  (ii) acquired by retail clients, or a class of retail clients, to whom a financial services licensee, or a representative of a financial services licensee, provides financial product advice.

Division 5—Other banned remuneration

Subdivision A—Volume-based shelf-space fees

964 Application

(1) This Subdivision applies if:

(a) a financial services licensee or an RSE licensee (the ***platform operator***) is, or offers to be, the provider of a custodial arrangement; and

(b) a monetary or non-monetary benefit is given, or to be given, by a financial services licensee or an RSE licensee (the ***funds manager***) to the platform operator; and

(c) a financial product to which the custodial arrangement relates is a financial product in which the funds manager deals (the ***funds manager's financial product***).

(2) In this Subdivision:

custodial arrangement has the same meaning as it has in subsection 1012IA(1), subject to subsection (3).

provider has the same meaning as in subsection 1012IA(1).

(3) The definition of ***custodial arrangement*** in subsection 1012IA(1) is to be read as if the reference in that definition to an instruction included a reference to a direction to follow an investment strategy of the kind mentioned in subsection 52(4) of the *Superannuation Industry (Supervision) Act 1993* that involves the acquisition of a particular financial product, or a financial product of a particular kind.

(4) A reference to a kind of financial product in subsection (3) has the same meaning in that subsection as it has in the definition of ***custodial arrangement*** in subsection 1012IA(1).

964A Platform operator must not accept volume-based shelf-space fees

(1) The platform operator must not accept the benefit if it is a volume-based shelf-space fee.

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

(2) Subject to subsection (3), the benefit is presumed to be a volume-based shelf-space fee if the benefit, or the value of benefit, is wholly or partly dependent on the total number or value of the funds manager's financial products of a particular class, or particular classes, to which the custodial arrangement relates.

(3) If it is proved that all or part of the benefit is of a kind specified in one of the following paragraphs then, to the extent that the benefit is of that kind, it is not presumed to be a volume-based shelf space fee:

(a) a reasonable fee for a service provided to the funds manager by the platform operator or another person;

(b) a discount on an amount payable, or a rebate of an amount paid, to the funds manager by the platform operator, the value of which does not exceed an amount that may reasonably be attributed to efficiencies gained by the funds manager because of the number or value of financial products in relation to which the funds manager provides services to the platform operator, or through the platform operator to another person.

Subdivision B—Asset-based fees on borrowed amounts

964B Application

This Subdivision applies where a financial services licensee, or a representative of a financial services licensee, provides financial product advice (the ***advice***) to a person (the ***client***) as a retail client.

964C Application to a financial services licensee acting as an authorised representative

If a financial services licensee is acting as an authorised representative of another financial services licensee in relation to the advice, this Subdivision applies to the first licensee in relation to the advice in that licensee's capacity as an authorised representative (rather than in the capacity of licensee).

964D Financial services licensees must not charge asset-based fees on borrowed amounts

(1) The financial services licensee must not charge an asset-based fee on a borrowed amount used or to be used to acquire financial products by or on behalf of the client.

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

(2) A financial services licensee contravenes this section if:

(a) a representative, other than an authorised representative, of the licensee charges an asset-based fee on a borrowed amount used or to be used to acquire financial products by or on behalf of the client; and

(b) the licensee is the, or a, responsible licensee in relation to the contravention.

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

Exceptions

(3) Subsections (1) and (2) do not apply in relation to a borrowed amount if it is not reasonably apparent that the amount has been borrowed.

(4) The regulations may provide that subsections (1) and (2) do not apply in prescribed circumstances.

Duty to make reasonable inquiries

(5) Nothing in this section affects the duty of the financial services licensee, or the representative of the financial services licensee, under section 961B to make reasonable inquiries to obtain complete and accurate information.

964E Authorised representatives must not charge asset-based fees on borrowed amounts

(1) The authorised representative of the financial services licensee must not charge an asset-based fee on a borrowed amount used or to be used to acquire financial products by or on behalf of the client.

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

Exceptions

(2) Subsection (1) does not apply in relation to a borrowed amount if it is not reasonably apparent that the amount has been borrowed.

(3) The regulations may provide that subsection (1) does not apply in prescribed circumstances.

Duty to make reasonable inquiries

(4) Nothing in this section affects the duty of the authorised representative under section 961B to make reasonable inquiries to obtain complete and accurate information.

964F What is an *asset-based fee*?

A fee for providing financial product advice to a person as a retail client is an ***asset-based fee*** to the extent that it is dependent upon the amount of funds used or to be used to acquire financial products by or on behalf of the person.

964G Meaning of *borrowed*

(1) In this Subdivision:

borrowed means borrowed in any form, whether secured or unsecured, including through:

(a) a credit facility within the meaning of the regulations; and

(b) a margin lending facility.

(2) To avoid doubt, an amount is no longer borrowed to the extent that it has been repaid.

964H When is something *reasonably apparent*?

Something is ***reasonably apparent*** if it would be apparent to a person with a reasonable level of expertise in the subject matter of the advice that has been sought by the client, were that person exercising care and objectively assessing the information given to the financial services licensee, or the representative of the financial services licensee, by the client.

Division 6—Anti-avoidance

965 Anti-avoidance [*see* Note 2]

(1) Subject to subsection (2), a person must not, either alone or together with one or more other persons, enter into, begin to carry out or carry out a scheme if:

(a) it would be concluded that the person, or any of the persons, who entered into, began to carry out or carried out the scheme or any part of the scheme did so for the sole or dominant purpose of avoiding the application of any provision of this Part in relation to any person or persons (whether or not a person or persons who entered into, began to carry out or carried out the scheme or any part of the scheme); and

(b) the scheme or the part of the scheme has achieved, or apart from this section, would achieve, that purpose.

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

(2) Subsection (1) does not apply to a scheme to the extent that the operation of the subsection would result in an acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) from a person otherwise than on just terms (within the meaning of that paragraph of the Constitution).

Division 7—Transition

966 *Transition period*

In this Division:

transition period means the period beginning on 1 July 2012 and ending on 30 June 2013.

967 Best interests obligations and remuneration provisions to apply during transition period

(1) A financial services licensee may, during the transition period, lodge notice in the prescribed form with ASIC that the obligations and prohibitions imposed under this Part are to apply to the licensee, and any person acting as a representative of the licensee, on and from a day that:

(a) falls on or after the day on which the notice is lodged with ASIC; and

(b) is specified in the notice.

(2) If a notice is lodged with ASIC in accordance with subsection (1), ASIC must, on its website:

(a) publish the name of the financial services licensee who lodged the notice; and

(b) include a statement that the obligations and prohibitions imposed under this Part are to apply to the licensee, and any person acting as a representative of the licensee; and

(c) state the day on and from which those obligations and prohibitions are to apply.

(3) A person:

(a) who would be subject to an obligation or prohibition under this Part, if it applied; and

(b) who would not be subject to the obligation or prohibition as a financial services licensee, or a person acting as a representative of a financial services licensee;

may, during the transition period, lodge notice in the prescribed form with ASIC that the obligations and prohibitions imposed under this Part are to apply to the person on and from a day that:

(c) falls on or after the day on which the notice is lodged with ASIC; and

(d) is specified in the notice.

(4) If a notice is lodged with ASIC in accordance with subsection (3), ASIC must, on its website:

(a) publish the name of the person who lodged the notice; and

(b) include a statement that the obligations and prohibitions imposed under this Part are to apply to the person; and

(c) state the day on and from which those obligations and prohibitions are to apply.

968 Notice to clients in transition period

(1) A financial services licensee who lodges a notice with ASIC in accordance with subsection 967(1) must ensure that any person in relation to whom the licensee, or a person acting as a representative of the licensee, has an obligation or is subject to a prohibition under this Part during the transition period (the ***client***) is given a notice that complies with this section.

(2) The notice:

(a) must be in writing; and

(b) must be given to the client on or before the notice day for the client; and

(c) must state that the obligations and prohibitions imposed under this Part begin to apply to the licensee, and any person acting as a representative of the licensee, on a day specified in the notice given to the client.

(3) The day specified in the notice given to the client must be the same as the day specified in the notice lodged with ASIC in accordance with subsection 967(1).

(4) The ***notice day*** is:

(a) for a person (the ***client***) in relation to whom the licensee, or a person acting as a representative of the licensee, has an obligation or is subject to a prohibition under Division 2 of this Part in relation to personal advice provided on or after a day that falls in the transition period—the first day on which personal advice is provided to the client during the transition period; and

(b) for a person to whom the licensee, or a person acting as a representative of the licensee, is obliged to give a fee disclosure statement during the transition period:

(i) unless subparagraph (ii) applies—the disclosure day for the arrangement in relation to which the fee disclosure statement is to be given that falls within the transition period; and

(ii) if a fee disclosure statement is given before the end of a period of 30 days beginning on that disclosure day—the day on which it is given; and

(c) for a person (the ***client***) in relation to whom the licensee, or a person acting as a representative of the licensee, has an obligation or is subject to a prohibition under Subdivision B of Division 5 of this Part in relation to the charging of an asset-based fee during the transition period—the first day on which the client is charged an asset-based fee during the transition period; and

(d) for a person in relation to whom more than one of paragraphs (a), (b) and (c) is satisfied—the earliest of the days specified as the notice day under the paragraphs that are satisfied for that person.

Part 7.8—Other provisions relating to conduct etc. connected with financial products and financial services, other than financial product disclosure

Division 1—Preliminary

980A Matters covered by this Part

This Part contains:

(a) provisions (see Divisions 2 to 7) relating to conduct etc. of financial services licensees; and

(b) miscellaneous provisions (see Division 8) relating to other conduct connected with financial products and financial services.

It does not deal with financial product disclosure (which is dealt with in Part 7.9).

980B General approach to offence provisions

Division 9 contains provisions creating offences by reference to various rules contained in Divisions of this Part. However, it does not create all the offences relating to those rules, as some offences are created by subsection 1311(1). Where offences are created by subsection 1311(1) in relation to a rule, this is indicated by a note at the end of the provision containing the rule.

Division 2—Dealing with clients' money

Subdivision A—Money other than loans

981A Money to which Subdivision applies

(1) This Subdivision applies (subject to subsections (2), (3) and (4)) to money paid to a financial services licensee (the ***licensee***) in the following circumstances:

(a) the money is paid in connection with:

(i) a financial service that has been provided, or that will or may be provided, to a person (the ***client***); or

(ii) a financial product held by a person (the ***client***); and

(b) the money is paid:

(i) by the client; or

(ii) by a person acting on behalf of the client; or

(iii) to the licensee in the licensee's capacity as a person acting on behalf of the client.

(2) This Subdivision does not apply to money paid as mentioned in subsection (1) to the extent that:

(a) the money is paid by way of remuneration payable to the licensee, or the licensee is entitled to deduct such remuneration from the money; or

(b) the money is paid:

(i) to reimburse the licensee for payments made to acquire, or acquire an increased interest in, a financial product; or

(ii) to discharge a liability incurred by the licensee in respect of the acquisition of a financial product or an increased interest in a financial product, or to indemnify the licensee in respect of such a liability; or

(c) the money is paid to acquire, or acquire an increased interest in, a financial product from the licensee, whether by way of issue or sale by the licensee; or

(ca) the licensee is a licensed trustee company, and the money is paid to the licensee in connection with traditional trustee company services provided by the licensee; or

(d) Subdivision B (loan money) applies to the money.

Note: Money excluded by paragraph (c) is covered by section 1017E.

(3) If a person pays money to a financial services licensee in order for it to be deposited to the credit of a deposit product held by the person or another person with the licensee, that payment does not constitute money to which this Subdivision applies.

(4) The regulations may:

(a) exempt money paid in specified circumstances from some or all of the provisions of this Subdivision; or

(b) declare that this Subdivision applies in relation to money paid in specified circumstances as if specified provisions of this Subdivision were omitted, modified or varied as set out in the regulations.

(5) An exemption in regulations made for the purposes of paragraph (4)(a) may be made subject to conditions specified in, or imposed in accordance with, the regulations. The regulations may provide for consequences of a contravention of a condition.

981B Obligation to pay money into an account

(1) The licensee must ensure that money to which this Subdivision applies is paid into an account that satisfies these requirements:

(a) the account is:

(i) with an Australian ADI; or

(ii) of a kind prescribed by regulations made for the purposes of this paragraph;

and is designated as an account for the purposes of this section of this Act; and

(b) the only money paid into the account is:

(i) money to which this Subdivision applies (which may be money paid by, on behalf of, or for the benefit of, several different clients); or

(ii) interest on the amount from time to time standing to the credit of the account; or

(iii) interest, or other similar payments, on an investment made in accordance with regulations referred to in section 981C, or the proceeds of the realisation of such an investment; or

(iv) other money permitted to be paid into the account by the regulations; and

(c) if regulations made for the purposes of this paragraph impose additional requirements—the requirements so imposed by the regulations; and

(d) if the licence conditions of the licensee's licence impose additional requirements—the requirements so imposed by the licence conditions.

The money must be paid into such an account on the day it is received by the licensee, or on the next business day.

(2) The licensee may, for the purposes of this section, maintain a single account or 2 or more accounts.

981C Regulations may deal with various matters relating to accounts maintained for the purposes of section 981B

The regulations may deal with all or any of the following in relation to accounts, or a class of accounts, maintained for the purposes of section 981B:

(a) the circumstances in which payments may be made out of an account (including the circumstances in which money may be withdrawn and invested, and the kinds of investment that may be made);

(b) the minimum balance to be maintained in an account;

(c) how interest on an account is to be dealt with;

(d) how interest or other earnings on an investment of money withdrawn from an account, or the proceeds of the realisation of such an investment, are to be dealt with.

981D Money related to derivatives may be used for general margining etc. purposes

Despite anything in regulations made for the purposes of section 981C, if:

(a) the financial service referred to in subparagraph 981A(1)(a)(i) is or relates to a dealing in a derivative; or

(b) the financial product referred to in subparagraph 981A(1)(a)(ii) is a derivative;

the money concerned may also be used for the purpose of meeting obligations incurred by the licensee in connection with margining, guaranteeing, securing, transferring, adjusting or settling dealings in derivatives by the licensee (including dealings on behalf of people other than the client).

981E Protection of money from attachment etc.

(1) This section applies to:

(a) money to which this Subdivision applies that has been paid to the licensee, both while it is in an account maintained for the purposes of section 981B and before and after it is paid into such an account; and

(b) other money in such an account as permitted by paragraph 981B(1)(b); and

(c) investments made in accordance with regulations made for the purposes of section 981C.

(2) Money and investments to which this section applies are not capable:

(a) of being attached or otherwise taken in execution; or

(b) of being made subject to a set-off, security interest or charging order, or to any process of a similar nature;

except at the suit of a person who is otherwise entitled to the money or investment.

981F Regulations may deal with how money to be dealt with if licensee ceases to be licensed etc.

The regulations may include provisions dealing with how money in an account maintained for the purposes of section 981B, or an investment of such money, is to be dealt with if:

(a) the licensee ceases to be a financial services licensee; or

(b) the licensee becomes insolvent, within the meaning of the regulations; or

(c) the licensee merges with another financial services licensee; or

(d) the licensee ceases to carry on some or all of the activities authorised by their licence.

981G Account provider not liable merely because of licensee's contravention

Nothing in this Subdivision, or in regulations made for the purposes of this Subdivision, makes the body (not being the licensee) that the account is with under paragraph 981B(1)(a) subject to any liability merely because of a failure by the licensee to comply with any of the provisions of this Subdivision or those regulations.

981H Money to which Subdivision applies taken to be held in trust

(1) Subject to subsection (3), money to which this Subdivision applies that is paid to the licensee:

(a) by the client; or

(b) by a person acting on behalf of the client; or

(c) in the licensee's capacity as a person acting on behalf of the client;

is taken to be held in trust by the licensee for the benefit of the client.

(3) The regulations may:

(a) provide that subsection (1) does not apply in relation to money in specified circumstances; and

(b) provide for matters relating to the taking of money to be held in trust (including, for example, terms on which the money is taken to be held in trust and circumstances in which it is no longer taken to be held in trust).

Subdivision B—Loan money

982A Money to which this Subdivision applies

(1) Subject to subsection (2), this Subdivision applies to money paid to a financial services licensee (the ***licensee***) by way of a loan from a person (the ***client***) in connection with activities authorised by the licensee's licence.

(2) If a person pays money to a financial services licensee:

(a) in order for it to be deposited to the credit of a deposit product held by the person or another person with the licensee; or

(b) on condition that it is to be repaid to the person by the licensee, as a debt, pursuant to the terms of a debenture or other financial product issued by the licensee;

that payment does not constitute money to which this Subdivision applies.

982B Obligation to pay money into an account

(1) The licensee must ensure that money to which this Subdivision applies is paid into an account that satisfies these requirements:

(a) the account is:

(i) with an Australian ADI; or

(ii) of a kind prescribed by regulations made for the purposes of this paragraph;

and is designated as an account for the purposes of this section of this Act; and

(b) the only money paid into the account is:

(i) money to which this Subdivision applies (which may be money lent by several different persons); or

(ii) interest on the amount from time to time standing to the credit of the account.

The money must be paid into such an account on the day it is received by the licensee, or on the next business day.

(2) The licensee may, for the purposes of this section, maintain a single account or 2 or more accounts.

982C Licensee to give client statement setting out terms of loan etc.

Obligation to give client a statement

(1) The licensee must, in accordance with the regulations, give the client a statement setting out:

(a) the terms and conditions on which the loan is made and accepted; and

(b) the purpose for which, and the manner in which, the licensee is to use the money.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Obligation to keep money in account until receive acknowledgment of receipt of statement

(2) The licensee must not take money out of the account before the client has given the licensee a written acknowledgment that the client has received the statement required by subsection (1).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

982D Permitted use of loan

The licensee must only use the money:

(a) for the purpose, and in the manner, set out in the statement given under section 982C; or

(b) for another purpose, or in another manner, agreed on in writing by the licensee and the client after the licensee gave the client the statement.

Note: Failure to comply with this section is an offence (see subsection 1311(1)).

Subdivision C—Powers of Court

983A Court may freeze certain accounts

(1) The Court may, by order, restrain dealings in respect of specified accounts with financial institutions that a person holds or maintains (whether in Australia or elsewhere), subject to such terms and conditions as the Court imposes, if subsection (2) or (3) applies in relation to the person.

(2) This subsection applies to a person if, on application by ASIC, the Court is satisfied that the person holds, or has at any time held, an Australian financial services licence and that:

(a) there are reasonable grounds for believing that there is a deficiency in an account maintained by the person for the purposes of section 981B or 982B, whether the account is maintained in this jurisdiction or elsewhere; or

(b) there has been undue delay, or unreasonable refusal, on the person's part in paying, applying or accounting for money as provided for by this Division, by a condition of the licence, or by the operating rules of a licensed market or a licensed CS facility in which the person is or has been a participant; or

(c) without limiting the generality of paragraph (a) or (b), the person has contravened section 981B or 982B.

(3) This subsection applies to a person if, on application by ASIC, the Court is satisfied that the person holds, or has at any time held, an Australian financial services licence and that:

(a) the licence has been revoked or suspended; or

(b) the person is incapable, through mental or physical incapacity, of managing his or her affairs; or

(c) the person no longer carries on a financial services business; or

(d) the person has died.

983B Interim order freezing accounts

(1) Before considering an application under section 983A, the Court may, if it considers it desirable to do so, grant an interim order that is an order of the kind applied for and is expressed to apply until the application is determined.

(2) The Court must not require ASIC or any other person, as a condition of granting an order under subsection (1), to give an undertaking as to damages.

983C Duty of person to whom order directed to make full disclosure

If an order made under section 983A is directed to a financial institution, the institution must:

(a) disclose to ASIC every account kept at the institution in the name of the person to whom the order relates, and any account that the institution reasonably suspects is held or kept at the institution for the benefit of that person; and

(b) permit ASIC to make a copy of, or to take an extract from, any account of the person to whom the order relates or any of the institution's books relating to that person.

Note: Failure to comply with this section is an offence (see subsection 1311(1)).

983D Further orders and directions

(1) If an order is made under section 983A or 983B, the Court may, on application by ASIC or a person whom the order affects, make a further order that does one or more of the following:

(a) deals with such ancillary matters as the Court thinks necessary or desirable;

(b) directs that specified amounts in an account affected by the first-mentioned order be paid to ASIC or a person nominated by ASIC;

(c) varies or discharges the first-mentioned order or an order under this section.

(2) An order under this section may be made subject to such terms and conditions as the Court imposes.

983E Power of Court to make order relating to payment of money

(1) An order made under section 983D may include directions to a person to whom money is ordered to be paid directing that the person:

(a) must pay the money into a separate account; or

(b) is authorised to prepare a scheme for distributing the money to persons who claim, within 6 months after the person receives the money, to be entitled to the money and satisfy the person that they are so entitled; or

(c) if the money received is insufficient to pay all proved claims, may, despite any rule of law or equity to the contrary, apportion the money among the claimants in proportion to their proved claims and show in the scheme how the money is so apportioned.

(2) If a person prepares a scheme for a distribution of money under subsection (1), the person must apply to the Court for approval of the scheme and for directions in respect of it.

(3) The Court may, in relation to money held in a separate account under subsection (1), give such directions as the Court thinks fit as to:

(a) the persons to whom that money is to be paid, and in what amounts the whole or any portion of that money is to be paid; and

(b) the payment of the balance of the money (if any) remaining in the account.

Division 3—Dealing with other property of clients

984A Property to which Division applies

(1) Subject to subsection (2), this Division applies to property other than money (for example, share certificates) given to a financial services licensee (the ***licensee***) in the following circumstances:

(a) the property is given in connection with:

(i) a financial service that has been provided, or that will or may be provided, to a person (the ***client***); or

(ii) a financial product held by a person (the ***client***); and

(b) the property is given:

(i) by the client; or

(ii) by a person acting on behalf of the client; or

(iii) for the benefit of the client; and

(c) the licensee is accountable for the property.

(2) The regulations may:

(a) exempt property given in specified circumstances from some or all of the provisions of this Division; or

(b) declare that this Division applies in relation to property given in specified circumstances as if specified provisions of this Division were omitted, modified or varied as set out in the regulations.

The circumstances that may be specified include (but are not limited to) that the property was given in connection with a specified class of financial product or financial service.

(3) An exemption in regulations made for the purposes of paragraph (2)(a) may be made subject to conditions specified in, or imposed in accordance with, the regulations. The regulations may provide for consequences of a contravention of a condition.

984B How property to which this Division applies is to be dealt with

(1) Subject to subsection (2), the licensee must ensure that property to which this Division applies is only dealt with in accordance with:

(a) the requirements (if any) specified in regulations made for the purposes of this paragraph; and

(b) subject to those requirements:

(i) the terms and conditions on which the property was given to the licensee; and

(ii) any subsequent instructions given by the client.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) If:

(a) the financial service referred to in subparagraph 984A(1)(a)(i) is or relates to a dealing in a derivative; or

(b) the financial product referred to in subparagraph 984A(1)(a)(ii) is a derivative;

the property concerned may also be used for the purpose of meeting obligations incurred by the licensee in connection with margining, guaranteeing, securing, transferring, adjusting or settling dealings in derivatives by the licensee (including dealings on behalf of people other than the client).

Division 4—Special provisions relating to insurance

985A Definitions etc.

(1) In this Division:

contract of insurance includes a contract of life insurance.

Note: ***Contract of life insurance*** has a meaning affected by subsection (2).

insured, in relation to a contract of life insurance, means a person (other than the insurer) who is entitled to a benefit under the contract, whether that person is the life insured or some other person.

Note: ***Intending insured*** has a corresponding meaning.

(2) For the purposes of this Division, if:

(a) a life policy (within the meaning of the *Life Insurance Act 1995*) would not ordinarily be regarded as a contract of life insurance; and

(b) liability under the policy is borne by a company registered under section 21 of that Act; and

(c) the policy was entered into after the commencement of section 9D of the *Insurance (Agents and Brokers) Act 1984* as in force before the commencement of this Chapter;

the policy is taken to be a contract of life insurance.

985B Status of amounts paid to financial services licensees in respect of contracts of insurance

(1) If:

(a) a contract of insurance is arranged or effected by a financial services licensee; and

(b) the licensee is not the insurer;

payment to the licensee of money payable (whether in respect of a premium or otherwise) by the insured under or in relation to the contract is a discharge, as between the insured and the insurer, of the liability of the insured to the insurer in respect of that money.

(2) Payment to a financial services licensee by or on behalf of an intending insured of money (whether in respect of a premium or otherwise) in respect of a contract of insurance to be arranged or effected by the licensee with an insurer (not being the licensee) is a discharge, as between the insured and the insurer, of any liability of the insured under or in respect of the contract, to the extent of the amount of the payment.

(3) Payment by an insurer to a financial services licensee of money payable to an insured, whether in respect of a claim, return of premiums or otherwise, under or in relation to a contract of insurance, does not discharge any liability of the insurer to the insured in respect of that money.

(4) An agreement, so far as it purports to alter or restrict the operation of subsection (1), (2) or (3), is void.

(5) Subsection (4) does not make void an agreement between a financial services licensee and an insured in so far as the agreement allows the licensee to set off against money payable to the insured money payable by the insured to the licensee in respect of premiums.

985C Regulations may impose other requirements etc. if financial services licensee is not the insurer

(1) The regulations may impose requirements to be complied with by a financial services licensee in relation to, or make other provision dealing with, a situation specified in subsection (2) that arises in relation to a contract or proposed contract of insurance under which the licensee is not the insurer.

(2) The situations are as follows:

(a) the licensee receives an amount as a premium or instalment of premium;

(b) the licensee does not receive an amount as a premium or instalment of premium by a particular time;

(c) the licensee is not aware of the amount of a premium or instalment of premium that is to be paid;

(d) the licensee receives money from the insured or intending insured but the risk or part of the risk has not been accepted by a particular time;

(e) the licensee receives money from the insurer for payment to or on behalf of the insured.

985D Financial services licensees etc. not to deal in general insurance products from unauthorised insurers etc.

(1) A financial services licensee, or an authorised representative of a financial services licensee, must not deal in a general insurance product if the insurer for the product, or (if there is more than one insurer for the product) each insurer for the product, is not at least one of the following:

(a) a general insurer within the meaning of the *Insurance Act 1973*;

(b) a Lloyd's underwriter within the meaning of that Act;

(c) a person in respect of whom a determination is in force, under subsection 7(1) of that Act, that subsection 9(1) or 10(1) or (2) of that Act does not apply (the effect of which is the effect referred to in paragraph 9(1)(c), 10(1)(c) or 10(2)(c) of that Act (as the case requires)).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) Subsection (1) does not apply in relation to a general insurance product if, because of section 3A of the *Insurance Act 1973*, undertaking liability under the contract of insurance concerned is not, or would not be, insurance business for the purposes of that Act.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

(3) Paragraph (1)(b) ceases to apply after section 93 of the *Insurance Act 1973* has ceased to have effect.

(4) An offence based on subsection (1) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

Division 4A—Special provisions relating to margin lending facilities

Subdivision A—Responsible lending conduct for margin lending facilities

985EA Application of this Subdivision

This Subdivision applies to a financial services licensee (the ***provider***) in relation to:

(a) the issuing of a margin lending facility to a retail client; or

(b) the increasing of the limit of a margin lending facility that was issued to a retail client.

985E Requirements before issuing etc. margin lending facility

Requirement to make assessment of unsuitability

(1) The provider must not:

(a) issue the margin lending facility to the retail client; or

(b) increase the limit of the margin lending facility that was issued to the retail client;

on a day (the ***critical day***) unless the provider has, within 90 days (or other period prescribed by the regulations) before the critical day:

(c) made an assessment that:

(i) is in accordance with section 985F; and

(ii) covers a period in which the critical day occurs; and

(d) made the inquiries and verification in accordance with section 985G.

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

Increase in limit of standard margin lending facility

(2) For the purposes of paragraph (1)(b), the limit of a standard margin lending facility is taken not to be increased if:

(a) apart from this subsection, there would be an increase in the limit; and

(b) the increase in the limit would result from an increase in the value, determined under the terms of the facility, of the secured property under the facility (as referred to in paragraph 761EA(2)(c)); and

(c) the increase in the value of the secured property does not result from the client contributing additional property to the secured property.

Regulations

(3) For the purposes of paragraph (1)(b), the regulations may prescribe particular situations in which the limit of a margin lending facility is taken:

(a) to be increased, despite subsection (2); or

(b) not to be increased.

985F Assessment of unsuitability of margin lending facility

For the purposes of paragraph 985E(1)(c), the provider must make an assessment that:

(a) specifies the period the assessment covers; and

(b) assesses whether the margin lending facility will be unsuitable for the retail client if the facility is issued or the limit is increased in that period.

Note: The provider is not required to make the assessment if the margin lending facility is not issued or the limit is not increased.

985G Reasonable inquiries etc. about the retail client

Requirement to make inquiries and take steps to verify

(1) For the purposes of paragraph 985E(1)(d), the provider must, before making the assessment:

(a) make reasonable inquiries about the retail client's financial situation; and

(b) take reasonable steps to verify the retail client's financial situation; and

(c) make any inquiries prescribed by the regulations about any matter prescribed by the regulations; and

(d) take any steps prescribed by the regulations to verify any matter prescribed by the regulations.

(2) The regulations may prescribe particular inquiries or steps that must be made or taken, or do not need to be made or taken, for the purposes of paragraph (1)(a) or (b).

When not required to take steps to verify

(3) Despite subsection (1), if:

(a) a financial services licensee that is authorised to provide financial product advice in relation to margin lending facilities has prepared a statement of advice for the retail client; and

(b) the statement of advice was prepared no more than 90 days before the critical day; and

(c) the statement of advice recommends that:

(i) the retail client acquire the particular margin lending facility; or

(ii) the limit of the particular margin lending facility be increased; and

(d) the limit of the facility, or the increase in the limit of the facility, is not greater than the limit, or the increase in the limit, recommended in the statement of advice; and

(e) the statement of advice includes the information that was used for the purposes of preparing the statement of advice;

then the provider is not required, for the purposes of paragraph (1)(b) or (d), to verify that information.

985H When margin lending facility must be assessed as unsuitable

Requirement to assess the margin lending facility as unsuitable

(1) The provider must assess that the margin lending facility will be unsuitable for the retail client if the margin lending facility will be unsuitable for the retail client under subsection (2).

Note 1: This subsection is a civil penalty provision (see section 1317E).

Note 2: Even if the margin lending facility will not be unsuitable for the retail client under subsection (2), the provider may still assess that the margin lending facility will be unsuitable for the retail client for other reasons.

(2) The margin lending facility will be unsuitable for the retail client if, at the time of the assessment, it is likely that:

(a) if the facility is issued or the limit increased in the period covered by the assessment, and the facility were to go into margin call, the retail client:

(i) would be unable to comply with the retail client's financial obligations under the terms of the facility; or

(ii) could only comply with substantial hardship; or

(b) if the regulations prescribe circumstances in which a margin lending facility is unsuitable—those circumstances will apply to the margin lending facility if the facility is issued or the limit increased in the period covered by the assessment.

Information to be used to make the assessment

(3) For the purposes of determining under subsection (2) whether the margin lending facility will be unsuitable, only information that satisfies both of the following paragraphs is to be taken into account:

(a) the information is about the retail client's financial situation, or any other matter prescribed by regulations under paragraph 985G(1)(c) or (d);

(b) at the time of the assessment:

(i) the provider had reason to believe that the information was true; or

(ii) the provider would have had reason to believe that the information was true if it had made the inquiries or verification under section 985G.

985J Giving the retail client the assessment

Requirement to give assessment if requested

(1) If, before the margin lending facility is issued or the limit is increased, the retail client requests a copy of the assessment from the provider, the provider must give the retail client a written copy of the assessment before issuing the facility or increasing the limit.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is a civil penalty provision (see section 1317E).

Note 3: The provider is not required to give the retail client a copy of the assessment if the margin lending facility is not issued or the limit is not increased.

(2) If, during the period that:

(a) starts on the critical day referred to in subsection 985E(1); and

(b) ends 7 years after that day;

the retail client requests a copy of the assessment from the provider, the provider must give the retail client a written copy of the assessment:

(c) if the request is made within 2 years of the critical day—before the end of 7 business days after the day the provider receives the request; and

(d) otherwise—before the end of 21 business days after the day the provider receives the request.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is a civil penalty provision (see section 1317E).

Manner of giving assessment

(3) The provider must give the retail client the copy of the assessment in the manner (if any) prescribed by the regulations.

No payment for assessment

(4) The provider must not request or demand payment of an amount for giving the retail client a copy of the assessment.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is a civil penalty provision (see section 1317E).

Strict liability

(5) An offence based on subsection (1), (2) or (4) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

985K Unsuitable margin lending facilities

Requirement not to issue unsuitable margin lending facilities etc.

(1) The provider must not:

(a) issue the margin lending facility to the retail client; or

(b) increase the limit of the margin lending facility that was issued to the retail client;

if the facility is unsuitable for the retail client under subsection (2).

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is a civil penalty provision (see section 1317E).

When a margin lending facility will be unsuitable

(2) The margin lending facility is unsuitable for the retail client if, at the time it is issued or the limit is increased:

(a) it is likely that, if the facility were to go into margin call, the retail client:

(i) would be unable to comply with the retail client's financial obligations under the terms of the facility; or

(ii) could only comply with substantial hardship; or

(b) if the regulations prescribe circumstances in which a margin lending facility is unsuitable—those circumstances apply to the margin lending facility.

Information to be used for the purposes of subsection (2)

(3) For the purposes of determining under subsection (2) whether the margin lending facility will be unsuitable, only information that satisfies both of the following paragraphs is to be taken into account:

(a) the information is about the retail client's financial situation, or any other matter prescribed by regulations under paragraph 985G(1)(c) or (d);

(b) at the time the margin lending facility is issued or the limit is increased:

(i) the provider had reason to believe that the information was true; or

(ii) the provider would have had reason to believe that the information was true if it had made the inquiries or verification under section 985G.

Regulations in relation to unsuitability of margin lending facility

(4) The regulations may prescribe particular situations in which a margin lending facility is taken not to be unsuitable for a retail client, despite subsection (2).

Increase in limit of standard margin lending facility

(5) For the purposes of paragraph (1)(b), the limit of a standard margin lending facility is taken not to be increased if:
(a) apart from this subsection, there would be an increase in the limit; and
(b) the increase in the limit would result from an increase in the value, determined under the terms of the facility, of the secured property under the facility (as referred to in paragraph 761EA(2)(c)); and
(c) the increase in the value of the secured property does not result from the client contributing additional property to the secured property.

Regulations in relation to increase in limit

(6) For the purposes of paragraph (1)(b), the regulations may prescribe particular situations in which the limit of a margin lending facility is taken:
(a) to be increased, despite subsection (5); or
(b) not to be increased.

Subdivision B—Notice of margin calls under margin lending facilities

985L Issue of margin lending facility must not be conditional on agreement to receive communications through agent

A financial services licensee must not require, as a condition of issuing a margin lending facility to a retail client, that the retail client enter into an agreement of the kind referred to in subsection

985M(2) (which deals with agreements about communications in relation to margin lending facilities).

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

985M Notification of margin calls

Provider must notify retail client of margin call

(1) A financial services licensee (the ***provider***) that has issued a margin lending facility to a retail client must, when the facility goes into margin call, take reasonable steps to notify the retail client under the facility of the margin call in accordance with this section.

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

When provider must notify retail client's agent, and agent must notify retail client, of margin call

(2) However, if there is an agreement between the provider, the retail client, and another financial services licensee (the ***agent***) that the agent will receive communications from the provider in relation to the margin lending facility on behalf of the retail client, then:

(a) the provider must take reasonable steps to notify the agent (instead of the retail client) of the margin call in accordance with this section; and

(b) the agent must take reasonable steps to notify the retail client of the margin call in accordance with this section.

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

When and how notice must be given

(3) A notice under this section must be given:

(a) at a time determined by ASIC; or

(b) if no time is determined by ASIC—as soon as practicable.

(4) A notice under this section must be given:

(a) if a manner in which the notice is to be given has been agreed between the person who is required to give the notice and the person to whom the notice is required to be given—in that manner; or

(b) if there is no agreement and ASIC has determined the manner in which the notice is to be given—in that manner; or

(c) otherwise—in a reasonable manner.

ASIC may determine when and how notice must be given

(5) ASIC may determine:

(a) the time by which, and manner in which, a provider must notify a client or agent of a margin call under this section; and

(b) the time by which, and manner in which, an agent must notify a client of a margin call under this section.

(6) A determination made under subsection (5):

(a) must be in writing; and

(b) is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Division 5—Obligations to report

986A Reporting in relation to money to which Subdivision A or B of Division 2 applies or property to which Division 3 applies

The regulations may impose reporting requirements to be complied with by a financial services licensee in relation to money to which Subdivision A or B of Division 2 applies or property to which Division 3 applies.

986B Reporting in relation to dealings in derivatives

The regulations may impose reporting requirements to be complied with by a financial services licensee in relation to dealings in derivatives on behalf of other people.

Division 6—Financial records, statements and audit

Subdivision A—Preliminary

987A Application of Division

(1) This Division applies in relation to a financial services licensee and a financial services business carried on by the licensee, whether that business is carried on in this jurisdiction or elsewhere.

(2) This Division does not affect, and is to be taken never to have affected, the operation of Chapter 2M in relation to a company that is a financial services licensee or in relation to a financial services business that is carried on by such a company.

Subdivision B—Financial records of financial services licensees

988A Obligation to keep financial records

(1) A financial services licensee must (subject to subsection (2)):

(a) keep financial records that correctly record and explain the transactions and financial position of the financial services business carried on by the licensee; and

(b) keep those records in accordance with the requirements of this Subdivision; and

(c) comply with the requirements of this Subdivision in relation to conversion of records into the English language (see subsection 988C(2)).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) The licensee does not contravene a requirement of this Subdivision merely because some or all of the records are kept as a part of, or in conjunction with, the records relating to any other business that is carried on by the licensee.

Note: A defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code.*

988B Records to be kept so that profit and loss statements and balance sheet can be prepared and audited

The records must be kept in a way that:

(a) enables true and fair profit and loss statements, and balance sheets, of the financial services business of the licensee to be prepared from time to time; and

(b) allows those statements and balance sheets to be conveniently and properly audited.

988C Language of records

(1) The records must be kept in writing in the English language, or in a manner that enables them to be readily accessible and readily converted into writing in the English language.

(2) If any of the records are not kept in writing in the English language, the licensee must, if required to convert the records concerned into writing in the English language by a person who is entitled to examine the records concerned, comply with the requirement within a reasonable time.

988D Location of records

If any of the records are kept outside this jurisdiction, the licensee must:

(a) cause to be sent to and kept at a place in this jurisdiction such particulars with respect to the business dealt with in those records as will enable true and fair profit and loss statements and balance sheets to be prepared; and

(b) if required by ASIC to produce those records at a place in this jurisdiction, comply with the requirement not later than 28 days after the requirement is made.

988E Particular categories of information to be shown in records

The records must be kept in sufficient detail to show particulars of:

(a) all money received or paid by the licensee, including money paid to, or disbursed from, an account maintained for the purposes of section 981B or 982B; and

(b) all acquisitions and disposals of financial products made by the licensee, the charges and credits arising from them, and the names of the person acquiring or disposing of each of those products; and

(c) all income received by the licensee from commissions, interest, and other sources, and all expenses, commissions, and interest paid by the licensee; and

(d) all the assets and liabilities (including contingent liabilities) of the licensee; and

(e) all securities or managed investment products that are the property of the licensee, showing by whom the securities or products, or the documents of title to the securities or products, are held and, if they are held by some other person, whether or not they are held as security against loans or advances; and

(f) all securities or managed investment products that are not the property of the licensee and for which the licensee or a nominee controlled by the licensee is accountable, showing:

(i) by whom, and for whom, the securities or products, or the documents of title to the securities or products, are held; and

(ii) the extent to which they are either held for safe custody or deposited with a third party as security for loans or advances made to the licensee; and

(g) such other matters (if any) as are specified in regulations made for the purposes of this paragraph.

988F Regulations may impose additional requirements

The regulations may impose additional requirements to be complied with in relation to the records including, for example, requirements for things to be contained in the records, and requirements relating to the level of detail to be shown in the records.

988G Records taken to be made with licensee's authority

An entry in the records is, unless the contrary is proved, to be taken to have been made by, or with the authority of, the licensee.

Subdivision C—Financial statements of financial services licensees

989A Meaning of *financial year*

In this Subdivision:

financial year, in relation to a financial services licensee, means:

(a) if the licensee is not a body corporate—a year ending on 30 June; and

(b) if the licensee is a body corporate—a financial year of the body corporate.

989B Financial services licensee to prepare and lodge annual profit and loss statement and balance sheet

(1) A financial services licensee must, in respect of each financial year, prepare a true and fair profit and loss statement and balance sheet in accordance with this Subdivision.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1).

(2) The licensee must lodge the statement and balance sheet with ASIC in accordance with this Subdivision.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1).

(3) The licensee must, with the statement and balance sheet, lodge an auditor's report with ASIC containing the information and matters required by the regulations.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1).

989C Requirements as to contents and applicable accounting principles

The profit and loss statement and the balance sheet must:

(a) contain the information that is required by the regulations; and

(b) be prepared in accordance with any requirements in the regulations as to the accounting principles to be used.

989CA Audit to be conducted in accordance with auditing standards

(1) If an individual auditor, or an audit company, conducts an audit of a profit and loss statement and balance sheet for the purposes of this Subdivision, the individual auditor or audit company must:

(a) conduct the audit in accordance with the auditing standards; and

(b) include in the audit report on the profit and loss statement, and balance sheet, any statements or disclosures required by the auditing standards.

(2) If an audit firm, or an audit company, conducts an audit of a profit and loss statement and balance sheet for the purposes of this Subdivision, the lead auditor for the audit or review must ensure that:

(a) the audit is conducted in accordance with the auditing standards; and

(b) the audit report on the profit and loss statement, and balance sheet, includes any statements or disclosures required by the auditing standards.

(3) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For ***strict liability*** see section 6.1 of the *Criminal Code*.

989D Time of lodgment

(1) Unless an extension is granted under subsection (3), the profit and loss statement and the balance sheet must be lodged before:

(a) if the licensee is not a body corporate—the day that is 2 months after the end of that financial year; or

(b) if the licensee is a body corporate—the day that is 3 months after the end of that financial year.

(2) If an extension is granted under subsection (3), the profit and loss statement and the balance sheet must be lodged before the end of the extended period.

(3) ASIC may, on application made:

(a) by a financial services licensee and the licensee's auditor; and

(b) before the end of the period that would otherwise apply;

approve an extension of the period for lodging the profit and loss statement and balance sheet. The extension may be of the period originally applicable or the period applicable under a previous extension.

(4) An approval under subsection (3) may be given subject to such conditions (if any) as ASIC imposes.

(5) If an approval under subsection (3) is given subject to conditions, the licensee must comply with those conditions.

Subdivision D—Appointment etc. of auditors

990A Sections 990B to 990H not to apply to public companies

Sections 990B to 990H do not apply to a financial services licensee that is a public company.

990B Appointment of auditor by licensee

(1) A financial services licensee must, within 1 month after beginning to hold the licence, appoint as auditor or auditors to audit the licensee's financial statements:

(a) a person or persons; or

(b) a firm or firms; or

(c) a person or persons and a firm or firms.

Subsections (4) and (5) must be complied with in relation to the appointment.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) Within 14 days after a vacancy occurs in the office of an auditor of the licensee, if there is no surviving or continuing auditor of the licensee, the licensee must appoint:

(a) a person or persons; or

(b) a firm or firms; or

(c) a person or persons and a firm or firms;

to fill the vacancy. Subsections (4) and (5) must be complied with in relation to the appointment.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(3) While a vacancy in the office of an auditor of the licensee continues, the surviving or continuing auditor or auditors (if any) may act.

(4) The licensee must not appoint as auditor a person who, or firm that, is ineligible by virtue of regulations made for the purposes of section 990C to act as auditor of the licensee.

(5) The licensee must not appoint a person or firm as auditor of the licensee unless that person or firm has, before the appointment, consented by written notice given to the licensee to act as auditor and has not withdrawn the consent by written notice given to the licensee.

(6) The licensee must, within 14 days after an appointment of a person or firm as auditor, lodge a written notice with ASIC stating that the licensee has made the appointment and specifying the name of the person or firm.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(7) The regulations may include provisions (including provisions imposing obligations) dealing with matters related to the appointment of a firm as auditor, including, for example:

(a) taking certain members of the firm to have been appointed as auditors; and

(b) the effect of a dissolution and reconstitution of the firm; and

(c) requiring a member of the firm who retires or withdraws to continue to act as auditor in certain circumstances; and

(d) how a report, notice or other document is to be made or given.

(8) Regulations made for the purposes of subsection (7) may also include provisions modifying the effect of provisions of this Subdivision in relation to matters dealt with in those regulations.

(9) In this section:

person means:

(a) an individual auditor; or

(b) an authorised audit company.

990C When a person or firm is ineligible to act as auditor

A person or firm is ineligible to act as auditor of the licensee if regulations made for the purposes of this section provide that the person or firm is ineligible so to act.

990D Ineligible person or firm must not consent to act or disqualify themselves etc.

(1) A person or firm, while ineligible to act as auditor of the licensee, must not:

(a) consent to be appointed as auditor of the licensee; or

(b) act as auditor of the licensee; or

(c) prepare a report that an auditor of the licensee is to prepare under this Part.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) A person must not:

(a) if the person has been appointed auditor of the licensee—disqualify himself or herself, while the appointment continues, from acting as auditor of the licensee; or

(b) if the person is a member of a firm that has been appointed auditor of the licensee—disqualify the firm, while the appointment continues, from acting as auditor of the licensee.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

990E Duration of appointment of auditors

An auditor of the licensee holds office until:

(a) death; or

(b) removal in accordance with section 990F; or

(c) resignation in accordance with sections 990G and 990H; or

(d) becoming prohibited by subsection 990D(1) from acting as auditor of the licensee;

whichever occurs first.

990F Removal of auditors

The licensee:

(a) must remove an auditor of the licensee from office if the auditor becomes ineligible to act as auditor of the licensee; and

(b) may, with ASIC's consent, remove an auditor of the licensee from office.

Note: Failure to comply with paragraph (a) is an offence (see subsection 1311(1)).

990G Resignation of auditors—requirements for resignation

(1) An auditor of the licensee may, by written notice given to the licensee, resign as auditor of the licensee if:

(a) the auditor has, by written notice given to ASIC, applied for consent to the resignation and, at or about the same time as the auditor gave notice to ASIC, gave written notice of the application to the licensee; and

(b) ASIC has consented and the auditor has received notice of ASIC's consent.

(2) ASIC must, as soon as practicable after receiving an application from an auditor under subsection (1), notify the auditor and the licensee whether it consents to the resignation.

(3) A statement by an auditor in an application under subsection (1), or in answer to an inquiry by ASIC relating to the reasons for the application:

(a) is not admissible in evidence in any civil or criminal proceedings in a court against the auditor other than proceedings for a contravention of section 1308; and

(b) may not be made the ground of a prosecution (other than a prosecution for a contravention of section 1308), action or suit against the auditor.

(4) A certificate by ASIC that a statement was made in an application under subsection (1), or in answer to an inquiry by ASIC relating to the reasons for such an application, is conclusive evidence that the statement was so made.

990H Resignation of auditors—when resignation takes effect

The resignation of an auditor of the licensee takes effect on:

(a) if the notice of resignation specifies a date as the date the resignation is to take effect—the date so specified; or

(b) the date on which ASIC gives its consent to the resignation; or

(c) if ASIC has fixed a date as the date the resignation is to take effect—the date so fixed;

whichever last occurs.

990I Auditor's right of access to records, information etc.

(1) An auditor of the licensee has a right of access at all reasonable times to the financial records or other records (including any register) of the licensee.

(2) An auditor of the licensee is entitled to require:

(a) from the licensee; or

(b) if the licensee is a body corporate—from any director, secretary or senior manager of the licensee;

such assistance and explanations as the auditor desires for the purposes of audit.

(3) The licensee, or a director, secretary or senior manager of the licensee if it is a body corporate, must not:

(a) refuse or fail to allow an auditor of the licensee access, in accordance with subsection (1), to financial records or other records of the licensee; or

(b) refuse or fail to give assistance, or an explanation, to an auditor of the licensee as and when required under subsection (2); or

(c) otherwise hinder, obstruct or delay an auditor of the licensee in the performance or exercise of the auditor's duties or powers.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

990J Auditor's fees and expenses

(1) The reasonable fees and expenses of an auditor of the licensee are payable by the licensee.

(2) The auditor may recover those fees by action against the licensee.

990K Auditor to report on certain matters

(1) If an auditor, in the performance of duties as auditor of the licensee, becomes aware of a matter referred to in subsection (2), the auditor must, within 7 days after becoming aware of the matter, lodge a written report on the matter with ASIC and send a copy of the report to the licensee, and to each licensed market (if any) and each licensed CS facility (if any) in which the licensee is a participant.

Note: Failure to comply with this section is an offence (see subsection 1311(1)).

(2) A report must be given in relation to any matter that, in the opinion of the auditor:

(a) has adversely affected, is adversely affecting or may adversely affect the ability of the licensee to meet the licensee's obligations as a licensee; or

(b) constitutes or may constitute a contravention of:

(i) a provision of Subdivision A or B of Division 2 (or a provision of regulations made for the purposes of such a provision); or

(ii) a provision of Division 3 (or a provision of regulations made for the purposes of such a provision); or

(iii) a provision of Subdivision B or C of this Division (or a provision of regulations made for the purposes of such a provision); or

(iv) a condition of the licensee's licence; or

(c) constitutes an attempt to unduly influence, coerce, manipulate or mislead the auditor in the conduct of the audit.

990L Qualified privilege for auditor etc.

Qualified privilege for auditor

(1) An auditor of the licensee has qualified privilege in respect of:
  (a) a statement that the auditor makes, orally or in writing, in the course of the auditor's duties as auditor; or
  (b) the lodging of a report under subsection 990K(1); or
  (c) the sending of a report to:
    (i) the licensee; or
    (ii) a licensed market or a licensed CS facility;
  under subsection 990K(1); or
  (d) a disclosure made by the auditor in response to a notice given to the auditor under subsection 225A(5) of the ASIC Act.

Note: If the auditor is an audit company, the company has qualified privilege under this subsection in respect of statements made, and reports lodged or sent, by individuals on behalf of the company if those statements and notices can be properly attributed to the company.

Qualified privilege for registered company auditor acting on behalf of audit company

(2) If the auditor of the licensee is an audit company, a registered company auditor acting on behalf of the company has qualified privilege in respect of:
  (a) a statement that the registered company auditor makes (orally or in writing) in the course of the performance, on behalf of the company, of the company's duties as auditor; or
  (b) the lodging by the registered company auditor, on behalf of the company, of a report under subsection 990K(1); or
  (c) the sending by the registered company auditor, on behalf of the company, of a report to:
    (i) the licensee; or
    (ii) a licensed market or a licensed CS facility;
  under subsection 990K(1); or
  (d) a disclosure made by the registered company auditor in response to a notice given to the audit company under subsection 225A(5) of the ASIC Act.

Qualified privilege for subsequent publication

(3) A person has qualified privilege in respect of the publishing of a document:

(a) prepared by an auditor of the licensee in the course of the auditor's duties as auditor; or

(b) required by or under this Chapter to be lodged with ASIC (whether or not the document has been so lodged).

(4) A person has qualified privilege in respect of the publishing of a statement:

(a) made by an auditor of the licensee as mentioned in subsection (1); or

(b) a statement made by a registered company auditor as mentioned in subsection (2).

Division 7—Other rules about conduct

991A Financial services licensee not to engage in unconscionable conduct

(1) A financial services licensee must not, in or in relation to the provision of a financial service, engage in conduct that is, in all the circumstances, unconscionable.

(2) If a person suffers loss or damage because a financial services licensee contravenes subsection (1), the person may recover the amount of the loss or damage by action against the licensee.

(3) An action under subsection (2) may be begun at any time within 6 years after the day on which the cause of action arose.

(4) This section does not affect any liability that a person has under any other law.

991B Financial services licensee to give priority to clients' orders

(1) This section applies if:

(a) a person (the ***client***) has instructed a financial services licensee to buy or sell financial products of a particular class that are able to be traded on a licensed market; and

(b) the licensee has not complied with the instruction; and

(c) the client is not an associate of the licensee; and

(d) regulations made for the purposes of this paragraph do not exclude those financial products from this section.

(2) The financial services licensee must not, except as permitted by subsection (3):

(a) enter into a transaction of purchase or sale of financial products of that class either on their own behalf or on behalf of an associate of the licensee; or

(b) instruct another person to enter into a transaction of purchase or sale of financial products of that class on behalf of the licensee or an associate of the licensee.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(3) Subsection (2) does not apply in relation to the entering into of a transaction, or the giving of an instruction, by the licensee if:

(a) the client's instructions required the purchase or sale to be effected only on specified conditions relating to price and the licensee has been unable to comply with the instructions because of those conditions; or

(b) the transaction, or the giving of the instruction, is permitted by regulations made for the purposes of this paragraph.

Note: A defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code.*

991C Regulations may deal with various matters relating to instructions to deal through licensed markets

The regulations may do all or any of the following in relation to instructions received by financial services licensees to deal in financial products through licensed markets:

(a) impose requirements relating to the order in which instructions are to be transmitted to a licensed market or to another financial services licensee who is a participant in a licensed market;

(b) impose requirements relating to the order in which dealings that have been effected on a licensed market are to be allocated to instructions;

(c) prohibit the disclosure of instructions in specified circumstances.

991D Regulations may require records to be kept in relation to instructions to deal on licensed markets and foreign markets

The regulations may impose requirements for the keeping of records relating to all or any of the following:

(a) instructions received by financial services licensees to deal in financial products through licensed markets or through other financial markets (whether inside or outside Australia);

(b) the execution of such instructions;

(c) the transmission of such instructions.

991E Obligations of financial services licensee in relation to dealings with non-licensees

Obligation to disclose if acting on own behalf

(1) Subject to the regulations, a financial services licensee must not, either personally or through an authorised representative, enter into a financial product transaction on their own behalf:

(a) that relates to a financial product that is able to be traded on a licensed market; and

(b) that is with a person (the ***non-licensee***) who is not a financial services licensee or an authorised representative;

if:

(c) the licensee has not (in accordance with any applicable regulations made for the purposes of paragraph (2)(a)) disclosed to the non-licensee the fact that the licensee will be acting on their own behalf in the proposed dealing; or

(d) the non-licensee has not (in accordance with any applicable regulations made for the purposes of paragraph (2)(b)) consented to the licensee so acting in the proposed dealing.

If the licensee is acting through an authorised representative, the disclosure referred to in paragraph (c) may instead be given by the representative.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) The regulations may deal with either or both of the following:

(a) how a disclosure referred to in paragraph (1)(c) is to be made;

(b) how a consent referred to in paragraph (1)(d) is to be given.

Obligation not to charge fee

(3) If a financial services licensee, either personally or through an authorised representative, enters into a transaction of sale or purchase of financial products on their own behalf:

(a) that relates to a financial product that is able to be traded on a licensed market; and

(b) that is with a person (the ***non-licensee***) who is not a financial services licensee or an authorised representative;

the licensee must only charge the non-licensee a brokerage, commission or other fee in respect of the transaction if the charge is permitted by the regulations.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Person may rescind contract if section contravened

(4) If subsection (1) or (3) is contravened in relation to a transaction (whether or not anyone is convicted of an offence in respect of the contravention), the non-licensee may, subject to subsection (5), rescind the contract effecting the transaction, unless the contract was for the purchase of financial products by the non-licensee and the non-licensee has disposed of those products.

(5) The right under subsection (4) to rescind the contract:
  (a) can only be exercised during the period of 14 days starting on:
    (i) unless subparagraph (ii) applies—the day on which the contract was entered into; or
    (ii) if regulations made for the purposes of this subparagraph specify a later day—that later day; and
  (b) is to be exercised by notice in writing to the licensee.

(6) Nothing in subsections (4) and (5) affects any other right that a person has.

Regulations may require records to be kept in relation to transactions entered into by licensee on own behalf

(7) The regulations may impose requirements for the keeping of records relating to financial products transactions entered into by a financial services licensee on their own behalf.

991F Dealings involving employees of financial services licensees

(1) Subject to the regulations, a financial services licensee and an employee of the licensee must not, on their own behalves, jointly acquire a financial product.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) Subject to the regulations, a financial services licensee must not give credit to an employee of the licensee, or to a person who they know is an associate of an employee of the licensee, if:

(a) the credit is given for the purpose of enabling the person to whom the credit is given to acquire a financial product; or

(b) the licensee knows or has reason to believe that the credit will be used for the purpose of acquiring a financial product.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(3) Subject to the regulations, a person:

(a) who is an employee of a financial services licensee that is a participant in a licensed market; and

(b) who is so employed in connection with a business of dealing in financial products;

must only, on their own behalf, acquire or agree to acquire a financial product of a kind that is able to be traded on that market if the licensee acts as the agent of the person in respect of the acquisition.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(4) In this section, a reference to an employee of a financial services licensee includes, for a licensee that is a body corporate, a reference to an officer of the body.

Division 8—Miscellaneous

992A Prohibition on hawking of certain financial products

(1) A person must not offer financial products for issue or sale in the course of, or because of, an unsolicited meeting with another person.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) Subsection (1) does not apply to offering of securities, hawking of which is prohibited by section 736, or to offering of managed investment products, hawking of which is prohibited by section 992AA.

Note: A defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code.*

(3) A person must not make an offer to issue or sell a financial product in the course of, or because of:

(aa) an unsolicited telephone call to another person; or

(ab) an unsolicited contact with another person in another way that is prescribed by the regulations for the purposes of this paragraph;

unless the other person has been:

(a) contacted only during the hours prescribed by the regulations and only if the person is not listed on the "No Contact/No Call" register in relation to the person making the contact; and

(b) given an opportunity to:

(i) register on a "No Contact/No Call" register maintained by the person making the contact at no cost to that person; and

(ii) select the time and frequency of any future contacts; and

(c) given a Product Disclosure Statement before becoming bound to acquire a financial product; and

(d) clearly informed of the importance of using the information in the Product Disclosure Statement when making a decision to acquire a financial product; and

(e) given the option of having the information in the Product Disclosure Statement read out to that person.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(3A) Neither subsection (1) nor (3) applies to an offer of financial products if the offer is not to a retail client.

Note: A defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code*.

(3B) Neither subsection (1) nor (3) applies to an offer of financial products that is made under an eligible employee share scheme.

Note: A defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code*.

(4) In addition to other penalties for breaches of this section, a failure to comply with this section gives the other person a right of return and refund exercisable within 1 month after the expiry date of the relevant cooling-off period for the financial product, or one month and fourteen days in the event that no cooling-off period applies to the financial product, subject to the following provisions:

(a) on the exercise of the right to return the product:

(i) if the product is constituted by a legal relationship between the client and the issuer of the product—that relationship is, by force of this subsection, terminated with effect from that time without penalty to the client; and

(ii) any contract for the acquisition of the product by the client is, by force of this subsection, terminated with effect from that time without penalty to the client;

(b) the regulations may provide for consequences and obligations (in addition to those provided for in paragraph (a)) to apply if the right to return a financial product is exercised;

(c) the regulations may do any or all of the following:

(i) provide that a specified subclass of financial products that would otherwise be covered by this subsection is excluded from this subsection;

(ii) provide additional requirements to be satisfied before this subsection applies in relation to a class or subclass of financial products;

(iii) provide that this subsection does not apply in relation to the provision of a financial product in specified circumstances.

(5) For the purposes of this section:

(a) a reference to offering a financial product for issue (or offering to issue a financial product) includes a reference to inviting an application for the issue of the financial product; and

(b) a reference to offering a financial product for sale (or offering to sell a financial product) includes a reference to inviting an offer to purchase the financial product.

992AA Prohibition of hawking of managed investment products

(1) A person must not offer interests in managed investment schemes for issue or sale in the course of, or because of:

(a) an unsolicited meeting with another person; or

(b) an unsolicited telephone call to another person;

unless the offer is exempted under subsection (2).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) Subsection (1) does not apply to an offer of interests in managed investment schemes if:

(a) the offer is not to a retail client;

(b) the offer is an offer of interests in a listed managed investment scheme made by telephone by a financial services licensee; or

(c) the offer is made to a client by a financial services licensee through whom the client has acquired or disposed of an interest in a managed investment scheme in the previous 12 months; or

(d) the offer is made under an eligible employee share scheme.

(3) For the purposes of this section:

(a) a reference to offering interests in a managed investment scheme for issue includes a reference to inviting an application for the issue of interests in the scheme; and

(b) a reference to offering interests in a managed investment scheme for sale includes a reference to inviting an offer to purchase interests in the scheme.

992B Exemptions and modifications by ASIC

(1) ASIC may:

(a) exempt a person or class of persons from all or specified provisions of this Part; or

(b) exempt a financial product or class of financial products from all or specified provisions of this Part; or

(c) declare that this Part applies in relation to a person or a financial product, or a class of persons or financial products, as if specified provisions of this Part were omitted, modified or varied as specified in the declaration.

(3) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.

(4) An exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.

(5) If conduct (including an omission) of a person would not have constituted an offence if a particular declaration under paragraph (1)(c) had not been made, that conduct does not constitute an offence unless, before the conduct occurred (in addition to complying with the gazettal requirement of subsection (4)):

(a) the text of the declaration was made available by ASIC on the internet; or

(b) ASIC gave written notice setting out the text of the declaration to the person.

In a prosecution for an offence to which this subsection applies, the prosecution must prove that paragraph (a) or (b) was complied with before the conduct occurred.

(6) For the purpose of this section, the ***provisions of this Part*** include:

(a) definitions in this Act, or in the regulations, as they apply to references in this Part; and

(b) any provisions of Part 10.2 (transitional provisions) that relate to provisions of this Part.

Note: Because of section 761H, a reference to this Part or Part 10.2 also includes a reference to regulations or other instruments made for the purposes of this Part or Part 10.2 (as the case requires).

992C Exemptions and modifications by regulations

(1) The regulations may:

(a) exempt a person or class of persons from all or specified provisions of this Part; or

(b) exempt a financial product or a class of financial products from all or specified provisions of this Part; or

(c) provide that this Part applies as if specified provisions were omitted, modified or varied as specified in the regulations.

(2) For the purpose of this section, the ***provisions of this Part*** include:

(a) definitions in this Act, or in the regulations, as they apply to references in this Part; and

(b) any provisions of Part 10.2 (transitional provisions) that relate to provisions of this Part.

Division 9—Enforcement

993A Overview

This Division contains provisions creating offences by reference to various rules contained in preceding Divisions of this Part. However, it does not create all the offences relating to those rules, as some offences are created by subsection 1311(1). Where offences are created by subsection 1311(1) in relation to a rule, this is indicated by a note at the end of the provision containing the rule.

993B Offence of failing to pay client money into an account as required

Strict liability offence

(1) A financial services licensee commits an offence if:
   (a) the licensee is required by subsection 981B(1) to pay particular money into an account in accordance with that subsection; and
   (b) the licensee does not pay the money into an account in accordance with that subsection.

(2) An offence based on subsection (1) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

Ordinary offence

(3) A financial services licensee commits an offence if:
   (a) the licensee is required by subsection 981B(1) to pay particular money into an account in accordance with that subsection; and
   (b) the licensee does not pay the money into an account in accordance with that subsection.

993C Offence of failing to comply with requirements relating to client money account

Strict liability offence

(1) A financial services licensee commits an offence if the licensee contravenes a requirement in regulations made for the purposes of section 981C.

(2) An offence based on subsection (1) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

Ordinary offence

(3) A financial services licensee commits an offence if:
(a) a requirement in regulations made for the purposes of section 981C applies to the licensee; and
(b) the licensee contravenes the requirement.

993D Offence of failing to pay loan money into an account as required

Strict liability offence

(1) A financial services licensee commits an offence if:
(a) the licensee is required by subsection 982B(1) to pay particular money into an account in accordance with that subsection; and
(b) the licensee does not pay the money into an account in accordance with that subsection.

(2) An offence based on subsection (1) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

Ordinary offence

(3) A financial services licensee commits an offence if:
(a) the licensee is required by subsection 982B(1) to pay particular money into an account in accordance with that subsection; and
(b) the licensee does not pay the money into an account in accordance with that subsection.

Part 7.9—Financial product disclosure and other provisions relating to issue, sale and purchase of financial products

Division 1—Preliminary

1010A Part generally does not apply to securities

(1) Apart from section 1017F and Divisions 5A, 5B, 5C and 6 (and provisions of Division 7 that apply in relation to that section or provisions of those Divisions), nothing in this Part applies in relation to securities.

Note: Chapters 6CA and 6D provide for disclosure in relation to securities.

(2) Apart from section 1017F and Divisions 5A, 5B and 6, nothing in this Part applies in relation to debentures, stocks or bonds issued or proposed to be issued by a government.

Note: These financial products are not ***securities*** within the meaning of section 761A.

1010B Part does not apply to financial products not issued in the course of a business

(1) Apart from Division 5A, nothing in this Part applies in relation to a financial product that is not or was not issued, or that will not be issued, in the course of a business of issuing financial products.

(2) For this purpose, the issue of:

(a) any managed investment product; or

(b) any superannuation product;

is taken to occur in the course of a business of issuing financial products.

1010BA Part does not apply to contribution plans

Apart from section 1017F and Divisions 5A and 6 (and provisions of Division 7 that apply in relation to that section or provisions of those Divisions), nothing in this Part applies in relation to contribution plans.

1010C Special provisions about meaning of *sale* and *offer*

(1) For the purposes of this Part, a reference to a ***sale*** or ***purchase*** of a financial product is a reference to a sale of the product by, or a purchase of the product from, a person who has (whether by issue or otherwise) acquired the product. The issue of a financial product is not a sale of the financial product.

(2) For the purposes of this Part:

(a) a reference to offering to issue a financial product includes a reference to inviting an application for the issue of the financial product; and

(b) a reference to offering to sell a financial product includes a reference to inviting an offer to purchase the financial product.

1010D General approach to offence provisions

Division 7 contains provisions creating offences by reference to various rules contained in Divisions of this Part. However, it does not create all the offences relating to those rules, as some offences are created by subsection 1311(1). Where offences are created by subsection 1311(1) in relation to a rule, this is indicated by a note at the end of the provision containing the rule.

Division 2—Product Disclosure Statements

Subdivision A—Preliminary

1011A Jurisidictional scope of Division

(1) Subject to subsection (2), sections 1012A, 1012B and 1012C only apply in relation to offers and recommendations referred to in those sections that are received in this jurisdiction.

(2) Section 1012B also applies in relation to issues referred to in subparagraph 1012B(3)(a)(iii) that are made in this jurisdiction.

(3) The regulations may make provision dealing with the jurisdictional scope of some or all of the other provisions of this Division. The other provisions of this Division have effect subject to any such regulations.

1011B Definitions

In this Division:

issue Statement has the meaning given by subsection 1013A(1).

offer has a meaning affected by sections 1010C and 1011C.

regulated person, in relation to a financial product, means:

(a) an issuer of the financial product; or

(b) a seller of the financial product if the sale takes place in circumstances described in subsection 1012C(5), (6) or (8) (secondary sales that require a Product Disclosure Statement); or

(c) any financial services licensee; or

(d) any authorised representative of a financial services licensee; or

(f) any person who is not required to hold an Australian financial services licence because the person is covered by:

(i) paragraph 911A(2)(j); or

(ii) an exemption in regulations made for the purposes of paragraph 911A(2)(k); or

(iii) an exemption specified by ASIC for the purposes of paragraph 911A(2)(l); or

(g) any person who is required to hold an Australian financial services licence but who does not hold such a licence.

responsible person for a Product Disclosure Statement has the meaning given by subsection 1013A(3).

sale has a meaning affected by section 1010C.

sale Statement has the meaning given by subsection 1013A(2).

1011C Treatment of offers of options over financial products

For the purposes of this Division:

(a) an offer of an option over a financial product is not to be taken to be an offer of the underlying financial product; and

(b) the grant of an option without an offer of the option is taken to be an offer of the option; and

(c) an offer to grant an option is taken to be an offer to issue the financial product constituted by the option.

Subdivision B—Requirement for a Product Disclosure Statement to be given

1012A Obligation to give Product Disclosure Statement—personal advice recommending particular financial product

Section sets out recommendation situation in which Product Disclosure Statement required

(1) This section sets out the situations in which giving financial product advice that consists of, or includes, a recommendation to acquire a financial product gives rise to an obligation on a regulated person to give another person a Product Disclosure Statement for the product.

(2) For the purposes of this Division:
   (a) each of the situations is a ***recommendation situation***; and
   (b) the ***relevant conduct*** for that situation is the making of the recommendation; and
   (c) the ***client*** for that situation is the person to whom the advice is provided.

Personal advice recommending a particular financial product

(3) A regulated person must give a person a Product Disclosure Statement for a financial product if:
   (a) the regulated person provides financial product advice to the person that consists of, or includes, a recommendation that the person acquire the financial product; and
   (b) the person would acquire the financial product by way of:
      (i) the issue of the product to the person (rather than the transfer of the product to the person); or
      (ii) the transfer of the product to the person in circumstances described in subsection 1012C(5), (6) or (8) (secondary sales that require a Product Disclosure Statement); and
   (c) the financial product advice is provided to the client as a retail client; and
   (d) the financial product advice is personal advice to the client.

The Product Disclosure Statement must be given at or before the time when the regulated person provides the advice and must be given in accordance with this Division.

This section has effect subject to other provisions

(4) This section has effect subject to sections 1012D, 1012DA, 1012E, 1012F, 1012G and 1014E.

1012B Obligation to give Product Disclosure Statement—situations related to issue of financial products

Section sets out issue situations in which Product Disclosure Statement required

(1) This section sets out situations in which:
   (a) an offer relating to the issue of a financial product; or

(b) the issue of a financial product;

gives rise to an obligation on a regulated person to give another person a Product Disclosure Statement for the product.

(2) For the purposes of this Division:

(a) each of the situations is an ***issue situation***; and

(b) the ***relevant conduct*** for that situation is the conduct by the regulated person that gives rise to the obligation to give the Product Disclosure Statement; and

(c) the ***client*** for that situation is the person to whom the financial product is to be or is issued.

The main issue situations

(3) A regulated person must give a person a Product Disclosure Statement for a financial product if:

(a) the regulated person:

(i) offers to issue the financial product to the person; or

(ii) offers to arrange for the issue of the financial product to the person; or

(iii) issues the financial product to the person in circumstances in which there are reasonable grounds to believe that the person has not been given a Product Disclosure Statement for the product; and

(b) the financial product is, or is to be, issued to the person as a retail client.

The Product Disclosure Statement must be given at or before the time when the regulated person makes the offer, or issues the financial product, to the person and must be given in accordance with this Division.

Note: If a Product Disclosure Statement is given when the offer is made, it will not need to be given again when the product is issued to the person (see subsection 1012D(1)) unless the Product Disclosure Statement that was given is no longer up to date.

Receiving offer to acquire financial product

(4) A regulated person must give a person a Product Disclosure Statement for a financial product if:

(a) the person makes an offer to the regulated person to acquire the financial product; and

(b) the person would acquire the financial product by way of the issue of the product to the person (rather than the transfer of the product to the person); and

(c) the financial product is to be issued to the person as a retail client.

The Product Disclosure Statement must be given to the person before the person becomes bound by a legal obligation to acquire the financial product pursuant to the offer and must be given in accordance with this Division.

This section has effect subject to other provisions

(5) This section has effect subject to sections 1012D, 1012DAA, 1012E, 1012F, 1012G and 1014E.

1012C Obligation to give Product Disclosure Statement—offers related to sale of financial products

Section sets out sale situations in which Product Disclosure Statement required

(1) This section sets out situations in which an offer relating to the sale of a financial product gives rise to an obligation on a regulated person to give another person a Product Disclosure Statement for the product.

(2) For the purposes of this Division:

(a) each of the situations is a ***sale situation***; and

(b) the ***relevant conduct*** for that situation is the offer; and

(c) the ***client*** for that situation is the person to whom the product is to be sold.

Sale offers that require a Product Disclosure Statement

(3) A regulated person must give a person a Product Disclosure Statement for a financial product if:

(a) the regulated person offers to sell the financial product to the person; and

(b) a sale of the product to the person pursuant to the offer would take place in circumstances covered by subsection (5), (6) or (8); and

(c) the financial product is to be sold to the person as a retail client.

The Product Disclosure Statement must be given at or before the time when the regulated person makes the offer and must be given in accordance with this Division.

(4) A regulated person must give a person a Product Disclosure Statement for a financial product if:

(a) the person makes an offer to the regulated person to acquire the financial product; and

(b) the person would acquire the financial product by way of the transfer of the product to the person; and

(c) a sale of the product to the person pursuant to the offer would take place in the circumstances described in subsection (5), (6) or (8); and

(d) the financial product is to be sold to the person as a retail client.

The Product Disclosure Statement must be given to the person before the person becomes bound by a legal obligation to acquire the financial product pursuant to the offer and must be given in accordance with this Division.

Off-market sale by controller

(5) This subsection covers the circumstances in which:

(a) the seller controls the issuer of the financial product; and

(b) either:

(i) the product is not able to be traded on any licensed market; or

(ii) although the product is able to be traded on a licensed market, the offer is not made in the ordinary course of trading on a licensed market.

Note: See section 50AA for when a person controls a body.

Sale amounting to indirect issue

(6) This subsection covers the circumstances in which:

(a) the offer is made within 12 months after the issue of the financial product; and

(b) the product was issued without a Product Disclosure Statement for the product being prepared; and

(c) either:

(i) the issuer issued the product with the purpose of the person to whom it was issued selling or transferring the product, or granting, issuing or transferring interests in, or options or warrants over, the product; or

(ii) the person to whom the product was issued acquired it with the purpose of selling or transferring the product, or granting, issuing or transferring interests in, or options or warrants over, the product.

The purpose test in subsection (6)

(7) For the purposes of subsection (6):

(a) a financial product is taken to be:

(i) issued with the purpose referred to in subparagraph (6)(c)(i); or

(ii) acquired with the purpose referred to in subparagraph (6)(c)(ii);

if there are reasonable grounds for concluding that the product was issued or acquired with that purpose (whether or not there were or may have been other purposes for the issue or acquisition); and

(b) without limiting paragraph (a), a financial product is taken to be:

(i) issued with the purpose referred to in subparagraph (6)(c)(i); or

(ii) acquired with the purpose referred to in subparagraph (6)(c)(ii);

if the financial product, or any financial product of the same kind that was issued at the same time, is subsequently sold, or offered for sale, within 12 months after issue, unless it is proved that the circumstances of the issue and the subsequent sale or offer are not such as to give rise to reasonable grounds for concluding that the product was issued or acquired with that purpose.

Sale amounting to indirect off-market sale by controller

(8) This subsection covers the circumstances in which:

(a) the offer is made within 12 months after the sale of the financial product by a person (the ***controller***) who controlled the issuer of the product at the time of the sale; and

(b) either:

(i) at the time of the sale by the controller, the product was not able to be traded on any licensed market; or

(ii) although the product was able to be traded on a licensed market at that time, the sale by the controller did not occur in the ordinary course of trading on a licensed market; and

(c) a Product Disclosure Statement was not prepared by, or on behalf of, the controller before the sale of the product by the controller; and

(d) either:

(i) the controller sold the product with the purpose of the person to whom it was sold selling or transferring the product, or granting, issuing or transferring interests in, or options or warrants over, the product; or

(ii) the person to whom the controller sold the product acquired it with the purpose of selling or transferring the product, or granting, issuing or transferring interests in, or options or warrants over, the product.

Note: See section 50AA for when a person controls a body.

The purpose test in subsection (8)

(9) For the purposes of subsection (8):

(a) a financial product is taken to be:

(i) sold with the purpose referred to in subparagraph (8)(d)(i); or

(ii) acquired with the purpose referred to in subparagraph (8)(d)(ii);

if there are reasonable grounds for concluding that the product was sold or acquired with that purpose (whether or not there were or may have been other purposes for the sale or acquisition); and

(b) without limiting paragraph (a), a financial product is taken to be:

(i) sold with the purpose referred to in subparagraph (8)(d)(i); or

(ii) acquired with the purpose referred to in subparagraph (8)(d)(ii);

if the financial product, or any financial product of the same kind that was sold by the controller at the same time, is subsequently sold, or offered for sale, within 12 months after issue, unless it is proved that the circumstances of the initial sale and the subsequent sale or offer are not such as to give rise to reasonable grounds for concluding that the product was sold or acquired (in the initial sale) with that purpose.

This section has effect subject to other provisions

(10) This section has effect subject to sections 1012D, 1012DA, 1012E and 1014E.

1012D Situations in which Product Disclosure Statement is not required

Recommendation, issue or sale situation—client has already received an up to date Product Disclosure Statement

(1) In a recommendation situation, issue situation or sale situation, the regulated person does not have to give the client a Product Disclosure Statement if:

(a) the client has already received a Product Disclosure Statement that contains all of the information that the first-mentioned Product Disclosure Statement would be required to contain; or

(b) the regulated person believes on reasonable grounds that paragraph (a) applies.

Recommendation, issue or sale situation—client has or has access to up to date information

(2) In a recommendation situation, issue situation or sale situation, the regulated person does not have to give the client a Product Disclosure Statement for the financial product if:

(a) the client already holds a financial product of the same kind; and

(b) the regulated person believes on reasonable grounds that the client has received, or has, and knows that they have, access to, all of the information that the first-mentioned Product Disclosure Statement would be required to contain through:

(i) a Product Disclosure Statement; and

(ii) information provided to the client under section 1017B, 1017C or 1017D or through continuous disclosure under Chapter 6CA.

Note: Paragraph (a)—see subsection (10).

Recommendation or issue situation—interests in self-managed superannuation funds

(2A) In a recommendation situation or issue situation, the regulated person does not have to give the client a Product Disclosure Statement for the financial product if:

(a) the financial product is an interest in a self-managed superannuation fund; and

(b) the regulated person believes on reasonable grounds that the client has received, or has, and knows that they have, access to, all of the information that the Product Disclosure Statement would be required to contain.

Recommendation, issue or sale situation—no information required to be in Product Disclosure Statement

(2B) In a recommendation situation, issue situation or sale situation, the regulated person does not have to give the client a Product Disclosure Statement for the financial product if, because of section 1013F, no information would be required to be included in the Statement.

Recommendation or issue situation—certain offers to present holders

(3) In a recommendation situation or issue situation, the regulated person does not have to give the client a Product Disclosure Statement for the financial product if:

(a) the client already holds a financial product of the same kind; and

(b) either:

(i) in a recommendation situation—the advice that constitutes the relevant conduct relates to an offer made under a distribution reinvestment plan or switching facility; or

(ii) in an issue situation—the offer or issue that constitutes the relevant conduct is made under a distribution reinvestment plan or switching facility.

Note: Paragraph (a)—see subsection (10).

Recommendation, issue or sale situation—no consideration to be provided

(5) In a recommendation situation, an issue situation or a sale situation, the regulated person does not have to give the client a Product Disclosure Statement if:

(a) no consideration is to be provided for the issue or sale of the financial product; and

(b) the financial product is not an option and is:

(i) a managed investment product; or

(ii) a financial product of a kind prescribed by regulations made for the purposes of this subparagraph.

(6) In a recommendation situation, an issue situation or a sale situation, the regulated person does not have to give the client a Product Disclosure Statement if:

(a) the financial product is an option; and

(b) no consideration is to be provided for the issue or sale of the financial product; and

(c) no consideration is to be provided for the underlying financial product on the exercise of the option.

Issue or sale situation—takeovers

(7) In an issue situation or a sale situation, the regulated person does not have to give the client a Product Disclosure Statement if:

(a) the financial product is:

(i) a managed investment product; or

(ii) an option to acquire, by way of transfer, a share in a body, a debenture of a body or a legal or equitable right

or interest in a share in a body or a debenture of a body; and

(b) the offer that constitutes the relevant conduct is made as consideration for an offer made under a takeover bid under Chapter 6; and

(c) the offer is accompanied by a bidder's statement.

Note: Although a Product Disclosure Statement is not needed, disclosures must be made in the bidder's document under section 636.

Recommendation, issue or sale situation—responsible entity an exempt body

(8) In a recommendation situation, an issue situation or a sale situation, the regulated person does not have to give the client a Product Disclosure Statement if:

(a) the financial product is a financial product described in paragraph 764A(1)(ba) (which relates to certain managed investment schemes that are not registered schemes); and

(b) the holder of the office (by whatever name it is known), in relation to the managed investment scheme, that corresponds most closely to the office of responsible entity of a registered scheme is an exempt body; and

(c) in the case of a recommendation situation or an issue situation—either:

(i) the recommendation that constitutes the relevant conduct relates to an offer made by the office holder referred to in paragraph (b); or

(ii) the offer that constitutes the relevant conduct is made by or to the office holder referred to in paragraph (b).

Note 1: Section 66A defines ***exempt body***.

Note 2: In the case of a sale situation, there is no additional requirement equivalent to paragraph (c).

Recommendation or issue situation—interim contracts of insurance

(9) In a recommendation situation or an issue situation, the regulated person does not have to give the client a Product Disclosure Statement if the financial product is an interim contract of insurance (as defined in subsection 11(2) of the *Insurance Contracts Act 1984*).

Note: This does not detract from the obligation to give a Product Disclosure Statement relating to any contract of insurance that replaces or supersedes the interim contract.

Recommendation, issue or sale situation—client is associated with registered scheme

(9A) In a recommendation situation, an issue situation or a sale situation, the regulated person does not have to give the client a Product Disclosure Statement if:

(a) the financial product is a managed investment product; and

(b) the client is associated (within the meaning of subsection (9B)) with the scheme's responsible entity.

(9B) For the purposes of subsection (9A), the client is associated with the scheme's responsible entity if the client is:

(a) a senior manager of the responsible entity or of a related body corporate; or

(b) a spouse, parent, child, brother or sister of a person who is a senior manager of the responsible entity or a related body corporate; or

(c) a body corporate controlled by a person referred to in paragraph (a) or (b).

Interpretation

(10) For the purposes of this section:

(a) a financial product (other than a managed investment product or a superannuation product) is of the same kind as another financial product only if they are both issued:

(i) by the same issuer; and

(ii) on the same terms and conditions (other than price); and

(b) a managed investment product, or a superannuation product, is of the same kind as another product only if the other product is an interest in the same scheme or fund; and

(c) a reference to information that a Product Disclosure Statement would be required to contain includes a reference to information that would be required to be in any statement that the Product Disclosure Statement would be required to contain.

1012DAA Rights issues for which Product Disclosure Statement is not required

(1) In a recommendation situation or issue situation, the regulated person does not have to give the client a Product Disclosure Statement if:

(a) but for subsection (2), the regulated person would be required by section 1012B to give a Product Disclosure Statement for the transfer or issue of a financial product (the ***relevant product***); and

(b) a determination under subsection (3) was not in force in relation to the issuer of the relevant product at the time when the relevant product was issued.

Conditions required for rights issue

(2) The regulated person does not have to give the client a Product Disclosure Statement if:

(a) the relevant product is being offered under a rights issue; and

(b) the class of the relevant product are quoted securities at the time at which the offer is made; and

(c) trading in that class of the relevant product on a prescribed financial market on which they are quoted was not suspended for more than a total of 5 days during the shorter of the following periods:

(i) the period during which the class of the relevant product is quoted;

(ii) the period of 12 months before the day on which the offer is made; and

(d) no exemption under section 111AS or 111AT covered the issuer of the relevant product, or any person as director or auditor of the issuer, at any time during the relevant period referred to in paragraph (c); and

(e) no order under section 340 or 341 covered the issuer of the relevant product, or any person as director or auditor of the issuer, at any time during the relevant period referred to in paragraph (c); and

(f) the issuer of the relevant product gives the relevant market operator for the issuer a written notice that complies with subsection (7) within the 24 hour period before the relevant conduct occurs.

Determination by ASIC

(3) ASIC may make a determination under this subsection if ASIC is satisfied that in the previous 12 months the issuer of the relevant product contravened any of the following provisions:

(a) the provisions of Chapter 2M as they apply to the registered scheme in which the relevant product is an interest;

(b) section 674 or 675 as it applies to the registered scheme in which the relevant product is an interest;

(c) section 1016E, 1021D, 1021E or 1021J;

(d) subsection (10) of this section;

(e) section 1308 as it applies to a notice under subsection (2) of this section.

(4) The determination must be made in writing and a copy must be published in the *Gazette* as soon as practicable after the determination is made.

(5) The determination made under subsection (3) is not a legislative instrument.

(6) A failure to publish a copy of the determination does not affect the validity of the determination.

Requirements for notice

(7) A notice complies with this subsection if the notice:

(a) states that the relevant product was issued without a Product Disclosure Statement for the relevant product being prepared; and

(b) states that the notice is being given under paragraph (2)(f); and

(c) states that, as a disclosing entity, the issuer of the relevant product is subject to regular reporting and disclosure obligations; and

(d) states that, as at the date of the notice, the issuer of the relevant product has complied with:

(i) the provisions of Chapter 2M as they apply to the registered scheme in which the relevant product is an interest; and

(ii) section 674 as it applies to that registered scheme; and

(e) sets out any information that is excluded information as at the date of the notice (see subsections (8) and (9)); and

(f) states:

(i) the potential effect the issue of the relevant product will have on the control of the body; and

(ii) the consequences of that effect.

Note 1: A person is taken not to contravene section 1021C if a notice purports to comply with this subsection but does not actually comply with this subsection: see subsection 1021C(5).

Note 2: A notice must not be false or misleading in a material particular, or omit anything that would render it misleading in a material respect: see sections 1308 and 1309. The issuer has an obligation to correct a defective notice: see subsection (10) of this section.

(8) For the purposes of subsection (7), excluded information is information:

(a) that has been excluded from a continuous disclosure notice in accordance with the listing rules of the relevant market operator to whom that notice is required to be given; and

(b) that a person would reasonably require for the purpose of making a decision, as a retail client, whether to acquire the relevant product.

(9) The notice given under subsection (2) must contain any excluded information only to the extent to which it is reasonable for a person considering, as a retail client, whether to acquire the relevant product to expect to find the information in a Product Disclosure Statement.

Obligation to correct defective notice

(10) The issuer of the relevant product contravenes this subsection if:

(a) the notice given under subsection (2) is defective; and

(b) the issuer becomes aware of the defect in the notice within 12 months after the relevant product is issued; and

(c) the issuer does not, within a reasonable time after becoming aware of the defect, give the relevant market operator a notice that sets out the information necessary to correct the defect.

(11) For the purposes of subsection (10), the notice under subsection (2) is ***defective*** if the notice:

(a) does not comply with paragraph (2)(f); or

(b) is false or misleading in a material particular; or

(c) has omitted from it a matter or thing, the omission of which renders the notice misleading in a material respect.

1012DA Product Disclosure Statement not required for sale amounting to indirect issue

Product Disclosure Statement not required

(1) In a recommendation situation or sale situation, the regulated person does not have to give the client a Product Disclosure Statement if:

(a) but for subsection (5), (11) or (12), the regulated person would be required by section 1012A or 1012C to give a Product Disclosure Statement for the relevant product; and

(b) the transfer or sale of the financial product (the ***relevant product***) to the client would take place in circumstances covered by subsection 1012C(6); and

(c) the relevant product was not issued by the issuer with the purpose referred to in subparagraph 1012C(6)(c)(i); and

(d) a determination under subsection (2) was not in force in relation to the issuer of the relevant product at the time when the relevant product was issued.

(1A) In a recommendation situation or sale situation, the regulated person does not have to give the client a Product Disclosure Statement if:

(a) but for subsection (5), the regulated person would be required by section 1012C to give a Product Disclosure Statement for the transfer or sale of the financial product (the ***relevant product***); and

(b) the transfer or sale of the relevant product to the client would take place in circumstances covered by subsection 1012C(8); and

(c) the relevant product was not sold by the controller with the purpose referred to in subparagraph 1012C(8)(d)(i); and

(d) a determination under subsection (2) was not in force in relation to the issuer of the relevant product at the time when the relevant product was issued.

Determination by ASIC

(2) ASIC may make a determination under this subsection if ASIC is satisfied that in the previous 12 months the issuer of the relevant product contravened any of the following provisions:

(a) the provisions of Chapter 2M as they apply to the issuer (or, if the relevant financial product is an interest in a registered scheme, as those provisions apply to the scheme);

(b) section 674 or 675 as it applies to the issuer (or, if the relevant financial product is an interest in a registered scheme, as that section applies to the scheme);

(c) section 1016E, 1021D, 1021E or 1021J;

(d) subsection (9) of this section;

(e) section 1308 as it applies to a notice under subsection (5) of this section.

(3) The determination must be made in writing and a copy must be published in the *Gazette* as soon as practicable after the determination is made.

(4) A failure to publish a copy of the determination does not affect the validity of the determination.

Transfer or sale of quoted securities—case 1

(5) The regulated person does not have to give the client a Product Disclosure Statement if:

(a) the relevant product is in a class of financial products that were quoted securities at all times in the 3 months before the day on which the relevant product was issued; and

(b) trading in that class of financial products on a prescribed financial market on which they were quoted was not suspended for more than a total of 5 days during the shorter of the period during which the class of financial product was quoted, and the period of 12 months before the day on which the relevant product was issued; and

(c) no exemption under section 111AS or 111AT covered the issue of the relevant product, or any person as director or auditor of the issuer, at any time during the relevant period referred to in paragraph (b); and

(d) no order under section 340 or 341 covered the issuer of the relevant product, or any person as director or auditor of the issuer, at any time during the relevant period referred to in paragraph (b); and

(e) either:

(i) if the regulated person is not required under subsection (1) to give a Product Disclosure Statement—the issuer of the relevant product gives the relevant market operator for the issuer a written notice that complies with subsection (6) before the relevant conduct occurs; or

(ii) if the regulated person is not required under subsection (1A) to give a Product Disclosure Statement—both the issuer of the relevant product, and the controller, give the relevant market operator for the issuer a written notice that complies with subsection (6) before the relevant conduct occurs.

(6) A notice complies with this subsection if the notice:

(a) is given within 5 business days after the day on which the relevant product was issued; and

(b) states that the relevant product was issued without a Product Disclosure Statement for the relevant product being prepared; and

(c) states that the notice is being given under paragraph (5)(e); and

(d) states that, as a disclosing entity, the issuer of the relevant product is subject to regular reporting and disclosure obligations; and

(e) states that, as at the date of the notice, the issuer of the relevant product has complied with:

(i) the provisions of Chapter 2M as they apply to the issuer (or, if the relevant financial product is an interest in a registered scheme, as those provisions apply to the scheme); and

(ii) section 674 as it applies to the issuer (or, if the relevant financial product is an interest in a registered scheme, as that section applies to the scheme); and

(f) sets out any information that is excluded information as at the date of the notice (see subsections (7) and (8)).

Note 1: A person is taken not to contravene section 1021C if a notice purports to comply with this subsection but does not actually comply with this subsection: see subsection 1021C(5).

Note 2: A notice must not be false or misleading in a material particular, or omit anything that would render it misleading in a material respect: see sections 1308 and 1309. The issuer has an obligation to correct a defective notice: see subsection (9) of this section.

(7) For the purposes of subsection (6), excluded information is information:

(a) that has been excluded from a continuous disclosure notice in accordance with the listing rules of the relevant market operator to whom that notice is required to be given; and

(b) that a person would reasonably require for the purpose of making a decision, as a retail client, whether to acquire the relevant product.

(8) The notice given under subsection (5) must contain any excluded information only to the extent to which it is reasonable for a person considering, as a retail client, whether to acquire the relevant product to expect to find the information in a Product Disclosure Statement.

Obligation to correct defective notice

(9) The issuer of the relevant product contravenes this subsection if:

(a) the notice given under subsection (5) is defective; and

(b) the issuer becomes aware of the defect in the notice within 12 months after the relevant product is issued; and

(c) the issuer does not, within a reasonable time after becoming aware of the defect, give the relevant market operator a notice that sets out the information necessary to correct the defect.

(10) For the purposes of subsection (9), the notice under subsection (5) is ***defective*** if the notice:

(a) does not comply with paragraph (6)(f); or

(b) is false or misleading in a material particular; or

(c) has omitted from it a matter or thing the omission of which renders the notice misleading in a material respect.

Transfer or sale of quoted securities—case 2

(11) The regulated person does not have to give the client a Product Disclosure Statement if:

(a) the relevant product is in a class of financial products that are quoted securities of the issuer; and

(b) either:

(i) a Product Disclosure Statement required to be given by section 1012B is lodged with ASIC on or after the day on which the relevant product is issued but before the day on which the relevant conduct occurs; or

(ii) a Product Disclosure Statement required to be given by section 1012B is lodged with ASIC before the day on which the relevant product is issued and, on the day on which the relevant product is issued, the Product Disclosure Statement is still being used by the issuer of the relevant product for offers of financial products in the same class of financial products as the relevant product; and

(c) the Product Disclosure Statement is for a financial product of the issuer of the relevant product that is in the same class of financial products as the relevant product.

Transfer or sale of quoted securities—case 3

(12) The regulated person does not have to give the client a Product Disclosure Statement if:

(a) a Product Disclosure Statement for a financial product was given under section 1012B; and

(b) the relevant product was issued to:

(i) a person (the ***underwriter***) named in that Product Disclosure Statement as an underwriter of the issue of the financial product; or

(ii) a person nominated by the underwriter; and

(c) the relevant product was issued to the underwriter, or the person nominated by the underwriter, at or about the time that persons who applied for the financial product under that

Product Disclosure Statement were issued with that product; and

(d) the relevant product is in a class of financial products that were quoted securities of the issuer.

1012E Small scale offerings of managed investment and other prescribed financial products (20 issues or sales in 12 months)

(1) This section applies only to financial products that are:

(a) managed investment products; or

(b) financial products of a kind prescribed by regulations made for the purposes of this paragraph.

(2) Personal offers of financial products do not need a Product Disclosure Statement under this Part if:

(a) all of the financial products are issued by the same person (the ***issuer***); and

(b) none of the offers results in a breach of the 20 purchasers ceiling (see subsections (6) and (7)); and

(c) none of the offers results in a breach of the $2 million ceiling (see subsections (6) and (7)).

(3) Subsection (2) does not apply to an offer to which subsection 1012C(6) (sale amounting to indirect issue) or (8) (sale amounting to indirect sale by controller) applies.

Note: Under section 1012K, ASIC may make a determination aggregating the transactions of bodies that ASIC considers to be closely related.

(4) If subsection (2) applies to an offer of a financial product, a recommendation to a person to acquire a financial product in response to a personal offer of that kind does not need a Product Disclosure Statement under this Part.

(5) For the purposes of subsections (2) and (4), a ***personal offer*** is one that:

(a) may only be accepted by the person to whom it is made; and

(b) is made to a person who is likely to be interested in the offer, having regard to:

(i) previous contact between the person making the offer and that person; or

(ii) some professional or other connection between the person making the offer and that person; or

(iii) statements or actions by that person that indicate that they are interested in offers of that kind.

(6) An offer to issue, or arrange for the issue of, a financial product:

(a) results in a breach of the 20 purchasers ceiling if it results in the number of people to whom the issuer has issued financial products exceeding 20 in any 12 month period; and

(b) results in a breach of the $2 million ceiling if it results in the amount raised by the issuer from issuing financial products exceeding $2 million in any 12 month period.

(7) An offer by a person to sell a financial product:

(a) results in a breach of the 20 purchasers ceiling if it results in the number of people to whom the person sells financial products issued by the issuer of that financial product exceeding 20 in any 12 month period; and

(b) results in a breach of the $2 million ceiling if it results in the amount raised by the person from selling financial products issued by the issuer of that financial product exceeding $2 million in any 12 month period.

(8) In counting issues and sales of the financial products issued by the issuer, and the amount raised from issues and sales, for the purposes of subsection (2), disregard issues and sales that result from offers that:

(a) do not need a Product Disclosure Statement (otherwise than because of this section); or

(b) are made under a Product Disclosure Statement.

Note: Also see provisions on restrictions on advertising (section 1018A) and the anti-hawking provisions in section 992A.

(9) In counting issues and sales of the financial products issued by the issuer, and the amount raised from issues and sales, for the purposes of subsection (2), disregard any issues and sales made by a body if:

(a) the body was a managed investment scheme (but not a registered scheme) at the time that the offer of interests in the scheme that resulted in the issues or sales was made; and

(b) the body became a registered scheme within 12 months after that offer was made; and

(c) the offer would not have required a Product Disclosure Statement (otherwise than because of this section) if the managed investment scheme had been a registered scheme at the time that the offer was made.

(10) In working out the amount of money raised by the issuer from issuing financial products, include the following:

(a) the amount payable for the financial products at the time when they are issued;

(b) if the financial product is an option—any amount payable on the exercise of the option;

(c) if the financial products carry a right to convert the financial product into other financial products—any amount payable on the exercise of that right.

(11) If a person relies on subsection (2) to make offers of financial products without a Product Disclosure Statement under this Part, the person must not issue, arrange for the issue of, or transfer, financial products without a Product Disclosure Statement under this Part if the issue or transfer would result in a breach of the 20 purchasers ceiling or the $2 million ceiling (see subsections (6), (7), (8), (9) and (10)).

(12) For the purposes of this section, an ***offer of a financial product*** is an offer to:

(a) issue the financial product; or

(b) arrange for the issue of the financial product; or

(c) sell the financial product.

1012F Product Disclosure Statement for certain superannuation products may be provided later

In a recommendation situation or an issue situation in which the financial product is a superannuation product of a kind specified in regulations made for the purposes of this section, the regulated person:

(a) need not give the client the Product Disclosure Statement at or before the time when it would otherwise be required to be given; and

(b) must give the client the Product Disclosure Statement as soon as is reasonably practicable and in any event within 3 months after the product is issued to the client; and

(c) need not give the client the Product Disclosure Statement at all if the client ceases to be a member of the superannuation fund concerned before the regulated person is required to give the Product Disclosure Statement under paragraph (b).

1012G Product Disclosure Statement may sometimes be provided later

(1) The regulated person may deal with a financial product under this section only if:

(a) the financial product is one for which an application form is not required under section 1016A and section 1019B (cooling off period) will apply if the client enters into a legal obligation to acquire the product pursuant to the recommendation or offer that constitutes the relevant conduct; or

(b) the financial product is:

(i) a basic deposit product; or

(ii) a facility for making non-cash payments (see section 763D) that is related to a basic deposit product; or

(iii) a financial product of a kind prescribed by regulations made for the purposes of this subparagraph.

(2) In a recommendation situation or an issue situation, the regulated person need not give the client a Product Disclosure Statement for the financial product at or before the time when it would otherwise be required to be given if:

(a) the client expressly instructs the regulated person that they require:

(i) in a recommendation situation—the advice constituting the recommendation; or

(ii) in an issue situation—the financial product;

to be provided or issued immediately, or by a specified time; and

(b) it is not reasonably practicable, while complying with the client's instructions, to give the client the Product Disclosure Statement at or before the time when it would otherwise be required to be given.

The regulated person must comply with subsection (3) instead.

(3) The regulated person must:

(a) at or before the time referred to in paragraph (2)(b), orally communicate the following information to the client:

(i) the name and contact details of the issuer of the financial product; and

(ii) information about the essential features of the financial product; and

(iii) the information that would be required to be in a Product Disclosure Statement for the financial product by paragraphs 1013D(1)(c), (d), (g) and (i); and

(b) give the client the Product Disclosure Statement as soon as practicable after that time, and in any event not later than:

(i) the time when the confirmation requirement (if applicable) is complied with; or

(ii) the end of the fifth day after the day on which the financial product was issued or sold to the client.

(3A) The information referred to in paragraph (3)(a) must be communicated in a clear, concise and effective manner.

(4) For the purposes of paragraph (3)(b), the confirmation requirement is complied with when:

(a) the client receives confirmation, as mentioned in paragraph 1017F(5)(a), of the transaction by which they acquired the financial product; or

(b) confirmation of that transaction is available to the client by a facility as mentioned in paragraph 1017F(5)(b).

1012H Obligation to take reasonable steps to ensure that Product Disclosure Statement is given to person electing to be covered by group financial product

(1) This section covers the situation in which a financial product:

(a) is issued to a person; and

(b) covers, or is designed to cover, a group of people; and

(c) may cover a particular person (the ***new group member***) if the person elects to be covered by the financial product.

(2) The issuer must take reasonable steps to ensure that the new group member is given a Product Disclosure Statement for the financial product in accordance with this Division before the new group member makes an election to be covered by the financial product.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(3) For the purposes of this section, a person is covered by a financial product if benefits are, or may be, provided under the financial product directly to:

(a) the person; or

(b) a relative of the person; or

(c) a person nominated by the person.

1012I Obligation to give employer a Product Disclosure Statement in relation to certain superannuation products and RSA products

(1) At or before the time when a person (the ***applicant***) becomes a standard employer-sponsor of a superannuation entity, the person (the ***issuer***) who is to provide the superannuation products to the applicant's employees must give the applicant a Product Disclosure Statement in accordance with this Division for each of those superannuation products.

(2) If:

(a) a person (the ***applicant***) applies for the issue of an RSA product to the employee; and

(b) the applicant has not previously applied to the RSA provider for the issue to any employee of an RSA product of the same kind;

the person (the ***issuer***) who is to issue the RSA product to the employee must, at or before the time when the RSA product is issued to the employee, give the applicant a Product Disclosure Statement in accordance with this Division for the RSA product.

(2A) If:

(a) a trustee (the ***applicant***), under Part 24 of the *Superannuation Industry (Supervision) Act 1993*, applies on behalf of a

person for the issue of an interest in a relevant superannuation entity; and

(b) the applicant has not previously applied under that Part for the issue of an interest in that entity on behalf of any person;

the person (the ***issuer***) who is to issue the interest to the person must, at or before the time when the interest is issued to the person, give the applicant a Product Disclosure Statement in accordance with this Division for the interest.

(2B) If:

(a) a trustee (the ***applicant***), under Part 9 of the *Retirement Savings Accounts Act 1997*, applies on behalf of a person for the issue of an interest in a relevant superannuation entity; and

(b) the applicant has not previously applied under that Part for the issue of an interest in that entity on behalf of any person;

the person (the ***issuer***) who is to issue the interest to the person must, at or before the time when the interest is issued to the person, give the applicant a Product Disclosure Statement in accordance with this Division for the interest.

(3) The issuer does not have to give the applicant a Product Disclosure Statement under subsection (1), (2), (2A) or (2B) for a financial product if:

(a) the applicant has already received a Product Disclosure Statement for that financial product that contains all of the information that the first-mentioned Product Disclosure Statement would be required to contain; or

(b) the issuer believes on reasonable grounds that paragraph (a) applies.

Note: Information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

(4) The issuer need not give the applicant a Product Disclosure Statement under subsection (1), (2), (2A) or (2B) in the circumstances specified in the regulations.

(5) In this section:

(a) terms used in subsection (1) that are defined for the purposes of the *Superannuation Industry (Supervision) Act 1993* have the same meanings as in that Act; and

(b) terms used in subsection (2) that are defined for the purposes of the *Retirement Savings Accounts Act 1997* have the same meanings as in that Act; and

(c) ***relevant superannuation entity*** has the same meaning as in section 1016A of this Act.

1012IA Treatment of arrangements under which a person can instruct another person to acquire a financial product

Definitions

(1) In this section:

acquirer, in relation to a custodial arrangement, has the meaning given by the definition of ***custodial arrangement***.

client, in relation to a custodial arrangement, has the meaning given by the definition of ***custodial arrangement***.

custodial arrangement means an arrangement between a person (the ***provider***) and another person (the ***client***) (whether or not there are also other parties to the arrangement) under which:

(a) the client is, or is entitled, to give an instruction that a particular financial product, or a financial product of a particular kind, is to be acquired; and

(b) if the client gives such an instruction, a person (the ***acquirer***), being the provider or a person with whom the provider has or will have an arrangement, must (subject to any discretion they have to refuse) acquire the financial product, or a financial product of that kind; and

(c) if the acquirer acquires the financial product, or a financial product of that kind, pursuant to an instruction given by the client, either:

(i) the product is to be held on trust for the client or another person nominated by the client; or

(ii) the client, or another person nominated by the client, is to have rights or benefits in relation to the product or a beneficial interest in the product, or in relation to, or calculated by reference to, dividends or other benefits derived from the product.

instruction includes a direction or request.

provider, in relation to a custodial arrangement, has the meaning given by the definition of ***custodial arrangement***.

regulated acquisition means an acquisition of a financial product pursuant to an instruction by the client under a custodial arrangement, being an acquisition:

(a) by way of issue by the issuer (the ***regulated person***); or

(b) pursuant to a sale by a person (the ***regulated person***) in circumstances described in subsection 1012C(5), (6) or (8).

regulated person, in relation to a regulated acquisition of a financial product, has the meaning given by paragraph (a) or (b) (as the case requires) of the definition of ***regulated acquisition***.

Obligation on provider to give client a PDS

(2) Before a regulated acquisition of a financial product occurs pursuant to an instruction given by the client under a custodial arrangement, the provider must give the client a Product Disclosure Statement for the product if a Product Disclosure Statement for the product would, if there were an equivalent direct acquisition by the client, be required by subsection 1012B(3) or 1012C(3) (see subsection (3) of this section) to be given to the client by the regulated person before that acquisition occurred. For this purpose, an ***equivalent direct acquisition*** is an acquisition that would occur if:

(a) the product were instead being offered for issue or sale direct to the client by the regulated person for the same price (or for the appropriate proportion of that price, if the transaction for the regulated acquisition also covers other products); and

(b) the circumstances of that issue or sale to the client were otherwise the same as those in which the regulated acquisition will occur.

Determining whether a PDS would have to be given for an equivalent direct acquisition

(3) The following provisions apply for the purpose of determining whether the regulated person would be required by subsection 1012B(3) or 1012C(3) to give the client a Product Disclosure Statement for the financial product:

(a) the effect of the provisions referred to in subsection 1012B(5) or 1012C(10), as the case requires, as they have effect subject to the following paragraphs, must be taken into account;

(b) subsections 1012D(1), (2) and (2A) apply as if references in those subsections to the regulated person's belief in relation to a matter were instead references to the provider's belief in relation to that matter;

(c) subsections 1012D(2) and (3) apply as if references to the client already holding a financial product of the same kind also included a reference to a person already holding a financial product of the same kind as a result of an instruction given by the client under a custodial arrangement;

(d) sections 1012E and 1012F are to be disregarded;

(e) section 1012G has effect in accordance with subsection (4).

Modification of section 1012G

(4) The following provisions apply in relation to section 1012G:

(a) in determining for the purposes of subsection (2) whether the regulated person would be required by subsection 1012B(3) or 1012C(3) to give the client a Product Disclosure Statement for the financial product, subsection 1012G(2) applies as if the reference to the client instructing the regulated person (in an issue situation) that they require the financial product to be provided or issued immediately, or by a specified time, were instead a reference to the client instructing the provider that they require the financial product to be acquired immediately, or by a specified time;

(b) if, because of subsection 1012G(2) as it applies because of paragraph (a) of this subsection, the provider does not have to give the client a Product Disclosure Statement for a financial product before a regulated acquisition of the financial product occurs pursuant to an instruction given by the client under a custodial arrangement:

(i) subsection 1012G(2) applies in relation to the provider, the client and the regulated acquisition as if the obligation it imposes to comply with subsection 1012G(3) were imposed on the provider; and

(ii) subsection 1012G(3) applies in relation to the provider, the client and the regulated acquisition as if the reference to the regulated person were instead a reference to the provider, as if subparagraph 1012G(3)(b)(i) were omitted and as if the reference in subparagraph 1012G(3)(b)(ii) to the day on which the financial product was issued or sold to the client were instead a reference to the day on which the regulated acquisition occurs.

Modification of section 1013A

(5) Section 1013A applies in relation to a regulated acquisition as if:

(a) paragraph 1013A(1)(b) also covered a Product Disclosure Statement that is required to be given by subsection (2) of this section in relation to an acquisition covered by paragraph (a) of the definition of ***regulated acquisition*** in subsection (1) of this section; and

(b) paragraph 1013A(2)(b) also covered a Product Disclosure Statement that is required to be given by subsection (2) of this section in relation to an acquisition covered by paragraph (b) of the definition of ***regulated acquisition*** in subsection (1) of this section.

Provider is not an agent for the purposes of section 1015C

(6) For the purposes of the application of section 1015C in relation to a regulated acquisition, the provider in relation to the relevant custodial arrangement is taken not to be an agent of the client.

Provider is covered by sections 1015E, 1021F and 1021I

(7) Sections 1015E, 1021F and 1021I apply in relation to a regulated acquisition as if the references to a regulated person were instead references to the provider in relation to the relevant custodial arrangement.

Regulations may provide for other modifications

(8) The regulations may provide for other modifications of provisions of this Part that are to have effect in relation to regulated acquisitions.

1012J Information must be up to date

The information in a Product Disclosure Statement must be up to date as at the time when it is given.

Note: A Supplementary Product Disclosure Statement containing updated information may be given with a Product Disclosure Statement that has become out of date. The updated information is taken to be included in the Product Disclosure Statement (see section 1014D).

1012K Anti-avoidance determinations

(1) ASIC may determine in writing that a number of different bodies are closely related and that their transactions should be aggregated for the purposes of this Subdivision. If ASIC does so:

(a) an issue, sale or transfer of financial products of any other bodies is taken to also be an issue, sale or transfer of the financial products of each of the other bodies by those bodies; and

(b) any money received from an issue, sale or transfer of financial products of any of the bodies is taken to also be received by each of the other bodies from an issue, sale or transfer of its own financial products.

ASIC must give written notice of the determination to each of the bodies.

(2) ASIC may determine in writing that the transactions of a body and of a person who controls the body should be aggregated for the purposes of this Subdivision. If ASIC does so:

(a) an issue of financial products of the body is taken to also be the transfer of the financial products by the controller; and

(b) any money received from an issue of financial products of the body is taken to also be received by the controller from a transfer of the financial products; and

(c) a sale or transfer of financial products of the body by the controller is taken to also be the issue of the financial products by the body; and

(d) any money received from a sale or transfer of financial products of the body by the controller is taken to also be received by the body from an issue of the financial products.

ASIC must give written notice of the determination to the body and the controller.

Subdivision C—Preparation and content of Product Disclosure Statements

1013A Who must prepare Product Disclosure Statement

(1) A Product Disclosure Statement that:

(a) is required to be given by section 1012A (otherwise than in a situation in which the recommendation concerned relates to an offer described in subsection 1012C(3) or (4)); or

(b) is required to be given by section 1012B; or

(c) section 1012H requires an issuer to take reasonable steps to ensure is given to a new group member; or

(d) is required to be given by section 1012I;

must be a document that has been prepared by the issuer of the financial product. A Product Disclosure Statement of this kind is in this Division referred to as an ***issue Statement***.

(2) A Product Disclosure Statement that:

(a) is required to be given by section 1012A in a situation in which the recommendation concerned relates to an offer described in subsection 1012C(3) or (4)); or

(b) is required to be given by section 1012C;

must be a document that has been prepared by the person making the offer to sell the financial product. A Product Disclosure Statement of this kind is in this Division referred to as a ***sale Statement***.

(3) The person who, or on whose behalf, a Product Disclosure Statement for a financial product is required to be prepared is, in this Division, referred to as the ***responsible person*** for the financial product.

(4) For the purposes of this Part, a Product Disclosure Statement prepared on behalf of a person is taken to be prepared by the person.

1013B Title of Product Disclosure Statement

(1) The title "Product Disclosure Statement" must be used on the cover of, or at or near the front of, a Product Disclosure Statement.

(2) In any other part of a Product Disclosure Statement, "Product Disclosure Statement" may be abbreviated to "PDS".

1013C Product Disclosure Statement content requirements

(1) A Product Disclosure Statement:

(a) must include the following statements and information required by this Subdivision:

(i) the statements and information required by section 1013D; and

(ii) the information required by section 1013E; and

(iii) the information required by the other provisions of this Subdivision; and

(b) may also:

(i) include other information; or

(ii) refer to other information that is set out in another document.

Note: A Supplementary Product Disclosure Statement containing additional information may be given with a Product Disclosure Statement that does not contain all the required information. The additional information is taken to be included in the Product Disclosure Statement (see section 1014D).

(2) The information required by sections 1013D and 1013E need only be included in the Product Disclosure Statement to the extent to which it is actually known to:

(a) the responsible person; and

(b) in the case of a sale Statement—the issuer of the financial product; and

(c) any person named in the Statement as an underwriter of the issue or sale of the financial product; and

(d) any person:

(i) named in the Statement as a financial services licensee providing services in relation to the issue or sale of the financial product; and

(ii) who participated in any way in the preparation of the Statement; and

(e) any person who has given a consent referred to in section 1013K in relation to a statement included in the Statement; and

(f) any person named in the Statement with their consent as having performed a particular professional or advisory function; and

(g) if any of the above persons is a body corporate—any director of that body corporate.

(3) The information included in the Product Disclosure Statement must be worded and presented in a clear, concise and effective manner.

(4) The responsible person may include in the Product Disclosure Statement a statement about the association between the financial product and another person.

(5) The responsible person must not include a statement about the association between the financial product and a person if:

(a) the statement creates the impression that the financial product is issued or sold by that other person; and

(b) the person has not issued or sold the product.

(6) The responsible person must not include a statement about the association between the financial product and a person if:

(a) the statement creates the impression that the financial product is guaranteed or underwritten by that other person; and

(b) the person has not guaranteed or underwritten the product.

(7) If the Product Disclosure Statement states that a person provides, or is to provide, services in relation to the financial product, the Product Disclosure Statement must clearly distinguish between the respective roles of that person and the issuer or seller of the financial product.

1013D Product Disclosure Statement content—main requirements

(1) Subject to this section, subsection 1013C(2) and sections 1013F and 1013FA, a Product Disclosure Statement must include the following statements, and such of the following information as a person would reasonably require for the purpose of making a decision, as a retail client, whether to acquire the financial product:

(a) a statement setting out the name and contact details of:

(i) the issuer of the financial product; and

(ii) if the Statement is a sale Statement—the seller; and

(b) information about any significant benefits to which a holder of the product will or may become entitled, the circumstances in which and times at which those benefits will or may be provided, and the way in which those benefits will or may be provided; and

(c) information about any significant risks associated with holding the product; and

(d) information about:

(i) the cost of the product; and

(ii) any amounts that will or may be payable by a holder of the product in respect of the product after its acquisition, and the times at which those amounts will or may be payable; and

(iii) if the amounts paid in respect of the financial product and the amounts paid in respect of other financial products are paid into a common fund—any amounts that will or may be deducted from the fund by way of fees, expenses or charges; and

(e) if the product will or may generate a return to a holder of the product—information about any commission, or other similar payments, that will or may impact on the amount of such a return; and

(f) information about any other significant characteristics or features of the product or of the rights, terms, conditions and obligations attaching to the product; and

(g) information about the dispute resolution system that covers complaints by holders of the product and about how that system may be accessed; and

(h) general information about any significant taxation implications of financial products of that kind; and

(i) information about any cooling-off regime that applies in respect of acquisitions of the product (whether the regime is provided for by a law or otherwise); and

(j) if the product issuer (in the case of an issue Statement) or the seller (in the case of a sale Statement) makes other information relating to the product available to holders or prospective holders of the product, or to people more generally—a statement of how that information may be accessed; and

(k) any other statements or information required by the regulations; and

(l) if the product has an investment component—the extent to which labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of the investment; and

(m) unless in accordance with the regulations, for information to be disclosed in accordance with paragraphs (b), (d) and (e), any amounts are to be stated in dollars.

(2) For the purposes of paragraph (1)(d), an amount will or may be payable in respect of a financial product by the holder of the financial product if:

(a) the holder will or may have to pay an amount in respect of the product; or

(b) an amount will or may be deducted from:

(i) a payment to be made by the holder; or

(ii) a payment to be made to the holder; or

(iii) an amount held on the holder's behalf under the financial product; or

(c) an account representing the holder's interest in the financial product will or may be debited with an amount.

It includes an amount that the holder will or may have to pay, or that will or may be deducted or debited, as a fee, expense or charge in relation to a particular transaction in relation to the financial product.

(2A) For the purposes of paragraph (1)(l), products which have an investment component include superannuation products, managed investment products and investment life insurance products.

(3) Subsection (1) requires information to be included in the Product Disclosure Statement only to the extent to which the requirement is applicable to the financial product. The Product Disclosure Statement does not need to indicate that a particular requirement is not applicable to the financial product.

(4) The regulations may:

(a) provide that a provision of subsection (1) does not apply in a particular situation; or

(b) provide that particular information is not required by a provision of subsection (1), either in a particular situation or generally; or

(c) provide a more detailed statement of the information that is required by a provision of subsection (1), either in a particular situation or generally.

1013DA Information about ethical considerations etc.

ASIC may develop guidelines that must be complied with where a Product Disclosure Statement makes any claim that labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of the investment.

1013E General obligation to include other information that might influence a decision to acquire

Subject to subsection 1013C(2) and sections 1013F and 1013FA, a Product Disclosure Statement must also contain any other information that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client, whether to acquire the product.

1013F General limitations on extent to which information is required to be included

(1) Despite anything in section 1013D or 1013E, information, or a statement containing information, is not required to be included in a Product Disclosure Statement if it would not be reasonable for a person considering, as a retail client, whether to acquire the product to expect to find the information in the Statement.

(2) In considering whether it would not be reasonable for a person considering, as a retail client, whether to acquire the product to expect to find particular information in the Statement, the matters that may be taken into account include, but are not limited to:

(a) the nature of the product (including its risk profile); and

(b) the extent to which the product is well understood by the kinds of person who commonly acquire products of that kind as retail clients; and

(c) the kinds of things such persons may reasonably be expected to know; and

(d) if the product is an ED security that is not a continuously quoted security—the effect of the following provisions:

(i) Chapter 2M as it applies to disclosing entities;

(ii) sections 674 and 675; and

(e) the way in which the product is promoted, sold or distributed; and

(f) any other matters specified in the regulations.

1013FA Information not required to be included in PDS for continuously quoted securities

(1) This section applies to a Product Disclosure Statement that relates to a continuously quoted security.

(2) Despite anything in section 1013D, 1013E or 1013F, information is not required to be included in the Product Disclosure Statement if:

(a) the information is included in any of the following documents:

(i) the annual financial report most recently lodged with ASIC by the issuer of the product;

(ii) any half-year financial report lodged with ASIC by the issuer of the product after the lodgment of that annual financial report and before the date of the Product Disclosure Statement;

(iii) any continuous disclosure notices given by the issuer of the product after the lodgment of that annual financial report and before the date of the Product Disclosure Statement; and

(b) the Product Disclosure Statement:

(i) states that as a disclosing entity, the issuer of the product is subject to regular reporting and disclosure obligations; and

(ii) informs people of their right to obtain a copy of any of the documents referred to in paragraph (a).

If the Product Disclosure Statement informs people of their right to obtain a copy of the document, the issuer of the product must give a copy of the document free of charge to anyone who asks for it.

(3) ASIC may determine that this section does not apply to Product Disclosure Statements for continuously quoted securities if ASIC is satisfied that in the previous 12 months:

(a) the issuer of the continuously quoted securities contravened:

(i) the provisions of Chapter 2M; or

(ii) subsection 674(2) or 675(2); or

(iii) subsection 1012DAA(10) or 1012DA(9); or

(iv) section 1308 as it applies to a notice under subsection 1012DAA(2) or 1012DA(5); or

(b) the responsible person for the Product Disclosure Statement contravened section 1016E, 1021D, 1021E or 1021J.

(4) The determination must be made in writing and ASIC must publish a copy of the determination in the *Gazette*.

1013G Product Disclosure Statement must be dated

A Product Disclosure Statement must be dated. The date must be:

(a) if a copy of the Product Disclosure Statement has been lodged with ASIC (see section 1015B)—the date on which it was so lodged; or

(b) in any other case—the date on which the Product Disclosure Statement was prepared or its preparation was completed.

1013H Requirements if Product Disclosure Statement states or implies that financial product will be able to be traded

If a Product Disclosure Statement states or implies that the financial product will be able to be traded on a financial market (whether in Australia or elsewhere), the Statement must state that:

(a) the product is able to be traded on that market; or

(b) an application has been made to the operator of that market for the taking of such action as is necessary to enable the product to be traded on that market; or

(c) an application of a kind referred to in paragraph (b) will be made to the operator of that market within 7 days after the date of the Statement.

1013I Extra requirements if Product Disclosure Statement relates to managed investment products that are ED securities

(1) This section applies to a Product Disclosure Statement that relates to managed investment products that are ED securities.

(2) The Product Disclosure Statement must include a statement that:

(a) as a disclosing entity, the scheme is subject to regular reporting and disclosure obligations; and

(b) copies of documents lodged with ASIC in relation to the scheme may be obtained from, or inspected at, an ASIC office.

(3) The Product Disclosure Statement must either:

(a) inform people of their right to obtain a copy of the following documents:

(i) the annual financial report most recently lodged with ASIC by the scheme;

(ii) any half-year financial report lodged with ASIC by the scheme after the lodgment of that annual financial report and before the date of the Product Disclosure Statement;

(iii) any continuous disclosure notices given by the scheme after the lodgment of that annual report and before the date of the Product Disclosure Statement; or

(b) include, or be accompanied by, a copy of the relevant document or documents.

(4) If:

(a) the Product Disclosure Statement informs people of their right to obtain a copy of a document referred to in subsection (3); and

(b) a person asks the issuer (in the case of an issue Statement) or the seller (in the case of a sale Statement) for a copy of the document;

the issuer or seller must give (see subsection (5)) the person a copy of the document free of charge as soon as practicable, and in any event within 5 days, after receiving the person's request.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(5) In subsection (4), ***give*** means give in a way that would satisfy the requirements of section 1015C if the copy of the document were a Statement to which that section applied.

1013J Requirements if Statement has been lodged with ASIC

A Product Disclosure Statement, a copy of which has been lodged with ASIC (see section 1015B), must include a statement that:

(a) a copy of the document has been lodged with ASIC; and

(b) ASIC takes no responsibility for the content of the document.

1013K Requirements relating to consents to certain statements

(1) A Product Disclosure Statement must only include a statement made by a person, or a statement said in the Product Disclosure Statement to be based on a statement made by a person, if:

(a) the person has consented to the statement being included in the Product Disclosure Statement in the form and context in which it is included; and

(b) the Product Disclosure Statement states that the person has given this consent; and

(c) the person has not withdrawn this consent before the date of the Product Disclosure Statement.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) The person who prepared the Product Disclosure Statement must not, without reasonable excuse, fail to keep the consent, or a copy of it, for the period, and in the manner, required by the regulations.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

1013L Product Disclosure Statement may consist of 2 or more separate documents given at same time

(1) Subject to this section, a Product Disclosure Statement may be made up of 2 or more separate documents that are given at the same time.

(2) Each of the documents must have on the cover of the document, or at or near the front of the document, a statement:

(a) to the effect that the document is part of a Product Disclosure Statement; and

(b) that (subject to subsection (3)) identifies the other documents that make up the Product Disclosure Statement.

(3) If there are or may be different versions of a document referred to in paragraph (2)(b), the statement required by subsection (2) does not have to identify any particular one of those versions and may instead identify the document generically.

Note: For example, if a Product Disclosure Statement is made up of a core document that is not updated very frequently, and a separate document providing information about remuneration that is updated more frequently:

(a) the statement in the core document need only refer to the fact that it, and a separate document about remuneration, make up the Product Disclosure Statement; and

(b) the statement in the document about remuneration need only refer to the fact that it, and a separate document about all other required matters, make up the Product Disclosure Statement.

(4) The requirement of section 1013B (title of Product Disclosure Statement) is taken to be satisfied if the title "Product Disclosure Statement" is used on the cover of, or at or near the front of, at least one of the documents that make up the Product Disclosure Statement.

(5) The requirement of section 1013G (dating of Product Disclosure Statement) must be separately complied with in relation to each of the documents. If, for any purpose, a single date needs to be determined as the date of the Product Disclosure Statement as a whole, that date is the most recent of the dates of those documents.

(6) Section 1015E applies to an alteration to one of the documents as though the reference in that section to the date specified in the Product Disclosure Statement were a reference to the date specified in the document.

(7) The regulations may impose additional requirements to be complied with if a Product Disclosure Statement is made up of 2 or more documents.

1013M Combining a Product Disclosure Statement and a Financial Services Guide in a single document

For provisions about combining a Product Disclosure Statement and a Financial Services Guide in a single document, see section 942DA and regulations made for the purposes of that section.

Subdivision D—Supplementary Product Disclosure Statements

1014A What a Supplementary Product Disclosure Statement is

A ***Supplementary Product Disclosure Statement*** is a document by which a person who has prepared a Product Disclosure Statement (the ***PDS***) can:

(a) correct a misleading or deceptive statement in the PDS; or

(b) correct an omission from the PDS of information it is required to contain; or

(c) update, or add to, the information contained in the PDS; or

(d) change a statement of a kind referred to in paragraph 1016E(1)(a) or (b).

Note: In certain circumstances a Replacement Product Disclosure Statement may be prepared instead of a Supplementary Product Disclosure Statement (see Subdivision DA).

1014B Title of Supplementary Product Disclosure Statement

(1) The title "Supplementary Product Disclosure Statement" must be used on the cover of, or at or near the front of, a Supplementary Product Disclosure Statement.

(2) In any other part of a Supplementary Product Disclosure Statement, "Supplementary Product Disclosure Statement" may be abbreviated to "SPDS".

1014C Form of Supplementary Product Disclosure Statement

At the beginning of a Supplementary Product Disclosure Statement there must be:

(a) a statement that it is a Supplementary Product Disclosure Statement; and

(b) an identification of the Product Disclosure Statement that it supplements; and

(c) a statement that it is to be read together with that Product Disclosure Statement and any other specified Supplementary Disclosure Statements.

1014D Effect of giving person a Supplementary Product Disclosure Statement

If:

(a) a person is given a Product Disclosure Statement (the ***PDS***); and

(b) at the same time, or later, they are given a Supplementary Product Disclosure Statement (the ***SPDS***) that supplements the PDS;

the PDS is taken, from when the SPDS is given to the person, to include the information and statements contained in the SPDS.

1014E Situation in which only a Supplementary Product Disclosure Statement need be given

If:

(a) apart from this section, a person would be required to give another person (the ***client***) a Product Disclosure Statement (the ***new PDS***) relating to a financial product; and

(b) the client has, because of some previous conduct, already received a Product Disclosure Statement (the ***earlier PDS***) relating to the financial product; and

(c) the earlier PDS contains some, but not all, of the information that the new PDS is required to contain;

the person may, instead of giving the client the new PDS, give the client a Supplementary Product Disclosure Statement that contains the additional information.

1014F Application of other provisions in relation to Supplementary Product Disclosure Statements

Sections 1013A, 1013G, 1013H, 1013J and 1013K, and subsections 1013C(3) to (7), apply in relation to a Supplementary

Product Disclosure Statement in the same way as they apply to a Product Disclosure Statement.

Subdivision DA—Replacement Product Disclosure Statements

1014G Application of this Subdivision—stapled securities

This Subdivision applies if:

(a) a Product Disclosure Statement has been lodged in relation to an offer for the issue or sale of an interest in a managed investment scheme; and

(b) the interest can only be transferred together with one or more securities; and

(c) a disclosure document has been lodged in relation to an offer for the issue or sale of the security (or securities).

1014H What a Replacement Product Disclosure Statement is

A ***Replacement Product Disclosure Statement*** is a document that replaces the Product Disclosure Statement (the ***earlier PDS***) mentioned in paragraph 1014G(a) in order to:

(a) correct a misleading or deceptive statement in the earlier PDS; or

(b) correct an omission from the earlier PDS of information it is required to contain; or

(c) update, or add to, the information contained in the earlier PDS; or

(d) change a statement of a kind referred to in paragraph 1016E(1)(a) or (b).

1014J Consequences of lodging a Replacement Product Disclosure Statement

If a Replacement Product Disclosure Statement is prepared in accordance with section 1014K and lodged with ASIC as provided by Subdivision E (in its application under section 1014L), a reference to a Product Disclosure Statement is taken to be a reference to the Replacement Product Disclosure Statement for the purposes of the application of this Act to events that occur after the lodgment.

Note: This section means, for example, that offers made after lodgment of the Replacement Product Disclosure Statement must be accompanied by copies of the Replacement Product Disclosure Statement and not the earlier PDS.

1014K Form, content and preparation of Replacement Product Disclosure Statements

(1) At the beginning of a Replacement Product Disclosure Statement, there must be:

(a) a statement that it is a Replacement Product Disclosure Statement; and

(b) an identification of the Product Disclosure Statement it replaces.

(2) The title "Replacement Product Disclosure Statement" must be used on the cover of, or at or near the front of, a Replacement Product Disclosure Statement.

(3) In any other part of a Replacement Product Disclosure Statement, "Replacement Product Disclosure Statement" may be abbreviated to "RPDS".

(4) Otherwise, section 1012J and Subdivision C (apart from section 1013B) apply in relation to a Replacement Product Disclosure Statement in the same way as they apply to a Product Disclosure Statement.

Note: Section 1012J provides that the information in a Product Disclosure Statement must be up to date at the time it is given. Subdivision C deals with the preparation and content of Product Disclosure Statements.

1014L Giving, lodgment and notice of Replacement Product Disclosure Statements

Subdivision E applies in relation to a Replacement Product Disclosure Statement in the same way as it applies to a Product Disclosure Statement that is required to be lodged with ASIC under section 1015B.

Subdivision E—Other requirements relating to Product Disclosure Statements and Supplementary Product Disclosure Statements

1015A Subdivision applies to Product Disclosure Statements and Supplementary Product Disclosure Statements

This Subdivision applies to Product Disclosure Statements and to Supplementary Product Disclosure Statements. Both kinds of document are referred to in this Subdivision as a ***Statement***.

1015B Some Statements must be lodged with ASIC

(1) A copy of a Statement must have been lodged with ASIC (in accordance with the requirements of subsection (2) for consents) before the Statement is given to a person for the purposes of a provision of this Part if:

(a) the following subparagraphs apply:

(i) the financial product is a managed investment product; and

(ii) the Statement states or implies that the product will be able to be traded on a financial market; and

(iii) the Statement meets the requirements set out in section 1013H; or

(b) the financial product is a managed investment product that can be traded on a financial market; or

(c) the financial product is a financial product of a kind specified in regulations made for the purposes of this paragraph.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) The lodgment of a Statement with ASIC requires the consent of:

(a) whether it is an issue Statement or a sale Statement:

(i) if the responsible person is a body corporate—every director of the responsible person; or

(ii) otherwise—the responsible person; and

(b) if it is a sale Statement:

(i) if the issuer of the financial product concerned is a body corporate—every director of the issuer; or

(ii) otherwise—the issuer of the financial product concerned.

1015C How a Statement is to be given

(1) A Statement:

(a) must be:

(i) given to a person, or the person's agent, personally; or

(ii) sent to the person, or the person's agent, at an address (including an electronic address) or fax number nominated by the person or the agent; and

(b) may be printed or be in electronic form.

(2) For the purposes of this section, the Statement is sent to a person at an address if, and only if:

(a) the Statement is sent to the address; and

(b) either:

(i) the envelope or other container in which the Statement is sent; or

(ii) the message that accompanies the Statement;

is addressed to the person.

(3) The Statement may be given or sent to the person's agent only if the agent is not acting as the person's agent in one of the following capacities:

(a) a financial services licensee;

(b) an authorised representative of a financial services licensee;

(d) a person who is not required to hold an Australian financial services licence because the person is covered by:

(i) paragraph 911A(2)(j); or

(ii) an exemption in regulations made for the purposes of paragraph 911A(2)(k); or

(iii) an exemption specified by ASIC for the purposes of paragraph 911A(2)(l);

(e) a person who is required to hold an Australian financial services licence but who does not hold such a licence;

(f) an employee, director or other representative of a person referred to in paragraph (a), (b), (d) or (e).

(4) The regulations may provide for alternative ways of giving a Statement to a person.

(5) The regulations may specify requirements as to:

(a) the manner in which a Statement may be given to a person; and

(b) the presentation, structure and format for a Statement that is to be given in electronic form.

The giving of the Statement is not effective unless those requirements are satisfied.

1015D Notice, retention and access requirements for Statement that does not need to be lodged

(1) This section applies to a Statement if section 1015B does not require a copy of the Statement to be lodged with ASIC.

(2) The responsible person for the Statement (other than the trustee of a self-managed superannuation fund) must lodge a notice with ASIC, in electronic form, advising of the occurrence of any of the following events as soon as practicable, and in any event within 5 business days, after the occurrence of the event:

(a) except in the case of a Supplementary Product Disclosure Statement—a copy of the Statement is first given to someone in a recommendation, issue or sale situation;

(b) a change is made to fees and charges set out in the Statement;

(c) the financial product to which the Statement relates ceases to be available to be recommended or offered to new clients in a recommendation, issue or sale situation.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: The fees and charges set out in a Product Disclosure Statement may be changed by a Supplementary Product Disclosure Statement (see section 1014A).

(3) The responsible person for the Statement must keep a copy of the Statement for the period of 7 years after the date of the Statement.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(4) During that period the responsible person:

(a) must make a copy of the Statement available to ASIC if asked to do so by ASIC; and

(b) must comply with any reasonable request from any other person for a copy of the Statement.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

1015E Altering a Statement after its preparation and before giving it to a person

(1) A regulated person must not, in purported compliance with a provision of this Part, give a person a Statement that has been altered (otherwise than pursuant to paragraph (b)) after the date of the Statement if either or both of the following paragraphs applies:

(a) the alteration was not made by, or with the authority of, the issuer or seller, as the case requires, of the financial products;

(b) the alteration is a material alteration and the date of the Statement has not been changed to:

(i) if a copy of the altered Statement has been lodged with ASIC (see subsection (2))—the date on which it was so lodged; or

(ii) in any other case—the date on which the alteration was made.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) If the alteration is a material alteration to a Statement that has been lodged with ASIC under section 1015B, that section applies to the altered Statement as if it were a new Statement.

Subdivision F—Other rights and obligations related to Product Disclosure Statements

1016A Provisions relating to use of application forms

(1) In this section:

defective, in relation to a Product Disclosure Statement as at a particular time, means that the Product Disclosure Statement, if it

had been given to a person at that time, would have been ***defective*** as defined in Subdivision A of Division 7.

Note: Information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

eligible application, in relation to a restricted issue or restricted sale of a relevant financial product, means an application that satisfies the following requirements:

(a) the application is made using an application form; and

(b) the application form used to apply for the product:

(i) was included in, or accompanied, a Product Disclosure Statement (relating to the product) that was given to the applicant and that was not defective as at the time when the application was made; or

(ii) was copied, or directly derived, by the applicant from a form referred to in subparagraph (i); and

(c) all other applicable requirements (if any) in regulations made for the purposes of this paragraph are satisfied in relation to the application.

Note: Information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

relevant financial product means:

(a) a managed investment product; or

(b) a superannuation product; or

(c) an investment life insurance product; or

(d) an RSA product; or

(da) an FHSA product; or

(db) a margin lending facility; or

(e) a financial product of a kind specified in regulations made for the purposes of this paragraph.

relevant superannuation entity means a superannuation entity of a kind specified in regulations made for the purposes of this definition.

restricted issue means an issue of a relevant financial product to a person as a retail client, other than an issue covered by either of the following paragraphs:

(a) an issue in a situation, or pursuant to an offer made in a situation, to which a subsection, other than subsection (1), of section 1012D applies; or

(b) an issue in a situation, or pursuant to an offer made in a situation, to which section 1012E or 1012F applies.

restricted sale means a sale of a relevant financial product pursuant to an offer that:

(a) is of a kind described in subsection 1012C(3) or (4); and

(b) is not made in a situation to which a subsection, other than subsection (1), of section 1012D applies.

RSA provider has the same meaning as in the *Retirement Savings Accounts Act 1997*.

standard employer-sponsor has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*.

standard employer-sponsored fund has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*.

standard employer-sponsored member has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*.

(2) A person (the ***issuer*** or ***seller***) must only make a restricted issue or a restricted sale of a relevant financial product to a person (the ***recipient***) if:

(a) the issue or sale is made pursuant to an eligible application made to the issuer or seller by the recipient; or

(b) it is a restricted issue in relation to which the following conditions are satisfied:

(i) the financial product is an interest in a relevant superannuation entity;

(ii) the interest is issued pursuant to an application made to the issuer by a standard employer-sponsor of the entity on the recipient's behalf;

(iii) if the application is the first application for the issue of a superannuation interest made to the issuer by the standard employer-sponsor on behalf of any person—the application is an eligible application; or

(c) it is a restricted issue in relation to which the following conditions are satisfied:

(i) the financial product is an interest in a relevant superannuation entity;

(ii) the interest is issued pursuant to an application made to the issuer by another trustee under Part 24 of the *Superannuation Industry (Supervision) Act 1993* on the recipient's behalf;

(iii) if the application is the first application under Part 24 of that Act made to the issuer by the other trustee on behalf of any person—the application is an eligible application; or

(d) it is a restricted issue in relation to which the following conditions are satisfied:

(i) the financial product is an interest in a relevant superannuation entity;

(ii) the interest is issued pursuant to an application made to the issuer by an RSA provider under Part 9 of the *Retirement Savings Accounts Act 1997* on the recipient's behalf;

(iii) if the application is the first application under Part 9 of that Act made to the issuer by the RSA provider on behalf of any person—the application is an eligible application; or

(e) it is a restricted issue in relation to which the following conditions are satisfied:

(i) the financial product is an RSA product;

(ii) the interest is issued pursuant to an application made to the issuer by an employer (within the meaning of the *Retirement Savings Accounts Act 1997*) of the recipient;

(iii) if the application is the first application for the issue of an RSA product of that kind made to the issuer by the employer on behalf of any person—the application is an eligible application;

(iv) all other applicable requirements (if any) in regulations made for the purposes of this subparagraph are satisfied in relation to the application; or

(f) the issue or sale occurs in a situation covered by regulations made for the purposes of this paragraph.

Note 1: This subsection does not apply to an issue or sale pursuant to paragraph 1016E(2)(c) (see subsection 1016E(2C)).

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(3) The trustee of a relevant superannuation entity must only permit a person to become a standard employer-sponsor of the entity if:

(a) the person applied to become a standard employer-sponsor of the entity using an application form; and

(b) the application form used to apply to become a standard employer-sponsor:

(i) was included in, or accompanied, a Product Disclosure Statement (relating to an interest in the entity) that was given to the person and that was not defective as at the time when the application was made; or

(ii) was copied, or directly derived, by the person from a form referred to in subparagraph (i).

Note 1: Information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(4) The regulations may:

(a) provide for defences to offences based on subsection (2) or (3); and

(b) provide for additional offences relating to the receipt or non-receipt of applications or application forms.

Note 1: A defendant bears an evidential burden in relation to a defence. See subsection 13.3(3) of the *Criminal Code*.

Note 2: For the limit on penalties for offences against the regulations, see paragraph 1364(2)(w).

1016B If Statement lodged with ASIC, financial product is not to be issued or sold before specified period

(1) If:

(a) a copy of a Product Disclosure Statement has been lodged with ASIC; and

(b) the financial product to which the Statement relates is not able to be traded on any financial market (whether in Australia or elsewhere);

the responsible person must not issue or sell a financial product, pursuant to an application made in response to the Statement, until the period of 7 days (or that period as extended under subsection (2)) after lodgment of the Statement has ended.

Note 1: This subsection does not apply to an issue or sale pursuant to paragraph 1016E(2)(c) (see subsection 1016E(2C)).

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) ASIC may extend the period by notice in writing to the responsible person. The period as extended must end no more than 14 days after lodgment.

1016C Minimum subscription condition must be fulfilled before issue or sale

If a Product Disclosure Statement for a financial product states that a financial product to which the Statement relates will not be issued or sold unless:

(a) applications for a minimum number of financial products of that kind are received; or

(b) a minimum amount is raised;

the responsible person must not issue or sell a financial product of that kind, pursuant to an application made in response to the Statement, if that condition has not been satisfied. For the purpose of working out whether the condition has been satisfied, a person who has agreed to take a financial product as underwriter is taken to have applied for that product.

Note 1: Statements in a Supplementary Product Disclosure Statement are taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

Note 1A: This subsection does not apply to an issue or sale pursuant to paragraph 1016E(2)(c) (see subsection 1016E(2C)).

Note 2: Failure to comply with this section is an offence (see subsection 1311(1)).

1016D Condition about ability to trade on a market must be fulfilled before issue or sale

(1) If a Product Disclosure Statement for a financial product states or implies that a financial product to which the Statement relates will be able to be traded on a financial market (whether in Australia or elsewhere), the responsible person must only issue or sell a financial product of that kind, pursuant to an application made in response to the Statement, if:

(a) the product is able to be traded on that market; or

(b) an application has, within 7 days after the relevant date (see subsection (3)), been made to the operator of that market for the taking of such action as is necessary to enable financial products of that kind to be traded on that market.

Paragraph (b) ceases to apply to the financial product at the end of the period of 3 months starting on the relevant date.

Note 1: Statements in a Supplementary Product Disclosure Statement are taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

Note 1A: This subsection does not apply to an issue or sale pursuant to paragraph 1016E(2)(c) (see subsection 1016E(2C)).

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Issue or transfer void if quotation condition not fulfilled

(2) If a Product Disclosure Statement for a financial product states or implies that the financial product is to be quoted on a financial market (whether in Australia or elsewhere) and:

(a) an application has not, within 7 days after the relevant date (see subsection (3)), been made to the operator of that market for the taking of such action as is necessary to enable financial products of that kind to be traded on that market; or

(b) the product is not able to be traded on that market at the end of 3 months after the relevant date;

then:

(c) an issue or transfer to a person of a financial product of that kind is void if:

(i) the issue or transfer is pursuant to an application made in response to the Statement; or

(ii) the person should have been given the Statement; and

(d) if:

(i) an issue or transfer of a financial product to a person is void because of paragraph (c); and

(ii) the responsible person received money from that person on account of the issue or transfer—the responsible person must, as soon as practicable, return the money to that person.

Note 1: Paragraphs (c) and (d) do not apply to an issue or sale pursuant to paragraph 1016E(2)(c) (see subsection 1016E(2C)).

Note 2: Failure to comply with paragraph (d) is an offence (see subsection 1311(1)).

The relevant date

(3) For the purposes of this section, the ***relevant date*** in relation to an express or implied statement is:

(a) if the statement is express or implied in a Product Disclosure Statement, disregarding the effect of section 1014D—the date of the Product Disclosure Statement; or

(b) if the statement is express or implied in a Supplementary Product Disclosure Statement—the date of the Supplementary Product Disclosure Statement; or

(c) if the statement is express or implied in a Replacement Product Disclosure Statement (whether or not it is express or implied in the earlier Product Disclosure Statement it replaces)—the date of the Replacement Product Disclosure Statement.

1016E Choices open to person making the offer if disclosure condition not met or Product Disclosure Statement defective

(1) This section applies if:

(a) a Product Disclosure Statement for a financial product states that a financial product to which the Statement relates will not be issued or sold unless:

(i) applications for a minimum number of financial products of that kind are received; or

(ii) a minimum amount is raised;

and that condition is not satisfied within 4 months after the relevant date (see subsections (3) and (4)); or

(b) a Product Disclosure Statement for a financial product states or implies that a financial product to which the Statement relates will be able to be traded on a financial market (whether in Australia or elsewhere) and:

(i) an application has not, within 7 days after the relevant date (see subsection (4)), been made to the operator of that market for the taking of such action as is necessary to enable financial products of that kind to be traded on that market; or

(ii) at the end of the period of 3 months starting on the relevant date, financial products of that kind are not able to be traded on that market; or

(c) in relation to a Product Disclosure Statement for a financial product, the responsible person becomes aware that the Product Disclosure Statement was defective as at the time when it was prepared, or that it became or has become defective as at some later time.

Note: Information and statements in a Supplementary Product Disclosure Statement are taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

(2) If this section applies, the responsible person must, in relation to any application for financial products of the relevant kind that is made in response to the Product Disclosure Statement (the ***first Product Disclosure Statement***) and that has not resulted in an issue or sale of financial products of that kind, comply with one of the following paragraphs:

(a) the responsible person must repay the money they received from the applicant; or

(aa) the responsible person must give the applicant:

(i) a new Product Disclosure Statement for the financial products, and an additional statement that identifies the respects in which the new Product Disclosure Statement is materially different from the first Product Disclosure Statement; and

(ii) 1 month to withdraw their application and be repaid; or

(b) the responsible person must give the applicant:

(i) a Supplementary Product Disclosure Statement that changes the statement referred to in paragraph (1)(a) or (b), or that corrects the deficiency referred to in paragraph (1)(c); and

(ii) 1 month to withdraw their applications and be repaid; or

(ba) the responsible person must issue or sell the financial products to the applicant and give them:

(i) a new Product Disclosure Statement for the financial products, and an additional statement that identifies the respects in which the new Product Disclosure Statement is materially different from the first Product Disclosure Statement; and

(ii) 1 month to return the financial products and be repaid; or

(c) the responsible person must issue or sell the financial products to the applicant and give them:

(i) a Supplementary Product Disclosure Statement that changes the statement referred to in paragraph (1)(a) or (b), or that corrects the deficiency referred to in paragraph (1)(c); and

(ii) 1 month to return the financial products and be repaid.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: If the responsible person chooses the option given by paragraph (aa) or (b), that option does not require the responsible person to wait until the end of the month referred to in subparagraph (aa)(ii) or (b)(ii) before going ahead and issuing or selling the financial products to the applicant if the applicant indicates before then that they still wish to proceed with the application.

Note 3: However, if the responsible person chooses the option given by paragraph (aa) or (b), whether the responsible person may go ahead and issue or sell the financial products to the applicant at the end of the month referred to in subparagraph (aa)(ii) or (b)(ii) (or earlier, as mentioned in note 2) is affected by this subsection and sections 1016A to 1016E (including as those provisions are affected by subsections (2A) and (2B) of this section).

Note 4: If the responsible person chooses the option given by paragraph (c), sections 1016A to 1016D do not prohibit the issue or sale of the financial products under that paragraph (see subsection (2C) of this section).

(2A) If, in accordance with paragraph (2)(aa), the responsible person gives the applicant a new Product Disclosure Statement for the financial products and the additional statement referred to in subparagraph (2)(aa)(i):

(a) subsection (2), and sections 1016B, 1016C, 1016D and 1016E, apply in relation to the application, from the time when the applicant is given the new Product Disclosure Statement (the ***correction time***), as if the application had been made in response to the new Product Disclosure Statement; and

(b) if:

(i) the reason for giving the new Product Disclosure Statement was that the responsible person became aware that the first Product Disclosure Statement was defective as at the time when it was prepared, or had become defective by the time the application was made; and

(ii) the financial products are ***relevant financial products*** as defined in section 1016A;

section 1016A applies in relation to the application, from the correction time, as if the first Product Disclosure Statement had instead contained the content of the new Product Disclosure Statement.

Note 1: Because of paragraph (a):

(a) if this section applies to the new Product Disclosure Statement, the responsible person's ability to proceed to issue or sell the financial products pursuant to the application will be affected by subsection (2), and by sections 1016B, 1016C and 1016D, as those provisions apply in relation to the new Product Disclosure Statement (even though the application was actually made in response to the first Product Disclosure Statement); and

(b) sections 1016B, 1016C and 1016D, as they relate to the first Product Disclosure Statement, cease to apply in relation to the application.

Note 2: Because of paragraph (b), the application may be an ***eligible application*** as defined in section 1016A, even though the first Product Disclosure Statement was actually defective as at the time when the application was made.

(2B) If:

(a) in accordance with paragraph (2)(b), the responsible person gives the applicant a Supplementary Product Disclosure Statement that relates to the financial products; and

(b) the reason for giving the Supplementary Product Disclosure Statement was that the responsible person became aware that the first Product Disclosure Statement was defective as at the time when it was prepared, or had become defective by the time the application was made; and

(c) the financial products are ***relevant financial products*** as defined in section 1016A;

section 1016A applies in relation to the application, from the time when the applicant is given the Supplementary Product Disclosure Statement, as if the Supplementary Product Disclosure Statement had been given to the applicant before the application was made.

Note 1: Because of this subsection and section 1014D (information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements), the application may be an ***eligible application*** as defined in section 1016A, even though the Supplementary Product Disclosure Statement was not actually given until after the time when the application was made.

Note 2: The responsible person's ability to proceed to issue or sell the financial products pursuant to the application will be affected by subsection (2), and by sections 1016B, 1016C and 1016D, as those provisions apply in relation to the first Product Disclosure Statement as affected by the Supplementary Product Disclosure Statement and any other Supplementary Product Disclosure Statements.

(2BA) If Subdivision DA applies:

(a) for the purposes of subsection (2), instead of giving the applicant a Supplementary Product Disclosure Statement, the responsible person may give the applicant a Replacement Product Disclosure Statement; and

(b) if the responsible person gives the applicant a Replacement Product Disclosure Statement, subsection (2B) applies as if references in that subsection to a Supplementary Product Disclosure Statement were references to the Replacement Product Disclosure Statement.

(2C) If the responsible person chooses to comply with paragraph (2)(c), nothing in sections 1016A to 1016D applies to the issue or sale of the financial products under that paragraph.

Note: This subsection affects the elements of the offences under sections 1016A to 1016D, and so it is not an exception in relation to which a defendant bears an evidential burden under subsection 13.3(3) of the *Criminal Code*.

(3) For the purpose of working out whether the condition referred to in paragraph (1)(a) has been satisfied, a person who has agreed to take a financial product as an underwriter is taken to have applied for that financial product.

(4) For the purposes of paragraphs (1)(a) and (b), the ***relevant date*** in relation to an express or implied statement is:

(a) if the statement is express or implied in a Product Disclosure Statement, disregarding the effect of section 1014D—the date of the Product Disclosure Statement; or

(b) if the statement is express or implied in a Supplementary Product Disclosure Statement—the date of the Supplementary Product Disclosure Statement; or

(c) if the statement is express or implied in a Replacement Product Disclosure Statement (whether or not it is express or implied in the earlier Product Disclosure Statement it replaces)—the date of the Replacement Product Disclosure Statement.

(5) For the purposes of this section, ***defective***, when used in relation to a Product Disclosure Statement at a particular time, means that the Product Disclosure Statement, if it had been given to a person at that time, would have been ***defective*** as defined in Subdivision A of Division 7.

Note: Information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

1016F Remedies for person acquiring financial product under defective Product Disclosure Document

(1) Subject to this section, if a financial product is issued or sold to a person (the ***client***) in contravention of section 1016E, the client has the right to return the product and to have the money they paid to acquire the product repaid. This is so even if the responsible person is being wound up.

(2) If the responsible person:

(a) is a body corporate; and

(b) does not repay the money as required by subsection (1);

the directors of the responsible person are personally liable to repay the money.

(3) The right to return the product must be exercised by notifying the responsible person in one of the following ways:

(a) in writing; or

(b) electronically; or

(c) in any other way specified in the regulations.

Also, if the regulations require the client to comply with other requirements in order to exercise the right to return the product, those other requirements must be complied with.

(4) The right to return the product can only be exercised during the period of 1 month starting on the date of the issue or sale of the product to the client.

(5) On the exercise of the right to return the product:

(a) if the product is constituted by a legal relationship between the client and the issuer of the product—that relationship is, by force of this section, terminated with effect from that time without penalty to the client; and

(b) any contract for the acquisition of the product by the client is, by force of this section, terminated with effect from that time without penalty to the client.

(6) The regulations may provide for consequences and obligations (in addition to those provided for by subsection (5)) to apply if the right to return a financial product is exercised.

(7) The regulations may do any or all of the following:

(a) provide that a specified subclass of financial products that would otherwise be covered by this section is excluded from this section;

(b) provide additional requirements to be satisfied before this section applies in relation to a class or subclass of financial products;

(c) provide that this section does not apply in relation to the provision of a financial product in specified circumstances.

Division 3—Other disclosure obligations of the issuer of a financial product

1017A Obligation to give additional information on request

Obligation to give information

(1) The following people may request the person who is the responsible person for a Product Disclosure Statement for a financial product under Division 2 to provide further information about the product:

(a) a person who:

(i) has been or should have been given, or who has obtained, the Product Disclosure Statement for the financial product; and

(ii) is not a holder of the financial product;

(b) a financial services licensee;

(c) an authorised representative of a financial services licensee;

(e) a person who is not required to hold an Australian financial services licence because the person is covered by:

(i) paragraph 911A(2)(j); or

(ii) an exemption in regulations made for the purposes of paragraph 911A(2)(k); or

(iii) an exemption specified by ASIC for the purposes of paragraph 911A(2)(l).

(2) The responsible person must give the person the information if:

(a) the financial product is offered in this jurisdiction or the Product Disclosure Statement is given or obtained in this jurisdiction; and

(b) the responsible person has previously made the information generally available to the public; and

(c) the information might reasonably influence a person's decision, as a retail client, whether to acquire a financial product to which the Statement relates; and

(d) it is reasonably practicable for the responsible person to give the person the information; and

(e) the person pays any charge payable under subsection (5).

The responsible person does not need to give information that is contained in the Product Disclosure Statement.

Note 1: Paragraph (b)—This requirement means that the responsible person does not have to disclose material that is confidential because it is:

(a) an internal working document; or

(b) personal information about another person; or

(c) a trade secret or other information that has a commercial value that would be reduced or destroyed by the disclosure; or

(d) material that the responsible person owes another a person a duty not to disclose.

Note 2: Information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

(3) The responsible person must take reasonable steps to ensure that, as soon as practicable after receiving the request, and in any event within one month, subsection (2) is complied with.

Manner of giving information

(4) The responsible person may give the person making the request the information:

(a) by making a document containing the information available for inspection by the person:

(i) at a suitable place (having adequate facilities for the person to inspect and photocopy the document); and

(ii) during normal business hours; or

(b) in some other way that is agreed between the responsible person and the person making the request.

Issuer or seller may charge for giving information

(5) The responsible person may require the person making the request to pay a charge for obtaining the information.

(6) The amount of the charge must not exceed the reasonable costs that the responsible person incurs that are reasonably related to giving the information (including any costs incurred in photocopying the document containing the information).

Note: This would include the costs of searching for, obtaining and collating the information.

1017B Ongoing disclosure of material changes and significant events

Issuer to notify holders of changes and events

(1) If:

(a) a person (the ***holder***) acquired a financial product as a retail client (whether or not it was acquired from the issuer); and

(b) either:

(i) the financial product was offered in this jurisdiction; or

(ii) the holder applied for the financial product in this jurisdiction; and

(c) the product is not specified in regulations made for the purposes of this paragraph; and

(d) the circumstances in which the product was acquired are not specified in regulations made for the purposes of this paragraph;

the issuer must, in accordance with subsections (3) to (8), notify the holder of changes and events referred to in subsection (1A).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

The changes and events that must be notified

(1A) The changes and events that must be notified are:

(a) any material change to a matter, or significant event that affects a matter, being a matter that would have been required to be specified in a Product Disclosure Statement for the financial product prepared on the day before the change or event occurs; and

(b) any other change, event or other matter of a kind specified in regulations made for the purposes of this paragraph; and

(c) without limiting paragraph (a) or (b)—any replacement of a kind specified in regulations made for the purposes of this paragraph of a beneficial interest of a class that is a MySuper product with a beneficial interest of another class in a superannuation entity.

Note: Paragraph (a) applies whether or not a Product Disclosure Statement for the financial product was in fact prepared (or required to be prepared) on the day before the change or event occurs.

(2) The issuer does not need to give the notice if the financial product is a managed investment product that is an ED security.

Note 1: The continuous disclosure provisions in Chapter 6CA (sections 674-677) apply to managed investment products that are ED securities.

Note 2: A defendant bears an evidential burden in relation to the matters in this subsection.

(3) The issuer must notify the holder in one of the following ways:

(a) in writing; or

(b) electronically; or

(c) in a way specified in the regulations.

(4) The notice must give the holder the information that is reasonably necessary for the holder to understand the nature and effect of the change or event.

Time for notifying holders

(5) The time within which the issuer must give the notice is set out in the following table:

Time for giving notice of change or event

	Nature of change or event	Time for giving notice
1	Change or event is not an increase in fees or charges	Subject to subsection (6), before the change or event occurs or as soon as practicable after, but not more than 3 months after, the change or event occurs
2	Change is an increase in fees or charges	30 days before the change takes effect

(6) If the change or event is not an increase in fees or charges, the notice may be given more than 3 months after the change or event occurs if:

(a) the issuer reasonably believes that the event is not adverse to the holder's interests and accordingly the holder would not be expected to be concerned about the delay in receiving the information; and

(b) the notice is given no later than 12 months after the change or event occurs.

(7) If the change or event might result in an increase in fees or charges, this section applies to the change or event as if it would result in an increase in fees or charges.

(8) In any proceedings against the issuer for an offence based on subsection (1), it is a defence if the issuer took reasonable steps to ensure that the other person would be notified of the matters required by subsection (1) in accordance with subsections (3) to (8).

Note: A defendant bears an evidential burden in relation to the matters in subsection (8). See subsection 13.3(3) of the *Criminal Code*.

(9) In this section:

fees or charges does not include fees or charges payable under a law of the Commonwealth or of a State or Territory.

1017C Information for existing holders of superannuation products and RSA products

Application

(1) This section applies to the issuer of a financial product if the product is:

(a) a superannuation product; or

(b) an RSA product.

Information for concerned person related to a superannuation product

(2) If the financial product is a superannuation product, then, subject to subsection (4), the issuer must, on request by a concerned person, give the concerned person information that the concerned person reasonably requires for the purposes of:

(a) understanding any benefit entitlements that the concerned person may have, has or used to have under the superannuation product; or

(b) understanding the main features of:

(i) the relevant sub-plan; or

(ii) if there is no relevant sub-plan—the superannuation entity; or

(c) making an informed judgment about the management and financial condition of:

(i) the superannuation entity; and

(ii) the relevant sub-plan (if any); or

(d) making an informed judgment about the investment performance of:

(i) the relevant sub-plan; or

(ii) if there is no relevant sub-plan—the superannuation entity; or

(e) understanding the particular investments of:

(i) the superannuation entity; and

(ii) the relevant sub-plan (if any).

The information must be given in accordance with the other requirements of this section.

Note 1: Subsection (9) defines ***concerned person*** and ***relevant sub-plan***.

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Information for concerned person related to an RSA product

(2A) If the financial product is an RSA product, then, subject to subsection (4), the issuer must, on request by a concerned person, give the concerned person information that the concerned person reasonably requires for the purposes of:

(a) understanding any benefit entitlements that the concerned person may have, has or used to have under the RSA product; or

(b) understanding the main features of the RSA product.

The information must be given in accordance with the other requirements of this section.

Note 1: Subsection (9) defines ***concerned person***.

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Information for employer-sponsor related to a superannuation product

(3) If the financial product is a superannuation product, then, subject to subsection (4), the issuer must, on request by an employer-sponsor, give the employer-sponsor information that the employer-sponsor reasonably requires for the purposes of:

(a) understanding the kinds of benefits to which the employer-sponsor's employees are entitled or will or may become entitled; or

(b) understanding the main features of:

(i) the relevant sub-plan; or

(ii) if there is no relevant sub-plan—the superannuation entity; or

(c) making an informed judgment about the management and financial condition of:

(i) the superannuation entity; and

(ii) the relevant sub-plan (if any); or

(d) making an informed judgment about the investment performance of:

(i) the relevant sub-plan; or

(ii) if there is no relevant sub-plan—the superannuation entity; or

(e) a matter related to the *Superannuation Guarantee (Administration) Act 1992*.

The information must be given in accordance with the other requirements of this section.

Note 1: Subsection (9) defines ***relevant sub-plan***.

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Information for employer related to an RSA product

(3A) If the financial product is an RSA product, then, subject to subsection (4), the issuer must, on request by an employer who made an application to acquire the RSA product on behalf of an employee, give the employer information that the employer reasonably requires for the purposes of:

(a) understanding the kinds of benefits to which the employer's employees are entitled or will or may become entitled; or

(b) understanding the main features of the RSA product; or

(c) a matter related to the *Superannuation Guarantee (Administration) Act 1992*.

The information must be given in accordance with the other requirements of this section.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Exceptions

(4) This section does not require (and does not, by implication, authorise) the disclosure of:

(a) internal working documents of the issuer; or

(b) information or documents that would disclose, or tend to disclose:

(i) personal information of another person if, in the circumstances, the disclosure would be unreasonable; or

(ii) trade secrets or other information having a commercial value that would be reduced or destroyed by the disclosure; or

(c) information or documents in relation to which the issuer owes to another person a duty of non-disclosure.

Note: A defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code*.

Specific requirements

(5) The issuer must, on request in writing by a person who is a concerned person, an employer-sponsor (if the financial product is a superannuation product) or an employer referred to in subsection (3A) (if the financial product is an RSA product), give the person:

(a) a copy of a prescribed document (to the extent the issuer has access to the document) specified in the request; or

(b) prescribed information (to the extent to which the issuer has or has access to the information) specified in the request.

The document or information must be given in accordance with the other requirements of this section.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(6) Subsection (5) does not apply if the issuer is the trustee of a self-managed superannuation fund.

Documents may be made available for inspection

(7) It is sufficient compliance with a requirement imposed by this section on the issuer to give information, or to give a copy of a document, to a person (the ***client***) if:

(a) a document containing the information; or

(b) a copy of the document;

is made available for inspection by the issuer:

(c) at a suitable place (having adequate facilities for the person to inspect and photocopy the document); and

(d) during normal business hours;

or as otherwise agreed between the issuer for the financial product and the client.

Time for compliance

(8) The issuer must comply with a request to give information, or a copy of a document, as soon as practicable. The issuer must, in any event, make reasonable efforts to comply with the request within 1 month of receiving the request.

Definitions

(9) In this section:

concerned person:

(a) in relation to a superannuation product—means a person who:

(i) is, or was within the preceding 12 months, a member of the superannuation entity; or

(ii) is a beneficiary of the superannuation entity; or

(b) in relation to an RSA product—means a person who:

(i) is, or was within the preceding 12 months, a holder of the RSA product; or

(ii) has a right or a claim under the RSA product.

relevant sub-plan, in relation to a superannuation product, has the meaning given by the regulations.

1017D Periodic statements for retail clients for financial products that have an investment component

(1) If:

(a) a person (the ***holder***) of a financial product acquired the financial product as a retail client (whether or not it was acquired from the issuer); and

(b) the product is:

(i) a managed investment product; or

(ii) a superannuation product; or

(iii) an RSA product; or

(iiia) an FHSA product; or

(iv) an investment life insurance product; or

(v) a deposit product; or

(va) a margin lending facility; or

(vi) specified in regulations made for the purposes of this paragraph; and

(c) either:

(i) the financial product was offered in this jurisdiction; or

(ii) the holder applied for the financial product in this jurisdiction;

the issuer of the product must, in accordance with subsections (2) to (6), give the holder a periodic statement for each reporting period during which the holder holds the product.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) The following provisions apply in relation to reporting periods:

(a) each reporting period lasts for a period, not exceeding 1 year, determined by the issuer;

(b) the first reporting period starts when the holder acquired the product;

(c) each subsequent reporting period starts at the end of the preceding reporting period;

(d) if the holder ceases to hold the product, the period starting at the end of the preceding reporting period and ending when the holder ceases to hold the product is a reporting period.

(3) The periodic statement must be given as soon as practicable after, and in any event within 6 months after, the end of the reporting period to which it relates.

(4) The periodic statement must give the holder the information that the issuer reasonably believes the holder needs to understand his or her investment in the financial product.

(5) The periodic statement must include the following if they are relevant to the financial product:

(a) opening and closing balances for the reporting period;

(b) the termination value of the investment at the end of the reporting period (to the extent to which it is reasonably practicable to calculate that value for the investment or a component of the investment);

(c) details of transactions in relation to the product during the reporting period as required by regulations made for the purposes of this paragraph;

(d) any increases in contributions in relation to the financial product by the holder or another person during the reporting period;

(e) return on investment during the reporting period (on an individual basis if reasonably practicable to do so and otherwise on a fund basis);

(f) details of any change in circumstances affecting the investment that has not been notified since the previous periodic statement;

(g) details prescribed by regulations made for the purposes of this paragraph.

(5A) Unless in accordance with the regulations:

(a) for information to be disclosed in accordance with paragraphs (5)(a), (b), (c), (d) and (e), any amounts are to be stated in dollars; and

(b) for any other information in relation to amounts paid by the holder of the financial product during the period, any amounts are to be stated in dollars.

(6) The periodic statement must be given in one of the following ways:

(a) in writing; or

(b) electronically; or

(c) in a way specified in the regulations.

(7) The periodic statement need not be given if the issuer has already given the holder all the information that would be included in the periodic statement if it were to be given.

Note: A defendant bears an evidential burden in relation to the matters in this subsection.

1017DA Trustees of superannuation entities—regulations may specify additional obligations to provide information

(1) The regulations may:

(a) require the trustee of a superannuation entity to do all or any of the following:

(i) provide information to the holder of a superannuation product (being an interest in that entity) with information relating to the management, financial condition and investment performance of the entity and/or of any relevant sub-plan (within the meaning of section 1017C);

(ii) provide information to the holder or former holder of a superannuation product (being an interest in that entity), or to any other person to whom benefits under the product are payable, with information relating to his or her benefit entitlements;

(iii) provide information to the holder of a superannuation product (being an interest in the entity) with information about arrangements for dealing with inquiries and/or complaints relating to the product; or

(b) require an RSA provider to do either or both of the following:

(i) provide information to the holder or former holder of an RSA product provided by the RSA provider, or to any other person to whom benefits under the product are payable, with information relating to his or her benefit entitlements;

(ii) provide information to the holder of an RSA product provided by the RSA provider with information about arrangements for dealing with inquiries and/or complaints relating to the product.

(2) Without limiting subsection (1), regulations made for the purposes of that subsection may deal with all or any of the following:

(a) what information is to be provided;

(b) when information is to be provided;

(c) how information is to be provided.

(3) The trustee of a superannuation entity, or an RSA provider, must provide information in accordance with any applicable requirements of regulations made for the purposes of subsection (1).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(4) In this section:

RSA provider has the same meaning as in the *Retirement Savings Accounts Act 1997*.

superannuation entity has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*.

1017E Dealing with money received for financial product before the product is issued

(1) This section applies to money paid to:

(a) an issuer (the ***product provider***) of financial products; or

(b) a seller (the ***product provider***) of financial products in relation to which the seller has prepared a Product Disclosure Statement;

if:

(c) the money is paid to acquire, or acquire an increased interest in, one or more of those financial products from the product provider (whether or not the acquisition would be by a person as a retail client); and

(d) the product provider does not, for whatever reason, issue or transfer the product or products, or the increased interest, immediately after receiving the money; and

(e) either:

(i) the financial product or increased interest was offered in this jurisdiction; or

(ii) the application for the financial product or increased interest was made in this jurisdiction; or

(iii) the money was received in this jurisdiction.

(2) The product provider must ensure that the money is paid into an account that satisfies these requirements:

(a) the account is:

(i) with an Australian ADI; or

(ii) of a kind prescribed by regulations made for the purposes of this paragraph;

and is designated as an account for the purposes of this section of this Act; and

(b) the only money paid into the account is:

(i) money to which this section applies; or

(ii) interest on the amount from time to time standing to the credit of the account; and

(c) if regulations made for the purposes of this paragraph impose additional requirements—the requirements so imposed by the regulations.

The money must be paid into the account on the day it is received by the product provider, or on the next business day.

Note: See section 1021O for related offences.

(2A) Subject to subsection (2C), the money is taken to be held in trust by the product provider for the benefit of the person who paid the money.

(2C) The regulations may:

(a) provide that subsection (2A) does not apply in relation to money in specified circumstances; and

(b) provide for matters relating to the taking of money to be held in trust (including, for example, terms on which the money is taken to be held in trust and circumstances in which it is no longer taken to be held in trust).

(3) The money must only be taken out of the account if:

(a) it is taken out for the purpose of return to the person by whom it was paid; or

(b) the product is issued or transferred to, or in accordance with the instructions of, that person; or

(c) it is taken out for a purpose specified by regulations made for the purposes of this paragraph; or

(d) it is taken out in a situation specified by regulations made for the purposes of this paragraph.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(4) The product provider must:

(a) return the money; or

(b) issue or transfer the product to, or in accordance with the instructions of, the person who paid the money; or

(c) if the money is taken out:

(i) for a purpose specified by regulations made for the purposes of paragraph (3)(c); or

(ii) in a situation specified by regulations made for the purposes of paragraph (3)(d);

do any action required, by regulations made for the purposes of this paragraph, after taking out that money;

either:

(d) before the end of one month starting on the day on which the money was received; or

(e) if it is not reasonably practicable to do so before the end of that month—by the end of such longer period as is reasonable in the circumstances.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(5) The product provider may, for the purposes of this section, maintain a single account or 2 or more accounts.

(6) Nothing in this section, or in regulations made for the purposes of this section, makes the body (not being the product provider) that the account is with under paragraph (2)(a) subject to any liability merely because of a failure by the product provider to comply with any of the provisions of this section or those regulations.

1017F Confirming transactions

Transactions to which this section applies

(1) This section applies in relation to a transaction involving a financial product if:

(a) a person (the ***holder***) acquired the product as a retail client; and

(b) the transaction is:

(i) the transaction by which the holder acquired the product; or

(ii) a transaction that occurs while the holder holds the product, including a transaction by which the holder disposes of all or part of the product (and see also subsection (3)); and

(c) the transaction is not one that does not require confirmation because of subsection (4); and

(d) the holder has not, in accordance with regulations made for the purposes of paragraph (9)(d), waived their right to be provided with confirmation of the transaction; and

(e) either:

(i) the financial product was offered to, or acquired by, the holder in this jurisdiction; or

(ii) the transaction takes place in this jurisdiction.

Note: This section extends to financial products that are securities (see section 1010A).

Obligation to confirm transactions

(2) The person (the ***responsible person***) specified in column 3 of an item in the following table must provide the holder with confirmation of the transaction specified in column 2 of the same item. The confirmation must be provided in accordance with subsections (5) to (8).

Who bears the obligation to confirm a transaction

Item	Transaction	Whose obligation?

Who bears the obligation to confirm a transaction

Item	Transaction	Whose obligation?
1	transaction by which the holder acquired the financial product, unless that transaction was a sale pursuant to an offer to which section 1012C applies	the issuer of the product
2	transaction by which the holder acquired the financial product, where that transaction was a sale pursuant to an offer to which section 1012C applies	the seller of the product
3	any other transaction in relation to the financial product that occurs while the holder holds the product, other than a disposal of all or part of the product	the issuer of the product
4	transaction by which the holder disposes of all or part of the financial product	the person specified in the regulations made for the purposes of this item

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Examples of transactions that are covered by subparagraph (1)(b)(ii)

(3) Without limiting the generality of subparagraph (1)(b)(ii), the transactions that are covered by that subparagraph include:

(a) varying the terms of the financial product while the holder holds the product (unless subsection (4) provides that the variation does not require confirmation); and

(b) the redemption or surrender of the financial product from or by the holder.

Transactions that do not require confirmation

(4) The following transactions do not require confirmation:

(a) a transaction consisting solely of an additional contribution towards the financial product in either of the following circumstances:

(i) the timing and amount, or method of calculating the amount, of the additional contribution was agreed on when the product was acquired by the holder;

(ii) the additional contribution is an amount that is payable under the terms of the product because of an increase in an external factor, such as a person's salary, an inflation index or a rate of a tax or levy;

(b) if the financial product is a security—a transaction consisting solely of a variation of the rights attaching to the security;

(c) if the financial product is a deposit product—any of the following transactions:

(i) a withdrawal from the deposit product pursuant to a cheque drawn on the account;

(ii) a deposit to, or withdrawal from, the deposit product under a direct credit arrangement or a direct debit arrangement;

(iii) crediting interest to the deposit product;

(iv) debiting the deposit product for fees or charges in respect of the product or transactions involving the product;

(v) debiting the deposit product for charges or duties on deposits into, or withdrawals from, the product that are payable under a law of the Commonwealth or of a State or Territory;

(vi) a transaction of a kind specified in regulations made for the purposes of this subparagraph;

(d) a variation of the terms of all financial products in the class to which the financial product belongs;

(e) a transaction of a kind specified in regulations made for the purposes of this paragraph.

Note 1: Because of subparagraph (a)(i), confirmation is not required, e.g., for regular monthly contributions to a superannuation fund.

Note 2: A defendant bears an evidential burden in relation to the matters in this subsection.

Confirmation may be provided on a transaction-by-transaction basis or by means of a standing facility

(5) Confirmation of a transaction must be provided:

(a) by confirming the transaction in accordance with subsections (6) to (8), to the holder as soon as is reasonably practicable after the transaction occurs; or

(b) subject to subsection (5A), by providing the holder with access to a facility through which they can, for themselves, get a confirmation of the transaction in accordance with subsections (6) to (8) as soon as is reasonably practicable after the transaction occurs.

An arrangement under which the holder may request or require another person to provide a confirmation does not count as a facility that satisfies paragraph (b).

When confirmation may be provided by means of a standing facility

(5A) Confirmation may only be provided by means of a facility as mentioned in paragraph (5)(b) if:

(a) the holder concerned has agreed that confirmation of transactions involving the product may be provided by means of the facility; or

(b) the holder concerned:

(i) has, in accordance with the applicable requirements (if any) in regulations made for the purposes of this subparagraph, been informed, by or on behalf of the responsible person, about the facility and its availability to the holder as a means of obtaining confirmation of transactions involving the product; and

(ii) has not advised the responsible person that the holder does not agree to use the facility as a means of obtaining such confirmations.

Means of confirmation

(6) The confirmation of the transaction:

(a) must be:

(i) in writing; or

(ii) electronic; or

(iii) in some other form applicable under regulations made for the purposes of this paragraph; and

(b) may be provided:

(i) in a case to which paragraph (5)(a) applies—directly by the responsible person or through another person (such as a financial services licensee); or

(ii) in a case to which paragraph (5)(b) applies—through a facility provided directly by the responsible person, or provided on behalf of the responsible person by someone else.

Content of confirmation

(7) The confirmation of the transaction must give the holder the information that the responsible person reasonably believes the holder needs (having regard to the information the holder has received before the transaction) to understand the nature of the transaction.

(8) Without limiting subsection (7), the confirmation of the transaction must:

(a) identify the issuer and the holder; and

(b) if required to be given by a person other than the issuer—identify that person; and

(c) give details of the transaction, including:

(i) the date of the transaction; and

(ii) a description of the transaction; and

(iii) subject to regulations made for the purposes of this subparagraph—any amount paid or payable by the holder in relation to the transaction; and

(iv) subject to any regulations made for the purposes of this subparagraph—any taxes and stamp duties payable in relation to the transaction; and

(d) give any other details prescribed by regulations made for the purposes of this paragraph.

Regulations may provide for modification or waiver of confirmation obligation

(9) The regulations may do all or any of the following:

(a) modify subsection (2) to change the person required to provide confirmation of a transaction;

(b) modify subsections (5) and (6) to expand on or change the way in which confirmation of a transaction must be provided in particular circumstances;

(c) modify subsections (7) and (8) to expand on or change the information that must be included in the confirmation of a transaction in particular circumstances;

(d) specify the circumstances in which a person may waive the right to be provided with confirmation of a transaction, and specify how such a waiver may be made.

1017G Certain product issuers and regulated persons must meet appropriate dispute resolution requirements

(1) If:

(a) particular financial products are, or have been, available for acquisition (whether by issue or sale) by a person or persons as retail clients; and

(b) the issue or sale of those products is not covered by an Australian financial services licence;

both the issuer, and any regulated person obliged under subsection 1012C(5), (6) or (8) to give a retail client a Product Disclosure Statement for one or more of those financial products, must each have a dispute resolution system complying with subsection (2).

Note 1: If the issue of particular financial products is covered by an Australian financial services licence, the requirement to have a dispute resolution system relating to the issue of the products is imposed by paragraph 912A(1)(g).

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) To comply with this subsection, a dispute resolution system must consist of:

(a) an internal dispute resolution procedure that:

(i) complies with standards, and requirements, made or approved by ASIC in accordance with regulations made for the purposes of this subparagraph; and

(ii) covers complaints, against the person required to have the system, made by retail clients in relation to financial services provided in relation to any of those products; and

(b) membership of one or more external dispute resolution schemes that:

(i) is, or are, approved by ASIC in accordance with regulations made for the purposes of this subparagraph; and

(ii) covers, or together cover, complaints (other than complaints that may be dealt with by the Superannuation Complaints Tribunal established by section 6 of the *Superannuation (Resolution of Complaints) Act 1993*), against the person required to have the system, made by retail clients in relation to financial services provided in relation to any of those products.

(3) Regulations made for the purposes of subparagraph (2)(a)(i) or (2)(b)(i) may also deal with the variation or revocation of:

(a) standards or requirements made by ASIC; or

(b) approvals given by ASIC.

Division 4—Advertising for financial products

1018A Advertising or other promotional material for financial product must refer to Product Disclosure Statement

Advertisements and promotional material must identify issuer (or issuer and seller) and refer to Product Disclosure Statement

(1) Subject to this section, if a particular financial product is available for acquisition by persons as retail clients (whether or not it is also available for acquisition by persons as wholesale clients) by way of issue, or pursuant to sale offers to which section 1012C applies or will apply, a person must only:

(a) advertise the product; or

(b) publish a statement that is reasonably likely to induce people to acquire the product;

if the advertisement or statement:

(c) identifies:

(i) if the product is available by way of issue—the issuer of the product; or

(ii) if the product is available pursuant to sale offers to which section 1012C applies or will apply—the issuer of the product and the seller of the product; and

(d) indicates that a Product Disclosure Statement for the product is available and where it can be obtained; and

(e) indicates that a person should consider the Product Disclosure Statement in deciding whether to acquire, or to continue to hold, the product.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) Subject to this section, if a particular financial product, or proposed financial product, is not available for acquisition by persons as retail clients but it is reasonably likely that the product will become so available (whether or not it is, or will also become, available for acquisition by persons as wholesale clients) by way of issue, or pursuant to sale offers to which section 1012C will apply, a person must only:

(a) advertise the product; or

(b) publish a statement that is reasonably likely to induce people to acquire the product;

if the advertisement or statement:

(c) identifies:

(i) if the product is likely to be so available by way of issue—the issuer of the product; or

(ii) if the product is likely to be so available pursuant to sale offers to which section 1012C will apply—the issuer of the product and the seller of the product; and

(d) indicates that a Product Disclosure Statement for the product will be made available when the product is released or otherwise becomes available; and

(e) indicates when and where the Product Disclosure Statement is expected to be made available; and

(f) indicates that a person should consider the Product Disclosure Statement in deciding whether to acquire, or continue to hold, the product.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: Subsection (2) has an extended operation in relation to recognised offers under Chapter 8 (see subsection 1200L(4)).

Distribution of disclosure document

(3) A person may distribute a Product Disclosure Statement without contravening subsection (1) or (2). This does not apply if an order under section 1020E is in force in relation to the product.

Note 1: A defendant bears an evidential burden in relation to the matters in this section. See subsection 13.3(3) of the *Criminal Code.*

Note 2: Subsection (3) has an extended operation in relation to recognised offers under Chapter 8 (see subsection 1200L(5)).

General exceptions

(4) An advertisement or publication does not contravene subsection (1) or (2) if it:

(a) relates to a financial product that is able to be traded on a financial market and consists of a notice or report by the issuer of the product, or one of its officers, about its affairs to the market operator; or

(b) consists solely of a notice or report of a general meeting of the issuer; or

(c) consists solely of a report about the issuer that is published by the issuer and:

(i) does not contain information that materially affects affairs of the issuer, other than information previously made available in a Product Disclosure Statement that has been distributed or disclosure document that has been lodged with ASIC, an annual report or a notice or report referred to in paragraph (a) or (b); and

(ii) does not refer (whether directly or indirectly) to the offer of the financial product; or

(d) is a news report, or is genuine comment, in the media relating to:

(i) a Product Disclosure Statement that has been distributed or disclosure document that has been lodged with ASIC; or

(ii) information contained in such a Statement or document; or

(iii) a notice or report covered by paragraph (a), (b) or (c); or

(e) is a report about the financial products of the issuer published by someone who is not:

(i) the issuer; or

(ii) acting at the instigation of, or by arrangement with, the issuer; or

(iii) a director of the issuer; or

(iv) a person who has an interest in the success of the issue or sale of the financial product.

Paragraphs (d) and (e) do not apply if anyone gives consideration or another benefit for publishing the report.

Note: A defendant bears an evidential burden in relation to the matters in this section. See subsection 13.3(3) of the *Criminal Code.*

Liability of publishers

(5) A person does not contravene subsection (1) or (2) by publishing an advertisement or statement if the person:

(a) publishes it in the ordinary course of a media business; and

(b) did not know, and had no reason to suspect, that its publication would amount to a contravention of a provision of this section.

Note: A defendant bears an evidential burden in relation to the matters in this section. See subsection 13.3(3) of the *Criminal Code.*

Meaning of ***media***

(6) For the purposes of this section, the ***media*** consists of:

(a) newspapers and magazines; and

(b) radio and television broadcasting services; and

(c) electronic services (including services provided through the internet) that:

(i) are operated on a commercial basis; and

(ii) are similar to newspapers, magazines or radio or television broadcasts.

1018B Prohibition on advertising personal offers covered by section 1012E

(1) A person must not advertise an offer, or intended offer, of financial products that would not need a Product Disclosure Statement because of section 1012E.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) A person does not contravene subsection (1) by publishing an advertisement or statement if the person:

(a) publishes it in the ordinary course of a media business; and

(b) did not know, and had no reason to suspect, that a Product Disclosure Statement was needed.

For this purpose, ***media*** has the same meaning as it has in section 1018A.

Note: A defendant bears an evidential burden in relation to the matters in this section. See subsection 13.3(3) of the *Criminal Code.*

Division 5—Cooling-off periods

1019A Situations in which this Division applies

(1) Subject to subsection (2), this Division applies if:

(a) a financial product of one of the following classes is provided in this jurisdiction to a person as a retail client after the commencement of this Chapter:

(i) risk insurance products;

(ii) investment life insurance products;

(iii) managed investment products;

(iiia) FHSA products;

(iv) superannuation products;

(v) RSA products; and

(b) the product is provided to the person:

(i) by way of issue; or

(ii) by way of sale pursuant to an offer to which section 1012C applies.

(2) The regulations may do any or all of the following:

(a) provide that a specified subclass of financial products that would otherwise be covered by a subparagraph of paragraph (1)(a) are excluded from that subparagraph;

(b) provide additional requirements to be satisfied before this Division applies in relation to a class or subclass of financial products;

(c) provide that this Division does not apply in relation to the provision of a financial product in specified circumstances.

(3) In this Division:

(a) the person referred to in paragraph (1)(a) is the ***client***; and

(b) the person who issues or sells the product to the client is the ***responsible person***.

1019B Cooling-off period for return of financial product

(1) Subject to this section, the client has the right to return the financial product to the responsible person and to have the money they paid to acquire the product repaid. This is so even if the responsible person is being wound up.

(2) The right to return the product must be exercised by notifying the responsible person in one of the following ways:

(a) in writing; or

(b) electronically; or

(c) in any other way specified in the regulations.

Also, if the regulations require the client to comply with other requirements in order to exercise the right to return the product, those other requirements must be complied with.

(3) The right to return the product can only be exercised during the period of 14 days starting on the earlier of:

(a) the time when the confirmation requirement (if applicable) is complied with; or

(b) the end of the 5th day after the day on which the product was issued or sold to the client.

(4) For the purposes of subsection (3), the confirmation requirement is complied with when:

(a) the client receives confirmation, as mentioned in paragraph 1017F(5)(a), of the transaction by which they acquired the product; or

(b) confirmation of that transaction is available to the client by a facility as mentioned in paragraph 1017F(5)(b).

(5) The right to return the product (and have money paid to acquire it repaid) cannot be exercised at any time after:

(a) the client has (whether before or after the start of the period referred to in subsection (3)) exercised a right or power that they have under the terms applicable to the product; or

(b) the time (whether before or after the start of the period referred to in subsection (3)) at which, under the terms applicable to the product, the client's rights or powers in respect of the product end.

Note: So, e.g.:

(a) if the product is a contract of insurance, the right to return cannot be exercised after the client has made a claim under the contract of insurance; and

(b) if the product is a contract of insurance covering a period of only one week, the right to return cannot be exercised after the end of that week.

(5A) The regulations may specify other circumstances in which the right to return the product (and have money paid to acquire it repaid) cannot be exercised.

(6) On the exercise of the right to return the product:

(a) if the product is constituted by a legal relationship between the client and the issuer of the product—that relationship is, by force of this section, terminated with effect from that time without penalty to the client; and

(b) any contract for the acquisition of the product by the client is, by force of this section, terminated with effect from that time without penalty to the client.

(7) The regulations may provide for consequences and obligations (in addition to those provided for by subsection (6)) to apply if the right to return a financial product is exercised.

(8) The regulations may provide that, in specified circumstances, the amount to be repaid on exercise of the right to return a financial product is to be increased or reduced in accordance with the regulations.

Division 5A—Unsolicited offers to purchase financial products off-market

1019C Definitions

In this Division:

date of offer has the meaning given by subsection 1019I(1).

offeree, in relation to an offer to which this Division applies, has the meaning given by subsection 1019D(1).

offeror, in relation to an offer to which this Division applies, has the meaning given by subsection 1019D(1).

offer to which this Division applies means an offer to which this Division applies because of section 1019D.

1019D Offers to which this Division applies

(1) This Division applies to an offer in relation to which the following paragraphs are satisfied:

(a) the offer is an unsolicited offer to purchase a financial product made by a person (the ***offeror***) to another person (the ***offeree***);

(b) the offer is made otherwise than on a licensed market;

(c) one or more of the following apply:

(i) the offer is made in the course of a business of purchasing financial products;

(ii) the offeror was not in a personal or business relationship with the offeree before the making of the offer;

(iii) the offer is made in circumstances specified in regulations made for the purposes of this subparagraph;

(d) the offer is not:

(i) made to the issuer of the financial products; or

(ii) to buy back shares under a buy-back authorised by section 257A; or

(iii) made under a compromise or arrangement approved at a meeting held as a result of an order under subsection 411(1) or (1A); or

(iv) to acquire securities under an off-market bid; or

(v) to compulsorily acquire or buy out securities under Chapter 6A; or

(vi) to acquire shares from a dissenting shareholder under section 414; or

(vii) made in relation to particular financial products that are specified in regulations made for the purposes of this subparagraph; or

(viii) made in circumstances that are specified in regulations made for the purposes of this subparagraph;

(e) the offer is made or received in this jurisdiction.

(2) The regulations may clarify:

(a) when an offer is, or is not, made in the course of a business of purchasing financial products; or

(b) when an offeror was, or was not, in a previous personal or business relationship with an offeree.

Regulations made for the purposes of this subsection have effect despite anything else in this section.

1019E How offers are to be made

(1) An offer to which this Division applies must not be made otherwise than by sending an offer document in printed or electronic form to the offeree in accordance with the following requirements:

(a) the document must be sent to an address of the offeree (which may be an electronic address);

(b) either the envelope or the container in which it is sent, or the message that accompanies it, must be addressed to the offeree.

(2) The offer document must be sent to the offeree as soon as practicable after the date of offer.

1019F Prohibition on inviting offers to sell

A person must not invite another person to make an offer to sell a financial product in circumstances in which, if the invitation were instead an offer to purchase the financial product, that offer would be an offer to which this Division applies.

1019G Duration and withdrawal of offers

(1) An offer to which this Division applies:
  (a) must remain open for at least 1 month after the date of offer; and
  (b) cannot remain open for more than 12 months after the date of offer.

(2) The offer may be withdrawn by the offeror at any time, but not within 1 month of the date of offer.

(3) The offer may only be withdrawn by the offeror by sending a withdrawal document in printed or electronic form to the offeree in accordance with paragraphs 1019E(1)(a) and (b). The withdrawal document must identify the offeror and be dated.

(4) A purported withdrawal of the offer contrary to subsection (2) or (3) is ineffective.

1019H Terms of offer cannot be varied

(1) The terms of an offer to which this Division applies, as set out in the offer document, cannot be varied.

(2) A purported variation of the terms of the offer is ineffective.

(3) This section does not:
  (a) affect the offeror's obligation under section 1019J to update the market value of the financial product to which the offer relates; or
  (b) prevent the offeror from withdrawing the offer in accordance with section 1019G or paragraph 1019J(2)(a) and making another offer on different terms; or
  (c) prevent the offeree from making a counter-offer on different terms.

1019I Contents of offer document

(1) The offer document by which an offer to which this Division applies is made must identify the offeror and be dated (this date is the ***date of offer***).

(2) The offer document must also contain the following:

(a) the price at which the offeror wishes to purchase the financial products;

(b) if the financial product is able to be traded on a licensed market and there is a market value for the product as traded on that market—the market value of the product as at the date of offer;

(c) if paragraph (b) does not apply—a fair estimate of the value of the product as at the date of offer, and an explanation of the basis on which that estimate was made;

(d) the period during which the offer remains open (which must be consistent with subsection 1019G(1));

(e) a statement to the effect that the offer may be withdrawn by sending a withdrawal document to the offeree, but generally not within 1 month of the date of offer;

(f) any other information specified in regulations made for the purposes of this paragraph.

(3) The regulations may clarify:

(a) the manner in which a fair estimate of the value of a financial product (see paragraph (2)(c)) is to be worked out; and

(b) the level of detail required in the explanation of the basis on which the estimate was made.

Regulations made for the purposes of this subsection have effect despite anything else in this section.

(4) The offer document must be worded and presented in a clear, concise and effective manner.

1019J Obligation to update market value

(1) This section applies if:

(a) the offer document by which an offer to which this Division applies is made states the market value of the financial product to which the offer relates as at the date of the offer; and

(b) while the offer remains open, there is an increase or decrease in the market value of the product when compared to:

(i) unless subparagraph (ii) applies—the market value (the ***currently stated value***) stated as mentioned in paragraph (a); or

(ii) if this section has previously applied in relation to the offer and one or more supplementary offer documents have been sent to the offeree—the market value (the ***currently stated value***) stated as mentioned in paragraph (3)(c) in the supplementary offer document most recently sent to the offeree; and

(c) the increase or decrease, expressed as a percentage of the currently stated value, exceeds the percentage specified in the regulations for the purposes of this paragraph.

(2) The offeror must, within 10 business days of this section applying because of a particular increase or decrease in value:

(a) withdraw the offer by sending a withdrawal document, in printed or electronic form, to the offeree in accordance with paragraphs 1019E(1)(a) and (b):

(i) that identifies the offeror and that is dated; and

(ii) that contains a statement to the effect that the offer is withdrawn because of a change in the market value of the product, and that withdrawal for this reason is permitted even within 1 month of the date of offer; or

(b) send a supplementary offer document (see subsection (3)) in printed or electronic form to the offeree in accordance with paragraphs 1019E(1)(a) and (b).

Nothing in section 1019G affects the effectiveness of a withdrawal of the offer under paragraph (a) of this subsection.

(3) A supplementary offer document must:

(a) identify the offer to which it relates; and

(b) be dated; and

(c) state the market value of the financial product to which the offer relates as at that date; and

(d) state the price that was stated in the offer document as required by paragraph 1019I(2)(a), and contain a statement to the effect that this is still the price at which the offeror wishes to purchase the product and that the terms of the offer remain unchanged; and

(e) contain a statement to the effect that the document has been prepared because the market value of the product has changed.

(4) A supplementary offer document must be worded and presented in a clear, concise and effective manner.

(5) In this section, a reference to stating a market value of a financial product includes a reference to purporting to state the market value of the product.

1019K Rights if requirements of Division not complied with

First situation covered by this section—offers to which this Division applies

(1) This section applies if, in relation to an offer to which this Division applies, the offeree (the ***seller***) accepts the offer and enters into a contract for the sale of the financial product to the offeror (the ***buyer***), and one or more of the following paragraphs applies:

(a) section 1019E was not complied with in relation to the offer;

(b) the offer was accepted after the period referred to in paragraph 1019G(1)(b);

(c) the offeror gave the offeree an offer document and either:

(i) the offer document did not comply with section 1019I; or

(ii) there was a misleading or deceptive statement in the offer document;

(d) in a situation to which section 1019J applies, either:

(i) subsection 1019J(2) was not complied with; or

(ii) subsection 1019J(2) was complied with, but the offeree did not receive the withdrawal document, or the supplementary offer document, as the case requires, until after the offeree had accepted the offer;

(e) in a situation to which section 1019J applies, the offeror gave the offeree a supplementary offer document and either:

(i) the supplementary offer document did not comply with subsection 1019J(3); or

(ii) there was a misleading or deceptive statement in the supplementary offer document.

Second situation covered by this section—invitations prohibited by section 1019F

(2) This section applies if, in response to an invitation prohibited by section 1019F, a person (the ***seller***) makes an offer to sell a financial product to the person who made the invitation (the ***buyer***), and that person accepts the offer and enters into a contract for the purchase of that financial product from the seller.

Seller's right to refuse to transfer, or to seek the return of, the financial product

(3) The seller has:

(a) the right to refuse to transfer the financial product to the buyer; or

(b) if the seller has already transferred the financial product to the buyer—the right to have the financial product returned to the seller, if the buyer still holds the product.

The seller's right under paragraph (a) or (b) is conditional on the seller repaying any money that has been paid to the seller for the purchase of the financial product.

How the seller's right is to be exercised

(4) The seller's right under subsection (3) must be exercised by notifying the buyer in one of the following ways:

(a) in writing;

(b) electronically;

(c) in any other way specified in regulations made for the purposes of this paragraph.

Also, if the regulations require the seller to comply with other requirements in order to exercise that right, those other requirements must be complied with.

(5) The seller's right under subsection (3) can only be exercised during the period of 30 days starting on the day the contract was entered into.

Effect of exercise of seller's right

(6) On the exercise of the seller's right under subsection (3), the contract referred to in subsection (1) or (2) is, by force of this section, terminated from that time without penalty to the seller.

Regulations may provide for certain matters

(7) The regulations may provide for consequences and obligations (in addition to those provided for by subsection (6)) to apply if the seller's right under subsection (3) is exercised.

(8) The regulations may provide that, in specified circumstances, the amount to be repaid as mentioned in subsection (3) is to be increased or reduced in accordance with the regulations.

Division 5B—Disclosure etc. in relation to short sales covered by securities lending arrangement of listed section 1020B products

Note: Section 1020B prohibits certain short sales of section 1020B products.

1020AA Definitions

(1) In this Division:

crossing: a ***crossing*** of section 1020B products is a sale of section 1020B products made by a financial services licensee:

(a) on behalf of both the buyer and the seller of the products; or

(b) on behalf of the buyer of the products and on its own behalf as seller of the products; or

(c) on behalf of the seller of the products and on its own behalf as buyer of the products.

section 1020B products has the meaning given by subsection 1020B(1).

securities lending arrangement means an arrangement under which:

(a) one entity (the ***lender***) agrees that it will:

(i) deliver particular securities, managed investment products or other financial products to another entity (the ***borrower***) or to an entity nominated by the borrower; and

(ii) vest title in those products in the entity to which they are delivered; and

(b) the borrower agrees that it will, after the lender does the things mentioned in paragraph (a):

(i) deliver the products (or equivalent products) to the lender or to an entity nominated by the lender; and

(ii) vest title in those products (or those equivalent products) in the entity to which they are delivered.

(2) To avoid doubt, for the purposes of this Division, treat the entering into of an agreement to sell section 1020B products as the sale of the products.

(3) To avoid doubt, for the purposes of this Division, treat a financial services licensee as making a sale on behalf of a person if the sale is, in economic substance, made by the licensee for the person.

Example: A request that the sale be made is passed from the person to the financial services licensee through a chain of intermediaries.

(4) For the purposes of this Division, treat a crossing of section 1020B products as being made on a licensed market.

1020AB Seller disclosure

(1) Subsection (3) applies if:

(a) either:

(i) a financial services licensee, on behalf of a person (the ***seller***), makes a sale in this jurisdiction of section 1020B products on a licensed market to a buyer; or

(ii) a financial services licensee (the ***seller***), on its own behalf, makes a sale in this jurisdiction of section 1020B products on a licensed market to a buyer; and

(b) before the time of the sale, the seller had entered into or gained the benefit of a securities lending arrangement; and

(c) at the time of the sale, the seller intends that the securities lending arrangement will ensure that some or all the section 1020B products can be vested in the buyer; and

(d) the following requirements are satisfied (if applicable):

(i) if regulations made for the purposes of this subparagraph specify a kind of section 1020B product—the section 1020B products are of that kind;

(ii) if regulations made for the purposes of this subparagraph specify a kind of section 1020B product—the section 1020B products are not of that kind;

(iii) if regulations made for the purposes of this subparagraph specify circumstances in which the sale is made—the sale is made in those circumstances.

(2) Subsection (3) applies regardless of whether the seller is inside or outside Australia.

Offence

(3) The seller must:

(a) give the entity mentioned in subsection (4) particulars specified in the regulations in relation to the circumstances mentioned in paragraphs (1)(a), (b) and (c); and

(b) do so:

(i) on or before the time specified in the regulations; and

(ii) in the manner specified in the regulations.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(4) The entity is:

(a) if subparagraph (1)(a)(i) applies:

(i) the financial services licensee mentioned in that subparagraph; or

(ii) if the regulations specify another entity—that entity; or

(b) if subparagraph (1)(a)(ii) applies:

(i) the operator of the licensed market mentioned in that subparagraph; or

(ii) if the regulations specify another entity—that entity.

1020AC Licensee disclosure

(1) Subsection (2) applies if:

(a) the seller mentioned in subparagraph 1020AB(1)(a)(i) gives a financial services licensee information in accordance with section 1020AB in relation to a sale of section 1020B products on a licensed market; and

(b) the following requirements are satisfied (if applicable):

(i) if regulations made for the purposes of this subparagraph specify a kind of section 1020B product—the section 1020B products are of that kind;

(ii) if regulations made for the purposes of this subparagraph specify a kind of section 1020B product—the section 1020B products are not of that kind;

(iii) if regulations made for the purposes of this subparagraph specify circumstances in which the sale is made—the sale is made in those circumstances.

Offence

(2) The financial services licensee must:

(a) give the entity mentioned in subsection (3) particulars specified in the regulations in relation to the circumstances mentioned in paragraph (1)(a); and

(b) do so:

(i) on or before the time specified in the regulations; and

(ii) in the manner specified in the regulations.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(3) The entity is:

(a) the operator of the licensed market mentioned in paragraph (1)(a); or

(b) if the regulations specify another entity—that entity.

1020AD Public disclosure of information

(1) Subsection (2) applies if:

(a) any of the following apply, in relation to a sale of section 1020B products on a licensed market:

(i) the seller mentioned in subparagraph 1020AB(1)(a)(ii) gives information to the operator of a licensed market (or to another entity) in accordance with section 1020AB;

(ii) the financial services licensee mentioned in paragraph 1020AC(1)(a) gives information to the operator of a licensed market (or to another entity) in accordance with section 1020AC;

(iii) if regulations for the purposes of subparagraph 1020AB(4)(a)(ii) provide that the entity to which information is to be given in accordance with section 1020AB is the operator of a licensed market (or another entity)—the seller mentioned in subparagraph

1020AB(1)(a)(i) gives information to the operator (or other entity) in accordance with that section; and

(b) the following requirements are satisfied (if applicable):

(i) if regulations made for the purposes of this subparagraph specify a kind of section 1020B product—the section 1020B products are of that kind;

(ii) if regulations made for the purposes of this subparagraph specify a kind of section 1020B product—the section 1020B products are not of that kind;

(iii) if regulations made for the purposes of this subparagraph specify circumstances in which the sale is made—the sale is made in those circumstances.

Offence

(2) The operator (or the other entity) must:

(a) make a public disclosure of particulars specified in the regulations in relation to the information mentioned in paragraph (1)(a); and

(b) do so:

(i) on or before the time specified in the regulations; and

(ii) in the manner specified in the regulations.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

1020AE Licensee's obligation to ask seller about short sale

The financial services licensee must not make a sale in this jurisdiction of section 1020B products on a licensed market if:

(a) the sale is on behalf of a person (the ***seller***); and

(b) the seller will be obliged under section 1020AB to give the financial services licensee information in relation to the sale; and

(c) either or both of the following apply:

(i) before making the sale, the financial services licensee failed to ask the seller, orally or in writing, whether the seller will be obliged under section 1020AB to give the financial services licensee information in relation to the sale;

(ii) before making the sale, the financial services licensee failed to record, in writing, the seller's answer.

Note 1: Failure to comply with this section is an offence (see subsection 1311(1)).

Note 2: For the definition of ***writing***, see section 25 of the *Acts Interpretation Act 1901*. For the application of the *Acts Interpretation Act 1901* to this Act, see section 5C of this Act.

1020AF Regulations

(1) Regulations made for the purposes of this Division may specify a matter or thing differently for different kinds of persons, things or circumstances. For example, the regulations may:

(a) specify a matter or thing differently for different kinds of sellers mentioned in subsection 1020AB(1) or 1020AC(1); and

(b) specify a time differently for different kinds of circumstances.

Note: For specification by class, see subsection 13(3) of the *Legislative Instruments Act 2003*.

(2) Subsection (1) does not limit the regulations that may be made for the purposes of this Division.

Division 5C—Information about CGS depository interests

1020AG Jurisdictional scope of Division

(1) Section 1020AI applies only in relation to recommendations received in this jurisdiction.

(2) The regulations may make provision dealing with the jurisdictional scope of some or all of the other provisions of this Division. The other provisions of this Division have effect subject to any such regulations.

1020AH Definitions

In this Division:

CGS depository interest information website means a website that is prescribed by the regulations for the purposes of this definition.

information statement for a class of CGS depository interests means a document that:

(a) contains a statement that the document is an information statement for that class for the purposes of this Division; and

(b) contains information about all CGS depository interests of that class (whether or not it also contains information about CGS depository interests of another class); and

(c) is prepared by the Commonwealth; and

(d) is published on the CGS depository interest information website.

regulated person, in relation to a CGS depository interest, means:

(a) an issuer of the CGS depository interest; or

(b) any financial services licensee; or

(c) any authorised representative of a financial services licensee; or

(d) any person who is not required to hold an Australian financial services licence because the person is covered by:

(i) paragraph 911A(2)(j); or

(ii) an exemption in regulations made for the purposes of paragraph 911A(2)(k); or

(iii) an exemption specified by ASIC for the purposes of paragraph 911A(2)(l); or

(e) any person who is required to hold an Australian financial services licence but who does not hold such a licence.

1020AI Requirement to give information statements for CGS depository interest if recommending acquisition of interest

(1) A regulated person must give a person (the ***client***) each information statement for a class of CGS depository interests if:

(a) the regulated person provides financial product advice to the client that consists of, or includes, a recommendation that the client acquire a CGS depository interest of that class; and

(b) the financial product advice is provided to the client as a retail client; and

(c) the financial product advice is personal advice to the client.

Each information statement must be given at or before the time when the regulated person provides the advice and must be given in accordance with this Division.

Note: If the recommendation is to acquire CGS depository interests of a class for which there is an information statement and that is a subset of a wider class of CGS depository interests for which there is another information statement, the regulated person must give the client both information statements.

(2) However, the regulated person does not have to give the client an information statement for a class of CGS depository interests if:

(a) the client has already received that statement; or

(b) the regulated person reasonably believes that the client has received that statement.

Strict liability offence of failing to give statement

(3) A regulated person commits an offence if:

(a) the regulated person is required by this section to give another person an information statement for a class of CGS depository interests; and

(b) the regulated person does not give the other person, in accordance with section 1020AK, that statement by the time the regulated person is required to do so.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2). See subsection 13.3(3) of the *Criminal Code*.

(4) An offence based on subsection (3) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

Ordinary offence of failing to give statement

(5) A regulated person commits an offence if:

(a) the regulated person is required by this section to give another person an information statement for a class of CGS depository interests; and

(b) the regulated person does not give the other person, in accordance with section 1020AK, that statement by the time the regulated person is required to do so.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2).

Defence for authorised representative

(6) In any proceedings against an authorised representative of a financial services licensee for an offence based on subsection (3) or (5), it is a defence if:

(a) the licensee had provided the representative with information or instructions about the giving of information statements for a class of CGS depository interests; and

(b) the representative's failure to give an information statement for that class occurred because the representative was acting in reliance on that information or those instructions; and

(c) the representative's reliance on that information or those instructions was reasonable.

Note: A defendant bears an evidential burden in relation to the matters in subsection (6). See subsection 13.3(3) of the *Criminal Code*.

Offence of failing to ensure authorised representative gives statement

(7) A financial services licensee commits an offence if the licensee does not take reasonable steps to ensure that an authorised representative of the licensee complies with the representative's obligations under this section to give each information statement

for a class of CGS depository interests as and when required by this section.

1020AJ Information statement given must be up to date

A regulated person must not, in purported compliance with this Division, give a person at a time a document that:

(a) purports to be an information statement for a class of CGS depository interests; and

(b) is not an information statement for that class published at that time on the CGS depository interest information website.

Note: Failure to comply with this section is an offence (see subsection 1311(1)).

1020AK How an information statement is to be given

(1) An information statement for a class of CGS depository interests:

(a) must be:

(i) given to a person, or the person's agent, personally; or

(ii) sent to the person, or the person's agent, at an address (including an electronic address) or fax number nominated by the person or the agent; and

(b) may be printed or be in electronic form.

(2) For the purposes of this section, the information statement is sent to a person at an address if, and only if:

(a) the information statement is sent to the address; and

(b) either:

(i) the envelope or other container in which the information statement is sent; or

(ii) the message that accompanies the information statement;

is addressed to the person.

(3) The information statement may be given or sent to the person's agent only if the agent is not acting as the person's agent in one of the following capacities:

(a) a financial services licensee;

(b) an authorised representative of a financial services licensee;

(c) a person who is not required to hold an Australian financial services licence because the person is covered by:
  (i) paragraph 911A(2)(j); or
  (ii) an exemption in regulations made for the purposes of paragraph 911A(2)(k); or
  (iii) an exemption specified by ASIC for the purposes of paragraph 911A(2)(l);
(d) a person who is required to hold an Australian financial services licence but who does not hold such a licence;
(e) an employee, director or other representative of a person referred to in paragraph (a), (b), (c) or (d).

(4) The regulations may provide for other ways of giving an information statement for a class of CGS depository interests.

(5) The regulations may specify requirements as to the manner in which an information statement for a class of CGS depository interests may be given to a person. The giving of the information statement is not effective unless those requirements are satisfied.

1020AL Civil action for loss or damage

(1) A person (the ***client***) who suffers loss or damage for a reason described in column 1 of an item of the table may recover the amount of the loss or damage by action begun against a person indicated in column 2 of that item within 6 years after the loss or damage was suffered.

Recovery of amount of loss or damage

	Column 1 **Reason for loss or damage**	**Column 2** **Person amount may be recovered from**
1	The client was not given an information statement for a class of CGS depository interests as and when required by this Division	The person required to give the statement or, if that person was an authorised representative of a financial services licensee, each such licensee responsible for the person's conduct (see subsection (2))

Recovery of amount of loss or damage		
	Column 1 **Reason for loss or damage**	**Column 2** **Person amount may be recovered from**
2	The client was given at a time, in purported compliance with this Division, a document that: (a) purported to be an information statement for a class of CGS depository interests; and (b) was not an information statement for that class that was published at that time on the CGS depository interest information website	Each person who: (a) directly or indirectly caused or contributed to the giving of the document; and (b) did not take reasonable steps to ensure that the document given would be an information statement published at that time on the CGS depository interest information website

(2) A financial services licensee is responsible for the conduct of an authorised representative of the licensee for the purposes of item 1 of the table in subsection (1), and the authorised representative is not liable under that item, if:

(a) the authorised representative is not an authorised representative of any other financial services licensee; or

(b) the licensee is responsible (alone or jointly and severally with other financial services licensees) for the authorised representative's conduct under section 917C, disregarding sections 917D and 917F.

(3) This section does not affect any liability that a person has under any other law.

Other orders

(4) The court dealing with an action under subsection (1) may, in addition to awarding loss or damage under that subsection and if it thinks it necessary in order to do justice between the parties:

(a) make an order declaring void a contract entered into by the client referred to in that subsection for or relating to a financial product or a financial service; and

(b) if it makes an order under paragraph (a)—make such other order or orders as it thinks are necessary or desirable because of that order.

(5) Without limiting paragraph (4)(b), the orders that may be made under that paragraph include (but are not limited to) an order for the return of money paid by a person, and/or an order for payment of an amount of interest specified in, or calculated in accordance with, the order.

Division 6—Miscellaneous

1020A Offers etc. relating to certain managed investment schemes not to be made in certain circumstances

(1) A person must not engage in conduct of a kind referred to in subsection (2) in relation to a financial product described in paragraph 764A(1)(ba) (which relates to certain managed investment schemes that are not registered schemes) if the managed investment scheme concerned needs to be, or will need to be, registered and has not been registered. This is so even if it is proposed to register the scheme.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) Subject to subsection (3), the kinds of conduct that must not be engaged in in relation to such a managed investment product are as follows:

(a) making a recommendation, as described in subsection 1012A(3), that is received in this jurisdiction;

(b) making an offer, as described in subsection 1012B(3) or 1012C(3), that is received in this jurisdiction;

(c) accepting an offer, made as described in subsection 1012B(3) or (4), that was received in this jurisdiction.

(3) Subsection (2) does not apply to a recommendation or offer made in a situation to which a subsection of section 1012D, other than subsection 1012D(1), applies.

Note: A defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code*.

1020B Prohibition of certain short sales of securities, managed investment products and certain other financial products

(1) In this section and in Division 5B:

section 1020B products means:

(a) securities; or

(b) managed investment products; or

(c) financial products referred to in paragraph 764A(1)(j); or

(d) financial products of any other kind prescribed by regulations made for the purposes of this definition.

(2) Subject to this section and the regulations, a person must only, in this jurisdiction, sell section 1020B products to a buyer if, at the time of the sale:

(a) the person has or, if the person is selling on behalf of another person, that other person has; or

(b) the person believes on reasonable grounds that the person has, or if the person is selling on behalf of another person, that other person has;

a presently exercisable and unconditional right to vest the products in the buyer.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(3) For the purposes of subsection (2):

(a) a person who, at a particular time, has a presently exercisable and unconditional right to have section 1020B products vested in the person, or in accordance with the directions of the person, has at that time a presently exercisable and unconditional right to vest the products in another person; and

(b) a right of a person to vest section 1020B products in another person is not conditional merely because the products are subject to a security interest in favour of another person to secure the repayment of money.

(4) Subsection (2) does not apply in relation to a sale of section 1020B products by a person who, before the time of sale, has entered into a contract to buy those products and who has a right to have those products vested in the person that is conditional only upon all or any of the following:

(a) payment of the consideration in respect of the purchase;

(b) the receipt by the person of a proper instrument of transfer in respect of the products;

(c) the receipt by the person of the documents that are, or are documents of title to, the products.

(7) For the purposes of this section, a person who:

(a) purports to sell section 1020B products; or

(b) offers to sell section 1020B products; or

(c) holds himself, herself or itself out as entitled to sell section 1020B products; or

(d) instructs a financial services licensee to sell section 1020B products;

is taken to sell the products.

1020D Part cannot be contracted out of

A condition of a contract for the acquisition of a financial product is void if it provides that a party to the contract is:

(a) required or bound to waive compliance with any requirement of this Part (or of regulations made for the purposes of this Part); or

(b) if the acquisition occurs in circumstances in which the party is required by a provision of this Part to have been given a Product Disclosure Statement for the product—taken to have notice of any contract, document or matter not specifically referred to in a Product Disclosure Statement or Supplementary Product Disclosure Statement given to the party.

1020E Stop orders by ASIC

(1) This section applies if:

(a) either:

(i) a disclosure document or statement is defective (see subsection (11)); or

(ia) a disclosure document or statement does not comply with a requirement of this Part that it be worded and presented in a clear, concise and effective manner; or

(ii) an advertisement or statement of a kind referred to in subsection 1018A(1) or (2) that relates to financial products is defective (see subsection (11)); or

(b) an issuer of financial products is in breach of section 1017G.

(2) ASIC may order that:

(a) if paragraph (1)(a) applies—specified conduct in respect of the financial products to which the document, advertisement or statement relates; or

(b) if paragraph (1)(b) applies—specified conduct in respect of financial products issued by that issuer;

must not be engaged in while the order is in force.

(3) The order may include a statement that specified conduct engaged in contrary to the order will be regarded as not complying with the requirements of a specified provision of this Part.

(4) Before making an order under subsection (2), ASIC must:

(a) hold a hearing; and

(b) give a reasonable opportunity to any interested people to make oral or written submissions to ASIC on whether an order should be made.

(5) If ASIC considers that any delay in making an order under subsection (2) pending the holding of a hearing would be prejudicial to the public interest, ASIC may make an interim order under that subsection. The interim order may be made without holding a hearing and lasts for 21 days after the day on which it is made unless revoked before then.

(6) At any time during the hearing, ASIC may make an interim order under subsection (2). The interim order lasts until:

(a) ASIC makes an order under subsection (2) after the conclusion of the hearing; or

(b) the interim order is revoked;

whichever happens first.

(7) The order under subsection (2) must be in writing and must be served on:

(a) unless paragraph (b) or (c) applies—the issuer of the financial products concerned; or

(b) if paragraph (1)(a) applies and the document, advertisement or statement relates to a sale or proposed sale of the financial products—the seller of the financial products; or

(c) if subparagraph (1)(a)(i) applies and the disclosure document or statement is an offer document of a kind referred to in section 1019E or a supplementary offer document of a kind referred to in section 1019J—the offeror referred to in subsection 1019D(1).

(8) The person on whom the order is served must take reasonable steps to ensure that other people who engage in conduct to which the order applies are aware of the order.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(9) The person on whom the order is served, or a person who is aware of the order, must not engage in conduct contrary to the order.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(10) If the person on whom the order is served, or a person who is aware of the order, engages in conduct contrary to the order, any relevant statement included in the order under subsection (3) has effect accordingly. This applies in addition to any other consequence that is provided for by this Act.

(11) In this section:

defective:

(a) in relation to a disclosure document or statement—has the same meaning as in Subdivision B of Division 7; and

(b) in relation to an advertisement or statement of a kind referred to in subsection 1018A(1) or (2) that relates to financial products—means:

(i) there is a misleading or deceptive statement in the advertisement or statement; or

(ii) there is an omission from the advertisement or statement of material required by paragraph 1018A(1)(c), (d) or (e), or paragraph 1018A(2)(c), (d), (e) or (f), to be included in the advertisement or statement.

disclosure document or statement has the same meaning as it has in Subdivision B of Division 7.

1020F Exemptions and modifications by ASIC

(1) ASIC may:

(a) exempt a person or class of persons from all or specified provisions of this Part; or

(b) exempt a financial product or a class of financial products from all or specified provisions of this Part; or

(c) declare that this Part applies in relation to a person or a financial product, or a class of persons or financial products, as if specified provisions were omitted, modified or varied as specified in the declaration.

(4) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.

(5) An exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.

(6) If conduct (including an omission) of a person would not have constituted an offence if a particular declaration under paragraph (1)(c) had not been made, that conduct does not constitute an offence unless, before the conduct occurred (in addition to complying with the gazettal requirement of subsection (5)):

(a) the text of the declaration was made available by ASIC on the internet; or

(b) ASIC gave written notice setting out the text of the declaration to the person.

In a prosecution for an offence to which this subsection applies, the prosecution must prove that paragraph (a) or (b) was complied with before the conduct occurred.

(7) For the purpose of this section, the ***provisions of this Part*** include:

(a) definitions in this Act, or in the regulations, as they apply to references in this Part; and

(b) any provisions of Part 10.2 (transitional provisions) that relate to provisions of this Part.

Note: Because of section 761H, a reference to this Part or Part 10.2 also includes a reference to regulations or other instruments made for the purposes of this Part or Part 10.2 (as the case requires).

(8) To avoid doubt, a declaration under paragraph (1)(c) may specify omissions, modifications or variations that have any or all of the following effects:

(a) suspending, prohibiting or limiting:

(i) any form of short selling of financial products; or

(ii) any transaction that has the same or substantially similar market effect as a short sale of financial products;

(b) varying requirements under this Part that apply to:

(i) any form of short selling of financial products; or

(ii) any transaction that has the same or substantially similar market effect as a short sale of financial products;

(c) removing some or all requirements under this Part that apply to:

(i) any form of short selling of financial products; or

(ii) any transaction that has the same or substantially similar market effect as a short sale of financial products;

(d) imposing requirements that apply to:

(i) any form of short selling of financial products; or

(ii) any transaction that has the same or substantially similar market effect as a short sale of financial products.

1020G Exemptions and modifications by regulations

(1) The regulations may:

(a) exempt a person or class of persons from all or specified provisions of this Part; or

(b) exempt a financial product or a class of financial products from all or specified provisions of this Part; or

(c) provide that this Part applies as if specified provisions were omitted, modified or varied as specified in the regulations.

(3) For the purpose of this section, the ***provisions of this Part*** include:

(a) definitions in this Act, or in the regulations, as they apply to references in this Part; and

(b) any provisions of Part 10.2 (transitional provisions) that relates to provisions of this Part.

Division 7—Enforcement

Subdivision A—Offences

1021A Overview

This Subdivision contains provisions creating offences by reference to various rules contained in preceding Divisions of this Part. However, it does not create all the offences relating to those rules, as some offences are created by subsection 1311(1). Where offences are created by subsection 1311(1) in relation to a rule, this is indicated by a note at the end of the provision containing the rule.

1021B Definitions

(1) In this Subdivision:

defective, in relation to a disclosure document or statement, means:

(a) there is a misleading or deceptive statement in the disclosure document or statement; or

(b) if it is a Product Disclosure Statement—there is an omission from the Product Disclosure Statement of material required by section 1013C, other than material required by section 1013B or 1013G; or

(c) if it is a Supplementary Product Disclosure Statement that is given for the purposes of section 1014E—there is an omission from the Supplementary Product Disclosure Statement of material required by that section; or

(d) if it is information required by paragraph 1012G(3)(a)—there is an omission from the information of material required by that paragraph;

being a statement, or an omission, that is or would be materially adverse from the point of view of a reasonable person considering whether to proceed to acquire the financial product concerned.

Note: In determining whether a Product Disclosure Statement is defective, the effect of section 1014D must be taken into account (section 1014D takes information and statements in a Supplementary Product Disclosure Statement to be included in the Product Disclosure Statement it supplements).

disclosure document or statement means:

(a) a Product Disclosure Statement; or

(b) a Supplementary Product Disclosure Statement; or

(c) information required by paragraph 1012G(3)(a).

regulated person has the same meaning as it has in Division 2.

(1A) For the avoidance of doubt, if section 1012J (information must be up to date) is not complied with in relation to a Product Disclosure Statement, then, for the purposes of the definition of ***defective*** in subsection (1):

(a) if the circumstance constituting the non-compliance is that particular information included in the Product Disclosure Statement is not as up to date as section 1012J requires it to be—the information so included constitutes a misleading statement in the Product Disclosure Statement; and

(b) if the circumstance constituting the non-compliance is a failure to include particular information that was not previously required to be included in the Product Disclosure Statement—the failure to include the information constitutes an omission from the Statement of material required by section 1013C.

Note 1: The effect of section 1014D (information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements) must be taken into account in determining whether section 1012J is complied with in relation to a Product Disclosure Statement.

Note 2: Whether the inclusion of out of date information, or the failure to include information, results in the Product Disclosure Statement being ***defective*** as defined in subsection (1) depends on whether the materiality test set out in that definition is satisfied.

(2) In this Subdivision, a reference (including in the definitions in subsection (1)) to a document or statement, or to information, of a kind referred to in a paragraph of the definition of ***disclosure document or statement*** in subsection (1) includes a reference to something purporting to be a document or statement, or to be information, of that kind.

1021C Offence of failing to give etc. a disclosure document or statement

Strict liability offence

(1) A person (the ***providing entity***) commits an offence if:

(a) the providing entity:

(i) is required by a provision of this Part to give another person a Product Disclosure Statement or a Supplementary Product Disclosure Statement (the ***required disclosure document or statement***); or

(ii) is required by paragraph 1012G(3)(a) to orally communicate information (the ***required disclosure document or statement***) to another person; and

(b) the providing entity does not:

(i) if subparagraph (a)(i) applies—give (in accordance with section 1015C) the other person anything purporting to be the required disclosure document or statement by the time they are required to do so; or

(ii) if subparagraph (a)(ii) applies—orally communicate to the other person anything purporting to be the information required by paragraph 1012G(3)(a) by the time they are required to do so.

Note: A defendant bears an evidential burden in relation to the matters in sections 1012D, 1012DAA, 1012DA and 1012E.

(2) An offence based on subsection (1) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

Ordinary offence

(3) A person (the ***providing entity***) commits an offence if:

(a) the providing entity:

(i) is required by a provision of this Part to give another person a Product Disclosure Statement or a Supplementary Product Disclosure Statement (the ***required disclosure document or statement***); or

(ii) is required by paragraph 1012G(3)(a) to orally communicate information (the ***required disclosure document or statement***) to another person; and

(b) the providing entity does not:

(i) if subparagraph (a)(i) applies—give (in accordance with section 1015C) the other person anything purporting to be the required disclosure document or statement by the time they are required to do so; or

(ii) if subparagraph (a)(ii) applies—orally communicate to the other person anything purporting to be the information required by paragraph 1012G(3)(a) by the time they are required to do so.

Note: A defendant bears an evidential burden in relation to the matters in sections 1012D, 1012DAA, 1012DA and 1012E.

Defence for authorised representative

(4) In any proceedings against an authorised representative of a financial services licensee for an offence based on subsection (1) or (3), it is a defence if:

(a) the licensee had provided the representative with information or instructions about the giving or communication of disclosure documents or statements; and

(b) the representative's failure to give or communicate the required disclosure document or statement occurred because the representative was acting in reliance on that information or those instructions; and

(c) the representative's reliance on that information or those instructions was reasonable.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4). See subsection 13.3(3) of the *Criminal Code*.

Circumstances in which a person is taken not to contravene this section

(5) If:

(a) a person does not give another person a Product Disclosure Statement for a financial product because of section 1012DAA or 1012DA; and

(b) a notice was given under subsection 1012DAA(2) or 1012DA(5); and

(c) the notice purported to comply with subsection 1012DAA(7) or 1012DA(6) but did not actually comply with that subsection;

the person is taken not to contravene this section.

1021D Offence of preparer of defective disclosure document or statement giving the document or statement knowing it to be defective

(1) A person commits an offence if:

(a) the person prepares (or has someone else prepare for them) a disclosure document or statement (not being information required by paragraph 1012G(3)(a)); and

(b) the person knows that the disclosure document or statement is defective; and

(c) the person:

(i) gives (see subsection (3)) another person the disclosure document or statement in circumstances in which it is required by a provision of this Part to be given to the other person; or

(ii) gives (see subsection (3)), or makes available to, another person the disclosure document or statement reckless as to whether the other person will or may rely on the information in it.

Note: A defendant bears an evidential burden in relation to the matters in sections 1012D, 1012DAA, 1012DA and 1012E.

(2) A person commits an offence if:

(a) the person prepares (or has someone else prepare for them) a disclosure document or statement (not being information required by paragraph 1012G(3)(a)); and

(b) the person knows that the disclosure document or statement is defective; and

(c) the person gives (see subsection (3)), or makes available to, another person the disclosure document or statement, reckless as to whether the other person, or someone else, will or may give it, or make it available, to another person as mentioned in subparagraph (1)(c)(i) or (ii).

(3) In this section, ***give*** means give by any means (including orally), and is not limited to giving in accordance with section 1015C.

1021E Offence of preparer of defective disclosure document or statement giving the document or statement (whether or not known to be defective)

(1) A person commits an offence if:

(a) the person prepares (or has someone else prepare for them) a disclosure document or statement (not being information required by paragraph 1012G(3)(a)); and

(b) the disclosure document or statement is defective; and

(c) the person:

(i) gives (see subsection (5)) another person the disclosure document or statement in circumstances in which it is required by a provision of this Part to be given to the other person; or

(ii) gives (see subsection (5)), or makes available to, another person a disclosure document or statement, reckless as to whether the other person will or may rely on the information in it.

Note: A defendant bears an evidential burden in relation to the matters in sections 1012D, 1012DAA, 1012DA and 1012E.

(2) A person commits an offence if:

(a) the person prepares (or has someone else prepare for them) a disclosure document or statement (not being information required by paragraph 1012G(3)(a)); and

(b) the disclosure document or statement is defective; and

(c) the person gives (see subsection (5)), or makes available to, another person the disclosure document or statement, reckless as to whether the other person, or someone else, will or may give it, or make it available, to another person as mentioned in subparagraph (1)(c)(i) or (ii).

(3) For the purposes of an offence based on subsection (1) or (2), strict liability applies to the physical element of the offence specified in paragraph (1)(b) or (2)(b).

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(4) In any proceedings against a person for an offence based on subsection (1) or (2), it is a defence if the person took reasonable steps to ensure that the disclosure document or statement would not be defective.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4). See subsection 13.3(3) of the *Criminal Code*.

(5) In this section, ***give*** means give by any means (including orally), and is not limited to giving in accordance with section 1015C.

1021F Offence of regulated person (other than preparer) giving disclosure document or statement knowing it to be defective

(1) A regulated person commits an offence if:

(a) another person prepares (or has someone else prepare for them) a disclosure document or statement (not being information required by paragraph 1012G(3)(a)); and

(b) the regulated person knows that the disclosure document or statement is defective; and

(c) the regulated person:

(i) gives (see subsection (2)) another person the disclosure document or statement in circumstances in which it is required by a provision of this Part to be given to the other person; or

(ii) gives (see subsection (2)), or makes available to, another person the disclosure document or statement, reckless as to whether the other person will or may rely on the information in it.

Note: A defendant bears an evidential burden in relation to the matters in sections 1012D, 1012DAA, 1012DA and 1012E.

(2) In this section, ***give*** means give by any means (including orally), and is not limited to giving in accordance with section 1015C.

1021FA Paragraph 1012G(3)(a) obligation—offences relating to communication of information

Offence where information known to be defective

(1) A person (the ***providing entity***) commits an offence if:

(a) the providing entity communicates information required by paragraph 1012G(3)(a) to another person in circumstances in which the providing entity is required to do so; and

(b) the providing entity knows that the information is defective.

Note: A defendant bears an evidential burden in relation to the matters in sections 1012D and 1012E.

Offence whether or not information known to be defective

(2) A person (the ***providing entity***) commits an offence if:

(a) the providing entity communicates information required by paragraph 1012G(3)(a) to another person in circumstances in which the providing entity is required to do so; and

(b) the information is defective.

Note: A defendant bears an evidential burden in relation to the matters in sections 1012D and 1012E.

(3) For the purposes of an offence based on subsection (2), strict liability applies to the physical element of the offence specified in paragraph (2)(b).

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

Defences

(4) In any proceedings against a person for an offence based on subsection (1) or (2), it is a defence if the person took reasonable steps to ensure that the information communicated would not be defective.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4). See subsection 13.3(3) of the *Criminal Code*.

(5) In any proceedings against a person for an offence based on subsection (2), it is a defence if the information communicated was defective because of information, or an omission from information, provided to the person (whether in a document or otherwise) by the issuer of the financial product concerned.

Note: A defendant bears an evidential burden in relation to the matters in subsection (5). See subsection 13.3(3) of the *Criminal Code*.

1021FB Paragraph 1012G(3)(a) obligation—offences relating to information provided by product issuer for communication by another person

Product issuer knows information is defective

(1) The issuer of a financial product commits an offence if:

(a) the issuer provides information (whether in a document or otherwise) relating to the product to a person:
(i) for the purpose of the information being communicated under paragraph 1012G(3)(a); or
(ii) knowing that it is likely that the information will be so communicated; and
(b) the issuer knows that, if the person communicates the provided information for the purpose of paragraph 1012G(3)(a), the information communicated will be defective.

Product issuer knows information is not all the required information

(2) The issuer of a financial product commits an offence if:
(a) the issuer provides information (whether in a document or otherwise) relating to the product to a person:
(i) for the purpose of it being communicated under paragraph 1012G(3)(a); or
(ii) knowing that it is likely that it will be so communicated; and
(b) the provided information relates to a matter or matters, but the issuer knows that it is not all of the information relating to the matter or matters that is required to be so communicated; and
(c) the issuer is reckless as to whether the person will or may communicate information for the purposes of paragraph 1012G(3)(a) on the basis that the provided information is all the information relating to the matter or matters that is required to be so communicated.

Product issuer provides information that results in information required by paragraph 1012G(3)(a) being defective

(3) The issuer of a financial product commits an offence if:
(a) the issuer provides information (whether in a document or otherwise) relating to the product to a person:
(i) for the purpose of it being communicated under paragraph 1012G(3)(a); or
(ii) knowing that it is likely that it will be so communicated; and

(b) the person communicates the information for the purpose of paragraph 1012G(3)(a); and

(c) the information communicated is defective because it includes the provided information (whether or not it is defective for other reasons).

(4) For the purposes of an offence based on subsection (3), strict liability applies to the physical element of the offence specified in paragraph (3)(c).

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

Defence to subsection (3) offence

(5) In any proceedings against the issuer of a financial product for an offence based on subsection (3), it is a defence if the issuer took reasonable steps to ensure that the information they provided would not be such as to make the information communicated for the purpose of paragraph 1012G(3)(a) defective.

Note: A defendant bears an evidential burden in relation to the matters in subsection (5). See subsection 13.3(3) of the *Criminal Code*.

Product issuer does not provide all the required information

(6) The issuer of a financial product commits an offence if:

(a) the issuer provides information (whether in a document or otherwise) relating to the product to a person:

(i) for the purpose of it being communicated under paragraph 1012G(3)(a); or

(ii) knowing that it is likely that it will be so communicated; and

(b) the provided information relates to a matter or matters, but it is not all of the information relating to the matter or matters that is required to be so communicated; and

(c) the person communicates information for the purpose of paragraph 1012G(3)(a) on the basis that the provided information is all the information relating to the matter or matters that is required to be so communicated; and

(d) the information communicated is defective because it includes only that information about the matter or matters (whether or not it is also defective for other reasons).

(7) For the purposes of an offence based on subsection (6), strict liability applies to the physical elements of the offence specified in paragraphs (6)(b) and (d).

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

Defence to subsection (6) offence

(8) In any proceedings against the issuer of a financial product for an offence based on subsection (6), it is a defence if the issuer took reasonable steps to ensure that the information they provided about the matter or matters would be all the information about the matter or matters that would be required by paragraph 1012G(3)(a) to be communicated.

Note: A defendant bears an evidential burden in relation to the matters in subsection (8). See subsection 13.3(3) of the *Criminal Code*.

1021G Offence of financial services licensee failing to ensure authorised representative gives etc. disclosure documents or statements as required

A financial services licensee commits an offence if the licensee does not take reasonable steps to ensure that an authorised representative of the licensee complies with their obligations under this Part to give or communicate disclosure documents or statements as and when required by this Part.

1021H Offences if a Product Disclosure Statement (or Supplementary PDS) does not comply with certain requirements

(1) A person commits an offence if:

(a) the person prepares (or has someone else prepare for them) a Product Disclosure Statement, a Supplementary Product Disclosure Statement or a Replacement Product Disclosure Statement (the ***disclosure document***); and

(b) the disclosure document does not comply with:

(i) if it is a Product Disclosure Statement—section 1013B or 1013G or subsection 942DA(3); or

(ii) if it is a Supplementary Product Disclosure Statement—section 1013G, 1014B or 1014C; or

(iii) if it is a Replacement Product Disclosure Statement—subsection 942DA(3), section 1013G or subsection 1014K(1), (2) or (3); and

(c) the person:

(i) gives (see subsection (3)) another person the disclosure document in circumstances in which it is required by a provision of this Part to be given to the other person; or

(ii) gives (see subsection (3)), or makes available to, another person the disclosure document, reckless as to whether the other person will or may rely on the information in it; or

(iii) gives (see subsection (3)), or makes available to, another person the disclosure document, reckless as to whether the other person, or someone else, will or may give it, or make it available, to another person as mentioned in subparagraph (i) or (ii).

Note: A defendant bears an evidential burden in relation to the matters in sections 1012D, 1012DAA, 1012DA and 1012E.

(2) For the purposes of an offence based on subsection (1), strict liability applies to paragraph (b) of that subsection.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(3) In this section, ***give*** means give by any means (including orally), and is not limited to giving in accordance with section 1015C.

1021I Offence of giving disclosure document or statement that has not been prepared by the appropriate person

(1) A regulated person commits an offence if:

(a) the regulated person:

(i) gives (see subsection (2)) another person a disclosure document or statement (not being information required by paragraph 1012G(3)(a)) in circumstances in which it is required by a provision of this Part to be given to the other person; or

(ii) gives (see subsection (2)), or makes available to, another person a disclosure document or statement (not being information required by paragraph 1012G(3)(a)), reckless as to whether the other person will or may rely on the information in it; and

(b) the disclosure document or statement has not been prepared by, or on behalf of, the person required by section 1013A to prepare it.

Note: A defendant bears an evidential burden in relation to the matters in sections 1012D, 1012DAA, 1012DA and 1012E.

(2) In this section, ***give*** means give by any means (including orally), and is not limited to giving in accordance with section 1015C.

1021J Offences if preparer etc. of disclosure document or statement becomes aware that it is defective

(1) A person commits an offence if:

(a) the person prepares (or has someone else prepare for them) a disclosure document or statement (not being information required by paragraph 1012G(3)(a)); and

(b) the person becomes aware that the disclosure document or statement is defective; and

(c) the person does not, as soon as practicable, take reasonable steps to ensure that any regulated person to whom the disclosure document or statement has been provided for further distribution is given a direction that satisfies one of more of the following subparagraphs:

(i) a direction not to distribute the disclosure document or statement;

(ii) if it is a Product Disclosure Statement—a direction not to distribute the Product Disclosure Statement unless it is accompanied by a Supplementary Product Disclosure Statement that corrects the deficiency;

(iii) if it is a Product Disclosure Statement or a Supplementary Product Disclosure Statement—a direction not to distribute the Product Disclosure Statement or Supplementary Product Disclosure Statement without first altering it in a way that is specified in the direction, being a way that corrects the deficiency and that complies with section 1015E.

(2) A regulated person commits an offence if:

(a) the person is given a direction referred to in paragraph (1)(c); and

(b) the person does not comply with the direction.

(3) A regulated person commits an offence if:

(a) a disclosure document or statement (not being information required by paragraph 1012G(3)(a)) has been provided to the person for distribution; and

(b) the person becomes aware that the disclosure document or statement is defective; and

(c) the person does not take reasonable steps to notify the person by whom, or on whose behalf, the disclosure document or statement was prepared of the particulars of the deficiency.

(4) In this section, a reference to ***distributing*** a disclosure document or statement includes (but is not limited to) giving the document or statement to another person in purported compliance with a requirement of this Part.

1021K Offence of unauthorised alteration of Product Disclosure Statement (or Supplementary PDS)

(1) A person commits an offence if:

(a) the person engages in conduct that results in an alteration of a Product Disclosure Statement or a Supplementary Product Disclosure Statement that has been prepared by or on behalf of another person (the ***responsible person***); and

(b) the alteration results in the Product Disclosure Statement or Supplementary Product Disclosure Statement becoming defective, or more defective than it previously was; and

(c) the alteration is not made with the authority of the responsible person; and

(d) either:

(i) the person, in purported compliance with a provision of this Part, gives (see subsection (2)) the altered Product Disclosure Statement or Supplementary Product Disclosure Statement to another person; or

(ii) the person gives (see subsection (2)), or makes available to, another person the altered Product Disclosure Statement or Supplementary Product Disclosure Statement, reckless as to whether the other person will or may rely on the information in it; or

(iii) the person gives (see subsection (2)), or makes available to, another person the altered Product Disclosure Statement or Supplementary Product Disclosure Statement, reckless as to whether the other person, or someone else, will or may give it, or make it available, to another person as mentioned in subparagraph (i) or (ii).

(2) In this section, ***give*** means give by any means (including orally), and is not limited to giving in accordance with section 1015C.

1021L Offences of giving, or failing to withdraw, consent to inclusion of defective statement

(1) A person commits an offence if:

(a) they consent to the inclusion of a statement (the ***consented material***) in a Product Disclosure Statement or a Supplementary Product Disclosure Statement as mentioned in paragraph 1013K(1)(a); and

(b) either:

(i) there is a misleading or deceptive statement in the consented material; or

(ii) there is an omission of information from the consented material; and

(c) the statement or omission is or would be materially adverse from the point of view of a reasonable person considering whether to proceed to acquire the financial product concerned.

(2) A person commits an offence if:

(a) they consent to the inclusion of a statement (the ***consented material***) in a Product Disclosure Statement or a Supplementary Product Disclosure Statement as mentioned in paragraph 1013K(1)(a); and

(b) they become aware that either:

(i) there is a misleading or deceptive statement in the consented material; or

(ii) there is an omission of information from the consented material;

being a statement, or an omission, that:

(iii) is or would be materially adverse from the point of view of a reasonable person considering whether to proceed to acquire the financial product concerned; or

(iv) results in the Product Disclosure Statement or the Supplementary Product Disclosure Statement being defective, or more defective than it would otherwise be; and

(c) they do not withdraw their consent after becoming aware of the matter mentioned in paragraph (b).

1021M Offences relating to keeping and providing copies of Product Disclosure Statements (or Supplementary PDSs)

Strict liability offence

(1) A person commits an offence if:

(a) the person is required by section 1015D:

(i) to notify ASIC that a Product Disclosure Statement or a Supplementary Product Disclosure Statement is in use; or

(ii) to keep a copy of a Product Disclosure Statement or a Supplementary Product Disclosure Statement for a particular period; or

(iii) to make a copy of a Product Disclosure Statement or a Supplementary Product Disclosure Statement available to ASIC; or

(iv) to comply with a request from a person for a copy of a Product Disclosure Statement or a Supplementary Product Disclosure Statement; and

(b) the person does not comply with that requirement.

(2) An offence based on subsection (1) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

Ordinary offence

(3) A person commits an offence if:

(a) the person is required by section 1015D:

(i) to notify ASIC that a Product Disclosure Statement or a Supplementary Product Disclosure Statement is in use; or

(ii) to keep a copy of a Product Disclosure Statement or a Supplementary Product Disclosure Statement for a particular period; or

(iii) to make a copy of a Product Disclosure Statement or a Supplementary Product Disclosure Statement available to ASIC; or

(iv) to comply with a request from a person for a copy of a Product Disclosure Statement or a Supplementary Product Disclosure Statement; and

(b) the person does not comply with that requirement.

1021N Offence of failing to provide additional information requested under section 1017A

A person (the ***responsible person***) commits an offence if:

(a) a request is made to them by another person, in accordance with subsection 1017A(1), to provide further information about a financial product; and

(b) the responsible person is required by subsection 1017A(2) to give the other person the information; and

(c) the other person has paid any charge in respect of the request, being a charge that is in accordance with subsections 1017A(5) and (6); and

(d) the responsible person does not take reasonable steps to ensure that, as soon as practicable after receiving the request, and in any event within one month, the information is provided to the other person in accordance with subsection 1017A(4).

1021O Offences of issuer or seller of financial product failing to pay money into an account as required

Strict liability offence

(1) An issuer or seller of financial products commits an offence if:

(a) the issuer or seller is required by subsection 1017E(2) to pay particular money into an account in accordance with that subsection; and

(b) the issuer or seller does not pay the money into an account in accordance with that subsection.

(2) An offence based on subsection (1) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

Ordinary offence

(3) An issuer or seller of financial products commits an offence if:
(a) the issuer or seller is required by subsection 1017E(2) to pay particular money into an account in accordance with that subsection; and
(b) the issuer or seller does not pay the money into an account in accordance with that subsection.

1021P Offences relating to offers to which Division 5A applies

Failure to comply with requirements of section 1019E relating to how offers are made

(1) A person commits an offence if:
(a) the person makes an offer; and
(b) the offer is an offer to which Division 5A applies (see section 1019D); and
(c) in making the offer, the person fails to comply with a requirement of section 1019E.

Contravening section 1019F by inviting offers to sell

(2) A person commits an offence if:
(a) the person invites another person to make an offer to sell a financial product; and
(b) in making the invitation, the person contravenes section 1019F.

Failure to comply with requirements of section 1019G relating to duration and withdrawal of offers

(3) A person commits an offence if:
(a) the person makes an offer; and
(b) the offer is an offer to which Division 5A applies (see section 1019D); and
(c) any of the following apply:

(i) the offer does not remain open for the period required by paragraph 1019G(1)(a);
(ii) the offer remains open for longer than is permitted by paragraph 1019G(1)(b);
(iii) in purporting to withdraw the offer, the person fails to comply with a requirement of subsection 1019G(2) or (3).

Failure to comply with requirements of section 1019I relating to price or value

(4) A person commits an offence if:
(a) the person makes an offer; and
(b) the offer is an offer to which Division 5A applies (see section 1019D); and
(c) the person gives the offeree an offer document; and
(d) either:
(i) the offer document does not comply with paragraph 1019I(2)(a), (b) or (c); or
(ii) material of a kind referred to in paragraph 1019I(2)(a), (b) or (c) that is included in the offer document is misleading or deceptive.

Failure to comply with other requirements of section 1019I

(5) A person commits an offence if:
(a) the person makes an offer; and
(b) the offer is an offer to which Division 5A applies (see section 1019D); and
(c) the person gives the offeree an offer document; and
(d) either:
(i) the offer document does not comply with subsection 1019I(1), or paragraph 1019I(2)(d), (e) or (f); or
(ii) material of a kind referred to in subsection 1019I(1), or paragraph 1019I(2)(d), (e) or (f), that is included in the offer document is misleading or deceptive.

Failure to comply with requirements of section 1019J

(6) A person commits an offence if:

(a) the person makes an offer; and

(b) the offer is an offer to which Division 5A applies (see section 1019D); and

(c) section 1019J applies because of an increase or decrease in the market value of the financial product to which the offer relates; and

(d) one of the following subparagraphs applies:

(i) the person fails to comply with subsection 1019J(2) in relation to that increase or decrease; or

(ii) the person gives the offeree a supplementary offer document in relation to that increase or decrease, but that document does not comply with subsection 1019J(3); or

(iii) the person gives the offeree a supplementary offer document in relation to that increase or decrease, but material of a kind referred to in subsection 1019J(3) that is included in that document is misleading or deceptive.

Subdivision B—Civil liability

1022A Definitions

(1) In this Subdivision:

defective, in relation to a disclosure document or statement, means:

(a) there is a misleading or deceptive statement in the disclosure document or statement; or

(b) if it is a Product Disclosure Statement—there is an omission from the Product Disclosure Statement of material required by section 1013C, other than material required by section 1013B or 1013G; or

(c) if it is a Supplementary Product Disclosure Statement that is given for the purposes of section 1014E—there is an omission from the Supplementary Product Disclosure Statement of material required by that section; or

(d) if it is information required by paragraph 1012G(3)(a)—there is an omission from the information of material required by that paragraph; or

(e) if it is an offer document of a kind referred to in section 1019E—there is an omission from the document of material required by section 1019I; or

(f) if it is a supplementary offer document of a kind referred to in section 1019J—there is an omission from the document of material required by subsection 1019J(3).

Note: In determining whether a Product Disclosure Statement is defective, the effect of section 1014D must be taken into account (section 1014D takes information and statements in a Supplementary Product Disclosure Statement to be included in the Product Disclosure Statement it supplements).

disclosure document or statement means:

(a) a Product Disclosure Statement; or

(b) a Supplementary Product Disclosure Statement; or

(c) information required by paragraph 1012G(3)(a); or

(d) an offer document of a kind referred to in section 1019E; or

(e) a supplementary offer document of a kind referred to in section 1019J.

regulated person has the same meaning as it has in Division 2.

(1A) For the avoidance of doubt, if section 1012J (information must be up to date) is not complied with in relation to a Product Disclosure Statement, then, for the purposes of the definition of ***defective*** in subsection (1):

(a) if the circumstance constituting the non-compliance is that particular information included in the Product Disclosure Statement is not as up to date as section 1012J requires it to be—the information so included constitutes a misleading statement in the Product Disclosure Statement; and

(b) if the circumstance constituting the non-compliance is a failure to include particular information that was not previously required to be included in the Product Disclosure Statement—the failure to include the information constitutes an omission from the Statement of material required by section 1013C.

Note: The effect of section 1014D (information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements) must be taken into account in determining whether section 1012J is complied with in relation to a Product Disclosure Statement.

(2) In this Subdivision, a reference (including in the definitions in subsection (1)) to a document or statement, or to information, of a kind referred to in a paragraph of the definition of ***disclosure document or statement*** in subsection (1) includes a reference to something purporting to be a document or statement, or to be information, of that kind.

1022B Civil action for loss or damage

(1) This section applies in the following situations:

(a) a person:

(i) is required by a provision of this Part to give another person (the ***client***) a Product Disclosure Statement or a Supplementary Product Disclosure Statement (the ***required disclosure document or statement***); and

(ii) does not give (in accordance with section 1015C) the client anything purporting to be the required disclosure document or statement by the time they are required to do so; or

(aa) a person makes an offer to which Division 5A applies (see section 1019D) to another person (the ***client***) otherwise than by sending the client an offer document in accordance with section 1019E; or

(ab) a person makes an invitation prohibited by section 1019F to another person (the ***client***); or

(ac) a person:

(i) is required by subsection 1019J(2), in relation to an offer made to another person (the ***client***), to send the client a withdrawal document or a supplementary offer document; and

(ii) does not send (in accordance with paragraphs 1019E(1)(a) and (b)) the client anything purporting to be either of those things by the time they are required to do so; or

(b) a person:

(i) is required by paragraph 1012G(3)(a) to orally communicate information (the ***required disclosure document or statement***) to another person (the ***client***); and

(ii) does not orally communicate to the other person anything purporting to be the information required by that paragraph by the time they are required to do so; or

(c) a person:

(i) gives another person (the ***client***) a disclosure document or statement (other than an offer document of a kind referred to in section 1019E or a supplementary offer document of a kind referred to in section 1019J) that is defective in circumstances in which a disclosure document or statement is required by a provision of this Part to be given to the client; or

(ia) makes an offer to which Division 5A applies (see section 1019D) by sending another person (the ***client***) an offer document in accordance with section 1019E, but that offer document is defective; or

(ib) in a situation to which section 1019J applies, sends a person (the ***client***) a supplementary offer document in accordance with that section but that supplementary offer document is defective; or

(ii) is a regulated person and gives, or makes available to, another person (the ***client***) a disclosure document or statement, being a Product Disclosure Statement or a Supplementary Product Disclosure Statement, that is defective, reckless as to whether the client will or may rely on the information in it; or

(d) a person:

(i) gives consent to the inclusion of a statement in a Product Disclosure Statement or a Supplementary Product Disclosure Statement as mentioned in subsection 1021L(1), disregarding paragraph 1021L(1)(c); or

(ii) does not take reasonable steps to withdraw such a statement as mentioned in subsection 1021L(2), disregarding subparagraphs 1021L(2)(b)(iii) and (iv); or

(e) a person contravenes section 1017B or 1017D.

In paragraph (c), ***give*** means give by any means (including orally), and is not limited to giving in accordance with section 1015C or paragraph 1012G(3)(a).

(2) In a situation to which this section applies, if a person suffers loss or damage:

(a) if paragraph (1)(a) applies—because the client was not given the disclosure document or statement that they should have been given; or

(aa) if paragraph (1)(aa) applies—because the client was not sent an offer document in accordance with section 1019E; or

(ab) if paragraph (1)(ab) applies—because the client received an invitation prohibited by section 1019F rather than being sent an offer document in accordance with section 1019E; or

(ac) if paragraph (1)(ac) applies—because the client was not sent a withdrawal document or a supplementary offer document as required by subsection 1019J(2); or

(b) if paragraph (1)(b) applies—because the information required by paragraph 1012G(3)(a) was not communicated to the client; or

(c) if paragraph (1)(c) applies—because the disclosure document or statement the client was given or sent was defective; or

(d) if paragraph (1)(d) applies—because the consent referred to in that paragraph was given, or was not withdrawn, as the case requires; or

(e) if paragraph (1)(e) applies—because of the contravention referred to in that paragraph;

the person may recover the amount of the loss or damage by action against the, or a, liable person (see subsections (3) to (5)), whether or not that person (or anyone else) has been convicted of an offence in respect of the matter referred to in paragraph (a), (aa), (ab), (ac), (b), (c), (d) or (e).

(3) For the purposes of subsection (2), the, or a, ***liable person*** is:

(a) if paragraph (1)(a), (aa), (ab), (ac) or (b) applies—subject to subsection (4), the person first-referred to in that paragraph; or

(aa) if paragraph (1)(c) applies and the disclosure document or statement is information required by paragraph 1012G(3)(a)—subject to subsection (5A), the person first-referred to in paragraph (1)(c) of this section; or

(b) if paragraph (1)(c) (other than subparagraph (1)(c)(ia) or (ib)) applies and the disclosure document or statement is not information required by paragraph 1012G(3)(a)—subject to subsection (5):

(i) the person by whom, or on whose behalf, the disclosure document or statement was prepared; and

(ii) each other person involved in the preparation of the disclosure document or statement who, directly or indirectly, caused the disclosure document or statement to be defective or contributed to it being defective; or

(ba) if subparagraph (1)(c)(ia) or (ib) applies—the person who made the offer; or

(c) if paragraph (1)(d) applies—the person who gave the consent; or

(d) if paragraph (1)(e) applies—the person who contravened the provision concerned.

(4) If paragraph (1)(a) or (b) applies, or paragraph (1)(c) applies so far as it relates to information required by paragraph 1012G(3)(a), and the person who would, but for this subsection, be the liable person is an authorised representative, the authorised representative is not the liable person and the following paragraphs apply:

(a) if the authorised representative is an authorised representative of only one financial services licensee—that financial services licensee is the liable person;

(b) if the authorised representative is an authorised representative of more than one financial services licensee:

(i) if, under the rules in section 917C, one of those licensees is responsible for the person's conduct—that licensee is the (or a) liable person; or

(ii) if, under the rules in section 917C, 2 or more of those licensees are jointly and severally responsible for the person's conduct—each of those licensees is a liable person.

(4A) For the purposes of paragraph (4)(b):

(a) section 917C is taken to apply, despite section 917F; and

(b) section 917D is taken not to apply.

(5) If:

(a) paragraph (1)(c) (other than subparagraph (1)(c)(ia) or (ib)) applies; and

(b) an alteration was made to the disclosure document or statement (not being information required by paragraph 1012G(3)(a)) before it was given to the client; and

(c) the alteration made the disclosure document or statement defective, or more defective than it would otherwise have been; and

(d) the alteration was not made by, or with the authority of, the person who would, but for this subsection, be a liable person because of subparagraph (3)(b)(i);

then, so far as a person has suffered loss or damage because the disclosure document or statement was defective because of the alteration, the person who made the alteration is a liable person, rather than the person referred to in paragraph (d).

(5A) If:

(a) paragraph (3)(aa) applies; and

(b) the person referred to in that paragraph is not the issuer, or an authorised representative of the issuer, of the financial product to which the required disclosure document or statement relates; and

(c) the required disclosure document or statement was defective because of information, or an omission from information, provided to that person (whether in a document or otherwise) by the issuer of the product;

the issuer of the product is the liable person, rather than the person who would otherwise be the liable person because of paragraph (3)(aa) or subsection (4).

(6) An action under subsection (2) may be begun at any time within 6 years after the day on which the cause of action arose.

(7) A person is not liable under subsection (2) in a situation described in paragraph (1)(c) if the person took reasonable steps to ensure that the disclosure document or statement would not be defective.

(7A) If subsection (5A) applies, the issuer of the financial product is not liable under subsection (2) if the issuer took reasonable steps to ensure that the information provided as mentioned in paragraph (5A)(c) would not be such as to make the required disclosure document or statement defective.

(8) This section does not affect any liability that a person has under any other law.

1022C Additional powers of court to make orders

(1) The court dealing with an action under subsection 1022B(2) may, in addition to awarding loss or damage under that subsection and if it thinks it necessary in order to do justice between the parties:

(a) make an order declaring void a contract entered into by the client referred to in that subsection for or relating to a financial product or a financial service; and

(b) if it makes an order under paragraph (a)—make such other order or orders as it thinks are necessary or desirable because of that order.

(2) Without limiting paragraph (1)(b), the orders that may be made under that paragraph include (but are not limited to) an order for the return of money paid by a person, and/or an order for payment of an amount of interest specified in, or calculated in accordance with, the order.

Part 7.10—Market misconduct and other prohibited conduct relating to financial products and financial services

Division 1—Preliminary

1040A Content of Part

This Part deals in Division 2 with various kinds of prohibited conduct, other than insider trading. The insider trading prohibitions are contained in Division 3.

Division 2—The prohibited conduct (other than insider trading prohibitions)

1041A Market manipulation

A person must not take part in, or carry out (whether directly or indirectly and whether in this jurisdiction or elsewhere):

(a) a transaction that has or is likely to have; or

(b) 2 or more transactions that have or are likely to have;

the effect of:

(c) creating an artificial price for trading in financial products on a financial market operated in this jurisdiction; or

(d) maintaining at a level that is artificial (whether or not it was previously artificial) a price for trading in financial products on a financial market operated in this jurisdiction.

Note 1: Failure to comply with this section is an offence (see subsection 1311(1)).

Note 2: This section is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this section, see section 1317S.

1041B False trading and market rigging—creating a false or misleading appearance of active trading etc.

(1) A person must not do, or omit to do, an act (whether in this jurisdiction or elsewhere) if that act or omission has or is likely to have the effect of creating, or causing the creation of, a false or misleading appearance:

(a) of active trading in financial products on a financial market operated in this jurisdiction; or

(b) with respect to the market for, or the price for trading in, financial products on a financial market operated in this jurisdiction.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see Division 4.

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see Division 4 and section 1317S.

(1A) For the purposes of the application of the *Criminal Code* in relation to an offence based on subsection (1):

(a) intention is the fault element for the physical element consisting of doing or omitting to do an act as mentioned in that subsection; and

(b) recklessness is the fault element for the physical element consisting of having, or being likely to have, the effect of creating, or causing the creation of, a false or misleading appearance as mentioned in that subsection.

Note 1: For ***intention***, see section 5.2 of the *Criminal Code*.

Note 2: For ***recklessness***, see section 5.4 of the *Criminal Code*.

(2) For the purposes of subsection (1), a person is taken to have created a false or misleading appearance of active trading in particular financial products on a financial market if the person:

(a) enters into, or carries out, either directly or indirectly, any transaction of acquisition or disposal of any of those financial products that does not involve any change in the beneficial ownership of the products; or

(b) makes an offer (the ***regulated offer*)** to acquire or to dispose of any of those financial products in the following circumstances:

(i) the offer is to acquire or to dispose of at a specified price; and

(ii) the person has made or proposes to make, or knows that an associate of the person has made or proposes to make:

(A) if the regulated offer is an offer to acquire—an offer to dispose of; or

(B) if the regulated offer is an offer to dispose of—an offer to acquire;

the same number, or substantially the same number, of those financial products at a price that is substantially the same as the price referred to in subparagraph (i).

Note: The circumstances in which a person creates a false or misleading appearance of active trading in particular financial products on a financial market are not limited to the circumstances set out in this subsection.

(3) For the purposes of paragraph (2)(a), an acquisition or disposal of financial products does not involve a change in the beneficial ownership if:

(a) a person who had an interest in the financial products before the acquisition or disposal; or

(b) an associate of such a person;

has an interest in the financial products after the acquisition or disposal.

(4) The reference in paragraph (2)(a) to a transaction of acquisition or disposal of financial products includes:

(a) a reference to the making of an offer to acquire or dispose of financial products; and

(b) a reference to the making of an invitation, however expressed, that expressly or impliedly invites a person to offer to acquire or dispose of financial products.

1041C False trading and market rigging—artificially maintaining etc. trading price

(1) A person must not (whether in this jurisdiction or elsewhere) enter into, or engage in, a fictitious or artificial transaction or device if that transaction or device results in:

(a) the price for trading in financial products on a financial market operated in this jurisdiction being maintained, inflated or depressed; or

(b) fluctuations in the price for trading in financial products on a financial market operated in this jurisdiction.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see Division 4.

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see Division 4 and section 1317S.

(2) In determining whether a transaction is fictitious or artificial for the purposes of subsection (1), the fact that the transaction is, or was at any time, intended by the parties who entered into it to have effect according to its terms is not conclusive.

1041D Dissemination of information about illegal transactions

A person must not (whether in this jurisdiction or elsewhere) circulate or disseminate, or be involved in the circulation or dissemination of, any statement or information to the effect that the price for trading in financial products on a financial market operated in this jurisdiction will, or is likely to, rise or fall, or be maintained, because of a transaction, or other act or thing done, in relation to those financial products, if:

(a) the transaction, or thing done, constitutes or would constitute a contravention of section 1041A, 1041B, 1041C, 1041E or 1041F; and

(b) the person, or an associate of the person:

(i) has entered into such a transaction or done such an act or thing; or

(ii) has received, or may receive, directly or indirectly, a consideration or benefit for circulating or disseminating, or authorising the circulation or dissemination of, the statement or information.

Note 1: Failure to comply with this section is an offence (see subsection 1311(1)). For defences to a prosecution based on this section, see Division 4.

Note 2: This section is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this section, see Division 4 and section 1317S.

1041E False or misleading statements

(1) A person must not (whether in this jurisdiction or elsewhere) make a statement, or disseminate information, if:

(a) the statement or information is false in a material particular or is materially misleading; and

(b) the statement or information is likely:

(i) to induce persons in this jurisdiction to apply for financial products; or

(ii) to induce persons in this jurisdiction to dispose of or acquire financial products; or

(iii) to have the effect of increasing, reducing, maintaining or stabilising the price for trading in financial products on a financial market operated in this jurisdiction; and

(c) when the person makes the statement, or disseminates the information:

(i) the person does not care whether the statement or information is true or false; or

(ii) the person knows, or ought reasonably to have known, that the statement or information is false in a material particular or is materially misleading.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see Division 4.

Note 2: Failure to comply with this subsection may also lead to civil liability under section 1041I. For relief from liability under that section, see Division 4.

(2) For the purposes of the application of the *Criminal Code* in relation to an offence based on subsection (1), paragraph (1)(a) is a physical element, the fault element for which is as specified in paragraph (1)(c).

(3) For the purposes of an offence based on subsection (1), strict liability applies to subparagraphs (1)(b)(i), (ii) and (iii).

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

1041F Inducing persons to deal

(1) A person must not, in this jurisdiction, induce another person to deal in financial products:

(a) by making or publishing a statement, promise or forecast if the person knows, or is reckless as to whether, the statement is misleading, false or deceptive; or

(b) by a dishonest concealment of material facts; or

(c) by recording or storing information that the person knows to be false or misleading in a material particular or materially misleading if:

(i) the information is recorded or stored in, or by means of, a mechanical, electronic or other device; and

(ii) when the information was so recorded or stored, the person had reasonable grounds for expecting that it would be available to the other person, or a class of persons that includes the other person.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see Division 4.

Note 2: Failure to comply with this subsection may also lead to civil liability under section 1041I. For relief from liability under that section, see Division 4.

(2) In this section:

dishonest means:

(a) dishonest according to the standards of ordinary people; and

(b) known by the person to be dishonest according to the standards of ordinary people.

(3) This section applies in relation to the following conduct as if that conduct were dealing in financial products:

(a) applying to become a standard employer-sponsor (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of a superannuation entity (within the meaning of that Act);

(b) permitting a person to become a standard employer-sponsor (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of a superannuation entity (within the meaning of that Act);

(c) applying, on behalf of an employee (within the meaning of the *Retirement Savings Accounts Act 1997*), for the employee to become the holder of an RSA product.

1041G Dishonest conduct

(1) A person must not, in the course of carrying on a financial services business in this jurisdiction, engage in dishonest conduct in relation to a financial product or financial service.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: Failure to comply with this subsection may also lead to civil liability under section 1041I.

(2) In this section:

dishonest means:

(a) dishonest according to the standards of ordinary people; and

(b) known by the person to be dishonest according to the standards of ordinary people.

1041H Misleading or deceptive conduct (civil liability only)

(1) A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.

Note 1: Failure to comply with this subsection is not an offence.

Note 2: Failure to comply with this subsection may lead to civil liability under section 1041I. For limits on, and relief from, liability under that section, see Division 4.

(2) The reference in subsection (1) to engaging in conduct in relation to a financial product includes (but is not limited to) any of the following:

(a) dealing in a financial product;

(b) without limiting paragraph (a):

(i) issuing a financial product;

(ii) publishing a notice in relation to a financial product;

(iii) making, or making an evaluation of, an offer under a takeover bid or a recommendation relating to such an offer;

(iv) applying to become a standard employer-sponsor (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of a superannuation entity (within the meaning of that Act);

(v) permitting a person to become a standard employer-sponsor (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of a superannuation entity (within the meaning of that Act);

(vi) a trustee of a superannuation entity (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) dealing with a beneficiary of that entity as such a beneficiary;

(vii) a trustee of a superannuation entity (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) dealing with an employer-sponsor (within the meaning of that Act), or an associate (within the meaning of that Act) of an employer-sponsor, of that entity as such an employer-sponsor or associate;

(viii) applying, on behalf of an employee (within the meaning of the *Retirement Savings Accounts Act 1997*), for the employee to become the holder of an RSA product;

(ix) an RSA provider (within the meaning of the *Retirement Savings Accounts Act 1997*) dealing with an employer (within the meaning of that Act), or an associate (within the meaning of that Act) of an employer, who makes an application, on behalf of an employee (within the meaning of that Act) of the employer, for the employee to become the holder of an RSA product, as such an employer;

(x) carrying on negotiations, or making arrangements, or doing any other act, preparatory to, or in any way related to, an activity covered by any of subparagraphs (i) to (ix).

(3) Conduct:

(a) that contravenes:

(i) section 670A (misleading or deceptive takeover document); or

(ii) section 728 (misleading or deceptive fundraising document); or

(b) in relation to a disclosure document or statement within the meaning of section 953A; or

(c) in relation to a disclosure document or statement within the meaning of section 1022A;

does not contravene subsection (1). For this purpose, conduct contravenes the provision even if the conduct does not constitute an offence, or does not lead to any liability, because of the availability of a defence.

1041I Civil action for loss or damage for contravention of sections 1041E to 1041H

(1) A person who suffers loss or damage by conduct of another person that was engaged in in contravention of section 1041E, 1041F, 1041G or 1041H may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention, whether or not that other person or any person involved in the contravention has been convicted of an offence in respect of the contravention.

(1A) Subsection (1) has effect subject to section 1044B.

Note: Section 1044B may limit the amount that the person may recover for a contravention of section 1041H (Misleading or deceptive conduct) from the other person or from another person involved in the contravention.

(1B) Despite subsection (1), if:

(a) a person (the ***claimant***) makes a claim under subsection (1) in relation to:

(i) economic loss; or

(ii) damage to property;

caused by conduct of another person (the ***defendant***) that was done in contravention of section 1041H; and

(b) the claimant suffered the loss or damage:

(i) as a result partly of the claimant's failure to take reasonable care; and

(ii) as a result partly of the conduct referred to in paragraph (a); and

(c) the defendant:

(i) did not intend to cause the loss or damage; and

(ii) did not fraudulently cause the loss or damage;

the damages that the claimant may recover in relation to the loss or damage are to be reduced to the extent to which the court thinks just and equitable having regard to the claimant's share in the responsibility for the loss or damage.

Note: Division 2A also applies proportionate liability to a claim for damages under this section for a contravention of section 1041H.

(2) An action under subsection (1) may be begun at any time within 6 years after the day on which the cause of action arose.

(3) This section does not affect any liability that a person has under any other law.

(4) Section 1317S (which provides for relief from liability) applies in relation to liability under subsection (1) as if:

(a) the sections referred to in subsection (1) were civil penalty provisions; and

(b) proceedings under subsection (1) were eligible proceedings.

Note: Relief from liability under this section may also be available (depending on the circumstances) under Division 4.

1041J Sections of this Division have effect independently of each other

Subject to any express provision to the contrary, the various sections in this Division have effect independently of each other, and nothing in any of the sections limits the scope or application of any of the other sections.

1041K Division applies to certain conduct to the exclusion of State Fair Trading Acts provisions

(1) This section applies to conduct:

(a) that contravenes:

(i) section 670A (misleading or deceptive takeover document); or

(ii) section 728 (misleading or deceptive fundraising document); or

(b) that relates to a disclosure document or statement within the meaning of section 953A; or

(c) that relates to a disclosure document or statement within the meaning of section 1022A.

For this purpose, conduct contravenes the provision even if the conduct does not constitute an offence, or does not lead to any liability, because of the availability of a defence.

(2) This Division operates in relation to conduct to which this section applies to the exclusion of the provisions of the State Fair Trading Act of any State or Territory.

Division 2A—Proportionate liability for misleading and deceptive conduct

1041L Application of Division

(1) This Division applies to a claim (an ***apportionable claim***) if the claim is a claim for damages made under section 1041I for:

(a) economic loss; or

(b) damage to property;

caused by conduct that was done in a contravention of section 1041H.

(2) For the purposes of this Division, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).

(3) In this Division, a ***concurrent wrongdoer***, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.

(4) For the purposes of this Division, apportionable claims are limited to those claims specified in subsection (1).

(5) For the purposes of this Division, it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.

1041M Certain concurrent wrongdoers not to have benefit of apportionment

(1) Nothing in this Division operates to exclude the liability of a concurrent wrongdoer (an ***excluded concurrent wrongdoer***) in proceedings involving an apportionable claim if:

(a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim; or

(b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim.

(2) The liability of an excluded concurrent wrongdoer is to be determined in accordance with the legal rules (if any) that (apart from this Division) are relevant.

(3) The liability of any other concurrent wrongdoer who is not an excluded concurrent wrongdoer is to be determined in accordance with the provisions of this Division.

1041N Proportionate liability for apportionable claims

(1) In any proceedings involving an apportionable claim:
   (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss; and
   (b) the court may give judgment against the defendant for not more than that amount.

(2) If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:
   (a) liability for the apportionable claim is to be determined in accordance with the provisions of this Division; and
   (b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Division) are relevant.

(3) In apportioning responsibility between defendants in the proceedings:
   (a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law; and
   (b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.

(4) This section applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceedings.

(5) A reference in this Division to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings

(except as a plaintiff) whether joined under this Division, under rules of court or otherwise.

1041O Defendant to notify plaintiff of concurrent wrongdoer of whom defendant aware

(1) If:

(a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular person (the ***other person*****)** may be a concurrent wrongdoer in relation to the claim; and

(b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about:

(i) the identity of the other person; and

(ii) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim; and

(c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was not aware that the other person may be a concurrent wrongdoer in relation to the claim;

the court hearing the proceedings may order that the defendant pay all or any of those costs of the plaintiff.

(2) The court may order that the costs to be paid by the defendant be assessed on an indemnity basis or otherwise.

1041P Contribution not recoverable from defendant

A defendant against whom judgment is given under this Division as a concurrent wrongdoer in relation to an apportionable claim:

(a) cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer in respect of the apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in which judgment is given against the defendant); and

(b) cannot be required to indemnify any such wrongdoer.

1041Q Subsequent actions

(1) In relation to an apportionable claim, nothing in this Division or any other law prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any damage or loss from bringing another action against any other concurrent wrongdoer for that damage or loss.

(2) However, in any proceedings in respect of any such action, the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of the damage or loss, would result in the plaintiff receiving compensation for damage or loss that is greater than the damage or loss actually sustained by the plaintiff.

1041R Joining non-party concurrent wrongdoer in the action

(1) The court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim.

(2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim.

1041S Application of Division

Nothing in this Division:

(a) prevents a person being held vicariously liable for a proportion of an apportionable claim for which another person is liable; or

(b) prevents a partner from being held severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable; or

(c) affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.

Division 3—The insider trading prohibitions

Subdivision A—Preliminary

1042A Definitions

In this Division:

able to be traded has a meaning affected by section 1042E.

Division 3 financial products means:

(a) securities; or

(b) derivatives; or

(c) interests in a managed investment scheme; or

(ca) debentures, stocks or bonds issued or proposed to be issued by a government; or

(d) superannuation products, other than those prescribed by regulations made for the purposes of this paragraph; or

(e) any other financial products that are able to be traded on a financial market.

generally available, in relation to information, has the meaning given by section 1042C.

information includes:

(a) matters of supposition and other matters that are insufficiently definite to warrant being made known to the public; and

(b) matters relating to the intentions, or likely intentions, of a person.

inside information means information in relation to which the following paragraphs are satisfied:

(a) the information is not generally available;

(b) if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of particular Division 3 financial products.

material effect, in relation to a reasonable person's expectations of the effect of information on the price or value of Division 3 financial products, has the meaning given by section 1042D.

procure has a meaning affected by section 1042F.

relevant Division 3 financial products, in relation to particular inside information, means the Division 3 financial products referred to in paragraph (b) of the definition of ***inside information***.

1042B Application of Division

This Division applies to:

(a) acts and omissions within this jurisdiction in relation to Division 3 financial products (regardless of where the issuer of the products is formed, resides or located and of where the issuer carries on business); and

(b) acts and omissions outside this jurisdiction (and whether in Australia or not) in relation to Division 3 financial products issued by:

(i) a person who carries on business in this jurisdiction; or

(ii) a body corporate that is formed in this jurisdiction.

1042C When information is *generally available*

(1) For the purposes of this Division, information is ***generally available*** if:

(a) it consists of readily observable matter; or

(b) both of the following subparagraphs apply:

(i) it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in Division 3 financial products of a kind whose price might be affected by the information; and

(ii) since it was made known, a reasonable period for it to be disseminated among such persons has elapsed; or

(c) it consists of deductions, conclusions or inferences made or drawn from either or both of the following:

(i) information referred to in paragraph (a);

(ii) information made known as mentioned in subparagraph (b)(i).

(2) None of the paragraphs of subsection (1) limits the generality of any of the other paragraphs of that subsection.

1042D When a reasonable person would take information to have a *material effect* on price or value of Division 3 financial products

For the purposes of this Division, a reasonable person would be taken to expect information to have a ***material effect*** on the price or value of particular Division 3 financial products if (and only if) the information would, or would be likely to, influence persons who commonly acquire Division 3 financial products in deciding whether or not to acquire or dispose of the first-mentioned financial products.

1042E Division 3 financial products taken to be *able to be traded* despite suspensions or section 794D directions

Particular Division 3 financial products that are ordinarily able to be traded on a licensed market are taken, for the purposes of this Division, to be ***able to be traded*** on that market even though trading in those products on that market is suspended by action taken by the market licensee, or is contrary to a direction given to the market licensee by ASIC under subsection 794D(2) or 798J(2).

1042F Inciting, inducing or encouraging an act or omission constitutes *procuring* the omission

(1) For the purposes of this Division, but without limiting the meaning that the expression ***procure*** has apart from this section, if a person incites, induces, or encourages an act or omission by another person, the first-mentioned person is taken to ***procure*** the act or omission by the other person.

(2) Subsection (1) does not limit the application in relation to provisions in this Division of:
  (a) section 6 of the *Crimes Act 1914*; or
  (b) section 11.1, 11.2, 11.2A, 11.4 or 11.5 of the *Criminal Code*.

1042G Information in possession of officer of body corporate

(1) For the purposes of this Division:

(a) a body corporate is taken to possess any information which an officer of the body corporate possesses and which came into his or her possession in the course of the performance of duties as such an officer; and

(b) if an officer of a body corporate knows any matter or thing because he or she is an officer of the body corporate, it is to be presumed that the body corporate knows that matter or thing; and

(c) if an officer of a body corporate, in that capacity, is reckless as to a circumstance or result, it is to be presumed that the body corporate is reckless as to that circumstance or result; and

(d) for the purposes of paragraph 1043M(2)(b), if an officer of a body corporate ought reasonably to know any matter or thing because he or she is an officer of the body corporate, it is to be presumed that the body corporate ought reasonably to know that matter or thing.

(2) This section does not limit the application of section 769B in relation to this Division.

1042H Information in possession of partner or employee of partnership

(1) For the purposes of this Division:

(a) a member of a partnership is taken to possess any information:

(i) which another member of the partnership possesses and which came into the other member's possession in the other member's capacity as a member of the partnership; or

(ii) which an employee of the partnership possesses and which came into his or her possession in the course of the performance of duties as such an employee; and

(b) if a member or employee of a partnership knows any matter or thing because the member or employee is such a member or employee, it is to be presumed that every member of the partnership knows that matter or thing; and

(c) if a member or employee of a partnership, in that capacity, is reckless as to a circumstance or result, it is to be presumed that every member of the partnership is reckless as to that circumstance or result; and

(d) for the purposes of paragraph 1043M(2)(b), if a member or employee of a partnership ought reasonably to know any matter or thing because he or she is such a member or employee, it is to be presumed that every member of the partnership ought reasonably to know that matter or thing.

(2) This section does not limit the application of section 769B in relation to this Division.

Subdivision B—The prohibited conduct

1043A Prohibited conduct by person in possession of inside information

(1) Subject to this Subdivision, if:

(a) a person (the ***insider***) possesses inside information; and

(b) the insider knows, or ought reasonably to know, that the matters specified in paragraphs (a) and (b) of the definition of ***inside information*** in section 1042A are satisfied in relation to the information;

the insider must not (whether as principal or agent):

(c) apply for, acquire, or dispose of, relevant Division 3 financial products, or enter into an agreement to apply for, acquire, or dispose of, relevant Division 3 financial products; or

(d) procure another person to apply for, acquire, or dispose of, relevant Division 3 financial products, or enter into an agreement to apply for, acquire, or dispose of, relevant Division 3 financial products.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see section 1043M.

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see sections 1043N and 1317S.

(2) Subject to this Subdivision, if:

(a) a person (the ***insider***) possesses inside information; and

(b) the insider knows, or ought reasonably to know, that the matters specified in paragraphs (a) and (b) of the definition of ***inside information*** in section 1042A are satisfied in relation to the information; and

(c) relevant Division 3 financial products are able to be traded on a financial market operated in this jurisdiction;

the insider must not, directly or indirectly, communicate the information, or cause the information to be communicated, to another person if the insider knows, or ought reasonably to know, that the other person would or would be likely to:

(d) apply for, acquire, or dispose of, relevant Division 3 financial products, or enter into an agreement to apply for, acquire, or dispose of, relevant Division 3 financial products; or

(e) procure another person to apply for, acquire, or dispose of, relevant Division 3 financial products, or enter into an agreement to apply for, acquire, or dispose of, relevant Division 3 financial products.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see section 1043M.

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see sections 1043N and 1317S.

(3) For the purposes of the application of the *Criminal Code* in relation to an offence based on subsection (1) or (2):

(a) paragraph (1)(a) is a physical element, the fault element for which is as specified in paragraph (1)(b); and

(b) paragraph (2)(a) is a physical element, the fault element for which is as specified in paragraph (2)(b).

1043B Exception for withdrawal from registered scheme

Subsection 1043A(1) does not apply in respect of a member's withdrawal from a registered scheme if the amount paid to the member on withdrawal is calculated (so far as is reasonably practicable) by reference to the underlying value of the assets of the financial or business undertaking or scheme, common enterprise, investment contract or time-sharing scheme to which the member's interest relates, less any reasonable charge for acquiring the member's interest.

1043C Exception for underwriters

(1) Subsection 1043A(1) does not apply in respect of:

(a) applying for or acquiring securities or managed investment products under an underwriting agreement or a sub-underwriting agreement; or

(b) entering into an agreement referred to in paragraph (a); or

(c) disposing of securities or managed investment products acquired under an agreement referred to in paragraph (a).

(2) Subsection 1043A(2) does not apply in respect of:

(a) the communication of information in relation to securities or managed investment products to a person solely for the purpose of procuring the person to enter into an underwriting agreement in relation to any such securities or managed investment products; or

(b) the communication of information in relation to securities or managed investment products by a person who may be required under an underwriting agreement to apply for or acquire any such securities or managed investment products if the communication is made to another person solely for the purpose of procuring the other person to do either or both of the following:

(i) enter into a sub-underwriting agreement in relation to any such securities or managed investment products;

(ii) apply for any such securities or managed investment products.

1043D Exception for acquisition pursuant to legal requirement

Subsection 1043A(1) does not apply in respect of the acquisition of financial products pursuant to a requirement imposed by this Act.

1043E Exception for information communicated pursuant to a legal requirement

Subsection 1043A(2) does not apply in respect of the communication of information pursuant to a requirement imposed by the Commonwealth, a State, a Territory or any regulatory authority.

1043F Chinese wall arrangements by bodies corporate

A body corporate does not contravene subsection 1043A(1) by entering into a transaction or agreement at any time merely because of information in the possession of an officer or employee of the body corporate if:

(a) the decision to enter into the transaction or agreement was taken on its behalf by a person or persons other than that officer or employee; and

(b) it had in operation at that time arrangements that could reasonably be expected to ensure that the information was not communicated to the person or persons who made the decision and that no advice with respect to the transaction or agreement was given to that person or any of those persons by a person in possession of the information; and

(c) the information was not so communicated and no such advice was so given.

1043G Chinese wall arrangements by partnerships etc.

(1) The members of a partnership do not contravene subsection 1043A(1) by entering into a transaction or agreement at any time merely because one or more (but not all) of the members, or an employee or employees of the partnership, are in actual possession of information if:

(a) the decision to enter into the transaction or agreement was taken on behalf of the partnership by any one or more of the following persons:

(i) a member or members who are taken to have possessed the information merely because another member or other members, or an employee or employees of the partnership, were in possession of the information;

(ii) an employee or employees of the partnership who was not or were not in possession of the information; and

(b) the partnership had in operation at that time arrangements that could reasonably be expected to ensure that the information was not communicated to the person or persons who made the decision and that no advice with respect to the transaction or agreement was given to that person or any of those persons by a person in possession of the information; and

(c) the information was not so communicated and no such advice was so given.

(2) A member of a partnership does not contravene subsection 1043A(1) by entering into a transaction or agreement otherwise than on behalf of the partnership merely because the member is taken to possess information that is in the possession of another member or an employee of the partnership.

1043H Exception for knowledge of person's own intentions or activities

A natural person does not contravene subsection 1043A(1) by entering into a transaction or agreement in relation to financial products issued by another person merely because the person is aware that he or she proposes to enter into, or has previously entered into or proposed to enter into, one or more transactions or agreements in relation to financial products issued by the other person or by a third person.

1043I Exception for bodies corporate

(1) A body corporate does not contravene subsection 1043A(1) by entering into a transaction or agreement in relation to financial products issued by another person merely because the body corporate is aware that it proposes to enter into, or has previously entered into or proposed to enter into, one or more transactions or agreements in relation to financial products issued by the other person or by a third person.

(2) Subject to subsection (3), a body corporate does not contravene subsection 1043A(1) by entering into a transaction or agreement in relation to financial products issued by another person merely because an officer or employee of the body corporate is aware that the body corporate proposes to enter into, or has previously entered into or proposed to enter into, one or more transactions or agreements in relation to financial products issued by the other person or by a third person.

(3) Subsection (2) does not apply unless the officer or employee of the body corporate became aware of the matters referred to in that subsection in the course of the performance of duties as such an officer or employee.

1043J Exception for officers or agents of body corporate

(1) Subject to subsection (2), a person (the ***first person***) does not contravene subsection 1043A(1) by entering into a transaction or agreement on behalf of a person (the ***second person***) in relation to financial products issued by another person (the ***third person***) merely because the first person is aware that the second person proposes to enter into, or has previously entered into or proposed to enter into, one or more transactions or agreements in relation to financial products issued by the third person or by a fourth person.

(2) Subsection (1) does not apply unless the first person became aware of the matters referred to in that subsection in the course of the performance of duties as an officer or employee of the second person or in the course of acting as an agent of the second person.

1043K Transactions by holder of financial services licence or a representative of the holder of such a licence

A person (the ***agent***) does not contravene subsection 1043A(1) by applying for, acquiring, or disposing of, or entering into an agreement to apply for, acquire, or dispose of, financial products that are able to be traded on a licensed market if:

(a) the agent is a financial services licensee or a representative of a financial services licensee; and

(b) the agent entered into the transaction or agreement concerned on behalf of another person (the ***principal***) under a specific instruction by the principal to enter into that transaction or agreement; and

(c) the licensee had in operation, at the time when that transaction or agreement was entered into, arrangements that could reasonably be expected to ensure that any information in the possession of the licensee, or of any representative of the licensee, as a result of which the person in possession of the information would be prohibited by subsection 1043A(1) from entering into that transaction or agreement was not communicated to the agent and that no advice with respect to the transaction or agreement was given to the principal or to the agent by a person in possession of the information; and

(d) the information was not so communicated and no such advice was so given; and

(e) the principal is not an associate of the licensee or of any representative of the licensee;

but nothing in this section affects the application of subsection 1043A(1) in relation to the principal.

1043L A specific situation in which a compensation order under section 1317HA may be made

Situation to which this section applies

(1) If:

(a) a person (the ***insider***) possesses information that is not generally available but, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of Division 3 financial products (other than derivatives); and

(b) the insider knows that, or is reckless as to whether:

(i) the information is not generally available; and

(ii) if the information were generally available, it might have a material effect on the price or value of those Division 3 financial products; and

(c) the insider (whether as principal or agent) in contravention of subsection 1043A(1):

(i) applies for, acquires, or disposes of, or enters into an agreement to apply for, acquire, or dispose of, any such Division 3 financial products; or

(ii) procures another person to apply for, acquire, or dispose of, or to enter into an agreement to apply for, acquire, or dispose of, any such Division 3 financial products;

the following subsections apply.

Compensation for damage suffered by person applying for the Division 3 financial products

(2) If the insider applied for or agreed to apply for, or procured another person to apply for or to agree to apply for, the Division 3 financial products, the issuer of the products may, by action under section 1317HA, recover as compensation for damage suffered by the issuer, the amount (if any) by which the price described in the first of the following paragraphs was less than the price described in the second of those paragraphs:

(a) the price at which the products were applied for, or agreed to be applied for, by the insider or the other person;

(b) the price at which they would have been likely to have been disposed of in a disposal made at the time of the application or the time of the agreement, as the case may be, if the information had been generally available.

The action may be taken against the insider, the other person or any other person involved in the contravention.

Compensation for damage suffered by person disposing of the Division 3 financial products

(3) If the insider acquired or agreed to acquire, or procured another person to acquire or to agree to acquire, the Division 3 financial products from a person (in this subsection and subsection (5) called the ***disposer***) who did not possess the information, the disposer may, by action under section 1317HA, recover, as compensation for damage suffered by the disposer, the amount (if any) by which the price described in the first of the following paragraphs was less than the price described in the second of those paragraphs:

(a) the price at which the financial products were acquired, or agreed to be acquired, by the insider or the other person from the disposer;

(b) the price at which they would have been likely to have been acquired in an acquisition made at the time of the first-mentioned acquisition or the time of the agreement, as the case may be, if the information had been generally available.

The action may be taken against the insider, the other person or any other person involved in the contravention.

Compensation for damage suffered by person acquiring the Division 3 financial products

(4) If the insider disposed of or agreed to dispose of, or procured another person to dispose of or to agree to dispose of, the Division 3 financial products to a person (in this subsection and subsection (5) called the ***acquirer***) who did not possess the information, the acquirer may, by action under section 1317HA, recover, as compensation for damage suffered by the acquirer, the amount (if any) by which the price described in the first of the

following paragraphs was greater than the price described in the second of those paragraphs:

(a) the price at which the financial products were disposed of, or agreed to be disposed of, by the insider or the other person to the acquirer;

(b) the price at which they would have been likely to have been disposed of in a disposal made at the time of the first-mentioned disposal or the time of the agreement, as the case may be, if the information had been generally available.

The action may be taken against the insider, the other person or any other person involved in the contravention.

Additional situations in which issuer may recover

(5) In addition to any action that may be brought as provided by subsection (3) or (4), the issuer of the financial products may, in the case of an acquisition or disposal of, or an agreement to acquire or dispose of, the financial products by the insider or another person in the circumstances mentioned in that subsection, by action under section 1317HA, recover, as compensation for damage suffered by the issuer:

(a) in the case of an acquisition or agreement to acquire the financial products—the amount (if any) by which the price described in the first of the following subparagraphs was less than the price described in the second of those subparagraphs:

(i) the price at which the financial products were acquired, or agreed to be acquired, by the insider or other person from the disposer;

(ii) the price at which they were likely to have been acquired in an acquisition made at the time of the first-mentioned acquisition or the time of the agreement, as the case may be, if the information had been generally available; or

(b) in the case of a disposal or an agreement to dispose of financial products—the amount (if any) by which the price described in the first of the following subparagraphs was greater than the price described in the second of those subparagraphs:

(i) the price at which the financial products were disposed of, or agreed to be disposed of, by the insider or other person to the acquirer;

(ii) the price at which they would have been likely to have been disposed of at the time of the first-mentioned disposal or the time of the agreement, as the case may be, if the information had been generally available.

The action may be taken against the insider, the other person or any other person involved in the contravention.

ASIC may take action for benefit of issuer

(6) ASIC may, if it considers that it is in the public interest to do so, bring an action in accordance with subsection (2) or (5) in the name of, and for the benefit of, an issuer of Division 3 financial products for the recovery of an amount that the issuer is entitled to recover by virtue of that subsection.

Relief from liability

(7) In an action brought against a person in accordance with this section because the person entered into, or procured another person to enter into, a transaction or agreement at a time when certain information was in the first-mentioned person's possession, the court may relieve the person wholly or partly from liability if it appears to the court that the information came into the first-mentioned person's possession solely as a result of the information having been made known as mentioned in subparagraph 1042C(1)(b)(i).

Special provision for registered schemes—treatment of amount recovered in respect of subsection (2) loss

(8) If:

(a) the responsible entity for a registered scheme; or

(b) ASIC in the name of, and for the benefit of, the responsible entity for a registered scheme;

brings an action in accordance with subsection (2) in respect of a subscription for, or any agreement to subscribe for, any interests in the scheme, any amount recovered in the action:

(c) is to be held by the responsible entity on behalf of the persons who, at the time of the subscription or agreement,

had rights or interests in the relevant financial or business undertaking or scheme, common enterprise, investment contract or time-sharing scheme; and

(d) is to be held on their behalf in the respective proportions that, at that time, their individual rights or interests bore to the total of all those rights or interests.

Special provision for registered schemes—treatment of amount recovered in respect of subsection (5) loss

(9) If:

(a) the responsible entity for a registered scheme; or

(b) ASIC in the name of, and for the benefit of, the responsible entity for a registered scheme;

brings an action in accordance with subsection (5) in respect of an acquisition or disposal of, or an agreement to acquire or dispose of, interests in the scheme, any amount recovered in the action:

(c) is to be held by the responsible entity on behalf of the persons who, at the time of the disposal, acquisition or agreement, had rights or interests in the relevant financial or business undertaking or scheme, common enterprise, investment contract or time-sharing scheme; and

(d) is to be held on their behalf in the respective proportions that, at that time, their individual rights or interests bore to the total of all those rights or interests.

(10) Any right of action that a person has by virtue of this section is in addition to any right that any other person has under section 1317HA.

1043M Defences to prosecution for an offence

(1) In a prosecution of a person for an offence based on subsection 1043A(1) or (2), it is not necessary for the prosecution to prove the non-existence of facts or circumstances which, if they existed, would, by virtue of section 1043B, 1043C, 1043D, 1043E, 1043F, 1043G, 1043H, 1043I, 1043J or 1043K, preclude the act or omission from constituting a contravention of subsection 1043A(1) or (2), as the case may be, but it is a defence if the facts or circumstances existed.

Note: A defendant bears an evidential burden in relation to the facts or circumstances. See subsection 13.3(3) of the *Criminal Code*.

(2) In a prosecution brought against a person for an offence based on subsection 1043A(1) because the person entered into, or procured another person to enter into, a transaction or agreement at a time when certain information was in the first-mentioned person's possession:

(a) it is a defence if the information came into the first-mentioned person's possession solely as a result of the information having been made known as mentioned in subparagraph 1042C(1)(b)(i); and

(b) it is a defence if the other party to the transaction or agreement knew, or ought reasonably to have known, of the information before entering into the transaction or agreement.

Note: A defendant bears an evidential burden in relation to the matters referred to in paragraphs (a) and (b). See subsection 13.3(3) of the *Criminal Code*.

(3) In a prosecution against a person for an offence based on subsection 1043A(2) because the person communicated information, or caused information to be communicated, to another person:

(a) it is a defence if the information came into the first-mentioned person's possession solely as a result of the information having been made known as mentioned in subparagraph 1042C(1)(b)(i); and

(b) it is a defence if the other person knew, or ought reasonably to have known, of the information before the information was communicated.

Note: A defendant bears an evidential burden in relation to the matters referred to in paragraphs (a) and (b). See subsection 13.3(3) of the *Criminal Code*.

1043N Relief from civil liability

In proceedings against a person under Part 9.4B (including under section 1317HA) relating to a contravention of subsection 1043A(1) or (2), the court may relieve the person wholly or partly from liability if it appears to the court that:

(a) in any case—the circumstances in any of the sections referred to in subsection 1043M(1) applied; or

(b) in the case of subsection 1043A(1)—the circumstance referred to in paragraph 1043M(2)(a) or (b) applied; or

(c) in the case of subsection 1043A(2)—the circumstance referred to in paragraph 1043M(3)(a) or (b) applied.

1043O Powers of Court

If, in a proceeding instituted under this Act, the Court finds that a contravention of section 1043A has occurred, the Court may, in addition to any other orders that it may make under any other provision of this Act, make such order or orders as it thinks just, including, but without limiting the generality of the above, any one or more of the following orders:

(a) an order restraining the exercise of rights attached to Division 3 financial products;

(b) an order restraining the issue of Division 3 financial products;

(c) an order restraining the acquisition or disposal of Division 3 financial products;

(d) an order directing the disposal of Division 3 financial products;

(e) an order vesting Division 3 financial products in ASIC;

(f) an order cancelling an agreement for the acquisition or disposal of Division 3 financial products;

(g) an order cancelling an Australian financial services licence;

(h) for the purpose of securing compliance with any other order made under this section, an order directing a person to do or refrain from doing a specified act.

Division 4—Defences, relief and limits on liability

1044A General defence or relief for publishers

(1) It is a defence to a prosecution for an offence based on a provision of this Part committed by the publication of an advertisement if:

(a) the defendant was, at that time, a person whose business it was to publish or arrange for the publication of advertisements; and

(b) they received the advertisement for publication in the ordinary course of that business and did not know, and had no reason to believe, that its publication would amount to an offence against that provision.

Note: A defendant bears an evidential burden in relation to the matters in subsection (1). See subsection 13.3(3) of the *Criminal Code*.

(2) In proceedings against a person under:

(a) Part 9.4B (including under section 1317H or 1317HA) relating to a contravention of a civil penalty provision that is in this Part; or

(b) section 1041I relating to a contravention of a provision to which that section applies;

the court may relieve the person wholly or partly from liability if it appears to the court that the circumstances mentioned in paragraphs (1)(a) and (b) applied.

1044B Limit on liability for misleading or deceptive conduct

State or Territory professional standards law limits liability

(1) A professional standards law of a State, the Australian Capital Territory or the Northern Territory applies to limit occupational liability relating to an action for contravention of section 1041H in the same way as it limits occupational liability arising under a law of the State or Territory.

Note: Section 1041H prohibits misleading or deceptive conduct by a person in relation to a financial product or financial service.

(2) However, the professional standards law applies for that purpose:

(a) only in relation to a scheme that was prescribed by the regulations at the time (the ***contravention time***) of the contravention; and

(b) as if the scheme were in force under that law at the contravention time in the form the scheme would have been in if:

(i) the scheme had not been amended or revoked under that law since the scheme was first prescribed; and

(ii) the modifications (if any) prescribed by the regulations at the contravention time had been made to the scheme.

Which State's or Territory's professional standards law applies?

(3) For the purposes of working out whether a professional standards law of a particular State or Territory applies under subsection (1) in relation to a particular contravention of section 1041H, choice of law rules operate in relation to the contravention in the same way as they operate in relation to a tort.

Definitions

(4) In this section:

modifications includes additions, omissions and substitutions.

occupation includes profession and trade.

occupational association means a body:

(a) that represents the interests of persons who have the same occupation; and

(b) whose membership is limited principally to such persons.

occupational liability means civil liability arising directly or vicariously from anything done or omitted by a member of an occupational association in the course of his or her occupation.

professional standards law means a law providing for the limitation of occupational liability by reference to schemes for limiting that liability that were formulated and published in accordance with that law.

Division 5—Miscellaneous

1045A Exemptions and modifications by regulations

(1) The regulations may:

(a) exempt a person or class of persons from all or specified provisions of this Part; or

(b) exempt a financial product or a class of financial products from all or specified provisions of this Part; or

(c) provide that this Part applies as if specified provisions were omitted, modified or varied as specified in the regulations.

(2) For the purpose of this section, the ***provisions of this Part*** include:

(a) definitions in this Act, or in the regulations, as they apply to references in this Part; and

(b) any provisions of Part 10.2 (transitional provisions) that relate to provisions of this Part.

Part 7.11—Title and transfer

Division 1—Title to certain securities

1070A Nature of shares and certain other interests in a company or registered scheme

(1) A share, other interest of a member in a company or interest of a person in a registered scheme:
  (a) is personal property; and
  (b) is transferable or transmissible as provided by:
    (i) the company's, or scheme's, constitution; or
    (ii) the operating rules of a prescribed CS facility if they are applicable; and
  (c) is capable of devolution by will or by operation of law.

(2) Paragraph (1)(c) has effect subject to:
  (a) in the case of a company:
    (i) the company's constitution (if any); and
    (ii) any replaceable rules that apply to the company; and
    (iii) the operating rules of a prescribed CS facility if they apply to the share or interest; and
  (b) in the case of a scheme:
    (i) the scheme's constitution; and
    (ii) the operating rules of a prescribed CS facility if they apply to the interest.

(3) Subject to subsection (1):
  (a) the laws applicable to ownership of, and dealing with, personal property apply to a share, other interest of a member in a company or interest of a person in a registered scheme as they apply to other property; and
  (b) equitable interests in respect of a share, interest of a member in a company or other interest of a person in a registered scheme may be created, dealt with and enforced as in the case of other personal property.

(4) For the purposes of any law, a share, other interest of a member in a company or interest of a person in a registered scheme is taken to be situated:

(a) if the share, interest in a company, or interest in a registered scheme is entered on the register kept under section 169—in the State or Territory where that register is kept; or

(b) if the share or interest in the company is entered on an overseas branch register kept under section 178—in the foreign country where that register is kept.

1070B Numbering of shares

(1) Except as provided in subsection (2), a company must ensure that each share in the company is distinguished by an appropriate number.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) Despite subsection (1):

(a) if at any time all the issued shares in a company, or all the issued shares in a company of a particular class:

(i) are fully paid up; and

(ii) rank equally for all purposes;

none of those shares is required to have a distinguishing number so long as each of those shares remains fully paid up, and ranks equally for all purposes with all shares of the same class for the time being issued and fully paid up; and

(b) if:

(i) all the issued shares in a company are evidenced by certificates in accordance with section 1070C; and

(ii) each certificate is distinguished by an appropriate number; and

(iii) that number is recorded in the register of members;

none of those shares is required to have a distinguishing number; and

(c) a share need not have a distinguishing number if the operating rules of a prescribed CS facility through which it is able to be transferred provide that the share need not have a distinguishing number.

Note: A defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code*.

1070C Matters to be specified in share certificate

(1) A company must ensure that a certificate it issues specifying the shares held by a member of the company states:

(a) the name of the company and the fact that it is registered under this Act; and

(b) the class of the shares; and

(c) the amount (if any) unpaid on the shares.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) A certificate issued in accordance with subsection (1) specifying shares held by a member of a company is prima facie evidence of the title of the member to the shares.

(3) A failure to comply with subsection (1) does not affect the rights of a holder of shares.

1070D Loss or destruction of title documents for certain securities

(1) This section applies to the following securities:

(a) shares in a company;

(b) debentures of a company;

(c) interests in a registered scheme.

(2) This section applies to an interest in a registered scheme as if:

(a) references to a company were instead references to the responsible entity of the registered scheme; and

(b) references to the directors of a company were instead references to the directors of the responsible entity of the registered scheme.

(3) A company must, in accordance with subsection (4), issue a duplicate certificate or other title document for securities if:

(a) the certificate or document is lost or destroyed; and

(b) the owner of the securities applies to the company for the duplicate in accordance with subsection (5); and

(c) the owner complies with any requirements made in accordance with subsection (6).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(4) The company must issue the duplicate:

(a) if the company requires the payment of an amount not exceeding the amount prescribed by regulations made for the purposes of this paragraph—within 21 days after the payment is received by the company or within such longer period as ASIC approves; or

(b) in a case to which paragraph (a) does not apply—within 21 days after the application is made or within such longer period as ASIC approves.

(5) The application must be accompanied by:

(a) a statement in writing that the certificate or other document:

(i) has been lost or destroyed; and

(ii) has not been pledged, sold or otherwise disposed of; and

(b) if the certificate or other document has been lost—a statement in writing that proper searches have been made; and

(c) an undertaking in writing that if the certificate or other document is found or received by the owner it will be returned to the company.

(6) The directors of the company may, before accepting an application for the issue of a duplicate certificate, require the applicant to do either or both of the following:

(a) place an advertisement in a daily newspaper circulating in a place specified by the directors stating that:

(i) the certificate or other document has been lost or destroyed; and

(ii) the owner intends, after the end of 14 days after the publication of the advertisement, to apply to the company for a duplicate certificate;

(b) give a bond for an amount equal to at least the current market value of the securities indemnifying the company against loss following the production of the original certificate or other document.

(7) If:

(a) a certificate or other title document for securities is cancelled in reliance on the operating rules of a prescribed CS facility; and

(b) having regard to those provisions, the certificate or other document should not have been cancelled;

this section applies to the certificate or other document as though it were destroyed on its cancellation.

Division 2—Transfer of certain securities

Subdivision A—General provisions

1071A Application of the Subdivision to certain securities

(1) This Subdivision applies to the following securities:
  (a) shares in a company;
  (b) debentures of a company;
  (c) interests in a registered scheme.

(2) This Subdivision applies to an interest in a registered scheme as if:
  (a) references to a company were instead references to the responsible entity of the registered scheme; and
  (b) references to the constitution of a company were instead references to the constitution of the registered scheme; and
  (c) references to members of a company were instead references to members of the registered scheme.

1071B Instrument of transfer

(1) This section does not apply to a transfer of a security through a prescribed CS facility.

(2) Subject to subsection (5), a company must only register a transfer of securities if a proper instrument of transfer (see subsections (3) and (4)) has been delivered to the company. This is so despite:
  (a) anything in its constitution; or
  (b) anything in a deed relating to debentures.

  Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(3) An instrument of transfer is not a proper instrument of transfer for the purposes of subsection (2) if it does not show the details, specified in the regulations, in relation to the company concerned.

(4) If the transfer of the securities is covered by Division 3 of this Part, then (in addition to subsection (3)), the instrument is not a proper instrument of transfer for the purposes of subsection (2) unless it is

a sufficient transfer of the securities under regulations made for the purposes of that Division.

(5) Subsection (2) does not prejudice the power of the company to register, as the holder of securities, a person to whom the right to the securities has devolved by will or by operation of law.

(6) Subsections (7) to (13) deal with a transfer of a security of a dead holder by the dead holder's personal representative. They deal with the transfer differently depending on whether the personal representative is a local representative or not.

(7) The personal representative is a ***local representative*** if the representative is duly constituted as a personal representative under the law of the State or Territory in which the security is situated.

Note: Subsection 1070A(4) provides that the security is situated where the relevant register is kept.

(8) If the personal representative is a local representative, a transfer of the security by the representative is as valid as if the representative had been registered as the holder of the security at the time when the instrument of transfer was executed.

(9) If:

(a) the personal representative is not a local representative; and

(b) the representative:

(i) executes an instrument of transfer of the security to the representative or to another person; and

(ii) delivers the instrument to the company; and

(iii) delivers to the company with the instrument a statement in writing made by the representative to the effect that, to the best of the representative's knowledge, information and belief, no grant of representation of the estate of the deceased holder has been applied for or made in the State or Territory in which the security is located and no application for such a grant will be made; and

(c) the statement is made within 3 months immediately before the date on which the statement is delivered to the company;

the company must (subject to subsection (10)) register the transfer and pay to the representative any dividends or other money accrued

in respect of the security up to the time when the instrument was executed.

(10) Subsection (9) does not operate so as to require the company to do anything that it would not have been required to do if the personal representative were a local representative.

(11) A transfer or payment made under subsection (9) and a receipt or acknowledgment of such a payment is, for all purposes, as valid and effectual as if the personal representative were a local representative.

(12) For the purposes of this section, an application by a personal representative of a dead person for registration as the holder of a security in place of the dead person is taken to be an instrument of transfer effecting a transfer of the security to the personal representative.

(13) The production to a company of a document that is, under the law of a State or Territory, sufficient evidence of probate of the will, or letters of administration of the estate, of a dead person having been granted to a person, is sufficient evidence of the grant (for the company's purposes). This is so despite:

(a) anything in its constitution; or

(b) in a deed relating to debentures.

1071C Occupation need not appear in transfer document, register etc.

(1) A document transferring securities need not state the occupation of the transferor or transferee and, if it is signed by a person, the signature need not be witnessed.

(2) Subsection (1) applies despite anything in:

(a) the constitution of:

(i) a company; or

(ii) a body referred to in paragraph 1073C(a) or (b); or

(b) the terms and conditions on which securities are created or issued.

(3) The omission from a register, certificate, document transferring securities or other document relating to a security, of a statement of the occupation of a person who is, or is entitled to be, registered as

the holder of the security does not breach any law, constitution, trust deed or other document relating to the securities.

1071D Registration of transfer at request of transferor

(1) A written application by the transferor of a security of a company for the transferee's name to be entered in the appropriate register is as effective (for the company's purposes) as if it were an application by the transferee. The application is subject to the same conditions as it would be if it had been made by the transferee.

(2) If the transferor of a security of a company requests the company in writing to do so, the company must, by written notice, require a person who has possession, custody or control of either or both of the following:

(a) any title documents for the security;

(b) the instrument of transfer of the security;

to bring it or them into the office of the company within a specified period, to have the document cancelled or rectified and the transfer registered or otherwise dealt with.

(3) The period specified under subsection (2) must be not less than 7 and not more than 28 days after the date of the notice.

(4) If a person refuses or fails to comply with a notice given under subsection (2), the transferor may apply to the Court for the issue of a summons for that person to appear before the Court and show cause why the documents mentioned in the notice should not be delivered up or produced as required by the notice.

(5) The Court may:

(a) if the person appears:

(i) examine the person upon oath or affirmation; and

(ii) receive other evidence; and

(b) if the person does not appear after being duly served with the summons—receive evidence in the person's absence; and

(c) in either case order the person to deliver up such documents to the company upon such terms or conditions as the Court considers just and reasonable.

The costs of the summons and of proceedings on the summons are in the discretion of the Court.

(6) Lists of documents required to be brought in under subsection (2) but not brought in in accordance with a requirement made under subsection (2) or delivered up in accordance with an order under subsection (5), must be:

(a) exhibited in the office of the company; and

(b) advertised in the *Gazette* and in such newspapers and at such times as the company thinks fit.

1071E Notice of refusal to register transfer

If a company refuses to register a transfer of a security of the company, it must, within 2 months after the date on which the transfer was lodged with it, give the transferee notice of the refusal.

Note: Failure to comply with this section is an offence (see subsection 1311(1)).

1071F Remedy for refusal to register transfer or transmission

(1) If a relevant authority in relation to a company:

(a) refuses or fails to register; or

(b) refuses or fails to give its consent or approval to the registration of;

a transfer or transmission of securities of the company, the transferee or transmittee may apply to the Court for an order under this section.

(2) If the Court is satisfied on the application that the refusal or failure was without just cause, the Court may:

(a) order that the transfer or transmission be registered; or

(b) make such other order as it thinks just and reasonable, including:

(i) in the case of a transfer or transmission of shares—an order providing for the purchase of the shares by a specified member of the company or by the company; and

(ii) in the case of a purchase by the company—an order providing for the reduction accordingly of the capital of the company.

(3) In this section:

relevant authority, in relation to a company, means:

(a) a person who has, 2 or more persons who together have, or a body that has, authority to register a transfer or transmission of securities of the company; or

(b) a person, 2 or more persons, or a body, whose consent or approval is required before a transfer or transmission of securities of the company is registered.

1071G Certification of transfers

(1) The certification by a company of an instrument of transfer of securities of the company:

(a) is taken as a representation by the company to any person acting on the faith of the certification that there have been produced to the company such documents as on the face of them show prima facie title to the securities in the transferor named in the instrument of transfer; and

(b) is not taken as a representation that the transferor has any title to the securities.

(2) If a person acts on the faith of a false certification by a company made negligently, the company is under the same liability to the person as if the certification had been made fraudulently.

(3) A certification may be expressed to be limited to 42 days or any longer period from the date of certification. If it is, the company and its officers and employees are not, in the absence of fraud, liable in respect of the registration of any transfer of securities comprised in the certification after the end of:

(a) the period so limited; or

(b) any extension of that period given by the company;

if the instrument of transfer has not, within that period, been lodged with the company for registration.

(4) For the purposes of this section:

(a) an instrument of transfer is taken to be certified if it bears the words “certificate lodged” or words to the like effect; and

(b) the certification of an instrument of transfer is taken to be made by a company if:

(i) the person issuing the instrument is a person authorised to issue certified instruments of transfer on the company's behalf; and

(ii) the certification is signed by a person authorised to certify transfers on the company's behalf or by an officer of the company or of a body corporate so authorised; and

(c) a certification that purports to be authenticated by a person's signature or initials (whether handwritten or not) is taken to be signed by the person unless it is shown that the signature or initials:

(i) was not or were not placed there by the person; and

(ii) was not or were not placed there by any other person authorised to use the signature or initials;

for the purpose of certifying transfers on the company's behalf.

1071H Duties of company with respect to issue of certificates

(1) Subject to subsection (2), within 2 months after a company issues a security, the company must:

(a) complete and have ready for delivery to the holder of the security all the appropriate certificates or other title documents in connection with the issue of the security; and

(b) unless otherwise instructed by the holder, send or deliver the completed certificates or other title documents to:

(i) the holder; or

(ii) if the holder has instructed the company in writing to send them to a nominated person—that person.

Paragraph (a) has effect in relation to shares subject to the conditions on which the shares are issued.

(2) If the operating rules of a prescribed CS facility include a provision to the effect that:

(a) no document is required by subsection (1) to be completed and delivered by a company in relation to the issue of a security in specified circumstances; or

(b) the only document required by subsection (1) to be completed and delivered by a company in relation to the issue of a security in specified circumstances is the document required by the provision;

the provision has effect accordingly.

(3) Within one month after the date on which a transfer of a security is lodged with a company, the company must:

(a) complete and have ready for delivery to the transferee all the appropriate transfer and title documents in connection with the transfer; and

(b) unless otherwise instructed by the transferee, send or deliver the completed documents to:

(i) the transferee; or

(ii) if the transferee has instructed the company in writing to send them to a nominated person—that person.

This subsection does not apply to a transfer that the company is for any reason entitled to refuse to register and does not register.

(4) The only document required by subsection (3) to be completed and delivered by a company in relation to a transfer covered by the operating rules of a prescribed CS facility is the document (if any) that those rules require to be completed and delivered.

(5) A company need not comply:

(a) with subsection (1) in relation to the issue of a security; or

(b) with subsection (3) in relation to a transfer of a security;

if the person to whom the security is issued, or the transferee, has:

(c) applied to ASIC for the making of a declaration under this subsection; and

(d) been declared by ASIC, by writing published in the *Gazette*, to be a person in relation to whom this section does not apply.

(6) If:

(a) either:

(i) if subsection (1) applies—the holder referred to in that subsection serves a notice on the company requiring the company to remedy a contravention of that subsection; or

(ii) if subsection (3) applies—the transferee referred to in that subsection serves a notice on the company requiring the company to remedy a contravention of that subsection; and

(b) the company fails to remedy the contravention within 10 days after the service of the notice; and

(c) the person entitled to have the documents delivered to him or her applies to the Court for an order under this subsection;

the Court may make an order directing the company and any officer or employee of the company to remedy the contravention within such period as is specified in the order.

(7) An order under subsection (6) may provide that all costs of, and incidental to, the application are to be borne by:

(a) the company; or

(b) any officer or employee of the company who was involved in the contravention;

in such proportions as the Court thinks just and reasonable.

Subdivision B—Special provisions for shares

1072A Transmission of shares on death *(replaceable rule—see section 135)*

If shares not held jointly

(1) If a shareholder who does not own shares jointly dies, the company will recognise only the personal representative of the deceased shareholder as being entitled to the deceased shareholder's interest in the shares.

(2) If the personal representative gives the directors the information they reasonably require to establish the representative's entitlement to be registered as holder of the shares:

(a) the personal representative may:

(i) by giving a written and signed notice to the company, elect to be registered as the holder of the shares; or

(ii) by giving a completed transfer form to the company, transfer the shares to another person; and

(b) the personal representative is entitled, whether or not registered as the holder of the shares, to the same rights as the deceased shareholder.

(3) On receiving an election under subparagraph (2)(a)(i), the company must register the personal representative as the holder of the shares.

(4) A transfer under subparagraph (2)(a)(ii) is subject to the same rules (for example, about entitlement to transfer and registration of transfers) as apply to transfers generally.

If shares held jointly

(5) If a shareholder who owns shares jointly dies, the company will recognise only the survivor as being entitled to the deceased shareholder's interest in the shares. The estate of the deceased shareholder is not released from any liability in respect of the shares.

1072B Transmission of shares on bankruptcy *(replaceable rule—see section 135)*

(1) If a person entitled to shares because of the bankruptcy of a shareholder gives the directors the information they reasonably require to establish the person's entitlement to be registered as holder of the shares, the person may:

(a) by giving a written and signed notice to the company, elect to be registered as the holder of the shares; or

(b) by giving a completed transfer form to the company, transfer the shares to another person.

(2) On receiving an election under paragraph (1)(a), the company must register the person as the holder of the shares.

(3) A transfer under paragraph (1)(b) is subject to the same rules (for example, about entitlement to transfer and registration of transfers) as apply to transfers generally.

(4) This section has effect subject to the *Bankruptcy Act 1966.*

1072C Rights of trustee of estate of bankrupt shareholder

(1) If:

(a) because of the *Bankruptcy Act 1966*, a share in a company, being part of the property of a bankrupt, vests in the trustee of the bankrupt's estate; and

(b) the bankrupt is the registered holder of that share;

this section applies whether or not the trustee has been registered as the holder of the share.

(2) On producing such information as the company's directors properly require, the trustee is entitled to:

(a) the same dividends and other benefits; and

(b) the same rights, for example, but without limitation, rights in relation to:

(i) meetings of the company; or

(ii) documents, including notices of such meetings; or

(iii) voting; or

(iv) inspection of the company's records;

as the bankrupt would be entitled to if he or she were not a bankrupt.

(3) The trustee has the same rights:

(a) to transfer the share; and

(b) to require a person to do an act or give a consent in connection with completing or registering a transfer of the share;

as the bankrupt would have if he or she were not a bankrupt.

(4) If the trustee transfers the share, the transfer is as valid as if the trustee had been registered as the holder of the share when the trustee executed the instrument of transfer.

(5) A person or body whose consent or approval is required for the transfer of shares in the company must not unreasonably withhold consent or approval for the transfer of the share by the trustee.

(6) If:

(a) the company's constitution requires:

(i) the share to be offered for purchase to a member of the company; or

(ii) an invitation to buy the share to be issued to such a member; and

(b) as at the end of a reasonable period after the trustee so offers the share, or so issues such an invitation, no such member has agreed to buy the share from the trustee at a reasonable price;

the trustee may sell and transfer the share to a person other than such a member.

(7) A provision of the company's constitution is void as against the trustee in so far as, apart from this section, it would affect rights attached to the share:

(a) because the bankrupt is a bankrupt; or

(b) because of some event that led to the bankrupt becoming, or that indicated that the bankrupt was about to become, or might be about to become, a bankrupt; or

(c) for reasons including a reason referred to in paragraph (a) or (b).

(8) Nothing in this section limits the generality of anything else in it.

(9) This section has effect despite anything in the company's constitution.

1072D Transmission of shares on mental incapacity *(replaceable rule—see section 135)*

(1) If a person entitled to shares because of the mental incapacity of a shareholder gives the directors the information they reasonably require to establish the person's entitlement to be registered as the holder of the shares:

(a) the person may:

(i) by giving a written and signed notice to the company, elect to be registered as the holder of the shares; or

(ii) by giving a completed transfer form to the company, transfer the shares to another person; and

(b) the person is entitled, whether or not registered as the holder of the shares, to the same rights as the shareholder.

(2) On receiving an election under subparagraph (1)(a)(i), the company must register the person as the holder of the shares.

(3) A transfer under subparagraph (1)(a)(ii) is subject to the same rules (for example, about entitlement to transfer and registration of transfers) as apply to transfers generally.

1072E Trustee etc. may be registered as owner of shares

(1) In this section:

share, in relation to a body corporate, means a share in the body that is registered in a register kept in this jurisdiction.

(2) A trustee, executor or administrator of the estate of a dead person who was the registered holder of a share in a corporation may be registered as the holder of that share as trustee, executor or administrator of that estate.

(3) A trustee, executor or administrator of the estate of a dead person who was entitled in equity to a share in a corporation may, with the consent of:

(a) the corporation; and

(b) the registered holder of that share;

be registered as the holder of that share as trustee, executor or administrator of that estate.

(4) If:

(a) a person (the ***administrator***) is appointed, under a law of a State or Territory relating to the administration of the estates of persons who, through mental or physical infirmity, are incapable of managing their affairs, to administer the estate of a person who is so incapable; and

(b) the incapable person is the registered holder of a share in a corporation;

the administrator may be registered as the holder of that share as administrator of that estate.

(5) If:

(a) a person (the ***administrator***) is appointed, under a law of a State or Territory relating to the administration of the estates of a person who, through mental or physical infirmity, are incapable of managing their affairs, to administer the estate of a person who is so incapable; and

(b) the incapable person is entitled in equity to a share in a corporation;

the administrator may, with the consent of the corporation and of the registered holder of that share, be registered as the holder of the share as administrator of that estate.

(6) If:

(a) by virtue of the *Bankruptcy Act 1966*, a share in a body corporate, being the property of a bankrupt, vests in the Official Trustee in Bankruptcy; and

(b) the bankrupt is the registered holder of that share;

the Official Trustee may be registered as the holder of that share as the Official Trustee in Bankruptcy.

(7) If:

(a) by virtue of the *Bankruptcy Act 1966*, a share in a body corporate, being the property of a bankrupt, vests in the Official Trustee in Bankruptcy; and

(b) the bankrupt is entitled in equity to that share;

the Official Trustee may, with the consent of the body and of the registered holder of that share, be registered as the holder of that share as the Official Trustee in Bankruptcy.

(8) A person registered under subsection (2), (3), (4), (5), (6) or (7), is, while registered as mentioned in that subsection:

(a) subject to the same liabilities in respect of the share as those to which he, she or it would have been subject if the share had remained, or had been, as the case requires, registered in the name of the dead person, the incapable person or the bankrupt, as the case may be; and

(b) subject to no other liabilities in respect of the share.

(9) Shares in a corporation registered in a register and held by a trustee in respect of a particular trust may, with the consent of the corporation, be marked in the register in such a way as to identify them as being held in respect of the trust.

(10) Except as provided in this section and section 169:

(a) no notice of a trust, whether express, implied or constructive, must be entered on a register kept in this jurisdiction or be receivable by ASIC; and

(b) no liabilities are affected by anything done under a preceding subsection of this section or under section 169; and

(c) nothing so done affects the body corporate concerned with notice of a trust.

(11) A person must, within one month after beginning to hold shares in a proprietary company as trustee for, or otherwise on behalf of or on account of, a body corporate, serve on the company notice in writing that the person so holds the shares.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

1072F Registration of transfers *(replaceable rule—see section 135)*

(1) A person transferring shares remains the holder of the shares until the transfer is registered and the name of the person to whom they are being transferred is entered in the register of members in respect of the shares.

(2) The directors are not required to register a transfer of shares in the company unless:

(a) the transfer and any share certificate have been lodged at the company's registered office; and

(b) any fee payable on registration of the transfer has been paid; and

(c) the directors have been given any further information they reasonably require to establish the right of the person transferring the shares to make the transfer.

(3) The directors may refuse to register a transfer of shares in the company if:

(a) the shares are not fully-paid; or

(b) the company has a lien on the shares.

(4) The directors may suspend registration of transfers of shares in the company at the times and for the periods they determine. The periods of suspension must not exceed 30 days in any one calendar year.

1072G Additional general discretion for directors of proprietary companies to refuse to register transfers *(replaceable rule—see section 135)*

The directors of a proprietary company may refuse to register a transfer of shares in the company for any reason.

1072H Notices relating to non-beneficial and beneficial ownership of shares

(1) If, upon registration of a transfer of shares in a company, the transferee would hold non-beneficially particular shares (the ***relevant shares***), being all or any of the shares to which the transfer relates, the transferee must only lodge the instrument of transfer with the company for registration of the transfer if the instrument of transfer includes a notice that:

(a) contains a statement to the effect that, upon registration of the transfer, the transferee will hold the relevant shares non-beneficially; and

(b) sets out particulars of the relevant shares; and

(c) is signed by or on behalf of the transferee.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) The fact that a person has failed to comply with subsection (1) does not affect the validity of the registration of a transfer of shares in a company.

(3) If:

(a) an instrument of transfer of shares in a company includes a notice of the kind referred to in paragraph (1)(c) and is lodged with the company for registration of the transfer; and

(b) upon registration of the transfer, the transferee holds beneficially particular shares (in this subsection called the ***relevant shares***), being all or any of the shares particulars of which are set out in the notice;

then, before the end of 14 days beginning on registration of the transfer, the transferee must, whether or not the transferee begins before the end of that period to hold all or any of the relevant shares non-beneficially, give to the company a notice that:

(c) sets out the name and address of the transferee; and

(d) contains a statement to the effect that, as from registration of the transfer, the transferee holds the relevant shares beneficially; and

(e) sets out particulars of the relevant shares; and

(f) is signed by or on behalf of the transferee.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(4) If:

(a) an instrument of transfer of shares in a company is lodged with the company for registration of the transfer; and

(b) upon registration of the transfer, the transferee holds non-beneficially particular shares (in this subsection called the ***relevant shares***), being all or any of the shares to which the instrument of transfer relates (other than, in a case in which the instrument of transfer includes a notice of the kind referred to in paragraph (1)(c), the shares particulars of which are set out in the notice);

then, before the end of 14 days beginning on registration of the transfer, the transferee must, whether or not the transferee begins before the end of that period to hold any of the relevant shares beneficially, give to the company a notice that:

(c) sets out the name and address of the transferee; and

(d) contains a statement to the effect that, as from registration of the transfer, the transferee holds the relevant shares non-beneficially; and

(e) sets out particulars of the relevant shares; and

(f) is signed by or on behalf of the transferee.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(5) If:

(a) at a particular time, a person holds beneficially shares in a company; and

(b) immediately after that time, the person holds non-beneficially particular shares (in this subsection called the ***relevant shares***), being all or any of the shares referred to in paragraph (a);

then, before the end of 14 days beginning at that time, the person must, whether or not the person recommences before the end of

that period to hold any of the relevant shares beneficially, give to the company a notice that:

(c) sets out the name and address of the person; and

(d) contains a statement to the effect that, after that time, the person holds the relevant shares non-beneficially; and

(e) specifies that time and sets out particulars of the relevant shares; and

(f) is signed by or on behalf of the person.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(6) If:

(a) at a particular time, a person holds non-beneficially shares in a company; and

(b) immediately after that time, the person holds beneficially particular shares (in this subsection called the ***relevant shares***), being all or any of the shares referred to in paragraph (a);

then, before the end of 14 days beginning at that time, the person must, whether or not the person recommences before the end of that period to hold any of the relevant shares non-beneficially, give to the company a notice that:

(c) sets out the name and address of the person; and

(d) contains a statement to the effect that, after that time, the person holds the relevant shares beneficially; and

(e) specifies that time and sets out particulars of the relevant shares; and

(f) is signed by or on behalf of the person.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(7) In proceedings under, or for an offence based on a provision of, this section, a person is, unless the contrary is established, presumed to have been aware at a particular time of a circumstance of which an employee or agent of the person, being an employee or agent having duties or acting in relation to the transfer to, or ownership by, the person of a share or shares in the company concerned, was aware at that time.

(8) For the purposes of this section and of section 169:

(a) if, at a particular time, a person:

(i) holds shares in a capacity other than that of sole beneficial owner; or

(ii) without limiting the generality of subparagraph (i), holds shares as trustee for, as nominee for, or otherwise on behalf of or on account of, another person;

the first-mentioned person is taken to hold the shares non-beneficially at that time; and

(b) a person who holds shares at a particular time is taken to hold the shares beneficially at that time unless the person holds the shares non-beneficially at that time.

Division 3—Transfer of certain securities effected otherwise than through a prescribed CS facility

1073A Application of the Division to certain securities

(1) This Division applies to the following securities:

(a) shares in a company;

(b) debentures of a company;

(c) interests in a registered scheme, being interests that are covered by regulations made for the purposes of this paragraph;

(d) rights (whether existing or future, and whether contingent or not) to acquire, by way of issue, a security referred to in paragraph (a), (b) or (c) (whether or not on payment of any money or for any other consideration);

(da) a CGS depository interest;

(e) securities declared by ASIC under section 1073E to be securities to which the regulations apply.

(2) This Division applies to an interest in a registered scheme as if:

(a) references to a company were instead references to the responsible entity of the registered scheme; and

(b) references to the constitution of a company were instead references to the constitution of the registered scheme; and

(c) references to members of a company were instead references to members of the registered scheme.

1073B Definitions

In this Division, unless the contrary intention appears:

transfer of a financial product means:

(a) a change in the ownership of the financial product; or

(b) if the financial product is a right—the renunciation and transfer of the right.

transfer document for the transfer of a financial product means a document, or electronic message or other electronic communication, by which the financial product is transferred.

1073C Application of Division to certain bodies as if they were companies

This Division applies to the following as if they were companies:

(a) a body corporate (other than a company) that:
  (i) is incorporated in a State or Territory in this jurisdiction; and
  (ii) is prescribed by regulations made for the purposes of this subparagraph;

(b) an unincorporated society, association or body, that:
  (i) is formed or established in a State or Territory in this jurisdiction; and
  (ii) is included in the official list of a licensed market; and
  (iii) is prescribed by regulations made for the purposes of this paragraph.

1073D Regulations may govern transfer of certain securities

(1) The regulations may make provision in relation to transfers of securities that are not effected through a prescribed CS facility.

Regulations may make provision in relation to the transfer of securities

(2) The regulations may specify:

(a) the way in which a security may be transferred, including:
  (i) the forms (if any) to be used; and
  (ii) what amounts to a proper or sufficient transfer of a security; and

(b) the legal effect of a proper or sufficient transfer of a security; and

(c) the rights, liabilities and obligations of a person in relation to the transfer of a security, including the rights, liabilities and obligations of:
  (i) the transferor and transferee; and
  (ii) any other person involved in the transfer; and

(d) the circumstances in which a person will be taken to be involved in the transfer of a security for the purposes of the regulations; and

(e) the circumstances in which a person is required not to register, or give effect to, a transfer.

Sufficient transfer

(3) Without limiting paragraph (2)(a), the regulations may:
(a) specify the requirements for a document to be a sufficient transfer of a security; and
(b) provide that a document meeting specified requirements may be used:
(i) as a proper instrument of transfer for the purposes of section 1071B; and
(ii) as an instrument of transfer for the purposes of any other law or instrument governing or relating to the security.

Rights and liabilities in relation to transfer

(4) Without limiting paragraph (2)(c), the regulations may provide that a person:
(a) is taken to have:
(i) agreed to do, to accept or to be bound by a particular thing; or
(ii) done a particular thing; or
(iii) given particular warranties; or
(iv) done particular things on behalf of another person; or
(b) is taken to be authorised to do particular things on behalf of another person; or
(c) is taken to be bound by a particular act; or
(d) is liable to indemnify another person against particular loss or damage; or
(e) is entitled to assume a particular matter without inquiry.

Person involved in transfer

(5) Without limiting paragraph (2)(d), the regulations may provide for any of the following to be taken to be involved in a transfer of securities:
(a) a person who carries on a financial services business and who arranges for the transfer; and

(b) a person who operates a financial market on which the securities are sold; and

(c) a person who operates a licensed CS facility through which the securities are transferred; and

(d) a company with which the transfer is lodged for registration; and

(e) an associate of a person who is involved in the transfer.

The regulations may specify the circumstances in which a person will be taken to be an associate of another person for the purposes of the regulations.

Offences

(6) Without limiting subsection (2), the regulations may provide for offences in relation to:

(a) the use, or purported use, of a stamp of a person who:

(i) carries on a financial services business; or

(ii) operates a financial market; or

(iii) operates a clearing and settlement facility; or

(b) the execution of a document, or the transmission of an electronic message or other electronic communication, that may be used as a sufficient transfer under this Division; or

(c) the lodgment of a transfer document or title document for a security with the issuer of the security; or

(d) the use of identifying codes in relation to transfers of securities.

Jurisdiction

(7) The regulations may apply to conduct engaged in in this jurisdiction or elsewhere.

1073E ASIC may extend regulations to securities not otherwise covered

(1) ASIC may, by writing, declare that:

(a) particular securities; or

(b) a particular class of securities;

are securities to which this Division, and regulations made for the purposes of section 1073D, apply.

Note: The securities in respect of which a declaration under this subsection may be made are not limited to those covered by paragraphs 1073A(1)(a) to (da).

(2) ASIC may specify in the declaration modifications of the regulations that are to have effect in relation to the application of this Division and the regulations to the securities, or the class of securities, to which the declaration relates.

(3) A declaration under subsection (1) has effect accordingly.

(4) ASIC must cause a copy of a declaration under subsection (1) to be published in the *Gazette*.

(5) If conduct (including an omission) of a person would not have constituted an offence if a particular declaration under subsection (1) had not been made, that conduct does not constitute an offence unless, before the conduct occurred (in addition to complying with the gazettal requirement of subsection (4)):

(a) the text of the declaration was made available by ASIC on the internet; or

(b) ASIC gave written notice setting out the text of the declaration to the person.

In a prosecution for an offence to which this subsection applies, the prosecution must prove that paragraph (a) or (b) was complied with before the conduct occurred.

1073F Operation of this Division and regulations made for its purposes

(1) This section deals with the effect of the provisions of:

(a) this Division; and

(b) the regulations made for the purposes of this Division.

(2) The provisions apply in relation to a transfer of securities despite anything to the contrary in:

(a) this Act (other than this Division); or

(b) another law, or instrument, relating to the transfer of the securities.

(3) Except as provided in the provisions, the provisions do not affect the terms and conditions on which securities are sold.

(4) Nothing in the provisions affects any right of the issuer of a security to refuse:

(a) to acknowledge or register a person as the holder of a security; or

(b) to issue a security to a person;

on a ground other than an objection to the form of document, or electronic message or other electronic communication, that is lodged with or sent to the issuer and purports to transfer the security to the person.

(5) The registration of a transfer, or the issue, of a security by means of a transfer effected in accordance with regulations made for the purposes of this Division does not breach any law, constitution, trust deed or other instrument relating to financial products.

(6) Nothing in the provisions prevents or affects the use of:

(a) any other form of transfer of securities; or

(b) any other mode of executing a document transferring securities;

that is otherwise permitted by law.

(7) A transfer of a security by or to a trustee or legal representative may be effected by means of a transfer in accordance with regulations made for the purposes of this Division. The transfer may be so effected despite the means required by any law or the provisions of the instrument (if any) creating, or having effect in relation to, the trust or will under which the trustee or legal representative is appointed.

(8) In subsection (7):

legal representative means:

(a) the executor, original or by representation, of a will of a dead person; or

(b) the administrator of the estate of a dead person.

Division 4—Transfer of financial products effected through prescribed CS facility

1074A Financial products to which this Division applies

This Division only applies in relation to particular financial products and a prescribed CS facility if regulations made for the purposes of this section provide that all financial products, or a class of financial products that includes the financial products, are financial products to which this Division applies in relation to the prescribed CS facility (whether or not they are also products to which this Division applies in relation to other prescribed CS facilities).

1074B Definitions

In this Division, unless the contrary intention appears:

transfer of a financial product has the meaning given by section 1073B.

transfer document for the transfer of a financial product has the meaning given by section 1073B.

1074C Operating rules of prescribed CS facility may deal with transfer of title

(1) The operating rules of a prescribed CS facility may deal with the transfer of financial products through the facility.

(2) Without limiting subsection (1), the operating rules of a prescribed CS facility may deal with the way in which a financial product may be transferred, including specifying:

(a) the financial products that may be transferred through the facility; and

(b) how financial products are transferred through the facility; and

(c) the person or body (if any) authorised to determine whether a transfer substantially complies with the operating rules of the facility.

(3) Nothing in subsection (1) or (2) confers a discretion to deal with a matter in the operating rules of a prescribed CS facility if there is an obligation under section 822A for that matter to be dealt with in those rules.

1074D Valid and effective transfer if operating rules complied with

(1) If a transfer of a financial product is effected:

(a) through a prescribed CS facility; and

(b) in accordance with the operating rules of the facility;

the transfer is valid and effective for the purposes of any law or instrument governing or relating to the way in which the financial product may be transferred.

(2) For the purposes of this section, the transfer of a financial product is taken to be, and always to have been, effected in accordance with the operating rules of a prescribed CS facility if the person or body authorised to do so under those rules determines that the transfer substantially complies with those rules.

1074E Regulations may govern transfer of financial products in accordance with operating rules of prescribed CS facility

Transfers that regulations may deal with

(1) The regulations may make provision in relation to transfers of financial products effected:

(a) through a prescribed CS facility; and

(b) in accordance with the operating rules of the facility.

Regulations may make provision in relation to the transfer of financial products

(2) The regulations may specify:

(a) the legal effect of a transfer of a financial product through the facility in accordance with its operating rules; and

(b) the rights, liabilities and obligations of a person in relation to the transfer of a financial product through the facility, including the rights, liabilities and obligations of:

(i) the transferor and transferee; and

(ii) any other person involved in the transfer; and

(c) the circumstances in which a person will be taken to be involved in the transfer of a financial product for the purposes of the regulations; and

(d) the circumstances in which a person is required not to register, or give effect to, a transfer through the facility; and

(e) the circumstances in which a person is required not to refuse or fail to register, or give effect to, a transfer through the facility; and

(f) the circumstances in which a transfer through the facility will be taken to have been made in accordance with the rules of a prescribed CS facility; and

(g) the circumstances in which a person will be taken to be the holder of a financial product for the purposes of:

(i) a meeting; or

(ii) paying or transferring money or property to a person because the person holds or held a financial product; or

(iii) issuing a financial product to a person because the person holds or held a financial product; or

(iv) conferring a right on a person because the person holds or held a financial product.

Rights and liabilities in relation to transfer

(3) Without limiting paragraph (2)(b), the regulations may provide that a person:

(a) is taken to have:

(i) agreed to do, to accept or to be bound by a particular thing; or

(ii) done a particular thing; or

(iii) given particular warranties; or

(iv) done particular things on behalf of another person; or

(b) is taken to be authorised to do particular things on behalf of another person (even if the person has died); or

(c) is taken to be bound by a particular act; or

(d) is liable to indemnify another person against particular loss or damage; or

(e) is entitled to assume a particular matter without inquiry.

Person involved in transfer

(4) Without limiting paragraph (2)(c), the regulations may provide for any of the following to be taken to be involved in a transfer of a financial product:

(a) a person who carries on a financial services business and who arranges for the transfer;

(b) a person who operates a financial market on which the financial product is sold;

(c) a person who operates a licensed CS facility through which the product is transferred;

(d) the issuer of the product;

(e) an associate of a person who is involved in the transfer.

The regulations may specify the circumstances in which a person will be taken to be an associate of another person for the purposes of the regulations.

Offences

(5) Without limiting subsection (2), the regulations may provide for offences in relation to:

(a) the lodgment of a transfer document or title document for a financial product with the issuer of the product; or

(b) the use of identifying codes in relation to transfers of financial products; or

(c) contraventions of the operating rules of a prescribed CS facility.

Civil liability

(6) The regulations may also:

(a) provide for the liability of a person who contravenes the operating rules of a prescribed CS facility to compensate a person for loss or damage the person suffers because of the conduct engaged in in contravention of those rules; and

(b) specify the period within which an action for compensation must be begun.

(7) The regulations do not affect a liability that a person has under any other law.

Jurisdiction

(8) The regulations may apply to conduct engaged in in this jurisdiction or elsewhere.

1074F Issuer protected from civil liability for person's contravention of prescribed CS facility's certificate cancellation rules

If:

(a) a person contravenes the certificate cancellation provisions of a prescribed CS facility in relation to the transfer of a particular financial product through the facility; and

(b) the issuer of the financial product is not involved in the contravention;

the issuer is not liable to an action or other proceeding for damages in relation to the person's contravention.

1074G Operation of this Division and regulations made for its purposes

(1) This section deals with the effect of the provisions of:

(a) this Division; and

(b) the regulations made for the purposes of this Division.

(2) The provisions apply in relation to a transfer of financial products despite anything to the contrary in:

(a) this Act (other than this Division); or

(b) another law, or instrument, relating to the transfer of the financial products.

(3) Except as provided in the provisions, the provisions do not affect the terms and conditions on which financial products are sold.

(4) Nothing in the provisions (other than in regulations made for the purpose of paragraph 1074E(2)(e)) affects any right of the issuer of a financial product to refuse:

(a) to acknowledge or register a person as the holder of a financial product; or

(b) to issue a financial product to a person;

on a ground other than an objection to the form of document, or electronic message or other electronic communication, that is

lodged with or sent to the issuer and purports to transfer the financial product to the person.

(5) The registration of a transfer, or the issue, of a financial product by means of a transfer effected in accordance with the operating rules of a prescribed CS facility does not breach any law, constitution, trust deed or other instrument relating to financial products.

(6) Nothing in the provisions (other than in regulations made for the purpose of paragraph 1074E(2)(d)) prevents or affects the use of:

(a) any other form of transfer of financial products; or

(b) any other mode of executing a document transferring financial products;

that is otherwise permitted by law.

(7) A transfer of a financial product by or to a trustee or legal representative may be effected by means of a transfer in accordance with the operating rules of a prescribed CS facility despite any law or the provisions of the instrument (if any) creating, or having effect in relation to, the trust or will under which the trustee or legal representative is appointed.

(8) In subsection (7):

legal representative means:

(a) the executor, original or by representation, of a will of a dead person; or

(b) the administrator of the estate of a dead person.

Division 5—Exemptions and modifications

1075A ASIC's power to exempt and modify

(1) ASIC may:

(a) exempt specified financial products, or a specified class of financial products, from a provision of this Part; or

(b) declare that this Part applies to specified financial products, or a specified class of financial products, as if specified provisions were omitted, modified or varied as specified in the declaration.

(2) ASIC's power to grant an exemption or make a declaration under this section may be exercised in relation to financial products, or a class of financial products, only if ASIC is satisfied that:

(a) if the exemption were granted or the declaration were made, the interests of the holders of those financial products, or of financial products in that class, would continue to have adequate protection; and

(b) the granting of the exemption or the making of the declaration would make the transfer of those financial products, or of financial products in that class, more efficient.

(3) The exemption or declaration may:

(a) apply to all or specified provisions of this Part; and

(b) apply to all persons, specified persons, or a specified class of persons; and

(c) relate to all financial products, specified financial products or a specified class of financial products; and

(d) relate to any other matter generally or as specified.

(4) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.

(5) The exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.

(6) If conduct (including an omission) of a person would not have constituted an offence if a particular declaration under paragraph (1)(b) had not been made, that conduct does not constitute an offence unless, before the conduct occurred (in addition to complying with the gazettal requirement of subsection (5)):

(a) the text of the declaration was made available by ASIC on the internet; or

(b) ASIC gave written notice setting out the text of the declaration to the person.

In a prosecution for an offence to which this subsection applies, the prosecution must prove that paragraph (a) or (b) was complied with before the conduct occurred.

(7) For the purposes of this section, the ***provisions of this Part*** include:

(a) definitions in this Act, or in the regulations, as they apply to references in this Part; and

(b) any provisions of Part 10.2 (transitional provisions) that relate to provisions of this Part.

Note: Because of section 761H, a reference to this Part or Part 10.2 also includes a reference to regulations or other instruments made for the purposes of this Part or Part 10.2 (as the case requires).

Part 7.12—Miscellaneous

Division 1—Qualified privilege

1100A Qualified privilege for information given to ASIC

(1) A person has qualified privilege in respect of the giving of any information to ASIC that the person:

(a) is required to give under this Chapter or regulations made for the purposes of this Chapter; or

(b) gives in relation to a contravention or suspected contravention of subsection 798H(1) (complying with market integrity rules).

(2) A person or body that is:

(a) a market licensee; or

(b) a CS facility licensee; or

(c) a person acting under an arrangement to operate a licensed market or supervise a licensed CS facility; or

(d) a foreign person or body responsible for the supervision of the operation in a foreign country of a financial market or clearing and settlement facility;

also has qualified privilege in respect of the giving of any information to ASIC in connection with the performance or exercise of ASIC's functions or powers under, or in relation to, this Chapter or regulations made for the purposes of this Chapter.

(3) A person or body that has qualified privilege under subsection (1) or (2) in respect of conduct is also not liable for any action based on breach of confidence in relation to that conduct.

1100B Qualified privilege for the conduct of market licensees and CS facility licensees

(1) A market licensee, or CS facility licensee, has qualified privilege in respect of actions (including the giving of information) done in connection with:

(a) the performance, or purported performance, of the licensee's obligations under this Act; or

(b) the exercise or performance, or purported exercise or performance, of the licensee's powers, functions or obligations under the operating rules of the market or facility concerned, if the licensee believes, on reasonable grounds, that the action is necessary:

(i) in the case of a market licensee—to ensure the market operates in a fair, orderly and transparent way; or

(ii) in the case of a CS facility licensee—to ensure the facility's services are provided in a fair and effective manner or to reduce systemic risk in the provision of those services.

(2) A market licensee, or CS facility licensee, has qualified privilege in respect of the giving of information:

(a) to the operator of a financial market (regardless of where the market is operated) for the purpose of assisting the operator to ensure that market operates in a fair, orderly and transparent way; or

(b) to the operator of a clearing and settlement facility (regardless of where the facility is operated) for the purpose of assisting the operator to ensure that facility's services are provided in a fair and effective manner or to reduce systemic risk.

(3) Despite subsections (1) and (2), a market licensee does not have qualified privilege in respect of the giving of information if:

(a) an entity included on the market's official list gave the information to the licensee under a provision of this Act or of the market's operating rules; and

(b) this Act, or those rules, expressly or impliedly authorised the entity to limit the purposes for which it gave the information to the licensee; and

(c) when giving the information to the licensee, the entity limited those purposes as so authorised; and

(d) the giving of the information by the licensee is not solely for one or more of the limited purposes.

(4) The protections given by this section apply to the giving of information whether or not the recipient of the information has an interest in the information.

1100C Qualified privilege for information given to market licensees and CS facility licensees etc.

A person has qualified privilege in respect of the giving of information if:

(a) the person gives the information to any of the following persons or bodies:

(i) a market licensee;

(ii) a CS facility licensee;

(iii) a person acting under an arrangement to operate a licensed market or supervise a licensed CS facility;

(iv) a foreign person or body responsible for the supervision of the operation in a foreign country of a financial market or clearing and settlement facility; and

(b) the information is in relation to a contravention or suspected contravention of this Act or the operating rules of the market or facility concerned.

1100D Extension of protections given by this Division

The protections given by this Division to a person or body in respect of conduct extend to officers, employees and representatives of the person or body.

Division 2—Other matters

1101A Approved codes of conduct

(1) ASIC may, on application, approve codes of conduct that relate to any aspect of the activities of:

(a) financial services licensees; or

(b) authorised representatives of financial services licensees; or

(c) issuers of financial products;

being activities in relation to which ASIC has a regulatory responsibility. The approval must be in writing.

(2) ASIC may, on application, approve a variation of an approved code of conduct. The approval must be in writing.

(3) ASIC must not approve a code of conduct, or a variation of a code of conduct, unless it is satisfied that:

(a) the code, or the code as proposed to be varied, is not inconsistent with this Act or any other law of the Commonwealth under which ASIC has regulatory responsibilities; and

(b) it is appropriate to approve the code, having regard to the following matters, and to any other matters that ASIC considers are relevant:

(i) the ability of the applicant to ensure that persons who hold out that they comply with the code will comply with the code as in force from time to time; and

(ii) the desirability of codes of conduct being harmonised to the greatest extent possible.

(4) ASIC may revoke an approval of a code of conduct:

(a) on application by the person who applied for the approval; or

(b) if ASIC is no longer satisfied as mentioned in subsection (3).

The revocation must be in writing.

1101B Power of Court to make certain orders

Court's power to make orders in relation to certain contraventions

(1) The Court may make such order, or orders, as it thinks fit if:

(a) on the application of ASIC, it appears to the Court that a person:

(i) has contravened a provision of this Chapter, or any other law relating to dealing in financial products or providing financial services; or

(ii) has contravened a condition of an Australian market licence, Australian CS facility licence, Australian derivative trade repository licence or Australian financial services licence; or

(iii) has contravened a provision of the operating rules, or the compensation rules (if any), of a licensed market or of the operating rules of a licensed CS facility; or

(v) has contravened a condition on an exemption from the requirement to hold an Australian market licence or an Australian CS facility licence; or

(vi) is about to do an act with respect to dealing in financial products or providing a financial service that, if done, would be such a contravention; or

(b) on the application of a market licensee, it appears to the Court that a person has contravened the operating rules, or the compensation rules (if any), of a licensed market operated by the licensee; or

(c) on the application of a CS facility licensee, it appears to the Court that a person has contravened a provision of the operating rules of a licensed CS facility operated by the licensee; or

(d) on the application of a person aggrieved by an alleged contravention by another person of subsection 798H(1) (complying with market integrity rules) or a provision of the operating rules, or the compensation rules (if any), of a licensed market, it appears to the Court that:

(i) the other person did contravene the provision; and

(ii) the applicant is aggrieved by the contravention.

However, the Court can only make such an order if the Court is satisfied that the order would not unfairly prejudice any person.

Note: For examples of orders the Court could make, see subsection (4).

(2) For the purposes of paragraph (1)(d), if a body corporate contravenes a provision of the operating rules of a licensed market, a person who holds financial products of the body corporate that are able to be traded on the licensed market is taken to be a person aggrieved by the contravention.

(3) Subsection (2) does not limit the circumstances in which a person may be aggrieved by a contravention for the purposes of paragraph (1)(d).

Examples of orders the Court may make

(4) Without limiting subsection (1), some examples of orders the Court may make under subsection (1) include:

(a) an order restraining a person from carrying on a business, or doing an act or classes of acts, in relation to financial products or financial services, if the person has persistently contravened, or is continuing to contravene:

(i) a provision or provisions of this Chapter; or

(ii) a provision or provisions of any other law relating to dealing in financial products or providing financial services; or

(iii) a condition on an Australian market licence, Australian CS facility licence, Australian derivative trade repository licence or Australian financial services licence; or

(v) a condition of an exemption from a requirement to hold an Australian market licence or Australian CS facility licence; or

(vi) a provision of the operating rules, or the compensation rules (if any), of a licensed market or of the operating rules of a licensed CS facility; or

(b) an order giving directions about complying with a provision of the market integrity rules, or of the derivative transaction rules or the derivative trade repository rules, or a provision of the operating rules, or the compensation rules (if any), of a licensed market or of the operating rules of a licensed CS facility to a person (or the directors of the body corporate, if the person is a body corporate) who contravened the provision; and

(c) an order requiring a person to disclose to the public or to specified persons, in accordance with the order, specified information that the person to whom the order is directed possesses or to which that person has access, if the person:

(i) contravened a provision of the market integrity rules, or of the derivative transaction rules or the derivative trade repository rules, or a provision of the operating rules of a licensed market or a condition relating to the disclosure or provision of information; or

(ii) was involved in such a contravention; and

(d) an order requiring a person to publish advertisements in accordance with the order at that person's expense, if the person:

(i) contravened a provision of the market integrity rules, or of the derivative transaction rules or the derivative trade repository rules, or a provision of the operating rules of a licensed market, or a condition relating to the disclosure or provision of information; or

(ii) was involved in such a contravention; and

(e) an order restraining a person from acquiring, disposing of or otherwise dealing with any financial products that are specified in the order; and

(f) an order restraining a person from providing any financial services that are specified in the order; and

(g) an order appointing a receiver of property (see subsection (9)) of a financial services licensee; and

(h) an order declaring a contract relating to financial products or financial services to be void or voidable; and

(i) an order directing a person to do or refrain from doing a specified act, if that order is for the purpose of securing compliance with any other order under this section; and

(j) any ancillary order considered to be just and reasonable in consequence of the making of an order under any of the preceding provisions of this subsection.

Interim orders

(5) Before considering an application to the Court under subsection (1), the Court may make an interim order of the kind applied for to apply pending the determination of the application, if in the opinion of the Court it is desirable to do so.

(6) However, if ASIC, a market licensee or a CS facility licensee applies for an order under subsection (1), the Court must not require the applicant, or any other person, to give any undertakings as to damages as a condition of making an interim order under subsection (5).

Power to give notice of applications

(7) Before making an order under subsection (1), the Court may do either or both of the following:

(a) direct that notice of the application be given to such persons as it thinks fit;

(b) direct that notice of the application be published in such manner as it thinks fit.

Powers of receivers appointed under Court orders

(8) A person appointed by order of the Court under subsection (1) as a receiver of the property (see subsection (12)) of a financial services licensee:

(a) may require the financial services licensee to:

(i) deliver to the person any property of which the person has been appointed receiver; or

(ii) give to the person all information concerning that property that may reasonably be required; and

(b) may acquire and take possession of any property of which the person has been appointed receiver; and

(c) may deal with any property that the person has acquired, or of which the person has taken possession, in any way in which the financial services licensee might lawfully have dealt with the property; and

(d) has such other powers in respect of the property as the Court specifies in the order.

Duty to comply with order

(10) A person must not, without reasonable excuse, contravene:

(a) an order under this section; or

(b) a requirement imposed under paragraph (8)(a) or (8)(d) by a receiver appointed by order of the Court under subsection (1).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Power to rescind or vary order

(11) The Court may rescind or vary an order made by it under this section or suspend the operation of such an order.

(12) In this section:

compensation rules has the same meaning as in Part 7.5.

property, in relation to a financial services licensee, includes:

(a) money; or

(b) financial products; or

(c) documents of title to financial products; or

(d) other property;

entrusted to, or received on behalf of, any other person by the financial services licensee or another person in the course of, or in connection with, a financial services business carried on by the financial services licensee.

1101C Preservation and disposal of records etc.

Registers

(1) A person who is required by a provision of this Chapter to keep a register in relation to a business carried on by the person must preserve it for 5 years after the day on which the last entry was made in the register.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Financial records

(2) A person who is required by a provision of this Chapter to keep any financial record in relation to a business carried on by the person must preserve it for 7 years after the transactions covered by the record are completed.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Other records

(3) A person who is required by a provision of this Chapter or the regulations to keep any other record must preserve it for 5 years after the day on which the last entry was made in the record.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Exceptions

(4) Registers and records must be preserved in accordance with this section (even if the person stops carrying on the business to which they relate during the period for which they must be preserved), unless:

(a) the regulations provide that those documents, or a class to which they belong, need not be preserved; and

(b) any conditions specified in or under those regulations have been complied with.

Note: A defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code*.

1101D Destruction of records by ASIC

ASIC may destroy or otherwise dispose of any document that is lodged under, or for the purposes of, a provision of this Chapter if:

(a) ASIC is of the opinion that it is no longer necessary or desirable to retain it; and

(b) it has been in the possession of ASIC for such period as is specified in the regulations, either generally or in relation to a particular document or class of documents.

1101E Concealing etc. of books

(1) A person must not:

(a) conceal, destroy, mutilate or alter a book:

(i) relating to the business carried on by a financial services licensee or an authorised representative of such a licensee; or

(ii) required under a provision of this Chapter to be kept by a market licensee, a CS facility licensee, a financial services licensee or an authorised representative of a financial services licensee; or

(b) send such a book out of this jurisdiction.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) In any proceedings against a person for an offence based on subsection (1), it is a defence if the person did not act with intent to:

(a) defraud; or

(b) defeat the objects of this Chapter; or

(c) prevent, delay or obstruct the carrying out of an examination, investigation or audit, or the exercise of a power, under this Chapter.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2). See subsection 13.3(3) of the *Criminal Code*.

1101F Falsification of records

(1A) A person must not engage in conduct that results in the falsification of:

(a) a book required to be kept by a provision of this Chapter; or

(b) a register or any accounting or other record referred to in section 1101C.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(1) If matter that is used, or intended to be used, in connection with:

(a) the keeping of a book required to be kept by a provision of this Chapter; or

(b) a register or any accounting or other record referred to in section 1101C;

is recorded or stored in an illegible form by means of a mechanical device, an electronic device or any other device, a person must not:

(c) record or store by means of that device matter that the person knows to be false in a material particular or materially misleading; or

(d) destroy, remove or falsify matter that is recorded or stored by means of that device, or has been prepared for the purpose of being recorded or stored, or for use in compiling other matter to be recorded or stored, by means of that device; or

(e) fail to record or store matter by means of that device, with intent to falsify any entry made or intended to be compiled, wholly or in part, from that matter.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) In any proceedings against a person for an offence based on subsection (1A) or (1), it is a defence if it is proved that the person acted honestly and that in all the circumstances the act or omission constituting the offence should be excused.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2). See subsection 13.3(3) of the *Criminal Code*.

1101G Precautions against falsification of records

A person required by a provision of this Chapter to keep a book or record must take reasonable precautions for guarding against falsification of the book or record and for facilitating discovery of any falsification.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

1101GA How Part 9.3 applies to books required to be kept by this Chapter etc.

(1) In this section:

Chapter 7 book means:

(a) a book (by whatever name it is known) that a provision of this Chapter requires to be kept; or

(b) a document lodged under, or for the purposes of, a provision of this Chapter; or

(c) a book relating to the business carried on by a financial services licensee or an authorised representative of a financial services licensee; or

(d) a register or accounting record referred to in section 1101C.

(2) Part 9.3 does not apply in relation to a Chapter 7 book except as provided in the following paragraphs:

(a) section 1303 applies to a Chapter 7 book;

(b) section 1305, and subsections 1306(5) and (6), apply to a Chapter 7 book as if references in section 1305 to a body corporate were instead references to a person;

(c) regulations made for the purposes of this paragraph may provide that other provisions of Part 9.3 apply in relation to a Chapter 7 book, or a class of Chapter 7 books, with such modifications (if any) as are specified in the regulations.

1101H Contravention of Chapter does not generally affect validity of transactions etc.

(1) Subject to subsection (2), a failure to comply with any requirement of this Chapter (including requirements in regulations made for the purposes of this Chapter) does not affect the validity or enforceability of any transaction, contract or other arrangement.

(2) Subsection (1) has effect subject to any express provision to the contrary in:

(a) this Chapter; or

(b) regulations made for the purposes of another provision of this Chapter; or

(c) regulations referred to in subsection (3).

(3) Regulations made for the purposes of this subsection may provide that a failure to comply with a specified requirement referred to in subsection (1) has a specified effect on the validity or enforceability of a transaction, contract or arrangement.

1101I Gaming and wagering laws do not affect validity of contracts relating to financial products

Despite any law of a State or Territory in this jurisdiction about gaming and wagering:

(a) a person may enter into a contract that is a financial product; and

(b) the contract is valid and enforceable.

1101J Delegation

The Minister may delegate any of the Minister's powers under this Chapter to:

(a) ASIC; or

(b) a member of ASIC (within the meaning of section 9 of the *Australian Securities and Investments Commission Act 2001*); or

(c) a staff member (within the meaning given by subsection 5(1) of that Act) who is an SES employee (within the meaning of section 34 of the *Public Service Act 1999*) or who holds an office or position that is at a level equivalent to that of an SES employee.

Chapter 8—Mutual recognition of securities offers

Part 8.1—Preliminary

1200A Definitions

(1) In this Chapter:

foreign recognition scheme means the provisions of a law of a recognised jurisdiction that are prescribed by the regulations as comprising a foreign recognition scheme for the purposes of this Chapter.

law of a recognised jurisdiction includes law of part of a recognised jurisdiction.

offer securities includes:

(a) invite applications for the issue of securities; and

(b) invite offers to purchase securities.

offeror, of securities, means:

(a) in relation to an offer of a kind prescribed by the regulations—a person of a kind prescribed by the regulations; and

(b) otherwise—the person who has the capacity, or who agrees, to issue or transfer the securities if the offer is accepted.

recognised jurisdiction means a foreign country prescribed by the regulations as a recognised jurisdiction.

recognised offer has the meaning given by section 1200B.

securities means:

(a) a share in a body; or

(b) a debenture of a body; or

(c) an interest in a managed investment scheme; or

(d) a legal or equitable right or interest in a security or interest covered by paragraph (a), (b) or (c); or

(e) an option to acquire, by way of issue, an interest or right covered by paragraph (a), (b), (c) or (d).

(2) For the purposes of this Chapter, paragraph (b) of the definition of ***debenture*** in section 9 is taken to include a reference to an undertaking by an institution, authorised by or under the law of a recognised jurisdiction as a deposit-taking institution (however described), to repay money deposited with it, or lent to it, in the ordinary course of its banking business.

(3) For the purposes of this Chapter:

(a) paragraph (c) of the definition of ***managed investment scheme*** in section 9 is taken to include a reference to a partnership that, if this Act applied to it, would not need to be incorporated or formed under an Australian law because of regulations made for the purposes of subsection 115(2); and

(b) paragraph (i) of the definition of ***managed investment scheme*** in section 9 is taken to include a reference to a scheme operated by an institution, authorised by or under the law of a recognised jurisdiction as a deposit-taking institution (however described), in the ordinary course of its banking business.

Part 8.2—Foreign offers that are recognised in this jurisdiction

Division 1—Recognised offers

1200B When an offer is a recognised offer

(1) An offer of securities becomes a ***recognised offer***, in relation to a recognised jurisdiction, on the day the offer is first made in this jurisdiction, if the conditions in section 1200C are met in relation to the offer on that day.

(2) The offer continues to be a recognised offer after that day, even if a condition in section 1200C ceases to be met after that day.

(3) If, at the time an offer is first made in this jurisdiction, the offer would be a recognised offer but for a failure to meet the condition in subsection 1200C(5) or (6) that ASIC is satisfied is minor or technical, ASIC may declare in writing that the offer is a recognised offer within the meaning of subsection (1).

(4) If ASIC makes a declaration under subsection (3) in relation to an offer, the condition is taken to have been met at the time the offer was first made in this jurisdiction.

(5) A declaration under subsection (3) is not a legislative instrument.

1200C Conditions that must be met to be a recognised offer

(1) For the purposes of subsection 1200B(1), the conditions that must be met are those set out in this section.

(2) The person offering the securities must be:
  (a) a person incorporated by or under the law of the recognised jurisdiction; or
  (b) a natural person resident in the recognised jurisdiction; or
  (c) a legal person established by or under the law of the recognised jurisdiction; or

(d) a person of a kind prescribed by regulations made in relation to the recognised jurisdiction for the purposes of this paragraph.

(3) The person offering the securities must not be banned under section 1200P.

(4) The offer must be an offer of a kind prescribed by the regulations in relation to the recognised jurisdiction.

(5) At least 14 days before the day on which the offer is first made in this jurisdiction, the person making the offer must have lodged with ASIC:

(a) a notice in the prescribed form (if any) of the person's intention to make a recognised offer; and

(b) the documents and information required to be lodged under section 1200D.

(6) If:

(a) before the offer is first made in this jurisdiction; and

(b) after a document or information was lodged with ASIC under section 1200D;

either:

(c) an event of a kind mentioned in the table in subsection 1200G(9) happened; or

(d) the address for service in this jurisdiction of the person proposing to offer the securities changed;

the person making the offer must have lodged with ASIC:

(e) if paragraph (c) applies—the document or information that would have been required to have been lodged under subsection 1200G(9) for the event if that subsection had applied; and

(f) if paragraph (d) applies—the changed address for service.

1200D Required documents and information

(1) For the purposes of paragraph 1200C(5)(b), the documents and information required to be lodged under this section are:

(a) any offer document required by the law of the recognised jurisdiction; and

(b) the warning statement that is to be included with an offer document in this jurisdiction (which, if regulations are in force for the purposes of section 1200E, must comply with those regulations); and

(c) unless paragraph (d) applies—the constitution of the body whose securities are to be the subject of the offer; and

(d) if the securities that are to be the subject of the offer are interests in a managed investment scheme, rights or interests in such interests, or options to acquire such interests by way of issue—the constituent document of the scheme; and

(e) details, in the prescribed form (if any), of any exemption from the securities law of the recognised jurisdiction that applies, but not exclusively, to the offer or to the offeror in relation to the offer; and

(f) if the offeror is relying on subsection (2)—notice of the document or information that is not being lodged because of the offeror's reliance on that subsection; and

(g) an address for service in this jurisdiction, in the prescribed form (if any); and

(h) a copy of any exemption from the securities law of the recognised jurisdiction that applies exclusively to the offer or to the offeror; and

(i) any other documents or information prescribed by the regulations.

(2) For the purposes of this Chapter, a person is taken to have lodged a document or information under this section if:

(a) the document or information has been lodged under Division 2 or 3 of Part 5B.2; or

(b) the document or information is not required to be lodged because of section 601CDA or 601CTA.

(3) For the purposes of this Chapter, a person is taken to have lodged a document or information under this section if the person lodged the document or information in compliance with subsection 1200C(6).

1200E Warning statement

The regulations may, in relation to offer documents used in this jurisdiction for recognised offers, prescribe either or both of the following:

(a) statements to be included with those documents that relate to the status of an offer as a recognised offer and the laws that regulate the offer;

(b) details to be given in statements to be included with those documents that relate to the status of an offer as a recognised offer and the laws that regulate the offer.

Division 2—Effect of a recognised offer

1200F Effect of a recognised offer

(1) The provisions listed in the table do not apply, in relation to a recognised offer, to the things specified in the table for those provisions.

Note: Recognised offers must comply with Division 3 instead.

Provisions that do not apply in relation to a recognised offer

Item	These provisions:	do not apply, in relation to the offer, to:
1	Chapter 2L	if the recognised offer is an offer of debentures—the offeror.
2	Chapter 5C	if the recognised offer is an offer of interests in a managed investment scheme—the operator of the managed investment scheme.
3	Chapter 6D, other than sections 736 and 738	(a) the recognised offer; or (b) the offeror of the recognised offer; or (c) any offer document for the offer.
4	Parts 7.6, 7.7 and 7.8, other than section 992AA	(a) the issue or disposal of a security under the recognised offer; or (b) general advice (within the meaning of Chapter 7) contained in any offer document for the offer; or (c) general advice contained in an advertisement for the recognised offer issued by, or on behalf of, the offeror; or (d) the provision of a custodial or depository service (within the meaning of Chapter 7) in relation to interests in a managed investment scheme that are the subject of the recognised offer.
5	Part 7.9, other than sections 1020AB, 1020AC, 1020AD and 1020B	the offeror of the recognised offer.

(2) Despite subsection (1), the regulations may:

(a) apply a provision listed in the table in subsection (1) to a person or class of persons; or

(b) apply a provision listed in the table in subsection (1) to a security or class of securities; or

(c) provide that a provision listed in the table in subsection (1) applies with the modifications specified in the regulations.

Division 3—Ongoing conditions for recognised offers

1200G Offering conditions

When the offering conditions apply

(1) The offering conditions in this section apply in relation to a recognised offer until the recognised offer closes in this jurisdiction.

Note: Failure to comply with an offering condition is an offence (see sections 1200Q and 1311).

Offering conditions

(2) The offer must be made in the recognised jurisdiction as well as in this jurisdiction.

(3) The offeror must meet the conditions in subsections 1200C(2) and (3).

(4) The offer must meet the condition in subsection 1200C(4).

(5) The offer must comply with the law of the recognised jurisdiction.

(6) There must be no person concerned in the management of the offeror:

(a) who is disqualified from managing corporations for the purposes of Part 2D.6; or

(b) who is disqualified from being concerned in the management of the offeror under the law of the recognised jurisdiction; or

(c) who is subject to a banning order under section 920A; or

(d) who is subject to a court order under paragraph 921A(2)(a).

(7) An offer document provided to a person in this jurisdiction must have included with it:

(a) the warning statement lodged under subsection 1200D(1) for that offer document; or

(b) if a changed warning statement is lodged with ASIC under subsection 1200G(9)—the changed warning statement.

(8) The offeror must, on request by a person in this jurisdiction, provide a copy of the constitution or constituent document lodged under paragraph 1200D(1)(c) or (d).

(9) If an event mentioned in an item of this table occurs in relation to the offer or offeror, the offeror must lodge with ASIC the document, statement or notice specified in the table for that event, by the time specified for that event.

Offering condition under subsection (9)

Item	If:	the offeror must lodge with ASIC:	by this time:
1	a change is made to an offer document, or any other document, required by the law of the recognised jurisdiction in relation to the offer	a copy of the document as changed	no later than 7 days after the day on which the offeror notified (or should have notified) the home regulator of the change.
2	a change is made to the warning statement that is included with the offer document in this jurisdiction	a copy of the warning statement as changed	no later than 7 days after the day on which the offeror notified (or should have notified) the home regulator of the change.
3	a supplementary or replacement offer document is required by the law of the recognised jurisdiction	a copy of the supplementary or replacement offer document	no later than 7 days after the day on which the supplementary or replacement offer document is (or should have been) lodged with the home regulator.
4	a change is made to the constitution or constituent document lodged under paragraph 1200D(1)(c) or (d)	a copy of the constitution or constituent document as changed	no later than 7 days after the day on which the offeror notified (or should have notified) the home regulator of the change.

Offering condition under subsection (9)			
Item	**If:**	**the offeror must lodge with ASIC:**	**by this time:**
5	the home regulator makes, changes or revokes an exemption that applies, but not exclusively, to the offer or the offeror under the law of the recognised jurisdiction	written notice in the prescribed form (if any) of the details of the exemption, change or revocation	no later than 14 days after the making, change or revocation occurs.
6	the home regulator makes, changes or revokes an exemption that applies exclusively to the offer or the offeror under the law of the recognised jurisdiction	a copy of the exemption, the exemption as changed, or notice in the prescribed form (if any) of the details of the revocation	no later than 7 days after the making, change or revocation occurs.
7	the home regulator begins enforcement action, or exercises a power it has under law, in relation to the offeror or offer	written notice in the prescribed form (if any) of the details of the action taken or power exercised	no later than 7 days after the action is taken or the power is exercised.

(10) For the purposes of this Chapter, a person is taken to have lodged a document under subsection (9) if:

(a) the document has been lodged under Division 2 or 3 of Part 5B.2; or

(b) the document is not required to be lodged because of section 601CDA or 601CTA.

(11) If:

(a) an event mentioned in the table in subsection (9) occurs while the offering conditions in this section apply; and

(b) the time by which an offeror is required to lodge a document, statement or notice with ASIC because of that event is after the offering conditions cease to apply;

then, for the purposes of this section and paragraph 1200Q(1)(b), the offering conditions are taken to continue to apply until that time in relation to the offer to the extent necessary to require the offeror to lodge the document, statement or information by that time.

(12) The offer must meet any other conditions prescribed by the regulations.

Home regulator

(13) For the purposes of subsection (9), the ***home regulator*** for a recognised jurisdiction is an authority in the recognised jurisdiction whose functions under the law of the recognised jurisdiction include functions equivalent to any of those of ASIC under this Act and that is prescribed by the regulations as the home regulator for that jurisdiction.

(14) If there is more than one authority in a recognised jurisdiction whose functions include functions under the law of the recognised jurisdiction equivalent to any of those of ASIC under this Act and that is prescribed under subsection (13), the regulations may prescribe the matters in relation to which that authority is to be regarded as the home regulator.

1200H Address for service condition

When the address for service condition applies

(1) The address for service condition in this section applies in relation to a recognised offer:

(a) until the end of the last day on which a person who resides in this jurisdiction could acquire securities under the offer; and

(b) if a person who resides in this jurisdiction acquires securities under the offer—at all times when the offeror's records indicate that someone who resides in this jurisdiction holds securities in the class of securities that was the subject of the recognised offer.

Note: Failure to comply with the address for service condition is an offence (see sections 1200Q and 1311).

Address for service condition

(2) The offeror must lodge with ASIC written notice, in the prescribed form (if any), of any change in its address for service in this jurisdiction, no later than the end of the seventh day after the day on which the address changed.

(3) If:

(a) the offeror's address for service in this jurisdiction changes while the address for service condition in this section applies; and

(b) the time by which the offeror is required to lodge notice with ASIC because of the change is after the address for service condition ceases to apply;

then, for the purposes of this section and subparagraph 1200Q(2)(b)(i), the address for service condition is taken to continue to apply until that time to the extent necessary to require the offeror to lodge notice by that time.

1200J Dispute resolution condition

When the dispute resolution condition applies

(1) The dispute resolution condition in this section applies, to a person who is or who has been the offeror of a recognised offer, at all times when the person's records indicate that someone who resides in this jurisdiction holds securities in the class of securities that was the subject of the recognised offer.

Note: Failure to comply with the dispute resolution condition is an offence (see sections 1200Q and 1311).

Dispute resolution condition

(2) The person must have a dispute resolution process that complies with subsection 1017G(2), if the recognised offer was an offer of:

(a) interests in a managed investment scheme; or

(b) rights or interests in such interests, or options to acquire such interests by way of issue.

Exemption from the dispute resolution condition

(3) ASIC may, on application by a person in the prescribed form (if any), grant the person an exemption from the dispute resolution condition in this section, subject to any conditions specified in the exemption.

(4) If ASIC grants a person an exemption under subsection (3), then, for the purposes of this Chapter, the person is taken to comply with the dispute resolution condition in this section for so long as the exemption is in force.

(5) ASIC may, in relation to an exemption under subsection (3):
  (a) vary, or impose, a condition in relation to the exemption; or
  (b) revoke the exemption.

(6) A variation, imposition or revocation under subsection (5) takes effect:
  (a) if the person has an address for service in this jurisdiction—when it is served on the person at that address; or
  (b) if the person does not have an address for service in this jurisdiction—on publication in the *Gazette*.

Division 4—Modification of provisions of this Act

1200K Additional operation of section 675 (continuous disclosure)

In relation to a disclosing entity that has been the offeror of a recognised offer, section 675 also has the operation it would have if paragraph 675(2)(c) were replaced by the following paragraph:

(c) the information is not required, by the law of the recognised jurisdiction to which the offer relates, to be included in a supplementary or replacement offer document; and

1200L Pre-offer advertising

Offers that need a disclosure document

(1) Subsection 734(4) also has the operation it would have if:

(a) the reference in that subsection to a disclosure document that has been lodged with ASIC were a reference to an offer document lodged with ASIC for the purposes of this Chapter; and

(b) the reference in that subsection to section 739 were a reference to section 1200N.

(2) Subsection 734(5) also has the operation it would have if:

(a) references in that subsection to a disclosure document were references to an offer document that complies with the law of a recognised jurisdiction; and

(b) references in that subsection to completing an application form were references to completing an application process under the law of that recognised jurisdiction.

(3) Subsection 734(6) also has the operation it would have if:

(a) references in that subsection to a disclosure document were references to an offer document lodged with ASIC for the purposes of this Chapter; and

(b) references in that subsection to completing an application form were references to completing an application process under the law of the recognised jurisdiction to which the offer relates.

Offers that need a Product Disclosure Statement

(4) Subsection 1018A(2) also has the operation it would have if:

(a) a reference in that subsection to a Product Disclosure Statement were a reference to an offer document that complies with the law of a recognised jurisdiction; and

(b) a reference in that subsection to sale offers to which section 1012C will apply were a reference to sale offers to which section 1012C would apply if the financial product, when made available, were not made available under a recognised offer.

(5) Subsection 1018A(3) also has, in relation to subsection 1018A(2), the operation it would have if:

(a) the reference in that subsection to a Product Disclosure Statement were a reference to an offer document that complies with the law of a recognised jurisdiction; and

(b) the reference to section 1020E were a reference to section 1200N.

1200M Modification by the regulations

The regulations may modify a provision of this Act in relation to its application in respect of a recognised offer or a proposed offer of securities that may become a recognised offer.

Division 5—ASIC's powers in relation to recognised offers

1200N Stop orders

(1) If, in relation to a thing mentioned in an item of this table, ASIC is satisfied of the matters specified in the table item for that thing, ASIC may make either or both of the orders specified in the table item about that thing.

Stop orders

Item	If, in relation to:	ASIC is satisfied that:	ASIC may order:
1	(a) an offer document lodged under paragraph 1200D(1)(a); or (b) a warning statement lodged under paragraph 1200D(1)(b); or (c) a document or information lodged under paragraph 1200D(1)(i)	there is a misleading or deceptive statement in, or a material omission from, the document, statement or information	(a) that no offers, issues, sales or transfers of the securities to which the document, statement or information relates be made while the order is in force; (b) that specified conduct in respect of those securities, or in respect of the document, statement or information, must not be engaged in while the order is in force.

Stop orders

Item	If, in relation to:	ASIC is satisfied that:	ASIC may order:
2	a document, statement or notice lodged under subsection 1200G(9)	the change results in there being a misleading or deceptive statement in, or a material omission from, the document, statement or notice	(a) that no offers, issues, sales or transfers of the securities to which the document, statement or notice relates be made while the order is in force; (b) that specified conduct in respect of those securities, or in respect of the document, statement or notice, must not be engaged in while the order is in force.
3	(a) an advertisement of securities the subject of a recognised offer; or (b) a published statement that is reasonably likely to induce people to acquire securities the subject of a recognised offer	there is a misleading or deceptive statement in, or a material omission from, the advertisement or statement	(a) that no offers, issues, sales or transfers of the securities to which the advertisement or statement relates be made while the order is in force; (b) that specified conduct in respect of those securities, or in respect of the advertisement or statement, must not be engaged in while the order is in force.

Stop orders

Item	If, in relation to:	ASIC is satisfied that:	ASIC may order:
4	an offer document lodged under paragraph 1200D(1)(a)	a new circumstance has arisen since lodgment and that circumstance would have been required by the law of the recognised jurisdiction to be included in the offer document, if the circumstance had arisen before the document was lodged with the home regulator (as defined in subsection 1200G(13))	(a) that no offers, issues, sales or transfers of the securities to which the document relates be made while the order is in force; (b) that specified conduct in respect of those securities, or in respect of the document, must not be engaged in while the order is in force.
5	a notice of intention to make a recognised offer lodged under paragraph 1200C(5)(a)	one or more of the requirements in section 1200C is not met in relation to the proposed offer	(a) that no offers, issues, sales or transfers of the securities that are proposed to be offered be made while the order is in force; (b) that specified conduct in respect of those securities must not be engaged in while the order is in force.
6	a recognised offer	an offering condition in section 1200G, the address for service condition in section 1200H or the dispute resolution condition in section 1200J is not being met	(a) that no offers, issues, sales or transfers of the securities be made while the order is in force; (b) that specified conduct in respect of those securities must not be engaged in while the order is in force.

(2) The order may include a statement that specified conduct engaged in contrary to the order will be regarded as not meeting a specified ongoing condition in Division 3.

(3) Before making an order under subsection (1), ASIC must:

(a) hold a hearing; and

(b) give a reasonable opportunity to any interested people to make oral or written submissions to ASIC on whether an order should be made.

(4) If ASIC considers that any delay in making an order under subsection (1) pending the holding of a hearing would be prejudicial to the public interest, ASIC may make an interim order. The interim order may be made without holding a hearing and lasts for 21 days after the day on which it is made unless revoked before then.

(5) At any time during the hearing, ASIC may make an interim order. The interim order lasts until:

(a) ASIC makes an order under subsection (1) after the conclusion of the hearing; or

(b) the interim order is revoked;

whichever happens first.

(6) An order under subsection (1), (4) or (5) must be in writing and must be served on the person who is ordered not to offer, issue, sell or transfer securities or not to engage in specified conduct.

(7) The person on whom the order is served must take reasonable steps to ensure that other people who engage in conduct to which the order applies are aware of the order.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(8) The person on whom the order is served, or a person who is aware of the order, must not engage in conduct contrary to the order.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(9) A statement under subsection (2) has effect accordingly in relation to a person on whom the order is served, or who is aware of it, who engages in conduct contrary to the order. This applies in addition to any other consequence that is provided for in this Act.

1200P Ban on making subsequent recognised offers

(1) ASIC may declare in writing that a person is, for the time specified in the declaration (which must be no longer than 5 years from the day the declaration takes effect), banned from making a recognised offer if:

(a) the person, or an associate of the person, has been convicted (whether or not in this jurisdiction) of an offence constituted by conduct engaged in in relation to a recognised offer; or

(b) a court in this jurisdiction has made a civil penalty order against the person, or an associate of the person, for a contravention in relation to a recognised offer; or

(c) a court in a recognised jurisdiction has made an order against the person, or an associate of the person, for a contravention of the law of the recognised jurisdiction (other than an offence) in relation to an offer that is a recognised offer in this jurisdiction.

(2) Before making the declaration, ASIC must give the person an opportunity:

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

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

This subsection does not apply if the person does not have an address for service in this jurisdiction.

(3) ASIC may, in writing, vary or cancel the declaration, on ASIC's own initiative or on application lodged by the person in the prescribed form (if any) together with any prescribed documents, if ASIC is satisfied that a circumstance on which ASIC based the declaration has changed.

(4) If ASIC proposes to reject an application by the person to vary or cancel the declaration, ASIC must give the person an opportunity:

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

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

(5) The declaration, and any variation or cancellation of the declaration, takes effect:
  (a) if the person to whom the declaration applies has an address for service in this jurisdiction—when it is served on the person at that address; or
  (b) if the person to whom the declaration applies does not have an address for service in this jurisdiction—when it is published in the *Gazette* under subsection (7).

(6) A declaration that is served on a person under paragraph (5)(a) must be accompanied by a statement of ASIC's reasons for the declaration.

(7) ASIC must publish a notice in the *Gazette* as soon as practicable after making, varying or cancelling the declaration. The notice:
  (a) must state when the action takes or took effect; and
  (b) in the case of the making of a declaration—set out a copy of the declaration; and
  (c) in the case of the varying of a declaration—set out a copy of the declaration as varied.

(8) A declaration under this section is not a legislative instrument.

1200Q Offence of breaching an ongoing condition

(1) A person commits an offence if, at any particular time:
  (a) the person is the offeror of a recognised offer; and
  (b) an offering condition in section 1200G applies in relation to the offer; and
  (c) the condition is not met in relation to the offer.

(2) A person commits an offence if:
  (a) the person is or has been the offeror of a recognised offer; and
  (b) at any particular time:
    (i) the address for service condition in section 1200H; or
    (ii) the dispute resolution condition in section 1200J;
  applies in relation to the offer; and
  (c) the condition is not met in relation to the offer.

Division 6—Miscellaneous

1200R Service of documents

(1) For the purposes of any law, a document may be served on a person who is, or who has been, the offeror of a recognised offer by leaving it at, or posting it to, the person's address for service in this jurisdiction.

(2) The person's address for service in this jurisdiction is:
  (a) the address lodged under paragraph 1200D(1)(g); or
  (b) if a change to that address has been lodged with ASIC under section 1200H—the changed address, on and from the later of:
    (i) the day that is 7 days after the day on which the change (or, if more than one change has been lodged, the latest change) was lodged; or
    (ii) the day specified in the notice of change as the day from which the change is to take effect.

(3) This section does not affect:
  (a) any other provision of this Act, or any provision of another law, that permits a document to be served in a different way; or
  (b) the power of a court to authorise a document to be served in a different way.

(4) This section does not apply in relation to a person who is, or who has been, the offeror of a recognised offer if the address for service condition in section 1200H does not apply to the person.

Part 8.3—Offers made under foreign recognition schemes

1200S Notice to ASIC

If:

(a) a body proposes to make an offer of securities in a recognised jurisdiction under a foreign recognition scheme; and

(b) under the foreign recognition scheme, the offer is to be regulated by the law of this jurisdiction;

the body must lodge with ASIC written notice, in the prescribed form (if any), of its intention to make the offer under the foreign recognition scheme, no later than the time it notifies the recognised jurisdiction of that intention.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

1200T Extension of this Act to recognised jurisdictions

(1) If:

(a) a body proposes to make, or is making, an offer of securities in a recognised jurisdiction under a foreign recognition scheme; and

(b) under the foreign recognition scheme, the offer is to be regulated by the law of this jurisdiction;

this Act applies in the recognised jurisdiction in relation to the offer as if it were an offer being made in this jurisdiction.

(2) Despite subsection (1), the regulations may:

(a) exempt a person or class of persons from all or specified provisions of this Act as it applies by force of subsection (1); or

(b) exempt a security or a class of securities from all or specified provisions of this Act as it applies by force of subsection (1); or

(c) provide that a provision of this Act as it applies by force of subsection (1) applies with the modifications specified in the regulations.

1200U ASIC stop order for advertising in a recognised jurisdiction

(1) If ASIC is satisfied that:

(a) an offer of securities is being made or has been made in a recognised jurisdiction under a foreign recognition scheme; and

(b) there is a contravention of section 734 or 1018A (as they apply by force of section 1200T) constituted by conduct in the recognised jurisdiction in relation to the offer;

ASIC may order that no offers, issues, sales or transfers of the securities the subject of the offer be made in the recognised jurisdiction while the order is in force.

(2) Before making an order under subsection (1), ASIC must:

(a) hold a hearing; and

(b) give a reasonable opportunity to any interested people to make oral or written submissions to ASIC on whether an order should be made.

(3) If ASIC considers that any delay in making an order under subsection (1) pending the holding of a hearing would be prejudicial to the public interest, ASIC may make an interim order that no offers, issues, sales or transfers of the securities be made while the interim order is in force. The interim order may be made without holding a hearing and lasts for 21 days after the day on which it is made unless revoked before then.

(4) At any time during the hearing, ASIC may make an interim order that no offers, issues, sales or transfers of the securities be made while the interim order is in force. The interim order lasts until:

(a) ASIC makes an order under subsection (1) after the conclusion of the hearing; or

(b) the interim order is revoked;

whichever happens first.

(5) An order under subsection (1), (3) or (4) must be in writing and must be served on the person who is ordered not to offer, issue, sell or transfer securities.

(6) The person on whom the order is served must take reasonable steps to ensure that other people who engage in conduct to which the order applies are aware of the order.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(7) The person on whom the order is served, or a person who is aware of the order, must not engage in conduct contrary to the order.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).