



Payment Systems and Netting Act 1998

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About this compilation

This compilation

This is a compilation of the *Payment Systems and Netting Act 1998* that shows the text of the law as amended and in force on 1 October 2020 (the **compilation date**).

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

Uncommenced amendments

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

Application, saving and transitional provisions for provisions and amendments

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

Editorial changes

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

Modifications

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

Self-repealing provisions

If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

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An Act to make provision in relation to payment and settlement systems and netting contracts, and for related purposes

Part 1—Preliminary

1 Short title

This Act may be cited as the *Payment Systems and Netting Act 1998*.

2 Commencement

This Act commences on the day on which it receives the Royal Assent.

3 Crown bound by this Act

This Act binds the Crown in all its capacities, but does not make the Crown liable to be prosecuted for an offence.

4 Application of *Criminal Code*

The *Criminal Code* applies to all offences against this Act.

5 Definitions

In this Act, unless the contrary intention appears:

ADI means an authorised deposit-taking institution within the meaning of the *Banking Act 1959*.

approved netting arrangement means a netting arrangement approved under section 12.

approved RTGS system means a payment or settlement system approved under section 9.

APRA means the Australian Prudential Regulation Authority.

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Banking Act statutory manager has the same meaning as in the *Banking Act 1959*.

Business Transfer Act means the *Financial Sector (Transfer and Restructure) Act 1999*.

close-out netting contract means:

- (a) a contract under which, if a particular event happens:
 - (i) particular obligations of the parties terminate or may be terminated; and
 - (ii) the termination values of the obligations are calculated or may be calculated; and
 - (iii) the termination values are netted, or may be netted, so that only a net cash amount (whether in Australian currency or some other currency) is payable; or
- (b) a contract declared by the regulations to be a close-out netting contract for the purposes of this Act;

but does not include:

- (c) a contract that constitutes, or is part of, an approved netting arrangement; or
- (d) a contract in relation to which a declaration under section 15 is in force; or
- (e) a contract declared by the regulations to not be a close-out netting contract for the purposes of this Act.

Commonwealth constitutional reach: a contract or arrangement is entered into in circumstances that are within Commonwealth constitutional reach if:

- (a) a constitutional corporation is a party to the contract or arrangement; or
- (b) the contract or agreement has a significant effect on the business affairs, or an activity, of a constitutional corporation; or
- (c) the contract or arrangement is entered into in the course of, for the purposes of or in relation to one or more of the following:
 - (i) dealings in currency, bills of exchange or promissory notes;

- (ii) money borrowed on the public credit of the Commonwealth;
- (iii) trade and commerce between Australia and places outside Australia or between places outside Australia;
- (iv) trade or commerce among the States;
- (v) trade or commerce within a Territory, between a State and a Territory or between 2 Territories;
- (vi) banking (other than State banking);
- (vii) insurance (other than State insurance); or
- (d) the contract or arrangement is entered into by means of or in relation to, postal, telegraphic, telephonic or other like services.

constitutional corporation means:

- (a) a foreign corporation; or
- (b) a trading or financial corporation formed within the limits of the Commonwealth.

derivative has the same meaning as in Chapter 7 of the *Corporations Act 2001*.

direction stay provision means any of the following:

- (aa) subsection 11CAC(2) of the *Banking Act 1959*;
- (a) subsection 11CD(1A) of the *Banking Act 1959*;
- (b) subsection 13N(2) of the *Banking Act 1959*;
- (ba) subsection 36C(2) of the *Insurance Act 1973*;
- (c) subsection 103K(2) of the *Insurance Act 1973*;
- (d) subsection 105(1A) of the *Insurance Act 1973*;
- (da) subsection 230AAD(2) of the *Life Insurance Act 1995*;
- (e) subsection 230AJ(2) of the *Life Insurance Act 1995*;
- (f) subsection 230C(1A) of the *Life Insurance Act 1995*;
- (g) subsection 101(2) of the *Private Health Insurance (Prudential Supervision) Act 2015*.

eligible obligation has the meaning given by section 14A.

external administration: a person goes into external administration if:

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- (a) they become a body corporate that is a Chapter 5 body corporate within the meaning of the *Corporations Act 2001*; or
- (b) they become an individual who is an insolvent under administration; or
- (c) someone takes control of the person's property for the benefit of the person's creditors because the person is, or is likely to become, insolvent; or
- (d) a Banking Act statutory manager takes control of the person's business under the *Banking Act 1959*; or
- (da) an Insurance Act statutory manager takes control of the person's business under the *Insurance Act 1973*; or
- (db) a Life Insurance Act statutory manager takes control of the person's business under the *Life Insurance Act 1995*; or
- (e) the person comes under judicial management under the *Insurance Act 1973*; or
- (f) the person, or a part of the person's business, comes under judicial management under the *Life Insurance Act 1995*.

external administrator for a person who goes into external administration is the person who takes control of the property, part of the property, the business, or part of the business, of the person under the administration.

financial property means any of the following property, regardless of whether the property (or, for paragraph (h), the intermediary or the account) is in Australia or elsewhere:

- (a) a security (within the meaning of section 92 of the *Corporations Act 2001* (for this purpose, disregard subsections 92(2A), (3) and (4) of that Act));
- (b) a derivative;
- (c) a financial product (within the meaning of the *Corporations Act 2001*) that is traded on a financial market (within the meaning of that Act) that is:
 - (i) operated in accordance with an Australian market licence (within the meaning of that Act); or
 - (ii) exempt from the operation of Part 7.2 of that Act;

- (d) a negotiable instrument (within the meaning of the *Personal Property Securities Act 2009*);
- (e) currency (whether of Australia or of any other country);
- (f) gold, silver or platinum;
- (g) property declared by the regulations to be financial property for the purposes of this Act;
- (h) if a person (an *intermediary*) maintains an account to which interests in property or rights to payment or delivery of property of a kind mentioned in any of paragraphs (a) to (g) may be credited or debited—the rights of a person in whose name the intermediary maintains the account, to the extent that those rights relate to the interests in that property or the rights to payment or delivery of that property;
- (i) proceeds (including rights and property) of property that is financial property;

but does not include any property declared by the regulations to not be *financial property* for the purposes of this Act.

foreign exchange contract has the same meaning as in Chapter 7 of the *Corporations Act 2001*.

general insurer has the same meaning as in the *Insurance Act 1973*.

general participant in a payment or settlement system means a participant who cannot, under the operating rules for the system, settle transactions on their own account through the system.

give security has a meaning affected by section 5A.

Insurance Act statutory manager has the same meaning as in the *Insurance Act 1973*.

intermediated financial property means the rights mentioned in paragraph (h) of the definition of *financial property*.

life company has the same meaning as in the *Life Insurance Act 1995*.

Life Insurance Act statutory manager has the same meaning as in the *Life Insurance Act 1995*.

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market netting contract means:

- (a) a contract:
 - (i) entered into in accordance with the rules that govern the operation of a netting market; and
 - (ii) under which obligations between parties to the contract are netted; or
- (aa) the rules governing the operation of a netting market, if those rules have effect as a contract between a participant in the netting market and one or more other persons; or
- (b) a contract declared by the regulations to be a market netting contract for the purposes of this Act;

but does not include:

- (c) a contract that constitutes, or is part of, an approved netting arrangement; or
- (d) a contract declared by the regulations not to be a market netting contract for the purposes of this Act.

multilateral netting arrangement means an arrangement that has more than 2 parties and under which the obligations owed by the parties to each other are netted.

netting market means:

- (a) an arrangement that is:
 - (i) a licensed market or a licensed CS facility as defined in section 761A of the *Corporations Act 2001*; and
 - (ii) approved by the Minister for the purposes of this definition; or
- (b) an arrangement declared by the regulations to be a netting market for the purposes of this Act.

non-terminal administration: a person goes into **non-terminal administration** if:

- (a) the person goes into external administration; and
- (b) if the person is a body corporate—the external administration is not a winding up under the *Corporations Act 2001* or a corresponding process under a law of a foreign country; and
- (c) if the person is an individual—the external administration is not the result of the person becoming a bankrupt under the

Bankruptcy Act 1966, or the person having a corresponding status under a law of a foreign country.

operating rules for a payment or settlement system means the rules governing the operation of the system.

participant in an approved RTGS system means a person who is a participant in the system in accordance with the rules governing the operations of the system.

party to an approved netting arrangement is a person who is a party to the arrangement in accordance with the rules governing the arrangement.

provable: an obligation is provable in an external administration if:

- (a) for an external administration that is a winding up under the *Corporations Act 2001*—the obligation is a debt or claim that is admissible to proof against the body being wound up; or
- (b) for an external administration that is a bankruptcy under the *Bankruptcy Act 1966*—the obligation is a debt or liability provable in the bankruptcy; or
- (c) in any other case—the person to whom the obligation is owed is entitled to share in any distribution of property to creditors under the administration on the basis of the obligation if the obligation is properly established.

receiving body has the same meaning as in the Business Transfer Act.

regulated body means a body corporate that is any of the following:

- (a) an ADI;
- (b) a general insurer;
- (c) a life company;
- (d) an authorised NOHC (within the meaning of the *Banking Act 1959*);
- (e) an authorised NOHC (within the meaning of the *Insurance Act 1973*);
- (f) a registered NOHC (within the meaning of the *Life Insurance Act 1995*);

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- (g) a subsidiary of a body corporate mentioned in paragraph (a), (b), (c), (d), (e) or (f);
- (h) a private health insurer within the meaning of the *Private Health Insurance (Prudential Supervision) Act 2015*.

regulated business:

- (a) in relation to an ADI—means the ADI’s banking business (within the meaning of the *Banking Act 1959*); and
- (b) in relation to a general insurer—means the general insurer’s insurance business (within the meaning of the *Insurance Act 1973*); and
- (c) in relation to a life company—means the life company’s life insurance business (within the meaning of the *Life Insurance Act 1995*).

related body corporate, in relation to a body corporate, means a body corporate that is related to the first-mentioned body, as determined in accordance with section 5AA.

Reserve Bank means the Reserve Bank of Australia.

resolution period has the meaning given by section 15A.

settling participant in a payment or settlement system means a participant who, under the operating rules for the system, can settle transactions through the system on their own behalf and for other participants.

specified moratorium provision: each of the following is a ***specified moratorium provision:***

- (a) section 15BA of the *Banking Act 1959*;
- (b) section 15BB of the *Banking Act 1959*;
- (c) section 15BC of the *Banking Act 1959*;
- (d) section 62PA of the *Insurance Act 1973*;
- (e) section 62PB of the *Insurance Act 1973*;
- (f) section 62PC of the *Insurance Act 1973*;
- (g) section 62ZOS of the *Insurance Act 1973*;
- (h) section 62ZOT of the *Insurance Act 1973*;
- (j) section 62ZOU of the *Insurance Act 1973*;

- (k) section 161A of the *Life Insurance Act 1995*;
- (l) section 161B of the *Life Insurance Act 1995*;
- (m) section 161C of the *Life Insurance Act 1995*;
- (n) section 179AS of the *Life Insurance Act 1995*;
- (o) section 179AT of the *Life Insurance Act 1995*;
- (p) section 179AU of the *Life Insurance Act 1995*.

specified provisions means:

- (a) subsections 11CD(2) and (3), section 11F and subsection 13A(3) of the *Banking Act 1959*; and
- (aa) subsections 105(2) and (3) of the *Insurance Act 1973*; and
- (b) section 187 and subsections 230C(2) and (3) of the *Life Insurance Act 1995*; and
- (c) section 86 of the *Reserve Bank Act 1959*; and
- (d) sections 415D to 415FA, 434J to 434LA, 437D, 440B, 451E to 451GA, 468, 556 and 588FL and Division 2 of Part 5.7B of the *Corporations Act 2001*; and
- (e) sections 120, 121, 122, 128B and 128C of the *Bankruptcy Act 1966*; and
- (f) section 142 of the *Superannuation Industry (Supervision) Act 1993*; and
- (fa) subsections 101(3) and (4) of the *Private Health Insurance (Prudential Supervision) Act 2015*; and
- (fb) sections 267 and 267A of the *Personal Property Securities Act 2009*; and
- (fc) the specified moratorium provisions; and
- (g) a law prescribed by the regulations for the purposes of this definition.

specified stay provision: each of the following is a ***specified stay provision***:

- (aa) subsection 11CAC(2) of the *Banking Act 1959*;
- (a) subsection 11CD(1A) of the *Banking Act 1959*;
- (b) subsection 13N(2) of the *Banking Act 1959*;
- (c) subsection 14AC(2) of the *Banking Act 1959*;
- (d) subsection 15C(2) of the *Banking Act 1959*;
- (e) subsection 36AA(2) of the *Business Transfer Act*;

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- (ea) subsection 36C(2) of the *Insurance Act 1973*;
- (f) subsection 62V(2) of the *Insurance Act 1973*;
- (g) subsection 62ZB(2) of the *Insurance Act 1973*;
- (ga) subsection 62ZOH(2) of the *Insurance Act 1973*;
- (gb) subsection 62ZOX(2) of the *Insurance Act 1973*;
- (h) subsection 103K(2) of the *Insurance Act 1973*;
- (i) subsection 105(1A) of the *Insurance Act 1973*;
- (j) subsection 165B(2) of the *Life Insurance Act 1995*;
- (k) subsection 168C(2) of the *Life Insurance Act 1995*;
- (ka) subsection 179AH(2) of the *Life Insurance Act 1995*;
- (kb) subsection 179AX(2) of the *Life Insurance Act 1995*;
- (kc) subsection 230AAD(2) of the *Life Insurance Act 1995*;
- (l) subsection 230AJ(2) of the *Life Insurance Act 1995*;
- (m) subsection 230C(1A) of the *Life Insurance Act 1995*;
- (n) subsection 101(2) of the *Private Health Insurance (Prudential Supervision) Act 2015*.

statutory/judicial management: a person is under **statutory/judicial management** if:

- (a) a Banking Act statutory manager, Insurance Act statutory manager or Life Insurance Act statutory manager has control of the person's business; or
- (b) the person is under judicial management under the *Insurance Act 1973*; or
- (c) the person, or a part of the person's business, is under judicial management under the *Life Insurance Act 1995*.

trigger event, for a close-out netting contract, means an event of a kind mentioned in paragraph (a) of the definition of **close-out netting contract**.

voidable: an action or thing is **voidable** in an external administration if it is:

- (a) for an external administration that is a winding up under the *Corporations Act 2001*—voidable under Division 2 of Part 5.7B of the *Corporations Act 2001*; or

- (b) for an external administration that is a bankruptcy under the *Bankruptcy Act 1966*—void as against the trustee in bankruptcy; or
- (c) in any other case—void as against the external administrator or voidable under the law governing the external administration.

5AA Meaning of *related body corporate*

For the purposes of this Act, the question whether a body corporate is related to another body corporate is to be determined in the same way as that question is determined for the purposes of the *Corporations Act 2001*.

5AB Meaning of subsidiary

For the purposes of this Act, the question whether a body corporate is a subsidiary of another body corporate is to be determined in the same way as that question is determined for the purposes of the *Corporations Act 2001*.

5A Security given over a person's right to require payment or performance of an obligation

If a person owes payment or performance of an obligation to another person (an ***account holder***):

- (a) the account holder may ***give security*** over the account holder's right to require the payment or performance of the obligation; and
- (b) the persons to whom ***security*** may be ***given*** include the person who owes the payment or the performance of the obligation to the account holder.

Example: A person holds an account with a bank. The person may ***give security*** to the bank over the person's right to require the bank to pay the person money from the account.

Part 2—Integrity of approved RTGS payment systems

6 Winding up not to affect transactions carried out on the day of appointment

- (1) If:
- (a) a participant in an approved RTGS system goes into external administration (other than non-terminal administration); and
 - (b) a payment or settlement transaction is executed through the system at any time on the day on which the external administrator is appointed; and
 - (c) the transaction involves the payment of money, or the transfer of an asset, by the participant;
- the payment or transfer has the same effect it would have had if the participant had gone into external administration on the next day.
- (2) This section has effect despite any other law (including the specified provisions and the specified stay provisions).

Note: Section 5 defines *specified provisions* and *specified stay provision*.

6A Non-terminal administration not to affect transactions

- (1) If:
- (a) a participant in an approved RTGS system goes into non-terminal administration; and
 - (b) a payment or settlement transaction is executed through the system at any time before the participant goes into, or while the participant is in, non-terminal administration; and
 - (c) the transaction involves the payment of money, or the transfer of an asset, by the participant;
- the payment or transfer has the same effect it would have had if the participant had not gone into non-terminal administration.

- (2) This section has effect despite any other law (including the specified provisions and the specified stay provisions).

Note: Section 5 defines *specified provisions* and *specified stay provision*.

7 Obligation to notify system administrator of external administration

- (1) A participant in an approved RTGS system must notify the system administrator if:
- (a) the participant; or
 - (b) another participant whose transactions the participant settles through the system;
- goes into external administration. The participant must give the notice as soon as practicable after the participant becomes aware of the external administration.
- (2) A person does not contravene subsection (1) if:
- (a) they took reasonable steps to comply with that subsection; or
 - (b) the system administrator was already aware of the external administration by the time the person was required to notify the administrator under subsection (1).
- (3) A person must not contravene subsection (1).

Penalty: Imprisonment for 5 years.

8 Application for approval of payment system

- (1) A person may apply to the Reserve Bank for approval of a payment or settlement system.
- (2) The application must:
- (a) be in the prescribed form; and
 - (b) be accompanied by the documents:
 - (i) specified in the regulations; or
 - (ii) required by the Reserve Bank.

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9 Reserve Bank may approve payment system

- (1) The Reserve Bank may, by legislative instrument, approve the system if it is satisfied that:
 - (a) systemic disruption in the financial system could result if a participant went into external administration and the system were not approved under this section; and
 - (b) the system is supported by a legally enforceable arrangement between participants in the system for the irrevocable settlement of transactions in real time; and
 - (c) the rules governing the system establish a system administrator for the arrangement; and
 - (d) the system administrator has the resources, competency and integrity needed to administer the system; and
 - (e) the system rules provide that if a settling participant goes into external administration, the system administrator may suspend from the system:
 - (i) the participant; and
 - (ii) any general participant for whom that participant is the sole sponsor; and
 - (f) the system rules provide that if a general participant goes into external administration, the system administrator may suspend that participant from the system; and
 - (g) the system rules require a settling participant to assume the obligations of any participant whose transactions they settle through the system if the participant fails to fulfil those obligations;and of any other matters specified in the regulations.
- (2) In deciding whether to approve a system, the Reserve Bank must have regard to the following:
 - (a) whether the system rules:
 - (i) allow all participants to settle transactions on their own account; or
 - (ii) provide both for participants who can settle transactions on their own account and for other participants (***settling participants***) and for participants who cannot settle

transactions on their own account (*general participants*);

- (b) whether the system rules provide for different obligations for settling participants and general participants and, if they do, whether they:
 - (i) require a general participant to have a settling participant to settle their transactions through the system; and
 - (ii) require a participant who goes into external administration to notify its settling participant (if any) of the external administration as soon as practicable; and
 - (iii) require a settling participant to notify the system administrator as soon as practicable if it becomes aware that a participant whose transactions it settles through the system has gone into external administration;
 - (c) whether the system rules require participants to notify the system administrator as soon as practicable if they go into external administration;
 - (d) any other matters specified in the regulations;
 - (e) any other matters the Reserve Bank considers relevant.
- (3) An approval may be given subject to the terms and conditions specified in the approval.

Part 3—Integrity of approved netting arrangements

10 Effectiveness of approved multilateral netting arrangements

- (1) If an approved netting arrangement is entered into in circumstances that are within Commonwealth constitutional reach:
 - (a) obligations may be terminated, termination values may be calculated and a net amount become payable in accordance with the arrangement; and
 - (b) paragraph (a) applies despite:
 - (i) any disposal of rights that may be netted under the arrangement; or
 - (ii) the creation of any encumbrance, or any other interest, in relation to those rights; or
 - (iii) the operation of any encumbrance, or any other interest, in relation to those rights that is created after the commencement of this section;in contravention of a prohibition in the arrangement; and
 - (c) for the purposes of any law, the assets and liabilities of a party to the arrangement are taken:
 - (i) to include any net obligation owed to a party under the arrangement; and
 - (ii) not to include obligations terminated under the arrangement.
- (2) If a party to an approved netting arrangement goes into external administration:
 - (a) if the external administration is not a non-terminal administration—the party may do anything permitted or required by the arrangement in order to net:
 - (i) obligations incurred before or on the day on which the party goes into external administration; and

- (ii) net obligations if the obligations that are directly or indirectly netted are incurred before or on the day on which the party goes into external administration; and
 - (aa) if the external administration is a non-terminal administration—the party may do anything permitted or required by the arrangement in order to net:
 - (i) obligations incurred before the participant goes into, or while the participant is in, non-terminal administration; and
 - (ii) net obligations if the obligations that are directly or indirectly netted are incurred before the participant goes into, or while the participant is in, non-terminal administration; and
 - (b) the obligations that are, or have been, netted under the arrangement are to be disregarded in the external administration (but see subsection (4)); and
 - (c) any net obligation owed by the party under the arrangement that has not been discharged is provable in the external administration; and
 - (d) any net obligation owed to the party under the arrangement that has not been discharged may be recovered by the external administrator for the benefit of creditors; and
 - (e) the netting and any payment made by the party under the arrangement to discharge a net obligation is not to be voidable in the external administration; and
 - (f) for an arrangement that is governed by the rules of a licensed CS facility as defined in section 761A of the *Corporations Act 2001*—a payment, or a transfer of property, by a party under the arrangement to discharge a net obligation is not to be void or voidable in the external administration; and
 - (g) paragraphs (a) to (f) apply despite:
 - (i) any disposal of rights that may be netted under the arrangement; or
 - (ii) the creation of any encumbrance, or any other interest, in relation to those rights; or
 - (iii) the operation of any encumbrance, or any other interest, in relation to those rights;in contravention of a prohibition in the arrangement.
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Note 1: Paragraphs (2)(a) and (2)(aa)—These paragraphs only authorise the party to take action to arrive at a net obligation; they do not authorise the party to settle the net obligation by payment or transfer of property.

Note 2: By giving express recognition to approved netting arrangements, subsections (1) and (2) remove the basis for arguing that the arrangements are void as contrary to public policy embodied in the laws dealing with insolvency.

- (3) Subsections (1) and (2) have effect despite any other law (including the specified provisions and the specified stay provisions).

Note: Section 5 defines *specified provisions* and *specified stay provision*.

- (4) If:

- (a) a party to an approved netting arrangement goes into external administration; and
- (b) an obligation owed by the party to another party to the arrangement has been netted under the arrangement; and
- (c) a direct payment by the party owing the obligation to the other party would have been voidable in the external administration if it had been made to settle the obligation on the day on which the netting occurred;

the external administrator may recover from the other party for the benefit of creditors an amount equal to the amount of the obligation.

11 Application for approval of netting arrangement

- (1) A person may apply to the Reserve Bank for approval of a multilateral netting arrangement.
- (2) The application must:
 - (a) be in the prescribed form; and
 - (b) be accompanied by the documents specified in the regulations or required by the Reserve Bank.

12 Reserve Bank may approve netting arrangement

- (1) The Reserve Bank may approve the arrangement if it is satisfied that:
- (a) systemic disruption in the financial system could result if a participant went into external administration and the arrangement were not approved under this section; and
 - (b) the arrangement provides for netting to occur at least once on each business day; and
 - (c) the rules governing the arrangement establish a coordinator for the arrangement; and
 - (d) the coordinator of the arrangement has the resources, competency and integrity needed to administer the arrangement; and
 - (e) the rules governing the arrangement provide that if a party to the arrangement goes into external administration:
 - (i) the party must notify the coordinator as soon as practicable; and
 - (ii) the coordinator may exclude the party from the arrangement; and
 - (f) the rules governing the arrangement require a party to the arrangement to notify the coordinator as soon as practicable if they have reasonable grounds to suspect that another party to the arrangement is insolvent;
- and of any other matters specified in the regulations.
- (2) An approval:
- (a) must be given in writing; and
 - (b) may be given subject to the terms and conditions specified in the approval.

13 Qualified privilege

A party to an approved netting arrangement has qualified privilege for a notice they give the coordinator under the rules governing the arrangement that they have reasonable grounds to suspect that another party to the arrangement is insolvent.

Part 4—Close-out netting contracts

Division 1—Effectiveness of close-out netting contracts

14 Effectiveness of close-out netting contracts

(1) If:

- (a) Australian law governs a close-out netting contract; and
- (b) the contract is entered into in circumstances that are within Commonwealth constitutional reach;

the following provisions apply:

- (c) obligations may be terminated, termination values may be calculated and a net amount become payable in accordance with the contract;
- (ca) security given over financial property, in respect of obligations of a party to the contract, may be enforced in accordance with the terms of the security, provided the terms of the security are evidenced in writing (but see section 14A);
- (d) paragraphs (c) and (ca) apply despite:
 - (i) any disposal of rights that may be netted under the contract; or
 - (ii) the creation of any encumbrance, or any other interest, in relation to those rights or financial property mentioned in paragraph (ca); or
 - (iii) the operation of any encumbrance, or any other interest, in relation to those rights or that financial property that is created after the commencement of this section;in contravention of a prohibition in the contract, or in the security mentioned in paragraph (ca);
- (e) for the purposes of any law, the assets of a party to the contract are taken:
 - (i) to include any net obligation owed to the party under the contract; and
 - (ii) not to include obligations terminated under the contract.

(2) If:

- (a) a person who is, or has been, a party to a close-out netting contract goes into external administration; and
 - (b) Australian law governs either:
 - (i) the external administration; or
 - (ii) the contract;
- the following provisions apply:
- (c) obligations may be terminated, termination values may be calculated and a net amount become payable in accordance with the contract;
 - (d) obligations that are, or have been, terminated under the contract are to be disregarded in the external administration (but see subsection (5));
 - (e) any net obligation owed by the party under the contract that has not been discharged is provable in the external administration;
 - (f) any net obligation owed to the party under the contract that has not been discharged may be recovered by the external administrator for the benefit of creditors;
 - (fa) security given over financial property, in respect of obligations of a party to the contract, may be enforced in accordance with the terms of the security, provided the terms of the security are evidenced in writing (but see section 14A);
 - (fb) if:
 - (i) under section 267 or 267A of the *Personal Property Securities Act 2009* or section 588FL of the *Corporations Act 2001*, a security interest would, but for this paragraph, vest in the grantor before the external administration begins; and
 - (ii) where the security interest did not vest under one of those sections before the external administration begins, the security would be enforceable under paragraph (fa);
 - the security interest does not vest under that section before the external administration begins;
 - (g) none of the following is to be void or voidable in the external administration:
 - (i) the netting or termination of obligations under the contract;

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- (ii) a payment by the party to discharge a net obligation under the contract;
 - (iii) the enforcement of security under paragraph (fa);
 - (h) paragraphs (c) to (g) apply despite:
 - (i) any disposal of rights that may be netted under the contract; or
 - (ii) the creation of any encumbrance, or any other interest, in relation to those rights or financial property mentioned in paragraph (fa); or
 - (iii) the operation of any encumbrance, or any other interest, in relation to those rights or that financial property;
- in contravention of a prohibition in the contract, or in the security mentioned in paragraph (fa).

Note: By giving express recognition to close-out netting contracts, subsections (1) and (2) remove the basis for arguing that the contracts are void as contrary to public policy embodied in the laws dealing with insolvency.

- (3) Subsections (1) and (2) have effect in relation to a close-out netting contract:

- (a) subject to a specified stay provision that applies to the contract; and
- (b) despite any other law (including the specified provisions).

Note 1: Section 5 defines *specified provisions* and *specified stay provision*.

Note 2: Division 2 sets out the circumstances in which non-direction stays may cease.

- (4) A person may not rely on the application of subsection (1) or (2) to a right or obligation under a close-out netting contract if:

- (a) the person acquired the right or obligation from another person with notice that that other person, or the other party to the contract, was at that time unable to pay their debts as and when they became due and payable; and
- (b) the person acquired the right or obligation otherwise than as a result of the operation of section 22, 35 or 36R of the Business Transfer Act.

- (5) Subsection (1) or (2) does not apply to an obligation owed by a party to a close-out netting contract to another person if:
-

- (a) the party goes into external administration; and
 - (b) the party acquired the obligation otherwise than as a result of the operation of section 22, 35 or 36R of the Business Transfer Act; and
 - (c) subsection (6) is satisfied.
- (6) This subsection is satisfied if any of the following are satisfied:
- (a) the other person did not act in good faith in entering into the transaction that created the terminated obligation;
 - (b) when that transaction was entered into, the other person had reasonable grounds for suspecting that the party was insolvent at that time or would become insolvent because of, or because of matters including:
 - (i) entering into the transaction; or
 - (ii) doing an act, or making an omission, for the purposes of giving effect to the transaction;
 - (c) the other person neither provided valuable consideration under, nor changed their position in reliance on, that transaction.
- (7) None of the following things done by a party to a close-out netting contract, while it is under statutory/judicial management and a specified stay provision applies to the contract, is to be void or voidable in an external administration:
- (a) making a payment, or transferring property, to another person to meet an obligation under the contract;
 - (b) creating rights or obligations in another person under the contract;
 - (c) giving any security to another person in relation to the contract;
 - (d) entering into one or more close-out netting contracts with another person;
 - (e) doing anything mentioned in paragraph (a), (b) or (c) under a close-out netting contract mentioned in paragraph (d).
- (8) Subsection (7) does not apply to a thing mentioned in that subsection done by a party to a close-out netting contract in relation to another person if:

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- (a) the transaction did not result from the operation of section 22, 35 or 36R of the Business Transfer Act; and
 - (b) either of the following is satisfied:
 - (i) the other person did not act in good faith in entering into the transaction;
 - (ii) the other person neither provided valuable consideration under, nor changed their position in reliance on, the transaction.
- (9) If security is given over financial property, in respect of obligations of a party to a close-out netting contract, then:
- (a) subsection (3) applies in relation to the security in the same way as it applies in relation to the contract; and
 - (b) subsection (4) applies in relation to rights and obligations under the security in the same way as it applies in relation to rights and obligations under the contract; and
 - (c) subsection (5) applies in relation to an obligation owed by a party to the security in the same way as it applies in relation to an obligation owed by a party to the contract; and
 - (d) subsection (7) applies to things done by a party to the security in relation to the security, or a right or obligation under the security, in the same way as it applies in relation to things done by a party to the contract in relation to the contract, or a right or obligation under the contract.

14A Effectiveness of security given in respect of obligations under close-out netting contracts

- (1) Paragraphs 14(1)(ca) and 14(2)(fa) apply to the enforcement of security over financial property, in respect of obligations of a party to a close-out netting contract, only to the extent that:
- (a) the obligations secured by the financial property, and discharged through the enforcement, are:
 - (i) eligible obligations in relation to the contract; or
 - (ii) obligations under the contract of a party to the contract to pay interest on an eligible obligation; or

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- (iii) obligations of a party to the contract to pay costs and expenses incurred in connection with enforcing security given in respect of an eligible obligation; and
- (b) before the enforcement, the financial property is transferred or otherwise dealt with so as to be in the possession or under the control of:
 - (i) the secured person; or
 - (ii) another person (who is not the grantor) on behalf of the secured person, under the terms of an arrangement evidenced in writing; and
- (c) the enforcement is carried out in a manner that complies with section 420A of the *Corporations Act 2001* (if it applies) and any applicable general law duties that are not inconsistent with the terms of the security.

Note: Section 5 defines *financial property*.

- (2) For the purposes of paragraph (1)(b), financial property is taken not to be in the possession or control of a person mentioned in that paragraph if, under the security, the grantor is free to deal with the financial property in the ordinary course of business until the secured person's interest in the financial property becomes fixed and enforceable.
- (3) Subsection (2) applies even if the secured person's interest in the financial property becomes fixed and enforceable before the enforcement of the security over that property mentioned in subsection (1).
- (4) Without limiting paragraph (1)(b), financial property is taken to be in the possession of a person for the purposes of that paragraph if:
 - (a) in a case where there is an issuer of the financial property—the person is registered by, or on behalf of, the issuer as the registered owner of the financial property; or
 - (b) in a case where the financial property is intermediated financial property—the person is the person in whose name the intermediary maintains the account.
- (5) Without limiting paragraph (1)(b), financial property is taken to be under the control of a person for the purposes of that paragraph if:

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- (a) the financial property is intermediated financial property; and
 - (b) the intermediary is not the grantor (but may be the secured person or any other person); and
 - (c) there is an agreement in force between the intermediary and one or more other persons, one of which is the secured person or the grantor; and
 - (d) the agreement has one or more of the following effects:
 - (i) the person in whose name the intermediary maintains the account is not able to transfer or otherwise deal with the financial property;
 - (ii) the intermediary must not comply with instructions given by the grantor in relation to the financial property without seeking the consent of the secured person (or a person who has agreed to act on the instructions of the secured person);
 - (iii) the intermediary must comply, or must comply in one or more specified circumstances, with instructions (including instructions to debit the account) given by the secured person in relation to the intermediated financial property without seeking the consent of the grantor (or any person who has agreed to act on the instructions of the grantor).
- (6) Without limiting paragraph (1)(b), the fact that a grantor retains a right of one or more of the following kinds does not of itself stop that paragraph from being satisfied:
- (a) right to receive and withdraw income in relation to the financial property;
 - (b) right to receive notices in relation to the financial property;
 - (c) right to vote in relation to the financial property;
 - (d) right to substitute other financial property that the parties agree is of equivalent value for the financial property;
 - (e) right to withdraw excess financial property;
 - (f) right to determine value of financial property.
- (7) The regulations may prescribe circumstances in which financial property is, or is not, transferred or dealt with so as to be in the

possession or under the control of a person for the purposes of paragraph (1)(b).

- (8) An obligation is an **eligible obligation** in relation to a close-out netting contract if the obligation is any of the following:
- (a) an obligation under the contract of a party to the contract that relates to a derivative or foreign exchange contract or is of another prescribed kind;
 - (b) an obligation that results from the netting of 2 or more obligations that are created under the contract that:
 - (i) must include at least one obligation covered by paragraph (a); and
 - (ii) may include one or more incidental obligations that, taken together, do not form a material part of the net obligation;
 - (c) an obligation declared by the regulations to be an eligible obligation in relation to a close-out netting contract.
- (9) However, an obligation is not an **eligible obligation** in relation to a close-out netting contract if it is declared by the regulations not to be an eligible obligation in relation to the contract for the purposes of this Act.

15 Declaration that section 14 does not apply

- (1) The Reserve Bank may, by notifiable instrument, declare that section 14 does not apply to a close-out netting contract if it is satisfied that systemic disruption in the financial system could result if a party to the contract went into external administration.

Note: This section is intended to allow the Reserve Bank to require an economically significant multilateral netting arrangement to meet the standards in Part 3 of this Act. It may be necessary to amend the rules governing the arrangement before it can be approved under that Part.

- (2) A declaration under subsection (1):
- (a) may only relate to a contract entered into after the day the declaration is registered on the Federal Register of Legislation under the *Legislation Act 2003*; and
 - (b) ceases to have effect at the end of 6 months after the day it is registered.

Division 2—Ceasing non-direction stays for derivatives contracts

15A Ceasing non-direction stays for derivatives contracts

- (1) This section applies in relation to a close-out netting contract if:
 - (aa) a party to the contract is:
 - (i) a regulated body; or
 - (ii) a related body corporate of a regulated body; and
 - (a) an obligation under the contract of a party to the contract is an eligible obligation in relation to the contract or is of another prescribed kind; and
 - (b) a specified stay provision (other than a direction stay provision) applies to a trigger event that happens in relation to the contract.
- (2) This section also applies in relation to a security given over financial property, in respect of an obligation of a party to a close-out netting contract, if:
 - (aa) a party to the contract is:
 - (i) a regulated body; or
 - (ii) a related body corporate of a regulated body; and
 - (a) the obligation is an eligible obligation in relation to the contract, or an obligation of a prescribed kind; and
 - (b) a specified stay provision (other than a direction stay provision) applies to a trigger event that happens in relation to the contract.
- (3) A specified stay provision (other than a direction stay provision) ceases to apply to a close-out netting contract or a security:
 - (a) at the time when a declaration under section 15B in relation to the contract or security takes effect; or
 - (b) at the end of the resolution period for the trigger event, if no declaration under section 15C in relation to the contract or security is made during that period.

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- (4) The **resolution period** for a trigger event is the period starting when the trigger event happens and ending:
- (a) at midnight (by legal time in the Australian Capital Territory) at the end of the first business day after the day on which the trigger event happens, unless the specified stay provision is subsection 36AA(2) of the Business Transfer Act; or
 - (b) for subsection 36AA(2) of the Business Transfer Act:
 - (i) if APRA makes a declaration under subsection (5)—at the time the declaration is made; or
 - (ii) if a certificate of transfer under that Act comes into force—just after the certificate of transfer comes into force.

Note: Subsection 36AA(2) of the Business Transfer Act applies indefinitely if neither subparagraph (b)(i) nor (b)(ii) ends the resolution period.

- (5) If:
- (a) a trigger event happens to which subsection 36AA(2) of the Business Transfer Act applies; and
 - (b) the trigger event is the fact that an act is done for the purposes of Division 2 or 3 of Part 4 of that Act; and
 - (c) APRA is satisfied that APRA will not issue a certificate of transfer under that Act;
- APRA may declare, in writing, that the resolution period for that trigger event ends.
- (6) A declaration under subsection (5) is not a legislative instrument.

15B When APRA may declare that non-direction stays cease

- (1) Subsection (2) applies if:
- (a) a trigger event to which a specified stay provision (other than a direction stay provision) applies happens in relation to a close-out netting contract; and
 - (aa) a party to the contract is:
 - (i) a regulated body; or
 - (ii) a related body corporate of a regulated body; and

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- (b) APRA is satisfied that APRA will not make a declaration under section 15C in relation to the party before the end of the resolution period for the trigger event.
- (2) APRA may, before the end of the resolution period for the trigger event, declare that the specified stay provision is to cease to apply to:
 - (a) all close-out netting contracts of the party; and
 - (b) all securities given over financial property, in respect of obligations of the party under all close-out netting contracts of the party.
- (3) A declaration under subsection (2) takes effect:
 - (a) if the declaration specifies a time before the end of the resolution period when the specified stay provision is to cease to apply—at the specified time; or
 - (b) in any other case—at the time when the declaration is made.
- (4) A declaration under subsection (2) cannot be varied or revoked.
- (5) If a declaration under subsection (2) is in writing, the declaration is not a legislative instrument.
- (6) The regulations may do any of the following:
 - (a) prescribe requirements relating to how declarations under subsection (2) are to be made (including requirements relating to the content or form of declarations);
 - (b) prescribe requirements relating to the notification or publication of declarations under subsection (2);
 - (c) include provisions that apply to determining, either generally or for a particular purpose, the time when declarations under subsection (2) are taken to be made.

Note: Regulations under paragraph (c) may (for example) provide that, for the purpose of this section, a declaration is taken not to have been made until certain requirements of regulations under paragraph (b) have been complied with.

**15C When APRA may declare that non-direction stays continue—
regulated body is party to trigger contract**

- (1) Subsection (2) applies if:
 - (a) a trigger event to which a specified stay provision (other than a direction stay provision) applies:
 - (i) is an event that involves a regulated body; and
 - (ii) happens in relation to a close-out netting contract (the **trigger contract**) to which the regulated body is a party; and
 - (b) APRA is satisfied that all the matters in subsection (3) will be satisfied in relation to the party in respect of which the declaration under subsection (2) will be made:
 - (i) unless subparagraph (ii) applies—at the time the declaration will be made; or
 - (ii) if a certificate of transfer will come into force under the Business Transfer Act for a transfer of business from the regulated body to a receiving body—just after that coming into force; and
 - (c) the party in respect of which the declaration under subsection (2) will be made is not in external administration (disregarding paragraphs (d), (da), (db), (e) and (f) of the definition of **external administration** in section 5); and
 - (d) APRA has not already made a declaration under section 15B in relation to the trigger event happening in relation to the trigger contract.
- (2) APRA may, before the end of the resolution period for the trigger event, declare that the specified stay provision is to continue to apply to:
 - (a) unless paragraph (b) or (c) applies:
 - (i) all close-out netting contracts to which the regulated body is a party; and
 - (ii) all securities given over financial property, in respect of obligations under those close-out netting contracts; or
 - (b) in the case of a total transfer under the Business Transfer Act:

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- (i) all close-out netting contracts to which the regulated body is a party (and to which the receiving body will become a party immediately after the transfer); and
 - (ii) all securities given over financial property, in respect of obligations under those close-out netting contracts; or
- (c) in the case of a partial transfer under the Business Transfer Act—either or both of the following:
 - (i) all close-out netting contracts to which the regulated body is a party (and to which the regulated body will remain a party immediately after the transfer), and all securities given over financial property in respect of obligations under those contracts;
 - (ii) all close-out netting contracts to which the regulated body is a party (and to which the receiving body will become a party immediately after the transfer), and all securities given over financial property in respect of obligations under those contracts.
- (3) For the purposes of paragraph (1)(b), the matters are as follows:
 - (a) that the party is able to meet all its liabilities under:
 - (i) close-out netting contracts to which it is a party; and
 - (ii) securities given over financial property in respect of obligations of the party under those contracts;as and when they become due and payable;
 - (b) that the party is solvent (within the meaning of the *Corporations Act 2001*);
 - (c) if the party is an ADI, a general insurer or a life company—that the party has each material authorisation (however described) necessary for its regulated business;
 - (d) if minimum capital requirements under the *Banking Act 1959*, the *Insurance Act 1973* or the *Life Insurance Act 1995* apply to the party—that either subsection (4) or subsection (5) is satisfied in respect of the party.
- (4) This subsection is satisfied if the party's level of capital complies with the minimum capital requirements that apply to it under:
 - (a) the *Banking Act 1959*, the *Insurance Act 1973* or the *Life Insurance Act 1995* (as the case requires); and

- (b) the applicable prudential standards made under that Act.
- (5) This subsection is satisfied if:
 - (a) arrangements are in place to ensure that the party performs all its obligations under:
 - (i) close-out netting contracts to which it is a party; and
 - (ii) securities given over financial property in respect of obligations of the party under those contracts; as and when they are due to be performed; and
 - (b) those arrangements will remain in place until at least the earliest day on which one or more of the following occurs:
 - (i) subsection (4) is satisfied;
 - (ii) if a Banking Act statutory manager is in control of the party's business—APRA makes an ultimate termination of control under subsection 13C(3) of the *Banking Act 1959*;
 - (iii) if an Insurance Act statutory manager is in control of the party's business—APRA makes an ultimate termination of control under subsection 62ZOC(3) of the *Insurance Act 1973*;
 - (iv) if a Life Insurance Act statutory manager is in control of the party's business—APRA makes an ultimate termination of control under subsection 179AC(3) of the *Life Insurance Act 1995*;
 - (v) if the party is under judicial management under the *Insurance Act 1973*—an order under section 62ZF of that Act cancelling the judicial management comes into force;
 - (vi) if the party is under judicial management under the *Life Insurance Act 1995*—an order under section 172 of that Act cancelling the judicial management comes into force.
- (6) A declaration under subsection (2) cannot be varied or revoked.
- (7) A declaration under this section is not a legislative instrument.
- (8) The regulations may do any of the following:

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- (a) prescribe requirements relating to how declarations under subsection (2) are to be made (including requirements relating to the content or form of declarations);
- (b) prescribe requirements relating to the notification or publication of declarations under subsection (2);
- (c) include provisions that apply to determining, either generally or for a particular purpose, the time when declarations under subsection (2) are taken to be made.

Note: Regulations under paragraph (c) may (for example) provide that, for the purpose of this section, a declaration is taken not to have been made until certain requirements of regulations under paragraph (b) have been complied with.

15D When APRA may declare that non-direction stays continue—related body corporate of regulated body is party to trigger contract

- (1) Subsection (3) applies if:
 - (a) a trigger event to which a specified stay provision (other than a direction stay provision) applies:
 - (i) is an event that involves a regulated body (the ***trigger body***); and
 - (ii) happens in relation to one or more close-out netting contracts (each of which is a ***trigger contract***) to which a related body corporate of the trigger body (the ***contracting body***) is a party; and
 - (b) APRA is satisfied that all the matters in subsection (5) will be satisfied in relation to each entity covered under subsection (2):
 - (i) unless subparagraph (ii) applies—at the time the declaration will be made; or
 - (ii) if a certificate of transfer will come into force under the Business Transfer Act for a transfer of business from the trigger body to a receiving body—just after that coming into force; and
 - (c) each entity covered under subsection (2) is not in external administration (disregarding paragraphs (d), (da), (db), (e))

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- and (f) of the definition of *external administration* in section 5); and
- (d) APRA has not already made a declaration under section 15B in relation to the trigger event happening in relation to the trigger contract.
- (2) For the purposes of paragraphs (1)(b) and (c), an entity is covered under this subsection if it is:
- (a) if section 15E does not apply—the trigger body; or
 - (b) if section 15E applies because of a transfer of business under the Business Transfer Act from the trigger body to a receiving body:
 - (i) in the case of a total transfer of business—the receiving body; or
 - (ii) in the case of a partial transfer of business—an entity specified in a determination under subsection 15E(3).
- (3) APRA may, before the end of the resolution period for the trigger event, make a declaration that the specified stay provision is to continue to apply to:
- (a) each trigger contract specified in the declaration; and
 - (b) all securities given over financial property, in respect of obligations under each trigger contract specified in the declaration.
- (4) APRA may specify either or both of the following in a declaration under subsection (3):
- (a) one or more trigger contracts;
 - (b) one or more classes of trigger contracts.
- Note: See subsection 15E(2) for a restriction on when APRA may make a declaration under subsection (2) of this section in the case of a transfer of business from the trigger body to a receiving body.
- (5) For the purposes of paragraph (1)(b), the matters are as follows:
- (a) that the entity covered under subsection (2) is able to meet all its liabilities under:
 - (i) close-out netting contracts to which it is a party; and
 - (ii) securities given over financial property in respect of obligations of the entity under those contracts;

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- as and when they become due and payable;
- (b) that the entity covered under subsection (2) is solvent (within the meaning of the *Corporations Act 2001*);
 - (c) if the entity covered under subsection (2) is an ADI, a general insurer or a life company—that the entity has each material authorisation (however described) necessary for its regulated business;
 - (d) if minimum capital requirements under the *Banking Act 1959*, the *Insurance Act 1973* or the *Life Insurance Act 1995* apply to the entity covered under subsection (2)—that either subsection (6) or subsection (7) is satisfied in respect of the entity covered under subsection (2).
- (6) This subsection is satisfied if the entity’s level of capital complies with the minimum capital requirements that apply to it under:
- (a) the *Banking Act 1959*, the *Insurance Act 1973* or the *Life Insurance Act 1995* (as the case requires); and
 - (b) the applicable prudential standards made under that Act.
- (7) This subsection is satisfied if:
- (a) arrangements are in place to ensure that the entity performs all its obligations under:
 - (i) close-out netting contracts to which it is a party; and
 - (ii) securities given over financial property in respect of obligations of the entity under those contracts;as and when they are due to be performed; and
 - (b) those arrangements will remain in place until at least the earliest day on which one or more of the following occurs:
 - (i) subsection (6) is satisfied;
 - (ii) if a Banking Act statutory manager is in control of the entity’s business—APRA makes an ultimate termination of control under subsection 13C(3) of the *Banking Act 1959*;
 - (iii) if an Insurance Act statutory manager is in control of the entity’s business—APRA makes an ultimate termination of control under subsection 62ZOC(3) of the *Insurance Act 1973*;

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- (iv) if a Life Insurance Act statutory manager is in control of the entity's business—APRA makes an ultimate termination of control under subsection 179AC(3) of the *Life Insurance Act 1995*;
 - (v) if the entity is under judicial management under the *Insurance Act 1973*—an order under section 62ZF of that Act cancelling the judicial management comes into force;
 - (vi) if the entity is under judicial management under the *Life Insurance Act 1995*—an order under section 172 of that Act cancelling the judicial management comes into force.
- (8) A declaration under subsection (3) cannot be varied or revoked.
- (9) A declaration under this section is not a legislative instrument.
- (10) The regulations may do any of the following:
- (a) prescribe requirements relating to how declarations under subsection (3) are to be made (including requirements relating to the content or form of declarations);
 - (b) prescribe requirements relating to the notification or publication of declarations under subsection (3);
 - (c) include provisions that apply to determining, either generally or for a particular purpose, the time when declarations under subsection (3) are taken to be made.

Note: Regulations under paragraph (c) may (for example) provide that, for the purpose of this section, a declaration is taken not to have been made until certain requirements of regulations under paragraph (b) have been complied with.

15E Declaration under subsection 15D(3)—total or partial transfer of business

- (1) This section applies if:
- (a) the requirement in paragraph 15D(1)(a) is satisfied in relation to a trigger event; and
 - (b) a certificate of transfer will come into force under the Business Transfer Act for:

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- (i) a total transfer of business from the trigger body to a receiving body; or
 - (ii) a partial transfer of business from the trigger body to a receiving body.
- (2) APRA must not make a declaration under subsection 15D(3) in relation to the trigger event unless APRA is satisfied that the declaration will not have a detrimental effect on any counterparty to a close-out netting contract to which the declaration would apply.
- (3) For the purposes of subparagraph 15D(2)(b)(ii), APRA may make a written determination specifying either or both of the following:
 - (a) the trigger body;
 - (b) the receiving body.
- (4) A determination under subsection (3) cannot be varied or revoked.
- (5) A determination under subsection (3) is not a legislative instrument.
- (6) The regulations may do any of the following:
 - (a) prescribe requirements relating to how determinations under subsection (3) are to be made (including requirements relating to the content or form of declarations);
 - (b) prescribe requirements relating to the notification or publication of determinations under subsection (3);
 - (c) include provisions that apply to determining, either generally or for a particular purpose, the time when determinations under subsection (3) are taken to be made.

Note: Regulations under paragraph (c) may (for example) provide that, for the purpose of this section, a determination is taken not to have been made until certain requirements of regulations under paragraph (b) have been complied with.

Part 5—Market netting contracts

16 Effectiveness of market netting contracts

(1) If:

- (a) Australian law governs a market netting contract; and
- (b) the contract is entered into in circumstances that are within Commonwealth constitutional reach;

the following provisions apply:

- (c) obligations may be terminated, termination values may be calculated and a net amount become payable in accordance with the contract;
- (ca) any security given, in accordance with the contract, in respect of obligations of a party to the contract may be enforced in accordance with the contract;
- (cb) rights and obligations of a party to the contract may be transferred in accordance with the contract;
- (cc) without limiting paragraph (cb):
 - (i) property (including property over which security has been given) of a party to the contract may be transferred or otherwise dealt with in accordance with the contract; and
 - (ii) property (including property over which security has been given) of another person on whose behalf a party to the contract is acting may, with that other person's prior written consent, be transferred or otherwise dealt with in accordance with the contract;
- (d) paragraphs (c), (ca), (cb) and (cc) apply despite:
 - (i) any disposal of rights that may be netted under the contract; or
 - (ia) any disposal of rights or property that may be transferred in accordance with the contract; or
 - (ii) the creation of any encumbrance, or any other interest, in relation to those rights or that property; or

Section 16

- (iii) the operation of any encumbrance, or any other interest, in relation to those rights or that property that is created after the commencement of this section;
in contravention of a prohibition in the contract;
 - (e) for the purposes of any law, the assets of a party to the contract are taken:
 - (i) to include any net obligation owed to the party under the contract; and
 - (ii) not to include obligations terminated under the contract.
- (2) If:
- (a) a party to a market netting contract goes into external administration; and
 - (b) Australian law governs either:
 - (i) the external administration; or
 - (ii) the contract;
- the following provisions apply:
- (c) obligations may be netted or terminated, termination values may be calculated and a net amount become payable in accordance with the contract;
 - (d) obligations that are, or have been, netted or terminated under the contract are to be disregarded in the external administration;
 - (e) any net obligation owed by the party under the contract that has not been discharged is provable in the external administration;
 - (f) any net obligation owed to the party under the contract that has not been discharged may be recovered by the external administrator for the benefit of creditors;
 - (fa) any security given by the party, in accordance with the contract, in respect of obligations of a party to the contract may be enforced in accordance with the contract;
 - (fb) rights and obligations of the party may be transferred in accordance with the contract;
 - (fc) without limiting paragraph (fb):

- (i) property (including property over which security has been given) of the party may be transferred or otherwise dealt with in accordance with the contract; and
- (ii) property (including property over which security has been given) of another person on whose behalf the party is acting may, with that other person's prior written consent, be transferred or otherwise dealt with in accordance with the contract;
- (g) none of the following is to be void or voidable in the external administration:
 - (i) the netting or termination of obligations under the contract;
 - (ii) a payment by the party to discharge a net obligation under the contract;
 - (iii) a payment, or a transfer of property (whether absolutely or by way of security), by the party to meet an obligation under the contract;
 - (iv) the enforcement of a security in accordance with the contract;
 - (v) a transfer of, or dealing with, rights, obligations or property in accordance with the contract;
- (h) paragraphs (c) to (g) apply despite:
 - (i) any disposal of rights that may be netted under the contract; or
 - (ii) any disposal of rights or property that may be transferred in accordance with the contract; or
 - (iii) the creation of any encumbrance, or any other interest, in relation to those rights or property over which security mentioned in paragraph (fa) is given; or
 - (iv) the operation of any encumbrance, or any other interest, in relation to those rights or that property;
 in contravention of a prohibition in the contract, or in the security mentioned in paragraph (fa).

Note: By giving express recognition to market netting contracts, subsections (1) and (2) remove the basis for arguing that the contracts are void as contrary to public policy embodied in the laws dealing with insolvency.

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- (3) Subsections (1) and (2) have effect despite any other law (including the specified provisions and the specified stay provisions).

Note: Section 5 defines *specified provisions* and *specified stay provision*.

- (4) A reference in this section to things done, or that may be done, in accordance with a contract is taken to include things done, or that may be done, in accordance with any security given in accordance with the contract.

Part 6—Administration

17 Prescribed forms

A document that this Act requires to be in a prescribed form must be:

- (a) if a form for the document is prescribed in the regulations—in the prescribed form; or
- (b) if a form for the document is not prescribed in regulations but the Reserve Bank has approved a form for the document—in the approved form.

18 Regulations

The Governor-General may make regulations prescribing matters:

- (a) required or permitted to be prescribed by this Act; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Endnotes

Endnote 1—About the endnotes

Endnotes

Endnote 1—About the endnotes

The endnotes provide information about this compilation and the compiled law.

The following endnotes are included in every compilation:

Endnote 1—About the endnotes

Endnote 2—Abbreviation key

Endnote 3—Legislation history

Endnote 4—Amendment history

Abbreviation key—Endnote 2

The abbreviation key sets out abbreviations that may be used in the endnotes.

Legislation history and amendment history—Endnotes 3 and 4

Amending laws are annotated in the legislation history and amendment history.

The legislation history in endnote 3 provides information about each law that has amended (or will amend) the compiled law. The information includes commencement details for amending laws and details of any application, saving or transitional provisions that are not included in this compilation.

The amendment history in endnote 4 provides information about amendments at the provision (generally section or equivalent) level. It also includes information about any provision of the compiled law that has been repealed in accordance with a provision of the law.

Editorial changes

The *Legislation Act 2003* authorises First Parliamentary Counsel to make editorial and presentational changes to a compiled law in preparing a compilation of the law for registration. The changes must not change the effect of the law. Editorial changes take effect from the compilation registration date.

If the compilation includes editorial changes, the endnotes include a brief outline of the changes in general terms. Full details of any changes can be obtained from the Office of Parliamentary Counsel.

Misdescribed amendments

A misdescribed amendment is an amendment that does not accurately describe the amendment to be made. If, despite the misdescription, the amendment can

Endnote 1—About the endnotes

be given effect as intended, the amendment is incorporated into the compiled law and the abbreviation “(md)” added to the details of the amendment included in the amendment history.

If a misdescribed amendment cannot be given effect as intended, the abbreviation “(md not incorp)” is added to the details of the amendment included in the amendment history.

Endnotes

Endnote 2—Abbreviation key

Endnote 2—Abbreviation key

ad = added or inserted	o = order(s)
am = amended	Ord = Ordinance
amdt = amendment	orig = original
c = clause(s)	par = paragraph(s)/subparagraph(s) /sub-subparagraph(s)
C[x] = Compilation No. x	pres = present
Ch = Chapter(s)	prev = previous
def = definition(s)	(prev...) = previously
Dict = Dictionary	Pt = Part(s)
disallowed = disallowed by Parliament	r = regulation(s)/rule(s)
Div = Division(s)	reloc = relocated
ed = editorial change	renum = renumbered
exp = expires/expired or ceases/ceased to have effect	rep = repealed
F = Federal Register of Legislation	rs = repealed and substituted
gaz = gazette	s = section(s)/subsection(s)
LA = <i>Legislation Act 2003</i>	Sch = Schedule(s)
LIA = <i>Legislative Instruments Act 2003</i>	Sdiv = Subdivision(s)
(md) = misdescribed amendment can be given effect	SLI = Select Legislative Instrument
(md not incorp) = misdescribed amendment cannot be given effect	SR = Statutory Rules
mod = modified/modification	Sub-Ch = Sub-Chapter(s)
No. = Number(s)	SubPt = Subpart(s)
	<u>underlining</u> = whole or part not commenced or to be commenced

Endnote 3—Legislation history

Endnote 3—Legislation history

Act	Number and year	Assent	Commencement	Application, saving and transitional provisions
Payment Systems and Netting Act 1998	83, 1998	2 July 1998	2 July 1998 (s 2)	
Corporations (Repeals, Consequential and Transitional) Act 2001	55, 2001	28 June 2001	s 4–14 and Sch 3 (items 402–408): 15 July 2001 (s 2(3))	s 4–14
Financial Services Reform (Consequential Provisions) Act 2001	123, 2001	27 Sept 2001	Sch 1 (items 260–262): 11 Mar 2002 (s 2(1), (6))	—
Bankruptcy Legislation Amendment (Superannuation Contributions) Act 2007	57, 2007	15 Apr 2007	Sch 1 (item 14): 28 July 2006 (s 2(1) item 2)	—
Financial Sector Legislation Amendment (Simplifying Regulation and Review) Act 2007	154, 2007	24 Sept 2007	Sch 4 (items 53, 54): 24 Sept 2007 (s 2(1) item 7)	—
Acts Interpretation Amendment Act 2011	46, 2011	27 June 2011	Sch 2 (item 908) and Sch 3 (items 10, 11): 27 Dec 2011 (s 2(1) items 7, 12)	Sch 3 (items 10, 11)
Corporations and Financial Sector Legislation Amendment Act 2013	59, 2013	21 June 2013	Sch 1 (items 1–9): 19 July 2013 (s 2(1) item 2)	Sch 1 (items 8, 9)
Insolvency Law Reform Act 2016	11, 2016	29 Feb 2016	Sch 2 (item 307): 1 Mar 2017 (s 2(1) item 7)	—

Endnotes

Endnote 3—Legislation history

Act	Number and year	Assent	Commencement	Application, saving and transitional provisions
Financial System Legislation Amendment (Resilience and Collateral Protection) Act 2016	43, 2016	4 May 2016	Sch 1 (items 1–35, 48): 1 June 2016 (s 2(1) item 2)	Sch 1 (item 48)
Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017	112, 2017	18 Sept 2017	Sch 1 (items 15–17): 1 July 2018 (s 2(1) item 3)	Sch 1 (item 17)
Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Act 2018	10, 2018	5 Mar 2018	Sch 5: 5 Mar 2018 (s 2(1) item 2)	Sch 5 (items 30, 31)
Corporations Amendment (Asia Region Funds Passport) Act 2018	61, 2018	29 June 2018	Sch 2A (item 9): 18 Sept 2018 (s 2(1) item 2)	—
Treasury Laws Amendment (2019 Measures No. 3) Act 2020	64, 2020	22 June 2020	Sch 3 (items 255–257, 325, 326): 1 Oct 2020 (s 2(1) item 6)	Sch 3 (items 325, 326)

Endnote 4—Amendment history

Endnote 4—Amendment history

Provision affected	How affected
Part 1	
s 5	am No 55, 2001; No 123, 2001; No 57, 2007; No 46, 2011; No 11, 2016; No 43, 2016; No 112, 2017; No 10, 2018; No 61, 2018
s 5AA.....	ad No 10, 2018 ed C10
s 5AB.....	ad No 10, 2018
s 5A	ad No 43, 2016
Part 2	
s 6	am No 43, 2016
s 6A	ad No 43, 2016
s. 9	am. No. 154, 2007
Part 3	
s 10	am No 43, 2016
Part 4	
Division 1	
Division 1 heading.....	ad No 43, 2016
s 14	am No 43, 2016
s 14A	ad No 43, 2016
s 15	am No 64, 2020
Division 2	
Division 2 heading.....	ad No 43, 2016
s 15A	ad No 43, 2016 am No 10, 2018
s 15B.....	ad No 43, 2016 am No 10, 2018
s 15C.....	ad No 43, 2016 am No 10, 2018
s 15D	ad No 10, 2018

Endnotes

Endnote 4—Amendment history

Provision affected	How affected
s 15E.....	ad No 10, 2018
Part 5	
s. 16	am. No. 59, 2013; No 43, 2016