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Volume 1:	sections 1–260E
Volume 2:	sections 283AA–600K
Volume 3:	sections 601–742
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	Endnotes

Each volume has its own contents

Prepared by the Office of Parliamentary Counsel, Canberra

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About this compilation

This compilation

This is a compilation of the *Corporations Act 2001* that shows the text of the law as amended and in force on 22 May 2024 (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 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 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 Register for the compiled law.

Self-repealing provisions

If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

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Chapter 7—Financial services and markets

Note: This Chapter applies to a CCIV in a modified form: see Division 4 of Part 8B.7.

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

(aa) the provision of suitable financial products to consumers of financial products; 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	meaning of some terms relating to financial services and markets
2	7.2	licensing of financial markets other matters relating to financial markets
2A	7.2A	supervision of financial markets

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Section 760B

Part-by-Part outline of Chapter 7		
	Part...	**Covers...**
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
5A	7.5A	regulation of derivative transactions and derivative trade repositories
5B	7.5B	regulation of financial benchmarks
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
8A	7.8A	design and distribution requirements relating to financial products
9	7.9	financial product disclosure requirements other requirements relating to issue, sale and purchase of financial products
9A	7.9A	intervention powers in relation to financial products

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Part-by-Part outline of Chapter 7

	Part...	Covers...
10	7.10	market misconduct and other prohibited conduct relating to financial products and services
10A	7.10A	authorisation and regulation of an external dispute resolution scheme for financial complaints additional provisions relating to superannuation complaints
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

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Division 2—Meaning of some terms relating to financial services and markets

761A Meaning of some terms relating to financial services and markets

In this Act:

AFCA (short for the Australian Financial Complaints Authority) means the operator of the AFCA scheme.

AFCA regulated superannuation scheme means:

(a) the scheme provided for by the *Australian Defence Force Cover Act 2015*; and

(b) if, under the AFCA scheme, an exempt public sector superannuation scheme may elect to join the AFCA scheme, and such a superannuation scheme so elects—that superannuation scheme.

AFCA scheme means the external dispute resolution scheme for which an authorisation under Part 7.10A is in force.

AFCA staff member means:

(a) a director, officer or employee of AFCA; or

(b) a person engaged as a consultant to, or to perform services for, AFCA for the purposes of the AFCA scheme.

annuity policy means a life policy in relation to an annuity that is declared to be a superannuation policy under regulations made for the purposes of paragraph (b) of the definition of ***superannuation policy*** in the Schedule to the *Life Insurance Act 1995*.

authorised clearing and settlement facility means:

(a) a licensed CS facility; or

(b) a clearing and settlement facility that satisfies the following requirements:

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(i) the operator of the facility is authorised to operate the facility in the foreign country in which the operator's principal place of business is located;

(ii) any requirements specified in regulations made for the purposes of this subparagraph.

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;

(b) provide a claims handling and settling service, on behalf of the insurer as insurer, in relation to risk insurance products;

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.

CGS depository interest means a depository interest (within the meaning of the *Commonwealth Inscribed Stock Act 1911*) that can be transferred through a licensed CS facility.

death benefit decision-maker means any of the following persons:

(a) the trustee of:

(i) a regulated superannuation fund; or

(ii) an AFCA regulated superannuation scheme; or

(iii) an approved deposit fund;

(b) an insurer in relation to a superannuation complaint;

(c) an RSA provider.

derivative retail client money: money paid as mentioned in subsection 981A(1) is ***derivative retail client money*** if:

(a) either:

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(i) the financial service referred to in subparagraph 981A(1)(a)(i) is or relates to a dealing in a derivative; or

(ii) the financial product referred to in subparagraph 981A(1)(a)(ii) is a derivative; and

(b) the financial service or product would be provided to the client as a retail client if:

(i) the service or product were provided to the client when the money is paid; and

(ii) section 761GA (about sophisticated investors) did not apply.

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).

financial services law means:

(a) a provision of this Chapter or of Chapter 5C, 5D, 6, 6A, 6B, 6C, 6D, 8A or 8B; 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 the Passport Rules for this jurisdiction; or

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

(e) 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

(f) in relation to a financial services licensee that is a licensed trustee company (in addition to paragraphs (a) to (e))—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.

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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:

(a) 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; but

(b) does not include a scheme or arrangement for the provision of benefits consisting of the payment of money, on the death of a person, for the purpose of meeting the whole or a part of the expenses of and incidental to the funeral, burial or cremation of the person.

insurer, in relation to a superannuation complaint, means the life company (within the meaning of the *Life Insurance Act 1995*) that is a party to the policy to which the complaint relates.

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

life policy fund means a regulated superannuation fund, or an AFCA regulated superannuation scheme, for the purpose of which the trustee maintains, in relation to at least some of the members of the fund:

(a) individual life policies covering each of those members; or

(b) a single life policy covering all of those members.

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.

sale, in relation to an annuity policy, includes any activity undertaken, or representation made:

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(a) at the time of, or preliminary to, the entry into the policy, so that the policy as so entered into extends to a particular person; and
(b) at the time of, or preliminary to, the variation of the policy, so that the policy as so varied affects a particular person.

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

761B Meaning of *arrangement*

(1) For the purposes of this Chapter, ***arrangement*** means 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.

(2) For the purposes of this Part, if:
(a) an arrangement (as defined in subsection (1)), 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 to be treated as if they together constituted a single arrangement.

761CAA Meaning of *claimant intermediary*

(1) A person is a ***claimant intermediary*** if the person:

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(a) carries on a business of representing persons insured under insurance products in pursuing claims under those products; and

(b) represents those persons insured for a benefit given as consideration for that service, whether a monetary benefit or otherwise and whether given to the person providing the services or another person nominated by that person.

(2) The regulations may prescribe circumstances in which a person is not a ***claimant intermediary*** despite subsection (1).

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 Act.

761D Meaning of *derivative*

(1) 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;

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(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 is a ***derivative***. A thing so declared is a derivative despite anything in subsections (3) and (4).

(3) Subject to subsection (2), none of the following is a ***derivative*** even if covered by 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.

(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*** merely because the arrangement provides for the consideration to be varied by reference to a general inflation index such as the Consumer Price Index.

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761DA Meaning of *insurance claims manager*

(1) A person is an ***insurance claims manager*** if:
  (a) the person carries on a business of providing claims handling and settling services on behalf of one or more insurers; and
  (b) where the person, as part of that business, also provides goods or other services—providing claims handling and settling services on behalf of one or more insurers is the primary part of the business.

(2) The regulations may prescribe:
  (a) circumstances in which, for the purposes of subsection (1), providing claims handling and settling services on behalf of one or more insurers is taken to be the primary part of a business carried on by a person; and
  (b) circumstances in which, for the purposes of subsection (1), providing claims handling and settling services on behalf of one or more insurers is taken not to be the primary part of a business carried on by a person.

761E Meaning of *acquire*, *issue* and *provide*

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.

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(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	the account concerned is opened in the person's name
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;

(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.

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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.

(4A) For the purposes of subsection (4), if the financial product issued to the client is an interest in a notified foreign passport fund, the operator of the fund is the person responsible for the obligations mentioned in that subsection that are owed under the terms of the facility that is the product.

(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:

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(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:

(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:

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(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.

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(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:

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(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.

*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.

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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

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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.

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(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) 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) 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 a disposal by the person as a retail client.

Wholesale clients

(4) 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.

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General insurance products

(5) 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.

Products and services relating to superannuation and RSAs

(6) For the purposes of this Act:

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

(aa) however, if a trustee of a pooled superannuation trust 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, or is a superannuation trustee service, 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 that has net assets of at least $10 million; or

(ii) an RSA provider;

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

Traditional trustee company services

(6A) 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) If a financial product is not, or a financial service (other than a traditional trustee company service or a superannuation trustee service) provided to a person does not relate to, a general insurance product, a superannuation product or an RSA, the product or service is provided to the person as a retail client unless one or more of the following paragraphs apply:

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(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 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 or Part 6D.3A, 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

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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. 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;

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(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

A financial product, or a financial service (other than a traditional trustee company service, a crowd-funding service or a superannuation trustee 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

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

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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.

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Division 3—Meaning of financial product and related terms

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 Act, 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.

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762C Meaning of *facility*

In this Act:

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 subsection 761B(2).

Subdivision B—The general definition

763A Meaning of *financial product*

(1) 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;

(b) manages financial risk;

(c) makes non-cash payments.

This has effect subject to section 763E.

(2) 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.

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763B Meaning of *makes a financial investment*

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).

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763C Meaning of *manages financial risk*

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 Meaning of *makes non-cash payments*

(1) 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) 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:

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(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:

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(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***:
(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);
(bb) any of the following in relation to a notified foreign passport fund:
(i) an interest in the fund;
(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;

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(d) a contract of insurance that is not a life policy, or a sinking fund policy, 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, 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, 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

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(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 product; or

(h) an RSA; or

(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;

(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.

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.

Contracts of insurance

(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.

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(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.

Declaring additional things to be financial products for specified provisions of this Chapter

(3) Subject to Subdivision D, a thing declared by regulations to be a financial product for a specified provision of this Act is a ***financial product*** for that provision.

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***:

(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);

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(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, 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, 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 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;

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(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 or a notified foreign passport fund:

(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, that is not a contract of insurance;

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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.

ASIC declarations

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

Regulations

(3) Despite anything in Subdivision B or C, the regulations may declare that a specified facility, interest or other thing is not a financial product for the purposes of specified provisions of this Chapter.

(4) A declaration under subsection (2) that is inconsistent with regulations made for the purposes of subsection (3) has no effect to the extent of the inconsistency, but a declaration is taken to be consistent with the regulations to the extent that the declaration is capable of operating concurrently with the regulations.

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Division 4—Meaning of financial service and related terms

766A Meaning of *financial service*

General

(1) Subject to paragraph (2)(b), a person provides a ***financial service*** if they:
- (a) provide financial product advice; or
- (b) deal in a financial product; or
- (c) make a market for a financial product; or
- (d) operate a registered scheme; or
- (da) operate the business and conduct the affairs of a CCIV; or
- (e) provide a custodial or depository service; or
- (ea) provide a crowd-funding service; or
- (eb) provide a claims handling and settling service; or
- (ec) provide a superannuation trustee service; 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)).

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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.

Overlap between financial services

(5) The fact that conduct constitutes the provision of a financial service is not to be taken to imply that the conduct does not also constitute the provision of another financial service.

Note: For example, conduct may constitute providing a superannuation trustee service and also providing another financial service (such as dealing in a financial product that is a superannuation product).

766B Meaning of *financial product advice*, *personal advice* and *general advice*

(1) ***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

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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) ***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.

(3A) However, the acts of asking for information solely to determine whether a person is in a target market for a financial product, and of informing the person of the result of that determination, do not, of themselves, constitute personal advice.

(4) ***General advice*** is financial product advice that is not personal advice.

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

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(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, 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

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(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).

(7A) A recommendation or a statement of opinion, or a report of either of those things, is not financial product advice if giving the recommendation, statement of opinion or report could reasonably be regarded as a necessary part of providing a claims handling and settling service.

(7B) The regulations may prescribe:

(a) circumstances in which giving a recommendation, statement of opinion or report could reasonably be regarded as a necessary part of providing a claims handling and settling service for the purposes of subsection (7A); and

(b) circumstances in which giving a recommendation, statement of opinion or report could not reasonably be regarded as a necessary part of providing a claims handling and settling service for the purposes of subsection (7A).

(8) Subsections (5), (6), (7) and (7A) 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

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(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) The 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 and interests in managed investment schemes—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.

(2A) Despite subsections (1) and (2), providing a crowd-funding service does not constitute ***dealing*** in a financial product.

(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

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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 (other than a CCIV) or an unincorporated body;
  (ca) a CCIV;

  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*

(1) A person ***makes a market*** for a financial product if:

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(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:
(i) superannuation products; or
(ii) managed investment products; or
(iii) financial products referred to in paragraph 764A(1)(ba) (which relates to certain managed investment schemes that are not registered schemes); or
(iv) foreign passport fund products.

766E Meaning of *custodial or depository service*

(1) 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), the time at which a custodial or depository service is provided is the time when the financial

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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;

(ba) the operation of a notified foreign passport fund;

(bb) the holding of the assets of a notified foreign passport fund;

(c) the operation of:

(i) a regulated superannuation fund; or

(ii) an AFCA regulated superannuation scheme; or

(iii) an approved deposit fund; or

(iv) a pooled superannuation trust;

by the trustees of that fund, scheme or trust;

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

(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.

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766F Meaning of *crowd-funding service*

*Meaning of provides a **crowd-funding service***

(1) A person provides a ***crowd-funding service*** if:
  (a) a CSF offer document for a CSF offer of securities of a company is published on a platform operated by the person; and
  (b) applications may be made to the person for the issue, by the company, of securities pursuant to the offer.

Note: CSF offers are dealt with in Part 6D.3A (Crowd-sourced funding).

(2) The financial service constituted by providing a ***crowd-funding service*** is taken to include (in addition to the matters mentioned in subsection (1)), performing all other aspects of the role of a CSF intermediary under Part 6D.3A.

To whom, and when, a crowd-funding service is provided

(3) A person who uses the application facility for the CSF offer to make an application pursuant to the offer is a person to whom the crowd-funding service is provided. The time at which the crowd-funding service is provided to the person is the time when the person first uses the application facility to make an application pursuant to the offer.

Note: For the meaning of ***application facility***, see subsection 738ZA(3).

(4) The company making the CSF offer is a person to whom the crowd-funding service is provided. The time at which the crowd-funding service is provided to the company is the time when the company enters into the hosting arrangement for the offer.

Note: For the meaning of ***hosting arrangement***, see subsection 738L(2).

766G Meaning of *claims handling and settling service*

(1) A person provides a ***claims handling and settling service*** if:
  (a) the person makes a recommendation, or states an opinion, in the following circumstances:

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(i) the recommendation, or statement of opinion, is made in response to an inquiry by or on behalf of another person about an existing or a potential claim by the other person under an insurance product;

(ii) the recommendation, or statement of opinion, could reasonably be expected to influence a decision whether to continue with the existing claim or to make the potential claim; or

(b) the person assists another person to make a claim under an insurance product; or

(c) the person represents a person insured under an insurance product in pursuing a claim under the product; or

(d) the person assesses whether an insurer has a liability under an insurance product, or provides assistance in relation to such an assessment; or

(e) the person makes a decision to accept or reject all or part of a claim under an insurance product; or

(f) the person quantifies the extent of the insurer's liability to another person under an insurance product, or provides assistance in relation to the quantification of the extent of such a liability; or

(g) the person offers to settle all or part of a claim under an insurance product; or

(h) the person satisfies a liability of the insurer under an insurance product in full or partial settlement of a claim under the insurance product.

(2) For the purposes of this Act, a claims handling and settling service provided in relation to an insurance product is to be treated as having been provided to the insured under the insurance product (who may be a person insured as a third party beneficiary under the contract of insurance that constitutes the insurance product, within the meaning of the *Insurance Contracts Act 1984*).

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766H Meaning of *superannuation trustee service*

(1) A person provides a ***superannuation trustee service*** if the person operates a registrable superannuation entity as trustee of the entity.

Note 1: The meaning of ***person*** here is affected by section 761FA (about multiple trustees).

Note 2: To determine whether a person to whom the service is provided is a retail client, see subsection 761G(6).

(2) However, the following do not constitute the provision of a ***superannuation trustee service***:

(a) the operation of an exempt public sector superannuation scheme;

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

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Division 5—Meaning of financial market

767A Meaning of *financial market*

(1) 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***:
  (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.

(3) Something that is done through or by means of the facility that constitutes a financial market is done ***on*** the financial market.

Note: For example, when securities are quoted or traded on a financial market.

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*Meaning of **participant***

(4) A person who is allowed to participate directly in a financial market under the market's operating rules is a ***participant*** in the market.

(5) A person who is:
  (a) recognised by the operating rules of the market as a suitably qualified affiliate of the market; and
  (b) involved in the carrying on of a financial services business (including as an employee, director or in some other capacity);

  is also, for the purposes of the following provisions, a ***participant*** in the market:
  (c) paragraph 792B(2)(b);
  (d) section 793B;
  (e) section 883A;
  (f) subsection 915F(2);
  (g) paragraphs 923B(3)(a) and (b);
  (h) any other provisions prescribed by regulations for the purposes of this paragraph.

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Division 6—Meaning of clearing and settlement facility

768A Meaning of *clearing and settlement facility*

(1) 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***:

(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;

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(e) conducting treasury operations between related bodies corporate;

(h) operating a facility for the exchange and settlement of non-cash payments between providers of non-cash payment facilities;

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

*Meaning of **participant***

(3) A person who is allowed to participate directly in a clearing and settlement facility under the facility's operating rules is a ***participant*** in the facility.

(4) A person who is:

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

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

is also, for the purposes of the following provisions, a ***participant*** in the facility:

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

(d) section 822B;

(e) subsection 915F(2);

(f) any other provisions prescribed by regulations for the purposes of this paragraph.

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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

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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,

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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 a 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

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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:

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proceeding under this Chapter has the same meaning as it has in section 769B.

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Part 7.2—Licensing of financial markets

Division 1—Preliminary

790A Meaning of *clearing and settlement arrangements*

Clearing and settlement arrangements for a transaction effected through a financial market are 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.

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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*.

(3) A person contravenes this subsection if the person contravenes subsection (1).

Note: This subsection is a civil penalty provision (see section 1317E).

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)).

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791C Exemptions by Minister

(1) The Minister may exempt a particular financial market, or a class of financial market, from all or specified provisions of this Part. An exemption may be unconditional, or subject to conditions specified in the exemption.

Note: The provisions of this Part include regulations made for the purposes of this Part (see section 761H).

(2) The Minister may, at any time:

(a) vary an exemption to:

(i) impose conditions, or additional conditions, on the exemption; or

(ii) vary or revoke any of the conditions on the exemption; or

(b) 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 class of financial markets—a notice has been published on ASIC's website allowing a reasonable period within which the operator of each financial market covered by the exemption may make submissions on the proposed action, and that period has ended.

(4) If an exemption is expressed to apply in relation to a class of financial markets (whether or not it is also expressed to apply in relation to one or more financial markets otherwise than by reference to membership of a class), then the exemption, and any variation or revocation of the exemption, is a legislative instrument.

(5) If subsection (4) does not apply to an exemption, then the exemption, and any variation or revocation of the exemption, must

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be in writing and the Minister must publish notice of it in the Gazette.

791D Meaning of *operated in this jurisdiction*—financial market

(1) 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***.

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Division 3—Regulation of market licensees

Subdivision A—Licensee's obligations

792A General obligations

(1) 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

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(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—take all reasonable steps to ensure that an unacceptable control situation () 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).

(2) A person contravenes this subsection if the person contravenes paragraph (1)(a), (c), (d), (e), (f), (g), (h) or (i).

Note: This subsection is a civil penalty provision (see section 1317E).

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

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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:

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(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)).

(7) A person contravenes this subsection if the person contravenes subsection (1), (2), (3), (4) or (5).

Note: This subsection is a civil penalty provision (see section 1317E).

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.

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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)).

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(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

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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

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(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).

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(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;
   (d) the client money reporting 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).

   Note 3: If there is an inconsistency between the market integrity rules, the derivative transaction rules or the derivative trade repository rules and the client money reporting rules, the market integrity rules, the derivative transaction rules or the derivative trade repository rules prevail: see subsection 981M(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).

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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 (other than a notified foreign passport fund)—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 (other than a notified foreign passport fund) that is, with its agreement, consent or 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 agreement, consent or 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.

(4A) For the purposes of this section, if a disclosing entity that is an undertaking to which interests in a notified foreign passport fund

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relate is, with the agreement, consent or acquiescence of the operator of the fund, included in the official list of a licensed market, the operator of the fund, or an associate of the operator, 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 operator or associate.

(4B) For the purposes of this section, if:

(a) subsection (3) does not apply to a CCIV; and

(b) a sub-fund of the CCIV is, with the agreement, consent or acquiescence of the CCIV, included in the official list of a licensed market;

the CCIV, or an associate of the CCIV, 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 CCIV or associate.

Note: Subsection (3) may apply to a CCIV instead of this subsection if the CCIV, and not a sub-fund, is included in the official list of a licensed market.

(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 in a prescribed form written notice of the change. The notice must:

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(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 in a prescribed form 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(1)(a)).

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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.

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Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

794C ASIC assessment of 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) If the market licensee is prescribed by the regulations for the purpose of this subsection, ASIC must, in respect of the obligation in paragraph 792A(1)(c), do such an assessment at least once a year.

(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.

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(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)).

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(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:

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(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.

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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 in a prescribed form 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(1)(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:

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(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(1)(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

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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

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(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 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;

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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 in a prescribed form 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.

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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 in a prescribed form 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 a Chapter 5 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

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(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); or

(e) in the case of a licensee that is a leviable entity (within the meaning of the *ASIC Supervisory Cost Recovery Levy Act 2017*)—the following have not been paid in full at least 12 months after the due date for payment:

(i) an amount of levy (if any) payable in respect of the licensee;

(ii) an amount of late payment penalty payable (if any) in relation to the levy;

(iii) an amount of shortfall penalty payable (if any) in relation to the levy.

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

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(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.

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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.

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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.

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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, scheme or fund (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 registered scheme whose responsible entity is a related body corporate of the market licensee;

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(ca) a notified foreign passport fund whose operator 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, scheme or fund 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.

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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, scheme or fund 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, scheme or fund 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, scheme or fund 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, scheme or fund must comply with those conditions.

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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, scheme or fund 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;

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(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,

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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(1)(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).

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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).

(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.

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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.

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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.

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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 an alleged contravention of a market integrity rule must not exceed:
  (a) for an individual—3,000 penalty units; and
  (b) for a body corporate—15,000 penalty units.

(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

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(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.

798M Exemptions by Minister

(1) The Minister may exempt a particular financial market, or class of financial markets, from all or specified provisions of this Part. An exemption may be unconditional, or subject to conditions specified in the exemption.

Note: The provisions of this Part include regulations made for the purposes of this Part (see section 761H).

(2) The Minister may, at any time:

(a) vary an exemption to:

(i) impose conditions, or additional conditions, on the exemption; or

(ii) vary or revoke any of the conditions on the exemption; or

(b) 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 class of financial markets—a notice has been published on ASIC's website allowing a reasonable period within which the operator of each financial market covered by the exemption may make submissions on the proposed action, and that period has ended.

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(4) If an exemption is expressed to apply in relation to a class of financial markets (whether or not it is also expressed to apply in relation to one or more financial markets otherwise than by reference to membership of a class), then the exemption, and any variation or revocation of the exemption, is a legislative instrument.

(5) If subsection (4) does not apply to an exemption, then the exemption, and any variation or revocation of the exemption, must be in writing and the Minister must publish notice of it in the Gazette.

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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*.

(3) A person contravenes this subsection if the person contravenes subsection (1).

Note: This subsection is a civil penalty provision (see section 1317E).

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;

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if that is not the case.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

820C Exemptions by Minister

(1) The Minister may exempt a particular clearing and settlement facility, or class of clearing and settlement facilities, from all or specified provisions of this Part. An exemption may be unconditional, or subject to conditions specified in the exemption.

Note: The provisions of this Part include regulations made for the purposes of this Part (see section 761H).

(2) The Minister may, at any time:
  (a) vary an exemption to:
    (i) impose conditions, or additional conditions, on the exemption; or
    (ii) vary or revoke any of the conditions on the exemption; or
  (b) 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 class of clearing and settlement facilities—a notice has been published on ASIC's website allowing a reasonable period within which the operator of each clearing and settlement facility covered by the exemption may make submissions on the proposed action, and that period has ended.

(4) If an exemption is expressed to apply in relation to a class of clearing and settlement facilities (whether or not it is also expressed to apply in relation to one or more clearing and settlement facilities otherwise than by reference to membership of

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a class), then the exemption, and any variation or revocation of the exemption, is a legislative instrument.

(5) If subsection (4) does not apply to an exemption, then the exemption, and any variation or revocation of the exemption, must be in writing and the Minister must publish notice of it in the Gazette.

820D Meaning of *operated in this jurisdiction*—clearing and settlement facility

(1) 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***.

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Division 2—Regulation of CS facility licensees

Subdivision A—Licensee's obligations

821A General obligations

(1) 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:

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(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—take all reasonable steps to ensure that an unacceptable control situation () 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).

(2) A person contravenes this subsection if the person contravenes paragraph (1)(aa), (a), (c), (d), (e), (f), (g) or (h).

Note: This subsection is a civil penalty provision (see section 1317E).

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

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(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.

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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.

(6) A person contravenes this subsection if the person contravenes subsection (1), (2), (3) or (4).

Note: This subsection is a civil penalty provision (see section 1317E).

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(1)(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)).

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(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)).

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(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

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(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, and the matters specified in the CS services rules 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

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(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;
(c) the client money reporting rules;
(d) the CS services rules;

those other rules prevail over the operating rules to the extent of the inconsistency.

Note 1: 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).

Note 2: If there is an inconsistency between the derivative transaction rules or the derivative trade repository rules and the client money reporting rules, the derivative transaction rules or the derivative trade repository rules prevail: see subsection 981M(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

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(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 in a prescribed form 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 in a prescribed form 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.

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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(1)(aa) and (a)), and the matters specified in the CS services rules for the purposes of this subsection.

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.

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(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 assessment of 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(1)(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) If the CS facility licensee is prescribed by the regulations for the purpose of this subsection, ASIC must, in respect of the obligation in paragraph 821A(1)(c), do such an assessment at least once a year.

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(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 assessment of licensee's compliance

(1) The Reserve Bank of Australia (the ***Reserve Bank***) may do an assessment of how well a CS facility licensee is complying with its obligation under paragraph 821A(1)(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.

(1A) If the CS facility licensee is prescribed by the regulations for the purpose of this subsection, the Reserve Bank must do such an assessment at least once a year.

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(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;

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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)).

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(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.

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(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.

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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 in a prescribed form 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:

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(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

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(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.

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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 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.

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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 in a prescribed form 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).

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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 in a prescribed form 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 a Chapter 5 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

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Minister is no longer satisfied as mentioned in paragraph 824B(2)(c); or

(e) in the case of a licensee that is a leviable entity (within the meaning of the *ASIC Supervisory Cost Recovery Levy Act 2017*)—the following have not been paid in full at least 12 months after the due date for payment:

(i) an amount of levy (if any) payable in respect of the licensee;

(ii) the amount of late payment penalty payable (if any) in relation to the levy;

(iii) the amount of shortfall penalty payable (if any) in relation to the levy.

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.

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(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.

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Note: The conditions on the licence can be varied under section 825A.

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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);

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(h) any relevant advice received from ASIC, the ACCC 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).

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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 CS services rules, 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:

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(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.

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Part 7.3A—CS services

Division 1—Preliminary

828 Meaning of *CS service*

(1) A ***CS service*** is a service that can only be provided if it has access to a clearing and settlement facility, or to data used in the operation of a clearing and settlement facility.

(2) The operation of a clearing and settlement facility is taken to be the provision of a ***CS service***.

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Division 2—Regulation of CS services: CS services rules

Subdivision A—Power to make CS services rules

828A CS services rules

(1) ASIC may, by legislative instrument, make rules (the ***CS services rules***) that deal with the following:
  (a) the activities, conduct or governance of CS facility licensees, and associated entities of CS facility licensees, in relation to CS services;
  (b) if regulations made for the purposes of this paragraph specify other persons—the activities, conduct or governance of those persons in relation to CS services;
  (c) matters that are incidental to the matters mentioned in paragraphs (a) and (b).

(2) Without limiting the scope of subsection (1), the rules may deal with the following:
  (a) the specification of persons who are required to comply with requirements imposed by the rules;
  (b) for the purposes of subsection 822A(1)—matters with which the operating rules of a licensed CS facility must deal, in relation to CS services;
  (c) for the purposes of subsection 822A(2)—matters in respect of which a licensed CS facility must have written procedures, in relation to CS services;
  (d) for the purposes of subsection 822E(4)—matters to which the Minister must have regard, as mentioned in that subsection, in relation to CS services.

(3) For the purposes of this section, governance of a person may be in relation to CS services even if there only an indirect relationship between the governance and CS services.

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(4) Despite subsection (1), the rules cannot provide for matters in relation to a clearing and settlement facility that is exempt from the operation of Part 7.3 because of an exemption under section 820C.

828B CS services in relation to which rules may impose requirements

Requirements can only be imposed in relation to CS services covered by a determination under this section

(1) The CS services rules cannot impose requirements in relation to CS services unless the CS services are covered by a determination under this section.

Minister may determine classes of CS services

(2) For the purposes of subsection (1), the Minister may, by legislative instrument, make a determination specifying one or more classes of CS services.

Making determinations by reference to matters

(3) A determination under subsection (2) may specify a class of CS services by reference to any of the following matters:
   (a) CS facilities to which the CS services have access;
   (b) CS facilities, where data to which the CS services have access is used in the operation of the CS facilities;
   (c) financial products to which the CS services relate.

(4) Subsection (3) does not limit:
   (a) the matters by reference to which a determination under subsection (2) may specify a class of CS services; and
   (b) the operation of subsection 13(3) of the *Legislation Act 2003*.

Making determinations: matters to which the Minister has regard

(5) In considering whether to make a determination under subsection (2), the Minister:

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(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 making the determination; and
  (ii) the likely regulatory impact of making the determination; and
  (iii) the likely effect of making the determination on the safety, fairness and effectiveness of competition in the provision of CS services; and
(b) must have regard to the matters (if any) raised by ASIC, the ACCC or the Reserve Bank of Australia in advice provided under subsection (6) in relation to the determination; and
(c) may have regard to any other matters that the Minister considers relevant.

Note: Matters that the Minister may have regard to under paragraph (c) may, for example, include any relevant international standards and international commitments.

ASIC, ACCC or Reserve Bank may advise Minister

(6) ASIC, the ACCC or the Reserve Bank of Australia may (on its own initiative) and must (at the request of the Minister):
  (a) consider whether a determination should be made under subsection (2) specifying one or more particular classes of CS services; 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*).

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Subdivision B—Compliance with CS services rules

828C Obligation to comply with CS services rules

A person must comply with provisions of the CS services 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: If there is an inconsistency between the standards determined under section 827D and the CS services rules, the standards prevail: see subsection 827D(2A).

828D Obligation to notify ASIC in respect of breach

(1) A person must give written notice to ASIC, as soon as practicable, if the person becomes aware that the person may no longer be able to meet, or has breached, an obligation under section 828C.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) A person contravenes this subsection if the person contravenes subsection (1).

Note: This subsection is a civil penalty provision (see section 1317E).

(3) If ASIC receives a notice under subsection (1), ASIC may give the Minister advice about the matter to which the notice relates.

828E Alternatives to civil proceedings

(1) The regulations may provide for a person who is alleged to have contravened section 828C 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;

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(d) enter into a legally enforceable undertaking.

(2) The penalty payable under regulations made under paragraph (1)(a) in relation to an alleged contravention of a CS services rule must not exceed:
(a) for an individual—3,000 penalty units; and
(b) for a body corporate—15,000 penalty units.

(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.

828F Failure to comply with CS services rules does not invalidate transaction etc.

A failure, in relation to a transaction, to comply with a requirement of the CS services rules does not invalidate the transaction or affect any rights or obligations arising under, or relating to, the transaction.

Subdivision C—Power of ASIC to give directions etc.

828G ASIC's power to give directions to person not complying with obligations

(1) If ASIC considers that a person is not complying, or is not likely to comply, with its obligations under the CS services rules, ASIC may give the person a direction, in writing, to do specified things that ASIC believes will promote compliance by the person with those obligations.

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(2) When ASIC gives the person the direction, ASIC must also give the person a statement, in writing, setting out the reasons for giving the direction.

(3) The direction has effect until the earlier of the following times:
  (a) the time ASIC revokes the direction under subsection (7);
  (b) the end of the period specified in the direction as the period during which the direction is effective.

(4) While the direction has effect, the person must comply with the direction.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(5) If the person 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) ASIC may vary the direction by giving written notice to the person.

(7) ASIC may revoke the direction by giving written notice to the person.

Subdivision D—The process of making CS services rules

828H Matters to which ASIC must have regard when making rules

In considering whether to make a CS services 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) the likely effect of the proposed rule on the safety, fairness and effectiveness of competition in the provision of CS services; and

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(iv) if the proposed rule will impose requirements in relation to a CS service—the structure of the market for the provision of the CS service; and

(b) must have regard to the matters (if any) raised by the ACCC or the Reserve Bank of Australia in consultations mentioned in paragraph 828J(1)(b); and

(c) may have regard to any other matters that ASIC considers relevant.

Note: Matters that ASIC may have regard to under paragraph (c) may, for example, include any relevant international standards and international commitments.

828J ASIC to consult before making rules

(1) ASIC must not make a CS services rule unless ASIC:

(a) has consulted the public about the proposed rule; and

(b) has also consulted the following about the proposed rule:

(i) the ACCC;

(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 828L.

(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 CS services rule.

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828K Ministerial consent to rules required

(1) ASIC must not make a CS services rule unless the Minister has consented, in writing, to the making of the rule.

Note: In some situations, consent is not required: see section 828L.

(2) A consent under subsection (1) is not a legislative instrument.

828L Emergency rules: consultation and consent not required

(1) ASIC may make a CS services rule without consulting as required by section 828J, and without the consent of the Minister as required by section 828K, 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) safety, fairness and effective competition in the provision of CS services.

(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.

(4) ASIC must not make a CS services rule in accordance with subsection (1) unless ASIC has consulted the Reserve Bank of Australia about the proposed rule.

(5) A failure to consult as required by subsection (4) does not invalidate a CS services rule.

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828M Amendment and revocation of CS services rules

(1) ASIC may amend or revoke a CS services 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 828H, 828J and 828K do not apply in relation to an amendment or revocation pursuant to a direction by the Minister under paragraph 828L(2)(b).

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Division 3—Other provisions

828N 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 the CS services rules.

Note: In some cases, the Minister must have regard to ASIC's advice: see paragraph 827A(2)(h).

828P ACCC may give advice to Minister

The ACCC may give advice to the Minister in relation to any matter concerning the CS services rules.

Note: In some cases, the Minister must have regard to the ACCC's advice: see paragraph 827A(2)(h).

828Q Reserve Bank of Australia may give advice to Minister

The Reserve Bank of Australia 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 the CS services rules.

Note: In some cases, the Minister must have regard to the Reserve Bank's advice: see paragraph 827A(2)(h).

828R Exemptions by the regulations or 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 provisions of this Part;

(iii) the provisions of rules made under Division 2; and

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(b) definitions in this Act, or in the regulations, as they apply to references in provisions referred to in paragraph (a).

(2) The regulations, or ASIC by written instrument, may exempt a person or class of persons 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, on application by ASIC, order the person to comply with the condition in a specified way.

(4) An exemption by ASIC is a legislative instrument if the exemption is expressed to apply in relation to a class of persons, (whether or not it is also expressed to apply in relation to one or more persons identified otherwise than by reference to membership of a class).

(5) If subsection (4) does not apply to an exemption by ASIC, the exemption is a notifiable instrument.

(6) If there is an inconsistency between:

(a) an exemption prescribed by regulations made for the purposes of subsection (2); and

(b) an exemption by ASIC under that subsection;

(including in relation to any conditions specified by ASIC), the regulations prevail to the extent of the inconsistency.

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Part 7.4—Limits on involvement with licensees

Division 1—Limit on control of certain licensees

Subdivision A—15% voting power limit

850A Meaning of *widely held market body*

A ***widely held market body*** is a body corporate that:

(a) either:

(i) has an Australian market licence or an Australian CS facility licence; or

(ii) is the holding company of a body corporate that has an Australian market licence or an Australian CS facility licence; and

(b) is specified in regulations made for the purposes of this paragraph.

850B Meaning of *unacceptable control situation*

(1) 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 before the first day those regulations are no longer

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liable to be disallowed, or to be taken to have been disallowed, under section 42 of the *Legislation 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 Orders to remedy unacceptable control situation

(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

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(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.

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(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.

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(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.

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(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 in a prescribed form 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.

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(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

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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

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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.

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(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 paragraph 850A(b)

(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 paragraph 850A(b).

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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.

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(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.

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Division 2—Individuals who are not fit and proper are disqualified

853A Meaning of *disqualified individual*

An individual is a ***disqualified individual*** 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 Meaning of *involved*—in some licensees or applicants for a licence

An individual is ***involved*** in a market licensee, a CS facility licensee, a derivative trade repository licensee or a benchmark administrator 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, a derivative trade repository licensee or a benchmark administrator 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

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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, an Australian derivative trade repository licence or a benchmark administrator 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, an Australian derivative trade repository licence or a benchmark administrator 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

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(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.

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853F Obligations on disqualified individuals

(1) A disqualified individual must not become involved in a market licensee, a CS facility licensee, a derivative trade repository licensee or a benchmark administrator 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, a derivative trade repository licensee or a benchmark administrator 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)).

(3) A person contravenes this subsection if the person contravenes subsection (2).

Note: This subsection is a civil penalty provision (see section 1317E).

853G Notification by ASIC

If ASIC becomes aware that an individual who is involved in a market licensee, a CS facility licensee, a derivative trade repository licensee or a benchmark administrator licensee is a disqualified individual because of paragraph 853A(b) or (c), ASIC must notify the individual, the licensee and the Minister as soon as practicable.

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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.

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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 i***nclude:
  (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.

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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 Meaning of some terms relating to compensation regimes for financial markets

In this Act:

compensation arrangements means arrangements that consist of:

(a) a set of rules about compensation; and

(b) a source of funds from which compensation is to be paid or provided; and

(c) associated administrative and monitoring arrangements.

Note: In Subdivision D (approved compensation arrangements) of Division 3 of Part 7.5, see also section 885A.

compensation rules means the set of rules forming part of compensation arrangements.

Note: In Subdivision D (approved compensation arrangements) of Division 3 of Part 7.5, see also section 885A.

Division 3 arrangements means compensation arrangements approved under Division 3 (approved compensation arrangements) of Part 7.5.

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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 (NGF Compensation regime) of Part 7.5.

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 or provision of compensation to clients of participants. Any investments made using money in the fund are taken to form part of the fund.

SEGC (short for Securities Exchanges Guarantee Corporation) means the body corporate in relation to which a nomination as the Securities Exchanges Guarantee Corporation is in force under section 890A.

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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:

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(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.

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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).

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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 in a prescribed form.

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.

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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

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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 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 or provide 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).

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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

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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.

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(2) As soon as practicable after the change is made, the operator must lodge with ASIC in a prescribed form 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 in a prescribed form 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:

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(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 in a prescribed form.

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).

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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

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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, or providing compensation in a form other than money, 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

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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;

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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, or the value of compensation to be provided in a form other than money 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.

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(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.

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 or provided.

(2) Without limiting subsection (1), the compensation rules may provide for compensation to be paid in a lump sum or by instalments.

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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

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(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:

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(a) a claim by a person for compensation (including interest referred to in subsection 885E(5)) 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.

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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.

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(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.

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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

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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.

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(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.

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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.

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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.

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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;

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(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

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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

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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*.

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(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

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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 (the ***SEGC***) 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

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(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.

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(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 all or 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.

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(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 in a prescribed form 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 in a prescribed form 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.

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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.

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(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.

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Division 5—Provisions common to both kinds of compensation arrangements

892A Meaning of *Part 7.5 authority* and *Part 7.5 regulated fund*

In this Act:

Part 7.5 authority:

(a) in relation to Division 3 arrangements of a financial market—means the operator of the market; and

(b) in relation to Division 4 arrangements—means the SEGC.

Part 7.5 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).

892B How Part 7.5 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 Part 7.5 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)).

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(2) The regulations may impose additional requirements to be complied with in relation to the keeping of a Part 7.5 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 Part 7.5 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 a Part 7.5 regulated fund may be invested

(1) Money in a Part 7.5 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 Part 7.5 authority may, with the approval of ASIC, appoint a person to invest on behalf of the 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

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(b) the Part 7.5 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 Part 7.5 authority and subject to such conditions (if any) as the authority imposes.

892D Powers of Part 7.5 authority to require production or delivery of documents or statements

(1) The Part 7.5 authority in relation to Division 3 arrangements or Division 4 arrangements may require a person:

(a) to deliver to the Part 7.5 authority documents or copies of documents, including documents of, or evidencing, title to financial products; or

(b) to make out and deliver to the Part 7.5 authority a statement of evidence;

that the Part 7.5 authority considers will assist it in determining a claim for compensation that has been made, or that the Part 7.5 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.

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(3) The person must comply with the requirement.

(4) If the person fails, without reasonable excuse, to comply with the requirement, the Part 7.5 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 Part 7.5 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 Part 7.5 authority may, in writing, delegate the power given by this section to a person involved in the administration of the Division 3 arrangements or Division 4 arrangements.

(7) the Part 7.5 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 Part 7.5 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 Part 7.5 authority; or
   (c) the person tells the Part 7.5 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

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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 Part 7.5 authority's right of subrogation if compensation is paid

(1) If compensation in respect of a claim is paid under Division 3 arrangements or Division 4 arrangements, the Part 7.5 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 Part 7.5 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 Part 7.5 regulated funds

(1) The regulations may determine, or provide a method for determining, when there is excess money in a Part 7.5 regulated fund.

(2) The regulations may make provision in relation to how excess money in a Part 7.5 regulated fund may be, or is to be, dealt with.

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The regulations may make different provision in relation to different funds.

892H Accounting and reporting

(1) The Part 7.5 authority in relation to Division 3 arrangements or Division 4 arrangements must, in relation to each Part 7.5 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 Part 7.5 authority, the authority must cause financial statements and notes to those financial statements (within the meaning of section 295) for the Part 7.5 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 Part 7.5 regulated fund in accordance with whichever of the following paragraphs applies:

(a) if there is only one Part 7.5 authority for the fund, that authority must appoint a registered company auditor, or authorised audit company, to audit the fund's accounts;

(b) if there is more than one Part 7.5 authority for the fund:

(i) each of those Part 7.5 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

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(ii) the appointment is to be made by one or more of the Part 7.5 authorities, with the consent of such of the authorities (if any) as do not make the appointment; and

(iii) a Part 7.5 authority must not purport to appoint a person to audit the fund's accounts unless each other Part 7.5 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 Part 7.5 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 Part 7.5 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 Part 7.5 authority for the Part 7.5 regulated fund must, within 14 days after receiving the auditor's report, lodge with ASIC in a prescribed form a copy of the report and a copy of the financial statements. If there is more than one Part 7.5 authority for the Part 7.5 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 Part 7.5 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.

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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 Part 7.5 regulated fund

The regulations may impose reporting requirements to be complied with by the Part 7.5 authority in relation to Division 3 arrangements in relation to situations in which compensation under the arrangements is provided otherwise than out of a Part 7.5 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)).

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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 i***nclude:
  (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.

893B Exemptions by Minister

(1) The Minister may exempt a particular financial market, or class of financial markets, from all or specified provisions of this Part. An exemption may be unconditional, or subject to conditions specified in the exemption.

Note: The provisions of this Part include regulations made for the purposes of this Part (see section 761H).

(2) The Minister may, at any time:
  (a) vary an exemption to:
    (i) impose conditions, or additional conditions, on the exemption; or

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(ii) vary or revoke any of the conditions on the exemption; or

(b) 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 class of financial markets—a notice has been published on ASIC's website allowing a reasonable period within which the operator of each financial market covered by the exemption may make submissions on the proposed action, and that period has ended.

(4) If an exemption is expressed to apply in relation to a class of financial markets (whether or not it is also expressed to apply in relation to one or more financial markets otherwise than by reference to membership of a class), then the exemption, and any variation or revocation of the exemption, is a legislative instrument.

(5) If subsection (4) does not apply to an exemption, then the exemption, and any variation or revocation of the exemption, must be in writing and the Minister must publish notice of it in the Gazette.

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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) a Territory; or
   (c) an external Territory, or another 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).

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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;

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(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:

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(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.

Meaning of ***execution requirements***

(5) ***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) ***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) ***Clearing requirements*** are requirements for derivative transactions to be cleared through:

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(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.

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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

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(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*).

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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.

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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).

Note 3: If there is an inconsistency between the derivative transaction rules and the client money reporting rules, the derivative transaction rules prevail: see subsection 981M(2).

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 an alleged contravention of a derivative transaction rule must not exceed:

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(a) for an individual—200 penalty units; and
(b) for a body corporate—1,000 penalty units.

(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 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

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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.

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(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).

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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.

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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));

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(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;

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(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.

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:

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(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).

Note 6: If there is an inconsistency between the derivative trade repository rules and the client money reporting rules, the derivative trade repository rules prevail: see subsection 981M(2).

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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 an alleged contravention of a derivative trade repository rule must not exceed:
  (a) for an individual—200 penalty units; and
  (b) for a body corporate—1,000 penalty units.

(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:

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(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.

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(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).

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

Subdivision A—Obligations

904A General obligations

(1) 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.

(2) A person contravenes this subsection if the person contravenes paragraph (1)(b) or (c).

Note: This subsection is a civil penalty provision (see section 1317E).

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

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(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

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(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)).

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(1A) A person contravenes this subsection if the person contravenes subsection (1).

Note: This subsection is a civil penalty provision (see section 1317E).

(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)).

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(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.

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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)).

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(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.

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(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

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(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.

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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.

(3) A person contravenes this subsection if the person contravenes subsection (2).

Note: This subsection is a civil penalty provision (see section 1317E).

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.

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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

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(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 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.

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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.

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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 a Chapter 5 body corporate; or

(c) the licensee asks ASIC to do so; or

(d) in the case of a licensee that is a leviable entity (within the meaning of the *ASIC Supervisory Cost Recovery Levy Act 2017*)—the following have not been paid in full at least 12 months after the due date for payment:

(i) an amount of levy (if any) payable in respect of the licensee;

(ii) the amount of late payment penalty payable (if any) in relation to the levy;

(iii) the amount of shortfall penalty payable (if any) in relation to the levy.

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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).

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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:

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(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.

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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.

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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

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(b) as in force or existing from time to time.

(3) Subsection (2) has effect despite subsection 14(2) of the *Legislation 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:

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(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:

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(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.

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Part 7.5B—Regulation of financial benchmarks

Division 1—Preliminary

908AA Simplified outline of this Part

Administrators of significant financial benchmarks must be licensed under this Part. Administrators of other financial benchmarks may voluntarily opt in to the same licensing scheme.

Licensees are subject to certain obligations.

ASIC may make financial benchmark rules that apply in relation to licensees and the financial benchmarks they administer.

ASIC may also make compelled financial benchmark rules to deal with circumstances such as the failure of a licensee to administer a significant financial benchmark specified in its licence.

Offences and civil penalty provisions apply to conduct that could unduly manipulate a financial benchmark.

908AB Meaning of *financial benchmark*

(1) A ***financial benchmark*** is a price, estimate, rate, index or value that:
  (a) is made available to users (whether or not for a fee); and
  (b) is calculated periodically from one or more:
    (i) transactions, instruments, currencies, prices, estimates, rates, indices, values, financial products, bank accepted bills or negotiable certificates of deposit; or
    (ii) other interests or goods (whether tangible or intangible); and
  (c) is referenced or otherwise used for purposes that include one or more of the following:

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(i) calculating the interest, or other amounts, payable under financial products, bank accepted bills or negotiable certificates of deposit;

(ii) calculating the price at which a financial product, bank accepted bill or negotiable certificate of deposit may be traded, redeemed or dealt in;

(iii) calculating the value of a financial product, bank accepted bill or negotiable certificate of deposit;

(iv) measuring the performance of a financial product, bank accepted bill or negotiable certificate of deposit.

(2) However, the regulations, or ASIC by written instrument, may provide that a price, estimate, rate, index or value is not a ***financial benchmark***.

(3) Such an instrument by ASIC is a legislative instrument if it is expressed to apply in relation to a class of prices, estimates, rates, indices or values (whether or not it is also expressed to apply in relation to one or more prices, estimates, rates, indices or values identified otherwise than by reference to membership of a class).

(4) If subsection (3) does not apply to an instrument by ASIC under subsection (2), ASIC must publish the instrument.

908AC Meaning of *significant financial benchmark*

(1) A ***significant financial benchmark*** is a financial benchmark that is declared under subsection (2).

(2) ASIC may, by legislative instrument, declare a financial benchmark to be a significant financial benchmark if ASIC is satisfied that:

(a) the benchmark is systemically important to the Australian financial system; or

(b) there is a material risk of financial contagion, or systemic instability, in Australia if the availability or integrity of the benchmark were disrupted; or

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(c) there would be a material impact on retail or wholesale investors in Australia if the availability or integrity of the benchmark were disrupted.

Note 1: For declaration by class, see subsection 13(3) of the *Legislation Act 2003*.

Note 2: For variation and revocation of a declaration, see subsection 33(3) of the *Acts Interpretation Act 1901*.

(3) ASIC must not make a declaration under subsection (2) unless consent for it has been given under subsection (4).

(4) The Minister may, in writing, consent to the making of a declaration under subsection (2).

908AD Emergency declarations: consultation and consent not required

(1) Despite subsection 908AC(3), ASIC may make a declaration under subsection 908AC(2) without the consent of the Minister 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) If ASIC makes a declaration under subsection 908AC(2) without the consent of the Minister, ASIC must:
   (a) provide the Minister, on the following day, with a written explanation of the need for the declaration; and
   (b) revoke the declaration in accordance with any direction under subsection (3).

(3) The Minister may give ASIC a written direction to revoke a declaration made as described in subsection (1).

(4) A direction under subsection (3) is not a legislative instrument.

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908AE Notifying administrator about declarations

ASIC must, as soon as practicable, give the administrator of a financial benchmark written notice of:

(a) any declaration of the financial benchmark under subsection 908AC(2); or

(b) any variation, or revocation, under subsection 908AC(2) of a declaration of the financial benchmark under that subsection; or

(c) any revocation under subsection 908AD(2)(b) of a declaration of the financial benchmark under subsection 908AC(2).

908AF ASIC to supervise financial benchmarks that are specified in benchmark administrator licences

(1) ASIC has the function of supervising financial benchmarks that are specified in benchmark administrator licences.

(2) If such a financial benchmark is wholly or partly generated or administered in a foreign country, ASIC may, to such extent as ASIC considers appropriate, perform the function of supervising the financial benchmark by satisfying itself:

(a) that the regulatory regime that applies in relation to the financial benchmark in that country provides for adequate supervision of the financial benchmark; or

(b) that adequate cooperative arrangements are in place with an appropriate authority of that country to ensure that the financial benchmark will be adequately supervised by that authority.

908AG Extraterritorial application

Subject to sections 908BB and 908DD, this Part applies to acts, omissions, matters and things in Australia or outside Australia.

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Division 2—Licensing of financial benchmarks

Subdivision A—Requirement to be licensed

908BA Administrators of significant financial benchmarks must be licensed

(1) A person commits an offence if:
  (a) the person:
    (i) administers a significant financial benchmark; or
    (ii) holds out that the person administers a significant financial benchmark; and
  (b) the person does not hold a benchmark administrator licence that specifies the financial benchmark; and
  (c) the period applying under subsection (2) for the financial benchmark has ended.

Penalty: 5 years imprisonment.

(2) The period for the purposes of paragraph (1)(c):
  (a) starts on the day (the ***start day***) the financial benchmark is declared under subsection 908AC(2) to be a significant financial benchmark; and
  (b) ends as described in subsection (3).

(3) The period ends at the end of the later of the following days:
  (a) the 90th day after the start day;
  (b) if, before the end of that 90th day, the person applies for a benchmark administrator licence specifying the financial benchmark—either:
    (i) the day the person withdraws the application; or
    (ii) the day the person is notified under subsection 908BC(4) of ASIC's decision to grant or refuse to grant the licence.

(4) Absolute liability applies to paragraph (1)(c).

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Note: For absolute liability, see section 6.2 of the *Criminal Code*.

908BB Other prohibitions on holding out

A person commits an offence if:

(a) in Australia, the person holds out that:

(i) the person holds a benchmark administrator licence; or

(ii) the administration of a financial benchmark by the person is authorised by a benchmark administrator licence; or

(iii) a financial benchmark is specified in a benchmark administrator licence; or

(iv) a financial benchmark is a significant financial benchmark; or

(v) a financial benchmark is not a significant financial benchmark; and

(b) this is not the case.

Penalty: 5 years imprisonment.

Subdivision B—Granting licences

908BC When a licence may be granted

Granting licences—general

(1) ASIC may grant an applicant a licence (a ***benchmark administrator licence***) to administer a specified financial benchmark if ASIC is satisfied that:

(a) the application was made in accordance with section 908BD; 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.

The licence may be granted subject to conditions.

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Note 1: ASIC must also have regard to the matters in section 908BO in deciding whether to grant a licence.

Note 2: A licence is required if the benchmark is a significant financial benchmark (see section 908BA). Licences are not required, but can still be granted, for other financial benchmarks.

Foreign bodies

(2) Despite subsection (1), 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) Despite subsection (1), ASIC must not grant the applicant a licence unless:
  (a) 42 days have passed since the application was made; and
  (b) if ASIC gives a notice under subsection 853D(2) to the applicant within those 42 days, ASIC decides not to make a declaration under section 853C about any individual who is involved in the applicant.

Notice of decision

(4) ASIC must give the applicant written notice of:
  (a) ASIC's decision whether to grant the applicant a licence; and
  (b) if the licence is granted—any conditions to which the licence is subject.

908BD Applying for a licence

(1) A body corporate may, by lodging an application with ASIC in a prescribed form, apply for a benchmark administrator licence for a particular financial benchmark.

Note: For fees for lodging applications, see Part 9.10.

(2) ASIC may, by written notice given to an applicant, require the applicant to lodge with ASIC in a prescribed form, within the

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period specified in the notice, further information in connection with the application.

(3) If the applicant fails to lodge the further information as required, ASIC may, by written notice given to the applicant:
   (a) refuse to consider the application; or
   (b) refuse to take any action, or any further action, in relation to the application.

908BE More than one financial benchmark may be specified in the same licence

(1) The same benchmark administrator licence may specify 2 or more financial benchmarks.

(2) In that case, a reference to the financial benchmark specified in the licence is taken instead to be a reference to each of those financial benchmarks severally.

(3) A benchmark administrator licence that specifies 2 or more financial benchmarks may be suspended or cancelled under Subdivision D in respect of one or some of those financial benchmarks only, as if the licensee held a separate licence for each of the financial benchmarks.

908BF Publishing details of licences

If ASIC grants a benchmark administrator licence, ASIC must publish a notice stating:
   (a) the name of the licensee and of the financial benchmark specified in the licence; and
   (b) when the licence was granted; and
   (c) any conditions to which the licence is subject; and
   (d) when the licence takes effect.

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Subdivision C—Conditions on licences

908BG Conditions, including varying and revoking conditions

(1) ASIC may, at any time, take action to:
  (a) impose conditions, or additional conditions, on a benchmark administrator licence; or
  (b) vary or revoke any conditions to which a benchmark administrator licence is subject (whether imposed under paragraph (a) or under subsection 908BC(1));

by giving written notice to the licensee. ASIC must also publish a notice with details of the action and when it took effect.

Note 1: As well as complying with the requirements in this section, ASIC must have regard to the matters in section 908BO.

Note 2: A licensee is also subject to other obligations in this Part (for example, see Divisions 3 and 4).

(2) ASIC may take action under subsection (1):
  (a) on its own initiative, subject to subsection (3); or
  (b) if the licensee lodges an application with ASIC, in a form approved by ASIC in writing, seeking:
    (i) the imposition of conditions; or
    (ii) the variation or revocation of conditions.

Note: For fees for lodging applications, see Part 9.10.

(3) ASIC may only take action on its own initiative to impose conditions or additional conditions, or to vary or revoke conditions, to which the licence is subject if:
  (a) ASIC considers it appropriate to do so having regard to:
    (i) the licensee's obligations under this Part; and
    (ii) the licensee's obligations under rules made under Division 3; and
    (iii) any change in the administration of the financial benchmark specified in the licence; and

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(b) ASIC gives the licensee written notice of the proposed action and an opportunity to make a submission before the proposed action is to take effect.

This subsection does not apply to ASIC imposing conditions when a licence is granted.

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

908BH Varying licences

ASIC may vary a benchmark administrator licence to:

(a) take account of a change in the licensee's name; or

(b) take account of a change in the financial benchmark specified in the licence; or

(c) specify one or more further financial benchmarks;

if the licensee seeks the variation by lodging an application with ASIC in a form approved by ASIC in writing.

Note 1: The conditions on the licence can be varied under section 908BG.

Note 2: For a variation referred to in paragraph (b) or (c), ASIC must also have regard to the matters in section 908BO.

Note 3: For fees for lodging applications, see Part 9.10.

908BI Immediate suspension or cancellation

(1) ASIC may, by giving written notice to a benchmark administrator licensee, suspend the licensee's licence for a specified period, or cancel it, if:

(a) the licensee ceases to carry on the business of administering the financial benchmark specified in the licence; or

(b) the licensee is a Chapter 5 body corporate, or under a foreign law is in a similar position to a Chapter 5 body corporate; or

(c) the licensee asks ASIC to do so; or

(d) in the case of a licensee that is a leviable entity (within the meaning of the *ASIC Supervisory Cost Recovery Levy Act*

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2017)—the following have not been paid in full at least 12 months after the due date for payment:

(i) an amount of levy (if any) payable in respect of the licensee;

(ii) the amount of late payment penalty payable (if any) in relation to the levy;

(iii) the amount of shortfall penalty payable (if any) in relation to the levy.

(2) However, before doing so, ASIC must have regard to anything that is required, or could be required, of the licensee under the compelled financial benchmark rules.

908BJ Suspension or cancellation following hearing and report

(1) If ASIC considers that a benchmark administrator licensee has breached, or is in breach of:

(a) any conditions to which the licence is subject; or

(b) any of its obligations under this Part; or

(c) any of its obligations under rules made under Division 3;

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

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(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 908BO.

(5) A notice under subsection (1) is not a legislative instrument.

908BK Effect of suspension

(1) A person whose benchmark administrator 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 908BI, or paragraph 908BJ(4)(b), that subsection (1) of this section does not apply for specified purposes.

908BL Varying or revoking a suspension

ASIC may at any time vary or revoke a suspension of a benchmark administrator licence by giving written notice to the licensee.

908BM Publishing details of suspensions or cancellations of licences

(1) If ASIC takes action to:

(a) suspend, or vary or revoke a suspension of, a benchmark administrator licence; or

(b) cancel a benchmark administrator licence;

ASIC must publish a notice to that effect.

(2) The notice must state when the action took effect.

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908BN Variations, suspensions or cancellations only in accordance with this Subdivision

A benchmark administrator 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 908BG.

Subdivision E—Matters to which ASIC must have regard

908BO Matters to which ASIC must have regard

(1) ASIC must have regard to certain matters in deciding whether to take any of the following actions in relation to a financial benchmark:
  (a) grant under section 908BC a benchmark administrator licence that specifies the financial benchmark;
  (b) impose, vary or revoke conditions on such a licence under section 908BC or 908BG;
  (c) vary such a licence under section 908BH for a change referred to in paragraph 908BH(b) or (c);
  (d) suspend or cancel such a licence under section 908BJ.

(2) The matters ASIC must have regard to are as follows:
  (a) how the financial benchmark is, or is to be, administered;
  (b) the nature and purpose of the financial benchmark;
  (c) the manner in which the financial benchmark is, or is to be, used;
  (d) the persons who are, or may be, required to report data or other information to the licensee for the purposes of generating or administering the financial benchmark;
  (e) for an entity that is authorised to administer the same or a similar financial benchmark in the foreign country in which its principal place of business is located:
    (i) the criteria that the entity satisfied to obtain an authorisation to administer that financial benchmark in that country; and

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(ii) the obligations the entity must continue to comply with to keep the authorisation; and

(iii) the level of supervision to which the administration of that financial benchmark in that country is subject; and

(iv) whether adequate arrangements exist for cooperation between ASIC and the authority that is responsible for that supervision;

(f) whether it would be in the public interest to take the action referred to in subsection (1).

(3) ASIC may also have regard to any other matter that ASIC considers relevant.

Subdivision F—Other obligations of licensees

908BP General obligations

A benchmark administrator 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 administration of the financial benchmark specified in the licence.

Note: The licensee also needs to comply with the rules made under Division 3 (see section 908CF).

908BQ Obligation to notify ASIC of certain matters

(1) A person commits an offence if:

(a) the person is a benchmark administrator licensee; and

(b) the licensee becomes aware of any of the following events:

(i) that the licensee may no longer be able to comply with an obligation under section 908BP;

(ii) that the licensee has failed to comply with an obligation under section 908BP;

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(iii) that a person becomes or ceases to be a director, secretary or senior manager of the licensee;

(iv) that a person becomes or ceases to be a director, secretary or senior manager of a holding company of the licensee; and

(c) the licensee fails to give written notice to ASIC of:

(i) the event; and

(ii) such related information (if any) as is prescribed by the regulations for the purposes of this subparagraph;

as soon as practicable after becoming aware of the event.

Penalty: 100 penalty units.

(2) Without limiting subparagraph (1)(b)(iii) or (iv), that subparagraph applies to the case where a person:

(a) changes from one of the positions mentioned in that subparagraph to another; or

(b) changes from a position mentioned in that subparagraph to a position mentioned in the other subparagraph.

908BR Obligation to assist ASIC, APRA and the Reserve Bank

(1) ASIC, APRA and the Reserve Bank of Australia are each a regulator to which this section applies.

(2) A person commits an offence if:

(a) the person is a benchmark administrator licensee; and

(b) a regulator to which this section applies reasonably requests, in writing, the person to:

(i) give the regulator access to the person's books that relate to the person's capacity as such a licensee; or

(ii) give other assistance to the regulator in relation to the performance of the regulator's functions; and

(c) the person fails to comply with the request.

Penalty: 100 penalty units.

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908BS Obligation to give ASIC access to licensee's facilities

A person commits an offence if:

(a) the person is a benchmark administrator licensee; and

(b) ASIC requests, in writing, the person to provide reasonable access to any of the person's facilities for any of the purposes of this Part; and

(c) the facilities relate to the person's capacity as such a licensee; and

(d) the person fails to comply with the request.

Penalty: 100 penalty units.

Subdivision G—Directions to licensees

908BT ASIC's power to give directions to licensee not complying with obligations

(1) If ASIC considers that a benchmark administrator licensee is not complying with:

(a) any of its obligations under this Part; or

(b) any of its obligations under rules made under Division 3;

ASIC may give the licensee a written direction to do specified things that ASIC believes will promote the licensee's compliance 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) ASIC may vary or revoke a direction at any time by giving written notice to the licensee.

(5) A direction under subsection (1) is not a legislative instrument.

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908BU Minister may disallow all or part of an ASIC direction etc.

(1) As soon as practicable after giving the benchmark administrator licensee:
   (a) a direction under subsection 908BT(1); or
   (b) a notice of variation or revocation under subsection 908BT(4);

   ASIC must give the Minister a copy of the direction or notice.

(2) Within 30 days after ASIC gives the Minister the copy of the direction or notice, the Minister may, by written instrument, disallow all or a specified part of that direction or notice.

(3) In deciding whether to do so, the Minister must have regard to:
   (a) the consistency of the direction or notice with the licensee's obligations referred to in subsection 908BT(1); and
   (b) the matters referred to in subsection 908BO(2).

(4) As soon as practicable after all or a part of a direction or notice is disallowed, ASIC must give notice of the disallowance to the licensee. The direction or notice ceases to have effect, to the extent of the disallowance, when the licensee receives notice of the disallowance.

(5) An instrument under subsection (2) is not a legislative instrument.

908BV ASIC's power to give directions requiring reports

(1) ASIC may, in writing, direct a benchmark administrator licensee to give ASIC a report that:
   (a) deals with specified matters; and
   (b) if ASIC requires—includes an audit statement on the licensee's report on those matters.

(2) A direction under subsection (1) must specify:
   (a) a reasonable period for giving ASIC the report; and
   (b) if paragraph (1)(b) applies—a person or body that is suitably qualified to prepare the audit statement.

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(3) ASIC may give a copy of the report to the Minister.

(4) A person commits an offence if:
  (a) the person is a benchmark administrator licensee; and
  (b) the person is given a direction under subsection (1); and
  (c) the person fails to comply with the direction.

Penalty: 100 penalty units.

(5) A direction under subsection (1) is not a legislative instrument.

Subdivision H—Other matters

908BW ASIC may assess licensee's compliance

(1) ASIC may do an assessment of how well a benchmark administrator licensee is complying with one or more of its obligations:
  (a) under this Part; or
  (b) under rules made under Division 3.

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

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(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 purposes of this paragraph.

(5) ASIC may publish all or part of the written report on an assessment.

908BX Basis of licences

(1) A benchmark administrator licence is granted under this Part on the basis that:

(a) the licence may be varied, suspended or cancelled, or made subject to conditions (or additional conditions), by or under:

(i) this Division; or

(ii) later legislation; and

(b) no compensation is payable if the licence is varied, suspended or cancelled, or made subject to conditions (or additional conditions), as mentioned in paragraph (a).

(2) Subsection (1) does not, by implication, affect the interpretation of any other provision:

(a) of this Act; or

(b) of an instrument made under this Act.

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Division 3—Financial benchmark rules and compelled financial benchmark rules

Subdivision A—Power to make financial benchmark rules

908CA ASIC may make financial benchmark rules

Subject to this Division, ASIC may, by legislative instrument, make rules (the ***financial benchmark rules***) dealing with one or more of the matters permitted by this Subdivision.

Note: Subdivision D deals with the process of making the rules.

908CB Main permitted matters that may be dealt with in the rules

The main permitted matters are the following:

(a) the responsibilities of benchmark administrator licensees, including for their oversight of internal and external parties who have a role in the generation and administration of the financial benchmarks specified in those licences;

(b) the generation and administration of financial benchmarks specified in benchmark administrator licences, including:

(i) the design of the financial benchmarks; and

(ii) the use of data or information in generating the financial benchmarks; and

(iii) the method for generating the financial benchmarks; and

(iv) the approach for changing the design referred to in subparagraph (i) or changing the method referred to in subparagraph (iii); and

(v) the public disclosure of one or more of the matters referred to in this paragraph;

(c) the manner in which benchmark administrator licensees may or must provide their services, including the manner and conditions (including fees) on which they provide access to the financial benchmarks specified in those licences;

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(d) business continuity planning for financial benchmarks specified in benchmark administrator licences, including the possible transition of such benchmarks to new licensees;

(e) the governance, management and resources (including financial, technological and human resources) of benchmark administrator licensees, including the following:

(i) the handling of conflicts of interest;

(ii) the handling of complaints;

(iii) the monitoring and enforcing of compliance with obligations;

(iv) the resources that benchmark administrator licensees must have (including requirements relating to the experience, qualifications or fitness for office of their officers and employees);

(v) the integrity and security of computer systems and other systems;

(vi) operational reliability;

(vii) business continuity planning;

(viii) the operational separation of functions;

(ix) the outsourcing of functions to other entities;

(f) the public disclosure of conditions (including fees) on which benchmark administrator licensees provide their services;

(g) the handling or use of financial benchmark data by benchmark administrator licensees and their officers and employees, including the following:

(i) the acceptance and retention of such data;

(ii) the creation of statistical data from such data;

(iii) the use and disclosure of, and provision of access to, such data (including statistical data referred to in subparagraph (ii));

(h) the responsibilities of entities whose activities result in the provision of data or information to benchmark administrator licensees for the generation or administration of the financial benchmarks specified in those licences;

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(i) the reporting to ASIC or other regulators of matters relating to:
  (i) benchmark administrator licensees; or
  (ii) the generation or administration of financial benchmarks specified in benchmark administrator licences;

(j) a matter prescribed by the regulations for the purposes of this paragraph.

Note: For paragraph (c), the rules may (for example) require benchmark administrator licensees to provide open and non-discriminatory access to their financial benchmarks, including as to price.

908CC Other permitted matters that may be dealt with in the rules

The other permitted matters are matters incidental or related to the matters permitted under section 908CB, including the following:

(a) subject to section 908CP, the persons who are obliged 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 financial benchmark rules.

Subdivision B—Power to make compelled financial benchmark rules

908CD ASIC may make compelled financial benchmark rules

Subject to this Division, ASIC may, by legislative instrument, make rules (the ***compelled financial benchmark rules***) conferring

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one or more of the powers, or dealing with one or more of the matters, permitted by this Subdivision.

Note: Subdivision D deals with the process of making the rules.

908CE Permitted powers and matters that may be dealt with in the rules

(1) The permitted powers and matters are the following:

(a) the power for ASIC to require, by written notice, an entity referred to in paragraph 908CB(h):

(i) to provide data or information to a benchmark administrator licensee, or to another entity, for the generation or administration of a significant financial benchmark specified in that licence; and

(ii) to provide ASIC with some or all of that data or information for purposes relating to the generation or administration of that significant financial benchmark;

(b) the power for ASIC to require, by written notice, a benchmark administrator licensee:

(i) to continue to generate or administer a significant financial benchmark specified in that licence; or

(ii) to generate or administer in a particular way a significant financial benchmark specified in that licence;

(c) powers or matters incidental or related to:

(i) one or more of the above powers; or

(ii) the compulsory generation or administration of a significant financial benchmark specified in a benchmark administrator licence;

including a power or matter prescribed by the regulations for the purposes of this paragraph.

(2) However, ASIC may only require something under a power referred to in subsection (1) if:

(a) ASIC reasonably believes it is in the public interest to do so; and

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(b) in the case of paragraph (1)(a)—the activities of the entity concerned have previously resulted in the provision of data or information to that licensee for the generation or administration of that significant financial benchmark.

Subdivision C—Compliance with each set of rules etc.

908CF Obligation to comply with each set of rules

(1) A person (whether a benchmark administrator licensee or otherwise) must comply with:

(a) provisions of the financial benchmark rules; and

(b) provisions of the compelled financial benchmark rules;

that apply to the person.

Note 1: This subsection is a civil penalty provision (see section 1317E). For the maximum penalty for contravening a civil penalty provision, see section 1317G. For relief from liability to a civil penalty relating to this subsection, see section 1317S.

Note 2: The regulations may limit the persons on whom each set of rules may impose requirements (see section 908CP).

(2) If there is an inconsistency between the financial benchmark rules and the compelled financial benchmark rules, the compelled financial benchmark rules prevail to the extent of the inconsistency.

(3) If there is an inconsistency between any of the rules made under this Division and any of the other rules made under other provisions of this Chapter, those other rules prevail to the extent of the inconsistency.

908CG Alternatives to civil proceedings

(1) The regulations may provide for a person who is alleged to have contravened subsection 908CF(1) to do one or more of the following as an alternative to civil proceedings:

(a) pay a penalty to the Commonwealth;

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(b) undertake or institute remedial measures (including education programs);
(c) accept sanctions other than the payment of a penalty to the Commonwealth.

(2) The penalty payable under regulations made under paragraph (1)(a) in relation to an alleged contravention of a provision of the financial benchmark rules or the compelled financial benchmark rules must not exceed:
(a) for an individual—1,110 penalty units; and
(b) for a body corporate—5,550 penalty units.

908CH Infringement notices

(1) Subsection 908CF(1) is subject to an infringement notice under Part 5 of the Regulatory Powers Act.

Infringement officer

(2) For the purposes of Part 5 of the Regulatory Powers Act, each staff member of ASIC who holds, or is acting in, an office or position that is equivalent to an SES employee is an infringement officer in relation to subsection 908CF(1) of this Act.

Relevant chief executive

(3) For the purposes of Part 5 of the Regulatory Powers Act, each member of ASIC (within the meaning of section 9 of the ASIC Act) is the relevant chief executive in relation to subsection 908CF(1) of this Act.

908CI Enforceable undertakings

(1) Subsection 908CF(1) is enforceable under Part 6 of the Regulatory Powers Act (about enforceable undertakings).

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Authorised person

(2) For the purposes of Part 6 of the Regulatory Powers Act, each staff member of ASIC who holds, or is acting in, an office or position that is equivalent to an SES employee is an authorised person in relation to subsection 908CF(1) of this Act.

Relevant courts

(3) For the purposes of Part 6 of the Regulatory Powers Act, each of the following courts is a relevant court in relation to subsection 908CF(1) of this Act:
  (a) the Federal Court of Australia;
  (b) the Federal Circuit and Family Court of Australia (Division 2);
  (c) a court of a State or Territory that has jurisdiction in relation to the matter.

908CJ Protection from liability for compliance in good faith

If:
  (a) a person (the ***protected person***):
    (i) provides financial benchmark data, or other information, to another person; or
    (ii) otherwise allows another person access to financial benchmark data, or other information; or
    (iii) generates or administers in a particular way a significant financial benchmark specified in a benchmark administrator licence; and
  (b) the protected person does so, in good faith, in compliance with a requirement imposed by the compelled financial benchmark rules;

the protected person is not liable to an action or other proceeding, whether civil or criminal, for or in relation to that conduct.

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Subdivision D—Matters relating to the making of each set of rules

908CK Matters to which ASIC has regard when making rules

In considering whether to make a rule under this Division, ASIC:

(a) must have regard to:

(i) the final report titled "Principles for Financial Benchmarks", dated July 2013 and published by the Board of the International Organization of Securities Commissions, as amended from time to time; and

(ii) the likely effect of the proposed rule on the Australian economy, and on the efficiency, integrity and stability of the Australian financial system; and

(iii) the likely regulatory impact of the proposed rule; and

(b) may have regard to any other matters that ASIC considers relevant.

Note 1: The Principles for Financial Benchmarks could in 2018 be viewed on the International Organization of Securities Commissions website (https://www.iosco.org/).

Note 2: Matters that ASIC may have regard to under paragraph (b) could, for example, include foreign laws relating to financial benchmarks, and any matters raised in consultations under section 908CL.

908CL ASIC to consult before making rules

(1) ASIC must not make a rule under this Division 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 purposes of this paragraph.

Note: In some situations, consultation is not required (see section 908CN).

(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:

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(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 rule.

908CM Ministerial consent to rules required

(1) ASIC must not make a rule under this Division unless consent for it has been given under subsection (2).

Note: In some situations, consent is not required (see section 908CN).

(2) The Minister may, in writing, consent to the making of a rule under this Division.

908CN Emergency rules: consultation and consent not required

(1) ASIC may make a rule under this Division without consulting as required by section 908CL, and without the consent of the Minister as required by section 908CM, 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 or stability of the Australian financial system; or
(c) the security or confidentiality of financial benchmark 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) vary or revoke the rule in accordance with any direction under subsection (3).

(3) The Minister may give ASIC a written direction to vary or revoke a rule made as described in subsection (1).

(4) A direction under subsection (3) is not a legislative instrument.

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908CO Requirements

Each of the financial benchmark rules and compelled financial benchmark rules may deal with a matter by imposing requirements.

908CP Regulations may limit how rules may deal with certain matters

(1) The regulations may prescribe limits on:
  (a) the extent to which, or the way in which, the financial benchmark rules may deal with matters permitted by Subdivision A; or
  (b) the classes of persons on whom those rules may impose requirements; or
  (c) the extent to which those rules may impose requirements (or certain kinds of requirements) on certain classes of persons.

(2) The regulations may prescribe limits on:
  (a) the extent to which, or the way in which, the compelled financial benchmark rules may deal with matters permitted by Subdivision B; or
  (b) the classes of persons on whom those rules may impose requirements; or
  (c) the extent to which those rules may impose requirements (or certain kinds of requirements) on certain classes of persons.

908CQ Varying or revoking the rules

(1) ASIC may vary or revoke a rule made under this Division 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 908CK, 908CL and 908CM do not apply in relation to a variation or revocation pursuant to a direction by the Minister under subsection 908CN(3).

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Division 4—Offences and civil penalties relating to manipulation of financial benchmarks

908DA Manipulation of financial benchmarks

Civil penalty provisions

(1) A person contravenes this subsection if:
  (a) the person does, or omits to do, one or more acts; and
  (b) the acts or omissions have or are likely to have the effect of influencing the level at which a financial benchmark is generated or administered; and
  (c) the person intends for the acts or omissions to have that effect (whether or not the person also intends for the acts or omissions to have another effect).

Note 1: This is a civil penalty provision (see section 1317E). For relief from liability, see section 1317S.

Note 2: Section 908DD (about geographical scope) causes this subsection to be read down so that it covers persons who are Australian entities, or persons whose acts or omissions occur wholly or partly in Australia etc.

(2) A person contravenes this subsection if:
  (a) paragraphs (1)(a) to (c) apply in relation to the person, one or more acts or omissions, and a financial benchmark; and
  (b) the acts or omissions result, or are likely to result, in any of the following suffering financial or other disadvantage from use of the financial benchmark:
    (i) an Australian citizen;
    (ii) a resident of Australia (within the meaning of the *Criminal Code*);
    (iii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

Note 1: This is a civil penalty provision (see section 1317E). For relief from liability, see section 1317S.

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Note 2: This subsection extends subsection (1) so that persons, who are not otherwise covered, will be covered if a result of their acts or omissions occurs wholly or partly in Australia etc.

Offence

(3) A person commits an offence if the person contravenes subsection (1) or (2).

Note: For the penalty for the offence, see section 908DC. For its geographical scope, see section 908DD.

908DB False or misleading statements or information that could affect financial benchmarks

Civil penalty provisions

(1) A person contravenes this subsection if:
  (a) the person makes one or more statements, or disseminates information; and
  (b) the statements or information:
    (i) are false or misleading; or
    (ii) omit any matter or thing without which the statements or information are misleading; and
  (c) the person knows the statements or information could be used in the generation or administration of a financial benchmark.

Note 1: This is a civil penalty provision (see section 1317E). For relief from liability, see section 1317S.

Note 2: Section 908DD (about geographical scope) causes this subsection to be read down so that it covers persons who are Australian entities, or persons whose conduct occurs wholly or partly in Australia etc.

(2) A person contravenes this subsection if:
  (a) paragraphs (1)(a) to (c) apply in relation to the person, one or more statements or information, and a financial benchmark; and
  (b) making the statements or disseminating the information results, or is likely to result, in any of the following suffering

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financial or other disadvantage from use of the financial benchmark:

(i) an Australian citizen;

(ii) a resident of Australia (within the meaning of the *Criminal Code*);

(iii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

Note 1: This is a civil penalty provision (see section 1317E). For relief from liability, see section 1317S.

Note 2: This subsection extends subsection (1) so that persons, who are not otherwise covered, will be covered if a result of their conduct occurs wholly or partly in Australia etc.

Offence

(3) A person commits an offence if the person contravenes subsection (1) or (2).

Note: For the penalty for the offence, see section 908DC. For its geographical scope, see section 908DD.

908DC Penalties for offences against this Division

The penalty for an offence against this Division is 15 years imprisonment.

Note: However, sections 1311A to 1311E will apply in relation to the penalty in the usual way.

908DD Geographical scope of offences and civil penalty provisions

Offences

(1) Section 15.2 of the *Criminal Code* (extended geographical jurisdiction—category B) applies to each offence against this Division.

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Contraventions of civil penalty provisions

(2) A declaration of contravention by a person must not be made under section 1317E relating to an alleged contravention by the person of a civil penalty provision in this Division unless:
  (a) the person's conduct that allegedly contravenes the provision occurs:
    (i) wholly or partly in Australia; or
    (ii) wholly or partly on board an Australian aircraft or an Australian ship; or
  (b) the person's conduct that allegedly contravenes the provision occurs wholly outside Australia and a result of the conduct occurs:
    (i) wholly or partly in Australia; or
    (ii) wholly or partly on board an Australian aircraft or an Australian ship; or
  (c) the person's conduct that allegedly contravenes the provision occurs wholly outside Australia and, at the time of the alleged contravention, the person is:
    (i) an Australian citizen; or
    (ii) a resident of Australia (within the meaning of the *Criminal Code*); or
    (iii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

Defences relating to contraventions of civil penalty provisions

(3) In proceedings under section 1317E for a declaration of contravention by a person relating to an alleged contravention by the person of a civil penalty provision in this Division, it is a defence if:
  (a) the conduct constituting the alleged contravention occurs wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and
  (b) the person is neither:
    (i) an Australian citizen; nor

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(ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; and

(c) there is not in force in:

(i) the foreign country where the conduct constituting the alleged contravention occurs; or

(ii) the part of the foreign country where the conduct constituting the alleged contravention occurs;

a law of that foreign country, or a law of that part of that foreign country, that provides for a pecuniary or criminal penalty for such conduct.

(4) A defendant bears an evidential burden in relation to the matter in subsection (3).

Attorney-General's consent needed for certain proceedings

(5) The Attorney-General's prior written consent must be obtained to commence proceedings under section 1317E for a declaration of contravention by a person relating to an alleged contravention by the person of a civil penalty provision in this Division if:

(a) the conduct constituting the alleged contravention occurs wholly in a foreign country; and

(b) at the time of the alleged contravention, the person is neither:

(i) an Australian citizen; nor

(ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

When conduct taken to occur partly in Australia

(6) For the purposes of (but without limiting) this section, if a person sends a thing, or causes a thing to be sent:

(a) from a point outside Australia to a point in Australia; or

(b) from a point in Australia to a point outside Australia;

that conduct is taken to have occurred partly in Australia.

(7) For the purposes of (but without limiting) this section, if a person sends, or causes to be sent, an electronic communication:

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(a) from a point outside Australia to a point in Australia; or
(b) from a point in Australia to a point outside Australia;

that conduct is taken to have occurred partly in Australia.

Definitions

(8) In this section:

Australian aircraft has the same meaning as in the *Criminal Code*.

Australian ship has the same meaning as in the *Criminal Code*.

conduct has the same meaning as in the *Criminal Code*.

electronic communication has the same meaning as in the *Criminal Code*.

evidential burden has the same meaning as in the *Criminal Code*.

foreign country has the same meaning as in the *Criminal Code*.

point has the same meaning as in section 16.2 of the *Criminal Code*.

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Division 5—Other provisions

908EA Making provision by referring to instruments as in force from time to time

(1) This section applies to the following instruments:
  (a) regulations made for the purposes of a provision of this Part;
  (b) rules made under Division 3.

(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 *Legislation Act 2003.*

908EB Exemptions by the regulations or 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 provisions of this Part;
    (iii) the provisions of rules made under Division 3; 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, or ASIC by written instrument, may:
  (a) exempt a person or class of persons from all or specified provisions covered by this section; or
  (b) exempt a financial benchmark or class of financial benchmarks from all or specified provisions covered by this section.

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(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, on application by ASIC, order the person to comply with the condition in a specified way.

(4) An exemption by ASIC is a legislative instrument if the exemption is expressed to apply in relation to:
   (a) a class of persons; or
   (b) a class of financial benchmarks;

   (whether or not it is also expressed to apply in relation to one or more persons or financial benchmarks identified otherwise than by reference to membership of a class).

(5) If subsection (4) does not apply to an exemption by ASIC, ASIC must publish the exemption.

(6) If there is an inconsistency between:
   (a) an exemption prescribed by regulations made for the purposes of subsection (2); and
   (b) an exemption by ASIC under that subsection;

   (including in relation to any conditions specified by ASIC), the regulations prevail to the extent of the inconsistency.

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Part 7.6—Licensing of providers of financial services

Division 1—Preliminary

910A Meaning of some terms relating to licensing of providers of financial services

In this Act:

body corporate licensee means a body corporate that:
(a) is a financial services licensee; and
(b) is authorised to provide personal advice to retail clients in relation to relevant financial products.

class of product advice means financial product advice about a class of products, but does not include a recommendation about a specific product in the class.

CPD year (short for continuing professional development year): a financial services licensee's ***CPD year*** is the 12-month period beginning on the day of the year included in the most recent notice given by the licensee under section 922HA.

foreign qualification means a bachelor or higher degree, or equivalent qualification, awarded by a tertiary education institution outside Australia.

limited-service time-sharing adviser: a person is a ***limited-service time-sharing adviser*** if:
(a) the person is a relevant provider; and
(b) the only relevant financial product that the person provides advice in relation to is a time-sharing scheme; and
(c) the person has not met any one or more of the education and training standards in subsections 921B(2) to (4).

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qualified tax relevant provider: a person is a ***qualified tax relevant provider*** if:

(a) the person is a relevant provider; and

(b) one or more of the following applies:

(i) the person is a registered tax agent;

(ii) if a determination is in force under subsection 921BB(1)—the person meets each requirement set out in the determination that is of a kind mentioned in any of paragraphs (a) to (d) of that subsection.

relevant financial products means financial products other than:

(a) basic banking products; or

(b) general insurance products; or

(c) consumer credit insurance; or

(d) a combination of any of those products.

relevant provider: a person is a ***relevant provider*** if the person:

(a) is an individual; and

(b) is:

(i) a financial services licensee; or

(ii) an authorised representative of a financial services licensee; or

(iii) an employee or director of a financial services licensee; or

(iv) an employee or director of a related body corporate of a financial services licensee; and

(c) is authorised to provide personal advice to retail clients, as the licensee or on behalf of the licensee, in relation to relevant financial products.

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910B Meaning of *control*

(1) In this Part, ***control***, of a body corporate, is:

(a) having the capacity to cast, or control the casting of, more than one half of the maximum number of votes that might be cast at a general meeting of the body corporate; or

(b) directly or indirectly holding more than one half of the issued share capital of the body corporate (not including any part of the issued share capital that carries no right to participate beyond a specified amount in a distribution of either profits or capital, and not including MCIs); or

(c) having the capacity to control the composition of the body corporate's board or governing body; or

(d) having the capacity to determine the outcome of decisions about the body corporate's financial and operating policies, taking into account:

(i) the practical influence that can be exerted (rather than the rights that can be enforced); and

(ii) any practice or pattern of behaviour affecting the body corporate's financial or operating policies (whether or not it involves a breach of an agreement or a breach of trust).

(2) In this Part, ***control***, of an entity other than a body corporate, is:

(a) having the capacity to control the composition of the entity's board or governing body (if any); or

(b) having the capacity to determine the outcome of decisions about the entity's financial and operating policies, taking into account:

(i) the practical influence that can be exerted (rather than the rights that can be enforced); and

(ii) any practice or pattern of behaviour affecting the entity's financial or operating policies (whether or not it involves a breach of an agreement or a breach of trust).

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910C Meaning of *linked to a refusal or failure to give effect to a determination made by AFCA*

(1) An entity is ***linked to a refusal or failure to give effect to a determination made by AFCA*** if:
  (a) a complaint is made under the AFCA scheme; and
  (b) AFCA makes a determination relating to the complaint; and
  (c) AFCA becomes aware that a party to the complaint (the ***primary entity***) may have refused or failed to give effect to the determination; and
  (d) AFCA gives particulars of the refusal or failure in accordance with subsection 1052E(1); and
  (e) the first-mentioned entity is the primary entity or is covered by subsection (2) of this section.

(2) This subsection covers an entity if, at any time during the period starting when AFCA makes the determination and ending when AFCA so gives the particulars, the entity is:
  (a) an officer of the primary entity; or
  (b) if the primary entity is an individual—substantially or significantly involved in the management of:
    (i) a financial services business carried on by the primary entity; or
    (ii) credit activities (within the meaning of the *National Consumer Credit Protection Act 2009*) engaged in by the primary entity; or
  (c) if the primary entity is the multiple trustees of a trust—one of the trustees of the trust.

910D Insurance fulfilment providers taken to be acting on behalf of financial services licensees

A person who:
  (aa) carries on a business of providing goods or services to persons insured under insurance products in satisfaction of the liability of the insurers under those products; and

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(a) in carrying on that business, provides goods or services to a person insured under an insurance product in satisfaction of the liability of the insurer under the product; and

(b) has been engaged by a financial services licensee, or by another person on behalf of a financial services licensee, to provide those goods or services; and

(c) does not (apart from this section) provide those goods or services as a representative of the financial services licensee;

is taken to be acting on behalf of the financial services licensee in providing the goods or services.

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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;

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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:

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(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;

(eh) the service is the acquisition of a financial product as an investment of the assets of a notified foreign passport fund by:

(i) the operator of the fund; or

(ii) another person acting on the direction of the operator of the fund, or the direction of an agent of the operator of the fund;

(ei) the service is the disposal of a financial product that was acquired as an investment of the assets of a notified foreign passport fund by:

(i) the operator of the fund; or

(ii) another person acting on the direction of the operator of the fund, or the direction of an agent of the operator of the fund;

(ej) the service is the issuing, acquisition or disposal of a derivative or foreign exchange contract by:

(i) the operator of a notified foreign passport fund; or

(ii) another person acting on the direction of the operator of a notified foreign passport fund, or the direction of an agent of the operator of a notified foreign passport fund;

for the purposes of managing the financial consequences to the fund of particular circumstances happening, or avoiding or limiting the financial consequences of fluctuations in, or in the value of, receipts or costs (including prices or interest rates);

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(ek) the service is a claims handling and settling service in relation to an insurance product, and the person providing the service is not one of the following:

(i) the insurer under the insurance product;

(ii) a person who has authority from the insurer to reject all or part of a claim under the insurance product and who carries on a business of providing goods or services to persons insured under insurance products in satisfaction of the liability of the insurers under those products;

(iii) an insurance claims manager;

(iv) an insurance broker (within the meaning of the *Insurance Contracts Act 1984*) who provides the claims handling and settling service in relation to the insurance product on behalf of the insurer;

(v) a person who has provided, or has entered into an arrangement to provide, financial product advice to a person insured under the insurance product (including a person insured as a third party beneficiary under the contract of insurance that constitutes the insurance product, within the meaning of the *Insurance Contracts Act 1984*) and who also provides the claims handling and settling service on behalf of the insurer under the insurance product;

(vi) if the insurance product is prescribed by the regulations for the purposes of this subparagraph—a claimant intermediary representing a person insured under the product in pursuing a claim under the product;

(el) the service is a claims handling and settling service in relation to an insurance product and all of the following apply:

(i) the claims handling and settling service is provided under an arrangement between the issuer of the insurance product and a financial services licensee;

(ii) the issuer of the insurance product is prescribed by the regulations, or of a class prescribed by the regulations;

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(iii) under the arrangement, the financial services licensee, or their authorised representatives, may provide the claims handling and settling service in relation to the insurance product;

(iv) the provision of the claims handling and settling service is covered by the financial services licensee's Australian financial services licence;

(v) the claims handling and settling service is provided to the insured as a retail client;

(em) the service is the provision of a claims handling and settling service in relation to an insurance product provided to a wholesale client under an arrangement between the issuer of the insurance product and a financial services licensee;

(en) the service is a claims handling and settling service of one of the following kinds:

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

(ii) except as prescribed by the regulations—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;

(iii) action taken by a lawyer, in a professional capacity as a lawyer, to determine whether an insurer is liable to another person under an insurance product, or to quantify the extent of the insurer's liability;

(iv) negotiation by a lawyer, in a professional capacity as a lawyer, of the settlement of a claim under an insurance product;

(v) other conduct by a lawyer, in a professional capacity as a lawyer and on behalf of another person, that could reasonably be regarded as a necessary part of acting on instruction and for which the lawyer has not received and is not entitled to receive a benefit other than the payment of professional charges, the reimbursement for expenses incurred on behalf of the other person, or the

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payment on account of expenses to be incurred on behalf of the other person;

(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;

(via) as a restructuring practitioner for a body corporate;

(vib) as a restructuring practitioner for a restructuring plan made 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;

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(ga) the service is a superannuation trustee service that 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 1: A defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code*.

Note 2: A person is also exempt from the requirement to hold an Australian financial services licence in relation to certain services connected with offers that are eligible to be made under Division 1A of Part 7.12 (Employee share schemes): see subsection 1100ZC(7).

(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.

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(4A) A person is not exempt under any paragraph of subsection (2) for a superannuation trustee service unless the exemption expressly covers a superannuation trustee 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.

(5B) A person contravenes this subsection if the person contravenes subsection (1).

Note: This subsection is a civil penalty provision (see section 1317E).

(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.

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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

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(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 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:

(i) subsection 911A(2); or

(ii) regulations made for the purposes of subsection 926B(1);

(f) these conditions are satisfied:

(i) the service is a claims handling and settling service in relation to an insurance product; and

(ii) the principal holds an Australian financial services licence covering the provision of the service; and

(iii) either the provider is not a person described in subparagraphs 911A(2)(ek)(i) to (vi) (insurers etc.) or, if the provider is a person described in one of those subparagraphs, the claims handling and settling service is of a kind described in paragraph 911A(2)(en) (legal services);

(g) these conditions are satisfied:

(i) the service is a claims handling and settling service in relation to an insurance product; and

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(ii) the principal is an authorised representative of a financial services licensee; and

(iii) the financial services licensee holds an Australian financial services licence covering the provision of the service; and

(iv) the authorisation by the financial services licensee covers the provision of the service by the authorised representative; and

(v) the authorised representative has entered into an arrangement with the provider for the provider to provide the service on behalf of the authorised representative and the financial services licensee; and

(vi) either the provider is not a person described in subparagraphs 911A(2)(ek)(i) to (vi) (insurers etc.) or, if the provider is a person described in one of those subparagraphs, the claims handling and settling service is of a kind described in paragraph 911A(2)(en) (legal services).

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.

(4) A person contravenes this subsection if the person contravenes subsection (1).

Note: This subsection is a civil penalty provision (see section 1317E).

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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) 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.

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Division 3—Obligations of financial services licensees

Subdivision A—General obligations

912A General obligations

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, except to the extent that:
    (i) those representatives are persons who carry on a business of providing goods or services to persons insured under insurance products in satisfaction of the liability of the insurers under those products; and
    (ii) the financial services laws relate to the provision of claims handling and settling services by those representatives; and
  (cb) comply with the law of each host economy for an Australian passport fund, if the licensee is:
    (i) the operator of the fund; or

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(ii) a person (other than a regulator) who has functions or duties in relation to the fund under the Passport Rules for this jurisdiction; and

(cc) comply with the Reference Checking and Information Sharing Protocol; and

(d) subject to subsection (4)—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 (including by complying with the CPD provisions), and are competent, to provide those financial services; and

(g) if those financial services are provided to persons as retail clients:

(i) have a dispute resolution system complying with subsection (2); and

(ii) give ASIC the information specified in any instrument under subsection (2A); and

(h) subject to subsection (5)—have adequate risk management systems; and

(j) comply with any other obligations that are prescribed by regulations made for the purposes of this paragraph.

Dispute resolution system

(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

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(c) membership of the AFCA scheme.

(2A) ASIC may, by legislative instrument, specify information that financial services licensees must give ASIC relating to their internal dispute resolution procedures and the operation of their internal dispute resolution procedures.

(2B) An instrument under subsection (2A) must not specify any information that is personal information within the meaning of the *Privacy Act 1988*.

(3) Regulations made for the purposes of subparagraph (2)(a)(i) may also deal with the variation or revocation of:

(a) standards or requirements made by ASIC; or

(b) approvals given by ASIC.

Reference Checking and Information Sharing Protocol

(3A) ASIC may, by legislative instrument, determine a protocol for sharing and requesting information about an individual in respect of whom there are reasonable grounds to suspect that:

(a) if the individual becomes a representative of a financial services licensee (***recruiting financial services licensee***), the individual will provide personal advice to retail clients about relevant financial products; or

(b) if the individual becomes a representative of a credit licensee (***recruiting credit licensee***), the individual will:

(i) provide credit assistance in relation to credit contracts secured by mortgages over residential property; and

(ii) be a mortgage broker or a director, employee or agent of a mortgage broker; or

(c) a mortgage intermediary (***prospective mortgage intermediary***) is acting, or will act, as an intermediary in relation to a credit licensee where the individual is, or is a former, current or prospective representative of, that credit licensee, and in that capacity the individual:

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(i) provides, provided or will provide credit assistance in relation to credit contracts secured by mortgages over residential property; and

(ii) is, was or will be a mortgage broker or a director, employee or agent of a mortgage broker.

(3AA) The Reference Checking and Information Sharing Protocol may provide for any or all of the following to share information about the individual with the recruiting financial services licensee, the recruiting credit licensee or the prospective mortgage intermediary:

(a) if the individual is a financial services licensee—the individual;

(b) if the individual is a former or current representative of a financial services licensee—that licensee.

(3AB) The Reference Checking and Information Sharing Protocol may provide, in a case covered by paragraph (3A)(a), for the recruiting financial services licensee to request information about the individual from any or all of the following:

(a) if the individual is a financial services licensee or credit licensee—the individual;

(b) if the individual is a former or current representative of a financial services licensee—that financial services licensee;

(c) if the individual is a former or current representative of a credit licensee—that credit licensee;

(d) if a mortgage intermediary has previously acted or is acting as an intermediary in relation to a credit licensee where the individual is, or is a former or current representative of, that credit licensee—that mortgage intermediary.

(3AC) The Reference Checking and Information Sharing Protocol may also provide for keeping and retaining records of information shared, and the circumstances under which that information is shared.

(3B) The Reference Checking and Information Sharing Protocol must not:

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(a) require or permit personal information (within the meaning of the *Privacy Act 1988*) to be shared, other than with the consent of the individual to whom the information relates; or

(b) require information to be shared in relation to conduct that occurred more than 5 years before the information is shared.

(3E) Expressions used in paragraphs (3A)(b) and (c) and (3AB)(c) and (d) that are also used in the *National Consumer Credit Protection Act 2009* (other than Reference Checking and Information Sharing Protocol) have the same meaning in that subsection as they have in that Act.

Qualified privilege

(3F) A person has qualified privilege in relation to information shared in accordance with the Reference Checking and Information Sharing Protocol.

(3G) A person who has qualified privilege under subsection (3F) in respect of conduct is also not liable for any action based on breach of confidence in relation to that conduct.

Adequate resources to provide financial services—APRA regulated bodies

(4) Paragraph (1)(d):

(a) does not apply to a body regulated by APRA, unless the body is an RSE licensee; and

(b) does not apply to an RSE licensee, unless the RSE licensee is also the responsible entity of a registered scheme.

Adequate risk management systems—APRA regulated bodies

(5) Paragraph (1)(h):

(a) does not apply to a body regulated by APRA, unless the body is an RSE licensee that is also the responsible entity of a registered scheme; and

(b) does not apply to an RSE licensee that is also the responsible entity of a registered scheme, to the extent that the risk

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relates solely to the operation of a regulated superannuation fund by the RSE licensee.

Civil penalty provision

(5A) A person contravenes this subsection if the person contravenes paragraph (1)(a), (aa), (ca), (cc), (d), (e), (f), (g), (h) or (j).

Note: This subsection is a civil penalty provision (see section 1317E).

912B Arrangements for compensation 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).

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Subdivision B—Providing information and assistance to ASIC

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; or
  (c) for the purposes of considering whether the requirement in section 913BA (fit and proper person test) is satisfied in relation to the licensee and the licence—any matters mentioned in section 913BB in relation to a person mentioned in a paragraph of subsection 913BA(1).

(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; and
  (e) may require a statement containing information to be given in a specified manner (including in electronic form).

(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:

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(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 Meaning of *reportable situation*

(1) There is a ***reportable situation*** in relation to a financial services licensee if one of the following paragraphs is satisfied:

(a) the financial services licensee or a representative of the financial services licensee has breached a core obligation and the breach is significant;

(b) the financial services licensee or a representative of the financial services licensee is no longer able to comply with a core obligation and the breach, if it occurs, will be significant;

(c) the financial services licensee or a representative of the financial services licensee conducts an investigation into whether there is a reportable situation of the kind mentioned in paragraph (a) or (b) and the investigation continues for more than 30 days;

(d) an investigation described in paragraph (c) discloses that there is no reportable situation of the kind mentioned in paragraph (a) or (b).

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(2) There is also a ***reportable situation*** in relation to a financial services licensee if:
   (a) in the course of providing a financial service, the financial services licensee or a representative of the financial services licensee has engaged in conduct constituting gross negligence; or
   (b) the financial services licensee or a representative of the financial services licensee has committed serious fraud; or
   (c) any other circumstances prescribed by the regulations for the purposes of this paragraph exist.

(3) Each of the following is a ***core obligation***:
   (a) an obligation under section 912A or 912B, other than the obligation under paragraph 912A(1)(c);
   (b) 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), (ba) and (c) of the definition of ***financial services law*** in section 761A;
   (c) 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 paragraph;
   (d) 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;
   (e) an obligation of a representative of the licensee under the financial services law, so far as it relates to provisions of this Act or the ASIC Act referred to in paragraphs (a), (b), (ba) and (c) of the definition of ***financial services law*** in section 761A.

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(4) For the purposes of this section, a breach of a core obligation is taken to be ***significant*** if:
  (a) the breach is constituted by the commission of an offence under any law and the commission of the offence is punishable on conviction by a penalty that may include imprisonment for a maximum period of:
    (i) if the offence involves dishonesty—3 months or more; or
    (ii) in any other case—12 months or more; or
  (b) the breach is constituted by the contravention of a civil penalty provision under any law, other than a civil penalty provision prescribed by the regulations for the purposes of this paragraph; or
  (c) the breach is constituted by a contravention of subsection 1041H(1) of this Act or subsection 12DA(1) of the ASIC Act (misleading or deceptive conduct in relation to a financial product or a financial service); or
  (d) the breach results, or is likely to result, in material loss or damage to:
    (i) in the case of a managed investment scheme—a member or members of the scheme; or
    (ii) in the case of a superannuation entity—a member or members of the entity; or
    (iii) in all cases—a person or persons to whom the financial services licensee or a representative of the financial services licensee provides a financial product or a financial service as a wholesale or retail client; or
  (e) any other circumstances prescribed by the regulations for the purposes of this paragraph exist.

(5) Otherwise, for the purposes of this section, a breach of a core obligation is ***significant*** having regard to the following:
  (a) the number or frequency of similar breaches;
  (b) the impact of the breach on the financial services licensee's ability to provide financial services covered by the licence;

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(c) the extent to which the breach indicates that the financial services licensee's arrangements to ensure compliance with those obligations are inadequate;

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

(6) Regulations for the purposes of paragraph (4)(b) may prescribe a civil penalty provision to the extent that it relates to the following:

(a) contraventions of specified provisions;

(b) specified matters.

912DAA Obligation to lodge a report—reportable situations in relation to the financial services licensee

Reporting a reportable situation to ASIC

(1) If there are reasonable grounds to believe that a reportable situation has arisen in relation to a financial services licensee:

(a) the financial services licensee must lodge a report in relation to the reportable situation with ASIC; and

(b) the report must be lodged in accordance with this section.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Report must be in the prescribed form

(2) The report must be lodged with ASIC in writing in the prescribed form.

Period within which report must be lodged

(3) The report must be lodged with ASIC within 30 days after the financial services licensee first knows that, or is reckless with respect to whether, there are reasonable grounds to believe the reportable situation has arisen.

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Strict liability applies in relation to paragraphs (1)(a) and (b)

(4) Strict liability applies in relation to paragraphs (1)(a) and (b).

If report is received by APRA

(5) A report that a financial services licensee is required to lodge under this section in relation to a reportable situation is taken to have been lodged with ASIC if:
   (a) the licensee is a body regulated by APRA; and
   (b) the licensee has given a report to APRA that contains all of the information that is required in a report under this section in relation to the reportable situation.

(6) Subsection (1) does not apply to a financial services licensee in relation to a reportable situation if:
   (a) the licensee is a body regulated by APRA; and
   (b) the auditor or actuary of the licensee gives APRA a written report about a matter to which the reportable situation relates; and
   (c) the report is given before, or within 10 business days after, the licensee first knows that, or is reckless with respect to whether, there are reasonable grounds to believe that the reportable situation has arisen.

Civil penalty provision

(7) A person contravenes this subsection if the person contravenes subsection (1).

Note: This subsection is a civil penalty provision (see section 1317E).

*Meaning of **knowledge** and **recklessness***

(8) For the purposes of this section:

knowledge has the meaning given by section 5.3 of the *Criminal Code*.

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recklessness has the meaning given by section 5.4 of the *Criminal Code*.

912DAB Obligation to lodge a report—reportable situations in relation to other financial services licensees

Reporting a reportable situation to ASIC

(1) A financial services licensee (the ***reporting licensee***) must lodge a report with ASIC in accordance with this section if there are reasonable grounds to believe that:

(a) a reportable situation has arisen in relation to another financial services licensee of the kind mentioned in:

(i) paragraph 912D(1)(a) or (b) (significant breach or likely breach of a core obligation); or

(ii) subsection 912D(2) (gross negligence or serious fraud); and

(b) one of the following is an individual who has engaged in conduct that forms part of the reportable situation:

(i) the other financial services licensee;

(ii) an employee of the other financial services licensee or of a related body corporate of the other financial services licensee, acting within the scope of the employee's employment;

(iii) a director of the other financial services licensee or of a related body corporate of the other financial services licensee, acting within the scope of the director's duties as director;

(iv) another representative of the other financial services licensee acting within the scope of the representative's authority given by the licensee; and

(c) the individual provides personal advice to retail clients in relation to relevant financial products.

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Report must be in the prescribed form

(2) The report must be lodged with ASIC in writing in the prescribed form.

Period within which report must be lodged

(3) The report must be lodged with ASIC within 30 days after the reporting licensee first knows of, or is reckless with respect to, the circumstances mentioned in paragraphs (1)(a), (b) and (c).

If the reportable situation already reported to ASIC

(4) Subsection (1) does not apply in relation to a reportable situation if there are reasonable grounds to believe that ASIC is aware of:
  (a) the existence of the reportable situation; and
  (b) all of the information that is required in a report under this section in relation to the reportable situation.

A copy of the report must be given to the other financial services licensee

(5) The reporting licensee must give a copy of any report that the reporting licensee is required to lodge with ASIC under subsection (1) to the other financial services licensee within 30 days after the reporting licensee first knows of, or is reckless with respect to, the circumstances mentioned in paragraphs (1)(a), (b) and (c).

(6) A financial services licensee has qualified privilege in relation to a copy of a report given under subsection (5).

(7) A financial services licensee who has qualified privilege under subsection (6) in respect of conduct is also not liable for any action based on breach of confidence in relation to that conduct.

Civil penalty provision

(8) A person contravenes this subsection if the person contravenes subsection (1) or (5).

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Note: This subsection is a civil penalty provision (see section 1317E).

*Meaning of **knowledge** and **recklessness***

(9) For the purposes of this section:

knowledge has the meaning given by section 5.3 of the *Criminal Code*.

recklessness has the meaning given by section 5.4 of the *Criminal Code*.

912DAC Obligation to give notice—participants in licensed market or licensed CS facility

(1) If a financial services licensee becomes a participant in a licensed market or a licensed CS facility, or ceases to be such a participant:
   (a) the financial services licensee must lodge written notice of that fact with ASIC; and
   (b) the notice must be lodged in accordance with this section.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) The notice must say when the event happened and identify the market or facility.

(3) The notice must be given as soon as practicable after the event happened.

(4) A person contravenes this subsection if the person contravenes subsection (1).

Note: This subsection is a civil penalty provision (see section 1317E).

912DAD ASIC must publish details of certain reports

(1) ASIC must, for each financial year, publish information about:
   (a) reports lodged with ASIC during the financial year under section 912DAA in relation to reportable situations of the

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kind mentioned in paragraphs 912D(1)(a) and (b) (breaches and likely breaches of core obligations); and

(b) reports lodged with APRA during the financial year, as described in subsections 912DAA(5) and (6), in relation to reportable situations of the kind mentioned in paragraphs 912D(1)(a) and (b) (breaches and likely breaches of core obligations); and

(c) the entities in relation to which those reports are lodged with ASIC or APRA.

(2) The information must:

(a) be published within 4 months after the end of the financial year; and

(b) be published on ASIC's website; and

(c) include the information (if any) prescribed by the regulations, which may include personal information (within the meaning of the *Privacy Act 1988*) in relation to a financial services licensee who is an individual; and

(d) if the regulations prescribe how the information is to be organised—be organised in accordance with the regulations.

(3) The regulations may prescribe circumstances in which information need not be included in the information published by ASIC under this section.

(4) ASIC may correct any error in, or omission from, information published under this section.

912DA Obligation to notify ASIC of change in control

(1) If an entity starts to control, or stops controlling, a financial services licensee, the licensee must lodge a notification with ASIC:

(a) in the prescribed form; and

(b) before the end of 30 business days after the day the entity starts to control, or stops controlling, the financial services licensee.

Note: Failure to comply with this subsection is an offence: see subsection 1311(1).

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(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*.

912DB Obligation to notify ASIC if licensee does not provide financial service

(1) If a financial services licensee does not provide a financial service covered by the licence before the end of 6 months after the licence is granted, the licensee must lodge a notification with ASIC:
   (a) in the prescribed form; and
   (b) before the end of 15 business days after the end of the 6 months.

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*.

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.

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Subdivision C—Notifying and remediating clients affected by reportable situations

912EA Reporting to clients affected by a reportable situation

Notifying an affected client of a reportable situation

(1) A financial services licensee must take reasonable steps to notify a person (the ***affected client***) of a reportable situation in accordance with this section if:
  (a) the licensee, or a representative of the licensee, provides or has provided personal advice to the affected client as a retail client in relation to a relevant financial product; and
  (b) there are reasonable grounds to believe that the reportable situation has arisen in relation to the licensee as mentioned in:
    (i) paragraph 912D(1)(a) (significant breach of a core obligation); or
    (ii) subsection 912D(2) (gross negligence or serious fraud); and
  (c) there are reasonable grounds to suspect that:
    (i) the affected client has suffered or will suffer loss or damage as a result of the reportable situation; and
    (ii) the affected client has a legally enforceable right to recover the loss or damage from the licensee.

Form and period for giving notice

(2) A notice under this section must:
  (a) be given in writing within 30 days after the financial services licensee first knows of, or is reckless with respect to, the circumstances mentioned in paragraphs (1)(a), (b) and (c); and
  (b) if ASIC has approved the form in which the notice must be given:
    (i) be in the approved form; and

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(ii) include the information, statements, explanations or other matters required by the form; and

(iii) be accompanied by any other material required by the form.

Qualified privilege

(3) A financial services licensee has qualified privilege in relation to a notice given under this section.

(4) A financial services licensee who has qualified privilege under subsection (3) in respect of conduct is also not liable for any action based on breach of confidence in relation to that conduct.

Civil penalty provision

(5) A person contravenes this subsection if the person contravenes subsection (1).

Note: This subsection is a civil penalty provision (see section 1317E).

*Meaning of **knowledge** and **recklessness***

(6) For the purposes of this section:

knowledge has the meaning given by section 5.3 of the *Criminal Code*.

recklessness has the meaning given by section 5.4 of the *Criminal Code*.

912EB Obligation to investigate reportable situations that may affect clients

Obligation to investigate

(1) A financial services licensee must conduct an investigation into a reportable situation in accordance with this section if:

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(a) the licensee, or a representative of the licensee, provides or has provided personal advice to a person as a retail client (the ***affected client***) in relation to a relevant financial product; and

(b) there are reasonable grounds to believe that the reportable situation has arisen in relation to the licensee as mentioned in:

(i) paragraph 912D(1)(a) (significant breach of a core obligation); or

(ii) subsection 912D(2) (gross negligence or serious fraud); and

(c) there are reasonable grounds to suspect that:

(i) the affected client has suffered or will suffer loss or damage as a result of the reportable situation; and

(ii) the affected client has a legally enforceable right to recover the loss or damage from the licensee.

Period within which investigation must be commenced

(2) The investigation must be commenced within 30 days after the financial services licensee first knows of, or is reckless with respect to, the circumstances mentioned in paragraphs (1)(a), (b) and (c).

Matters to be considered in the investigation

(3) In conducting the investigation, the financial services licensee must:

(a) identify the conduct that gave rise to the reportable situation; and

(b) quantify the loss or damage that there are reasonable grounds to believe:

(i) the affected client has suffered or will suffer as a result of the reportable situation; and

(ii) the affected client has a legally enforceable right to recover from the licensee; and

(c) do anything else prescribed by the regulations for the purposes of this paragraph.

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Completing the investigation

(4) The investigation must be completed as soon as is reasonably practicable after it is commenced.

Notifying affected client

(5) The financial services licensee must take reasonable steps to give the affected client a notice of the outcome of the investigation:
  (a) in writing within 10 days after the completion of the investigation; and
  (b) if ASIC has approved the form in which the notice must be given:
    (i) in the approved form; and
    (ii) that includes the information, statements, explanations or other matters required by the form; and
    (iii) that is accompanied by any other material required by the form.

(6) A financial services licensee has qualified privilege in relation to a notice given under subsection (5).

(7) A financial services licensee who has qualified privilege under subsection (6) in respect of conduct is also not liable for any action based on breach of confidence in relation to that conduct.

Compensating the affected client for loss or damage

(8) If, after the investigation is completed, there are reasonable grounds to believe that:
  (a) the affected client has suffered or will suffer loss or damage as a result of the reportable situation; and
  (b) the affected client has a legally enforceable right to recover the loss or damage from the financial services licensee;

the licensee must take reasonable steps to pay the affected client an amount equal to the loss or damage within 30 days after the investigation is completed.

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Civil penalty provision

(9) A person contravenes this subsection if the person contravenes subsection (1), (5) or (8).

Note: This subsection is a civil penalty provision (see section 1317E).

Nothing affects right of affected client to pursue legally enforceable rights

(10) Nothing in this section affects any legally enforceable right of the affected client to recover loss or damage that the affected client suffers, or will suffer, as a result of a reportable situation.

(11) However, a court may take into account the amount paid by the financial services licensee under this section when quantifying the amount of compensation (if any) to be paid by the licensee in relation to that loss or damage.

*Meaning of **knowledge** and **recklessness***

(12) For the purposes of this section:

knowledge has the meaning given by section 5.3 of the *Criminal Code*.

recklessness has the meaning given by section 5.4 of the *Criminal Code*.

912EC Obligation to keep records of compliance

(1) A financial services licensee must keep records sufficient to enable the licensee's compliance with this Subdivision to be readily ascertained.

Note 1: For preservation of records, see section 1101C.

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) The regulations may specify records that the financial services licensee must keep as part of the obligation in subsection (1).

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Subdivision D—Miscellaneous

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*.

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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 in a prescribed form 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 section 913BA (fit and proper person test) is satisfied in relation to the applicant and the licence applied for; and

(d) the applicant meets any other requirements prescribed by regulations made for the purposes of this paragraph.

Note 1: ASIC must not grant an Australian financial services licence to a person contrary to a banning order or disqualification order (see Division 8).

Note 2: There are limitations on ASIC granting an individual an Australian financial services licence that covers the provision of certain personal advice if the individual does not meet certain requirements (see section 921C).

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(2) However, ASIC must refuse to grant the Australian financial services licence if ASIC is satisfied that:
  (a) the application for the licence, or any information, audit report or statement lodged with ASIC in accordance with subsection (3), was false in a material particular or materially misleading; or
  (b) there was an omission of a material matter from the application or the information, audit report or statement.

ASIC may request information etc. from applicant

(3) ASIC may give a written notice to the applicant requesting the applicant to lodge with ASIC in a prescribed form, within the time specified in the notice, any of the following:
  (a) information specified in the notice in relation to any matters that ASIC may or must have regard to in deciding whether to grant the licence;
  (b) an audit report, prepared by a suitably qualified person specified in the notice, in relation to matters that ASIC may or must have regard to in deciding whether to grant the licence;
  (c) if ASIC proposes to grant the applicant a licence—a statement that either:
    (i) informs ASIC of any material changes in any information provided to ASIC in, or in connection with, the application; or
    (ii) confirms that there have been no such changes.

(4) To avoid doubt:
  (a) a notice under subsection (3), and the information, audit report or statement requested in the notice, may relate to any person mentioned in section 913BA in relation to the applicant and the licence applied for; and
  (b) subsection (4B) applies in relation to such a request even if the applicant is unable to comply with the request.

(4A) ASIC may, by written notice to the applicant within the time specified in the notice:

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(a) withdraw a request under subsection (3); or
(b) extend the time specified in the notice.

(4B) If the applicant does not lodge with ASIC in a prescribed form the information, audit report or statement requested in a notice under subsection (3) within the specified time, the applicant is taken to have withdrawn the application.

(4C) To avoid doubt, subsection (5) does not apply to an application that is taken to have been withdrawn under subsection (4B).

(4D) The regulations may make provision in relation to audit reports that applicants may be requested to lodge under paragraph (3)(b).

Applicant must be given hearing before refusal of licence

(5) 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.

913BA Fit and proper person test

(1) For the purposes of paragraph 913B(1)(c), subsection 914B(2) and paragraph 915C(1)(b), the requirement in this section is satisfied in relation to a person (the ***first person***) and a licence, or a proposed licence, if ASIC is satisfied that there is no reason to believe any of the following:
(a) that the first person is not a fit and proper person to provide the financial services covered by the licence;
(b) if the first person is a body corporate—that an officer of the first person is not a fit and proper person to perform one or more functions as an officer of an entity that provides the financial services covered by the licence;
(c) if the first person is a partnership or the multiple trustees of a trust:

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(i) that any of the partners or trustees are not fit and proper persons to provide the financial services covered by the licence; or

(ii) that any of the senior managers of the partnership or the trust are not fit and proper persons to perform one or more functions as an officer of an entity that provides the financial services covered by the licence;

(d) that any person who controls the first person is not a fit and proper person to control an entity that provides the financial services covered by the licence;

(e) if a controller mentioned in paragraph (d) is a body corporate—that an officer of the controller is not a fit and proper person to perform one or more functions as an officer of an entity that controls an entity that provides the financial services covered by the licence;

(f) if a controller mentioned in paragraph (d) is a partnership or the multiple trustees of a trust:

(i) that any of the partners or trustees are not fit and proper persons to control an entity that provides the financial services covered by the licence; or

(ii) that any of the senior managers of the partnership or the trust are not fit and proper persons to perform one or more functions as an officer of an entity that controls an entity that provides the financial services covered by the licence.

(2) In considering whether a person is fit and proper for a purpose mentioned in a paragraph of subsection (1), ASIC must have regard to the matters in section 913BB.

913BB Fit and proper person test—matters to which ASIC must have regard

(1) ASIC must have regard to the matters set out in subsection (2) (subject to Part VIIC of the *Crimes Act 1914*) for the purposes of applying any of the following provisions to a person:

(a) a paragraph of subsection 913BA(1);

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(b) paragraph 920A(1)(d).

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.

(2) The matters are as follows:

(a) whether any of the following of the person has ever been suspended or cancelled:

(i) an Australian financial services licence;

(ii) an Australian credit licence, or a registration under the Transitional Act, within the meaning of the *National Consumer Credit Protection Act 2009*;

(b) whether any of the following has ever been made against the person:

(i) a banning order, or a disqualification order under Subdivision B of Division 8 of this Part;

(ii) a banning order, or a disqualification order, under Part 2-4 of the *National Consumer Credit Protection Act 2009*;

(c) if the person is an individual—whether the person has ever been disqualified under this Act, or any other law of the Commonwealth or of a State or Territory, from managing corporations;

(d) whether the person has ever been banned from engaging in a credit activity (within the meaning of the *National Consumer Credit Protection Act 2009*) under a law of a State or Territory;

(e) whether the person has ever been linked to a refusal or failure to give effect to a determination made by AFCA;

(f) whether the person has ever:

(i) been a Chapter 5 body corporate or an insolvent under administration; or

(ii) if the person is a partnership—had a creditor's petition or a debtor's petition presented against it under Division 2 or 3 of Part IV of the *Bankruptcy Act 1966*;

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(g) if the person is the multiple trustees of a trust—whether a trustee of the trust has ever been a Chapter 5 body corporate or an insolvent under administration;

(h) whether, in the last 10 years, the person has been convicted of an offence;

(i) any relevant information given to ASIC by a State or Territory, or an authority of a State or Territory, in relation to the person;

(j) any other matter prescribed by the regulations;

(k) any other matter ASIC considers relevant.

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 and section 914B, 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.

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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 in a prescribed form 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, or imposing or varying conditions in accordance with an application under paragraph (2)(b).

(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:
  (aa) ASIC cannot impose, vary or revoke a condition on the licence if the licensee is authorised to provide a superannuation trustee service and doing so would, in ASIC's opinion, have the result of preventing the licensee from providing that service, unless:
    (i) APRA has agreed in writing with the proposed action; or
    (ii) the licensee applied under paragraph 914A(2)(b) for ASIC to take the proposed action; or
    (iii) the licensee's RSE licence is not in effect, and is not treated by section 29GB of the *Superannuation Industry (Supervision) Act 1993* as if it were in effect;
  (a) if paragraph (aa) does not apply, ASIC cannot:

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(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 paragraphs (aa) and (a) do 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

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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 this section to consult or inform APRA about, or to consider advice from ASIC about, or to get the agreement of APRA 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.

914B ASIC may request information etc. in relation to an application for conditions to be varied

(1) This section applies if a financial services licensee applies under paragraph 914A(2)(b) for ASIC to:

(a) impose conditions, or additional conditions, on the licence; or

(b) vary or revoke conditions imposed on the licence.

However, this section does not apply in relation to a power to which paragraph 914A(5)(a) applies.

(2) Without limiting ASIC's power to refuse to grant the application, ASIC may refuse to grant the application if the requirement in

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section 913BA (fit and proper person test) is not satisfied in relation to the applicant and the licence as proposed to be varied.

ASIC may request information etc. from applicant

(3) ASIC may give a written notice to the applicant requesting the applicant to lodge with ASIC in a prescribed form, within the time specified in the notice, any of the following:
  (a) information specified in the notice in relation to any matters that ASIC must have regard to for the purposes of deciding whether the requirement in section 913BA is satisfied as mentioned in subsection (2) of this section;
  (b) an audit report, prepared by a suitably qualified person specified in the notice, in relation to matters that ASIC must have regard to for the purposes of deciding whether the requirement in section 913BA is satisfied as mentioned in subsection (2) of this section;
  (c) if ASIC proposes to grant the application—a statement that either:
    (i) informs ASIC of any material changes in any information provided to ASIC in, or in connection with, the application; or
    (ii) confirms that there have been no such changes.

(4) To avoid doubt:
  (a) a notice under subsection (3), and the information, audit report or statement requested in the notice, may relate to any person mentioned in section 913BA in relation to the applicant and the licence as proposed to be varied; and
  (b) subsection (6) applies in relation to such a request even if the applicant is unable to comply with the request.

(5) ASIC may, by written notice to the applicant within the time specified in the notice:
  (a) withdraw the request; or
  (b) extend the time specified in the notice.

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(6) If the applicant does not lodge with ASIC in a prescribed form the information, audit report or statement requested by ASIC in a notice under subsection (3) within the specified time, the applicant is taken to have withdrawn the application.

(7) To avoid doubt, subsection (9) does not apply to an application that is taken to have been withdrawn under subsection (6).

(8) The regulations may make provision in relation to audit reports that applicants may be requested to lodge under paragraph (3)(b).

Applicant must be given hearing before refusal of application

(9) ASIC may only refuse to grant the application 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.

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 in a prescribed form 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.

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915B Immediate suspension or cancellation

Licence held by an individual

(1) ASIC may suspend or cancel an Australian financial services licence held by an individual, 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 in a prescribed form 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; or

(f) is liable to pay levy imposed by the *ASIC Supervisory Cost Recovery Levy Act 2017* and has not paid in full at least 12 months after the due date for payment:

(i) the amount of levy; and

(ii) the amount of any late payment penalty payable in relation to the levy; and

(iii) the amount of any shortfall penalty payable in relation to the levy; or

(g) is liable to pay an instalment of levy (within the meaning of the *Financial Services Compensation Scheme of Last Resort Levy (Collection) Act 2023*) and has not paid in full at least 12 months after the due date for payment:

(i) the amount of the instalment of levy; and

(ii) the amount of any late payment penalty in relation to the instalment of levy; and

(iii) the amount of any shortfall penalty payable in relation to the instalment of levy.

Note: For fees in respect of lodging applications, see Part 9.10.

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(1A) ASIC may also cancel an Australian financial services licence held by an individual, by giving written notice to the individual, if the individual does not provide a financial service covered by the licence before the end of 6 months after the licence is granted.

(1B) ASIC must cancel an Australian financial services licence held by an individual, by giving written notice to the individual, if:

(a) the individual is required to pay an amount to another person in accordance with a relevant AFCA determination; and

(b) the CSLR operator has paid, under section 1063, an amount of compensation to the other person for the relevant AFCA determination.

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

(ba) an officer of the partnership becomes an insolvent under administration; or

(c) one or more of the partners is convicted of serious fraud; or

(d) the partnership lodges with ASIC in a prescribed form 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; or

(e) in the case of a partnership that is a leviable entity (within the meaning of the *ASIC Supervisory Cost Recovery Levy Act 2017*)—the following have not been paid in full at least 12 months after the due date for payment:

(i) an amount of levy (if any) payable in respect of the licensee;

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(ii) an amount of late payment penalty payable (if any) in relation to the levy;

(iii) an amount of shortfall penalty payable (if any) in relation to the levy; or

(f) in the case of a partnership that is liable to pay an instalment of levy (within the meaning of the *Financial Services Compensation Scheme of Last Resort Levy (Collection) Act 2023*)—the following have not been paid in full at least 12 months after the due date for payment:

(i) the amount of the instalment of levy;

(ii) the amount of any late payment penalty in relation to the instalment of levy;

(iii) the amount of any shortfall penalty payable in relation to the instalment of levy.

Note: For fees in respect of lodging applications, see Part 9.10.

(2A) ASIC may also cancel an Australian financial services licence held by a partnership, by giving written notice to the partnership, if the partnership does not provide a financial service covered by the licence before the end of 6 months after the licence is granted.

(2B) ASIC must cancel an Australian financial services licence held by a partnership, by giving written notice to the partnership, if:

(a) one or more of the partners is required to pay an amount to a person in accordance with a relevant AFCA determination; and

(b) the CSLR operator has paid, under section 1063, an amount of compensation to the person for the relevant AFCA determination.

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:

(a) the body ceases to carry on the financial services business; or

(b) the body becomes a Chapter 5 body corporate; or

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(ba) an officer of the body becomes an insolvent under administration; or

(c) the body 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

(caa) the body is an operator of a notified foreign passport fund whose members have suffered, or are likely to suffer, loss or damage because the body has breached this Act; or

(ca) the body 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) the body lodges with ASIC in a prescribed form 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; or

(e) the body is liable to pay levy imposed by the *ASIC Supervisory Cost Recovery Levy Act 2017* and has not paid in full at least 12 months after the due date for payment:

(i) the amount of levy; and

(ii) the amount of any late payment penalty payable in relation to the levy; and

(iii) the amount of any shortfall penalty payable in relation to the levy; or

(f) the body is liable to pay an instalment of levy (within the meaning of the *Financial Services Compensation Scheme of Last Resort Levy (Collection) Act 2023*) and has not paid in full at least 12 months after the due date for payment:

(i) the amount of the instalment of levy; and

(ii) the amount of any late payment penalty in relation to the instalment of levy; and

(iii) the amount of any shortfall penalty payable in relation to the instalment of levy.

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Note: For fees in respect of lodging applications, see Part 9.10.

(3A) ASIC may also cancel an Australian financial services licence held by a body corporate, by giving written notice to the body, if the body does not provide a financial service covered by the licence before the end of 6 months after the licence is granted.

(3B) ASIC must cancel an Australian financial services licence held by a body corporate, by giving written notice to the body, if:

(a) the body is required to pay an amount to a person in accordance with a relevant AFCA determination; and

(b) the CSLR operator has paid, under section 1063, an amount of compensation to the person for the relevant AFCA determination.

(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 an individual:

(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 a Chapter 5 body corporate; or

(ca) an officer of a trustee becomes an insolvent under administration; or

(d) the trustees lodge with ASIC in a prescribed form 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; or

(e) in the case of a licensee that is a single legal entity under section 761FA and also a leviable entity (within the meaning of the *ASIC Supervisory Cost Recovery Levy Act 2017*)—the

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following have not been paid in full at least 12 months after the due date for payment:

(i) an amount of levy (if any) payable in respect of the licensee;

(ii) an amount of late payment penalty payable (if any) in relation to the levy;

(iii) an amount of shortfall penalty payable (if any) in relation to the levy; or

(f) in the case of a licensee that is a single legal entity under section 761FA of this Act and also liable to pay an instalment of levy (within the meaning of the *Financial Services Compensation Scheme of Last Resort Levy (Collection) Act 2023*)—the following have not been paid in full at least 12 months after the due date for payment:

(i) the amount of the instalment of levy;

(ii) the amount of any late payment penalty in relation to the instalment of levy;

(iii) the amount of any shortfall penalty payable in relation to the instalment of levy.

Note: For fees in respect of lodging applications, see Part 9.10.

(4A) ASIC may also cancel an Australian financial services licence held by the trustees of a trust, by giving written notice to the trustees, if the trustees of the trust do not provide a financial service covered by the licence before the end of 6 months after the licence is granted.

(4B) ASIC must 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 are required to pay an amount to a person in accordance with a relevant AFCA determination; and

(b) the CSLR operator has paid, under section 1063, an amount of compensation to the person for the relevant AFCA determination.

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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) the requirement in section 913BA (fit and proper person test) is not satisfied in relation to the licensee and the licence;

(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;

(e) the licensee is the operator of an Australian passport fund, or a person (other than a regulator) who has functions or duties in relation to an Australian passport fund under the Passport Rules for this jurisdiction, and each of the following is satisfied:

(i) a host regulator for the fund has notified ASIC in writing that it is of the opinion that the person or the fund has not complied, is not complying or is not likely to comply with the law of that host economy to the extent that the law is administered by the host regulator for the fund (including the Passport Rules for the host economy for the fund);

(ii) ASIC is of the opinion that it should suspend or cancel the licence, given the potential impact of the failure, or potential failure, to comply on members or potential members of the fund;

(f) the application for the licence:

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(i) was false in a material particular or materially misleading; or
(ii) omitted a material matter;

(g) any information, audit report or statement lodged with ASIC in accordance with a request under subsection 913B(3) in relation to the application for the licence:
(i) was false in a material particular or materially misleading; or
(ii) omitted a material matter;

(h) an application made by the licensee under paragraph 914A(2)(b) in relation to the licence:
(i) was false in a material particular or materially misleading; or
(ii) omitted a material matter;

(i) any information, audit report or statement lodged with ASIC in accordance with a request under subsection 914B(3) in relation to an application made by the licensee under paragraph 914A(2)(b) in relation to the licence:
(i) was false in a material particular or materially misleading; or
(ii) omitted a material matter.

(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.

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(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.

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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:

(aa) ASIC cannot suspend or cancel the licensee's licence if the licensee is authorised to provide a superannuation trustee service unless:

(i) APRA has agreed in writing with the proposed action; or

(ii) the licensee applied under paragraph 915B(1)(e), (2)(d), (3)(d) or (4)(d) for ASIC to take the proposed action; or

(iii) the licensee's RSE licence is not in effect, and is not treated by section 29GB of the *Superannuation Industry (Supervision) Act 1993* as if it were in effect;

(a) if paragraph (aa) does not apply, 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 paragraphs (aa) and (a) do 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*);

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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 this section to consult or inform APRA about, or to consider advice from ASIC about, or to get the agreement of APRA about, a suspension or cancellation, 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.

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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.

Note: There are limitations on a financial services licensee authorising an individual to provide certain personal advice if the individual does not meet certain requirements (see section 921C).

(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; or

(c) in contravention of subsection 921C(2).

(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.

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(2) A purported authorisation contrary to this section or subsection 921C(3) is void.

(2A) A person must not give a purported authorisation if that purported authorisation is contrary to this section or subsection 921C(3).

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(3) An authorised representative (an ***authoriser***) 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 authoriser.

Note: There are limitations on sub-authorising an individual to provide certain personal advice if the individual does not meet certain requirements (see section 921C).

(3A) An individual who is authorised as mentioned in subsection (3) cannot, in that capacity, authorise another person under subsection (3).

(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 an authoriser, 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:

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(a) the licensee; or
(b) the authoriser 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 authoriser, 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; or
(c) the only financial services provided by the person as authorised representative of any financial services licensee are claims handling and settling services.

(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

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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.

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916F Obligation to notify ASIC etc. about authorised representatives

(1) A person must lodge with ASIC in a prescribed form 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 by an authorised representative (the ***authoriser***) if:

(a) the authorisation is given as mentioned in subsection 916B(3); and

(b) the relevant consent under subsection 916B(3) was given in respect of a specified class of individuals of which the representative is a member; and

(c) the representative is an employee of the authoriser; and

(d) the only financial services that the representative is authorised to provide are one or more of the following:

(i) general advice that relates to financial products covered by regulations made for the purposes of this paragraph;

(ii) dealing in financial products covered by regulations made for the purposes of this paragraph;

(iii) personal advice about a basic deposit product or about a facility for making non-cash payments that relates to a basic deposit product; and

(e) the authoriser provides information about the representative and the representative's authorisation when requested.

Note 1: Regulations made for the purposes of paragraph (d) may be expressed to cover all financial products, or only 1 or more specified kinds of financial products.

Note 2: A defendant bears an evidential burden in relation to the matters in subsection (1AA). See subsection 13.3(3) of the *Criminal Code*.

(1A) A person who authorises an individual to provide a financial service on behalf of a financial services licensee as mentioned in

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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

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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

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(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:

(i) an offence against section 6 of the *Crimes Act 1914*; or

(ii) an ancillary offence (within the meaning of the *Criminal Code*);

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 a country outside Australia; and

(b) paragraphs (5)(b) and (c) were omitted.

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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;

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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:

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(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

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(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.

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(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).

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

Subdivision A—Banning orders

920A ASIC's power to make a banning order

Making a banning order

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

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(db) the person has not complied with any one or more of his or her obligations under section 921F (requirements relating to provisional relevant providers); or

(dc) both of the following apply:

(i) a supervisor referred to in section 921F has not complied with any one or more of his or her obligations under that section in relation to a provisional relevant provider;

(ii) both the supervisor and the provisional relevant provider are authorised to provide personal advice to retail clients, on behalf of the person, in relation to relevant financial products; or

(dd) both of the following apply:

(i) a provisional relevant provider has not complied with his or her obligations under subsection 921F(7);

(ii) the provisional relevant provider is authorised to provide personal advice to retail clients, on behalf of the person, in relation to relevant financial products; or

(de) ASIC has reason to believe that the person was authorised, in contravention of subsection 921C(2), (3) or (4), to provide personal advice to retail clients in relation to relevant financial products; or

(e) the person has not complied with a financial services law (other than subsection 921E(3) (relevant providers to comply with the Code of Ethics)); or

(f) ASIC has reason to believe that the person is likely to contravene a financial services law; or

(g) the person has been involved in the contravention of a financial services law by another person; or

(h) ASIC has reason to believe that the person is likely to become involved in the contravention of a financial services law by another person; or

(i) the person is the operator of, or another person connected with, an Australian passport fund, and each of the following is satisfied:

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(i) a host regulator for the fund has notified ASIC in writing that it is of the opinion that the person or the fund has not complied, is not complying or is not likely to comply with the law of that host economy to the extent that the law is administered by the host regulator for the fund (including the Passport Rules for the host economy for the fund);

(ii) ASIC is of the opinion that it should make the banning order, given the potential impact of the failure, or potential failure, to comply on members or potential members of the fund; or

(j) the person has, at least twice, been linked to a refusal or failure to give effect to a determination made by AFCA relating to a complaint that relates to:

(i) a financial services business; or

(ii) credit activities (within the meaning of the *National Consumer Credit Protection Act 2009*); or

(ja) all of the following apply:

(i) an individual who holds an Australian financial services licence, a partner in a partnership, a body corporate or a trustee of a trust is required to pay an amount in accordance with a relevant AFCA determination;

(ii) the CSLR operator has paid, under section 1063, an amount of compensation for the relevant AFCA determination;

(iii) at the time the payment is made by the CSLR operator, the person is the individual licensee, a partner in the partnership, an officer of the body corporate or the trustee of the trust; or

(k) subsection (1C) applies to the person in relation to 2 or more corporations.

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

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

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When a person is not a fit and proper person

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

When a person contravenes a financial services law

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

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

(1C) This subsection applies to a person in relation to a corporation if, within the last 7 years:

(a) the person was an officer of the corporation when the corporation was:

(i) carrying on a financial services business; or

(ii) engaging in credit activities (within the meaning of the *National Consumer Credit Protection Act 2009*); and

(b) the corporation was wound up either:

(i) while the person was an officer of the corporation; or

(ii) within the 12 months after the person ceased to be an officer of the corporation; and

(c) a liquidator lodged a report under subsection 533(1) (including that subsection as applied by section 526-35 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*) about the corporation's inability to pay its debts.

Person to be given an opportunity to be heard

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

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(a) to appear, or be represented, at a hearing before ASIC that takes place in private; and
(b) to make submissions to ASIC on the matter.

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

(3) ASIC may make a banning order against a person without giving the person the opportunities mentioned in subsection (2) if:
(a) either:
(i) ASIC has not delegated its power to make the banning order to a Financial Services and Credit Panel; or
(ii) ASIC exercises its power to make the banning order despite such a delegation; and
(b) ASIC's grounds for making the banning order are or include both of the following:
(i) that the suspension or cancellation of the relevant licence took place under section 915B;
(ii) that the person has been convicted of serious fraud.

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

Special procedure for RSE licensees

(3A) If a person against whom ASIC proposes to make a banning order is a financial services licensee who is authorised to provide a superannuation trustee service, the following provisions apply:
(a) ASIC cannot make the banning order if doing so would, in ASIC's opinion, have the result of preventing the licensee from providing that service, unless:
(i) APRA agrees in writing to the making of the banning order; or
(ii) the licensee's RSE licence is not in effect, and is not treated by section 29GB of the *Superannuation Industry (Supervision) Act 1993* as if it were in effect;

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(b) if ASIC makes the banning order and paragraph (a) does not apply to that action, ASIC must, within one week, inform APRA of the action that has been taken.

(3B) A failure to comply with a requirement of subsection (3A) to get the agreement of APRA about a banning order does not invalidate the action taken.

Copy of banning order to be given to the person

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

920B What a banning order prohibits

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

(2) The banning order may specify that a particular prohibition specified in the order applies against the person:
(a) if the sole ground for the banning order is because paragraph 920A(1)(k) applies—for a specified period of up to 5 years; or
(b) otherwise—either permanently or for a specified period.

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

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(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 against whom a banning order is made must not engage in conduct in breach of the banning order.

Fault-based offence

(3) A person commits an offence if the person contravenes subsection (2).

Civil liability

(4) A person contravenes this subsection if the person contravenes subsection (2).

Note: This subsection is a civil penalty provision (see section 1317E).

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 in a prescribed form an application for ASIC to do so,

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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.

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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) one or more orders disqualifying the person, permanently or for a specified period, from doing one or more of the following:
    (i) providing any financial services;
    (ii) providing specified financial services in specified circumstances or capacities;
    (iii) controlling, whether alone or in concert with one or more other entities, an entity that carries on a financial services business;
    (iv) performing any function involved in the carrying on of a financial services business (including as an officer, manager, employee, contractor or in some other capacity);
    (v) performing specified functions involved in the carrying on of a financial services business; or
  (b) any other order the Court considers appropriate.

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(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.

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Division 8A—Professional standards for relevant providers etc.

Subdivision A—Education and training standards

921B Meaning of *education and training standards*

(1) This section sets out the ***education and training standards*** for a person who is, or is to be, a relevant provider.

Conditions for relevant providers

(2) The first standard is that:
  (a) the person:
    (i) has completed a bachelor or higher degree, or equivalent qualification, approved by the Minister; and
    (ii) has satisfied the conditions (if any) approved by the Minister for completing the degree or qualification, and has satisfied those conditions in a way (if any) approved by the Minister; or
  (b) both of the following conditions are satisfied:
    (i) the person has completed a foreign qualification;
    (ii) the Minister has approved the foreign qualification under section 921G; or
  (c) the person holds an approval in force under subsection 921GA(3).

(3) The second standard is that the person has passed an exam administered under this subsection by ASIC in accordance with principles approved by the Minister.

(4) The third standard is that the person has undertaken at least 1 year of work and training that meets the requirements set by the Minister.

Note: A relevant provider who is undertaking work and training in accordance with this subsection is a provisional relevant provider (see

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the definition of ***provisional relevant provider*** in section 9). For rules relating to provisional relevant providers, see Subdivision C.

Continuing standard for relevant providers

(5) The fourth standard is that the person meets the requirements for continuing professional development set by the Minister.

Determinations by Minister

(6) The Minister may, by legislative instrument, do any or all of the following in one or more determinations:
  (a) approve bachelor or higher degrees, or equivalent qualifications, for the purposes of subparagraph (2)(a)(i);
  (aa) approve for the purposes of subparagraph (2)(a)(ii):
    (i) one or more conditions for completing an approved degree or qualification; and
    (ii) one or more ways for satisfying such conditions;
  (b) approve principles for the purposes of subsection (3);
  (c) set requirements for work and training for the purposes of subsection (4);
  (d) set requirements for continuing professional development for the purposes of subsection (5) in relation to the CPD year of a financial services licensee, the period mentioned in subsection 1546E(5), or any other period determined by the Minister.

(7) Before exercising the power in subsection (6), the Minister must be satisfied that doing so is necessary or desirable to ensure that relevant providers are adequately trained and competent to provide personal advice to retail clients in relation to relevant financial products.

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921BA Relevant providers to meet education and training standards

Qualifications

(1) A relevant provider must meet the education and training standard in subsection 921B(2).

Exam

(2) A relevant provider must meet the education and training standard in subsection 921B(3).

Work and training

(3) A relevant provider must either:
  (a) meet the education and training standard in subsection 921B(4); or
  (b) be undertaking work and training in accordance with that subsection.

Continuing professional development

(4) A relevant provider must comply with subsection 921B(5):
  (a) in the case of a relevant provider who is a financial services licensee—during the licensee's CPD year; or
  (b) in the case of a relevant provider who is authorised to provide personal advice to retail clients, on behalf of a financial services licensee, in relation to relevant financial products—during the licensee's CPD year.

Note: Section 922HB requires a notice to be given at the end of a financial services licensee's CPD year if a relevant provider has not complied with this subsection during that year.

Civil liability

(5) A person contravenes this subsection if the person contravenes subsection (1), (2), (3) or (4).

Note 1: This subsection is a restricted civil penalty provision (see sections 921Q and 1317E).

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Note 2: ASIC or a Financial Services and Credit Panel may take certain other action against a relevant provider who contravenes subsection (1), (2), (3) or (4) (see Division 8B).

Note 3: Exemptions apply in relation to certain relevant providers (see section 921BC).

921BB Additional requirements for relevant providers who provide tax (financial) advice services

(1) The Minister may, by legislative instrument, determine any or all of the following requirements for a person who provides, or is to provide, a tax (financial) advice service:

(a) a requirement that the person has completed one or more specified bachelor or higher degrees;

(b) a requirement that the person has completed one or more specified qualifications;

(c) a requirement that the person has completed one or more specified courses;

(d) a requirement that the person has undertaken specified work and training;

(e) a requirement for continuing professional development in relation to the CPD year of a financial services licensee or any other period determined by the Minister.

Note: The determination may deal with matters of a transitional nature relating to any or all of the requirements mentioned in this subsection.

(2) Before exercising the power in subsection (1), the Minister must be satisfied that doing so is necessary or desirable to ensure that relevant providers are adequately trained and competent to provide tax (financial) advice services.

Continuing professional development

(3) If a determination in force under subsection (1) sets out a requirement mentioned in paragraph (1)(e), a relevant provider who provides tax (financial) advice services must comply with that requirement:

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(a) in the case of a relevant provider who is a financial services licensee—during the licensee's CPD year; or

(b) in the case of a relevant provider who is authorised to provide personal advice to retail clients, on behalf of a financial services licensee, in relation to relevant financial products—during the licensee's CPD year.

Note: Section 922HB requires a notice to be given at the end of a financial services licensee's CPD year if a relevant provider has not complied with this subsection during that year.

Civil liability

(4) A person contravenes this subsection if the person contravenes subsection (3).

Note 1: This subsection is a restricted civil penalty provision (see sections 921Q and 1317E).

Note 2: ASIC or a Financial Services and Credit Panel may take certain other action against a relevant provider who contravenes subsection (3) (see Division 8B).

Note 3: Exemptions apply in relation to certain relevant providers (see section 921BC).

921BC Exemptions for certain relevant providers

Time-sharing schemes

(1) Sections 921BA and 921BB do not apply to a relevant provider if the only relevant financial product in relation to which the relevant provider provides personal advice to retail clients is a time-sharing scheme.

Provisional relevant providers

(2) The CPD provisions do not apply to provisional relevant providers.

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Subdivision AA—Limitations on authorisation to provide personal advice

921C Limitation on authorisation to provide personal advice unless conditions met

Financial services licensees

(1) ASIC must not grant an applicant an Australian financial services licence that covers the provision of personal advice to retail clients in relation to relevant financial products if the applicant is an individual and any of the following paragraphs apply:

(a) the applicant has not met any one or more of the education and training standards in subsections 921B(2) to (4);

(b) if:

(i) the applicant is to provide a tax (financial) advice service; and

(ia) the applicant is not a registered tax agent; and

(ii) a determination in force under subsection 921BB(1) sets out a requirement mentioned in any of paragraphs (a) to (c) of that subsection;

the applicant has not met the requirement;

(c) if:

(i) the applicant is to provide a tax (financial) advice service; and

(ia) the applicant is not a registered tax agent; and

(ii) a determination in force under subsection 921BB(1) includes a requirement for a person who is to provide a tax (financial) advice service to have undertaken specified work and training;

the applicant has not undertaken that work and training.

Authorised representatives

(2) A financial services licensee must not, under section 916A, give a person a written notice authorising the person to provide personal

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advice to retail clients, on behalf of the licensee, in relation to relevant financial products if the person is an individual and any of the following paragraphs apply:

(a) the person has not met either or both of the education and training standards in subsections 921B(2) and (3);

(b) the person has not met the education and training standard in subsection 921B(4), and is not undertaking work and training in accordance with that subsection;

(c) if:

(i) the person is to provide a tax (financial) advice service; and

(ia) the person is not a registered tax agent; and

(ii) a determination in force under subsection 921BB(1) sets out a requirement mentioned in any of paragraphs (a) to (d) of that subsection;

the person has not met the requirement.

Sub-authorisations

(3) An authorised representative of a financial services licensee must not, under subsection 916B(3), give an individual a written notice authorising that individual to provide personal advice to retail clients, on behalf of the licensee, in relation to relevant financial products if any of the following paragraphs apply:

(a) the individual has not met either or both of the education and training standards in subsections 921B(2) and (3);

(b) the individual has not met the education and training standard in subsection 921B(4), and is not undertaking work and training in accordance with that subsection;

(c) if:

(i) the individual is to provide a tax (financial) advice service; and

(ia) the individual is not a registered tax agent; and

(ii) a determination in force under subsection 921BB(1) sets out a requirement mentioned in any of paragraphs (a) to (d) of that subsection;

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the individual has not met the requirement.

Employees and directors

(4) A financial services licensee must not authorise an employee or director of the licensee, or of a related body corporate of the licensee, to provide personal advice to retail clients, on behalf of the licensee, in relation to relevant financial products if any of the following paragraphs apply:

(a) the employee or director has not met either or both of the education and training standards in subsections 921B(2) and (3);

(b) the employee or director has not met the education and training standard in subsection 921B(4), and is not undertaking work and training in accordance with that subsection;

(c) if:

(i) the employee or director is to provide a tax (financial) advice service; and

(ia) the employee or director is not a registered tax agent; and

(ii) a determination in force under subsection 921BB(1) sets out a requirement mentioned in any of paragraphs (a) to (d) of that subsection;

the employee or director has not met the requirement.

Exemption in relation to time-sharing schemes

(5) This section does not apply in relation to a person who is to provide personal advice to retail clients in relation to relevant financial products if the only relevant financial product in relation to which the person is to provide personal advice to retail clients is a time-sharing scheme.

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Subdivision B—Ethical standards

921E Code of Ethics

(1) The Minister may, by legislative instrument, make a Code of Ethics.

(2) Without limiting subsection 33(3A) of the *Acts Interpretation Act 1901*, the Code of Ethics may make different provision in relation to different classes of relevant provider.

(3) A relevant provider must comply with the Code of Ethics.

Note 1: Subsection (3) is a restricted civil penalty provision (see sections 921Q and 1317E).

Note 2: ASIC or a Financial Services and Credit Panel may take certain other action against a relevant provider who contravenes subsection (3) (see Division 8B).

Subdivision C—Provisional relevant providers

921F Requirements relating to provisional relevant providers

(1) This section sets out the requirements in relation to a person who is a provisional relevant provider.

Meaning of ***supervisor***

(2) A ***supervisor*** of a provisional relevant provider is an individual who:

(a) has supervisory responsibility for the provisional relevant provider; and

(b) is a relevant provider; and

(c) is not a provisional relevant provider; and

(d) is not a limited-service time-sharing adviser.

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Role of supervisors

(3) A supervisor of a provisional relevant provider must ensure that appropriate supervision is provided to the provisional relevant provider.

(4) A supervisor of a provisional relevant provider must approve, in writing, any Statement of Advice provided by the provisional relevant provider to a retail client.

Personal advice provided by provisional relevant providers

(5) For the purposes of this Act, personal advice provided (whether orally or in writing) by a provisional relevant provider at a particular time to a retail client in relation to a relevant financial product is taken to have been provided to the client by each person who is, at that time, a supervisor of the provisional relevant provider (instead of by the provisional relevant provider).

Retail clients to be informed of certain matters

(6) A supervisor of a provisional relevant provider must ensure that a retail client is informed:
   (a) of the name of each supervisor of the provisional relevant provider (even if the retail client has been informed of the name of each previous supervisor); and
   (b) that the provisional relevant provider is undertaking work and training in accordance with subsection 921B(4); and
   (c) that each supervisor is responsible for any personal advice provided by the provisional relevant provider to the client in relation to a relevant financial product.

Provisional relevant providers not to obstruct or hinder supervision

(7) A provisional relevant provider must not obstruct or hinder a supervisor of the provisional relevant provider in ensuring that appropriate supervision is provided to the provisional relevant provider.

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Civil liability

(8) A person contravenes this subsection if the person contravenes subsection (3), (4), (6) or (7).

Note 1: Subsection (8) is a restricted civil penalty provision (see sections 921Q and 1317E).

Note 2: ASIC or a Financial Services and Credit Panel may take certain other action against a relevant provider who contravenes subsection (3), (4), (6) or (7) (see Division 8B).

Subdivision D—Other matters

921G Approval of foreign qualifications

Application for approval

(1) A person who has completed a foreign qualification may apply to the Minister in the form approved, in writing, by the Minister for approval of the foreign qualification.

Approval or refusal to approve

(2) The Minister must either:
  (a) approve the foreign qualification in accordance with subsection (3); or
  (b) refuse to approve the foreign qualification.

(3) The Minister may approve the foreign qualification only if:
  (a) the Minister is satisfied that the foreign qualification gives the person qualifications equivalent to a degree or qualification approved by the Minister for the purposes of subparagraph 921B(2)(a)(i); or
  (b) both of the following apply:
    (i) the Minister specifies one or more courses to be completed by the person under subsection (4) of this section;
    (ii) the person completes each of those courses.

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(4) The Minister may specify one or more courses for the purposes of paragraph (3)(b) only if the Minister is satisfied that (together with the person's foreign qualification) the course or courses will give the person qualifications equivalent to a degree or qualification approved by the Minister for the purposes of subparagraph 921B(2)(a)(i).

When approval comes into force

(5) An approval under paragraph (2)(a) comes into force:
  (a) if the Minister specifies one or more courses to be completed by the person under subsection (4)—when the person has completed all of those courses; or
  (b) otherwise—when it is given.

921GA Approval of domestic qualifications

Application for approval

(1) A person who:
  (a) has completed a bachelor or higher degree approved by a determination in force for the purposes of subparagraph 921B(2)(a)(i) (the ***domestic qualification***); but
  (b) has not completed the domestic qualification in accordance with subparagraph 921B(2)(a)(ii);

may apply to the Minister for approval of the domestic qualification.

(2) The application must be:
  (a) in writing; and
  (b) in the form approved, in writing, by the Minister.

Approval or refusal

(3) The Minister must, by written notice given to the person, either:
  (a) approve the domestic qualification; or
  (b) refuse to approve the domestic qualification.

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(4) The Minister may approve the domestic qualification under subsection (3) only if the Minister is satisfied that:
  (a) the person has completed the domestic qualification but not in accordance with subparagraph 921B(2)(a)(ii); and
  (b) the person nevertheless has qualifications equivalent to the person completing the domestic qualification in accordance with subparagraph 921B(2)(a)(ii).

When approval comes into force

(5) An approval under subsection (3) comes into force when it is given.

921H Modifications of Part in relation to continuing professional development

(1) The Minister may, by legislative instrument, determine modifications of the operation of a provision in this Part in relation to a period determined by the Minister under:
  (a) paragraph 921B(6)(d); or
  (b) paragraph 921BB(1)(e).

(2) A determination made under subsection (1) has effect according to its terms, despite any other provision of this Act.

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Division 8B—Action against relevant providers

Subdivision A—Action by Financial Services and Credit Panels

921K Power of Financial Services and Credit Panels to take action against relevant providers

(1) Subject to subsections (2) and (3), a Financial Services and Credit Panel may make an instrument of a kind specified in subsection 921L(1) in relation to a relevant provider if:

(a) the relevant provider becomes an insolvent under administration; or

(b) the relevant provider is convicted of fraud; or

(c) the panel reasonably believes, having regard to the matters specified in section 921U but subject to Part VIIC of the *Crimes Act 1914*, that the relevant provider is not a fit and proper person to provide personal advice to retail clients in relation to relevant financial products; or

(d) the panel reasonably believes that the relevant provider has contravened a financial services law (including a restricted civil penalty provision); or

(e) the relevant provider has been involved in the contravention of a financial services law (including a restricted civil penalty provision) by another person; or

(f) the relevant provider has, at least twice, been linked to a refusal or failure to give effect to a determination made by AFCA relating to a complaint that relates to:

(i) a financial services business; or

(ii) credit activities (within the meaning of the *National Consumer Credit Protection Act 2009*); or

(g) subsection 920A(1C) (when a person has been an officer of a corporation unable to pay its debts) applies to the relevant provider in relation to 2 or more corporations.

Note 1: Part VIIC of the *Crimes Act 1914* includes provisions that, in certain circumstances, relieve persons from the requirement to disclose spent

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convictions and require persons aware of such convictions to disregard them.

Note 2: Subsection 921E(3) (relevant providers to comply with the Code of Ethics) is a financial services law.

Note 3: To work out whether a relevant provider has been linked as described in paragraph (f), see section 910C.

Proposed action notice given in relation to relevant circumstances

(2) A Financial Services and Credit Panel must not make an instrument under subsection (1) in relation to a relevant provider because of circumstances (the ***relevant circumstances***) mentioned in that subsection unless:

(a) the panel gave the relevant provider a proposed action notice in relation to a proposal to make the instrument because of the relevant circumstances and either:

(i) no submission or request for a hearing was made within the response period for the notice; or

(ii) a submission or request for a hearing was made within the response period for the notice and the panel has taken into account the submission or held the hearing (as the case may be); or

(b) all of the following apply:

(i) the panel gave the relevant provider a proposed action notice in relation to a proposal to make a different instrument in relation to the relevant circumstances or to give the relevant provider an infringement notice in relation to the relevant circumstances;

(ii) a submission or request for a hearing was made within the response period for the notice;

(iii) the panel has taken into account the submission or held the hearing (as the case may be).

Infringement notices, warnings and reprimands

(3) A Financial Services and Credit Panel must not make an instrument under subsection (1) in relation to a relevant provider because of circumstances mentioned in that subsection if the panel,

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or another Financial Services and Credit Panel, has given the relevant provider an infringement notice, or a warning or reprimand, in relation to those circumstances.

When a person contravenes a financial services law

(4) 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.

Instruments not legislative

(5) An instrument made under subsection (1) is not a legislative instrument.

Interaction with ASIC Act

(6) Subsection (2) does not limit section 158 of the ASIC Act (panels to take account of evidence and submissions).

921L Instruments that Financial Services and Credit Panels may make in relation to relevant providers

(1) For the purposes of subsection 921K(1), the following kinds of instrument are specified:
  (a) a written direction that a relevant provider:
    (i) undertake specified training; or
    (ii) receive specified counselling; or
    (iii) receive specified supervision; or
    (iv) report specified matters to ASIC;
  (b) a written order (a ***registration suspension order***), in relation to a relevant provider, that suspends all of the relevant provider's registrations under section 921ZC for a period (the ***suspension period***) specified in the order;
  (c) a written order (a ***registration prohibition order***), in relation to a relevant provider, that:

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(i) cancels all of the relevant provider's registrations under section 921ZC at a time (the ***cancellation time***) specified in the order; and

(ii) provides that the person who is or was the relevant provider is not to be registered under section 921ZC until after a day (the ***prohibition end day***) specified in the order.

Note: If a registration prohibition order is in force against a person who is or was a relevant provider:

(a) each registration of the person under section 921ZC will cease to be in force at the cancellation time specified in the order (unless the registration has ceased to be in force at an earlier time) (see sections 921ZD and 921ZE); and

(b) ASIC must refuse to register the person until after the prohibition end day specified in the order (see subsection 921ZC(3)).

Effect of paragraph (1)(a) direction

(2) A relevant provider must comply with a direction in relation to the relevant provider that is in force under paragraph (1)(a).

Note: This subsection is a civil penalty provision (see section 1317E).

Effect of registration suspension order

(3) For the purposes of this Part, if a registration suspension order is in force against a relevant provider, all of the relevant provider's registrations under section 921ZC are taken not to be in force during the suspension period specified in the order.

Suspension period and cancellation time

(4) The suspension period specified in a registration suspension order that is made in relation to a relevant provider must begin at or after the time a copy of the order is given to the relevant provider.

(5) The cancellation time specified in a registration prohibition order that is made in relation to a relevant provider must be a time that is at or after a copy of the order is given to the relevant provider.

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When instruments come into force

(6) An instrument of a kind specified in subsection (1) that is made in relation to a relevant provider comes into force when a copy of it is given to the relevant provider in accordance with subsection 921M(1).

921M Copy of instrument to be given to affected person etc.

(1) If, under subsection 921K(1), a Financial Services and Credit Panel makes an instrument in relation to a person (the ***affected person***), the panel must:
   (a) give a copy of the instrument to the affected person; and
   (b) at the same time, give a copy of the instrument to:
      (i) ASIC; and
      (ii) if the affected person is authorised to provide personal advice to retail clients, on behalf of a financial services licensee, in relation to relevant financial products—the licensee; and
   (c) at the same time, give the affected person a written notice informing the affected person of their right to make an application under subsection 921N(3) in relation to the instrument.

Note: ASIC must enter details of certain instruments in the Register of Relevant Providers (see paragraph 922Q(2)(uc)).

(2) A copy of an instrument given to a person under paragraph (1)(a) or (b) must be accompanied by a statement of reasons for the decision to make the instrument.

(3) A failure to comply with subsection (1) or (2) in relation to an instrument does not affect the validity of the instrument.

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921N Variation or revocation of instruments made in relation to relevant providers

(1) This section applies if an instrument of a kind specified in subsection 921L(1) is in force against a person (the ***affected person***).

Variation or revocation at ASIC's initiative

(2) ASIC may request a Financial Services and Credit Panel to make a decision under subsection (5) in relation to the instrument if ASIC is satisfied that there has been a change in any of the circumstances on the basis of which the instrument was made.

Application by affected person for variation or revocation

(3) The affected person may apply to ASIC in the approved form for:
  (a) the instrument to be revoked; or
  (b) a specified variation to be made to the instrument.

(4) If the affected person makes an application under subsection (3), ASIC must decide to:
  (a) request a Financial Services and Credit Panel to make a decision under subsection (5) in relation to the instrument; or
  (b) refuse to make such a request.

Decisions of Financial Services and Credit Panel about variations or revocations

(5) If ASIC makes a request of a Financial Services and Credit Panel under subsection (2) or paragraph (4)(a), the panel must decide to:
  (a) revoke the instrument; or
  (b) if the affected person made an application under subsection (3)—make the variation of the instrument specified in the application; or
  (c) make a variation of the instrument (even if the affected person made an application under subsection (3) and the application specified another variation); or

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(d) refuse to revoke the instrument; or
(e) refuse to vary the instrument.

(6) The panel must give written notice of the panel's decision to:
(a) if the decision is mentioned in paragraph (5)(a), (b) or (c)—all of the following:
(i) the affected person;
(ii) ASIC;
(iii) if the affected person is authorised to provide personal advice to retail clients, on behalf of a financial services licensee, in relation to relevant financial products—the licensee; or
(b) otherwise—the affected person.

(7) A notice given under subsection (6) must be accompanied by a statement of reasons for the decision to which the notice relates.

Subdivision B—Proposed action notices etc.

921P Proposed action notice

(1) A Financial Services and Credit Panel must give a written notice (a ***proposed action notice***) to a relevant provider if the panel proposes to:
(a) make an instrument under subsection 921K(1) in relation to the relevant provider because of circumstances (the ***relevant circumstances***) mentioned in that subsection; or
(b) give the relevant provider an infringement notice for the alleged contravention by the relevant provider of a restricted civil penalty provision.

(2) The proposed action notice must:
(a) set out details of the action proposed to be taken, including:
(i) for an action mentioned in paragraph (1)(a)—the relevant circumstances; and
(ii) for an action mentioned in paragraph (1)(b)—the alleged contravention and the amount to be stated in the

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infringement notice for the purposes of paragraph 1317DAP(1)(f); and

(b) invite the relevant provider to do either of the following within the period of 28 days beginning on the day the notice is given (or such longer period as is approved by the panel) (the ***response period***):

(i) make a submission, in writing, in relation to the action;

(ii) make a request, in writing, that the panel hold a hearing under Division 4 of Part 9 of the ASIC Act in relation to the action; and

(c) inform the relevant provider that if no submission or request for a hearing is made within the response period, the panel may take the action; and

(d) for an action mentioned in paragraph (1)(a)—inform the relevant provider that if the panel makes an instrument under subsection 921K(1), ASIC may be required to enter details of the instrument in the Register of Relevant Providers in accordance with paragraph 922Q(2)(uc).

921Q Recommendations to ASIC in relation to restricted civil penalty provisions

(1) If a Financial Services and Credit Panel reasonably believes that:

(a) a person has contravened a restricted civil penalty provision; and

(b) the person was a relevant provider at the time of the alleged contravention;

the panel may, by written notice given to ASIC, recommend that ASIC make an application under subsection 1317J(1) in relation to the alleged contravention.

Note: If ASIC decides to not follow the panel's recommendation, ASIC must report on the recommendation and ASIC's reasons for not following it (see subparagraph 136(1)(da)(iv) of the ASIC Act).

(2) Subsection (1) applies whether or not the panel also makes an instrument under subsection 921K(1) in relation to the alleged contravention by the person.

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(3) Each of the following is a ***restricted civil penalty provision***:
  (a) subsection 921BA(5);
  (b) subsection 921BB(4);
  (c) subsection 921E(3);
  (d) subsection 921F(8);
  (e) section 921Y.

921R Notices to Tax Practitioners Board about qualified tax relevant providers who are registered tax agents

(1) ASIC must give a written notice to the Tax Practitioners Board if an action specified in subsection (2) is taken against a qualified tax relevant provider who is a registered tax agent.

(2) The following actions are specified:
  (a) a Financial Services and Credit Panel making an instrument under subsection 921K(1) in relation to the qualified tax relevant provider;
  (b) ASIC giving the qualified tax relevant provider a warning or reprimand under subsection 921S(1);
  (c) a Financial Services and Credit Panel giving the qualified tax relevant provider a warning or reprimand under subsection 921T(1);
  (d) a Financial Services and Credit Panel giving the qualified tax relevant provider an infringement notice for the alleged contravention by the qualified tax relevant provider of a restricted civil penalty provision;
  (e) ASIC making an application under subsection 1317J(1) in relation to the alleged contravention by the qualified tax relevant provider of a restricted civil penalty provision;
  (f) a Financial Services and Credit Panel accepting an undertaking by the qualified tax relevant provider under subsection 171E(1) of the ASIC Act.

(3) A notice under subsection (1) must include:
  (a) details of the action; and

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(b) if the action is a Financial Services and Credit Panel making an instrument under subsection 921K(1)—the panel's reasons for making the instrument; and

(c) if the action is ASIC giving the qualified tax relevant provider a warning or reprimand—ASIC's reasons for giving the warning or reprimand; and

(d) if the action is a Financial Services and Credit Panel giving the qualified tax relevant provider a warning or reprimand—the panel's reasons for giving the warning or reprimand.

Notice about variation etc. of certain instruments

(4) ASIC must give a written notice to the Tax Practitioners Board if:

(a) ASIC has given a notice to the Tax Practitioners Board under subsection (1); and

(b) an instrument mentioned in that notice is subsequently varied, revoked or withdrawn.

(5) A notice under subsection (4) must include details of the variation, revocation or withdrawal, as the case may be.

Subdivision C—Warnings and reprimands

921S Warnings and reprimands by ASIC

(1) ASIC must give a relevant provider a written warning or reprimand if:

(a) ASIC reasonably believes that one or more of the following circumstances exist or have occurred in relation to the relevant provider:

(i) the relevant provider is not a fit and proper person to provide personal advice to retail clients in relation to relevant financial products, having regard to the matters specified in section 921U but subject to Part VIIC of the *Crimes Act 1914*;

(ii) the relevant provider has contravened a financial services law (including a restricted civil penalty provision);

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(iii) a circumstance mentioned in any of paragraphs 921K(1)(a), (b), (e), (f) or (g) (power of Financial Services and Credit Panels to take action against relevant providers); and

(b) ASIC has not convened, and does not propose to convene, a Financial Services and Credit Panel under subsection 139(1) of the ASIC Act to perform functions or exercise powers under the corporations legislation in relation to that circumstance or those circumstances; and

(c) ASIC has not exercised, and does not propose to exercise, any of its powers under the corporations legislation (other than this section) against the relevant provider in relation to that circumstance or those circumstances.

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.

(2) If the relevant provider is authorised to provide personal advice to retail clients, on behalf of a financial services licensee, in relation to relevant financial products, ASIC must give a copy of the warning or reprimand to the licensee.

(3) The warning or reprimand, and any copy of the warning or reprimand given to a financial services licensee under subsection (2), must be accompanied by a statement of reasons for the decision to give the warning or reprimand.

(4) A warning or reprimand given under subsection (1) is not a legislative instrument.

921T Warnings and reprimands by Financial Services and Credit Panels

(1) A Financial Services and Credit Panel may give a relevant provider a written warning or reprimand if the panel reasonably believes that:

(a) the relevant provider is not a fit and proper person to provide personal advice to retail clients in relation to relevant

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financial products, having regard to the matters specified in section 921U but subject to Part VIIC of the *Crimes Act 1914*; or

(b) the relevant provider has contravened a financial services law (including a restricted civil penalty provision); or

(c) a circumstance mentioned in any of paragraphs 921K(1)(a), (b), (e), (f) or (g) (power of Financial Services and Credit Panels to take action against relevant providers) exists or has occurred in relation to the relevant provider.

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.

(2) If a Financial Services and Credit Panel gives a relevant provider a warning or reprimand under subsection (1), the panel must, at the same time, give a copy of the warning or reprimand to:

(a) ASIC; and

(b) if the relevant provider is authorised to provide personal advice to retail clients, on behalf of a financial services licensee, in relation to relevant financial products—the licensee.

(3) The warning or reprimand, and each copy of the warning or reprimand given to a person under subsection (2), must be accompanied by a statement of reasons for the decision to give the warning or reprimand.

(4) A warning or reprimand given under subsection (1) is not a legislative instrument.

Subdivision D—Fit and proper person test

921U Fit and proper person test for relevant providers

The following matters are specified in relation to a relevant provider and a Financial Services and Credit Panel:

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(a) whether any of the following of the relevant provider has ever been suspended or cancelled:
  (i) an Australian financial services licence;
  (ii) an Australian credit licence, or a registration under the Transitional Act, within the meaning of the *National Consumer Credit Protection Act 2009*;
(b) whether any of the following has ever been made against the relevant provider:
  (i) a banning order, or a disqualification order under Subdivision B of Division 8 of this Part;
  (ii) a banning order, or a disqualification order, under Part 2-4 of the *National Consumer Credit Protection Act 2009*;
(c) whether the relevant provider has ever been disqualified under this Act, or any other law of the Commonwealth or of a State or Territory, from managing corporations;
(d) whether the relevant provider has ever been banned from engaging in a credit activity (within the meaning of the *National Consumer Credit Protection Act 2009*) under a law of a State or Territory;
(e) whether the relevant provider has ever been linked to a refusal or failure to give effect to a determination made by AFCA;
(f) whether the relevant provider has ever been an insolvent under administration;
(g) whether, in the last 10 years, the relevant provider has been convicted of an offence;
(h) any relevant information given to ASIC, or an authority of a State or Territory, in relation to the relevant provider;
(i) whether, in the last 10 years, a Financial Services and Credit Panel has made an instrument under subsection 921K(1) in relation to the relevant provider;
(j) whether, in the last 10 years, a Financial Services and Credit Panel has given the relevant provider an infringement notice (unless the infringement notice was withdrawn);
(k) any other matter prescribed by the regulations;

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(l) any other matter the panel considers relevant.

Subdivision E—Review of decisions made under this Division etc.

921V Review of decisions etc.

Review of decisions

(1) A person may apply to the Tribunal for review of any of the following:
  (a) a decision by a Financial Services and Credit Panel to make an instrument under subsection 921K(1);
  (b) a decision by a Financial Services and Credit Panel that is covered by paragraph 921N(5)(c), (d) or (e);
  (c) a decision by a Financial Services and Credit Panel to give a relevant provider a warning or reprimand under subsection 921T(1).

Notice of reviewable decisions and review rights

(2) Section 1317D applies in relation to a decision by a Financial Services and Credit Panel that is covered by subsection (1) of this section as if:
  (a) the panel were a decision maker for the purposes of section 1317D; and
  (b) the decision were a decision to which section 1317B applied.

Subdivision F—Electronic communication

921W Electronic communication of documents given by Financial Services and Credit Panels etc.

(1) This section applies to any document that is required or permitted to be given to a person:

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(a) by a Financial Services and Credit Panel, or the Chair of a Financial Services and Credit Panel, under a provision of this Act; or

(b) by ASIC under any of the following:

(i) Division 8A of this Part (Professional standards for relevant providers etc.);

(ii) this Division;

(iii) Division 8C of this Part (Registration of relevant providers);

(iv) Division 3 of Part 9.4AB (Infringement notices given by Financial Services and Credit Panels).

(2) The document may be given to the recipient by means of an electronic communication.

(3) The document may be given by giving the recipient (by means of an electronic communication or otherwise) sufficient information to allow the recipient to access the document electronically.

(4) However, an electronic communication or electronic access may only be used if, at the time the electronic communication is used or information about the electronic access is given:

(a) it is reasonable to expect that the document would be readily accessible so as to be useable for subsequent reference; and

(b) there is a nominated electronic address in relation to the recipient.

921X Electronic communication of documents given to Financial Services and Credit Panels etc.

(1) This section applies to any document that is required or permitted to be given to:

(a) a Financial Services and Credit Panel, or the Chair of a Financial Services and Credit Panel, under a provision of this Act; or

(b) ASIC under any of the following:

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(i) Division 8A of this Part (Professional standards for relevant providers etc.);
(ii) this Division;
(iii) Division 8C of this Part (Registration of relevant providers);
(iv) Division 3 of Part 9.4AB (Infringement notices given by Financial Services and Credit Panels).

Giving a document to a Financial Services and Credit Panel etc.

(2) The document may be given to the recipient by means of an electronic communication.

Signing the document

(3) If the document is required to be signed by the person under a provision mentioned in subsection (1), that requirement is taken to have been met in relation to the electronic communication of the document if:
(a) the person receives a copy or counterpart of the document:
(i) that is in a physical form; or
(ii) by means of an electronic communication; and
(b) the copy or counterpart includes the entire contents of the document; and
(c) the person indicates, by means of an electronic communication, that the person has signed the document; and
(d) a method is used to identify the person and to indicate the person's intention in respect of the information communicated in the document; and
(e) the method used was either:
(i) as reliable as appropriate for the purpose for which the document was generated or communicated, in light of all the circumstances, including any relevant agreement; or
(ii) proven in fact to have fulfilled the functions described in paragraph (d), by itself or together with further evidence.

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(4) For the purposes of paragraph (3)(b), a copy or counterpart of a document need not include:
   (a) the signature of another person signing the document; or
   (b) any material included in the document to identify another person signing the document or to indicate another person's intention in respect of the contents of the document.

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Division 8C—Registration of relevant providers

Subdivision A—Requirement for relevant providers to be registered

921Y Unregistered relevant providers not to provide personal advice

A relevant provider must not provide personal advice to retail clients in relation to relevant financial products unless a registration of the relevant provider under subsection 921ZC(1) or (1A) is in force.

Note: This section is a restricted civil penalty provision (see sections 921Q and 1317E).

921Z Financial services licensees not to continue to authorise unregistered relevant providers to provide personal advice

Authorised representatives

(1) A financial services licensee contravenes this subsection if:
  (a) the licensee has given a relevant provider a written notice under subsection 916A(1) authorising the relevant provider to provide personal advice to retail clients, on behalf of the licensee, in relation to relevant financial products; and
  (b) the relevant provider provides such advice; and
  (c) at the time when the relevant provider does so:
    (i) the licensee has not revoked the authorisation under subsection 916A(4); and
    (ii) no registration of the relevant provider under subsection 921ZC(1) or (1A) is in force.

Employees and directors

(2) A financial services licensee contravenes this subsection if:

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(a) the licensee authorises a relevant provider who is an employee or director of the licensee, or of a related body corporate of the licensee, to provide personal advice to retail clients, on behalf of the licensee, in relation to relevant financial products; and
(b) the relevant provider provides such advice; and
(c) at the time when the relevant provider does so:
(i) the licensee has not ceased to authorise the relevant provider as described in paragraph (a); and
(ii) no registration of the relevant provider under subsection 921ZC(1) or (1A) is in force.

Strict liability offence

(3) A person commits an offence of strict liability if the person contravenes subsection (1) or (2).

Civil liability

(4) A person contravenes this subsection if the person contravenes subsection (1) or (2).

Note: This subsection is a civil penalty provision (see section 1317E).

Subdivision B—Applications for registration

921ZA Application for registration—relevant providers who are financial services licensees applying to be registered

(1) A relevant provider who is a financial services licensee may apply to ASIC to be registered under subsection 921ZC(1).

Note: A notice must be lodged with ASIC under section 922D if a person becomes a relevant provider.

(2) The application must:
(a) be in the approved form; and
(b) include the following written declarations by the relevant provider:

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(i) that the relevant provider is a fit and proper person to provide personal advice to retail clients in relation to relevant financial products;

(ii) if subsection 921BA(1) applies to the relevant provider—that the relevant provider has met the education and training standard in subsection 921B(2);

(iii) if subsection 921BA(2) applies to the relevant provider—that the relevant provider has met the education and training standard in subsection 921B(3);

(iv) if subsection 921BA(3) applies to the relevant provider—that the relevant provider has met the education and training standard in subsection 921B(4);

(v) if the relevant provider provides, or is to provide, a tax (financial) advice service—that the relevant provider is a qualified tax relevant provider.

Note: A person may commit an offence or contravene a civil penalty provision if the person gives false or misleading information (see section 1308 of this Act and section 137.1 of the *Criminal Code*).

(3) Subject to Part VIIC of the *Crimes Act 1914*, the relevant provider must have regard to the matters specified in section 921U (other than the matters specified in paragraphs (h) and (l) of that section) for the purposes of making a declaration mentioned in subparagraph (2)(b)(i) of this section.

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.

921ZB Application for registration—financial services licensees applying to register relevant providers

(1) A financial services licensee may apply to ASIC to register a relevant provider under subsection 921ZC(1A).

Note 1: A notice must be lodged with ASIC under section 922D if a person becomes a relevant provider.

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Note 2: An application cannot be made under this subsection in relation to a provisional relevant provider (see subparagraph (2)(b)(v) of this section).

(2) The application must:

(a) be in the approved form; and

(b) include the following:

(i) a written declaration by the licensee that the relevant provider has given the licensee a declaration that the relevant provider is a fit and proper person to provide personal advice to retail clients in relation to relevant financial products;

(ii) a written declaration by the licensee as to whether the licensee is aware of any reason why the relevant provider might not be a fit and proper person to provide personal advice to retail clients in relation to relevant financial products;

(iii) if subsection 921BA(1) applies to the relevant provider—a written declaration by the licensee that the relevant provider has met the education and training standard in subsection 921B(2);

(iv) if subsection 921BA(2) applies to the relevant provider—a written declaration by the licensee that the relevant provider has met the education and training standard in subsection 921B(3);

(v) if subsection 921BA(3) applies to the relevant provider—a written declaration by the licensee that the relevant provider has met the education and training standard in subsection 921B(4);

(vi) if the relevant provider provides, or is to provide, a tax (financial) advice service—a written declaration by the licensee that the relevant provider is a qualified tax relevant provider.

Note: A person may commit an offence or contravene a civil penalty provision if the person gives false or misleading information (see section 1308 of this Act and section 137.1 of the *Criminal Code*).

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(3) Subject to Part VIIC of the *Crimes Act 1914*, the relevant provider and the licensee must have regard to the matters specified in section 921U (other than the matters specified in paragraphs (h) and (l) of that section) for the purposes of making a declaration mentioned in subparagraph (2)(b)(i) or (ii) of this section.

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.

Subdivision C—Registration and period of registration

921ZC Registration of relevant providers

Registration—relevant providers who are financial services licensees applying to be registered

(1) If an application for registration is made in accordance with section 921ZA by a relevant provider who is a financial services licensee, ASIC must register the relevant provider under this subsection by recording in the Register of Relevant Providers that the relevant provider is registered.

Registration—financial services licensees applying to register relevant providers

(1A) If an application is made in accordance with section 921ZB by a financial services licensee to register a relevant provider, ASIC must register the relevant provider under this subsection by recording in the Register of Relevant Providers that the relevant provider is registered in relation to the licensee.

(1B) To avoid doubt, a relevant provider is able to be registered under subsection (1A) multiple times in relation to different financial services licensees.

Note: The relevant provider may provide personal advice on behalf of multiple licensees, so long as the relevant provider is registered in relation to at least one of them.

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Refusal to register relevant provider

(2) Despite subsection (1) or (1A), ASIC must refuse to register a relevant provider under that subsection if:

(a) a banning order is in force against the relevant provider that has the effect that the relevant provider is prohibited from providing personal advice to retail clients in relation to relevant financial products; or

(b) a disqualification order under Division 8 is in force against the relevant provider that has the effect of disqualifying the relevant provider from providing personal advice to retail clients in relation to relevant financial products.

(3) Despite subsection (1) or (1A), if a registration prohibition order is in force against a relevant provider, ASIC must refuse to register the relevant provider under that subsection until after the prohibition end day specified in the order.

Notice of registration

(4) If:

(a) an application is made in accordance with section 921ZA by a relevant provider; and

(b) ASIC registers the relevant provider under subsection (1) of this section;

ASIC must, as soon as practicable after recording in the Register of Relevant Providers that the relevant provider is registered, give a written notice of the registration to the relevant provider.

(5) If:

(a) an application is made in accordance with section 921ZB to register a relevant provider; and

(b) ASIC registers the relevant provider under subsection (1A) of this section;

ASIC must, as soon as practicable after recording in the Register of Relevant Providers that the relevant provider is registered in relation to the applicant, give a written notice of the registration to:

(c) the relevant provider; and

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(d) the applicant.

Notice of refusal to register relevant provider

(6) If ASIC refuses to register a relevant provider under subsection (1) or (1A), ASIC must, within 5 business days after the refusal, give a written notice of the refusal to:
  (a) the relevant provider; and
  (b) if the refusal relates to an application made in accordance with section 921ZB—the applicant.

(7) The notice must specify which of the following provisions apply in relation to the relevant provider:
  (a) paragraph (2)(a) or (b);
  (b) subsection (3).

921ZD Period of registration—relevant providers who are financial services licensees

If a relevant provider who is a financial services licensee makes an application in accordance with section 921ZA, and ASIC registers the relevant provider under subsection 921ZC(1), the registration:
  (a) comes into force when ASIC records in the Register of Relevant Providers that the relevant provider is registered; and
  (b) remains in force until the earliest of the following:
    (i) the cancellation time specified in a registration prohibition order in force against the relevant provider;
    (ii) the time when a banning order against the relevant provider takes effect;
    (iii) the relevant provider's Australian financial services licence ceases to be in force.

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921ZE Period of registration—relevant providers who are registered in relation to financial services licensees

If a financial services licensee makes an application in accordance with section 921ZB in relation to a relevant provider, and ASIC registers the relevant provider under subsection 921ZC(1A), the registration of the relevant provider in relation to the licensee:

(a) comes into force when ASIC records in the Register of Relevant Providers that the relevant provider is registered in relation to the licensee; and

(b) remains in force until the earliest of the following:

(i) the cancellation time specified in any registration prohibition order in force against the relevant provider;

(ii) the time when any banning order against the relevant provider takes effect;

(iii) the licensee ceases to authorise the relevant provider to provide personal advice to retail clients, on behalf of the licensee, in relation to relevant financial products.

Note 1: A notice must be lodged under section 922H when there is a change in a matter for a relevant provider.

Note 2: For relevant providers with more than one registration, all registrations cease to be in force under subparagraph (b)(i) or (ii). For subparagraph (b)(iii), only the registration relating to the licensee referred to in that subparagraph ceases.

921ZF Assisted decision making

(1) ASIC may arrange for the use, under ASIC's control, of processes to assist decision making (such as computer applications and systems) for any purposes for which ASIC may make decisions in the performance or exercise of ASIC's functions or powers under this Division.

(2) A decision the making of which is assisted by the operation of such a process under an arrangement made under subsection (1) is taken to be a decision made by ASIC.

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(3) ASIC may substitute a decision for a decision (the ***initial decision***) the making of which is assisted by the operation of such a process under an arrangement under subsection (1) if ASIC is satisfied that the initial decision is incorrect.

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Division 9—Registers relating to financial services

Subdivision A—Registers generally

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.

Note: The Register of Relevant Providers is maintained under Subdivision C of this Division.

922B Fees for searching registers

The regulations may prescribe the fees that a person must pay to ASIC to do the things mentioned in section 1274A in relation to a register mentioned in section 922A or the Register of Relevant Providers.

Note: Section 1274A provides that ASIC may permit a person to search certain registers kept by ASIC for prescribed information.

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Subdivision B—Notice requirements relating to the Register of Relevant Providers

922D Obligation to notify ASIC about a person who becomes a relevant provider

Notice to include details about relevant provider

(1) A notice must be lodged under this section, in accordance with section 922L, if a person becomes a relevant provider.

Note: A financial services licensee required to lodge a notice under this section may obtain information from a relevant provider under section 922N.

Content of notice

(2) The notice must include:
  (a) for a relevant provider who is a financial services licensee—the information in section 922E; or
  (b) for a relevant provider who is not a financial services licensee—the information in section 922F.

922E Information about a relevant provider who is a financial services licensee

(1) For the purposes of paragraph 922D(2)(a), the notice must include the following:
  (a) the relevant provider's name;
  (b) the address of the relevant provider's principal place of business;
  (c) the licence number given to the relevant provider under subsection 913C(1);
  (d) the year in which the relevant provider first provided personal advice to retail clients in relation to relevant financial products in accordance with the law (including the law of a State or Territory);
  (e) if applicable, the ABN of the relevant provider;

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(f) information about both of the following:
  (i) the relevant financial products in relation to which the relevant provider is authorised to provide personal advice to retail clients;
  (ii) whether the relevant provider is authorised to provide class of product advice in relation to some or all of those products;
(g) the recent advising history of the relevant provider for the 5 years ending immediately before the time the notice is lodged;
(h) information about the educational qualifications of, and any training courses completed by, the relevant provider, to the extent that the qualifications and training courses are relevant to the provision of financial services.

Note: For the meaning of ***recent advising history***, see section 922G.

Educational qualifications

(2) For the purposes of paragraph (1)(h), if a relevant provider has more than 5 educational qualifications or has completed more than 5 training courses, the notice must include the 5 qualifications or training courses that the person lodging the notice believes, on reasonable grounds, are most relevant to the provision of financial services.

922F Information about a relevant provider who is not a financial services licensee

(1) For the purposes of paragraph 922D(2)(b), the notice must include the following:
  (a) the relevant provider's name;
  (b) the address of the relevant provider's principal place of business;
  (c) the relevant provider's date and place of birth;
  (d) the name of the financial services licensee on whose behalf the relevant provider is authorised to provide personal advice to retail clients in relation to relevant financial products;

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(e) the licence number given to that licensee under subsection 913C(1);

(f) if the relevant provider is a provisional relevant provider—the fact that the relevant provider is a provisional relevant provider;

(g) if the relevant provider is a provisional relevant provider—the day the relevant provider began undertaking work and training in accordance with subsection 921B(4);

(h) except in relation to provisional relevant providers—the year in which the relevant provider first provided personal advice to retail clients in relation to relevant financial products in accordance with the law (including the law of a State or Territory);

(i) if the relevant provider is a relevant provider as a result of section 916B—each of the following:

(i) the name of the authorised representative who authorised the relevant provider under that section;

(ii) the number allocated to the authorised representative by ASIC;

(j) if applicable, the ABN of any of the following:

(i) the relevant provider;

(ii) the licensee referred to in paragraph (d);

(iii) the authorised representative referred to in paragraph (i);

(k) details of both of the following:

(i) the relevant financial products in relation to which the relevant provider is authorised to provide personal advice to retail clients;

(ii) whether the relevant provider is authorised to provide class of product advice in relation to some or all of those products;

(l) the recent advising history of the relevant provider for the 5 years ending immediately before the time the notice is lodged;

(m) information about the educational qualifications of, and any training courses completed by, the relevant provider, to the

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extent that the qualifications and training courses are relevant to the provision of financial services.

Note: For the meaning of ***recent advising history***, see section 922G.

Educational qualifications

(2) For the purposes of paragraph (1)(m), if a relevant provider has more than 5 educational qualifications or has completed more than 5 training courses, the notice must include the 5 qualifications or training courses that the person lodging the notice believes, on reasonable grounds, are most relevant to the provision of financial services.

Information already registered

(3) The notice does not need to include the information referred to in paragraph (1)(h), (l) or (m) if:
   (a) the person required under subsection 922L(4) to cause the notice to be lodged believes on reasonable grounds that the information has previously been lodged; or
   (b) the information is already entered on the Register of Relevant Providers.

Provisional relevant providers

(4) The notice does not need to include the information referred to in paragraph (1)(k) in relation to a provisional relevant provider if that information is not known at the time the notice relating to the provisional relevant provider is lodged by the licensee.

Note: A notice must be lodged under section 922H once this information is known.

922G Meaning of *recent advising history*

The ***recent advising history*** of a relevant provider is the following information:
   (a) for a relevant provider who is or was a financial services licensee authorised to provide personal advice to retail clients

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in relation to relevant financial products—each period during which the relevant provider was such a licensee;

(b) for a relevant provider who is or was authorised to provide personal advice to retail clients, on behalf of one or more financial services licensees, in relation to relevant financial products—the following information:

(i) the name of each licensee;

(ii) if the relevant provider is or was a relevant provider as a result of section 916B—the name of each authorised representative who authorised the relevant provider under that section;

(iii) each period during which the relevant provider was authorised by each licensee or each authorised representative to provide such advice.

Note: If a relevant provider is covered by paragraphs (a) and (b) of this section, the relevant provider's recent advising history includes all the information required under those paragraphs.

922H Ongoing obligation to notify ASIC when there is a change in a matter for a relevant provider

(1) A notice must be lodged under this section, in accordance with section 922L, if:

(a) there is a change in a matter, particulars of which are entered for a relevant provider in the Register of Relevant Providers (other than a change that is a direct consequence of an act by ASIC); or

(b) both of the following apply:

(i) a notice is lodged under section 922D in relation to a relevant provider by a financial services licensee without including the information referred to in paragraph 922F(1)(k);

(ii) the information becomes known to the licensee after the notice is lodged.

Note: For paragraph (1)(a) of this section, an example of a change in a matter would be a person ceasing to be a relevant provider.

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(2) The notice must include the following information:
  (a) the new particulars or information to be entered in the Register;
  (b) the relevant provider's name;
  (c) if applicable, the number given to the relevant provider under section 922R.

922HA Obligation to notify ASIC of financial services licensee's CPD year

(1) A notice must be lodged under this subsection, in accordance with section 922L, if ASIC grants an applicant an Australian financial services licence that covers the provision of personal advice to retail clients in relation to relevant financial products.

(2) A notice lodged under subsection (1) must include the day on which the licensee's CPD year is to begin.

(3) A notice must be lodged under this subsection, in accordance with section 922L, if a financial services licensee:
  (a) has previously lodged a notice under subsection (1) or this subsection specifying a particular day of the year; and
  (b) decides that the licensee's CPD year is to begin on another day of the year; and
  (c) has not lodged a notice under subsection (1) or this subsection in the 12-month period preceding that decision.

(4) A notice lodged under subsection (3) must include the day on which the licensee's CPD year is to begin.

922HB Obligation to notify ASIC of non-compliance with CPD provisions

(1) A notice must be lodged under this section, in accordance with section 922L, in relation to a person if, at the end of a financial services licensee's CPD year:
  (a) the person:
    (i) is the licensee; or

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(ii) is authorised to provide personal advice to retail clients, on behalf of the licensee, in relation to relevant financial products; and

(b) the person is a relevant provider; and

(c) during the licensee's CPD year:

(i) a CPD provision applied to the relevant provider; and

(ii) the relevant provider did not comply with that provision.

Note: A financial services licensee may obtain information from a relevant provider under section 922N for the purposes of determining whether to lodge a notice under this section.

(2) The notice must state which of the CPD provisions the relevant provider did not comply with during the licensee's CPD year.

922HC Requirement to retain information

(1) A financial services licensee must retain evidence of the continuing professional development undertaken during the licensee's CPD year by:

(a) if the licensee is a relevant provider—the licensee; and

(b) if a relevant provider is authorised to provide personal advice to retail clients, on behalf of the licensee, in relation to relevant financial products—the relevant provider.

(2) The evidence must be retained for 12 months after the end of the CPD year.

Offence

(3) A person commits an offence if:

(a) the person is required to retain evidence under this section; and

(b) the person fails to retain the evidence in accordance with this section.

Penalty: 50 penalty units.

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922J Obligation to notify ASIC about a person who starts to have control of a body corporate licensee

(1) A notice must be lodged under this section, in accordance with section 922L, if a person starts to have control of a body corporate licensee.

Note: Subsection 922P(3) provides that a notice is not required to be lodged when a person starts and then ceases to have control of a body corporate licensee within 30 business days.

(2) The notice must include the following information:
  (a) the name of the licensee;
  (b) the licence number given to the licensee under subsection 913C(1);
  (c) the name of the person who starts to have control of the licensee;
  (d) the day the person starts to have control of the licensee.

922K Obligation to notify ASIC about a person who ceases to have control of a body corporate licensee

(1) A notice must be lodged under this section, in accordance with section 922L, if a person ceases to have control of a body corporate licensee.

Note: Subsection 922P(3) provides that a notice is not required to be lodged when a person starts and then ceases to have control of a body corporate licensee within 30 business days.

(2) The notice must include the following information:
  (a) the name of the licensee;
  (b) the licence number given to the licensee under subsection 913C(1);
  (c) the name of the person who ceases to have control of the licensee;
  (d) the day the person ceases to have control of the licensee.

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922L Requirement for notice to be lodged

(1) A notice lodged with ASIC under any of the following provisions (a ***notice provision***) must be in a prescribed form:
  (a) section 922D;
  (b) section 922H;
  (c) section 922HA;
  (d) section 922HB;
  (e) section 922J;
  (f) section 922K.

Note 1: Under section 350, a document that this Act requires to be lodged with ASIC in a prescribed form must:
  (a) if a form for the document is prescribed in the regulations—be in that prescribed form; and
  (b) if a form for the document is not prescribed in the regulations but ASIC has approved a form for the document—be in that approved form.

Note 2: The prescribed form may deal with information that is required under more than one section of this Act.

When notice must be lodged

(2) A notice under a notice provision must be lodged within 30 business days of the following day:
  (a) if the notice is lodged under subsection 922HA(1)—the day ASIC grants the Australian financial services licence mentioned in that subsection;
  (b) if the notice is lodged under subsection 922HA(3)—the day the financial services licensee mentioned in that subsection decides that the licensee's CPD year is to begin on another day of the year;
  (c) if the notice is lodged under subsection 922HB(1)—the last day of the CPD year of the financial services licensee mentioned in that subsection;
  (e) if the notice is lodged under any other notice provision—the day of the event mentioned in subsection (1) of the notice provision.

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(3) The information contained in the notice must be accurate as at the day mentioned in paragraph (2)(a), (b), (c) or (e).

Who must cause notice to be lodged

(4) The following person must cause a notice under section 922D, 922H or 922HB to be lodged in relation to a relevant provider:
  (a) if the relevant provider is a financial services licensee—the licensee;
  (b) otherwise—the financial services licensee on whose behalf the relevant provider is authorised to provide personal advice to retail clients in relation to relevant financial products.

(5) A notice under subsection 922HA(1) or (3) must be lodged by the financial services licensee mentioned in that section.

(7) A notice under section 922J or 922K relating to a person who starts or ceases to have control of a body corporate licensee must be lodged by the licensee.

922M Failing to comply with obligation to notify ASIC

Failing to comply with obligation to notify ASIC

(1) A person contravenes this subsection if:
  (a) the person is required to cause a notice to be lodged under a provision referred to in subsection 922L(1); and
  (b) the person fails to cause the notice to be lodged in accordance with that provision.

(2) However, subsection (1) does not apply if:
  (a) the person fails to cause the notice to be lodged in accordance with section 922D; and
  (b) the only reason the person fails to cause the notice to be lodged in accordance with that section is because the information referred to in paragraph 922F(1)(h), (l) or (m) is not included in the notice; and

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(c) subsection 922F(3) provides that the notice does not need to include that information.

Note: In criminal proceedings, a defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

Fault-based offence

(3) A person commits an offence if the person contravenes subsection (1).

(4) Subsection 4K(2) of the *Crimes Act 1914* does not apply to subsection (1) of this section.

Note: A person may commit an offence or contravene a civil penalty provision if the person gives false or misleading information (see section 1308 of this Act and section 137.1 of the *Criminal Code*).

Civil liability

(5) A person contravenes this subsection if the person contravenes subsection (1).

Note: This subsection is a civil penalty provision (see section 1317E).

922N Obligation for relevant providers to provide information to financial services licensees

Information about relevant provider

(1) A person must provide information to a financial services licensee in accordance with this section if:

(a) the person is a relevant provider; and

(b) the person has been authorised to provide personal advice to retail clients, on behalf of the licensee, in relation to relevant financial products; and

(c) the licensee has asked the person to provide the information so that the licensee can:

(i) comply with its obligation to lodge a notice relating to the person in accordance with section 922D; or

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(iii) determine whether the licensee has an obligation to lodge a notice under section 922HB.

Note: A person may commit an offence or contravene a civil penalty provision if the person gives false or misleading information (see section 1308 of this Act and section 137.1 of the *Criminal Code*).

When information must be given

(2) The information must be given to the licensee within a period that allows the licensee to comply with the obligation referred to in paragraph (1)(c).

922P Change in matter within 30 business days

(1) Notices must be given under sections 922D and 922H in relation to a person who was a relevant provider even if the person ceases to be a relevant provider before a notice has been lodged under section 922D.

(2) A notice is not required to be given under section 922HB in relation to a person if:
   (a) the person was a relevant provider at the end of a financial services licensee's CPD year; and
   (b) the person was authorised at that time to provide personal advice to retail clients, on behalf of the licensee, in relation to relevant financial products; and
   (c) the person ceases to be a relevant provider within 30 business days of becoming a relevant provider.

(3) A notice is not required to be given under sections 922J and 922K in relation to a person who starts or ceases to have control of a body corporate licensee if the person ceases to have control of the licensee within 30 business days of starting to have control of the licensee.

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Subdivision C—Register of Relevant Providers

922Q Register of Relevant Providers

Register to include details of relevant providers

(1) ASIC must enter details on a Register of Relevant Providers in respect of each person who is or was a relevant provider.

Contents of Register

(2) The details that must be entered on the Register include the following:
  (a) the relevant provider's name;
  (b) the relevant provider's principal place of business;
  (c) the name of each financial services licensee on whose behalf the relevant provider is or was authorised to provide personal advice to retail clients in relation to relevant financial products;
  (d) if applicable, each person who has control of the licensee;
  (e) the relevant provider's date and place of birth;
  (f) the licence number given under subsection 913C(1) to the relevant provider and each licensee referred to in paragraph (c);
  (g) if applicable, the number given under section 922R;
  (h) if the relevant provider is a relevant provider as a result of section 916B:
    (i) the name of the authorised representative who authorised the relevant provider under that section; and
    (ii) the number allocated to the authorised representative by ASIC;
  (i) the recent advising history of the relevant provider;
  (j) if the relevant provider is a provisional relevant provider:
    (i) the fact that the relevant provider is a provisional relevant provider; and

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(ii) the day the relevant provider began undertaking work and training in accordance with subsection 921B(4); and

(iii) a statement that the relevant provider is required to be supervised in accordance with Subdivision C of Division 8A;

(k) except in relation to provisional relevant providers—the year in which the relevant provider first provided personal advice to retail clients in relation to relevant financial products in accordance with the law (including the law of a State or Territory);

(l) whether the person is currently, or has ceased to be, a relevant provider;

(m) if a financial services licensee has lodged a notice under section 922HB in relation to the relevant provider and a CPD provision—that the relevant provider did not comply with the CPD provision during the licensee's CPD year;

(n) if the relevant provider has been disqualified from managing corporations—information contained on the register established under section 1274AA;

(o) if the relevant provider has been banned or disqualified under section 80 or 86 of the *National Consumer Credit Protection Act 2009*—information about that banning or disqualification;

(p) if the relevant provider has been banned, disqualified or suspended under Division 8 of Part 7.6, or under section 130F of the *Superannuation Industry (Supervision) Act 1993*—information about that banning, disqualification or suspension;

(q) information about any undertaking that the relevant provider has given under:

(i) section 93AA or 171E of the ASIC Act; or

(ii) section 322 of the *National Consumer Credit Protection Act 2009*;

(s) if applicable, information about both of the following:

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(i) the relevant financial products in relation to which the relevant provider is authorised to provide personal advice to retail clients;

(ii) whether the relevant provider is authorised to provide class of product advice in relation to some or all of those products;

(t) if applicable, the ABN of any of the following:

(i) the relevant provider;

(ii) each licensee referred to in paragraph (c);

(iii) if applicable, the authorised representative referred to in paragraph (h);

(u) information about the educational qualifications of, and any training courses completed by, the relevant provider (but not courses completed in accordance with a CPD provision), to the extent that the qualifications and training courses are relevant to the provision of financial services;

(ua) whether a registration under section 921ZC of the relevant provider is in force;

(ub) whether the relevant provider provides, or is to provide, a tax (financial) advice service;

(uc) if an instrument of a kind prescribed by regulations made for the purposes of subsection (3) is given to, or made in relation to, the relevant provider—details of the instrument;

(ud) if a Financial Services and Credit Panel gives the relevant provider an infringement notice and the relevant provider pays the amount stated in the notice before the end of the payment period for the notice—all of the following:

(i) details of the notice;

(ii) a statement that the relevant provider has complied with the notice;

(iii) a statement that compliance with the notice is not an admission of guilt or liability;

(iv) a statement that the relevant provider is not regarded as having contravened the provision specified in the notice;

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(ue) any declaration under section 1317E that the relevant provider has contravened a restricted civil penalty provision;

(w) any other information that ASIC believes should be included in the Register that relates to the provision of financial services by the relevant provider.

Note 1: Not all of the Register's contents are publicly available. However, section 1274A provides that ASIC may permit a person to search certain registers kept by ASIC for prescribed information.

Note 2: Information in paragraph (2)(s) may not be known in relation to a provisional relevant provider (see subsection 922F(4)).

(3) The regulations may prescribe instruments of one or more of the following kinds:

(a) an instrument made by a Financial Services and Credit Panel under subsection 921K(1);

(b) a warning or reprimand given by ASIC under subsection 921S(1);

(c) a warning or reprimand given by a Financial Services and Credit Panel under subsection 921T(1).

922R Relevant provider number

ASIC may give a unique number (or any unique combination of numbers, characters, symbols and letters) to a person who is a relevant provider.

922S Correcting the Register

ASIC may correct any error in, or omission from, the Register of Relevant Providers.

Note: Australian Privacy Principle 13 applies to ASIC and requires it to take reasonable steps to correct personal information that is wrong or misleading so that the information is accurate, up to date, complete, relevant and not misleading (see Schedule 1 to the *Privacy Act 1988*).

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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)).

Note 3: A Financial Services Guide may need to include a statement relating to the restriction in this subsection (see paragraphs 942B(2)(fa) and 942C(2)(ga)).

(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):

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(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

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(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.

(6) To avoid doubt, for the purposes of this section a restricted word or expression is not assumed or used if the restricted word or expression is included in a statement in accordance with a requirement in paragraph 942B(2)(fa) or 942C(2)(ga).

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

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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:

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(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

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(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.

923C Restriction on use of terms "financial adviser" and "financial planner"

(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 the service; and

(c) any of the following apply:

(i) the person is not a relevant provider;

(ii) the person is a provisional relevant provider;

(iii) the person is a limited-service time-sharing adviser.

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Note 1: For the meanings of ***restricted word or expression*** and ***assume or use***, see subsections (8) and (9) of this section.

Note 2: A contravention of this subsection is an offence (see subsection 1311(1)).

(2) A person (the ***first person***) contravenes this subsection if:
  (a) the first person carries on a financial services business or provides a financial service; and
  (b) another person provides a financial service on behalf of the person; and
  (c) the first person assumes or uses, in this jurisdiction, a restricted word or expression in relation to the service; and
  (d) any of the following apply:
    (i) the first person is not a relevant provider;
    (ii) the first person is a provisional relevant provider;
    (iii) the first person is a limited-service time-sharing adviser.

Note 1: For the meanings of ***restricted word or expression*** and ***assume or use***, see subsections (8) and (9) of this section.

Note 2: A contravention of this subsection is an offence (see subsection 1311(1)).

Advice to wholesale clients

(3) It is not a contravention of subsection (1) for a person to assume or use a restricted word or expression if:
  (a) the person provides advice to wholesale clients; and
  (b) the person assumes or uses the restricted word or expression only in relation to that advice.

Note: A defendant bears an evidential burden in relation to the matters in subsection (3). See subsection 13.3(3) of the *Criminal Code*.

(4) It is not a contravention of subsection (2) for a person to assume or use a restricted word or expression if:
  (a) another person (the ***adviser***) provides a financial service on behalf of the person; and
  (b) the adviser provides advice to wholesale clients; and

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(c) the person assumes or uses the restricted word or expression only in relation to that advice.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4). See subsection 13.3(3) of the *Criminal Code*.

Advice as employee or director

(5) It is not a contravention of subsection (1) for a person to assume or use a restricted word or expression if:
(a) the person is an employee or director of a body; and
(b) the person provides advice to the body; and
(c) the person assumes or uses the restricted word or expression only in relation to that advice.

Note: A defendant bears an evidential burden in relation to the matters in subsection (5). See subsection 13.3(3) of the *Criminal Code*.

(6) It is not a contravention of subsection (2) for a person to assume or use a restricted word or expression if:
(a) another person (the ***adviser***) is an employee or director of a body; and
(b) the adviser provides advice to the body; and
(c) the person assumes or uses the restricted word or expression only in relation to that advice.

Note: A defendant bears an evidential burden in relation to the matters in subsection (6). See subsection 13.3(3) of the *Criminal Code*.

Continuing contravention

(7) If a person assumes or uses a word or expression in circumstances that give rise to the person committing an offence under subsection (1) or (2), the person commits the offence in respect of:
(a) the first day on which the offence is committed; and
(b) each subsequent day (if any) on which the circumstances that gave rise to the person committing the offence continue (including the day of conviction for any such offence or any later day).

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References to restricted word or expression

(8) In this section:

(a) a reference to a restricted word or expression is a reference to:

(i) the expression ***financial adviser*** or ***financial planner***; or

(ii) any other word or expression specified in the regulations as a restricted word or expression for the purposes of this section; or

(iii) any other word or expression (whether or not in English) that is of like import to a word or expression covered by any of the previous subparagraphs; and

(b) a reference to a restricted word or expression being assumed or used includes a reference to the restricted word or expression being assumed or used:

(i) as part of another word or expression; or

(ii) in combination with other words, letters or other symbols.

(9) However, a reference in this section to a restricted word or expression does not include a reference to a word or expression mentioned in paragraph (8)(a) if:

(a) the word or expression mentioned in that paragraph is assumed or used in relation to a provisional relevant provider; and

(b) the word or expression is assumed or used as part of a word or expression determined by the Minister under subsection (9A).

(9A) The Minister may, by legislative instrument, determine a word or expression for the purposes of paragraph (9)(b).

Contravention does not affect arrangements for compensation

(10) To avoid doubt, this section does not affect the obligation of a financial services licensee to have arrangements in place under section 912B.

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Note: Section 912B requires financial services licensees to have in place arrangements for compensation if the licensee provides financial services to retail clients.

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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.

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(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.

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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

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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,

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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.

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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 *Legislation Act*

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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 or 10.23A (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 i***nclude:

(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.

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(3) An exemption that:
   (a) is made for the purposes of paragraph (1)(a); and
   (b) exempts a person or class of persons from subsection 911A(1) to enable testing of particular financial services;

may apply unconditionally or subject to specified conditions.

(4) 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 described in subsection (3) may empower ASIC to make decisions relating to how the exemption starts or ceases to apply to a person or class of persons.

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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:

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(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, a Statement of Advice or a Cash Settlement Fact Sheet 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

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(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;

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(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.

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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.

(3) A person contravenes this subsection if the person contravenes subsection (1).

Note: This subsection is a civil penalty provision (see section 1317E).

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

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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.

(4) A person contravenes this subsection if the person contravenes subsection (1) or (2).

Note: This subsection is a civil penalty provision (see section 1317E).

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 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).

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Dealing in financial products in ordinary course of operation of superannuation entity

(2A) The providing entity does not have to give the client a Financial Services Guide if:

(a) the providing entity is the trustee of a superannuation entity; and

(b) the client is a member (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of the superannuation entity; and

(c) the financial service is a dealing by the trustee in financial products in the ordinary course of operation of the superannuation entity.

Dealing in financial products in ordinary course of operation of registered scheme

(2B) 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 client is a member the scheme; and

(c) the financial service is a dealing by the responsible entity in financial products in the ordinary course of operation of the scheme.

Dealing in financial products in ordinary course of operating the business and conducting the affairs of a CCIV

(2C) The providing entity does not have to give the client a Financial Services Guide if:

(a) the providing entity is the corporate director of a CCIV; and

(b) the client is a member of the CCIV; and

(c) the financial service is a dealing by the corporate director in financial products in the ordinary course of operating the business and conducting the affairs of the CCIV.

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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.

Providing entity is merely operating a notified foreign passport fund

(3A) The providing entity does not have to give the client a Financial Services Guide if:
  (a) the providing entity is the operator of a notified foreign passport fund; and
  (b) the financial service consists only of the operation of that fund by the operator.

Providing entity is merely providing a superannuation trustee service

(3B) The providing entity does not have to give the client a Financial Services Guide if:
  (a) the providing entity is the trustee of a registrable superannuation entity; and
  (b) the financial service consists only of a superannuation trustee service.

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

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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 in, is the provision of financial product advice 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 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), (fa) and (h), or paragraphs 942C(2)(a), (ga) and (i), as the case requires.

Claims handling and settling service

(7A) The providing entity does not have to give the client a Financial Services Guide if:

(a) the financial service consists only of a claims handling and settling service; and

(b) the claims handling and settling service does not consist only of representing the client as a person insured under an insurance product in pursuing a claim under that product.

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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), (fa) and (i), or paragraphs 942C(2)(f), (g), (ga) 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.

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(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

(1) The information in the Financial Services Guide must be up to date as at the time when it is given to the client.

(2) However, if the Financial Services Guide is given to the client under subsection 941D(4), the information in the Financial Services Guide may be up to date as at the time the statement referred to in that subsection 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

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(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

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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

(fa) if the authorised services provided by the providing entity include the provision of personal advice to retail clients, and the providing entity would contravene subsection 923A(1) by assuming or using a restricted word or expression (within the meaning of subsection 923A(5)) in relation to such provision of personal advice—a statement that:

(i) sets out that the providing entity is not independent, impartial or unbiased (which are restricted words or expressions within the meaning of subsection 923A(5)) in relation to the provision of personal advice, and explains the reasons why; and

(ii) if any other word or expression has been specified as a restricted word or expression in regulations made for the purposes of subparagraph 923A(5)(a)(ii)—sets out that the providing entity is not able to assume or use the restricted word or expression in relation to the provision of personal advice, and explains the reasons why; and

(iii) meets the requirements (if any) determined in an instrument under subsection (7A); and

(g) if the providing entity provides further market-related advice (see subsection 946B(1)) or advice to which

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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

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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).

(7A) ASIC may, by legislative instrument, determine requirements for a statement for the purposes of subparagraph (2)(fa)(iii).

(7B) Without limiting subsection (7A), the instrument may include the following:
  (a) requirements that a specified form, or specified form of words, be used for the statement;
  (b) requirements for the statement to include specified information;

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(c) requirements about the presentation, structure and format of the statement, including the location of the statement within the Financial Services Guide.

(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

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(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

(ga) if the authorised services provided by the providing entity include the provision of personal advice to retail clients, and the providing entity would contravene subsection 923A(1) by assuming or using a restricted word or expression (within the

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meaning of subsection 923A(5)) in relation to such provision of personal advice—a statement that:

(i) sets out that the providing entity is not independent, impartial or unbiased (which are restricted words or expressions within the meaning of subsection 923A(5)) in relation to the provision of personal advice, and explains the reasons why; and

(ii) if any other word or expression has been specified as a restricted word or expression in regulations made for the purposes of subparagraph 923A(5)(a)(ii)—sets out that the providing entity is not able to assume or use the restricted word or expression in relation to the provision of personal advice, and explains the reasons why; and

(iii) meets the requirements (if any) determined in an instrument under subsection (7A); 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

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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;

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(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).

(7A) ASIC may, by legislative instrument, determine requirements for a statement for the purposes of subparagraph (2)(ga)(iii).

(7B) Without limiting subsection (7A), the instrument may include the following:

(a) requirements that a specified form, or specified form of words, be used for the statement;

(b) requirements for the statement to include specified information;

(c) requirements about the presentation, structure and format of the statement, including the location of the statement within the Financial Services Guide.

(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

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(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

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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).

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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 licensee, or each of 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

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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.

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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:

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(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)).

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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.

(4) A person contravenes this subsection if the person contravenes subsection (1).

Note: This subsection is a civil penalty provision (see section 1317E).

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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, unless the client already has an interest in the product.

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

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(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.

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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, foreign passport fund 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

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(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 email; 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, managed investment products or foreign passport fund products—either:

(i) the securities or products are admitted to quotation on a licensed market and their admission to quotation is not suspended; or

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(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 or a notified foreign passport fund 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, foreign passport fund 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)).

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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 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;

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(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

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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 business 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”.

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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

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(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.

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(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,

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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.

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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:

(a) 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; or

(b) the client dispose of, or reduce the client's interest in, a MySuper product offered by a regulated superannuation fund, or by an AFCA regulated superannuation scheme, and instead acquire an interest, or increase the client's interest, in another MySuper product or a choice product offered by the fund.

(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.

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(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

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providing entity has complied with all material requirements of this Division in relation to the advice.

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Division 3A—Cash Settlement Fact Sheet

Subdivision A—When this Division applies

948B Situation in which this Division applies

This Division applies in relation to the provision of a claims handling and settling service in the following circumstances:

(a) the service is offering to settle all or part of a claim under a general insurance product using a cash payment;

(b) the service 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***); or

(iii) by another person on behalf of a financial services licensee (the ***providing entity***), or on behalf of 2 or more financial services licensees (each of which is a ***providing entity***);

(c) the service is provided to a person (the ***client***) as a retail client who is insured under the insurance product;

(d) cash payment is not the only option legally available to the client to settle the claim, or the part of the claim.

Subdivision B—Requirement for a Cash Settlement Fact Sheet to be given

948C Obligation to give client a Cash Settlement Fact Sheet

(1) The providing entity must give the client a Cash Settlement Fact Sheet in accordance with this Division.

(2) A person contravenes this subsection if the person contravenes subsection (1).

Note: This subsection is a civil penalty provision (see section 1317E).

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948D Timing for giving a Cash Settlement Fact Sheet

The Cash Settlement Fact Sheet must be given to the client when the offer to settle all or part of the claim using a cash payment is made.

Subdivision C—Contents of a Cash Settlement Fact Sheet

948E Title of Cash Settlement Fact Sheet

(1) The title "Cash Settlement Fact Sheet" must be used on the cover of, or at or near the front of, a Cash Settlement Fact Sheet.

(2) In any other part of the Cash Settlement Fact Sheet, "Cash Settlement Fact Sheet" may be abbreviated to "CSFS".

948F Content of Cash Settlement Fact Sheet

(1) A Cash Settlement Fact Sheet must contain:
  (a) a statement outlining the options for settlement legally available to the client under the insurance product; and
  (b) a statement setting out the sum insured under the insurance product; and
  (c) a statement setting out:
    (i) the total amount of the cash settlement being offered; and
    (ii) the amount of each component of the total amount of cash settlement being offered (such as components representing the sum insured, additional payments relating to emergencies and ex gratia payments); and
  (d) a statement that the client should consider obtaining independent legal or financial advice before settling; and
  (e) if, despite accepting the offer, the client would be entitled under the insurance product to have the payout reviewed—an outline of the rights of review; and
  (f) any other information prescribed by the regulations.

(2) The Cash Settlement Fact Sheet must be given in writing.

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(3) The Cash Settlement Fact Sheet must be dated. The date must be the date on which the Cash Settlement Fact Sheet was prepared or its preparation completed.

(4) The Cash Settlement Fact Sheet may also contain other information.

(5) The information included in the Cash Settlement Fact Sheet must be worded and presented in a clear, concise and effective manner.

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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

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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

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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*.

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(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)).

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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, Cash Settlement Fact Sheet 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

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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 i***nclude:

(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 i***nclude:

(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.

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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 Meaning of *defective* and *disclosure document or statement*

(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;

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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, a Cash Settlement Fact Sheet, or 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

(iia) if it is a Cash Settlement Fact Sheet—there is an omission from the Cash Settlement Fact Sheet of material required by section 948F; 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

(ca) a Cash Settlement Fact Sheet; or

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(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.

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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.

(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.

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

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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.

(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

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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.

(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 Giving a defective disclosure document or statement (whether or not known to be defective)

Financial services licensee gives a defective disclosure document or statement

(1) A person (the ***providing entity***), being a financial services licensee, contravenes this subsection if:

(a) the providing entity:

(i) gives (see subsection (5)) 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 (5)), 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.

Authorised representative gives a defective disclosure statement or document

(2) An authorised representative of a financial services licensee contravenes this subsection if:

(a) the representative gives (see subsection (5)) a person a disclosure document or statement that is one of the following, in circumstances in which the document or statement is required by a provision of this Part to be given to the person:

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(i) a Statement of Advice;
(ii) a Cash Settlement Fact Sheet;
(iii) 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); and

(b) the disclosure document or statement is defective.

Exceptions

(3) A person does not contravene subsection (1) or (2) if the person took reasonable steps to ensure that the disclosure document or statement would not be defective.

Note: In criminal proceedings, 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 person does not contravene subsection (2) 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: In criminal proceedings, a defendant bears an evidential burden in relation to the matters in subsection (4). See subsection 13.3(3) of the *Criminal Code*.

*Meaning of **give***

(5) In this section, ***give*** means give by any means (including orally), and is not limited to the meaning it has because of section 940C.

Fault-based offence

(6) A person commits an offence if the person contravenes subsection (1) or (2).

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(7) 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).

(8) 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).

Civil liability

(9) A person contravenes this subsection if the person contravenes subsection (1) or (2).

Note: This subsection is a civil penalty provision (see section 1317E).

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:

(i) a Statement of Advice; or

(ii) a Cash Settlement Fact Sheet; or

(iii) 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, a Cash Settlement Fact Sheet, or information, a statement or a copy of a record

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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.

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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:

(i) a Statement of Advice; or

(ii) a Cash Settlement Fact Sheet; or

(iii) 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, a Cash Settlement Fact Sheet, 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.

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(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).

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(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 Financial services licensee failing to ensure authorised representative gives disclosure documents or statements as required

Obligation

(1) A financial services licensee contravenes this subsection if the licensee does not take reasonable steps to ensure that an authorised representative of the licensee:

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(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.

Fault-based offence

(2) A person commits an offence if the person contravenes subsection (1).

Civil liability

(3) A person contravenes this subsection if the person contravenes subsection (1).

Note: This subsection is a civil penalty provision (see section 1317E).

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).

(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

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(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.

(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

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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.

(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.

952JA Offence if a Cash Settlement Fact Sheet 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 Cash Settlement Fact Sheet in circumstances in which it is required by a provision of this Part to be given to the person; and

(b) the Cash Settlement Fact Sheet does not comply with section 948E.

Note: 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 (b) of that subsection.

(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:

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(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.

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.

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(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

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(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 Meaning of *defective* and *disclosure document or statement*

(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, a Cash Settlement Fact Sheet, or 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

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(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

(iia) if it is a Cash Settlement Fact Sheet—there is an omission from the Cash Settlement Fact Sheet of material required by section 948F; 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

(ca) a Cash Settlement Fact Sheet; 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

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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.

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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

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(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.

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(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.

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Part 7.7A—Best interests obligations and remuneration

Division 1—Preliminary

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.

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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).

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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;

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(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.

Advice given by Australian ADIs—best interests duty satisfied if certain steps are taken

(3) If:

(a) the provider is:

(i) an agent or employee of an Australian ADI; or

(ii) otherwise acting by arrangement with an Australian ADI under the name of the Australian ADI; and

(b) the subject matter of the advice sought by the client relates only to the following:

(i) a basic banking product;

(ii) a general insurance product;

(iii) consumer credit insurance;

(iv) a combination of any of those products;

the provider satisfies the duty in subsection (1) in relation to the advice given in relation to the basic banking product and the general insurance product 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) To the extent that the subject matter of the advice sought by the client is a general insurance product, the provider satisfies the duty

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in subsection (1) if the provider takes the steps mentioned in paragraphs (2)(a), (b) and (c).

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 Meaning of *reasonably apparent*

For the purposes of this Division, 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 Meaning of *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.

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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 Meaning of *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;

(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).

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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).

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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) If:

(a) the provider is:

(i) an agent or employee of an Australian ADI; or

(ii) otherwise acting by arrangement with an Australian ADI under the name of the Australian ADI; and

(b) the subject matter of the advice sought by the client relates only to the following:

(i) a basic banking product;

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(ii) a general insurance product;
(iii) consumer credit insurance;
(iv) a combination of any of those products;

subsection (1) does not apply to the extent that the advice relates to a basic banking product or a general insurance product or a combination of those 2 products.

(3) Subsection (1) does not apply to the extent that the subject matter of the advice sought by the client is 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.

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(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.

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(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 Meaning of *responsible licensee*

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.

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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.

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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 Meaning of *ongoing fee arrangement*

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

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(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.

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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 Meaning of *ongoing fee*

A fee that is payable under an ongoing fee arrangement is referred to in this Division as an ***ongoing fee***.

962C Meaning of *fee recipient*

(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.

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Subdivision B—Termination, disclosure and renewal

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 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 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 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).

962FA Arrangement terminates if Subdivision C not complied with

(1) It is a condition of the ongoing fee arrangement that the arrangement terminates if any of the following provisions have not

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been complied with in relation to the arrangement, whether by the current or a previous fee recipient:

(a) section 962R (fee recipient must not deduct ongoing fees without consent);

(b) section 962S (fee recipient must not arrange for deduction of ongoing fees without consent or accept such deductions).

Note: A Court may order that the fee recipient refund amounts deducted without consent (see section 1317GB).

(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 gives consent under Subdivision C, in relation to the deduction of ongoing fees relating to the ongoing fee arrangement, after a failure to comply with a provision referred to in subsection (1) in relation to the ongoing fee arrangement.

(3) However, if the client gives that consent after a failure to comply with a provision referred to in subsection (1) in relation to the ongoing fee arrangement, the fee recipient is not obliged to refund an amount deducted, or received as a result of a deduction made, in accordance with the consent.

962G Annual requirement to give fee disclosure statement

(1) The current fee recipient in relation to an ongoing fee arrangement must, no later than 60 days after the anniversary day for the arrangement in each year, give the client a fee disclosure statement for the arrangement and the anniversary day.

(2) The regulations may provide that subsection (1) does not apply in a particular situation.

*Meaning of **anniversary day***

(3) ***Anniversary day***, for an ongoing fee arrangement, means the anniversary of the day on which the arrangement was entered into.

Note: Section 1673C provides a modified meaning of ***anniversary day*** in relation to ongoing fee arrangements in force before 1 July 2021.

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Civil penalty

(4) A person contravenes this subsection if the person contravenes subsection (1).

Note: This subsection is a civil penalty provision (see section 1317E).

962H Fee disclosure statements

Fee disclosure statement

(1) A ***fee disclosure statement*** for an ongoing fee arrangement and an anniversary day is a statement in writing that:
  (a) includes the information and statements required under this section; and
  (b) relates to:
    (i) the period of 12 months (the ***previous year***) ending immediately before the anniversary day; and
    (ii) the period of 12 months (the ***upcoming year***) starting on the anniversary day.

(1A) A fee disclosure statement may also include other information.

Information relating to the previous year

(2) The fee disclosure statement must include the following information relating to the previous year, subject to subsection (3):
  (a) the amount of each ongoing fee paid under the arrangement by the client in the previous year;
  (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.

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Information relating to the upcoming year

(2A) The fee disclosure statement must include the following information relating to the upcoming year, subject to subsection (3):

(a) the amount of each ongoing fee that the client will be required to pay under the arrangement during the upcoming year;

(b) information about the services that the client will be entitled to receive under the arrangement during the upcoming year;

(c) if the client will be required to pay under the arrangement an ongoing fee after the end of the upcoming year for a service referred to in paragraph (b)—the amount of any such ongoing fee;

(d) information about any other prescribed matters.

(2B) If an amount of an ongoing fee that is required to be included in a fee disclosure statement under subsection (2A) cannot be determined at the time of preparing the statement, the statement must include a reasonable estimate of the amount of the ongoing fee and an explanation of the method used to work out the estimate.

Statements relating to renewal

(2C) The fee disclosure statement must include:

(a) a statement that the client may renew the ongoing fee 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 120 days beginning on the anniversary day.

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Other requirements

(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.

(4) Information about the amount of an ongoing fee that is required to be included in a fee disclosure statement under this section must be expressed in Australian dollars, unless an alternative is provided in the regulations.

962L Meaning of *renewal period*

The ***renewal period*** for an anniversary day is the period of 120 days beginning on the anniversary day.

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 an anniversary day 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 an anniversary day 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 anniversary day.

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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—Consent required for deduction of ongoing fees from accounts

962R Fee recipient must not deduct ongoing fees without consent

(1) This section applies if:
  (a) an ongoing fee is, or will be, payable to a fee recipient under an ongoing fee arrangement; and
  (b) a person (the ***account holder***) holds an account with the fee recipient; and
  (c) the account is not:
    (i) an account linked to a credit card; or
    (ii) a basic deposit product; and
  (d) the fee recipient proposes to deduct the amount of the ongoing fee from the account holder's account.

(2) Subject to subsection (3), the fee recipient must not deduct the amount of the ongoing fee from the account unless all of the following are satisfied:

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(a) the account holder has given the fee recipient written consent for the fee recipient to deduct amounts from the account in respect of ongoing fees under the ongoing fee arrangement;
(b) if requirements that apply in relation to the consent are determined under section 962T—the consent complies with those requirements;
(c) at the time of making the deduction:
(i) the consent has not been withdrawn under paragraph 962U(1)(a); and
(ii) if the consent has been varied under paragraph 962U(1)(b)—the consent as varied still allows for the deduction to be made; and
(iii) the consent has not ceased to have effect under section 962V.

(3) If the account holder holds the account jointly with one or more other persons, the fee recipient must not deduct the amount of the ongoing fee from the account unless all of the paragraphs in subsection (2) are satisfied in relation to the account holder as well as each of those other persons as account holders.

(4) A person contravenes this subsection if the person contravenes subsection (2) or (3).

Note: This subsection is a civil penalty provision (see section 1317E).

962S Fee recipient must not arrange for deduction of ongoing fees without consent or accept such deductions

(1) This section applies if:
(a) an ongoing fee is, or will be, payable to a fee recipient under an ongoing fee arrangement; and
(b) a person (the ***account holder***) holds an account with another person (the ***account provider***) who is not the fee recipient; and
(c) the account is not:
(i) an account linked to a credit card; or
(ii) a basic deposit product; and

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(d) the fee recipient proposes to arrange with the account provider for the amount of the ongoing fee to be deducted from the account holder's account.

(2) To avoid doubt, the fee recipient proposes to arrange with the account provider for the amount of the ongoing fee to be deducted from the account holder's account:

(a) if the fee recipient is a financial services licensee—by doing so directly or through another entity such as a representative of the financial services licensee; or

(b) if the fee recipient is a representative of a financial services licensee—by doing so directly or through another entity such as the financial services licensee.

Fee recipient must not arrange deductions without consent

(3) Subject to subsection (4), the fee recipient must not arrange for the account provider to deduct the amount from the account unless all of the following are satisfied:

(a) the account holder has given the fee recipient written consent for the fee recipient to arrange for amounts to be deducted from the account in respect of ongoing fees under the ongoing fee arrangement;

(b) if requirements that apply in relation to the consent are determined under section 962T—the consent complies with those requirements;

(c) the fee recipient has given a copy of the account holder's consent to the account provider;

(d) at the time of giving the copy of the consent to the account provider:

(i) the consent has not been withdrawn under paragraph 962U(1)(a); and

(ii) if the consent has been varied under paragraph 962U(1)(b)—the consent as varied still allows for the deduction to be made; and

(iii) the consent has not ceased to have effect under section 962V.

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(4) If the account holder holds the account jointly with one or more other persons, the fee recipient must not arrange for deductions from the account unless all of the paragraphs in subsection (3) are satisfied in relation to the account holder as well as each of those other persons as account holders.

(5) A person contravenes this subsection if the person contravenes subsection (3) or (4).

Note: This subsection is a civil penalty provision (see section 1317E).

Fee recipient must not accept deductions made without consent

(6) Subject to subsection (7), if the fee recipient has arranged with the account provider, with the account holder's consent, for an amount to be deducted from the account, the fee recipient must not accept payment of the amount unless at the time the payment is made to the fee recipient all of the following are satisfied:

(a) the consent has not been withdrawn under paragraph 962U(1)(a);

(b) if the consent has been varied under paragraph 962U(1)(b)—the consent as varied still allows for the deduction to be made;

(c) the consent has not ceased to have effect under section 962V.

(7) If the account holder holds the account jointly with one or more other persons, the fee recipient must not accept the payment unless all of the paragraphs in subsection (6) are satisfied in relation to the account holder as well as each of those other persons as account holders.

(8) A person contravenes this subsection if the person contravenes subsection (6) or (7).

Note: This subsection is a civil penalty provision (see section 1317E).

(9) However, subsection (8) does not apply if an amount accepted in contravention of subsection (6) or (7) is repaid into the account holder's account within 10 business days of the day on which the payment was accepted.

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962T Requirements relating to consent

(1) ASIC may, by legislative instrument, determine requirements for the giving of consent to deductions from an account for the purposes of this Subdivision.

(2) Without limiting subsection (1), the instrument may require that:
  (a) a specified form, or specified form of words, must be used for giving consent; or
  (b) a consent must include specified information.

962U Variation or withdrawal of consent

(1) If a person (the ***account holder***) who holds an account gives consent to a fee recipient under section 962R or 962S for the purposes of this Subdivision, the account holder may:
  (a) withdraw the consent at any time, by notice in writing to the fee recipient; and
  (b) vary the consent at any time, by notice in writing to the fee recipient.

(2) If the fee recipient receives a notice from the account holder under subsection (1), the fee recipient must within 10 business days of receipt:
  (a) give written confirmation to the account holder that the notice was received; and
  (b) if the fee recipient gave a copy of the account holder's consent to an account provider under paragraph 962S(3)(c)—give the account provider a copy of the notice.

(3) A person contravenes this subsection if the person contravenes subsection (2).

Note: This subsection is a civil penalty provision (see section 1317E).

962V When consent ceases to have effect

(1) A consent given in relation to an ongoing fee arrangement for the purposes of this Subdivision ceases to have effect:

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(a) unless paragraph (b) or (c) applies—at the end of the period of 150 days after the anniversary day for the ongoing fee arrangement; or

(b) if the ongoing fee arrangement is terminated—at the time the ongoing fee arrangement terminates; or

(c) if a new consent is given in relation to the ongoing fee arrangement for the purposes of this Subdivision—at the time that new consent is given.

(2) If:

(a) a consent given in relation to an ongoing fee arrangement for the purposes of this Subdivision ceases to have effect under subsection (1); and

(b) a fee recipient gave a copy of the consent to an account provider under paragraph 962S(3)(c);

the fee recipient must give written notice of the cessation to the account provider within 10 business days of the cessation.

(3) A person contravenes this subsection if the person contravenes subsection (2).

Note: This subsection is a civil penalty provision (see section 1317E).

962W Conditions requiring consent to be given are void

Any condition of the ongoing fee arrangement, or any other arrangement, that requires the client to do either or both of the following is void:

(a) to give consent under this Subdivision in relation to the deduction of ongoing fees relating to the ongoing fee arrangement;

(b) not to vary or withdraw such consent.

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Subdivision D—Records of compliance

962X Obligation to keep records of compliance

(1) A fee recipient in relation to an ongoing fee arrangement must keep records sufficient to enable the fee recipient's compliance with this Division in relation to the ongoing fee arrangement to be readily ascertained.

Note 1: Failure to comply with this subsection is an offence: see subsection 1311(1).

Note 2: For preservation of records, see section 1101C.

(2) The regulations may specify records that the fee recipient must keep as part of the obligation in subsection (1).

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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—Meaning of conflicted remuneration

963A Meaning of *conflicted remuneration*—general

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.

Note: A reference in this Subdivision (including sections 963A, 963AA, 963B, 963C and 963D) to giving a benefit includes a reference to causing or authorising it to be given: see the definition of ***doing*** in section 9.

963AA Benefits given in relation to life risk insurance products

The regulations may prescribe circumstances, in addition to those set out in section 963A, in which a benefit given to a financial

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services licensee, or a representative of a financial services licensee, in relation to a life risk insurance product, or life risk insurance products, is ***conflicted remuneration***.

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

(1) 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) each of the following is satisfied in relation to the benefit:

(i) the benefit is given to the licensee or representative in relation to a life risk insurance product or life risk insurance products;

(ii) none of the products is a life risk insurance product covered by subsection (2);

(iii) either:

(A) the benefit ratio for the benefit is the same for the year in which the product or products are issued as it is for each year in which the product or products are continued; or

(B) the benefit ratio requirements and clawback requirements are satisfied in relation to the benefit;

(ba) the benefit is given to the licensee or representative in relation to consumer credit insurance;

(c) each of the following is satisfied in relation to a financial product other than a life risk insurance product:

(i) the benefit is given to the licensee or representative in relation to the issue or sale of the financial product to a person;

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(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.

Note: Under the governing rules of some regulated superannuation funds, a member may seek advice on the basis that the trustee of the fund will pay the licensee or representative for the advice and then recover the amount paid from the assets of the fund attributed to that member. In that case, the member has caused or authorised the amount to be paid to the licensee or representative and so paragraph (1)(d) would apply to that amount. This does not affect the trustee's obligations under section 62 of the *Superannuation Industry (Supervision) Act 1993* (which deals with the purposes for which a trustee may act in maintaining a regulated superannuation fund).

(2) A life risk insurance product is covered by this subsection 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 class of members of the entity; or

(b) both of the following apply:

(i) 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;

(ii) 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.

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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*.

(3A) The ***benefit ratio*** for a benefit given to a financial services licensee, or a representative of a financial services licensee, in relation to a life risk insurance product, or life risk insurance products, for a year is the ratio between:

(a) the benefit; and

(b) the policy cost payable for the product or products, or that part of the policy cost payable for the product or products to which the benefit relates, for the year.

(3B) The ***policy cost*** for a life risk insurance product, or products, for a year is the sum of:

(a) the premiums payable for the product, or products, for that year; and

(b) any fees payable for that year to the issuer of the product or products for that issue; and

(c) any additional fees payable because the premium for the product, or products, is paid periodically rather than in a lump sum; and

(d) any other amount prescribed by the regulations for the purposes of this paragraph.

(3C) However, the ***policy cost*** for a life risk insurance product, or products, does not include any amount prescribed by the regulations for the purposes of this subsection.

(4) The regulations may prescribe circumstances in which, despite a provision of this section, all or part of a benefit is to be treated as conflicted remuneration.

(5) This section applies despite section 963A and any regulations made for the purposes of section 963AA.

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Note: The expression ***intrafund advice*** is often used to describe financial product advice given by a trustee (or an employee of, or another person acting under arrangement with, the trustee) of a regulated superannuation fund to its members, where that advice is not of a kind to which the prohibition in section 99F of the *Superannuation Industry (Supervision) Act 1993* applies. (Section 99F of that Act prohibits trustees of regulated superannuation funds from passing on the cost of providing certain kinds of financial product advice in relation to one member of the fund to another.)

963BA Meaning of *benefit ratio requirements* and *clawback requirements*

Benefit ratio requirements

(1) The ***benefit ratio requirements*** are satisfied in relation to a benefit given to a financial services licensee, or a representative of a financial services licensee, in relation to a life risk insurance product, or life risk insurance products, if the benefit ratio for the benefit for:

(a) the year in which the product or products are issued; and

(b) each year during which the product or products are continued;

is equal to or less than that determined by ASIC under subsection (2) as an acceptable benefit ratio for that year.

(2) ASIC may, by legislative instrument, determine an acceptable benefit ratio, or a way of working out an acceptable benefit ratio, for a benefit for a year.

Clawback requirements

(3) The ***clawback requirements*** are satisfied in relation to a benefit given to a financial services licensee, or a representative of a financial services licensee, in relation to a life risk insurance product, or life risk insurance products, if:

(a) the arrangement under which the benefit is payable includes an obligation to repay all or part of the benefit if:

(i) the product, or one of the products, is cancelled or is not continued, other than because a claim is made under the

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insurance policy or because other prescribed circumstances exist; or

(ii) the policy cost for the product, or one of the products, during a year or across 2 years is reduced, other than in prescribed circumstances;

within 2 years after the product is first issued to a retail client; and

(b) the amount to be repaid under the obligation is equal to or greater than the amount determined by ASIC under subsection (4) as an acceptable repayment.

(4) ASIC may, by legislative instrument, determine the amount, or a way of working out the amount, that is an acceptable repayment for the purposes of paragraph (3)(b).

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

(1) 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 carrying on of a financial services business;

(iii) the benefit complies with regulations made for the purposes of this subparagraph;

(d) the benefit satisfies each of the following:

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(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.

(2) The regulations may prescribe circumstances in which, despite subsection (1), all or part of a benefit is to be treated as conflicted remuneration.

(3) This section applies despite section 963A and any regulations made for the purposes of section 963AA.

963D Benefits for employees etc. of ADIs

(1) This section applies if:

(a) a monetary or non-monetary benefit is given to a financial services licensee, or a representative of a financial services licensee; and

(b) the benefit is in whole or in part remuneration for work carried out, or to be carried out, by the licensee or representative:

(i) as an agent or employee of an Australian ADI; or

(ii) in otherwise acting by arrangement with an Australian ADI under the name of the Australian ADI.

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(2) If:
  (a) access to the benefit, or the amount of the benefit, is in whole or in part dependent on the licensee or representative recommending:
    (i) a basic banking product; or
    (ii) a general insurance product; or
    (iii) consumer credit insurance; and
  (b) the licensee or representative does not, in the course of recommending any, or any combination, of those products give other financial product advice that does not relate to any of those products;

to the extent that the benefit relates to the recommendation of any, or any combination of, the products mentioned in paragraph (a), the benefit is not ***conflicted remuneration***.

(3) The regulations may prescribe circumstances in which, despite subsection (2), all or part of a benefit is to be treated as conflicted remuneration.

(4) This section applies despite section 963A and any regulations made for the purposes of section 963AA.

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).

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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).

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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:

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(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.

Subdivision D—Rebate of conflicted remuneration

963M Person covered by this section in relation to conflicted remuneration

(1) This section covers a person in relation to conflicted remuneration if:

(a) the person is legally obliged (disregarding Subdivision C) to give, on or after 1 January 2021, the conflicted remuneration to another person; and

(b) the person is prohibited under that Subdivision from giving the conflicted remuneration to the other person, or the other person is prohibited under that Subdivision from accepting the conflicted remuneration.

(2) This section also covers a person in relation to conflicted remuneration if:

(a) regulations made for the purposes of this subsection specify conditions in relation to the conflicted remuneration; and

(b) those conditions are met.

(3) Despite subsections (1) and (2), this section does not cover a person in relation to conflicted remuneration if:

(a) regulations made for the purposes of this subsection specify conditions in relation to the conflicted remuneration; and

(b) those conditions are met.

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963N Regulations may provide for rebate of conflicted remuneration

(1) The regulations may provide for a scheme under which a person covered by section 963M in relation to conflicted remuneration must, in the circumstances set out in subsection (2), pay amounts based on that conflicted remuneration, or provide monetary benefits based on that conflicted remuneration, to persons (the ***product holders***) described in subsection (3).

(2) The circumstances are as follows:
  (a) a financial services licensee, or a representative of a financial services licensee:
    (i) provided financial product advice to one or more persons as retail clients, in connection with the conflicted remuneration; or
    (ii) is or was legally obliged to provide financial product advice to one or more persons as retail clients, in connection with the conflicted remuneration; and
  (b) the financial product advice relates to a particular financial product or class of financial products.

(3) A person is a product holder mentioned in subsection (1) if:
  (a) the person holds the particular financial product mentioned in paragraph (2)(b), or a financial product in the class mentioned in that paragraph; or
  (b) another person holds the particular financial product mentioned in that paragraph, or a financial product in the class mentioned in that paragraph, on behalf of the person.

(4) Without limiting the scope of regulations made for the purposes of subsection (1), those regulations may make different provision in respect of any of the following:
  (a) different classes of person covered by section 963M;
  (b) different classes of financial product;
  (c) different classes of product holder;
  (d) different classes of conflicted remuneration;

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(e) different classes of circumstances in which conflicted remuneration arises.

(5) Without limiting the scope of regulations made for the purposes of subsection (1), those regulations may provide that a person covered by section 963M need not pay amounts mentioned in subsection (1), nor provide monetary benefits mentioned in that subsection, to one or more specified classes of product holder.

(6) Without limiting the scope of regulations made for the purposes of subsection (1), those regulations may provide for any of the following matters:

(a) the identification of product holders;

(b) the timeframe for making payments or providing monetary benefits;

(c) a method or methods of determining amounts of payments, or amounts of monetary benefits;

(d) a method or methods of making payments or providing monetary benefits.

963P Person covered by section 963M must pay amount etc. in accordance with regulations

If regulations made for the purposes of subsection 963N(1) require a person covered by section 963M to pay an amount, or provide a monetary benefit, the person must pay the amount or provide the monetary benefit in accordance with those regulations.

Note: This section is a civil penalty provision (see section 1317E).

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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, RSE licensee or the operator of a notified foreign passport fund (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) a direction of the kind mentioned in paragraph 58(2)(d) or (da) of the *Superannuation Industry (Supervision) Act 1993* that will involve the acquisition of a particular financial product, or a financial product of a particular kind; and

(b) a direction of the kind mentioned in subsection 52B(4) of the *Superannuation Industry (Supervision) Act 1993* that will involve the acquisition of a particular financial product, or a financial product of a particular kind.

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(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.

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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).

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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.

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964F Meaning of *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 Meaning of *reasonably apparent*

For the purposes of this Division, 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.

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Division 6—Anti-avoidance

965 Anti-avoidance

(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 purpose or for a purpose (that is not incidental) 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).

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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.

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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

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(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:

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(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.

(3) A person contravenes this subsection if the person contravenes subsection (1).

Note: This subsection is a civil penalty provision (see section 1317E).

981C Regulations may deal with various matters relating to accounts maintained for the purposes of section 981B

(1) 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);

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(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.

(2) A person contravenes this subsection if the person contravenes regulations made for the purposes of subsection (1).

Note: This subsection is a civil penalty provision (see section 1317E).

981D Money related to derivatives may be used for general margining etc. purposes

(1) 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).

(2) However, if the money is derivative retail client money, subsection (1) only applies to an obligation if:
(a) the entry into of the derivative referred to in paragraph (1)(a) or (b) was or will be cleared through an authorised clearing and settlement facility; and
(b) the licensee incurred the obligation, in connection with the derivative, under the operating rules of the facility.

981E Protection of money from attachment etc.

(1) This section applies to:

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(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)

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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 AA—Client money reporting rules

981J Client money reporting rules

(1) ASIC may, by legislative instrument, make rules (the ***client money reporting rules***) dealing with matters as permitted by this Subdivision, for purposes relating to derivative retail client money.

(2) The regulations may provide that the client money reporting rules:
  (a) cannot impose requirements (or certain kinds of requirements) in relation to certain classes of persons or money; or

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(b) can only impose requirements (or certain kinds of requirements) in relation to certain classes of persons or money in certain circumstances.

981K Matters that may be dealt with in client money reporting rules

(1) The client money reporting rules may impose any of the following kinds of requirements:
  (a) requirements to report information (see also paragraph (2)(b));
  (b) reconciliation requirements (see also paragraph (2)(c));
  (c) requirements that are incidental or related to the requirements mentioned in paragraph (a) or (b).

(2) The client money reporting rules may also deal with matters incidental or related to requirements referred to in subsection (1), including any of the following:
  (a) the classes of money in relation to which particular requirements apply;
  (b) for requirements to report information:
    (i) to whom information is required to be reported; and
    (ii) the information that is required to be reported;
  (c) for reconciliation requirements:
    (i) the information that is required to be reconciled; and
    (ii) how reconciliations are required to be reviewed or approved, including who is required to review or approve reconciliations; and
    (iii) to whom reconciliations are required to be submitted;
  (d) the financial services licensees who are required to comply with requirements imposed by the rules;
  (e) the manner and form in which persons must comply with requirements imposed by the rules;
  (f) the circumstances in which persons are, or may be, relieved from complying with requirements in the rules that would otherwise apply to them;

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(g) the keeping of records, or the provision of records or other information, relating to accounts maintained for the purposes of section 981B;

(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 matters that the regulations provide, for the purposes of this paragraph, may be dealt with in the client money reporting rules;

(j) any other matters that the provisions of this Act provide may be dealt with in the client money rules.

981L ASIC to consult before making rules

(1) ASIC must not make a client money reporting rule unless ASIC has consulted the public about the proposed rule.

(2) Without limiting the ways in which ASIC may comply with the obligation in subsection (1) 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 client money reporting rule.

981M Complying with client money reporting rules

(1) Financial services licensees must comply with the client money reporting rules.

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) If there is an inconsistency between the client money reporting rules, and any of the following other rules:

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(a) the market integrity rules;
(b) the derivative transaction rules;
(c) the derivative trade repository rules;

those other rules prevail to the extent of the inconsistency.

Note: If there is an inconsistency between the client money reporting rules and the operating rules of a licensed market or of a licensed CS facility, the client money reporting rules prevail: see subsections 793B(2) and 822B(2).

981N Alternatives to civil proceedings

(1) The regulations may provide for a person who is alleged to have contravened subsection 981M(1) (complying with client money reporting 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 an alleged contravention of a provision of client money reporting rules must not exceed:
(a) for an individual—3,000 penalty units; and
(b) for a body corporate—15,000 penalty units.

(3) Without limiting regulations that may be made for the purposes 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.

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981P Compliance with requirements to provide data or other information to ASIC: protection from liability

If:

(a) a financial services licensee, or a person acting on behalf of a financial services licensee:

(i) provides data or information to ASIC; or

(ii) otherwise allows ASIC access to data or information; and

(b) the licensee or person does so, in good faith, in compliance with a requirement imposed by or under a provision of the client money reporting rules;

the licensee or person is not liable to an action or other proceeding, whether civil or criminal, for or in relation to the conduct mentioned in paragraph (a).

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.

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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)).

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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

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(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

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(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.

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(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.

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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.

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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).

(3) However, if the financial service or product, in connection with the property given, would be provided to the client as a retail client if:
  (a) the service or product were provided to the client when the property is given; and
  (b) section 761GA (about sophisticated investors) did not apply; and

then subsection (2) only applies to an obligation if:
  (c) the entry into of the derivative referred to in paragraph (2)(a) or (b) was or will be cleared through an authorised clearing and settlement facility; and

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(d) the licensee incurred the obligation, in connection with the derivative, under the operating rules of the facility.

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Division 4—Special provisions relating to insurance

985A Meaning of *contract of insurance* and *insured*

(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 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.

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(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;

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(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.

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Section 985D

(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*.

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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).

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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.

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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

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(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:

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(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.

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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).

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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).

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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).

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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

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(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.

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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.

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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.

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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.

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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, managed investment products or foreign passport fund 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, managed investment products or foreign passport fund 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.

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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

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 a prescribed form 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).

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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.

Fault-based offence

(3) A person commits an offence if the person contravenes subsection (1) or (2).

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Strict liability offence

(4) A person commits an offence of strict liability if the person contravenes subsection (1) or (2).

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.

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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.

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(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.

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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;

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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.

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(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

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(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 in a prescribed form 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

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(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

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(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).

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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

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(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.

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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.

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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

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(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;

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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.

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Division 8—Miscellaneous

992A Prohibition on hawking of financial products

General prohibition

(1) A person must not offer a financial product for issue or sale to another person (the ***consumer***), or request or invite the consumer to ask or apply for a financial product or to purchase a financial product, if:
  (a) the consumer is a retail client; and
  (b) the offer, request or invitation is made in the course of, or because of, an unsolicited contact with the consumer.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Exceptions

(2) Subsection (1) does not apply to:
  (a) an offer, request or invitation made in the course of the giving of advice to the consumer by a person who is required under Division 2 of Part 7.7A to act in the best interests of the consumer in relation to the advice; or
  (b) an offer of, or a request or invitation relating to, a financial product that is an add-on insurance product in relation to a product or service (the ***principal product or service***) that the consumer has indicated an intention to acquire from:
    (i) the person making the offer, request or invitation; or
    (ii) another person with whom that person has an arrangement that relates to the provision of add-on insurance products in relation to products or services that include the principal product or service; or
  (c) an offer, request or invitation of a kind prescribed by the regulations.

Note 1: A defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code*.

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Note 2: Subdivision DA of Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001* deals with offers, requests or invitations relating to add-on insurance products.

Note 3: Subsection (1) also does not apply in relation to an offer that is eligible to be made under Division 1A of Part 7.12 (Employee share schemes): see subsection 1100ZC(8).

(3) However, paragraph (2)(b) does not apply if:

(a) making the offer, request or invitation is covered by any of sections 12DU to 12DY of the *Australian Securities and Investments Commission Act 2001*; or

(b) the offer, request or invitation is made after the end of the period of 6 weeks beginning on the end of the first day of:

(i) the add-on insurance deferral period (within the meaning of section 12DP of that Act) in relation to the consumer acquiring, or entering into a commitment to acquire, the principal product or service; or

(ii) if there is no such add-on insurance deferral period—the add-on insurance pre-deferral period (within the meaning of that section).

Meaning of ***unsolicited contact***

(4) Contact by a person with the consumer, in connection with a financial product, is ***unsolicited contact*** with the consumer in connection with the product if:

(a) the contact is wholly or partly in one or more of the following forms:

(i) a telephone call;

(ii) a face-to-face meeting;

(iii) any other real-time interaction in the nature of a discussion or conversation; and

(b) either:

(i) the consumer did not consent to the contact; or

(ii) if the consumer consented to the contact—the requirements of subsection (5) are not met.

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(5) For the purposes of subparagraph (4)(b)(ii), the requirements are:

(a) in the case of an offer of that financial product for issue or sale to the consumer, either:

(i) the consent was a consent to the person contacting the consumer for the purpose of making the offer; or

(ii) offering to the consumer that financial product for issue or sale was reasonably within the scope of the consumer's consent; and

(b) in the case of a request or invitation to the consumer to ask or apply for a financial product or to purchase a financial product, either:

(i) the consent was a consent to the person requesting or inviting the consumer to ask or apply for, or to purchase, that financial product; or

(ii) requesting or inviting the consumer to ask or apply for, or to purchase, that financial product was reasonably within the scope of the consumer's consent; and

(c) the consumer gave the consent before the start of the contact; and

(d) giving the consent was a positive and voluntary act of the consumer; and

(e) the consent was clear, and a reasonable person would have understood that the consumer consented to the contact; and

(f) if the consent indicated the form of contact that the consumer wants—the contact is in that form; and

(g) the consent was given:

(i) within 6 weeks before the contact occurs; or

(ii) within such longer period (not exceeding 12 weeks) as the consumer agrees to, if the issue or sale of the financial product reasonably requires a period exceeding 6 weeks to allow for a medical examination; and

(h) the consent was not withdrawn before the contact occurs.

For the purposes of this subsection, take into account any variations that the consumer makes to the consent before the contact occurs.

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(6) The consumer may vary or withdraw the consent at any time. The variation or withdrawal may take any form, regardless of the form of the consent.

(7) To avoid doubt, advertising an offer, or publishing a statement about an offer, is not ***unsolicited contact*** if:
   (a) because of subsection 734(4), (5), (6), (7), (8) or (9), the advertisement or publication does not contravene subsection 734(2); or
   (b) because of paragraphs 1018A(1)(c) to (e), or because of subsection 1018A(3), (4) or (5), the advertisement or publication does not contravene subsection 1018A(1); or
   (c) because of paragraphs 1018A(2)(c) to (f), or because of subsection 1018A(3), (4) or (5), the advertisement or publication does not contravene subsection 1018A(2).

Application of this section to superannuation products

(8) This section, and regulations made for the purposes of this section, apply to financial products that are beneficial interests in a regulated superannuation fund as if each class of beneficial interest in the fund were a separate financial product.

Strict liability

(9) An offence based on subsection (1) is an offence of strict liability.

992AA Right of return and refund for hawked financial products

(1) If a person (the ***issuer***) contravenes section 992A in relation to a financial product issued or sold to another person (the ***consumer***), the consumer has a right of return and refund exercisable at any time during the period starting when the financial product was issued or sold and ending:
   (a) if, under section 1019B, the consumer has a right to return the financial product within a particular period—1 month after the end of that period; or

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(b) otherwise—1 month and 14 days after the financial product was issued or sold.

(2) If the financial product is returned under subsection (1):

(a) if the financial product is constituted by a legal relationship between the consumer and the issuer—by force of this section, that relationship is terminated, with effect from the time of the return, without penalty to the consumer; and

(b) by force of this section, any contract for the acquisition of the product by the consumer is terminated, with effect from the time of the return, without penalty to the consumer; and

(c) such additional consequences (which may include the imposition of additional obligations) apply as are specified in the regulations.

(3) However:

(a) this section does not apply in relation to a financial product included in a class of financial products that the regulations exclude from this section; and

(b) if the regulations provide that this section applies in relation to a class of financial products only if specified additional requirements are satisfied—this section does not apply in relation to a financial product included in that class unless those requirements are satisfied; and

(c) in circumstances specified in the regulations, this section does not apply to any financial product.

(4) This section, and regulations made for the purposes of this section, apply in relation to financial products that are beneficial interests in a regulated superannuation fund as if each class of beneficial interest in the fund were a separate financial product.

(5) This section applies in addition to any other penalties for or in relation to breaches of section 992A.

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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 i***nclude:
  (a) definitions in this Act, or in the regulations, as they apply to references in this Part; and

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(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 i***nclude:

(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.

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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.

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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 Failing to pay loan money into an account as required

Failing to pay loan money into account as required

(1) A financial services licensee contravenes this subsection 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.

Fault-based offence

(2) A person commits an offence if the person contravenes subsection (1).

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Strict liability offence

(3) A person commits an offence of strict liability if the person contravenes subsection (1).

Civil liability

(4) A person contravenes this subsection if the person contravenes subsection (1).

Note: This subsection is a civil penalty provision (see section 1317E).

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Part 7.8A—Design and distribution requirements relating to financial products for retail clients

Division 1—Preliminary

994A Meaning of some terms relating to design and distribution requirements

(1) In this Act:

excluded conduct means:

(a) a dealing in a financial product that consists of arranging for a retail client to apply for or acquire the product, where the arranging is undertaken:

(i) by a person, or by an associate of a person; and

(ii) for the purpose of implementing personal advice that the person has given to the retail client; or

(b) providing personal advice.

retail product distribution conduct, in relation to a financial product, means any of the following:

(a) dealing in the product in relation to a retail client;

(b) giving under Part 6D.2 a disclosure document in relation to an offer of the product to a retail client;

(c) giving under Part 7.9 a Product Disclosure Statement for the product to a retail client;

(d) providing financial product advice in relation to the product to a retail client.

review period for a target market determination means each of the following:

(a) the period starting on the day the determination is made and ending on the earlier of:

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(i) the day that a review of the determination under section 994C is started; and

(ii) the last day of the maximum period specified in the determination under paragraph 994B(5)(e);

(b) a period starting on the day after a review of the determination under section 994C is finished and ending on the earlier of:

(i) the day on which the next review of the determination under section 994C is started; and

(ii) the last day of the maximum period specified in the determination under paragraph 994B(5)(f).

(2) In this Part:

complaint, in relation to a financial product, means a complaint made to a regulated person about the product, which is covered by a dispute resolution system complying with subsection 912A(2).

dealing in a financial product has the meaning given by section 766C, subject to the following:

(a) paragraphs 766C(1)(d) and (e) do not apply;

(b) despite subsection 766C(3), a person deals in a financial product if the dealing is a regulated sale of the product on the person's own behalf;

(c) paragraph 766C(4)(c) does not apply if the dealing is an offer of securities that needs disclosure to investors under Part 6D.2.

regulated person, in relation to a financial product, means:

(a) the seller of the financial product, if a sale takes place in circumstances described in subsection 707(2), (3) or (5) or 1012C(5), (6) or (8); or

(b) a regulated person as defined in section 1011B (modified so that the references to financial products include references to securities); or

(c) a person prescribed, in relation to the product, by regulations made for the purposes of this paragraph.

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reporting period means:

(a) for information about the number of complaints about a financial product—a period specified under paragraph 994B(5)(g), in the target market determination for the product, as a reporting period for that kind of information; or

(b) for other kinds of information that must be reported under subsection 994F(5)—a period specified under subparagraph 994B(5)(h)(ii), in the target market determination for the product, as a reporting period for those other kinds of information.

(3) Section 1010C (references to offer, purchase and sale) applies for the purposes of this Part.

994AA Meaning of *financial product*—Part 7.8A

(1) In this Part, ***financial product*** includes a financial product within the meaning of Division 2 of Part 2 of the ASIC Act.

Note: Whether a target market determination is required to be made in relation to financial products covered by this extended definition is determined under section 994B, including any regulations made for the purposes of paragraph 994B(3)(f).

(2) In determining the meaning of a term used in a provision of this Part (other than this section), treat a reference in this Act to a financial product as being a reference to a financial product within the meaning of subsection (1) of this section.

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Division 2—Target market determinations for financial products

994B Target market determinations for financial products

Requirement to make a target market determination

(1) Subject to subsection (3), a person must make a target market determination for a financial product if:
  (a) under Part 6D.2, the person is required to prepare a disclosure document for the product; or
  (b) under Part 7.9, the person is required to prepare a Product Disclosure Statement for the product; or
  (ba) the product is not a financial product (as defined in Division 3 of Part 7.1) and:
    (i) the person issues the product to another person as a retail client; or
    (ii) the person sells the product under a regulated sale; or
  (c) regulations made for the purpose of this paragraph require the person to make a target market determination for the product.

(2) A person required by subsection (1) to make a target market determination for a financial product must do so before:
  (a) if paragraph (1)(a), (b) or (ba) applies—any person engages in retail product distribution conduct in relation to the product; or
  (b) if paragraph (1)(c) applies:
    (i) the time or event specified in regulations made for the purposes of that paragraph; or
    (ii) if there is no time or event so specified—any person engages in retail product distribution conduct in relation to the product.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

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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 section 1317S.

(3) Subsections (1) and (2) do not apply to:

(a) a MySuper product; or

(b) a margin lending facility; or

(d) a fully paid ordinary share in a company or a foreign company (except a fully paid ordinary share covered by subsection (4)); or

(e) a financial product issued, or offered for regulated sale, by an exempt body corporate of a State or Territory or by an exempt public authority; or

(f) a financial product of a kind prescribed by regulations made for the purposes of this paragraph.

Note: Division 1A of Part 7.12 (Employee share schemes) contains a separate regime for the making of offers in connection with employee share schemes. Subsections (1) and (2) of this section do not apply in relation to securities that are issued, sold or transferred under an offer that is eligible to be made under that Division: see subsection 1100ZC(6).

(4) Paragraph (3)(d) does not apply to a fully paid ordinary share in a company or a foreign company if:

(a) on the issue of the share, the company intended that the share be converted into a preference share within 12 months after the date of issue; or

(b) the company:

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

(ii) 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.

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Requirements for target market determinations

(5) A target market determination for a financial product must:
  (a) be in writing; and
  (b) describe the class of retail clients that comprises the target market (within the ordinary meaning of the term) for the product; and
  (c) specify any conditions and restrictions on retail product distribution conduct in relation to the product (***distribution conditions***), other than a condition or restriction imposed by or under another provision of this Act; and
  (d) specify events and circumstances (***review triggers***) that would reasonably suggest that the determination is no longer appropriate; and
  (e) specify the maximum period from the start of the day the determination is made to the start of the day the first review of the determination under section 994C is to finish; and
  (f) specify the maximum period from the start of the day a review of the determination under section 994C is finished to the start of the day the next review of the determination is to finish; and
  (g) specify a reporting period for reporting information about the number of complaints about the product (see subsection 994F(4)); and
  (h) specify the kinds of information needed to enable the person who made the target market determination to identify promptly whether a review trigger for the determination, or another event or circumstance that would reasonably suggest that the determination is no longer appropriate, has occurred and, for each kind of information, specify:
    (i) the regulated person or regulated persons that, under subsection 994F(5), are required to report the information to the person who made the determination; and
    (ii) a reporting period for reporting the information under subsection 994F(5).

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Note 1: For paragraph (c), an example of a distribution condition for a financial product is a restriction limiting the distribution of the product to specified methods of distribution.

Note 2: The requirements of this subsection also apply when a new target market determination is made as a result of a review under section 994C.

(6) A period specified under paragraph (5)(e) or (f), and a reporting period specified under paragraph (5)(g) or subparagraph (5)(h)(ii), must be reasonable.

(7) In determining what is reasonable for the purposes of subsection (6), regard must be had to:

(a) the need to identify promptly whether a review trigger for the determination, or another event or circumstance that would reasonably suggest that the determination is no longer appropriate, has occurred; and

(b) the likelihood, nature and extent of detriment to retail clients that may result if:

(i) a review trigger for the determination, or another event or circumstance that would reasonably suggest that the target market determination is no longer appropriate, has occurred; and

(ii) the target market determination is not promptly reviewed.

(8) A target market determination for a financial product must be such that it would be reasonable to conclude that, if the product were to be issued, or sold in a regulated sale:

(a) to a retail client in accordance with the distribution conditions—it would be likely that the retail client is in the target market; and

(b) to a retail client in the target market—it would likely be consistent with the likely objectives, financial situation and needs of the retail client.

(8A) A target market determination for a financial product is ***appropriate*** if it satisfies the requirements of subsection (8).

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Making target market determinations public

(9) A person who makes a target market determination must ensure that the determination is available to the public free of charge.

Note 1: Contravention of this subsection is an offence (see subsection 1311(1)).

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 section 1317S.

Note 3: This subsection applies to all target market determinations, including those that have ceased to apply.

994C Target market determinations to be reviewed

Reviews of target market determinations

(1) A person who makes a target market determination may at any time:
   (a) review the determination; or
   (b) make a new target market determination in accordance with section 994B.

(2) A person contravenes this subsection if:
   (a) the person makes a target market determination for a financial product; and
   (b) the product is on offer for acquisition by issue, or for regulated sale, to retail clients at or after the end of the review period; and
   (c) the person did not complete a review of the determination during the review period.

Note 1: Contravention of this subsection is an offence (see subsection 1311(1)).

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 section 1317S.

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Distribution where target market determinations not appropriate: maker of determination

(3) If:

(a) a person makes a target market determination for a financial product; and

(b) the product is on offer for acquisition by issue, or for regulated sale, to retail clients at any time during a review period for the determination; and

(c) the person knows that:

(i) a review trigger for the determination has occurred; or

(ii) an event or circumstance has occurred that would reasonably suggest that the determination is no longer appropriate;

then, from as soon as practicable, but no later than 10 business days, after the person first knew of the occurrence of the review trigger, event or circumstance, the person must not engage in retail product distribution conduct in relation to the product unless:

(d) the person has reviewed the determination and, if the determination is no longer appropriate, made a new determination in accordance with section 994B; or

(e) the retail product distribution conduct is excluded conduct.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: In a prosecution for an offence, the defendant bears an evidential burden in relation to the matters in paragraphs (d) and (e) (see subsection 13.3(3) of the *Criminal Code*).

(4) If:

(a) a person makes a target market determination for a financial product; and

(b) the product is on offer for acquisition by issue, or for regulated sale, to retail clients at any time during a review period for the determination; and

(c) the person knows, or ought reasonably to know, that:

(i) a review trigger for the determination has occurred; or

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(ii) an event or circumstance has occurred that would reasonably suggest that the determination is no longer appropriate;

then, from as soon as practicable, but no later than 10 business days, after the person first knew of the occurrence of the review trigger, event or circumstance, the person must not engage in retail product distribution conduct in relation to the product unless:

(d) the person has reviewed the determination and, if the determination is no longer appropriate, made a new target market determination in accordance with section 994B; or

(e) the retail product distribution conduct is excluded conduct.

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.

(5) If:

(a) a person makes a target market determination for a financial product; and

(b) the product is on offer for acquisition by issue, or for regulated sale, to retail clients at any time during a review period for the determination; and

(c) the person knows that:

(i) a review trigger for the determination has occurred; or

(ii) an event or circumstance has occurred that would reasonably suggest that the determination is no longer appropriate;

the person must, as soon as practicable, but no later than 10 business days, after the person first knew of the occurrence of the review trigger, event or circumstance, take all reasonable steps to ensure that regulated persons who engage in retail product distribution conduct in relation to the product (or are expected to do so) are informed that they must not engage in retail product distribution conduct in relation to the product unless:

(d) the determination has been reviewed since the review trigger, event or circumstance occurred and, if a new target market determination is required, it has been made; or

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(e) the retail product distribution conduct is excluded conduct.

Note 1: Contravention of this subsection is an offence (see subsection 1311(1)).

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 section 1317S.

Distribution where target market determinations not appropriate: regulated persons

(6) If a regulated person in relation to a financial product knows that the person who made the target market determination for the product has taken steps referred to in subsection (5), the regulated person must, as soon as practicable, but no later than 10 business days, after the regulated person first became aware that the steps had been taken, cease to engage in retail product distribution conduct in relation to the product unless:

(a) the determination has been reviewed since a review trigger, event or circumstance mentioned in paragraph (5)(c) occurred and, if a new target market determination is required, it has been made; or

(b) the regulated person:

(i) made all inquiries (if any) that were reasonable in the circumstances; and

(ii) after doing so, believed on reasonable grounds that the determination had been reviewed since a review trigger, event or circumstance mentioned in paragraph (5)(c) occurred and, if a new target market determination was required, it had been made; or

(c) the retail product distribution conduct is excluded conduct.

Note 1: Contravention of this subsection is an offence (see subsection 1311(1)).

Note 2: In a prosecution for an offence, the defendant bears an evidential burden in relation to the matters in paragraphs (a), (b) and (c) (see subsection 13.3(3) of the *Criminal Code*).

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(7) If a regulated person knows or ought reasonably to know that the person who made the target market determination for a financial product has taken steps referred to in subsection (5), the regulated person must, as soon as practicable, but no later than 10 business days, after the regulated person first became aware or should have become aware that the steps had been taken, cease to engage in retail product distribution conduct in relation to the product unless:

(a) the determination has been reviewed since a review trigger, event or circumstance mentioned in paragraph (5)(c) occurred and, if a new target market determination is required, it has been made; or

(b) the regulated person:

(i) made all inquiries (if any) that were reasonable in the circumstances; and

(ii) after doing so, believed on reasonable grounds that the determination had been reviewed since a review trigger, event or circumstance mentioned in paragraph (5)(c) occurred and, if a new target market determination was required, it had been made; or

(c) the retail product distribution conduct is excluded conduct.

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.

994D Prohibition on engaging in retail product distribution conduct unless target market determination made

If:

(a) under section 994B, a person must make a target market determination for a financial product but the determination has not been made; and

(b) the product is on offer for acquisition by issue, or for regulated sale, to retail clients;

a regulated person must not engage in retail product distribution conduct in relation to the product unless:

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(c) the regulated person made all inquiries (if any) that were reasonable in the circumstances and, after doing so, believed on reasonable grounds that:
  (i) the determination had been made; or
  (ii) this Part does not require a target market determination for the product; or

(d) the retail product distribution conduct is excluded conduct.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: In a prosecution for an offence, the defendant bears an evidential burden in relation to the matters in paragraphs (c) and (d) (see subsection 13.3(3) of the *Criminal Code*).

Note 3: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

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Division 3—Distribution of financial products

994E Reasonable steps to ensure consistency with target market determinations

Persons who make target market determinations

(1) A person who makes a target market determination for a financial product must take reasonable steps that will, or are reasonably likely to, result in retail product distribution conduct in relation to the product (other than excluded conduct) being consistent with the determination.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: In a prosecution for an offence, the defendant bears an evidential burden in relation to conduct being excluded conduct (see subsection 13.3(3) of the *Criminal Code*).

Note 3: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

(2) A person is not taken to have failed to take reasonable steps for the purpose of subsection (1) merely because:
  (a) retail product distribution conduct of a regulated person (other than the person) in relation to the product is inconsistent with the target market determination; or
  (b) a retail client who is not in the target market for the product acquires the product.

Regulated persons

(3) If:
  (a) a target market determination for a financial product has been made; and
  (b) the product is on offer for acquisition by issue, or for regulated sale, to retail clients; and

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(c) a regulated person engages in retail product distribution conduct in relation to the product; and

(d) the regulated person failed to take reasonable steps that would have resulted in, or would have been reasonably likely to have resulted in, the retail product distribution conduct being consistent with the determination;

the regulated person contravenes this subsection unless the retail product distribution conduct is excluded conduct.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: In a prosecution for an offence, the defendant bears an evidential burden in relation to conduct being excluded conduct (see subsection 13.3(3) of the *Criminal Code*).

Note 3: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see section 1317S.

(4) A regulated person is not taken to have failed to take reasonable steps for the purpose of paragraph (3)(d) merely because a retail client who is not in the target market for the product acquires the product.

What are reasonable steps

(5) Without limiting subsections (1) and (3), ***reasonable steps*** in relation to a person are steps that, in the circumstances, the person is reasonably able to take that will, or are reasonably likely to, result in retail product distribution conduct in relation to the financial product being consistent with the target market determination for the product, taking into account all relevant matters, including:

(a) the likelihood of any such conduct being inconsistent with the determination; and

(b) the nature and degree of harm that might result from an issue or regulated sale of the financial product:

(i) to retail clients who are not in the target market; or

(ii) that is inconsistent with the determination; and

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(c) what the person knows, or ought reasonably to know, about:
  (i) the matters referred to in paragraphs (a) and (b); and
  (ii) ways of eliminating or minimising the likelihood and the harm; and
(d) the availability and suitability of ways to eliminate or minimise the likelihood and the harm.

(6) A regulated person is not taken to have failed to take reasonable steps for the purpose of paragraph (3)(d) if the person engages in retail product distribution conduct that:
  (a) relates to a particular retail client; and
  (b) relates to a particular financial product; and
  (c) is necessary to implement personal advice given to the client in relation to the product.

994F Record keeping and notification obligations

Record keeping by persons who make, or are required to make, target market determinations

(1) A person who makes, or who is required by this Part to make, a target market determination for a financial product must collect and keep complete and accurate records of:
  (a) the person's decisions in relation to the following:
    (i) all target market determinations for the product;
    (ii) review triggers for those target market determinations;
    (iii) review periods for those target market determinations;
    (iv) the requirements of subsections 994B(5) and (8) for those target market determinations; and
  (b) the reasons for those decisions.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

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 section 1317S.

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Note 3: There are further requirements about records in sections 1101C, 1101E and 1101F.

Record keeping by other regulated persons

(2) Subsections (3) to (6) apply if:
  (a) a target market determination has been made for a financial product; and
  (b) the product is on offer for acquisition by issue, or for regulated sale, to retail clients; and
  (c) a regulated person engages in retail product distribution conduct in relation to the product.

(3) The regulated person must collect and keep complete and accurate records of the following information (***distribution information***) in relation to the product:
  (a) the number of complaints in relation to the product that the regulated person receives;
  (b) the steps the regulated person has taken in relation to the product as required by section 994E (reasonable steps to ensure consistency with the target market determination);
  (c) if the regulated person is specified in the determination as required to report information of a specified kind to the person who made the determination (see subparagraph 994B(5)(h)(i))—information of that kind that the regulated person acquires;
  (d) if the regulated person is not the person that made the determination—the dates on which the regulated person reported as required by subsection (4), (5) or (6) and the substance of the reports.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

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 section 1317S.

Note 3: There are further requirements about records in sections 1101C, 1101E and 1101F.

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Reporting complaint information to persons who make target market determinations

(4) If the regulated person engages in the retail product distribution conduct during a reporting period specified under paragraph 994B(5)(g) (which relates to complaints), the regulated person must, as soon as practicable, but in any case within 10 business days, after the end of the reporting period, report in writing to the person who made the target market determination:

(a) whether the regulated person received complaints in relation to the product during the reporting period; and

(b) if the regulated person received such complaints—the number of complaints the regulated person received.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

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 section 1317S.

Reporting other information to persons who make target market determinations

(5) If:

(a) under the target market determination for the financial product, the regulated person is required to report information of a specified kind to the person that made the determination (see subparagraph 994B(5)(h)(i)); and

(b) the regulated person engages in the retail product distribution conduct in relation to the product during a reporting period for that kind of information;

the regulated person must, as soon as practicable, but in any case within 10 business days, after the end of the reporting period for information of that kind, report in writing to the person that made the determination:

(c) all the information of that kind that the regulated person acquired during the reporting period; or

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(d) if the regulated person did not acquire information of that kind during the reporting period—that fact.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

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 section 1317S.

(6) If the regulated person:

(a) becomes aware of a significant dealing in the product; and

(b) becomes aware that the dealing is not consistent with the target market determination;

the regulated person must, as soon as practicable, and in any case within 10 business days, report the dealing, in writing, to the person who made the determination.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

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 section 1317S.

Regulations

(7) The regulations may impose requirements in relation to records relating to compliance with this Part.

(8) A person contravenes this subsection if the person refuses or fails to comply with the requirements of regulations made for the purposes of subsection (7).

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

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 section 1317S.

994G Notice to ASIC

If:

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(a) a person makes a target market determination for a financial product; and

(b) the person becomes aware of a significant dealing in the product in relation to a retail client (except a dealing of a kind referred to in paragraph (a) of the definition of ***excluded conduct*** in subsection 994A(1)); and

(c) the person becomes aware that the dealing is not consistent with the determination;

the person must give written notice to ASIC as soon as practicable, and in any case within 10 business days, after becoming so aware.

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.

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Division 4—ASIC powers

994H Information to be provided to ASIC

(1) ASIC may, in writing, require:

(a) a person who makes, or is required by this Part to make, a target market determination for a financial product; or

(b) a regulated person who engages in retail product distribution conduct in relation to a financial product;

to provide ASIC with distribution information, relating to the financial product, that is in the person's possession or to which the person has access.

(2) ASIC may, in writing, require a person who makes, or is required by this Part to make, a target market determination for a financial product to provide records referred to in subsection 994F(1) relating to the product.

(3) A person who is required by ASIC to provide it with distribution information or records under subsection (1) or (2) must comply with the requirement:

(a) by the date specified by ASIC in the requirement; or

(b) if no date is so specified, within 10 business days after the day the person is notified by ASIC of the requirement in subsection (1) or (2).

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

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 section 1317S.

994J Stop orders

(1) This section applies if ASIC is satisfied that a provision of Division 2, or section 994E, has been contravened in relation to a financial product.

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(2) ASIC may order, in writing, that specified conduct in relation to retail clients in respect of the financial product (except excluded conduct) must not be engaged in while the order is in force. The order is not a legislative instrument.

(3) Before making an order under subsection (2), ASIC must:
  (a) hold a hearing; and
  (b) give a reasonable opportunity to any interested person 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 (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.

(5) 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.

(6) If ASIC makes an order under subsection (2) in relation to a financial product, ASIC must serve a copy of the order on the person who made or was required to make the target market determination.

(7) The person on whom the order is served must take all reasonable steps to ensure that other people who engage in conduct to which the order applies are aware of the order.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

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 section 1317S.

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(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 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

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 section 1317S.

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Division 5—Exemptions and modifications

994L Exemptions and modifications by ASIC

Individuals

(1) ASIC may, by notifiable instrument:
  (a) exempt a specified person from all or specified provisions of this Part; or
  (b) exempt a specified financial product from all or specified provisions of this Part; or
  (c) declare that this Part applies in relation to:
    (i) a specified person; or
    (ii) a specified financial product;
  as if specified provisions were omitted, modified or varied as specified in the declaration.

Classes

(2) ASIC may, by legislative instrument:
  (a) exempt a specified class of persons from all or specified provisions of this Part; or
  (b) exempt a specified class of financial products from all or specified provisions of this Part; or
  (c) declare that this Part applies in relation to:
    (i) a specified class of persons; or
    (ii) a specified class of financial products;
  as if specified provisions were omitted, modified or varied as specified in the declaration.

(3) Subsection (2) applies whether or not the legislative instrument is also expressed to apply in relation to one or more persons or products identified otherwise than by reference to membership of a class.

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Conditions on exemptions

(4) An exemption may apply unconditionally or subject to specified conditions.

(5) A person to whom a condition specified in an exemption applies must comply with the condition.

(6) The Court may, on application by ASIC, order the person to comply with the condition in a specified way.

Protections

(7) If conduct (including an omission) of a person would not have constituted an offence if a particular declaration under paragraph (1)(c) or (2)(c) had not been made, that conduct does not constitute an offence unless, before the conduct occurred:
   (a) the text of the declaration was made available by ASIC on the internet; or
   (b) ASIC gave to the person written notice setting out the text of the declaration.

   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.

(8) For the purposes of this section, the ***provisions of this Part*** include definitions in this Act as they apply to references in this Part.

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Division 6—Miscellaneous

994M Civil liability

(1) If:

(a) a person (the ***first person***) contravenes section 994B, 994C or 994D or subsection 994E(1) or (3); and

(b) another person (the ***client***) suffers loss or damage because of the contravention;

the client may recover the amount of the loss or damage by action against the first person, whether or not:

(c) the first person (or anyone else) has been convicted of an offence in relation to the contravention; or

(d) a Court has made a declaration of contravention under subsection 1317E(1) in relation to the contravention; or

(e) a Court has ordered the first person (or anyone else) to pay the Commonwealth a pecuniary penalty under section 1317G in relation to the contravention.

(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.

994N Additional powers of court to make orders

(1) The court dealing with an action under subsection 994M(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 who suffered loss or damage relating to a financial product; 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.

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(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 payment of an amount of interest specified in, or calculated in accordance with, the order.

994P Orders to redress loss or damage suffered by non-party consumers etc.

Orders

(1) If:
  (a) a person engaged in conduct (the ***contravening conduct***) in contravention of section 994B, 994C or 994D or subsection 994E(1) or (3); and
  (b) the contravening conduct caused, or is likely to cause, a class of persons to suffer loss or damage; and
  (c) the class includes persons (***non-party consumers***) who have not been a party to proceedings under this Act in relation to the contravening conduct;

the Court may, on the application of ASIC, make such order or orders (other than an award of damages) as the Court thinks appropriate against a person referred to in subsection (2) of this section.

Note: The orders that the Court may make include all or any of the orders set out in section 994Q.

(2) An order under subsection (1) may be made against the person who engaged in the contravening conduct, or a person involved in that conduct.

(3) The Court must not make an order under subsection (1) unless the Court considers that the order will:
  (a) redress, in whole or in part, the loss or damage suffered by the non-party consumers in relation to the contravening conduct; or

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(b) prevent or reduce the loss or damage suffered, or likely to be suffered, by the non-party consumers in relation to the contravening conduct.

Application for orders

(4) An application may be made under subsection (1) even if a proceeding in relation to the contravening conduct has not been instituted.

(5) An application under subsection (1) may be made at any time within 6 years after the day on which the cause of action that relates to the contravening conduct accrues.

Determining whether to make an order

(6) In determining whether to make an order under subsection (1) against a person referred to in subsection (2), the Court may have regard to the conduct of the person, and of the non-party consumers in relation to the contravening conduct, since the contravention occurred.

(7) In determining whether to make an order under subsection (1), the Court need not make a finding about either of the following matters:

(a) which persons are non-party consumers in relation to the contravening conduct;

(b) the nature of the loss or damage suffered, or likely to be suffered, by such persons.

When a non-party consumer is bound by an order etc.

(8) If:

(a) an order is made under subsection (1) against a person; and

(b) the loss or damage suffered, or likely to be suffered, by a non-party consumer in relation to the contravening conduct to which the order relates has been redressed, prevented or reduced in accordance with the order; and

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(c) the non-party consumer has accepted the redress, prevention or reduction;

then:

(d) the non-party consumer is bound by the order; and

(e) any other order made under subsection (1) that relates to that loss or damage has no effect in relation to the non-party consumer; and

(f) despite any other provision of this Act or any other law of the Commonwealth, or a State or Territory, no claim, action or demand may be made or taken against the person by the non-party consumer in relation to that loss or damage.

994Q Kinds of orders that may be made to redress loss or damage suffered by non-party consumers etc.

Without limiting subsection 994P(1), the orders that the Court may make under that subsection against a person (the ***respondent***) include all or any of the following:

(a) an order declaring the whole or any part of a contract made between the respondent and a non-party consumer referred to in that subsection, or a collateral arrangement relating to such a contract:

(i) to be void; and

(ii) if the Court thinks fit—to have been void ab initio or void at all times on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);

(b) an order:

(i) varying such a contract or arrangement in such manner as is specified in the order; and

(ii) if the Court thinks fit—declaring the contract or arrangement to have had effect as so varied on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);

(c) an order refusing to enforce any or all of the provisions of such a contract or arrangement;

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(d) an order directing the respondent to refund money or return property to a non-party consumer referred to in that subsection;

(e) an order directing the respondent, at the respondent's own expense, to repair, or provide parts for, goods that have been supplied under the contract or arrangement to a non-party consumer referred to in that subsection;

(f) an order directing the respondent, at the respondent's own expense, to supply specified services to a non-party consumer referred to in that subsection;

(g) an order, in relation to an instrument creating or transferring an interest in land, directing the respondent to execute an instrument that:

(i) varies, or has the effect of varying, the first-mentioned instrument; or

(ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the first-mentioned instrument.

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