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Chapter 5C—Managed investment schemes

Part 5C.1—Registration of managed investment schemes

601EA Applying for registration

- (1) To register a managed investment scheme, a person must lodge an application with ASIC.
- (2) The application must state:
 - (a) the name, and the address of the registered office, of the proposed responsible entity; and
 - (b) the name and address of a person who has consented to be the auditor of the compliance plan.
- (3) The applicant must have the consent referred to in paragraph (2)(b) when the application is lodged. After the scheme is registered, the applicant must give the consent to the responsible entity. The responsible entity must keep the consent.
- (4) The following must be lodged with the application:
 - (a) a copy of the scheme's constitution;
 - (b) a copy of the scheme's compliance plan;
 - (c) a statement signed by the directors of the proposed responsible entity that:
 - (i) the scheme's constitution complies with sections 601GA and 601GB; and
 - (ii) the scheme's compliance plan complies with section 601HA.

Note: Section 601HC requires that the copy of the compliance plan be signed by the directors of the responsible entity.

601EB Registration of managed investment scheme

- (1) ASIC must register the scheme within 14 days of lodgment of the application, unless it appears to ASIC that:

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- (c) the application does not comply with section 601EA; or
 - (d) the proposed responsible entity does not meet the requirements of section 601FA; or
 - (e) the scheme's constitution does not meet the requirements of sections 601GA and 601GB; or
 - (f) the scheme's compliance plan does not meet the requirements of section 601HA; or
 - (g) the copy of the compliance plan lodged with the application is not signed as required by section 601HC; or
 - (h) arrangements are not in place that will satisfy the requirements of section 601HG in relation to audit of compliance with the plan.
- (2) If ASIC registers the scheme, ASIC must give it an ARSN.
- (3) ASIC must keep a record of the registration of the scheme.
- (4) For the purpose of determining whether subsection (1) is satisfied in relation to the scheme:
- (a) references in Parts 5C.3, 5C.4 and 5C.5 to a registered scheme are taken to include a reference to the scheme; and
 - (b) references in those Parts to the responsible entity of a registered scheme are taken to include a reference to the proposed responsible entity of the scheme.

601EC All documents etc. lodged with ASIC to bear ARSN

After a managed investment scheme is registered, the scheme's ARSN must appear on all documents relating to the scheme that are lodged with ASIC.

601ED When a managed investment scheme must be registered

- (1) Subject to subsection (2), a managed investment scheme must be registered under section 601EB if:
- (a) it has more than 20 members; or
 - (b) it was promoted by a person, or an associate of a person, who was, when the scheme was promoted, in the business of promoting managed investment schemes; or

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- (c) a determination under subsection (3) is in force in relation to the scheme and the total number of members of all of the schemes to which the determination relates exceeds 20.
- (2) A managed investment scheme does not have to be registered if all the issues of interests in the scheme that have been made did not need disclosure to investors under Part 6D.2 (see sections 706 and 708) when they were made.
- (3) ASIC may, in writing, determine that a number of managed investment schemes are closely related and that each of them has to be registered at any time when the total number of members of all of the schemes exceeds 20. ASIC must give written notice of the determination to the operator of each of the schemes.
- (4) For the purpose of this section, when working out how many members a scheme has:
 - (a) joint holders of an interest in the scheme count as a single member; and
 - (b) an interest in the scheme held on trust for a beneficiary is taken to be held by the beneficiary (rather than the trustee) if:
 - (i) the beneficiary is presently entitled to a share of the trust estate or of the income of the trust estate; or
 - (ii) the beneficiary is, individually or together with other beneficiaries, in a position to control the trustee.
- (5) A person must not operate in this jurisdiction a managed investment scheme that this section requires to be registered under section 601EB unless the scheme is so registered.
- (6) For the purpose of subsection (5), a person is not operating a 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 or remedy a defect that led to the scheme being deregistered.
- (7) A person who would otherwise contravene subsection (5) because an interest in a scheme is held in trust for 2 or more beneficiaries (see paragraph (4)(b)) does not contravene that subsection if they prove that they did not know, and had no reason to suspect, that the interest was held in that way.

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601EE Unregistered schemes may be wound up

- (1) If a person operates a managed investment scheme in contravention of subsection 601ED(5), the following may apply to the Court to have the scheme wound up:
 - (a) ASIC;
 - (b) the person operating the scheme;
 - (c) a member of the scheme.
- (2) The Court may make any orders it considers appropriate for the winding up of the scheme.

Part 5C.2—The responsible entity

Division 1—Responsibilities and powers

601FA Responsible entity to be public company and hold dealers licence

The responsible entity of a registered scheme must be a public company that holds a dealers licence authorising it to operate a managed investment scheme.

601FB Responsible entity to operate scheme

- (1) The responsible entity of a registered scheme is to operate the scheme and perform the functions conferred on it by the scheme's constitution and this Act.
- (2) The responsible entity has power to appoint an agent, or otherwise engage a person, to do anything that it is authorised to do in connection with the scheme. For the purpose of determining whether:
 - (a) there is a liability to the members; or
 - (b) the responsible entity has properly performed its duties for the purposes of subsection 601GA(2);the responsible entity is taken to have done (or failed to do) anything that the agent or person has done (or failed to do) because of the appointment or engagement, even if they were acting fraudulently or outside the scope of their authority or engagement.

Note: A scheme's constitution may provide for the responsible entity to be indemnified for liabilities—see subsection 601GA(2).
- (3) An agent appointed, or a person otherwise engaged, by:
 - (a) the agent or person referred to in subsection (2); or
 - (b) a person who is taken under this subsection to be an agent of the responsible entity;to do anything that the responsible entity is authorised to do in connection with the scheme is taken to be an agent appointed by

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the responsible entity to do that thing for the purposes of subsection (2).

(4) If:

- (a) an agent holds scheme property on behalf of the responsible entity; and
- (b) the agent is liable to indemnify the responsible entity against any loss or damage that:
 - (i) the responsible entity suffers as a result of a wrongful or negligent act or omission of the agent; and
 - (ii) relates to a failure by the responsible entity to perform its duties in relation to the scheme;

any amount recovered under the indemnity forms part of the scheme property.

601FC Duties of responsible entity

- (1) In exercising its powers and carrying out its duties, the responsible entity of a registered scheme must:
 - (a) act honestly; and
 - (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the responsible entity's position; and
 - (c) act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to the members' interests; and
 - (d) treat the members who hold interests of the same class equally and members who hold interests of different classes fairly; and
 - (e) not make use of information acquired through being the responsible entity in order to:
 - (i) gain an improper advantage for itself or another person; or
 - (ii) cause detriment to the members of the scheme; and
 - (f) ensure that the scheme's constitution meets the requirements of sections 601GA and 601GB; and
 - (g) ensure that the scheme's compliance plan meets the requirements of section 601HA; and
 - (h) comply with the scheme's compliance plan; and

- (i) ensure that scheme property is:
 - (i) clearly identified as scheme property; and
 - (ii) held separately from property of the responsible entity and property of any other scheme; and
- (j) ensure that the scheme property is valued at regular intervals appropriate to the nature of the property; and
- (k) ensure that all payments out of the scheme property are made in accordance with the scheme's constitution and this Act; and
- (l) report to ASIC any breach of this Act that:
 - (i) relates to the scheme; and
 - (ii) has had, or is likely to have, a materially adverse effect on the interests of members;as soon as practicable after it becomes aware of the breach; and
- (m) carry out or comply with any other duty, not inconsistent with this Act, that is conferred on the responsible entity by the scheme's constitution.

Note: Subsection (1) is a civil penalty provision as defined by section 1317DA and Part 9.4B provides for civil and criminal consequences of contravening it.

- (2) The responsible entity holds scheme property on trust for scheme members.

Note: Under subsection 601FB(2), the responsible entity may appoint an agent to hold scheme property separately from other property.

- (3) A duty of the responsible entity under subsection (1) or (2) overrides any conflicting duty an officer or employee of the responsible entity has under Part 2D.1.

Investment of scheme property in other managed investment schemes

- (4) The responsible entity may only invest scheme property, or keep scheme property invested, in another managed investment scheme if that other scheme is registered under this Chapter.

601FD Duties of officers of responsible entity

- (1) An officer of the responsible entity of a registered scheme must:
-

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- (a) act honestly; and
- (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position; and
- (c) act in the best interests of the members and, if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests; and
- (d) not make use of information acquired through being an officer of the responsible entity in order to:
 - (i) gain an improper advantage for the officer or another person; or
 - (ii) cause detriment to the members of the scheme; and
- (e) not make improper use of their position as an officer to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme; and
- (f) take all steps that a reasonable person would take, if they were in the officer's position, to ensure that the responsible entity complies with:
 - (i) this Act; and
 - (ii) any conditions imposed on the responsible entity's dealers licence; and
 - (iii) the scheme's constitution; and
 - (iv) the scheme's compliance plan.

Note: Subsection (1) is a civil penalty provision as defined in section 1317DA and Part 9.4B provides for civil and criminal consequences of contravening it.

- (2) A duty of an officer of the responsible entity under subsection (1) overrides any conflicting duty the officer has under Part 2D.1.

601FE Duties of employees of responsible entity

- (1) An employee of the responsible entity of a registered scheme must not:
 - (a) make use of information acquired through being an employee of the responsible entity in order to:

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- (i) gain an improper advantage for the employee or another person; or
- (ii) cause detriment to members of the scheme; or
- (b) make improper use of their position as an employee to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme.

Note: Subsection (1) is a civil penalty provision as defined in section 1317DA and Part 9.4B provides for civil and criminal consequences of contravening it.

- (2) A duty of an employee of the responsible entity under subsection (1) overrides any conflicting duty the employee has under Part 2D.1.

601FF Surveillance checks by ASIC

- (1) ASIC may, from time to time, check whether the responsible entity of a registered scheme is complying with the scheme's constitution and compliance plan and with this Act.

Note: For this purpose ASIC may exercise the powers set out in Division 3 of Part 3 of the ASIC Act.

- (2) The responsible entity and its officers must take all reasonable steps to assist ASIC in carrying out a check under subsection (1).

601FG Acquisition of interest in scheme by responsible entity

The responsible entity of a registered scheme may acquire and hold an interest in the scheme, but it must only do so:

- (a) for not less than the consideration that would be payable if the interest were acquired by another person; and
- (b) subject to terms and conditions that would not disadvantage other members.

Note 1: If the responsible entity holds an interest in the scheme, it does so subject to section 253E (certain members cannot vote or be counted).

Note 2: This section is a civil penalty provision as defined in section 1317DA and Part 9.4B provides for civil and criminal consequences of contravening it.

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601FH Liquidator etc. of responsible entity entitled to exercise indemnity rights

If the company that is a registered scheme's responsible entity is being wound up, is under administration or has executed a deed of company arrangement that has not terminated:

- (a) a provision of the scheme's constitution, or of another instrument, is void against the liquidator, or the administrator of the company or the deed, if it purports to deny the company a right to be indemnified out of the scheme property that the company would have had if it were not being wound up, were not under administration, or had not executed a deed of company arrangement; and
- (b) a right of the company to be indemnified out of the scheme property may only be exercised by the liquidator or the administrator of the company or the deed.

Division 2—Changing the responsible entity

601FJ Changes only take effect when ASIC alters record of registration

- (1) Despite anything in this Division, the company named in ASIC's record of registration as the responsible entity or temporary responsible entity of a registered scheme remains the scheme's responsible entity until the record is altered to name another company as the scheme's responsible entity or temporary responsible entity.
- (2) A purported change of the scheme's responsible entity is ineffective unless it is in accordance with this Division.

601FK Requirements of section 601FA must be met

A company cannot be chosen or appointed as the responsible entity or temporary responsible entity of a registered scheme unless it meets the requirements of section 601FA.

601FL Retirement of responsible entity

- (1) If the responsible entity of a registered scheme wants to retire, it must call a members' meeting to explain its reason for wanting to retire and to enable the members to vote on a resolution to choose a company to be the new responsible entity. The resolution must be an extraordinary resolution if the scheme is not listed.
- (2) If the members choose a company to be the new responsible entity and that company has consented, in writing, to becoming the scheme's responsible entity:
 - (a) as soon as practicable and in any event within 2 business days after the resolution is passed, the current responsible entity must lodge a notice with ASIC asking it to alter the record of the scheme's registration to name the chosen company as the scheme's responsible entity; and
 - (b) if the current responsible entity does not lodge the notice required by paragraph (a), the company chosen by the

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members to be the new responsible entity may lodge that notice; and

- (c) ASIC must comply with the notice when it is lodged.
- (3) If the members do not choose a company to be the new responsible entity, or the company they choose does not consent to becoming the scheme's responsible entity, the current responsible entity may apply to the Court for appointment of a temporary responsible entity under section 601FP.
- (4) A person must not lodge a notice under subsection (2) unless the consent referred to in that subsection has been given before the notice is lodged.

601FM Removal of responsible entity by members

- (1) If members of a registered scheme want to remove the responsible entity, they may take action under Division 1 of Part 2G.4 for the calling of a members' meeting to consider and vote on a resolution that the current responsible entity should be removed and a resolution choosing a company to be the new responsible entity. The resolutions must be extraordinary resolutions if the scheme is not listed.
- (2) If the members vote to remove the responsible entity and, at the same meeting, choose a company to be the new responsible entity that consents, in writing, to becoming the scheme's responsible entity:
 - (a) as soon as practicable and in any event within 2 business days after the resolution is passed, the current responsible entity must lodge a notice with ASIC asking it to alter the record of the scheme's registration to name the chosen company as the scheme's responsible entity; and
 - (b) if the current responsible entity does not lodge the notice required by paragraph (a), the company chosen by the members to be the new responsible entity may lodge that notice; and
 - (c) ASIC must comply with the notice when it is lodged.

- (3) A person must not lodge a notice under subsection (2) unless the consent referred to in that subsection has been given before the notice is lodged.

Note: If the members vote to remove the responsible entity but do not, at the same meeting, choose a company to be the new responsible entity, or the company they choose does not consent to becoming the scheme's responsible entity, the scheme must be wound up (see section 601NE).

601FN ASIC or scheme member may apply to Court for appointment of temporary responsible entity

ASIC or a member of the registered scheme may apply to the Court for the appointment of a temporary responsible entity of the scheme under section 601FP if the scheme does not have a responsible entity that meets the requirements of section 601FA.

601FP Appointment of temporary responsible entity by Court

- (1) On application under section 601FL or 601FN, the Court may, by order, appoint a company as the temporary responsible entity of a registered scheme if the Court is satisfied that the appointment is in the interest of the members.
- (2) The Court may make any further orders that it considers necessary.
- (3) If the application was made by the current responsible entity, it must, as soon as practicable after the Court's order appointing the temporary responsible entity, lodge a notice with ASIC informing ASIC of the appointment made by the Court.
- (4) As soon as practicable after the appointment, ASIC must alter the record of the scheme's registration to name the appointed company as the scheme's temporary responsible entity.

601FQ Temporary responsible entity to take steps for appointment of new responsible entity

- (1) The temporary responsible entity of a registered scheme must call a members' meeting for the purpose of the members, by resolution, choosing a company to be the new responsible entity. The resolution must be an extraordinary resolution if the scheme is not

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listed. The temporary responsible entity must call the meeting as soon as practicable and, in any event, within 3 months of becoming the temporary responsible entity.

- (2) Within that 3 months, the temporary responsible entity may call further members' meetings for the purpose of choosing a company to be the new responsible entity. Before the end of the 3 months, it may apply to the Court for an extension of that period. If the Court grants the extension, the temporary responsible entity may, within the extended period, call further members' meetings for the purpose of choosing a company to be the new responsible entity.
- (3) Provided it still meets the requirements in section 601FA, nothing prevents the company that is the temporary responsible entity from being chosen as the new responsible entity.
- (4) If the members choose a company to be the new responsible entity and that company has consented, in writing, to becoming the scheme's responsible entity, the temporary responsible entity must, as soon as practicable, lodge a notice with ASIC asking it to alter the record of the scheme's registration to name the chosen company as the scheme's responsible entity. ASIC must comply with the notice when it is lodged.
- (5) The temporary responsible entity must apply to the Court for an order directing it to wind up the scheme, and the Court may make the order, if:
 - (a) no meeting is called within the 3 months or extended period for the purpose of choosing a new company to be the responsible entity; or
 - (b) the meeting or meetings called within that period for that purpose have not resulted in the members choosing a company to be the new responsible entity that consents to becoming the scheme's responsible entity.ASIC or a member of the scheme may apply for the order if the temporary responsible entity does not do so.
- (6) The temporary responsible entity must not lodge a notice under subsection (4) unless the consent referred to in that subsection has been given before the notice is lodged.

Division 3—Consequences of change of responsible entity

601FR Former responsible entity to hand over books and provide reasonable assistance

If the responsible entity of a registered scheme changes, the former responsible entity must:

- (a) as soon as practicable give the new responsible entity any books in the former responsible entity's possession or control that this Act requires to be kept in relation to the scheme; and
- (b) give other reasonable assistance to the new responsible entity to facilitate the change of responsible entity.

601FS Rights, obligations and liabilities of former responsible entity

- (1) If the responsible entity of a registered scheme changes, the rights, obligations and liabilities of the former responsible entity in relation to the scheme become rights, obligations and liabilities of the new responsible entity.
- (2) Despite subsection (1), the following rights and liabilities remain rights and liabilities of the former responsible entity:
 - (a) any right of the former responsible entity to be paid fees for the performance of its functions before it ceased to be the responsible entity; and
 - (b) any right of the former responsible entity to be indemnified for expenses it incurred before it ceased to be the responsible entity; and
 - (c) any right, obligation or liability that the former responsible entity had as a member of the scheme; and
 - (d) any liability for which the former responsible entity could not have been indemnified out of the scheme property if it had remained the scheme's responsible entity.

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601FT Effect of change of responsible entity on documents etc. to which former responsible entity is party

- (1) If the responsible entity of a registered scheme changes, a document:
 - (a) to which the former responsible entity is a party, in which a reference is made to the former responsible entity, or under which the former responsible entity has acquired or incurred a right, obligation or liability, or might have acquired or incurred a right, obligation or liability if it had remained the responsible entity; and
 - (b) that is capable of having effect after the change;has effect as if the new responsible entity (and not the former responsible entity) were a party to it, were referred to in it or had or might have acquired or incurred the right, obligation or liability under it.
- (2) Subsection (1) does not apply to a right, obligation or liability that remains a right, obligation or liability of the former responsible entity because of subsection 601FS(2).

Part 5C.3—The constitution

601GA Contents of the constitution

- (1) The constitution of a registered scheme must make adequate provision for:
 - (a) the consideration that is to be paid to acquire an interest in the scheme; and
 - (b) the powers of the responsible entity in relation to making investments of, or otherwise dealing with, scheme property; and
 - (c) the method by which complaints made by members in relation to the scheme are to be dealt with; and
 - (d) winding up the scheme.
- (2) If the responsible entity is to have any rights to be paid fees out of scheme property, or to be indemnified out of scheme property for liabilities or expenses incurred in relation to the performance of its duties, those rights:
 - (a) must be specified in the scheme's constitution; and
 - (b) must be available only in relation to the proper performance of those duties;and any other agreement or arrangement has no effect to the extent that it purports to confer such a right.
- (3) If the responsible entity is to have any powers to borrow or raise money for the purposes of the scheme:
 - (a) those powers must be specified in the scheme's constitution; and
 - (b) any other agreement or arrangement has no effect to the extent that it purports to confer such a power.
- (4) If members are to have a right to withdraw from the scheme, the scheme's constitution must:
 - (a) specify the right; and

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- (b) if the right may be exercised while the scheme is liquid (as defined in section 601KA)—set out adequate procedures for making and dealing with withdrawal requests; and
- (c) if the right may be exercised while the scheme is not liquid (as defined in section 601KA)—provide for the right to be exercised in accordance with Part 5C.6 and set out any other adequate procedures (consistent with that Part) that are to apply to making and dealing with withdrawal requests.

The right to withdraw, and any provisions in the constitution setting out procedures for making and dealing with withdrawal requests, must be fair to all members.

601GB Constitution must be legally enforceable

The constitution of a registered scheme must be contained in a document that is legally enforceable as between the members and the responsible entity.

601GC Changing the constitution

- (1) The constitution of a registered scheme may be modified, or repealed and replaced with a new constitution:
 - (a) by special resolution of the members of the scheme; or
 - (b) by the responsible entity if the responsible entity reasonably considers the change will not adversely affect members' rights.
- (2) The responsible entity must lodge with ASIC a copy of the modification or the new constitution. The modification, or repeal and replacement, cannot take effect until the copy has been lodged.
- (3) The responsible entity must lodge with ASIC a consolidated copy of the scheme's constitution if ASIC directs it to do so.
- (4) The responsible entity must send a copy of the scheme's constitution to a member of the scheme within 7 days if the member:
 - (a) asks the responsible entity, in writing, for the copy; and
 - (b) pays any fee (up to the prescribed amount) required by the responsible entity.

Part 5C.4—The compliance plan

601HA Contents of the compliance plan

- (1) The compliance plan of a registered scheme must set out adequate measures that the responsible entity is to apply in operating the scheme to ensure compliance with this Act and the scheme's constitution, including the arrangements for:
 - (a) ensuring that all scheme property is clearly identified as scheme property and held separately from property of the responsible entity and property of any other scheme (see paragraph 601FC(1)(i)); and
 - (b) if the scheme is required to have a compliance committee (see section 601JA)—ensuring that the compliance committee functions properly, including adequate arrangements relating to:
 - (i) the membership of the committee; and
 - (ii) how often committee meetings are to be held; and
 - (iii) the committee's reports and recommendations to the responsible entity; and
 - (iv) the committee's access to the scheme's accounting records and to the auditor of the scheme's financial statements; and
 - (v) the committee's access to information that is relevant to the responsible entity's compliance with this Act; and
 - (c) ensuring that the scheme property is valued at regular intervals appropriate to the nature of the property; and
 - (d) ensuring that compliance with the plan is audited as required by section 601HG; and
 - (e) ensuring adequate records of the scheme's operations are kept; and
 - (f) any other matter prescribed by the regulations.
- (2) If:
 - (a) a registration application is made as a result of a resolution passed under subparagraph 1457(1)(a)(i); and

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(b) the resolution included a direction under subsection 1457(1A);
the compliance plan lodged with the application must provide for scheme property to be held by a person other than the responsible entity, or a person that is not related to the responsible entity, as the responsible entity's agent.

601HB Compliance plan may incorporate provisions from another scheme's plan

- (1) The responsible entity of a registered scheme may lodge with ASIC a compliance plan for the scheme that is expressed to incorporate specified provisions, as in force at a specified time, of a compliance plan of another registered scheme of which it is also the responsible entity.
- (2) The specified provisions, as in force at the specified time, are taken to be included in the plan.

601HC Directors must sign lodged copy of compliance plan

The copy of a scheme's compliance plan that is lodged with ASIC must be signed by all the directors of the responsible entity.

601HD ASIC may require further information about compliance plan

ASIC may direct the responsible entity of a registered scheme to give it information about the arrangements contained in the compliance plan. The direction is to be given by notice in writing to the responsible entity.

601HE Changing the compliance plan

Responsible entity's powers

- (1) The responsible entity of a registered scheme may modify the scheme's compliance plan or repeal it and replace it with a new compliance plan.

ASIC may require modifications

- (2) ASIC may direct the responsible entity of a registered scheme to modify the scheme's compliance plan, as set out in the direction, to ensure that the plan is consistent with section 601HA. The direction is to be given by notice in writing to the responsible entity.

Lodgment of modification or new plan

- (3) The responsible entity must lodge with ASIC a copy of a modification of the scheme's compliance plan or of a new compliance plan within 14 days after the modification is made or the old plan is repealed. The copy must be signed by all the directors of the responsible entity.

601HF ASIC may require consolidation of compliance plan to be lodged

- (1) ASIC may direct the responsible entity of a registered scheme to lodge a consolidated copy of the scheme's compliance plan.
- (2) The consolidation must set out:
 - (a) the plan as modified to the time of lodgment; and
 - (b) if required by ASIC's direction—the full text of provisions taken to be included in the plan by subsection 601HB(2).

601HG Audit of compliance plan

- (1) The responsible entity of a registered scheme must ensure that at all times a registered company auditor is engaged to audit compliance with the scheme's compliance plan in accordance with this section. This auditor is referred to as the ***auditor of the compliance plan***.
- (2) A person is not eligible to act as the auditor of the compliance plan if the person is:
 - (a) an associate of the responsible entity; or
 - (b) an agent holding scheme property on behalf of the responsible entity or an associate of an agent of that kind; or
 - (c) the auditor of the responsible entity's financial statements.

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The auditor of the compliance plan and the auditor of the responsible entity's financial statements may, however, work for the same firm of auditors.

- (3) Within 3 months after the end of a financial year of the scheme, the auditor of the compliance plan must:
 - (a) examine the scheme's compliance plan; and
 - (b) carry out:
 - (i) if the scheme has only had one responsible entity during the financial year—an audit of the responsible entity's compliance with the compliance plan during the financial year; or
 - (ii) if the scheme has had more than one responsible entity during the financial year—an audit of each responsible entity's compliance with the compliance plan during that part of the financial year when it was the scheme's responsible entity; and
 - (c) give to the scheme's current responsible entity a report that states whether, in the auditor's opinion:
 - (i) the responsible entity, or each responsible entity, complied with the scheme's compliance plan during the financial year or that part of the financial year when it was the scheme's responsible entity; and
 - (ii) the plan continues to meet the requirements of this Part.
 - (4) The auditor of the compliance plan must, as soon as possible, notify ASIC in writing if the auditor:
 - (a) has reasonable grounds to suspect that a contravention of this Act has occurred; and
 - (b) believes that the contravention has not been or will not be adequately dealt with by commenting on it in the auditor's report under subsection (3) or bringing it to the attention of the responsible entity.
 - (5) The auditor of the compliance plan:
 - (a) has a right of access at all reasonable times to the books of the scheme; and
 - (b) may require an officer of the responsible entity to give the auditor information and explanations for the purposes of the audit.
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- (6) An officer of the responsible entity must:
 - (a) allow the auditor of the compliance plan to have access to the books of the scheme; and
 - (b) give the auditor information or an explanation required under subsection (5); and
 - (c) otherwise assist the conduct of the audit.
- (7) The responsible entity must lodge the auditor's report under subsection (3) with ASIC at the same time as the financial statements and reports in respect of the scheme are to be lodged with ASIC (see sections 292 and 321).
- (8) The auditor of the compliance plan has qualified privilege in respect of:
 - (a) a statement made in a report under subsection (3); or
 - (b) a notification to ASIC under subsection (4).
- (9) This section does not prevent the responsible entity from arranging for the auditor of the compliance plan to carry out audits in addition to those required by this section.

601HH Removal and resignation of auditors

Removal of auditor by responsible entity

- (1) The responsible entity:
 - (a) must remove the auditor of the compliance plan if the auditor becomes ineligible under subsection 601HG(2) to act as auditor of the compliance plan; and
 - (b) may, with ASIC's consent, remove the auditor of the compliance plan.

Resignation of auditor

- (2) The auditor of the compliance plan may resign by written notice to the responsible entity if:
 - (a) the auditor:
 - (i) applies to ASIC in writing for its consent to the resignation; and

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- (ii) gives the responsible entity written notice of the application at or about the same time as applying to ASIC; and
 - (b) ASIC consents to the resignation.
- (3) As soon as practicable after receiving the application, ASIC must notify the auditor and the responsible entity whether it consents to the resignation.
- (4) A statement by the auditor in the application 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 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.

A certificate by ASIC that the statement was made in the application, or in answer to an inquiry by ASIC, is conclusive evidence that the statement was so made.
- (5) The auditor's resignation takes effect on the later of:
 - (a) the day (if any) specified in the notice of resignation; or
 - (b) the day ASIC consents to the resignation; or
 - (c) the day (if any) fixed by ASIC for the purpose.

601HI Action on change of auditor of compliance plan

If the auditor of the compliance plan of a registered scheme changes, the responsible entity must, as soon as practicable after the change and in writing, ask ASIC to alter the record of the scheme's registration to show the name of the new auditor as the auditor of the scheme's compliance plan. ASIC must comply with the request if the change complies with this Act.

Part 5C.5—The compliance committee

601JA When is a compliance committee required?

- (1) The responsible entity of a registered scheme must establish a compliance committee if less than half of the directors of the responsible entity are external directors.
- (2) A director of the responsible entity is an external director if they:
 - (a) are not, and have not been in the previous 2 years, an employee of the responsible entity or a related body corporate; and
 - (b) are not, and have not been in the previous 2 years, an executive officer of a related body corporate; and
 - (c) are not, and have not been in the previous 2 years, substantially involved in business dealings, or in a professional capacity, with the responsible entity or a related body corporate; and
 - (d) are not a member of a partnership that is, or has been in the previous 2 years, substantially involved in business dealings, or in a professional capacity, with the responsible entity or a related body corporate; and
 - (e) do not have a material interest in the responsible entity or a related body corporate; and
 - (f) are not a relative or de facto spouse of a person who has a material interest in the responsible entity or a related body corporate.
- (3) The responsible entity must establish the compliance committee within 14 days after it is required to do so by subsection (1) or within any longer period that ASIC has agreed to in writing.
- (4) In agreeing to a longer period under subsection (3), ASIC may impose conditions to be complied with and the responsible entity must comply with them.

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601JB Membership of compliance committee

- (1) A scheme's compliance committee must have at least 3 members, and a majority of them must be external members.
- (2) A member of the compliance committee is an external member if they:
 - (a) are not, and have not been in the previous 2 years, a non-external director, an executive officer or an employee of the responsible entity or a related body corporate; and
 - (b) are not, and have not been in the previous 2 years, substantially involved in business dealings, or in a professional capacity, with the responsible entity or a related body corporate; and
 - (c) are not a member of a partnership that is, or has been in the previous 2 years, substantially involved in business dealings, or in a professional capacity, with the responsible entity or a related body corporate; and
 - (d) do not have a material interest in the responsible entity or a related body corporate; and
 - (e) are not a relative or de facto spouse of a person who has a material interest in the responsible entity or a related body corporate.
- (3) For the purposes of paragraph (2)(a), a person who is a director of a related body corporate, but not of the responsible entity itself, is an external director of the related body corporate if they would have been an external director of the responsible entity under subsection 601JA(2) had they been a director of the responsible entity.
- (4) A person who is, or has been, either:
 - (a) an external director of the responsible entity; or
 - (b) a member of a compliance committee for the scheme or another registered managed investment scheme operated by the responsible entity;is not, merely because of that directorship or membership, taken to be, or to have been, substantially involved in business dealings, or in a professional capacity, with the responsible entity.

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- (5) If the membership of the scheme's compliance committee ceases to satisfy subsection (1), the responsible entity must make appointments to the committee to satisfy that subsection within 14 days or within any longer period that ASIC has agreed to in writing.
- (6) In agreeing to a longer period under subsection (5), ASIC may impose conditions to be complied with and the responsible entity must comply with them.

601JC Functions of compliance committee

- (1) The functions of a scheme's compliance committee are:
 - (a) to monitor to what extent the responsible entity complies with the scheme's compliance plan and to report on its findings to the responsible entity; and
 - (b) to report to the responsible entity:
 - (i) any breach of this Act involving the scheme; or
 - (ii) any breach of the provisions included in the scheme's constitution in accordance with section 601GA; of which the committee becomes aware or that it suspects; and
 - (c) to report to ASIC if the committee is of the view that the responsible entity has not taken, or does not propose to take, appropriate action to deal with a matter reported under paragraph (b); and
 - (d) to assess at regular intervals whether the compliance plan is adequate, to report to the responsible entity on the assessment and to make recommendations to the responsible entity about any changes that it considers should be made to the plan.
- (2) In carrying out its functions, the compliance committee may commission independent legal, accounting or other professional advice or assistance, at the reasonable expense of the responsible entity.

601JD Duties of members

- (1) A member of a scheme's compliance committee must:
 - (a) act honestly; and

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- (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the member's position; and
- (c) not make use of information acquired through being a member of the committee in order to:
 - (i) gain an improper advantage for the member or another person; or
 - (ii) cause detriment to the members of the scheme; and
- (d) not make improper use of their position as a member of the committee to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme.

Note: Subsection (1) is a civil penalty provision as defined in section 1317DA and Part 9.4B provides for civil and criminal consequences of contravening it.

- (2) A member of the compliance committee is to take all reasonable steps to assist ASIC in carrying out a check under subsection 601FF(1).

601JE Compliance committee members have qualified privilege in certain cases

A member of a scheme's compliance committee has qualified privilege in respect of a statement concerning the operation of the scheme made by or on behalf of the committee, or a member of the committee, to the responsible entity or to ASIC.

601JF When can responsible entity indemnify compliance committee members?

- (1) A scheme's responsible entity or a related body corporate must not:
 - (a) indemnify a person who is or has been a member of the scheme's compliance committee against a liability incurred by the person as a member; or
 - (b) exempt the person from such a liability.
- (2) A provision of the scheme's constitution or a body corporate's constitution is void in so far as it provides for the responsible entity or a related body corporate to do something that subsection (1) prohibits.

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- (3) Subsection (1) does not prevent a person from being indemnified against a liability to another person (other than the responsible entity or a related body corporate) unless the liability arises out of conduct involving a lack of good faith.
- (4) Subsection (1) does not prevent a person from being indemnified against a liability for costs and expenses incurred by them:
 - (a) in defending proceedings, whether civil or criminal, in which judgment is given in favour of them or in which they are acquitted; or
 - (b) in connection with an application, in relation to such proceedings, in which the Court grants relief to them under this Act.
- (5) In this section:
indemnify includes indemnify indirectly through one or more interposed entities.

601JG When can responsible entity pay insurance premiums for compliance committee members?

- (1) A scheme's responsible entity or a related body corporate must not pay, or agree to pay, a premium in respect of a contract insuring a person who is or has been a member of the scheme's compliance committee against a liability:
 - (a) incurred by the person as a member; and
 - (b) arising out of conduct involving a wilful breach of a duty referred to in section 601JD.
- (2) If subsection (1) is contravened, the contract is void in so far as it insures the person against the liability.
- (3) Subsections (1) and (2) do not apply to a liability for costs and expenses incurred by a person in defending proceedings, whether civil or criminal and whatever their outcome.
- (4) In this section:
pay includes pay indirectly through one or more interposed entities.

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601JH Proceedings of compliance committee

- (1) Subject to the requirements of the compliance plan, a scheme's compliance committee may regulate its proceedings as it thinks appropriate.
- (2) The committee must keep:
 - (a) minutes of its meetings; and
 - (b) records of its reports and recommendations.
- (3) A committee meeting may be held using any technology agreed to by all the members.

601JJ Disclosure of interests

- (1) A member of a scheme's compliance committee must disclose to the committee a direct or indirect pecuniary interest that they have in a matter being considered, or about to be considered, by the committee if their interest could conflict with the proper performance of their duties in relation to the consideration of the matter.
- (2) A disclosure under subsection (1) must occur at the first meeting of the committee after the relevant facts have come to the member's knowledge and must be recorded in the minutes of the meeting.

Part 5C.6—Members' rights to withdraw from a scheme

601KA Members' rights to withdraw

Withdrawal from schemes that are liquid

- (1) The constitution of a registered scheme may make provision for members to withdraw from the scheme, wholly or partly, at any time while the scheme is liquid (see subsection 601GA(4)).

Withdrawal from schemes that are not liquid

- (2) The constitution of a registered scheme may make provision for members to withdraw from the scheme, wholly or partly, in accordance with this Part while the scheme is not liquid (see subsection 601GA(4)).

Restrictions on withdrawal from schemes

- (3) The responsible entity must not allow a member to withdraw from the scheme:
 - (a) if the scheme is liquid—otherwise than in accordance with the scheme's constitution; or
 - (b) if the scheme is not liquid—otherwise than in accordance with the scheme's constitution and sections 601KB to 601KE.

Liquid schemes

- (4) A registered scheme is liquid if liquid assets account for at least 80% of the value of scheme property.

Liquid assets

- (5) The following are liquid assets unless it is proved that the responsible entity cannot reasonably expect to realise them within the period specified in the constitution for satisfying withdrawal requests while the scheme is liquid:

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- (a) money in an account or on deposit with a bank;
 - (b) bank accepted bills;
 - (c) marketable securities (as defined in section 9);
 - (d) property of a prescribed kind.
- (6) Any other property is a liquid asset if the responsible entity reasonably expects that the property can be realised for its market value within the period specified in the constitution for satisfying withdrawal requests while the scheme is liquid.

601KB Non-liquid schemes—offers

- (1) The responsible entity of a registered scheme that is not liquid may offer members an opportunity to withdraw, wholly or partly, from the scheme to the extent that particular assets are available and able to be converted to money in time to satisfy withdrawal requests that members may make in response to the offer.
- (2) The withdrawal offer must be in writing and be made:
 - (a) if the constitution specifies procedures for making the offer—in accordance with those procedures; or
 - (b) otherwise—by giving a copy of the offer to all members of the scheme or to all members of a particular class.
- (3) The withdrawal offer must specify:
 - (a) the period during which the offer will remain open (this period must last for at least 21 days after the offer is made); and
 - (b) the assets that will be used to satisfy withdrawal requests; and
 - (c) the amount of money that is expected to be available when those assets are converted to money; and
 - (d) the method for dealing with withdrawal requests if the money available is insufficient to satisfy all requests.

The method specified under paragraph (d) must comply with section 601KD.
- (4) For joint members, a copy of the withdrawal offer need only be given to the joint member named first in the register of members.

- (5) As soon as practicable after making the withdrawal offer, the responsible entity must lodge a copy of the offer with ASIC.

601KC Non-liquid schemes—only one withdrawal offer to be open at any time

Only one withdrawal offer may be open at any time in relation to a particular interest in a registered scheme that is not liquid.

601KD Non-liquid schemes—how payments are to be made

The responsible entity of a registered scheme that is not liquid must ensure that withdrawal requests made in response to a withdrawal offer are satisfied within 21 days after the offer closes. No request made under the withdrawal offer may be satisfied while the offer is still open. If an insufficient amount of money is available from the assets specified in the offer to satisfy all requests, the requests are to be satisfied proportionately in accordance with the formula:

$$\text{Amount of money available} \times \frac{\text{Amount member requested to withdraw}}{\text{Total of all amounts members request to withdraw}}$$

601KE Non-liquid schemes—responsible entity may cancel withdrawal offer

- (1) The responsible entity of a registered scheme that is not liquid:
- (a) may cancel a withdrawal offer before it closes if the offer contains a material error; or
 - (b) must cancel a withdrawal offer before it closes if it is in the best interests of members to do so.
- (2) The cancellation must be made:
- (a) if the constitution specifies procedures for cancelling the withdrawal offer—in accordance with those procedures; or
 - (b) otherwise—by notice in writing to the members to whom the withdrawal offer was made.

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- (3) The responsible entity must lodge written notice of the cancellation with ASIC.

Part 5C.7—Related party transactions

601LA Chapter 2E applies with modifications

Chapter 2E applies to a registered scheme with the modifications set out in sections 601LB to 601LE and as if:

- (a) references to a public company were instead references to the responsible entity of the scheme; and
- (b) references to a benefit being given to or received by a related party of a public company were instead references to a benefit being given to or received by the responsible entity or a related party; and
- (c) references to a resolution of a public company were instead references to a resolution of the members of the scheme; and
- (d) references to a general meeting were instead references to a members' meeting of the scheme; and
- (e) references to members of a public company were instead references to members of the scheme; and
- (f) references to the company's best interests were instead references to the best interests of the scheme's members.

601LB Replacement section 207

Chapter 2E applies as if section 207 were replaced by the following section:

207 Purpose

The rules in this Chapter, as they apply to a registered scheme, are designed to protect the interests of the scheme's members as a whole, by requiring member approval for giving financial benefits to the responsible entity or its related parties that come out of scheme property or that could endanger those interests.

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601LC Replacement section 208

Chapter 2E applies as if section 208 were replaced by the following section:

208 Need for member approval for financial benefit

- (1) If all the following conditions are satisfied in relation to a financial benefit:
- (a) the benefit is given by:
 - (i) the responsible entity of a registered scheme; or
 - (ii) an entity that the responsible entity controls; or
 - (iii) an agent of, or person engaged by, the responsible entity
 - (b) the benefit either:
 - (i) is given out of the scheme property; or
 - (ii) could endanger the scheme property
 - (c) the benefit is given to:
 - (i) the person or a related party; or
 - (ii) another person referred to in paragraph (a) or a related party of that person;
- then, for the person referred to in paragraph (a) to give the benefit, either:
- (d) the person referred to in paragraph (a) must:
 - (i) obtain the approval of the scheme's members in the way set out in sections 217 to 227; and
 - (ii) give the benefit within 15 months after the approval; or
 - (e) the giving of the benefit must fall within an exception set out in sections 210 to 216.

Note: Section 228 defines *related party*, section 191 defines *entity*, section 191 defines *control* and section 229 affects the meaning of *giving a financial benefit*.

- (2) If:
- (a) the giving of the benefit is required by a contract; and
 - (b) the making of the contract was approved in accordance with subparagraph (1)(d)(i) as a financial benefit given to the entity or related party; and
 - (c) the contract was made:

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- (i) within 15 months after that approval; or
 - (ii) before that approval, if the contract was conditional on the approval being obtained;
member approval for the giving of the benefit is taken to have been given and the benefit need not be given within the 15 months.
- (3) Subsection (1) does not prevent the responsible entity from paying itself fees, and exercising rights to an indemnity, as provided for in the scheme's constitution under subsection 601GA(2).

601LD Omission of sections 213, 214 and 224

Chapter 2E applies as if sections 213, 214 and 224 were omitted.

Note: Instead of section 224, the rule in section 253E will apply.

601LE Modification of section 225

Chapter 2E applies as if subsection 225(1) were amended by omitting "subsection 224(1)" and substituting "section 253E".

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Part 5C.8—Effect of contraventions (civil liability and voidable contracts)

601MA Civil liability of responsible entity to members

- (1) A member of a registered scheme who suffers loss or damage because of conduct of the scheme's responsible entity that contravenes a provision of this Chapter may recover the amount of the loss or damage by action against the responsible entity whether or not the responsible entity has been convicted of an offence, or has had a civil penalty order made against it, in respect of the contravention.
- (2) An action under subsection (1) must be begun within 6 years after the cause of action arises.
- (3) This section does not affect any liability that a person has under other provisions of this Act or under other laws.

601MB Voidable contracts where subscription offers and invitations contravene this Act

- (1) If:
 - (a) a managed investment scheme is being operated in contravention of subsection 601ED(5) and a person (the *offeror*) offers an interest in the scheme for subscription, or issues an invitation to subscribe for an interest in the scheme; or
 - (b) a person (the *offeror*), in contravention of Chapter 6D, offers an interest in a registered scheme for subscription, or issues an invitation to subscribe for an interest in a registered scheme;a contract entered into by a person (other than the offeror) to subscribe for the interest as a result of the person accepting the offer, or of the acceptance of an offer made by the person in response to the invitation, is voidable at the option of that person by notice in writing to the offeror.

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- (2) If the person gives a notice under subsection (1), the obligations of the parties to the contract are suspended:
 - (a) during the period of 21 days after the notice is given; and
 - (b) during the period beginning when an application is made under subsection (4) in relation to the notice and ending when the application, and any appeals arising out of it, have been finally determined or otherwise disposed of.
- (3) Subject to subsection (6), the notice takes effect to void the contract:
 - (a) at the end of 21 days after the notice is given; or
 - (b) if, within that 21 days, the offeror applies under subsection (4)—at the end of the period when the obligations of the parties are suspended under paragraph (2)(b).
- (4) Within 21 days after the notice is given, the offeror may apply to the Court for an order declaring the notice to have had no effect.
- (5) The Court may extend the period within which the offeror may apply under subsection (4), even if the notice has taken effect.
- (6) On application under subsection (4), the Court may declare the notice to have had no effect if it is satisfied that, in all the circumstances, it is just and equitable to make the declaration.

Part 5C.9—Winding up

601NA Winding up required by scheme's constitution

The constitution of a registered scheme may provide that the scheme is to be wound up:

- (a) at a specified time; or
- (b) in specified circumstances or on the happening of a specified event;

but a provision of the constitution that purports to provide that the scheme is to be wound up if a particular company ceases to be its responsible entity is of no effect (including for the purposes of paragraph 601NE(1)(a)).

601NB Winding up at direction of members

If members of a registered scheme want the scheme to be wound up, they may take action under Division 1 of Part 2G.4 for the calling of a members' meeting to consider and vote on an extraordinary resolution directing the responsible entity to wind up the scheme.

601NC Winding up if scheme's purpose accomplished or cannot be accomplished

- (1) If the responsible entity of a registered scheme considers that the purpose of the scheme:
 - (a) has been accomplished; or
 - (b) cannot be accomplished;it may, in accordance with this section, take steps to wind up the scheme.
- (2) The responsible entity must give to the members of the scheme and to ASIC a notice in writing:
 - (a) explaining the proposal to wind up the scheme, including explaining how the scheme's purpose has been accomplished or why that purpose cannot be accomplished; and

- (b) informing the members of their rights to take action under Division 1 of Part 2G.4 for the calling of a members' meeting to consider the proposed winding up of the scheme and to vote on any extraordinary resolution members propose about the winding up of the scheme; and
 - (c) informing the members that the responsible entity is permitted to wind up the scheme unless a meeting is called to consider the proposed winding up of the scheme within 28 days of the responsible entity giving the notice to the members.
- (3) If no meeting is called within that 28 days to consider the proposed winding up, the responsible entity may wind up the scheme.

601ND Winding up ordered by Court

- (1) The Court may, by order, direct the responsible entity of a registered scheme to wind up the scheme if:
- (a) the Court thinks it is just and equitable to make the order; or
 - (b) within 3 months before the application for the order was made, execution or other process was issued on a judgment, decree or order obtained in a court (whether an Australian court or not) in favour of a creditor of, and against, the responsible entity in its capacity as the scheme's responsible entity and the execution or process has been returned unsatisfied.
- (2) An order based on paragraph (1)(a) may be made on the application of:
- (a) the responsible entity; or
 - (b) a director of the responsible entity; or
 - (c) a member of the scheme; or
 - (d) ASIC.
- (3) An order based on paragraph (1)(b) may be made on the application of a creditor.

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601NE The winding up of the scheme

- (1) The responsible entity of a registered scheme must ensure that the scheme is wound up in accordance with its constitution and any orders under subsection 601NF(2) if:
 - (a) the scheme's constitution provides that the scheme is to be wound up at a specified time, in specified circumstances or on the happening of a specified event and that time is reached, those circumstances occur or that event occurs; or
 - (b) the members pass an extraordinary resolution directing the responsible entity to wind up the scheme; or
 - (c) the Court makes an order directing the responsible entity to wind up the scheme; or
 - (d) the members pass a resolution removing the responsible entity but do not, at the same meeting, pass a resolution choosing a company to be the new responsible entity that consents to becoming the scheme's responsible entity.

Note: For the Court's power to order winding up, see subsection 601FQ(5) and section 601ND.

- (2) The responsible entity of a registered scheme may wind up the scheme in accordance with its constitution and any orders under subsection 601NF(2) if the responsible entity is permitted by subsection 601NC(3) to wind up the scheme.
- (3) Interests must not be issued in a registered scheme at a time after the responsible entity has become obliged to ensure the scheme is wound up, or after the scheme has started to be wound up.

601NF Other orders about winding up

- (1) The Court may, by order, appoint a person to take responsibility for ensuring a registered scheme is wound up in accordance with its constitution and any orders under subsection (2) if the Court thinks it necessary to do so (including for the reason that the responsible entity has ceased to exist or is not properly discharging its obligations in relation to the winding up).
- (2) The Court may, by order, give directions about how a registered scheme is to be wound up if the Court thinks it necessary to do so

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(including for the reason that the provisions in the scheme's constitution are inadequate or impracticable).

- (3) An order under subsection (1) or (2) may be made on the application of:
- (a) the responsible entity; or
 - (b) a director of the responsible entity; or
 - (c) a member of the scheme; or
 - (d) ASIC.

601NG Unclaimed money to be paid to ASIC

If, on completion of the winding up of a registered scheme, the person who has been winding up the scheme has in their possession or under their control any unclaimed or undistributed money or other property that was part of the scheme property, the person must, as soon as practicable, pay the money or transfer the property to ASIC to be dealt with under Part 9.7.

Part 5C.10—Deregistration

601PA Deregistration—voluntary

Responsible entity may apply for deregistration

- (1) The responsible entity of a registered scheme may lodge an application for deregistration of the scheme with ASIC.
- (2) The responsible entity may only apply if:
 - (a) the scheme:
 - (i) has 20 or less members (calculated in accordance with subsection 601ED(4)) and all the members agree that the scheme should be deregistered; and
 - (ii) is not required to be registered by paragraph 601ED(1)(b) or (c); or
 - (b) because of subsection 601ED(2) (exemption based on Chapter 6D not applying), the scheme is not required to be registered and all the members agree that the scheme should be deregistered; or
 - (c) the scheme is not a managed investment scheme.
- (3) If ASIC is satisfied that the application complies with subsections (1) and (2), it must give notice of the proposed deregistration:
 - (a) on the national database; and
 - (b) in the *Gazette*.When 2 months have passed since the *Gazette* notice, ASIC may deregister the scheme.
- (4) ASIC must give notice of the deregistration to the applicant.

601PB Deregistration by ASIC

- (1) ASIC may decide to deregister a registered scheme if:
 - (a) the scheme does not have a responsible entity that meets the requirements of section 601FA; or

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- (b) the scheme does not have a constitution that meets the requirements of sections 601GA and 601GB; or
- (c) the scheme does not have a compliance plan that meets the requirements of section 601HA; or
- (d) the scheme's property is not being:
 - (i) clearly identified as the scheme's property; and
 - (ii) held separately from property of the responsible entity and property of any other scheme;in accordance with the scheme's compliance plan; or
- (e) the following conditions are satisfied:
 - (i) the annual return for the scheme is at least 6 months late; and
 - (ii) no other documents have been lodged by or on behalf of the scheme in the last 18 months; and
 - (iii) ASIC has no reason to believe that the scheme is being operated; or
- (f) the scheme has been wound up.

Deregistration procedure

- (2) If ASIC decides to deregister a scheme under this section, it must give notice of the proposed deregistration:
 - (a) to the scheme's responsible entity; and
 - (b) to any other person who is winding up the scheme; and
 - (c) on the national database; and
 - (d) in the *Gazette*.

If the notice is given under paragraph (1)(a), (b), (c) or (d), the notice must specify the period at the end of which ASIC proposes to deregister the scheme.

- (3) ASIC may deregister the scheme:
 - (a) if paragraph (1)(a), (b), (c) or (d) applies—at the end of the period set out in the *Gazette* notice; or
 - (b) if paragraph (1)(e) or (f) applies—when 2 months have passed since the *Gazette* notice.
- (4) ASIC does not have to give a person notice under subsection (2) if ASIC does not have the necessary information about the person's address.

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- (5) ASIC must give notice of the deregistration to everyone who was notified of the proposed deregistration under paragraph (2)(a) or (b).

601PC Reinstatement

- (1) ASIC may reinstate the registration of a managed investment scheme if ASIC is satisfied that the scheme should not have been deregistered or if the defect that led to the scheme being deregistered has been remedied.
- (2) The Court may make an order that ASIC reinstate the registration of a managed investment scheme if:
 - (a) an application for reinstatement is made to the Court by:
 - (i) a person aggrieved by the deregistration; or
 - (ii) a person who was winding up the scheme; and
 - (b) the Court is satisfied that it is just that the scheme's registration be reinstated.
- (3) The Court may give any directions it thinks just for putting the scheme and other people in the same position, as far as possible, as if the scheme had not been deregistered.

ASIC to give notice of reinstatement

- (4) ASIC must give notice of a reinstatement in the *Gazette*. If ASIC exercises its power under subsection (1) in response to an application by a person, ASIC must also give notice of the reinstatement to the applicant.

Part 5C.11—Exemptions and modifications

601QA ASIC’s power to make exemption and modification orders

- (1) ASIC may:
 - (a) exempt a person from a provision of this Chapter; or
 - (b) declare that this Chapter applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

Without limiting this, ASIC may declare that this Chapter applies to a person as if section 601HA included a requirement for scheme property to be held by a person other than the responsible entity as the responsible entity’s agent.
- (2) The exemption or declaration may:
 - (a) apply to all or specified provisions of this Chapter; and
 - (b) apply to all persons, specified persons, or a specified class of persons; and
 - (c) relate to all securities, specified securities or a specified class of securities; and
 - (d) relate to any other matter generally or as specified.
- (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) The exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.
- (5) For the purposes of this section, the *provisions of this Chapter* include:
 - (a) regulations made for the purposes of this Chapter; and
 - (b) definitions in this Act or the regulations as they apply to references in:
 - (i) this Chapter; or
 - (ii) regulations made for the purposes of this Chapter; and

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- (c) the old Division 11 of Part 11.2 transitionals.

601QB Modification by regulations

The regulations may modify the operation of this Chapter or any other provisions of this Act relating to securities in relation to:

- (a) a managed investment scheme; or
- (b) all managed investment schemes of a specified class.

Chapter 6—Takeovers

602 Purposes of Chapter

The purposes of this Chapter are to ensure that:

- (a) the acquisition of control over:
 - (i) the voting shares in a listed company, or an unlisted company with more than 50 members; or
 - (ii) the voting shares in a listed body; or
 - (iii) the voting interests in a listed managed investment scheme;takes place in an efficient, competitive and informed market; and
- (b) the holders of the shares or interests, and the directors of the company or body or the responsible entity for the scheme:
 - (i) know the identity of any person who proposes to acquire a substantial interest in the company, body or scheme; and
 - (ii) have a reasonable time to consider the proposal; and
 - (iii) are given enough information to enable them to assess the merits of the proposal; and
- (c) as far as practicable, the holders of the relevant class of voting shares or interests all have a reasonable and equal opportunity to participate in any benefits accruing to the holders through any proposal under which a person would acquire a substantial interest in the company, body or scheme; and
- (d) an appropriate procedure is followed as a preliminary to compulsory acquisition of voting shares or interests or any other kind of securities under Part 6A.1.

Note 1: To achieve the objectives referred to in paragraphs (a), (b) and (c), the prohibition in section 606 and the exceptions to it refer to interests in “voting shares”. To achieve the objective in paragraph (d), the provisions that deal with the takeover procedure refer more broadly to interests in “securities”.

Note 2: Subsection 92(3) defines *securities* for the purposes of this Chapter.

603 Chapter extends to some listed bodies that are not companies

This Chapter applies to the acquisition of relevant interests in the securities of listed bodies that are not companies but are incorporated or formed in Australia in the same way as it applies to the acquisition of relevant interests in the securities of companies.

Note: Section 9 defines *company* and *listed*.

604 Chapter extends to listed managed investment schemes

- (1) This Chapter applies to the acquisition of relevant interests in the interests in a registered scheme that is also listed as if:
 - (a) the scheme were a listed company; and
 - (b) interests in the scheme were shares in the company; and
 - (c) voting interests in the scheme were voting shares in the company; and
 - (d) a meeting of the members of the scheme were a general meeting of the company; and
 - (e) the obligations and powers that are imposed or conferred on the company were imposed or conferred on the responsible entity; and
 - (f) the directors of the responsible entity were the directors of the company; and
 - (g) the appointment of a responsible entity for the scheme were the election of a director of the company; and
 - (h) the scheme's constitution were the company's constitution.

Note 1: Paragraph (g): See subsection 610(2).

Note 2: Section 9 defines *voting interest* in a managed investment scheme.

- (2) The regulations may modify the operation of this Chapter as it applies in relation to the acquisition of interests in listed managed investment schemes.

605 Classes of securities

- (1) Takeover bids are made for securities within a particular class. Similarly, compulsory acquisition and buy-out rights operate on securities within a particular class.

- (2) For the purposes of this Chapter and Chapters 6A and 6C, securities are not taken to be different classes merely because:
- (a) some of the securities are fully-paid and others are partly-paid; or
 - (b) different amounts are paid up or remain unpaid on the securities.

Part 6.1—Prohibited acquisitions of relevant interests in voting shares

606 Prohibition on certain acquisitions of relevant interests in voting shares

Acquisition of relevant interests in voting shares through transaction entered into by or on behalf of person acquiring relevant interest

- (1) A person must not acquire a relevant interest in issued voting shares in a company if:
 - (a) the company is:
 - (i) a listed company; or
 - (ii) an unlisted company with more than 50 members; and
 - (b) the person acquiring the interest does so through a transaction in relation to securities entered into by or on behalf of the person; and
 - (c) because of the transaction, that person's or someone else's voting power in the company increases:
 - (i) from 20% or below to more than 20%; or
 - (ii) from a starting point that is above 20% and below 90%.

However, the person may acquire the relevant interest under one of the exceptions set out in section 611 without contravening this subsection.

Note 1: Section 9 defines *company* as meaning a company registered under this Act.

Note 2: Section 607 deals with the effect of a contravention of this section on transactions. Sections 608 and 609 deal with the meaning of *relevant interest*. Section 610 deals with the calculation of a person's voting power in a company.

Note 3: If the acquisition of relevant interests in an unlisted company with 50 or fewer members leads to the acquisition of a relevant interest in another company that is an unlisted company with more than 50 members, or a listed company, the acquisition is caught by this section because of its effect on that other company.

Acquisition of legal or equitable interest giving rise to relevant interest for someone else

- (2) A person must not acquire a legal or equitable interest in securities of a body corporate if, because of the acquisition:
- (a) another person acquires a relevant interest in issued voting shares in a company that is:
 - (i) a listed company; or
 - (ii) an unlisted company with more than 50 members; and
 - (b) someone's voting power in the company increases:
 - (i) from 20% or below to more than 20%; or
 - (ii) from a starting point that is above 20% and below 90%.

However, if the acquisition of the relevant interest is covered by one of the exceptions set out in section 611, the person may acquire the legal or equitable interest without contravening this subsection.

50 member threshold

- (3) In determining whether the company has more than 50 members for the purposes of subsection (1) or (2), count joint holders of a particular parcel of shares as 1 person.

Offers and invitations

- (4) A person must not:
- (a) make an offer, or cause an offer to be made on their behalf, if the person would contravene subsection (1) or (2) if the offer were accepted; or
 - (b) issue an invitation, or cause an invitation to be issued on their behalf, if the person would contravene subsection (1) or (2) if:
 - (i) an offer were made in response to the invitation; and
 - (ii) the offer were accepted.

Defences

- (5) It is a defence to the prosecution of a person for contravening subsection (1), (2) or (4) if the person proves that they contravened the subsection:

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- (a) because of inadvertence or mistake; or
- (b) because the person was not aware of a relevant fact or occurrence.

In determining whether the defence is available, disregard the person's ignorance of, or a mistake on the person's part concerning, a matter of law.

Extended meaning of acquiring relevant interests—conversions and increases in voting rights

- (6) A person is taken for the purposes of subsection (1) or (2) to acquire a relevant interest in voting shares in a company if:
 - (a) securities in which the person already had a relevant interest become voting shares in the company; or
 - (b) there is an increase in the number of votes that may be cast on a poll attached to voting shares that the person already had a relevant interest in.

The acquisition occurs when the securities become voting shares or the number of votes increases.

Note: Some examples of cases to which this subsection applies are:

- A person exercises a right to convert a non-voting preference share into an ordinary share that carries votes.
- A person pays up partly-paid shares with limited votes and this leads to an increase in the number of votes attached to the shares.

607 Effect on transactions

A transaction is not invalid merely because it involves a contravention of section 606.

608 Relevant interests in securities

Basic rule—relevant interest is holding, or controlling voting or disposal of, securities

- (1) A person has a relevant interest in securities if they:
 - (a) are the holder of the securities; or
 - (b) have power to exercise, or control the exercise of, a right to vote attached to the securities; or

- (c) have power to dispose of, or control the exercise of a power to dispose of, the securities.

It does not matter how remote the relevant interest is or how it arises. If 2 or more people can jointly exercise one of these powers, each of them is taken to have that power.

Extension to control exercisable through a trust, agreement or practice

- (2) In this section, power or control includes:
 - (a) power or control that is indirect; and
 - (b) power or control that is, or can be, exercised as a result of, by means of or by the revocation or breach of:
 - (i) a trust; or
 - (ii) an agreement; or
 - (iii) a practice; or
 - (iv) any combination of them;whether or not they are enforceable; and
 - (c) power or control that is, or can be made, subject to restraint or restriction.

It does not matter whether the power or control is express or implied, formal or informal, exercisable alone or jointly with someone else. It does not matter that the power or control cannot be related to a particular security.

Extension to relevant interests held through bodies corporate

- (3) A person has the relevant interests in any securities that any of the following has:
 - (a) a body corporate, or managed investment scheme, in which the person's voting power is above 20%;
 - (b) a body corporate, or managed investment scheme, that the person controls.

Paragraph (a) does not apply to a relevant interest that the body corporate or scheme itself has in the securities merely because of the operation of that paragraph in relation to another body corporate or managed investment scheme.

- (4) For the purposes of paragraph (3)(b), a person controls a body corporate if the person has the capacity to determine the outcome

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of decisions about the body corporate's financial and operating policies.

- (5) In determining whether a person has this capacity:
 - (a) the practical influence the person can exert (rather than the rights they can enforce) is the issue to be addressed; and
 - (b) any practice or pattern of behaviour affecting the body corporate's financial or operating policies is to be taken into account (even if it involves a breach of an agreement or a breach of trust).
- (6) The person does not control the body corporate merely because the person and an entity that is not an associate jointly have the capacity to determine the outcome of decisions about the body corporate's financial and operating policies.
- (7) A person is not taken to control a body corporate merely because of a capacity they have if they are under a legal obligation to exercise that capacity for the benefit of:
 - (a) if the person is an individual—someone else; or
 - (b) if the person is a body corporate—someone other than its members.

Extension to control in anticipation of performance of agreements etc.

- (8) If at a particular time all the following conditions are satisfied:
 - (a) a person has a relevant interest in issued securities;
 - (b) the person (whether before or after acquiring the relevant interest):
 - (i) has entered or enters into an agreement with another person with respect to the securities; or
 - (ii) has given or gives another person an enforceable right, or has been or is given an enforceable right by another person, in relation to the securities (whether the right is enforceable presently or in the future and whether or not on the fulfilment of a condition); or
 - (iii) has granted or grants an option to, or has been or is granted an option by, another person with respect to the securities;

- (c) the other person would have a relevant interest in the securities if the agreement were performed, the right enforced or the option exercised;

the other person is taken to already have a relevant interest in the securities.

Note: Subsections 609(6) and (7) deal with specific situations in which the agreement will not give rise to a relevant interest.

Body corporate may have relevant interest in its own securities

- (9) This section may result in a body corporate having a relevant interest in its own securities.

609 Situations not giving rise to relevant interests

Money lending and financial accommodation

- (1) A person does not have a relevant interest in securities merely because of a mortgage, charge or other security taken for the purpose of a transaction entered into by the person if:
 - (a) the mortgage, charge or security is taken or acquired in the ordinary course of the person's business of providing financial services and on ordinary commercial terms; and
 - (b) the person whose property is subject to the mortgage, charge or security is not an associate of the person.

Note: Sections 11 to 17 define *associate*.

Nominees and other trustees

- (2) A person who would otherwise have a relevant interest in securities as a bare trustee does not have a relevant interest in the securities if a beneficiary under the trust has a relevant interest in the securities because of a presently enforceable and unconditional right of the kind referred to in subsection 608(8).

Note: This subsection will often apply to a person who holds securities as a nominee.

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Holding of securities by securities dealer

- (3) A securities dealer does not have a relevant interest in securities merely because they hold securities on behalf of someone else in the ordinary course of their securities business.

Shares covered by buy-backs

- (4) A person does not have a relevant interest in a company's shares if the relevant interest would arise merely because the company has entered into an agreement to buy back the shares.

Proxies

- (5) A person does not have a relevant interest in securities merely because the person has been appointed to vote as a proxy or representative at a meeting of members, or of a class of members, of the company, body or managed investment scheme if:
- (a) the appointment is for one meeting only; and
 - (b) neither the person nor any associate gives valuable consideration for the appointment.

Exchange traded options and futures contracts

- (6) A person does not have a relevant interest in securities merely because of:
- (a) an exchange traded option over the securities; or
 - (b) a right to acquire the securities given by a futures contract.

This subsection stops applying to the relevant interest when the obligation to make or take delivery of the securities arises.

Note: Without this subsection, subsection 608(8) would create a relevant interest from the option or contract.

Conditional agreements

- (7) A person does not have a relevant interest in securities merely because of an agreement if the agreement:
- (a) is conditional on:
 - (i) a resolution under item 7 in the table in section 611 being passed; or

- (ii) ASIC exempting the acquisition under the agreement from the provisions of this Chapter under section 655A; and
 - (b) does not confer any control over, or power to substantially influence, the exercise of a voting right attached to the securities; and
 - (c) does not restrict disposal of the securities for more than 3 months from the date when the agreement is entered into.
- The person acquires a relevant interest in the securities when the condition referred to in paragraph (a) is satisfied.

Pre-emptive rights

- (8) A member of a company, body or managed investment scheme does not have a relevant interest in securities of the company, body or scheme merely because the company's, body's or scheme's constitution gives members pre-emptive rights on the transfer of the securities if all members have pre-emptive rights on the same terms.

Director of body corporate holding securities

- (9) A person does not have a relevant interest in securities merely because:
 - (a) the person is a director of a body corporate; and
 - (b) the body corporate has a relevant interest in those securities.

Prescribed exclusions

- (10) A person does not have a relevant interest in securities in the circumstances specified in the regulations. The regulations may provide that interests in securities are not relevant interests subject to specified conditions.

610 Voting power in a body corporate

Person's voting power in a body corporate

- (1) A person's **voting power** in a body corporate is:

$$\frac{\text{Person's and associates' votes}}{\text{Total votes in body corporate}} \times 100$$

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where:

person's and associates' votes is the total number of votes attached to all the voting shares in the body corporate (if any) that the person or an associate has a relevant interest in.

total votes in body corporate is the total number of votes attached to all voting shares in the body corporate.

Note: Even if a person's relevant interest in voting shares is based on control over disposal of the shares (rather than control over voting rights attached to the shares), their voting power in the body corporate is calculated on the basis of the number of votes attached to those shares.

Counting votes

- (2) For the purposes of this section, the number of votes attached to a voting share in a body corporate is the maximum number of votes that can be cast in respect of the share on a poll:
- (a) if the election of directors is determined by the casting of votes attached to voting shares—on the election of a director of the body corporate; or
 - (b) if the election of directors is not determined by the casting of votes attached to voting shares—on the adoption of a constitution for the body corporate or the amendment of the body corporate's constitution.

Note: The Corporations and Securities Panel may decide that the setting or varying of voting rights in a way that affects control of a body corporate is unacceptable circumstances under section 657A.

- (3) If:
- (a) a transaction in relation to, or an acquisition of an interest in, securities occurs; and
 - (b) before the transaction or acquisition, a person did not have a relevant interest in particular voting shares but an associate of the person did have a relevant interest in those shares; and
 - (c) because of the transaction or acquisition, the person acquires a relevant interest in those shares;

then, for the purposes of applying section 606 to the transaction or acquisition, the person's voting power is taken to have increased because of the transaction or acquisition from what it would have been before the transaction or acquisition if the votes attached to those shares were disregarded to what it was after the transaction

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or acquisition (taking the votes attached to those shares into account).

- (4) Disregard the operation of section 613 in working out a person's voting power in a body corporate.

Part 6.2—Exceptions to the prohibition

611 Exceptions to the prohibition

The following table sets out:

- (a) acquisitions of relevant interests in a company's voting shares that are exempt from the prohibition in subsection 606(1); and
- (b) acquisitions of relevant interests in a company's voting shares resulting from acquisitions of legal or equitable interests in securities of a body corporate that are exempt from the prohibition in subsection 606(2).

Note: Some of the items in the table cover only activities in relation to the company itself (items 7, 8, 12 and 13) while the other items cover acquisitions in that company that may occur through activities in relation to other companies.

Acquisitions that are exempt	[operative]
Takeover bids	
<i>Acceptance of takeover offer</i>	
1	An acquisition that results from the acceptance of an offer under a takeover bid. See also section 612.
<i>On-market purchase during bid period</i>	
2	An acquisition in relation to bid class securities that results from an on-market transaction if: <ul style="list-style-type: none">(a) the acquisition is by or on behalf of the bidder under a takeover bid; and(b) the acquisition occurs during the bid period; and(c) the bid is for all the voting shares in the bid class; and(d) the bid is:<ul style="list-style-type: none">(i) unconditional; or(ii) conditional only on the happening of an event referred to in subsection 652C(1) or (2). See also sections 612 and 613.

Acquisitions that are exempt

[operative]

On-market purchase of convertible securities during bid period

- 3 An acquisition of bid class securities that results directly from the exercise of rights attached to convertible securities if:
- (a) the acquisition is by or on behalf of the bidder under a takeover bid; and
 - (b) the bidder acquired a relevant interest in the convertible securities through an on-market transaction during the bid period; and
 - (c) the bid is for all the voting shares in the bid class; and
 - (d) the bid is:
 - (i) unconditional; or
 - (ii) conditional only on the happening of an event referred to in subsection 652C(1) or (2).

See sections 612 and 613.

Acceptance of scrip offered as takeover consideration

- 4 An acquisition that results from the acceptance of:
- (a) an offer under a takeover bid if the voting shares are included in the consideration for offers under the bid; or
 - (b) an offer that results in an acquisition to which item 5 applies.

See also section 612.

Nature of acquirer

- 6 An acquisition that results from the exercise by a person of a power, or appointment as a receiver, or receiver and manager, under a mortgage, charge or other security if:
- (a) the person's ordinary business includes providing financial services; and
 - (b) the person took or acquired the security in the ordinary course of their business of providing financial services and on ordinary commercial terms.

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Acquisitions that are exempt

[operative]

Approval by resolution of target

- 7 An acquisition approved previously by a resolution passed at a general meeting of the company in which the acquisition is made, if:
- (a) no votes are cast in favour of the resolution by:
 - (i) the person proposing to make the acquisition and their associates; or
 - (ii) the persons (if any) from whom the acquisition is to be made and their associates; and
 - (b) the members of the company were given all information known to the person proposing to make the acquisition or their associates, or known to the company, that was material to the decision on how to vote on the resolution, including:
 - (i) the identity of the person proposing to make the acquisition and their associates; and
 - (ii) the maximum extent of the increase in that person's voting power in the company that would result from the acquisition; and
 - (iii) the voting power that person would have as a result of the acquisition; and
 - (iv) the maximum extent of the increase in the voting power of each of that person's associates that would result from the acquisition; and
 - (v) the voting power that each of that person's associates would have as a result of the acquisition.

Target newly formed

- 8 An acquisition that results from an issue of securities of the company in which the acquisition is made if the company has not started to carry on any business and has not borrowed any money.

Manner of acquisition

3% creep in 6 months

- 9 An acquisition by a person if:
- (a) throughout the 6 months before the acquisition that person, or any other person, has had voting power in the company of at least 19%; and
 - (b) as a result of the acquisition, none of the persons referred to in paragraph (a) would have voting power in the company more than 3 percentage points higher than they had 6 months before the acquisition.

Acquisitions that are exempt

[operative]

Rights issues

- 10 An acquisition that results from an issue of securities that satisfies all of the following conditions:
- (a) a company offers to issue securities in a particular class;
 - (b) offers are made to every person who holds securities in that class to issue them with the percentage of the securities to be issued that is the same as the percentage of the securities in that class that they hold before the issue;
 - (c) all of those persons have a reasonable opportunity to accept the offers made to them;
 - (d) agreements to issue are not entered into until a specified time for acceptances of offers has closed;
 - (e) the terms of all the offers are the same.

This extends to an acquisition by a person as underwriter to the issue or sub-underwriter.

See section 615.

Dividend reinvestment etc.

- 11 An acquisition that results from an issue of:
- (a) shares in a company to existing holders of shares in the company under a dividend reinvestment plan or bonus share plan; or
 - (b) interests in a managed investment scheme to existing holders of interests in the scheme under a distribution reinvestment plan or switching facility;

if the plan or facility is available to all members.

Disregard any unavailability to foreign holders in determining whether the plan or facility is available to all members.

Initial public offering (IPO) fundraising

- 12 An acquisition that results from an issue under a disclosure document of securities in the company in which the acquisition is made if:
- (a) the issue is to a promoter; and
 - (b) the disclosure document is the first issued by the company; and
 - (c) the disclosure document disclosed the effect that the acquisition would have on the promoter's voting power in the company.

Underwriting of fundraising

- 13 An acquisition that results from an issue under a disclosure document of securities in the company in which the acquisition is made if:
- (a) the issue is to a person as underwriter to the issue or sub-underwriter; and
 - (b) the disclosure document disclosed the effect that the acquisition would have on the person's voting power in the company.

Section 612

Acquisitions that are exempt	[operative]
<i>Acquisition through listed company</i>	
14	An acquisition that results from another acquisition of relevant interests in voting shares in a body corporate included in the official list of: (a) a stock exchange; or (b) a foreign body conducting a stock market that is a body approved in writing by ASIC for the purposes of this item.
<i>Wills etc.</i>	
15	An acquisition through a will or through operation of law.
<i>Forfeiture of shares</i>	
16	An acquisition that results from an auction of forfeited shares conducted on-market.
Compromise, arrangement, liquidation or buy-back	
<i>Part 5.1 compromise or arrangement</i>	
17	An acquisition that results from a compromise or arrangement approved by the Court under Part 5.1.
<i>Section 507 arrangement</i>	
18	An acquisition that results from an arrangement entered into by a liquidator under section 507.
<i>Buy-back</i>	
19	An acquisition that results from a buy-back authorised by section 257A.
Regulations	
20	An acquisition made in a manner or in circumstances prescribed by the regulations. The circumstances may include acquisitions of relevant interests in voting shares in a specified body or class of bodies.

612 Effect of non-compliance with takeover rules for exceptions 1 to 4

The exceptions in items 1 to 4 of the table in section 611 do not apply to a takeover bid if the bid is carried out in contravention of:

- (a) section 618 (full or proportionate bid); or
- (b) section 619 (offers to be the same); or
- (c) subsection 621(3) (minimum price); or
- (d) subsection 624(1) (minimum offer period); or

- (e) sections 625 to 630 (conditional offers); or
- (f) items 2, 3 and 6 in the table in subsection 633(1) (procedural steps for off-market bid); or
- (g) items 3, 4 and 6 in the table in section 635 (procedural steps for market bid).

613 Bidder not to exercise voting rights if failure to send bids for off-market acquisition—exception 2 or 3

If the exception in item 2 or 3 of the table in section 611 applies to an acquisition on-market during a takeover bid, the bidder is not entitled to exercise the voting rights attached to the shares if:

- (a) the bid is an off-market bid; and
- (b) the bidder fails to send offers under the bid within 28 days after giving the bidder's statement to the target.

615 Treatment of foreign holders under equal access issue—exception 10

The exception in item 10 of the table in section 611 applies even though the conditions set out in the item are not satisfied in respect of foreign holders of the company's securities if, under the terms of the offers:

- (a) the company must appoint a nominee for foreign holders of the company's securities who is approved by ASIC; and
- (b) the company must transfer to the nominee:
 - (i) the securities that would otherwise be issued to the foreign holders who accept the offer; or
 - (ii) the right to acquire those securities; and
- (c) the nominee must sell the securities, or those rights, and distribute to each of those foreign holders their proportion of the proceeds of the sale net of expenses.

Part 6.3—The different types of takeover bid

616 Off-market bids and market bids

- (1) There are 2 kinds of takeover bid:
- (a) an off-market bid (for quoted or unquoted securities); or
 - (b) a market bid (only available for quoted securities).

Note: Although the prohibition in section 606 is against acquiring relevant interests in voting shares, a takeover bid may be made for any securities (for example, as a preliminary to compulsorily acquiring securities in that class under Part 6A.1).

- (2) The following table shows where to find the provisions dealing with the main features of the offers that may be made under off-market bids and market bids and the procedures to be followed:

Takeover bids		[signpost table]	
	Feature	Off-market bid	Market bid
1	people to whom offers made	617(1)-(2)	617(3)
2	securities covered	618(1)-(2)	618(3)
3	consideration offered for the securities	621(1), (3)-(5) and 651A	621(2), (3)-(5)
4	escalation agreements and collateral benefits not allowed	622 and 623	622 and 623
5	offer period	624(1)-(2) and 650C	624(1)-(2) and 649C
6	conditional offers	625(2)-(3) and 626-630	625(1)
7	procedure to be followed in making bid	632 and 633	634 and 635
8	acceptances	650E and 653A-653B	-

Part 6.4—Formulating the takeover offer

Division 1—General

617 Securities covered by the bid

Off-market bid

- (1) An off-market bid must relate to securities:
 - (a) in a class of securities (the *bid class*); and
 - (b) that exist or will exist as at the date set by the bidder under subsection 633(2).

Note: Subsection 92(3) defines *securities* for the purposes of this Chapter.

- (2) If other securities exist or will exist at that date that:
 - (a) will convert, or may be converted, to securities in the bid class; or
 - (b) confer rights to be issued securities in the bid class;the bid may extend to securities that come to be in the bid class during the offer period due to a conversion or exercise of the rights.

Note: The bidder's statement must say if the bid is extended in this way (see paragraph 636(1)(j)).

Market bid

- (3) A market bid must relate to securities:
 - (a) in a class of quoted securities (the *bid class*); and
 - (b) that exist or will exist at any time during the offer period.

618 Offers must be for all or a proportion of securities in the bid class

Off-market bid

- (1) An offer for securities under an off-market bid must be an offer to buy:
 - (a) all the securities in the bid class; or

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(b) a specified proportion of the securities in the bid class.

The proportion specified under paragraph (b) must be the same for all holders of securities in the bid class.

Off-market bid—non-marketable parcels

- (2) If accepting an offer under an off-market bid for quoted securities would leave a person with a parcel of the securities that is less than a marketable parcel (within the meaning of the rules of the relevant securities exchange), the offer extends to that parcel.

Market bid

- (3) An offer for securities under a market bid must be an offer to buy all the securities in the bid class.

619 General terms of the offer

Off-market bid

- (1) All the offers made under an off-market bid must be the same.

Note: The offers may include alternative forms of consideration (see section 621).

- (2) In applying subsection (1), disregard the following:
- (a) any differences in the offers attributable to the fact that the number of securities that may be acquired under each offer is limited by the number of securities held by the holder;
 - (b) any differences in the offers attributable to the fact that the offers relate to securities having different accrued dividend or distribution entitlements;
 - (c) any differences in the offers attributable to the fact that the offers relate to securities on which different amounts are paid up or remain unpaid;
 - (d) any differences in the offers attributable to the fact that the bidder may issue or transfer only whole numbers of securities as consideration for the acquisition;
 - (e) any additional cash amount offered to holders instead of the fraction of a security that they would otherwise be offered.

Foreign holders

- (3) If the consideration for the bid includes an offer of securities, the securities do not need to be offered to foreign holders of the target's securities if under the terms of the bid:
- (a) the bidder must appoint a nominee for foreign holders of the target's securities who is approved by ASIC; and
 - (b) the bidder must transfer to the nominee:
 - (i) the securities that would otherwise be transferred to the foreign holders who accept the bid for that consideration; or
 - (ii) the right to acquire those securities; and
 - (c) the nominee must sell the securities, or those rights, and distribute to each of those foreign holders their proportion of the proceeds of the sale net of expenses.

620 Off-market bid (offer formalities)

- (1) Each offer under an off-market bid must:
- (a) be in writing; and
 - (b) have the same date; and
 - (c) provide that, unless withdrawn, it will remain open until the end of the offer period (see section 624); and
 - (d) state how, and when, the bidder is to satisfy their obligations.
- (2) Each offer must provide that the bidder is to pay or provide the consideration for the offer:
- (a) if the bidder is given the necessary transfer documents with the acceptance—by the end of whichever of the following periods ends earlier:
 - (i) 1 month after the offer is accepted or, if the offer is subject to a defeating condition, within 1 month after the takeover contract becomes unconditional
 - (ii) 21 days after the end of the offer period; or
 - (b) if the bidder is given the necessary transfer documents after the acceptance and before the end of the bid period—within 1 month after the bidder is given the necessary transfer documents; or

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- (c) if the bidder is given the necessary transfer documents after the acceptance and after the end of the bid period—within 21 days after the bidder is given the necessary transfer documents.

Note: Subsection 630(1) requires an offer that is subject to a defeating condition to specify a date for declaring whether the condition has been fulfilled or not.

- (3) The offer may provide that the bidder may avoid the takeover contract if the bidder is not given the necessary transfer documents within 1 month after the end of the offer period.

Division 2—Consideration for the offer

621 Consideration offered

Off-market bid—general

- (1) A bidder making an off-market bid for securities may offer any form of consideration for the securities, including:
 - (a) a cash sum; or
 - (b) securities (including shares, debentures, interests in a managed investment scheme or options); or
 - (c) a combination of a cash sum and securities.

Note: Sections 650B and 651A deal with variations of the consideration offered under the bid.

Market bid—cash only

- (2) As the offers under a market bid for securities are made through the stock market of a securities exchange, the bidder must offer to acquire the securities for a cash sum only for each security.

Note: Section 649B deals with variations of the consideration offered under the bid.

All bids—minimum consideration if bidder purchased securities in the 4 months before the bid

- (3) The consideration offered for securities in the bid class under a takeover bid must equal or exceed the maximum consideration that the bidder or an associate provided, or agreed to provide, for a security in the bid class under any purchase or agreement during the 4 months before the date of the bid.
- (4) For the purposes of subsection (3), the consideration offered or provided for a security is:
 - (a) if the consideration offered or provided is a cash sum only—the amount of that cash sum; or
 - (b) if the consideration offered or provided does not include a cash sum—the value of that consideration; or

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- (c) if the consideration offered or provided is a cash sum and other consideration—the sum of the amount of the cash sum and the value of the other consideration.

The value of consideration that is not a cash sum is to be ascertained as at the time the relevant offer, purchase or agreement is made.

- (5) If:
 - (a) a person agrees to buy a security in a company; and
 - (b) the agreement provides that the price payable for the security is a price specified in the agreement but may be varied in accordance with the terms of the agreement;any variation in price under the agreement is to be disregarded in working out, for the purposes of subsection (3), the price agreed to be paid for the security under the agreement.

622 Escalation agreements

Benefits linked to bids and proposed bids not allowed

- (1) A person who makes or proposes to make a takeover bid for securities, or their associate, contravenes this section if:
 - (a) a person acquires a relevant interest in securities in the bid class within the 6 months before the bid is made or proposed; and
 - (b) at any time whatever, the bidder, proposed bidder or associate gives or agrees to give a benefit to, or receives or agrees to receive a benefit from:
 - (i) a person who had a relevant interest in any of the paragraph (a) securities immediately before the acquisition; or
 - (ii) an associate of a person who had a relevant interest in any of those securities at that time; and
 - (c) the benefit is attributable to the acquisition or matters that include the acquisition; and
 - (d) the amount or value of the benefit is, or is to be, determined by reference to or to matters that include either of the following:

- (i) the amount or value of the consideration for the securities under the bid or proposed bid;
- (ii) the amount or value of the consideration for which the bidder or proposed bidder acquires, offers or proposes to offer to acquire, securities in the bid class during the offer period (whether or not under the bid) or under Chapter 6A.

Contravening agreements void

- (2) An agreement is void to the extent that it purports to provide for:
 - (a) a person to give a benefit to a person; or
 - (b) a person to receive a benefit from a person;in contravention of subsection (1).

623 Collateral benefits not allowed

- (1) A bidder, or an associate, must not, during the offer period for a takeover bid, give, offer to give or agree to give a benefit to a person if:
 - (a) the benefit is likely to induce the person or an associate to:
 - (i) accept an offer under the bid; or
 - (ii) dispose of securities in the bid class; and
 - (b) the benefit is not offered to all holders of securities in the bid class under the bid.
- (2) For the purpose of this section, a person does not receive a benefit that is not offered under a takeover bid merely because the person sells bid class securities on-market and the takeover bid is an off-market bid or a conditional bid.
- (3) This section does not prohibit:
 - (a) the variation of a takeover offer as provided by sections 649A to 650D; or
 - (b) an acquisition of securities through an on-market transaction; or
 - (c) simultaneous takeover bids for different classes of securities in the target.

Division 3—The offer period

624 Offer period

Offer period set in offer

- (1) The offers under a takeover bid must remain open for the period stated in the offer. The period must:
 - (a) start on the date the first offer under the bid is made; and
 - (b) last for at least 1 month, and not more than 12 months.

However, the offer may be withdrawn during that period under section 652B.

Note: Sections 649C (market bids) and 650C (off-market bids) deal with variation of the offer period.

Automatic extension of offer period if bidder reaches 50% or consideration increased in last week

- (2) If, within the last 7 days of the offer period:
 - (a) for an off-market bid—the offers under the bid are varied to improve the consideration offered; or
 - (b) in any case—the bidder's voting power in the target increases to more than 50%;

the offer period is extended so that it ends 14 days after the event referred to in paragraph (a) or (b). The bidder must give the target and everyone who has not accepted an offer under the bid written notice that the extension has occurred within 3 days after that event.

Note: The consideration for a market bid cannot be increased in the last 5 trading days of the offer period (see section 649B).

Division 4—Conditional offers

625 Conditional offers—general

Market bids

- (1) Offers under a market bid must be unconditional.

Off-market bids may generally be conditional

- (2) Offers under an off-market bid may be subject to conditions that are not prohibited by sections 626 to 629.

- (3) If:

- (a) the consideration offered is or includes securities; and
- (b) the offer or the bidder's statement states or implies that the securities are to be quoted on a stock market of a securities exchange (whether in Australia or elsewhere);

the following rules apply:

- (c) the offer is subject to a condition that:
 - (i) an application for admission to quotation will be made within 7 days after the start of the bid period; and
 - (ii) permission for admission to quotation will be granted no later than 7 days after the end of the bid period;
- (d) the offer may not be freed from this condition.

Note: Section 1325A provides that a Court may make a remedial order if the condition is not satisfied.

626 Maximum acceptance conditions in off-market bids

Maximum acceptance conditions not allowed

- (1) Offers under an off-market bid must not be subject to a maximum acceptance condition. A maximum acceptance condition is one that provides that the offers will terminate, or the maximum consideration offered under the bid will be reduced, if one or more of the following occur:
 - (a) the number of securities for which the bidder receives acceptances reaches or exceeds a particular number; or

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- (b) the bidder's voting power in the company reaches or exceeds a particular percentage; or
 - (c) the percentage of securities the bidder has relevant interests in reaches or exceeds a particular percentage of securities in that class.
- (2) For the purposes of subsection (1), it does not matter:
- (a) how the condition is expressed; or
 - (b) how a particular number or percentage was, or is to be, determined; or
 - (c) whether or not a particular number or percentage is specified in the condition and, if it is so specified, how it is expressed.
- (3) For the purposes of subsection (1), an offer under an off-market bid terminates if:
- (a) the offer lapses, is withdrawn or otherwise ceases to have effect; or
 - (b) a binding takeover contract will not result from an acceptance of the offer; or
 - (c) an obligation of the bidder will not arise under the takeover contract; or
 - (d) the takeover contract is rescinded; or
 - (e) the bidder is entitled to rescind the takeover contract; or
 - (f) the bidder is relieved of an obligation arising under the takeover contract.

627 Discriminatory conditions not allowed for off-market bids

Offers under an off-market bid must not be subject to a condition that allows the bidder to acquire, or may result in the bidder acquiring, securities from some but not all of the people who accept the offers. It does not matter how the condition is expressed.

628 Conditions requiring payments to officers of target not allowed in off-market bids

An offer to a person under an off-market bid must not be made subject to a condition that requires the person to approve or consent to a payment or other benefit to an officer of the target or a related body corporate:

- (a) as compensation for loss of; or
- (b) as consideration in connection with retirement from; any office or employment in connection with the management of the target or of a related body corporate. A purported requirement of this kind is void.

629 Conditions turning on bidder's or associate's opinion not allowed in off-market bids

- (1) Offers under an off-market bid must not be subject to a defeating condition if the fulfilment of the condition depends on:
 - (a) the bidder's, or an associate's, opinion, belief or other state of mind; or
 - (b) the happening of an event that is within the sole control of, or is a direct result of action by, any of the following:
 - (i) the bidder (acting alone or together with an associate or associates);
 - (ii) an associate (acting alone or together with the bidder or another associate or associates of the bidder).

A purported condition of this kind is void.

Note: Section 9 defines *defeating condition*. Sections 630, 650F and 650G deal with defeating conditions.

- (2) For the purposes of paragraph (1)(b):
 - (a) the target; and
 - (b) a subsidiary of the target;are taken not to be associates of the bidder if they would otherwise be an associate merely because they are a related body corporate.

Note: Paragraph 11(b) makes related bodies corporate associates of each other.

630 Defeating conditions

Off-market bid may include defeating conditions

- (1) Offers under an off-market bid may be made subject to a defeating condition only if the offers specify a date (not more than 14 days and not less than 7 days before the end of the offer period) for giving a notice on the status of the condition.

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- (2) If the offer period is extended by a period:
- (a) the date for giving the notice is taken to be postponed for the same period; and
 - (b) as soon as practicable after the extension, the bidder must give a notice that states:
 - (i) the new date for giving the notice of the status of the condition; and
 - (ii) whether the offers have been freed from the condition and whether, so far as the bidder knows, the condition has been fulfilled on the date the notice under this subsection is given.

Bidder to give notice of status of defeating condition near end of offer period

- (3) On the date determined under subsection (1) or (2), the bidder must give a notice that states:
- (a) whether the offers are free of the condition; and
 - (b) whether, so far as the bidder knows, the condition was fulfilled on the date the notice is given; and
 - (c) the bidder's voting power in the target.

The bidder must comply with this subsection whether or not the bidder has given a notice under subsection (4) or 650F(1).

Note: The offers may be freed of the condition by a declaration by the bidder under subsection 650F(1).

Bidder to give notice if defeating condition fulfilled

- (4) If the condition is fulfilled (so that the offers become free of the condition) during the bid period but before the date for publishing the notice on the status of the condition, the bidder must publish as soon as practicable a notice that states that the condition has been fulfilled.
- (5) A notice under this section is given by:
- (a) giving the notice to the target; and
 - (b) for quoted bid class securities—giving the notice to the relevant securities exchange; and
 - (c) for unquoted bid class securities—lodging the notice with ASIC.

Part 6.5—The takeover procedure

Division 1—The overall procedure

631 Proposing or announcing a bid

Bid must proceed within 2 months after proposal

- (1) If a person publicly proposes to make a takeover bid for securities in a company, either alone or with other persons, the person contravenes this subsection unless they make offers for the securities under a takeover bid within 2 months after the proposal. The terms and conditions of the bid must be the same as or not substantially less favourable than those in the public proposal.

Note: The Court has power under section 1325B to order a person to proceed with a bid.

Proposals if takeover bid not intended

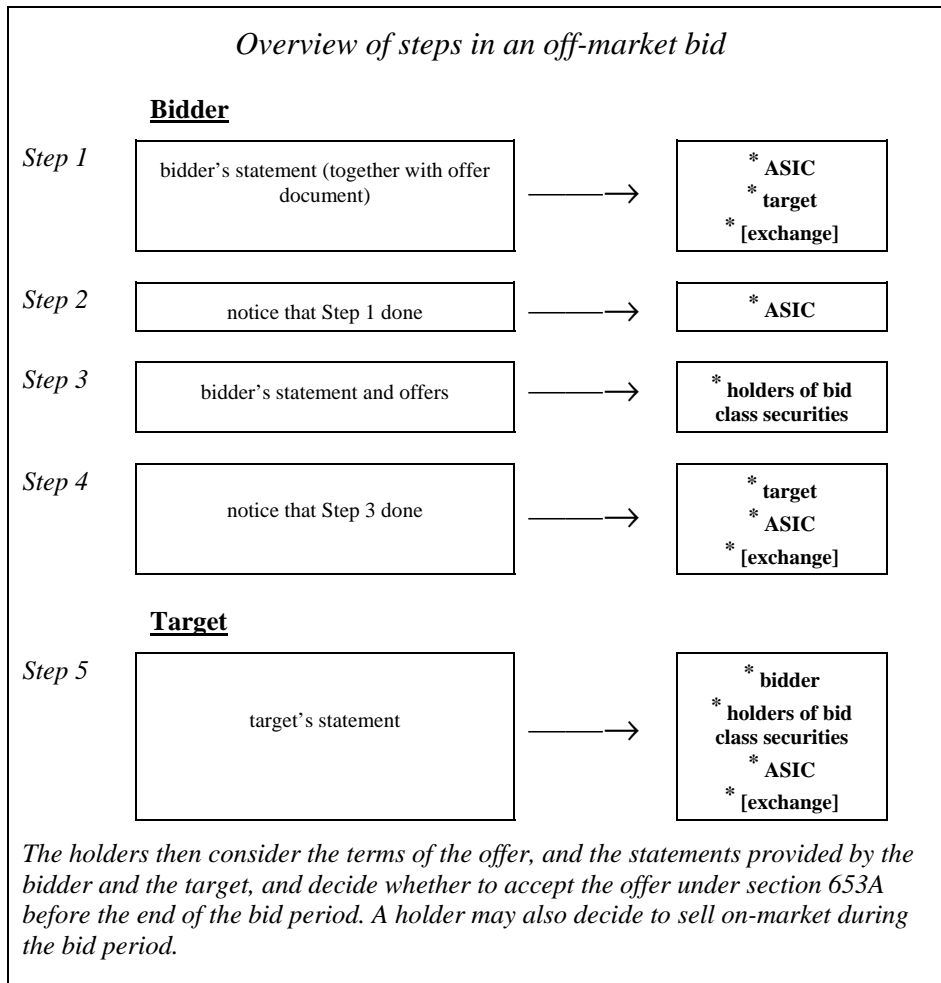
- (2) A person must not publicly propose, either alone or with other persons, to make a takeover bid if:
 - (a) the person knows the proposed bid will not be made, or is reckless as to whether the proposed bid is made; or
 - (b) the person is reckless as to whether they will be able to perform their obligations relating to the takeover bid if a substantial proportion of the offers under the bid are accepted.
- (3) Section 1314 (continuing offences) and subsection 1324(2) (injunctions) do not apply in relation to a failure to make a takeover bid in accordance with a public proposal under subsection (1).

Note: For liability and defences for contraventions of this section, see sections 670E and 670F.

632 Overview of steps in an off-market bid

The following diagram gives an overview of the steps involved in an off-market bid.

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633 Detailed steps in an off-market bid

- (1) The following table provides for the steps that a bidder must take to make an effective off-market bid and the steps that a target must take when an off-market bid is made.

Steps in off-market bid		[operative table]
Steps	Timing and relevant provisions	
1	<p>The bidder must prepare:</p> <ul style="list-style-type: none"> • a bidder’s statement; and • if the bidder’s statement does not set out all the terms of the offer—an offer document that sets out the other terms of the offer. 	<p><i>See section 636 for content of statement.</i></p>
2	<p>The bidder must lodge a copy of the bidder’s statement and offer document with ASIC.</p>	
3	<p>The bidder must send a copy of the bidder’s statement and offer document to the target.</p>	<p>To be done on the day the bidder’s statement is lodged or within 21 days afterwards</p>
4	<p>The bidder must lodge with ASIC a notice stating that the bidder’s statement and offer document have been sent to the target.</p>	<p>To be done on the day the bidder’s statement is sent to the target</p>
5	<p>The bidder must send a copy of the bidder’s statement and offer document to each securities exchange that has a stock market on which the target’s securities are quoted.</p>	<p>To be done on the day the bidder’s statement is sent to the target <i>See also subsection (5).</i></p>
6	<p>The bidder must send the bidder’s statement and offers to each person (other than the bidder) who holds:</p> <ul style="list-style-type: none"> • securities in the bid class; or • if the bid extends to securities that come to be in the bid class due to the conversion of or exercise of rights attached to other securities (see subsection 617(2))—the other securities; <p>as at the date set by the bidder under subsection (2).</p> <p>The offers must be made on the terms set out in the bidder’s statement and the offer document lodged with ASIC under item 2.</p>	<p>To be done:</p> <ul style="list-style-type: none"> • within a 3 day period; and • within 14-28 days after the bidder’s statement is sent to the target <p>The directors of the target may agree that the offers and accompanying documents be sent earlier.</p> <p><i>See also subsections (5) and (6).</i></p> <p><i>Item 2 of the table in section 611 covers offers made by the bidder on-market during the period between the lodgment of the bidder’s statement and the making of the offers under the bid.</i></p> <p><i>Sections 648B and 648C provide for the manner in which documents may be sent to holders.</i></p>

Chapter 6 Takeovers

Part 6.5 The takeover procedure

Division 1 The overall procedure

Section 633

Steps in off-market bid		[operative table]
Steps	Timing and relevant provisions	
7	The bidder must send a notice to the target that the bidder's statement and offers have been sent as required by item 6. The notice must state the date of the offers.	To be done on the day all offers have been sent as required by item 6 <i>See subsection 620(1) on date of offer.</i>
8	The bidder must send a notice that offers have been sent as required by item 6 to each securities exchange that has a stock market on which the target's securities are quoted.	To be done on the day all offers have been sent as required by item 6
9	The bidder must lodge with ASIC a notice that offers have been sent as required by item 6.	To be done on the day all offers have been sent as required by item 6
10	The target must prepare a target's statement.	<i>See section 638 for content of statement.</i>
11	The target must send the target's statement (and any accompanying report) to the bidder.	To be done no later than 15 days after the target receives a notice that all offers have been sent as required by item 6
12	The target must send a copy of the target's statement (and any accompanying report) to each person who holds: <ul style="list-style-type: none">• securities in the bid class; or• if the bid extends to securities that come to be in the bid class due to the conversion of or exercise of rights attached to other securities (see subsection 617(2))—the other securities; as at the date set by the bidder under subsection (2).	To be done: <ul style="list-style-type: none">• no earlier than the day on which the target sends the target's statement to the bidder; and• no later than 15 days after the target receives a notice that all offers have been sent as required by item 6 <i>Sections 648B and 648C provide for the manner in which documents may be sent to holders.</i>
13	The target must lodge a copy of the target's statement (and any accompanying report) with ASIC.	To be done on the day the target's statement is sent to the bidder <i>See also subsection (7).</i>

Steps in off-market bid		[operative table]
Steps	Timing and relevant provisions	
14	The target must send a copy of the target's statement (and any accompanying report) to each securities exchange that has a stock market on which the target's securities are quoted.	To be done on the day the target's statement is sent to the bidder <i>See also subsection (7).</i>

Date for determining holders of securities

- (2) The people to whom information is to be sent under items 6 and 12 of the table in subsection (1) are the holders of the securities referred to in those items as at the date set by the bidder in:
- (a) the bidder's statement; or
 - (b) a separate written notice given to the target on or before the date set by the bidder.

Note: The bidder may set the date when the bidder asks the target for a list of members under section 641.

- (3) The date set by the bidder must be:
- (a) on or after the date on which the bidder gives the bidder's statement, or the separate written notice, to the target; and
 - (b) on or before the date on which the first offers under the bid are made to holders of the securities.
- (4) As soon as practicable after setting the day, the bidder must give notice of it by:
- (a) if the securities in the bid class are quoted—giving the notice to the relevant securities exchange; or
 - (b) otherwise—lodging the notice with ASIC.

Information to be sent with bidder's statement

- (5) A bidder's statement required to be sent under item 5 or 6 in the table in subsection (1) must be sent together with any other information sent by the bidder to the target with the statement.

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Information to be sent with notices that offers have been sent

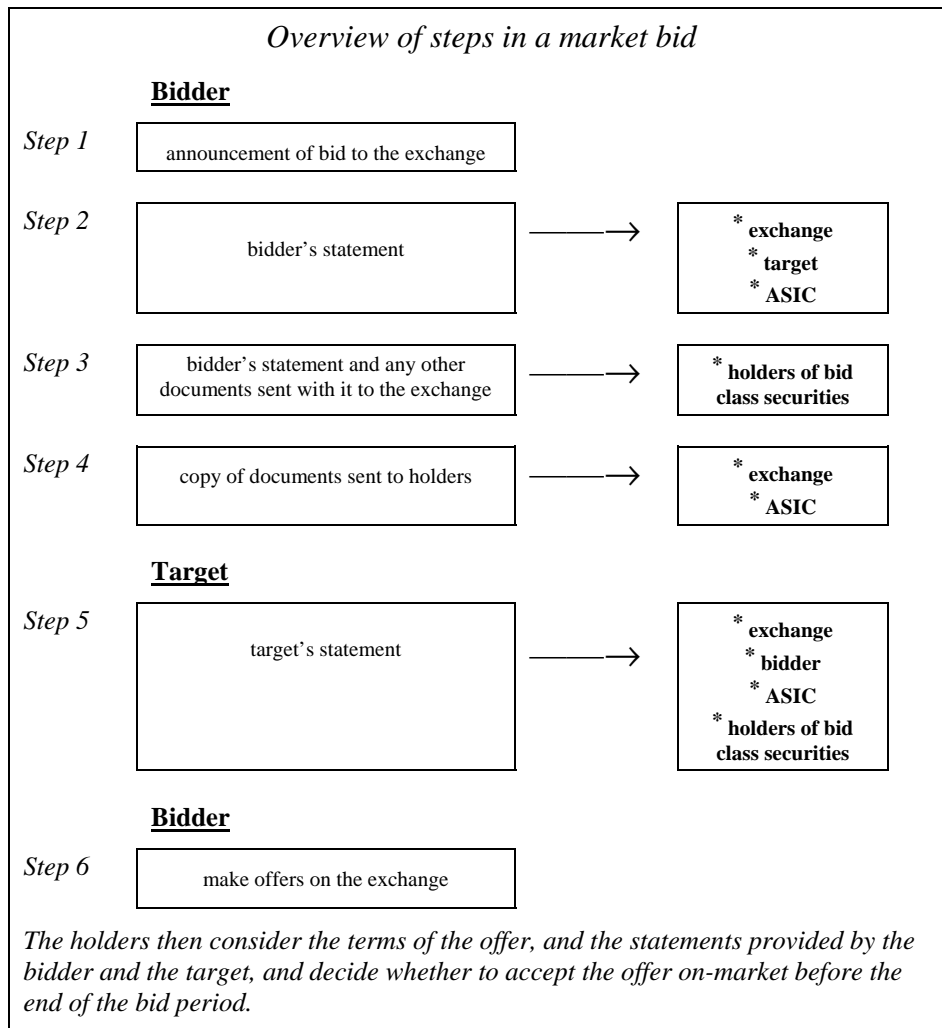
- (6) If the bidder sends the people to whom the bidder's statement is sent under item 6 of the table in subsection (1) additional information together with the bidder's statement and the offer, the bidder must also include that information in any notice under item 7, 8 or 9 of the table.

Information to be sent with target's statement

- (7) If the target sends the people to whom the target's statement is sent under item 12 of the table in subsection (1) additional information together with the target's statement, the target must also include that information in any notice under item 13 or 14 of the table.

634 Overview of steps in a market bid

The following diagram gives an overview of the steps involved in a market bid.



635 Detailed steps in a market bid

The following table provides for the steps that a bidder must take to make an effective market bid and the steps that a target must take when a market bid is made.

Chapter 6 Takeovers

Part 6.5 The takeover procedure

Division 1 The overall procedure

Section 635

Steps in market bid		[operative]
Steps	Timing and relevant provisions	
1	The bidder must prepare a bidder's statement.	<i>See section 636 for content of statement</i>
2	The bidder must have the bid announced to the relevant securities exchange.	
3	The bidder must send a copy of the bidder's statement to the relevant securities exchange.	To be done on the day the announcement is made
4	The bidder must send to the target: <ul style="list-style-type: none">• a copy of the bidder's statement; and• a copy of any other document that was sent with the bidder's statement to the relevant securities exchange.	To be done on the day the announcement is made
5	The bidder must lodge with ASIC: <ul style="list-style-type: none">• a copy of the bidder's statement; and• a copy of any other document that was sent with the bidder's statement to the relevant securities exchange.	To be done on the day the announcement is made
6	The bidder must send to each holder of bid class securities (other than the bidder): <ul style="list-style-type: none">• a copy of the bidder's statement; and• a copy of any other document that was sent with the bidder's statement to the relevant securities exchange.	Within 14 days after the announcement is made <i>Sections 648B and 648C provide for the manner in which documents may be sent to holders.</i>
7	The bidder must lodge with ASIC a copy of every other document sent to holders of bid class securities with the bidder's statement.	To be done no later than the day copies of the bidder's statement have been sent to all holders of bid class securities

Steps in market bid		[operative]
Steps	Timing and relevant provisions	
8	The bidder must give the relevant securities exchange a copy of every other document sent to holders of bid class securities with the bidder's statement.	To be done no later than the day copies of the bidder's statement have been sent to all holders of bid class securities
9	The target must prepare a target's statement.	<i>See section 638 for content of statement</i>
10	The target must send a copy of the target's statement to the relevant securities exchange.	Within 14 days after the announcement is made
11	The target must send to the bidder: <ul style="list-style-type: none"> • a copy of the target's statement; and • a copy of any other document that was sent with the target's statement to the relevant securities exchange. 	To be done on the day the target sends a copy of the target's statement to the securities exchange
12	The target must lodge with ASIC: <ul style="list-style-type: none"> • a copy of the target's statement; and • a copy of any other document that was sent with the target's statement to the relevant securities exchange. 	To be done on the day the target sends a copy of the target's statement to the securities exchange
13	The target must send each holder of bid class securities: <ul style="list-style-type: none"> • a copy of the target's statement; and • a copy of any other document that was sent with the target's statement to the relevant securities exchange. 	Within 14 days after the announcement is made <i>Sections 648B and 648C provide for the manner in which documents may be sent to holders.</i>

Section 635

Steps in market bid		[operative]
Steps	Timing and relevant provisions	
14	The bidder must make offers for the securities under the bid through the relevant securities exchange.	<p>To be done on the next day after the end of the 14 day period referred to in item 13.</p> <p>If the bidder does not make the offers at that time, the bidder contravenes this section.</p> <p><i>Item 2 of the table in section 611 covers offers made by the bidder on market during the 14 day period between the announcement and the making of the offers under the bid</i></p>

Division 2—The bidder's statement

636 Bidder's statement content

- (1) A bidder's statement must include the following:
 - (a) the identity of the bidder;
 - (b) the date of the statement;
 - (c) if the target is a company or body—details of the bidder's intentions regarding:
 - (i) the continuation of the business of the target; and
 - (ii) any major changes to be made to the business of the target, including any redeployment of the fixed assets of the target; and
 - (iii) the future employment of the present employees of the target;
 - (d) if the target is a managed investment scheme—details of the bidder's intentions regarding:
 - (i) the continued operation of the scheme; and
 - (ii) any major changes to be made to the operation of the scheme, including any redeployment of scheme property; and
 - (iii) any plans to remove the current responsible entity and appoint a new responsible entity;
 - (e) for an off-market bid—a statement that the bidder's statement has been lodged with ASIC but that ASIC takes no responsibility for the content of the statement;
 - (f) in relation to the cash consideration (if any) offered under the bid—details of:
 - (i) the cash amounts (if any) held by the bidder for payment of the consideration; and
 - (ii) the identity of any other person who is to provide, directly or indirectly, cash consideration from that person's own funds; and
 - (iii) any arrangements under which cash will be provided by a person referred to in subparagraph (ii);
 - (g) if any securities are offered as consideration under the bid and the bidder is:

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- (i) the body that has issued or will issue the securities; or
 - (ii) a person who controls that body;
- all material that would be required for a prospectus for an offer of those securities by the bidder under section 710 to 713;
- (h) if the bidder or an associate provided, or agreed to provide, consideration for a security in the bid class under a purchase or agreement during the 4 months before the date of the bid—the following information about the consideration:
 - (i) to the extent to which the consideration is a cash sum—the amount per security of the cash sum;
 - (ii) to the extent to which the consideration is quoted securities—the market price per security of those securities;
 - (iii) to the extent to which the consideration is neither a cash sum nor a quoted security—the value per security of that consideration;
- (i) if, during the period of 4 months before the date of the bid, the bidder or an associate gave, or offered to give or agreed to give a benefit to another person and the benefit was likely to induce the other person, or an associate, to:
 - (i) accept an offer under the bid; or
 - (ii) dispose of securities in the bid class;and the benefit is not offered to all holders of securities in the bid class under the bid—details of the benefit;
- (j) if the bid is to extend to securities that come to be in the bid class during the offer period due to the conversion of or exercise of rights attached to other securities (see subsection 617(2))—a statement to that effect;
- (k) for an off-market bid—the following details in relation to each class of securities in the target:
 - (i) the total number of securities in the class;
 - (ii) the number of securities in the class that the bidder had a relevant interest in immediately before the first offer is sent (expressed as a number of securities or as a percentage of the total number of securities in the class);
- (l) for an off-market bid—the bidder's voting power in the company;

- (m) any other information that:
 - (i) is material to the making of the decision by a holder of bid class securities whether to accept an offer under the bid; and
 - (ii) is known to the bidder; and
 - (iii) does not relate to the value of securities offered as consideration under the bid.

The information that the bidder must disclose under subparagraph (k)(i) and paragraph (l) must be only as up-to-date as it is reasonable to expect in the circumstances. The bidder does not have to disclose information under paragraph (m) if it would be unreasonable to require the bidder to do so because the information had previously been disclosed to the holders of bid class securities.

Note: Paragraph (b)—See subsection 637(2) for the date of the statement.

Expert's report on non-cash consideration provided for bid class securities in last 4 months

- (2) If the bidder's statement includes details of the value per share of consideration under subparagraph (1)(h)(iii), the statement must include, or be accompanied by, a report by an expert that states whether, in the expert's opinion, the value stated is fair and reasonable and gives the reasons for forming that opinion.

Note: Subsections 648A(2) and (3) provide for the independence of the expert and disclosure of any association between the bidder and the expert or the target and the expert. A contravention of one of those subsections results in the bidder's statement not complying with this subsection.

Consent of person to whom statement attributed

- (3) The bidder's statement may only include, or be accompanied by, a statement by a person, or a statement said in the bidder's statement to be based on a statement by a person, if:
 - (a) the person has consented to the statement being included in the bidder's statement, or accompanying it, in the form and context in which it is included; and
 - (b) the bidder's statement states that the person has given this consent; and
 - (c) the person has not withdrawn this consent before the bidder's statement is lodged with ASIC.

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- (4) The bidder must keep the consent.

637 Bidder's statement formalities

Approval

- (1) The copy of the bidder's statement that is lodged with ASIC must be approved by:
- (a) for a bidder that is a body corporate:
 - (i) if the consideration offered under the bid is a cash sum only—a resolution passed by the directors of the bidder; or
 - (ii) otherwise—a unanimous resolution passed by all the directors of the bidder; or
 - (b) for a bidder who is an individual—the bidder.
- (2) The bidder's statement must be dated. The date is the date on which it is lodged with ASIC.

Division 3—The target's response

638 Target's statement content

General requirement

- (1) A target's statement must include all the information that holders of bid class securities and their professional advisers would reasonably require to make an informed assessment whether to accept the offer under the bid. The statement must contain this information:
 - (a) only to the extent to which it is reasonable for investors and their professional advisers to expect to find the information in the statement; and
 - (b) only if the information is known to any of the directors of the target.
- (2) In deciding what information should be included under subsection (1), have regard to:
 - (a) the nature of the bid class securities; and
 - (b) if the bid class securities are interests in a managed investment scheme—the nature of the scheme; and
 - (c) the matters that the holders of bid class securities may reasonably be expected to know; and
 - (d) the fact that certain matters may reasonably be expected to be known to their professional advisers; and
 - (e) the time available to the target to prepare the statement.

Director's recommendations

- (3) A target's statement must contain a statement by each director of the target:
 - (a) recommending that offers under the bid be accepted or not accepted, and giving reasons for the recommendation; or
 - (b) giving reasons why a recommendation is not made.
- (4) The statement under subsection (3) must be made by:
 - (a) if the target is under administration—the liquidator or administrator; or

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- (b) if the target has executed a deed of company arrangement that has not yet terminated—the deed's administrator.

Consent of person to whom statement attributed

- (5) The target's statement may only include, or be accompanied by, a statement by a person, or a statement said in the target's statement to be based on a statement by a person, if:
 - (a) the person has consented to the statement being included in the target's statement, or accompanying it, in the form and context in which it is included; and
 - (b) the target's statement states that the person has given this consent; and
 - (c) the person has not withdrawn this consent before the target's statement is lodged with ASIC.
- (6) The target must keep the consent.

639 Target's statement formalities

Approval

- (1) The copy of the target's statement that is lodged with ASIC must be approved by:
 - (a) if paragraphs (b) and (c) do not apply—a resolution passed by the directors of the target; or
 - (b) for a target that is under administration—the liquidator or administrator; or
 - (c) for a target that has executed a deed of company arrangement that has not yet terminated—the deed's administrator.

Date

- (2) The target's statement must be dated. The date is the date on which it is lodged with ASIC.

640 Expert's report to accompany target's statement if bidder connected with target

- (1) If:
 - (a) the bidder's voting power in the target is 30% or more; or

- (b) for a bidder who is, or includes, an individual—the bidder is a director of the target; or
- (c) for a bidder who is, or includes, a body corporate—a director of the bidder is a director of the target;

a target's statement given in accordance with section 638 must include, or be accompanied by, a report by an expert that states whether, in the expert's opinion, the takeover offers are fair and reasonable and gives the reasons for forming that opinion.

Note: Subsections 648A(2) and (3) provide for the independence of the expert and disclosure of any association between the target and the expert or the bidder and the expert. A contravention of one of those subsections results in the target's statement not complying with this subsection.

- (2) In determining whether the bidder's voting power in the target is 30% or more, calculate the bidder's voting power at the time the bidder's statement is sent to the target.

641 Target must inform bidder about securities holdings

Requirement to inform bidder and information that must be given

- (1) If the bidder has given a bidder's statement to the target and requested the target to give the bidder information in accordance with this section, the target must inform the bidder of:
 - (a) the name and address of each person who, at a time specified by the bidder under subsection (2), held securities:
 - (i) in the bid class; or
 - (ii) convertible into securities in the bid class; and
 - (b) the type, and number of each type, of those securities held by the person at the specified time.

However, the target does not need to give information to the bidder about a person or their holding of securities unless the target knows the person's name.

Time at which target's information must be correct

- (2) The bidder's request must specify a day as at which the information must be correct. The day must be one that occurs after the day on which the bidder makes the request unless the target agrees to it being the day on which the bidder makes the request.

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Form in which target must provide information

- (3) The target must give the information to the bidder:
 - (a) in the form that the bidder requests; or
 - (b) if the target is unable to comply with the request—in writing.
- (4) If the target must give the information to the bidder in electronic form, the information must be readable but the information need not be formatted for the bidder's preferred operating system.

Fee for provision of information

- (5) The target may require the bidder to pay an amount, not exceeding the prescribed amount, for the provision of the information to the bidder.

Time by which target must provide information

- (6) The target must give the information to the bidder no later than the latest of the following times:
 - (a) the end of the second day after the day on which the bidder requested the information; or
 - (b) the end of the next day after the day as at which the information must be correct; or
 - (c) the time when the target receives the amount mentioned in subsection (5).

642 Expenses of directors of target companies

- (1) If the target is a company or body, the directors of the target have a right to recover from the target any expenses they reasonably incur in the interest of members of the target and in relation to the takeover bid. The directors have this right regardless of anything contained in the target's constitution (if any).
- (2) If the target is a managed investment scheme, the responsible entity for the scheme has a right to recover from scheme property any expenses it reasonably incurs in the interest of members of the scheme and in relation to the takeover bid. The responsible entity has this right regardless of anything contained in the scheme's constitution.

Division 4—Updating and correcting the bidder's statement and target's statement

643 Supplementary bidder's statement

If a bidder becomes aware of:

- (a) a misleading or deceptive statement in the bidder's statement;
or
- (b) an omission from the bidder's statement of information required by section 636; or
- (c) a new circumstance that:
 - (i) has arisen since the bidder's statement was lodged; and
 - (ii) would have been required by section 636 to be included in the bidder's statement if it had arisen before the bidder's statement was lodged;

that is material from the point of view of a holder of bid class securities, the bidder must prepare a supplementary bidder's statement that remedies this defect.

Note 1: The bidder must then send and lodge the supplementary bidder's statement in accordance with section 647.

Note 2: Section 670A makes it an offence to give a bidder's statement after the bidder has become aware of a misleading or deceptive statement, omission or new circumstance that is material from the point of view of a holder of securities to whom the statement is given (unless the deficiency is corrected).

Note 3: The power to issue a supplementary bidder's statement is not limited to the situations dealt with in this section.

Note 4: This section applies to a bidder's statement that has already been previously supplemented.

644 Supplementary target's statement

If a target becomes aware of:

- (a) a misleading or deceptive statement in the target's statement;
or
- (b) an omission from the target's statement of information required by section 638; or
- (c) a new circumstance that:

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- (i) has arisen since the target's statement was lodged; and
- (ii) would have been required by section 638 to be included in the target's statement if it had arisen before the target's statement was lodged;

that is material from the point of view of a holder of bid class securities, the target must prepare a supplementary target's statement that remedies this defect.

Note 1: The target must then send and lodge the supplementary target's statement in accordance with section 647.

Note 2: Section 670A makes it an offence to give a target's statement after the target has become aware of a misleading or deceptive statement, omission or new circumstance that is material from the point of view of a holder of securities to whom the statement is given (unless the deficiency is corrected).

Note 3: The power to issue a supplementary target's statement is not limited to the situations dealt with in this section.

Note 4: This section applies to a target's statement that has already been previously supplemented.

645 Form of supplementary statement

Identity as a supplementary statement

- (1) At the beginning of a supplementary bidder's or target's statement there must be:
 - (a) a statement that it is a supplementary statement; and
 - (b) an identification of the statement it supplements; and
 - (c) an identification of any previous supplementary statements lodged with ASIC in relation to the bid; and
 - (d) a statement that it is to be read together with the statement it supplements and any previous supplementary statements.

Approval of supplementary bidder's statement

- (2) The copy of the supplementary bidder's statement that is lodged with ASIC must be approved by:
 - (a) for a bidder that is a body corporate:
 - (i) if the consideration offered under the bid is a cash sum only—a resolution passed by the directors of the bidder; or

- (ii) otherwise—a unanimous resolution passed by all the directors of the bidder; or
- (b) for a bidder who is an individual—the bidder.

Approval of supplementary target's statement

- (3) The copy of a supplementary target's statement that is lodged with ASIC must be approved by:
 - (a) if paragraphs (b) and (c) do not apply—a resolution passed by the directors of the target; or
 - (b) for a target that is under administration—the liquidator or administrator; or
 - (c) for a target that has executed a deed of company arrangement that has not yet terminated—the deed's administrator.

Date

- (4) A supplementary statement must be dated. The date is the date on which it is lodged with ASIC.

646 Consequences of lodging a supplementary statement

If a supplementary statement is lodged with ASIC, for the purposes of the application of this Chapter and Chapter 6B to events that occur after the lodgment, the bidder's or target's statement is taken to be the original statement together with the supplementary statement.

647 To whom supplementary statement must be sent

- (1) A supplementary bidder's statement must be sent to the target as soon as practicable.
- (2) A supplementary target's statement must be sent to the bidder as soon as practicable.
- (3) Either kind of supplementary statement must as soon as practicable be:
 - (a) lodged with ASIC; and

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- (b) if the bid class securities are quoted and the target is listed—sent to each relevant securities exchange that has a stock market on which the target's securities are quoted; and
- (c) if the bid is an off-market bid and the bid class securities are not quoted—sent to all holders of bid class securities who have not accepted an offer under the bid.

Note: Sections 648B and 648C provide for the manner in which documents may be sent to holders.

Division 5—General rules on takeover procedure

Subdivision A—Experts' reports

648A Experts' reports

- (1) If the bidder or target obtains 2 or more reports each of which could be used for the purposes of subparagraph 636(1)(h)(iii) or subsection 640(1), the bidder's or target's statement must be accompanied by a copy of each report.
- (2) The expert must be someone other than an associate of the bidder or target.
- (3) The report must set out details of:
 - (a) any relationship between the expert and:
 - (i) the bidder or an associate of the bidder; or
 - (ii) the target or an associate of the target;including any circumstances in which the expert gives them advice, or acts on their behalf, in the proper performance of the functions attaching to the expert's professional capacity or business relationship with them; and
 - (b) any financial or other interest of the expert that could reasonably be regarded as being capable of affecting the expert's ability to give an unbiased opinion in relation to the matter being reported on; and
 - (c) any fee, payment or other benefit (whether direct or indirect) that the expert has received or will or may receive in connection with making the report.

Note: If the statement includes, or is accompanied by, the report, it must state that the expert has consented to this being done (see subsections 636(3) and 638(5)).

Subdivision B—Sending documents to holders of securities

648B Address at which bidder may send documents to holders of securities

The bidder may send a document to a holder of securities for the purposes of this Chapter at the address shown for the holder in the information given to the bidder by the target under section 641. This section does not limit the address to which the document may be sent to the holder.

Note: Section 109X makes general provision for service of documents.

648C Manner of sending documents to holders of securities

If a document must be sent to the holder of securities under this Chapter, the document must be sent:

- (a) if the document is to be sent to the holder outside Australia—by pre-paid airmail post or by courier; or
- (b) if the document is to be sent to the holder in Australia—by pre-paid ordinary post or by courier.

Subdivision C—Effect of proportional takeover approval provisions

648D Constitution may contain proportional takeover approval provisions

- (1) Subject to this Subdivision, the constitution of a company may contain provisions to the effect that, if offers are made under a proportional takeover bid for securities of the company:
 - (a) the registration of a transfer giving effect to a takeover contract for the bid is prohibited unless and until a resolution (an *approving resolution*) to approve the bid is passed in accordance with the provisions; and
 - (b) a person (other than the bidder or an associate of the bidder) who, as at the end of the day on which the first offer under the bid was made, held bid class securities is entitled to vote on an approving resolution; and

- (c) an approving resolution is to be voted on in whichever of the following ways is specified in the provisions:
 - (i) at a meeting, convened and conducted by the company, of the persons entitled to vote on the resolution;
 - (ii) by means of a postal ballot conducted by the company in accordance with a procedure set out in the provisions;or, if the provisions so provide, in whichever of those ways is determined by the directors of the company; and
- (d) an approving resolution that has been voted on is taken to have been passed if the proportion that the number of votes in favour of the resolution bears to the total number of votes on the resolution is greater than the proportion specified in the provisions, and otherwise is taken to have been rejected.

The proportion specified under paragraph (d) must not exceed 50%.

Note: Section 9 defines *proportional takeover bid*. See paragraph 618(1)(b).

- (2) To be effective, an approving resolution in relation to a proportional takeover bid must be passed before the **approving resolution deadline**. The deadline is the 14th day before the last day of the bid period.

Note: In certain circumstances, an approving resolution will be taken to have been passed (see subsection 648E(3)).

- (3) Except to the extent to which a company's constitution provides otherwise:
 - (a) the provisions that apply to a general meeting of the company apply, with such modifications as the circumstances require, to a meeting convened under the company's proportional takeover approval provisions; and
 - (b) those provisions apply as if the meeting convened under the proportional takeover provisions were a general meeting of the company.

The provisions referred to in paragraph (a) may be the provisions of a law, provisions of the company's constitution or any other provisions.

648E Resolution to be put if proportional bid made

- (1) If:
-

Section 648F

- (a) a company's constitution contains proportional takeover approval provisions; and
- (b) offers are made under a proportional bid for a class of the company's securities;

then:

- (c) the company's directors must ensure that a resolution to approve the bid is voted on in accordance with those provisions before the approving resolution deadline; and
- (d) if the directors fail to ensure that a resolution of that kind is voted on before the deadline, each of the directors contravenes this subsection.

Note: Subsection 648D(2) sets the approving resolution deadline.

- (2) If a resolution to approve the bid is voted on in accordance with the proportional takeover approval provisions before the approving resolution deadline, the company must, on or before the deadline, give:
 - (a) the bidder; and
 - (b) if the company is listed—each relevant securities exchange; a written notice stating that a resolution to approve the bid has been voted on and whether the resolution was passed or rejected.
- (3) If no resolution to approve the bid has been voted on in accordance with the proportional takeover approval provisions as at the end of the day before the approving resolution deadline, a resolution to approve the bid is taken, for the purposes of those provisions, to have been passed in accordance with those provisions.

648F Effect of rejection of approval resolution

If a resolution to approve the bid is voted on, in accordance with the proportional takeover approval provisions, before the approving resolution deadline and is rejected:

- (a) despite section 652A:
 - (i) all offers under the bid that have not been accepted as at the end of deadline; and
 - (ii) all offers under the bid that have been accepted, and from whose acceptance binding contracts have not resulted, as at the end of the deadline;

- are taken to be withdrawn at the end of the deadline; and
- (b) as soon as practicable after the deadline, the bidder must return to each person who has accepted an offer referred to in subparagraph (a)(ii) any documents that the person sent the bidder with the acceptance of the offer; and
 - (c) the bidder:
 - (i) is entitled to rescind; and
 - (ii) must rescind as soon as practicable after the deadline; each binding takeover contract for the bid; and
 - (d) a person who has accepted an offer made under the bid is entitled to rescind their takeover contract.

648G Including proportional takeover provisions in constitution

- (1) A company's proportional takeover approval provisions, unless sooner omitted from the constitution of the company, cease to apply at the end of:
 - (a) unless paragraph (b) or (c) applies—3 years;
 - (b) if the constitution provides that the provisions apply for a specified period of less than 3 years and the provisions have not been renewed—the specified period; or
 - (c) if the provisions have been renewed on at least one occasion and the resolution, or the most recent resolution, renewing the provisions states that the provisions are renewed for a specified period of less than 3 years—the specified period.
- (2) The period referred to in subsection (1) starts:
 - (a) if the provisions were contained in the company's constitution when it was incorporated or formed and have not been renewed—at that time; or
 - (b) if the provisions were inserted in the company's constitution and have not been renewed—when the provisions were inserted; or
 - (c) if the provisions have been renewed on at least one occasion—when the provisions were renewed, or last renewed.
- (3) When the provisions cease to apply, the company's constitution is, by force of this subsection, altered by omitting the provisions.

Section 648G

- (4) A company may renew its proportional takeover approval provisions. The provisions are to be renewed in the same manner as that in which the company could alter its constitution to insert proportional takeover approval provisions.
- (5) With every notice that:
- (a) specifies the intention to propose:
 - (i) a resolution to alter a company's constitution by inserting proportional takeover approval provisions; or
 - (ii) a resolution to renew a company's proportional takeover approval provisions; and
 - (b) is sent to a person who is entitled to vote on the proposed resolution;
- the company must send a statement that:
- (c) explains the effect of the proposed provisions, or of the provisions proposed to be renewed; and
 - (d) explains the reasons for proposing the resolution and sets out the factual matters and principles underlying those reasons; and
 - (e) states whether, as at the day on which the statement is prepared, any of the directors of the company is aware of a proposal by a person to acquire, or to increase the extent of, a substantial interest in the company and, if so, explains the extent (if any) to which the proposal has influenced the decision to propose the resolution; and
 - (f) for a proposed resolution to renew proportional takeover approval provisions—reviews both the advantages, and disadvantages, of the provisions proposed to be renewed for:
 - (i) the directors; and
 - (ii) the company's members;during the period during which the provisions have been in effect; and
 - (g) discusses both the potential advantages, and the potential disadvantages, of the proposed provisions, or of the provisions proposed to be renewed, for:
 - (i) the directors; and
 - (ii) the company's members.
- (6) If, on a particular day, a company purports to:

- (a) alter its constitution by inserting proportional takeover approval provisions; or
 - (b) renew its proportional takeover approval provisions;
- then:
- (c) holders who together hold not less than 10% (by number) of the issued securities in a class of securities in the company to which the provisions apply may, within 21 days after that day, apply to the Court to have the purported alteration or renewal set aside to the extent to which it relates to that class; and
 - (d) unless and until an application made under paragraph (c) is finally determined by the making of an order setting aside the purported alteration or renewal to that extent, the company is taken for all purposes (other than the purposes of an application of that kind):
 - (i) to have validly altered its constitution by inserting the provisions referred to in paragraph (a) applying to that class; or
 - (ii) to have validly renewed the provisions referred to in paragraph (b) applying to that class.
- (7) An application under paragraph (6)(c) may be made, on behalf of the holders entitled to make the application, by a holder or holders appointed by them in writing.
- (8) On an application under paragraph (6)(c), the Court may make an order setting aside the purported alteration or renewal to the extent to which it applies to that class if it is satisfied that it is appropriate in all the circumstances to do so. Otherwise the Court must dismiss the application.
- (9) Within 14 days after the day on which the Court makes an order of the kind referred to in subsection (8) in relation to a company, the company must lodge a copy of the order with ASIC.

648H Effect of Subdivision

This Subdivision applies notwithstanding anything contained in:

- (a) the business rules or listing rules of a securities exchange; or
- (b) the constitution of a company; or

Section 648H

(c) any agreement.

Part 6.6—Variation of offers

Division 1—Market bids

649A General

A bidder may only vary the offers under a market bid in accordance with section 649B or 649C.

Note: ASIC may allow other variations under section 655A.

649B Market bids—raising bid price

The bidder may increase the current market bid price. They may not do so, however, during the last 5 trading days of the relevant securities exchange in the offer period.

649C Market bids—extending the offer period

- (1) The bidder may extend the offer period. The extension must be announced to the relevant securities exchange at least 5 trading days of the exchange before the end of the offer period. However, the announcement may be made up to the end of the offer period if during those 5 trading days:
 - (a) another person lodges with ASIC a bidder's statement for a takeover bid for securities in the bid class; or
 - (b) another person announces a takeover bid for securities in the bid class; or
 - (c) another person makes offers under a takeover bid for securities in the bid class; or
 - (d) the consideration for offers under another takeover bid for securities in the bid class is improved.

The offer period is extended by having the extension announced to the relevant securities exchange.

Note: Section 624 provides for an automatic extension of the bid period in certain circumstances.

- (2) On the day on which the announcement is made, the bidder must:

Section 649C

- (a) give the target and the relevant securities exchange a notice setting out the terms of the announcement; and
- (b) lodge a notice setting out the terms of the announcement with ASIC.

Division 2—Off-market bids (express variation by bidder)

650A General

- (1) A bidder may only vary the offers under an off-market bid in accordance with section 650B, 650C or 650D.

Note: ASIC may allow other variations under section 655A.

- (2) If the bidder varies the offer under an off-market bid in accordance with section 650B, 650C or 650D, the bidder must vary all unaccepted offers under the bid in the same way.

Note: Subsections 650B(2) and (3) deal with the effect of a variation on takeover contracts that have already resulted from acceptances of offers under the bid when the variation is made.

650B Off-market bids—consideration offered

Improving the consideration offered

- (1) The bidder may vary the offers made under the bid to improve the consideration offered:
- (a) by increasing a cash sum offered; or
 - (b) by increasing the number of securities offered; or
 - (c) by increasing the rate of interest payable under debentures offered; or
 - (d) by increasing the amount or value of debentures offered; or
 - (e) by increasing the number of unissued securities that may be acquired under options offered; or
 - (f) by offering a cash sum in addition to securities; or
 - (g) if the securities being acquired include shares to which rights to accrued dividends are attached—by giving the holders the right to:
 - (i) retain the whole or a part of the dividend; or
 - (ii) be paid an amount equal to the amount of the dividend; in addition to the consideration already offered; or
 - (h) offering an additional alternative form of consideration.

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Division 2 Off-market bids (express variation by bidder)

Section 650B

Note: If the bidder increases the consideration during the last 7 days of the offer period, subsection 624(2) extends the offer period by a further 14 days.

Effect of increase in consideration on offers already accepted

- (2) Improving the consideration has the effects set out in the following table on the rights of a person who has already accepted an offer when the variation is made.

Effect of improving consideration		[operative]
Improvement	Effect on person who has already accepted bid offer	
1	improvement of the only form of consideration being offered	entitled to the improved consideration
2	2 or more forms of consideration offered and all forms improved by the same factor or percentage	entitled to the improvement in the form of consideration accepted
3	2 or more forms of consideration offered and improvement in the consideration is identical for all forms	entitled to the improvement in the form of consideration accepted
4	addition of a new form of consideration	entitled to make a fresh election as to the form of consideration to be taken
5	any other improvement	entitled to make a fresh election as to the form of consideration to be taken

The person is entitled to receive the improved consideration immediately, or immediately after the exercise of the election.

Fresh election as to the form of consideration

- (3) If a person who has already accepted an offer has the right to make a fresh election as to the form of consideration to be taken, the bidder must send the person as soon as practicable after the variation a written notice informing them about their right to make the election.

Note 1: Section 651B says how the election is to be exercised.

Note 2: Sections 648B and 648C provide for the manner in which documents may be sent to holders.

650C Off-market bids—extension of offer period

- (1) A bidder making an off-market bid may extend the offer period at any time before the end of the offer period.
- (2) If the bid is subject to a defeating condition, the bidder may extend the offer period after the publication of the notice under subsection 630(3) only if one of the following happens after the publication:
 - (a) another person lodges with ASIC a bidder's statement for a takeover bid for securities in the bid class;
 - (b) another person announces a takeover bid for securities in the bid class;
 - (c) another person makes offers under a takeover bid for securities in the bid class;
 - (d) the consideration for offers under another takeover bid for securities in the bid class is improved.

Note: Section 624 says how long the total offer period can be.

650D Off-market bids—method of making variation

Variation to be made by notice to the target and holders

- (1) To vary offers under an off-market bid, the bidder must:
 - (a) prepare a notice that:
 - (i) sets out the terms of the proposed variation; and
 - (ii) if the bid is subject to a defeating condition and the proposed variation postpones for more than 1 month the time by which the bidder must satisfy their obligations under the bid—informs people about the right to withdraw acceptances under section 650E; and
 - (b) lodge the notice with ASIC; and
 - (c) after the notice is lodged, give the notice to:
 - (i) the target; and
 - (ii) everyone to whom offers were made under the bid.

Note: Sections 648B and 648C provide for the manner in which documents may be sent to holders.

- (2) A person must be sent a copy of the notice under subparagraph (1)(c)(ii) even if they have already accepted the offer. However, they need not be sent a copy if:

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Section 650E

- (a) the variation merely extends the offer period; and
 - (b) the bid is not subject to a defeating condition at the time the notice is given to the target.
- (3) A notice under subsection (1) must be signed by:
- (a) if the bidder is, or includes, an individual—the individual; and
 - (b) if the bidder is, or includes, a body corporate with 2 or more directors—not fewer than 2 of the directors who are authorised to sign the notice by a resolution passed at a directors' meeting; and
 - (c) if the bidder is, or includes, a body corporate that has only one director—that director.
- (4) A copy of a notice given to a person under subparagraph (1)(c)(ii) must include a statement that:
- (a) a copy of the notice was lodged with ASIC on a specified date; and
 - (b) ASIC takes no responsibility for the contents of the notice.

650E Right to withdraw acceptance

- (1) A person who accepts an offer made under an off-market bid may withdraw their acceptance of the offer if:
- (a) the bid is subject to a defeating condition; and
 - (b) the bidder varies the offers under the bid in a way that postpones for more than 1 month the time when the bidder has to meet their obligations under the bid; and
 - (c) the person is entitled to be given a notice of the variation under subsection 650D(1).
- (2) To withdraw their acceptance, the person must:
- (a) give the bidder notice within 1 month beginning on the day after the day on which the copy of the notice of the variation was received; and
 - (b) return any consideration received by the person for accepting the offer.
- (3) A notice under paragraph (2)(a):

- (a) if it relates to securities that are entered on an SCH subregister—must be in an electronic form approved by the SCH business rules for the purposes of this Part; or
 - (b) if it relates to shares that are not entered on an SCH subregister—must be in writing.
- (4) To return consideration that includes securities, the person must:
- (a) if the securities are entered on an SCH subregister—take the action that the SCH business rules require in relation to the return of the securities; or
 - (b) otherwise—give the bidder any transfer documents needed to effect the return of securities.
- (5) If the person withdraws their acceptance, the bidder must:
- (a) take any action that the SCH business rules require in relation to any of the securities to which the acceptance relates that are entered on an SCH subregister; and
 - (b) return any documents that the person sent the bidder with the acceptance of the offer;
- within 14 days after:
- (c) if the person does the things referred to in subsection (2) on the same day—that day; or
 - (d) if the person does those things on different days—the last of those days.
- (6) If under this section a person returns to a company any certificates (together with any necessary transfer documents) in respect of the securities issued by the company, the company must cancel those securities as soon as possible. Any reduction in share capital is authorised by this subsection.

650F Freeing off-market bids from defeating conditions

- (1) If the offers under an off-market bid are subject to a defeating condition, the bidder may free the offers, and the takeover contracts, from the condition only by giving the target a notice declaring the offers to be free from the condition in accordance with this section:
- (a) if the condition is that the bidder may withdraw unaccepted offers if an event or circumstance referred to in subsection

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Division 2 Off-market bids (express variation by bidder)

Section 650G

- 652C(1) or (2) occurs in relation to the target—not later than 3 business days after the end of the offer period; or
- (b) in any other case—not less than 7 days before the end of the offer period.
- (2) The notice must:
- (a) state that the offers are free from the condition; and
- (b) specify the bidder's voting power in the company.
- (3) The notice must be:
- (a) if the securities in the bid class are quoted—given to the relevant securities exchange; and
- (b) if those securities are not quoted—lodged with ASIC.

650G Contracts and acceptances void if defeating condition not fulfilled

All takeover contracts, and all acceptances that have not resulted in binding takeover contracts, for an off-market bid are void if:

- (a) offers made under the bid have at any time been subject to a defeating condition; and
- (b) the bidder has not declared the offers to be free from the condition within the period before the date applicable under subsection 630(1) or (2); and
- (c) the condition has not been fulfilled at the end of the offer period.

A transfer of securities based on an acceptance or contract that is void under this section must not be registered.

Division 3—Off-market bids (automatic variations)

651A Off-market bid—effect on bid consideration of purchases made outside bid

Effect of purchases outside bid on offers made under the bid

- (1) The offers made under an off-market bid, and the takeover contracts, are varied under this section if:
- (a) the bidder purchases securities in the bid class outside the bid during the bid period; and
 - (b) the consideration for that purchase consists solely of a cash sum; and
 - (c) either:
 - (i) the consideration, or 1 of the forms of consideration, payable under the bid consists of a cash sum only and the consideration referred to in paragraph (b) is higher than the cash sum payable for the securities under the bid; or
 - (ii) a cash sum only is not the consideration, or 1 of the forms of consideration, payable under the bid.

Note 1: Section 9 defines *takeover contract*.

Note 2: The effect of section 623 is that the purchase outside the bid has to be made through an on-market transaction (see subsection 623(1) and paragraph 623(3)(b)).

Effect on unaccepted cash offers

- (2) If:
- (a) one of the forms of consideration offered to a person under an off-market bid is a cash sum only; and
 - (b) the person has not accepted the offer before the purchase outside the bid occurs;
- the cash sum is taken to be increased to the highest outside purchase price before the offer is accepted.

Section 651B

Effect on cash offers already accepted

- (3) The consideration payable for each security covered by a takeover contract arising from the acceptance of an offer for a cash sum only is increased to the highest outside purchase price. If the person who accepted the offer has already received the whole or any part of the consideration under the contract, they are entitled to receive the increase in consideration immediately.

Effect on non-cash offers accepted at any time during bid period

- (4) If:
- (a) a person accepts an offer under a bid at any time during the bid period; and
 - (b) the consideration paid or provided, or to be paid or provided, under the takeover contract arising from the acceptance of the offer does not consist of a cash sum only;
- then:
- (c) the person may elect to take as consideration for each security covered by the takeover contract a cash sum equal to the highest outside purchase price instead of the consideration they originally accepted; and
 - (d) the bidder must give the person a written notice of their right to make the election within 14 days after the end of the offer period.

Note: Section 651B says how the election is to be exercised.

651B How to make an election for new forms of consideration

- (1) An election under section 650B or 651A to take a new form of consideration must be made:
- (a) by written notice to the bidder; and
 - (b) within 1 month after the person receives the notice from the bidder of their right to make the election.
- (2) The person becomes entitled to the new form of consideration if they:
- (a) make the election; and
 - (b) return to the bidder:
 - (i) any consideration they have already received; and

- (ii) any necessary transfer documents.

651C Returning securities as part of election

If under section 651B a person returns to a company any certificates (together with any necessary transfer documents) in respect of the securities issued by a company, the company must cancel those securities as soon as possible.

Part 6.7—Withdrawal and suspension of offers

652A Withdrawal of unaccepted offers under takeover bid

Unaccepted offers under a takeover bid may only be withdrawn under section 652B or 652C.

652B Withdrawal of takeover offers with ASIC consent

Unaccepted offers under a takeover bid may be withdrawn with the written consent of ASIC. ASIC may consent subject to conditions.

652C Withdrawal of market bids

Bidder entitled to withdraw if certain events happen during the offer period

- (1) The bidder may withdraw unaccepted offers made under a market bid if 1 of the following happens during the bid period, but only if the bidder's voting power in the target is at or below 50% when the event happens:
 - (a) the target converts all or any of its shares into a larger or smaller number of shares (see section 254H);
 - (b) the target or a subsidiary resolves to reduce its share capital in any way;
 - (c) the target or a subsidiary:
 - (i) enters into a buy-back agreement; or
 - (ii) resolves to approve the terms of a buy-back agreement under subsection 257C(1) or 257D(1);
 - (d) the target or a subsidiary issues shares, or grants an option over its shares, or agrees to make such an issue or grant such an option;
 - (e) the target or a subsidiary issues, or agrees to issue, convertible notes;
 - (f) the target or a subsidiary disposes, or agrees to dispose, of the whole, or a substantial part, of its business or property;

Section 652C

- (g) the target or a subsidiary charges, or agrees to charge, the whole, or a substantial part, of its business or property;
 - (h) the target or a subsidiary resolves to be wound up.
- (2) The bidder may also withdraw unaccepted offers made under a market bid if 1 of the following happens during the bid period:
- (a) a liquidator or provisional liquidator of the target or of a subsidiary is appointed;
 - (b) a court makes an order for the winding up of the target or of a subsidiary;
 - (c) an administrator of the target, or of a subsidiary, is appointed under section 436A, 436B or 436C;
 - (d) the target or a subsidiary executes a deed of company arrangement;
 - (e) a receiver, or a receiver and manager, is appointed in relation to the whole, or a substantial part, of the property of the target or of a subsidiary.

This is so regardless of the bidder's voting power at the time.

- (3) Notice of the withdrawal must be given to each relevant securities exchange.

Part 6.8—Acceptances

653A Acceptance of offers made under off-market bid

If:

- (a) an offer is made under an off-market bid for quoted securities; and
- (b) the SCH business rules require that an acceptance of the offer, so far as it relates to those securities, must be made in a particular way;

an acceptance of the offer for those securities is effective only if it is made in that way.

653B Acceptances by transferees and nominees of offers made under off-market bid

(1) If an off-market bid is made for securities:

- (a) a person who:
 - (i) is able during the offer period to give good title to a parcel of those securities; and
 - (ii) has not already accepted an offer under the bid for those securities;

may accept as if an offer on terms identical with the other offers made under the bid had been made to that person in relation to those securities; and

- (b) a person who holds 1 or more parcels of those securities as trustee or nominee for, or otherwise on account of, another person may accept as if a separate offer had been made in relation to:
 - (i) each of those parcels; and
 - (ii) any parcel they hold in their own right.

If a person accepts an offer under a proportional takeover bid for securities, no-one else may accept an offer under the bid in respect of those securities.

Note: Section 9 defines *proportional takeover bid*. See paragraph 618(1)(b).

(2) For the purposes of this section:

Section 653B

- (a) a person is taken to hold securities if the person is, or is entitled to be registered as, the holder of the securities; and
 - (b) a person is taken to hold the securities on trust for, as nominee for or on account of another person if they:
 - (i) are entitled to be registered as the holder of particular securities; and
 - (ii) hold their interest in the securities on trust for, as nominee for or on account of that other person; and
 - (c) in determining under subsection (1) whether a person has accepted an offer for particular securities under a takeover bid, a person who accepts an offer under a proportional takeover bid is taken to have accepted the offer for all the securities in the bid class that they hold at the time they accept the offer.
- (3) If under paragraph (1)(b) a person may accept as if a separate offer is taken to be made to a person for a parcel of securities within a holding, an acceptance of that offer is ineffective unless:
- (a) the person gives the bidder a notice stating that the securities consist of a separate parcel; and
 - (b) the acceptance specifies the number of securities in the parcel.
- (4) A notice under subsection (3) must be made:
- (a) if it relates to securities that are entered on an SCH subregister—in an electronic form approved by the SCH business rules for the purposes of this Part; or
 - (b) if it relates to shares that are not entered on an SCH subregister—in writing.
- (5) A person contravenes this subsection if:
- (a) they purport to accept an offer under this section; and
 - (b) the acceptance is not made in accordance with this section.
- The acceptance is, however, as valid as it would have been if it had been made in accordance with this section.
- (6) A person may, at the one time, accept for 2 or more parcels under this section as if there had been a single offer for a separate parcel consisting of those parcels.

Part 6.9—Other activities during the bid period

654A Bidder not to dispose of securities during the bid period

- (1) The bidder must not dispose of any securities in the bid class during the bid period.
- (2) Subsection (1) does not apply to a disposal of securities by the bidder if:
 - (a) someone else who is not an associate of the bidder makes an offer, or improves the consideration offered, under a takeover bid for securities in the bid class after the bidder's statement is given to the target; and
 - (b) the bidder disposes of the securities after the offer is made or the consideration is improved.

654B Disclosures about substantial shareholdings in listed companies

During the bid period, substantial shareholding notices that need to be lodged under section 671B must be lodged by 9.30 am the next business day (rather than the usual 2 business days).

654C Disclosures about substantial shareholdings in unlisted companies

- (1) A bidder making a bid for securities of an unlisted company must give the target a notice stating the bidder's voting power in the target if, at a particular time during the bid period, the bidder's voting power in the target rises from below a percentage in the following list to that percentage or higher:
 - (a) 25%;
 - (b) 50%;
 - (c) 75%;
 - (d) 90%.
- (2) The notice must be given as soon as practicable, and in any event within 2 business days, after the rise in voting power occurred.

- (3) The target must:
- (a) make the notice available at its registered office for inspection without charge by any holder of bid class securities during the bid period; and
 - (b) lodge the notice with ASIC.

Part 6.10—Review and intervention

Division 1—ASIC's power to exempt and modify

655A ASIC's power to exempt and modify

- (1) ASIC may:
 - (a) exempt a person from a provision of this Chapter; or
 - (b) declare that this Chapter applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

Note: Under section 656A, the Panel has power to review the exercise by ASIC of its powers under this section.
- (2) In deciding whether to give the exemption or declaration, ASIC must consider the purposes of this Chapter set out in section 602.
- (3) The exemption or declaration may:
 - (a) apply to all or specified provisions of this Chapter; and
 - (b) apply to all persons, specified persons, or a specified class of persons; and
 - (c) relate to all securities, specified securities or a specified class of securities; and
 - (d) relate to any other matter generally or as specified.
- (4) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.
- (5) The exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.
- (6) For the purposes of this section, the *provisions of this Chapter* include:
 - (a) regulations made for the purposes of this Chapter; and
 - (b) definitions in this Act or the regulations as they apply to references in:

- (i) this Chapter; or
- (ii) regulations made for the purposes of this Chapter; and
- (c) the old Division 12 of Part 11.2 transitionals.

655B Notice of decision and review rights

- (1) Subject to subsection (2), ASIC must take such steps as are reasonable in the circumstances to give to each person whose interests are affected by a decision under section 655A a notice, in writing or otherwise:
 - (a) of the making of the decision; and
 - (b) of the person's right to have the decision reviewed by the Panel under section 656A.
- (2) Subsection (1) does not require ASIC to give notice to a person affected by the decision or to the persons in a class of persons affected by the decision, if ASIC determines that giving notice to the person or persons is not warranted, having regard to:
 - (a) the cost of giving notice to the person or persons; and
 - (b) the way in which the interests of the person or persons are affected by the decision.
- (3) A failure to comply with this section does not affect the validity of the decision.

Division 2—The Corporations and Securities Panel

Subdivision A—Review of ASIC’s exercise of its exemption or modification powers

656A Review of exercise of exemption or modification powers

- (1) The Panel may review:
 - (a) a decision of ASIC under section 655A; or
 - (b) a decision of ASIC under section 673 in relation to securities of the target of a takeover bid during the bid period.For these purposes, *decision* has the same meaning as in the *Administrative Appeals Tribunal Act 1975*.
- (2) An application to the Panel for review of the decision may be made by any person whose interests are affected by the decision.
- (3) For the purpose of reviewing the decision, the Panel may exercise all the powers and discretions conferred on ASIC by this Chapter or Chapter 6C. The Panel must make a decision:
 - (a) affirming the decision; or
 - (b) varying the decision; or
 - (c) setting aside the decision and:
 - (i) making a decision in substitution for the decision under review; or
 - (ii) remitting the matter for reconsideration by ASIC in accordance with any directions or recommendations of the Panel.
- (4) The decision must be in writing and published in the *Gazette*.
- (5) If the Panel varies an ASIC decision, or makes a decision in substitution for an ASIC decision:
 - (a) the ASIC decision as varied, or the substituted decision, is taken for all purposes (other than the purposes of applications to the Panel for review in accordance with this section) to be a decision of ASIC under section 655A; and
 - (b) when the Panel’s determination on the review comes into operation, the ASIC decision as varied, or the substituted

decision, has effect, or is taken to have had effect, on and from the day on which the ASIC decision has or had effect. Paragraph (b) applies unless the Panel otherwise orders.

656B Operation and implementation of a decision that is subject to review

- (1) Subject to this section, applying to the Panel under section 656A for review of an ASIC decision does not:
 - (a) affect the operation of the decision; or
 - (b) prevent the taking of action to implement the decision.
- (2) On application by a party to the proceedings before the Panel, the Panel may:
 - (a) make an order staying, or otherwise affecting the operation or implementation of, the whole or a part of the decision if the Panel considers that:
 - (i) it is desirable to make the order after taking into account the interests of any person who may be affected by the review; and
 - (ii) the order is appropriate for the purpose of securing the effectiveness of the hearing and determination of the application for review; or
 - (b) make an order varying or revoking an order made under paragraph (a) (including an order that has previously been varied on one or more occasions under this paragraph).
- (3) Subject to subsection (4), the Panel must not:
 - (a) make an order under paragraph (2)(a) unless ASIC has been given a reasonable opportunity to make a submission to the Panel in relation to the matter; or
 - (b) make an order under paragraph (2)(b) unless:
 - (i) ASIC; and
 - (ii) the person who requested the making of the order under paragraph (2)(a); and
 - (iii) if the order under paragraph (2)(a) has previously been varied by an order or orders under paragraph (2)(b)—the person or persons who applied for the last-mentioned order or orders;

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have been given a reasonable opportunity to make submissions to the Panel in relation to the matter.

- (4) Subsection (3) does not prohibit the Panel from making an order without giving to a person referred to in that subsection a reasonable opportunity to make a submission to the Panel in relation to a matter if the Panel is satisfied that, by reason of the urgency of the case or otherwise, it is not practicable to give that person such an opportunity. If an order is so made without giving such an opportunity to ASIC, the order does not come into operation until a notice setting out the terms of the order is served on ASIC.
- (5) An order in force under paragraph (2)(a) (including an order that has previously been varied on one or more occasions under paragraph (2)(b)):
 - (a) is subject to the conditions that are specified in the order; and
 - (b) has effect until:
 - (i) if a period for the operation of the order is specified in the order—the end of that period or, if the application for review is decided by the Panel before the end of that period, the decision of the Panel on the application for review comes into operation; or
 - (ii) if a period for the operation of the order is not specified in the order—the decision of the Panel on the application for review comes into operation.

Subdivision B—Unacceptable circumstances

657A Declaration of unacceptable circumstances

- (1) The Panel may declare circumstances in relation to the affairs of a company to be unacceptable circumstances. Without limiting this, the Panel may declare circumstances to be unacceptable circumstances whether or not the circumstances constitute a contravention of a provision of this Act.

Note: Sections 659B and 659C deal with court proceedings during and after a takeover bid.

- (2) The Panel may only declare circumstances to be unacceptable circumstances if it appears to the Panel that the circumstances:

- (a) are unacceptable having regard to the effect of the circumstances on:
 - (i) the control, or potential control, of the company or another company; or
 - (ii) the acquisition, or proposed acquisition, by a person of a substantial interest in the company or another company; or
- (b) are unacceptable because they constitute, or give rise to, a contravention of a provision of this Chapter or of Chapter 6A, 6B or 6C.

The Panel may only make a declaration under this subsection, or only decline to make a declaration under this subsection, if it considers that doing so is not against the public interest after taking into account any policy considerations that the Panel considers relevant.

- (3) In exercising its powers under this section, the Panel:
 - (a) must have regard to:
 - (i) the purposes of this Chapter set out in section 602; and
 - (ii) the other provisions of this Chapter; and
 - (iii) the rules made under section 658C; and
 - (iv) the matters specified in regulations made for the purposes of paragraph 195(3)(c) of the ASIC Act; and
 - (b) may have regard to any other matters it considers relevant.

In having regard to the purpose set out in paragraph 602(c) in relation to an acquisition, or proposed acquisition, of a substantial interest in a company, body or scheme, the Panel must take into account the actions of the directors of the company or body or the responsible entity for a scheme (including actions that caused the acquisition or proposed acquisition not to proceed or contributed to it not proceeding).

- (4) The Panel must give an opportunity to make submissions in relation to the matter to:
 - (a) each person to whom a proposed declaration relates; and
 - (b) each party to the proceedings; and
 - (c) ASIC.
- (5) The declaration must be in writing and published in the *Gazette*.

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- (6) As soon as practicable, the Panel must give each person to whom the declaration relates:
 - (a) a copy of the declaration; and
 - (b) a written statement of the Panel's reasons for making the declaration.
- (7) This section does not require the Panel to perform a function, or exercise a power, in a particular way in a particular case.

657B When Panel may make declaration

The Panel can only make a declaration under section 657A within:

- (a) 3 months after the circumstances occur; or
- (b) 1 month after the application under section 657C for the declaration was made;

whichever ends last. The Court may extend the period on application by the Panel.

657C Applying for declarations and orders

- (1) The Panel may make a declaration under section 657A, or an order under section 657D or 657E, only on an application made under this section.
- (2) An application for a declaration under section 657A or an order under section 657D or 657E may be made by:
 - (a) the bidder; or
 - (b) the target; or
 - (c) ASIC; or
 - (d) any other person whose interests are affected by the relevant circumstances.

Note: The Administrative Appeals Tribunal cannot review ASIC's decision whether to apply to the Panel (see paragraph 1317C(gc)).

- (3) An application for a declaration under section 657A can be made only within:
 - (a) 2 months after the circumstances have occurred; or
 - (b) a longer period determined by the Panel.

657D Orders that Panel may make following declaration

- (1) The Panel may make an order under subsection (2) if it has declared circumstances to be unacceptable under section 657A. It must not make an order if it is satisfied that the order would unfairly prejudice any person. Before making the order, the Panel must give:
- (a) each person to whom a proposed order relates; and
 - (b) each party to the proceedings; and
 - (c) ASIC;
- an opportunity to make submissions to the Panel about the matter
- (2) The Panel may make any order (including a remedial order but not including an order directing a person to comply with a requirement of Chapter 6, 6A, 6B or 6C) that it thinks appropriate to:
- (a) protect the rights or interests of any person affected by the circumstances; or
 - (b) ensure that a takeover bid or proposed takeover bid in relation to securities proceeds (as far as possible) in a way that it would have proceeded if the circumstances had not occurred; or
 - (c) specify in greater detail the requirements of an order made under this subsection; or
 - (d) determine who is to bear the costs of the parties to the proceedings before the Panel;

regardless of whether it has previously made an order under this subsection or section 657E in relation to the declaration. The Panel may also make any ancillary or consequential orders that it thinks appropriate.

Note: Section 9 defines *remedial order*.

- (3) The Panel may vary, revoke or suspend an order made under this section. Before doing so, it must give an opportunity to make submissions in relation to the matter to:
- (a) each person to whom the order is directed; and
 - (b) each party to the proceedings in which the order was made; and
 - (c) ASIC.

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- (4) If the Panel makes an order under this section, the Panel must give a copy of the order, and a written statement of its reasons for making the order, to:
- (a) each party to the proceedings before the Panel; and
 - (b) each person to whom the order is directed if they are not a party to the proceedings; and
 - (c) for an order relating to specified securities of a company—the company; and
 - (d) ASIC.

The Panel must also publish the order in the *Gazette*. The order takes effect as soon as it is made and not when all the requirements of this subsection are met.

- (5) If the Panel makes an order of the kind referred to in paragraph (j) of the definition of *remedial order*, the exercise of rights attached to shares is to be disregarded as provided in the order.
- (6) If the Panel makes an order of the kind referred to in paragraph (k) of the definition of *remedial order*, then, by force of this subsection, the agreement or offer specified in the order is cancelled, or becomes voidable, as from the making of the order or any later time that is specified in the order.

657E Interim orders

- (1) The Panel, or the President of the Panel, may make an interim order of a kind referred to in subsection 657D(2) in relation to circumstances even if:
- (a) there is no declaration under section 657A that the circumstances are unacceptable; or
 - (b) no application to the Panel for a declaration of that kind has been made.

The order must specify the period (not exceeding 2 months) for which it is to have effect.

- (2) The order ceases to have effect:
- (a) at the end of the period specified in the order; or
 - (b) if, before the end of that period, proceedings for a declaration under section 657A in relation to the circumstances (and all

related proceedings for an order under section 657D) are determined—when those proceedings are determined.

657EA Internal Panel reviews

- (1) The following may apply under this section for review by the Panel of a decision of the Panel made on an application under section 657C:

- (a) a party to the proceedings in which the decision was made; or
- (b) ASIC.

For these purposes, *decision* has the same meaning as in the *Administrative Appeals Tribunal Act 1975*.

- (2) If the decision is not:

- (a) a decision to make a declaration under section 657A; or
- (b) a decision to make an order under section 657D or 657E;

the person may apply for review only with the consent of the President of the Panel.

- (3) The regulations may provide for the time limits within which an application may be made for review of a decision.

Note: Regulations made under the ASIC Act deal with the constitution of the Panel for the purposes of conducting a review under this section and the procedures to be followed in conducting the review.

- (4) After conducting a review under this section, the Panel may:

- (a) vary the decision reviewed; or
- (b) set aside the decision reviewed; or
- (c) set aside the decision reviewed and substitute a new decision.

In conducting the review, the Panel has the same power to make a declaration under section 657A, or an order under section 657D or 657E, as it has when it is considering an application under section 657C.

657EB References by Courts

- (1) A Court hearing proceedings in relation to a decision of the Panel made on an application under section 657C may refer the decision to the Panel for review.

Chapter 6 Takeovers

Part 6.10 Review and intervention

Division 2 The Corporations and Securities Panel

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Note: Regulations made under the ASIC Act deal with the constitution of the Panel for the purposes of conducting a review under this section and the procedures to be followed in conducting the review.

- (2) After conducting a review under this section, the Panel may:
- (a) vary the decision reviewed; or
 - (b) set aside the decision reviewed; or
 - (c) set aside the decision reviewed and substitute a new decision.

In conducting the review, the Panel has the same powers to make a declaration under section 657A, or an order under section 657D or 657E, as it has when it is considering an application under section 657C.

657F Offence to contravene Panel order

A person who contravenes an order made under section 657D or 657E commits an offence.

657G Orders by the Court where contravention or proposed contravention of Panel order

- (1) If a person contravenes, or proposes to engage in conduct that would contravene, an order made by the Panel under section 657D or 657E, the Court may make any orders it considers appropriate to secure compliance with the Panel's order, including:
- (a) 1 or more remedial orders; and
 - (b) an order directing a person to do, or to refrain from doing, a specified act.

Note: Section 9 defines *remedial order*.

- (2) An application for an order under this section may only be made by:
- (a) ASIC; or
 - (b) the President of the Panel; or
 - (c) a person to whom the Panel's order relates; or
 - (d) a person who was a party to the proceedings in which the Panel's order was made.

657H ASIC may publish report about application to Panel or Court

- (1) ASIC may publish a report, statement or notice in relation to an application it has made for:
 - (a) a declaration of unacceptable circumstances under section 657A; or
 - (b) an order under subsection 657D(2); or
 - (c) an order under section 657E; or
 - (d) review under section 657EA of a decision of the Panel; or
 - (e) an order under section 657G to secure compliance with an order made under subsection 657D(2) or section 657E.
- (2) The report, statement or notice must:
 - (a) state that the application has been made; and
 - (b) name the company; and
 - (c) if ASIC considers that the report, statement or notice should name any other person to whom the declaration would relate or the order would be directed—name that other person.
- (3) The report, statement or notice may be published in any way that ASIC thinks appropriate. It need not be in writing.
- (4) This section does not limit a function or power of ASIC, the Panel or any other person or body.

Subdivision C—General provisions

658A Power of Panel where a proceeding is frivolous or vexatious

- (1) If an application is made to the Panel under this Division, the Panel may, at any stage of the proceeding, if it is satisfied that the application is frivolous or vexatious:
 - (a) dismiss the application; or
 - (b) if the Panel considers it appropriate, on the application of a party to the proceedings, direct that the person who made the application must not, without leave of the Panel, make a subsequent application to the Panel of a kind or kinds specified in the direction.

Section 658B

- (2) A direction given by the Panel under paragraph (1)(b) has effect despite any other provision of this Act or a provision of any other Act.
- (3) The Panel may revoke or vary the direction.

658B Evidentiary value of findings of fact by Panel

- (1) A finding of fact recorded in an order by the Panel, or a written statement of the reasons for an order of the Panel, is proof of the fact in the absence of evidence to the contrary.
- (2) A certificate signed by the President of the Panel that states a finding of fact made in proceedings before the Panel is proof of the fact in the absence of evidence to the contrary.

658C Panel's power to make rules

- (1) The President of the Panel may, after consultation with members of the Panel, make rules, not inconsistent with this Act or the Regulations, to clarify or supplement the operation of the provisions of this Chapter.
- (2) In making rules under this section, the President of the Panel must consider the purposes of this Chapter set out in section 602.
- (3) A rule under this section must be in writing and the President of the Panel must:
 - (a) publish notice of it in the *Gazette*; and
 - (b) give the Minister, and ASIC, a copy of the rule as soon as practicable after it is published in the *Gazette*.
- (4) Within 28 days after receiving the copy, the Minister may disallow the whole or a specified part of the rule.
- (5) If a person contravenes a rule made under this section, the Court may give directions for compliance with the rule to:
 - (a) that person; or
 - (b) if that person is a body corporate—the directors of the body corporate.

The Court must give the person against whom the order is sought, and any person aggrieved by the contravention, an opportunity to be heard before giving directions under this subsection.

- (6) The Court may give a direction under subsection (5) only on application by:
- (a) ASIC; or
 - (b) the President of the Panel; or
 - (c) a person aggrieved by the contravention.

658D Inconsistency between Panel rules and ASIC exemption or declaration

If there is an inconsistency between a rule made under section 658C and an exemption given, or declaration made, by ASIC under section 655A, the rule made under section 658C prevails to the extent of the inconsistency.

Division 3—Court powers

659A Panel may refer questions of law to the Court

The Panel may, of its own motion, refer a question of law arising in a proceeding before the Panel to the Court for decision.

659AA Object of sections 659B and 659C

The object of sections 659B and 659C is to make the Panel the main forum for resolving disputes about a takeover bid until the bid period has ended.

659B Court proceedings before end of bid period

Delay in commencing court proceedings until after end of bid period

- (1) Only the following may commence court proceedings in relation to a takeover bid, or proposed takeover bid, before the end of the bid period:
- (a) ASIC;
 - (b) a Minister of the Commonwealth;
 - (c) a Minister of a State or Territory in this jurisdiction;
 - (d) the holder of an office established by a law of:
 - (i) the Commonwealth; or
 - (ii) a State or Territory in this jurisdiction;
 - (e) a body corporate incorporated for a public purpose by a law of:
 - (i) the Commonwealth; or
 - (ii) a State or Territory in this jurisdiction;to the extent to which it is exercising a power conferred by a law of the Commonwealth or a State or Territory in this jurisdiction.

Note: This restriction starts to apply as soon as there is a takeover bid, or a proposed takeover bid; it does not start to apply only when the bid period commences.

Court power to stay proceedings that have already commenced

- (2) A court may stay:
- (a) court proceedings in relation to a takeover bid or proposed takeover bid; or
 - (b) court proceedings that would have a significant effect on the progress of a takeover bid;
- until the end of the bid period.
- (3) In deciding whether to exercise its powers under subsection (2), the court is to have regard to:
- (a) the purposes of this Chapter; and
 - (b) the availability of review by the Panel under Division 2.
- (4) For the purposes of this section:

court proceedings in relation to a takeover bid or proposed takeover bid:

- (a) means any proceedings before a court in relation to:
 - (i) an action taken or to be taken as part of, or for the purposes of, the bid or the target's response to the bid; or
 - (ii) a document prepared or to be prepared, or a notice given or to be given, under this Chapter; and
- (b) includes:
 - (i) proceedings to enforce an obligation imposed by this Chapter; or
 - (ii) proceedings for the review of a decision, or the exercise of a power or discretion, under this Chapter; or
 - (iii) proceedings for the review of a decision, or the exercise of a power or discretion, under Chapter 6C in relation to securities of the target of a takeover bid during the bid period; and
 - (iv) proceedings under Part 2F.1A for leave to bring, or to intervene in, proceedings referred to in paragraph (a) or subparagraph (b)(i), (ii) or (iii).

This is not limited to proceedings brought under this Chapter or this Act but includes proceedings under other Commonwealth and State or Territory laws (including the general law).

Section 659C

- (5) Nothing in this section is intended to affect the jurisdiction of the High Court under section 75 of the Constitution.

659C Court proceedings after end of bid period

- (1) If:
- (a) an application is made to the Panel for a declaration under section 657A that particular conduct amounts to, or leads to, circumstances that are unacceptable; and
 - (b) the Panel refuses to make the declaration; and
 - (c) a Court finds after the end of the bid period that the conduct contravenes this Act;
- the Court's powers under this Act in relation to the conduct are limited to the following:
- (d) the Court may:
 - (i) determine whether a person is guilty of an offence against this Act because they engaged in or were involved in the conduct; and
 - (ii) impose a penalty if the person is found guilty;
 - (e) the Court may:
 - (i) determine whether a person who engaged in, or was involved in, the conduct contravened a provision of this Act; and
 - (ii) order the person to pay an amount of money to another person (whether by way of damages, account of profits, pecuniary penalty or otherwise);
 - (f) the Court may make an order under section 1318 or 1322 in relation to the conduct.

This subsection does not confer power or jurisdiction on a court that it does not have apart from this subsection.

- (2) Without limiting subsection (1), the only kind of remedial order that the Court may make is one that requires the person to pay money to another person.

Chapter 6A—Compulsory acquisitions and buy-outs

660A Chapter extends to some listed bodies that are not companies

This Chapter extends to the acquisition of securities of listed bodies that are not companies but are incorporated or formed in Australia in the same way as it applies to the acquisition of securities of companies.

Note: Section 9 defines *company* and *listed*.

660B Chapter extends to listed managed investment schemes

- (1) This Chapter extends to the acquisition of interests in a registered scheme that is also listed as if:
 - (a) the scheme were a company; and
 - (b) interests in the scheme were shares in the company; and
 - (c) voting interests in the scheme were voting shares in the company.
- (2) If Part 6A.1 applies to a scheme at the end of the bid period for a takeover, that Part continues to apply to the scheme in relation to the takeover bid even if the scheme ceases to be listed.
- (3) If Part 6A.2 applies to a scheme when a compulsory acquisition notice under section 664C is lodged, that Part (including Division 2 of that Part) continues to apply to the scheme in relation to the notice even if the scheme ceases to be listed.
- (4) The regulations may modify the operation of this Chapter as it applies in relation to the acquisition of interests in listed managed investment schemes.

Part 6A.1—Compulsory acquisitions and buy-outs following takeover bid

Division 1—Compulsory acquisition of bid class securities

661A Compulsory acquisition power following takeover bid

Threshold for compulsory acquisition power

- (1) Under this subsection, the bidder under a takeover bid may compulsorily acquire any securities in the bid class if:
 - (a) the bid is:
 - (i) an off-market bid to acquire all the securities in the bid class; or
 - (ii) a market bid; and
 - (b) during, or at the end of, the offer period:
 - (i) the bidder and their associates have relevant interests in at least 90% (by number) of the securities in the bid class; and
 - (ii) the bidder and their associates have acquired at least 75% (by number) of the securities that the bidder offered to acquire under the bid (whether the acquisitions happened under the bid or otherwise).

This is so even if the bidder subsequently ceases to satisfy subparagraph (b)(i) because of the issue of further securities in the bid class.

Note: Subsection 92(3) defines *securities* for the purposes of this Chapter.

- (2) For the purposes of subsection (1), disregard any relevant interests that the bidder has merely because of the operation of subsection 608(3) (relevant interest by 20% interest in body corporate).

Court may allow compulsory acquisition even if threshold not reached

- (3) Under this subsection, the bidder under a takeover bid may compulsorily acquire securities in the bid class with the approval of the Court.

Securities to be acquired

- (4) If the bidder compulsorily acquires securities in the bid class under subsection (1) or (3), the bidder:
- (a) must acquire all the securities in the bid class:
 - (i) which were issued or granted before the end of the offer period; and
 - (ii) in which the bidder does not have a relevant interest; and
 - (b) may elect to acquire all securities in the bid class:
 - (i) that were issued or granted after the end of the offer period and before the notice under section 661B is issued; and
 - (ii) in which the bidder does not have a relevant interest; but only if the bidder and their associates have relevant interests in at least 90% (by number) of the securities in the bid class when the bidder gives notice under section 661B; and
 - (c) if securities exist when the bidder gives the notice under section 661B that:
 - (i) will convert, or may be converted, to securities in the bid class; or
 - (ii) confer rights to be issued securities in the bid class that may be exercised;
within the period of 6 weeks after the notice is given—may elect to acquire securities that come to be in the bid class during that period due to a conversion or exercise of the rights but only if the bidder and their associates have relevant interests in at least 90% of the securities (by number) in the bid class when the bidder gives notice under section 661B; and
 - (d) may elect to acquire any securities in the bid class in which the bidder has a relevant interest (no matter when they were issued or granted).
- (5) This section has effect despite anything in the constitution of the company whose securities are to be acquired.

Section 661B

661B Compulsory acquisition notice

Compulsory acquisition notice

- (1) To compulsorily acquire securities under subsection 661A(1) or (3), the bidder must:
 - (a) prepare a notice in the prescribed form that:
 - (i) informs the holders of the securities that the bidder is entitled to acquire their securities under that subsection; and
 - (ii) informs the holders about the compulsory acquisition procedure under this Part, including:
 - (A) their right under section 661D to obtain the names and addresses of everyone else the bidder has given the notice to; and
 - (B) their right under section 661E to apply to the Court for an order that the securities not be compulsorily acquired; and
 - (b) lodge the notice with ASIC; and
 - (c) give the notice to each other person who is:
 - (i) a holder of securities in the bid class; or
 - (ii) if the bidder elects under paragraph 661A(4)(c) to acquire securities that come to be in the bid class after the notice is given—a holder of the convertible securities referred to in that paragraph; and
 - (d) give a copy to each relevant securities exchange on the same day as it is lodged with ASIC if the target is listed.

If alternative forms of consideration were offered under the takeover bid, the notice must specify which of those forms of consideration will apply to the acquisition of the holder's securities if the holder does not elect one of the forms under paragraph 661C(2)(a).

Note: Everyone who holds bid class securities on the day on which the notice is lodged with ASIC is entitled notice. Under section 661E, anyone who holds the securities after that day may apply to the Court to stop the acquisition.

Time for dispatching notices to holders

- (2) The bidder must dispatch the notices under paragraph (1)(c):
-

- (a) during the offer period, or within 1 month after:
 - (i) the end of offer period if the acquisition is under subsection 661A(1); or
 - (ii) the court approval if the acquisition is under subsection 661A(3); and
- (b) on the day the bidder lodges the notice with ASIC or on the next business day.

The notices cannot be withdrawn.

Manner of giving notice to holders

- (3) The bidder may give the notice to a holder:
 - (a) personally; or
 - (b) by sending it by post to the address for the holder in the register of members, debenture holders or option holders.A notice sent by post is taken to be given 3 days after it is posted.
- (4) The notice may be sent:
 - (a) if the notice is to be sent to the holder outside Australia—by pre-paid airmail post or by courier; or
 - (b) if the notice is to be sent to the holder in Australia—by pre-paid ordinary post or by courier.

This section does not limit the manner in which the notice may be sent to the holder.

Note: Section 109X makes general provision for service of documents.

661C Terms on which securities to be acquired

Same terms as takeover bid

- (1) The bidder may acquire the securities only on the terms that applied to the acquisition of securities under the takeover bid immediately before:
 - (a) the notice under section 661B is given if it is given before the end of the offer period; or
 - (b) the end of the offer period if it is not.

Chapter 6A Compulsory acquisitions and buy-outs

Part 6A.1 Compulsory acquisitions and buy-outs following takeover bid

Division 1 Compulsory acquisition of bid class securities

Section 661D

Alternative forms of consideration under takeover bid

- (2) If alternative forms of consideration were offered under the takeover bid, the form of consideration that applies to the acquisition of the holder's securities is:
 - (a) the form that the holder elects; or
 - (b) the form set out in the compulsory acquisition notice under subsection 661B(1).
- (3) The holder makes an election under subsection (2) by giving the bidder a notice of the election by the later of:
 - (a) 1 month after the compulsory acquisition notice is given under section 661B; or
 - (b) 14 days after the holder is given a statement under section 661D if the holder asks for it.
- (4) The election must be:
 - (a) in an electronic form approved by the SCH business rules for the purposes of this Part if it relates to securities that are entered on an SCH subregister; or
 - (b) in writing if it relates to securities that are not entered on an SCH subregister.

661D Holder may obtain names and addresses of other holders

Within 1 month after a compulsory acquisition notice in relation to securities in the bid class is lodged with ASIC under section 661B, the holder of the securities may ask the bidder in writing for a written statement of the names and addresses of everyone else the bidder has given the notice to. The bidder must give the holder the statement within 7 days after the request.

661E Holder may apply to Court to stop acquisition

- (1) The holder of securities covered by a compulsory acquisition notice under section 661B may apply to the Court for an order that the securities not be compulsorily acquired under subsection 661A(1). The application must be made before the later of:
 - (a) the end of 1 month after the holder is given notice under section 661B; or

- (b) the end of 14 days after the holder is given a statement under section 661D if the holder asks for it.
- (2) The Court may order that the securities not be compulsorily acquired under subsection 661A(1) only if the Court is satisfied that the consideration is not fair value for the securities.
- Note: See section 667C on valuation.
- (3) If the Court makes an order under this section in relation to an acquisition of securities, the order applies to all holders who have applications to the Court pending for an order under this section in relation to the acquisition.

661F Signpost—completing the acquisition of the securities

See section 666A to find out how to complete the acquisition.

Division 2—Compulsory buy-out of bid class securities

662A Bidder must offer to buy out remaining holders of bid class securities

- (1) If the bidder and their associates have relevant interests in at least 90% of the securities (by number) in the bid class at the end of the offer period, the bidder must offer to buy out the remaining holders of bid class securities in accordance with sections 662B and 662C.
- (2) This section does not apply to securities that are issued:
 - (a) if the takeover bid was not subject to a defeating condition—after the end of the offer period; or
 - (b) if the takeover bid was subject to a defeating condition—after the notice whether the bid is free from a defeating condition or not is given under subsection 630(3).

662B Bidder to tell remaining holders of their right to be bought out

Notice to remaining holders of bid class securities

- (1) The bidder must:
 - (a) prepare a notice in the prescribed form that:
 - (i) states that the bidder and their associates have relevant interests in at least 90% (by number) of the securities in the bid class; and
 - (ii) informs the holder of bid class securities about their right to be bought out under this Part; and
 - (iii) sets out the terms on which the holder may be bought out; and
 - (b) lodge the notice with ASIC; and
 - (c) give the notice to each other person who:
 - (i) is a holder of securities in the bid class on the day on which the notice is lodged with ASIC; and
 - (ii) has not been given a compulsory acquisition notice under section 661B when the notice under subsection (2) is given; and

- (d) give the notice to each relevant securities exchange on the same day as it is lodged with ASIC if the target is listed.

If alternative forms of consideration were offered under the takeover bid, the notice must specify which of those forms will apply to the acquisition of the holder's securities if the holder does not give the bidder an election notice under subsection 662C(1).

Note: The notice is to be given to everyone who holds bid class securities on the day on which the notice is lodged with ASIC. Under section 662C, anyone who acquires the securities after that day may require the bidder to acquire the securities.

Time for dispatching notice to holders

- (2) The bidder must dispatch the notices under paragraph (1)(c):
- (a) during, or within 1 month after the end of, the offer period; and
 - (b) on the day the bidder lodges the notice with ASIC or on the next business day.

The notices cannot be withdrawn.

Manner of giving notice to holders

- (3) The bidder may give the notice to a holder:
- (a) personally; or
 - (b) by sending it by post to the address for the holder in the register of members, debenture holders or option holders.
- A notice sent by post is taken to be given 3 days after it is posted.
- (4) The notice may be sent:
- (a) if the notice is to be sent to the holder outside Australia—by pre-paid airmail post or by courier; or
 - (b) if the notice is to be sent to the holder in Australia—by pre-paid ordinary post or by courier.

This subsection does not limit the manner in which the document may be sent to the holder.

Note: Section 109X makes general provision for service of documents.

Section 662C

662C Right of remaining holder of securities in the bid class to be bought out

- (1) Within 1 month after notice is given in relation to securities under section 662B, the holder of the securities may give the bidder written notice requiring the bidder to acquire the securities. If alternative forms of consideration were offered under the takeover bid, the holder may elect in the notice which of those forms will apply to the acquisition of the holder's securities.
- (2) The notice by the holder gives rise to a contract between the holder and the bidder for the sale of the securities on:
 - (a) the terms that applied to the acquisition of securities under the bid immediately before the end of the offer period; or
 - (b) if alternative forms of consideration applied at that time—on the terms that the bidder will provide:
 - (i) the alternative specified by the holder in the notice under subsection (1); or
 - (ii) if the holder has not made an election under that subsection—the alternative set out in the bidder's notice under section 662B; or
 - (c) if the holder and the bidder agree on other terms—those terms.

Division 3—Compulsory buy-out of convertible securities

663A Bidder must offer to buy out holders of convertible securities

If the bidder and their associates have relevant interests in at least 90% of the securities (by number) in the bid class at the end of the offer period, the bidder must offer to buy out the holders of securities that are convertible into bid class securities in accordance with sections 663B and 663C. This section does not apply to securities if a takeover bid has been made for the convertible securities and a notice has been given under section 661B or 662B in relation to the convertible securities.

Note: For when securities are convertible into bid class securities, see the definition of *convertible securities* in section 9.

663B Bidder to tell holders of convertible securities of their right to be bought out

Notice to holders of convertible securities

- (1) The bidder must:
 - (a) prepare a notice in the prescribed form that:
 - (i) states that the bidder and their associates have relevant interests in at least 90% of the securities (by number) in the bid class; and
 - (ii) informs the holder of convertible securities about their right to be bought out under this Part; and
 - (iii) sets out the terms on which the holder may be bought out; and
 - (b) lodge the notice with ASIC; and
 - (c) give each other person who is a holder of convertible securities:
 - (i) the notice; and
 - (ii) a copy of the expert's report, or of all the experts' reports, under section 667A; and
 - (d) give a copy of those documents to each relevant securities exchange on the same day as it is lodged with ASIC if the target is listed.

Chapter 6A Compulsory acquisitions and buy-outs

Part 6A.1 Compulsory acquisitions and buy-outs following takeover bid

Division 3 Compulsory buy-out of convertible securities

Section 663C

Note 1: Subparagraph (a)(iii)—Section 667A deals with the contents of an expert's report.

Note 2: The notice is to be given to everyone who holds convertible securities on the day on which the notice is lodged with ASIC. Under section 663C, anyone who acquires the securities after that day may require the bidder to acquire the securities.

Time for dispatching notice to holders

- (2) The bidder must dispatch the notices and reports under paragraph (1)(c):
- (a) during, or within 1 month after the end of, the offer period; and
 - (b) on the day the bidder lodges the notice with ASIC or on the next business day.

The notices cannot be withdrawn.

Manner of giving notice to holders

- (3) The bidder may give the notice or report to a holder:
- (a) personally; or
 - (b) by sending it by post to the address for the holder in the register of members, debenture holders or option holders.

A notice or report sent by post is taken to be given 3 days after it is posted.

- (4) The notice may be sent:
- (a) if the notice is to be sent to the holder outside Australia—by pre-paid airmail post or by courier; or
 - (b) if the notice is to be sent to the holder in Australia—by pre-paid ordinary post or by courier.

This subsection does not limit the manner in which the document may be sent to the holder.

Note: Section 109X makes general provision for service of documents.

663C Right of holders of convertible securities to be bought out

- (1) Within 1 month after notice under section 663B is given in relation to convertible securities, the holder of the convertible securities may give the bidder a notice requiring the bidder to acquire the securities.

- (2) The holder's notice gives rise to a contract between the holder and the bidder for the sale of the securities on:
 - (a) the terms agreed to by the bidder and the holder; or
 - (b) the terms determined by the Court on application by the holder.
- (3) If the Court makes a determination under paragraph (2)(b) in relation to the terms of sale for a holder's securities of a particular class, the determination applies to all holders of securities in that class who have applications to the Court pending for a determination under that paragraph in relation to the terms of sale of their securities.

Part 6A.2—General compulsory acquisitions and buy-outs

Division 1—Compulsory acquisition of securities by 90% holder

664A Threshold for general compulsory acquisition power

90% holder—holder of 90% of securities in particular class

- (1) A person is a 90% holder in relation to a class of securities of a company if the person holds, either alone or with a related body corporate, full beneficial interests in at least 90% of the securities (by number) in that class.

90% holder—holder with 90% voting power and 90% of whole company or scheme

- (2) A person is also a 90% holder in relation to a class of securities of a company if:
 - (a) the securities in the class are shares or convertible into shares; and
 - (b) the person's voting power in the company is at least 90%; and
 - (c) the person holds, either alone or with a related body corporate, full beneficial interests in at least 90% by value of all the securities of the company that are either shares or convertible into shares.

Note: Subsection 667A(2) provides that the expert's report that accompanies the compulsory acquisition notice must support the paragraph (c) condition.

90% holder may acquire remainder of securities in class

- (3) Under this section, a 90% holder in relation to a class of securities of a company may compulsorily acquire all the securities in that class in which neither the person nor any related bodies corporate has full beneficial interests if either:

(a) the holders of securities in that class (if any) who have objected to the acquisition between them hold less than 10% by value of those remaining securities at the end of the objection period set out in the notice under paragraph 664C(1)(b); or

(b) the Court approves the acquisition under section 664F.

If subsection (2) applies to the 90% holder, the holder may compulsorily acquire securities in a class only if the holder gives compulsory acquisition notices in relation to all classes of shares and securities convertible into shares of which they do not already have full beneficial ownership.

Note: Subsection 92(3) defines *securities* for the purposes of this Chapter.

- (4) This section has effect despite anything in the constitution of the company whose securities are to be acquired.
- (5) This Part does not apply to shares that give the shareholder, as a shareholder, a right to occupy or use real property that the company owns or holds under lease, whether the right is a lease or licence or a contractual right.
- (6) The 90% holder's power to compulsorily acquire securities under a notice given under section 664C ends if the 90% holder contravenes section 664D by offering benefits outside the terms proposed in the compulsory acquisition notice under section 664C.

664AA Time limit on exercising compulsory acquisition power

The 90% holder in relation to a class of securities of a company may compulsorily acquire securities in that class under section 664A only if the holder lodges the compulsory acquisition notice for the acquisition with ASIC under paragraph 664C(2)(a) within whichever of the following periods ends last:

- (a) the period of 12 months that started on 13 March 2000; or
(b) the period of 6 months after the 90% holder becomes the 90% holder in relation to that class.

Section 664B

664B The terms for compulsory acquisition

The 90% holder may acquire the securities in the class for a cash sum only and must pay the same amount for each security in the class acquired.

664C Compulsory acquisition notice

Compulsory acquisition notice

- (1) To compulsorily acquire securities under section 664A, the 90% holder must prepare a notice in the prescribed form that:
 - (a) sets out the cash sum for which the 90% holder proposes to acquire the securities; and
 - (b) specifies a period of at least 1 month during which the holders may return the objection forms; and
 - (c) informs the holders about the compulsory acquisition procedure under this Part, including:
 - (i) their right to obtain the names and addresses of the other holders of securities in that class from the company register; and
 - (ii) their right to object to the acquisition by returning the objection form that accompanies the notice within the period specified in the notice; and
 - (d) gives details of the consideration given for any securities in that class that the 90% holder or an associate has purchased within the last 12 months; and
 - (e) discloses any other information that is:
 - (i) known to the 90% holder or any related bodies corporate; and
 - (ii) material to deciding whether to object to the acquisition; and
 - (iii) not disclosed in an expert's report under section 667A.
- (2) The 90% holder must then:
 - (a) lodge the notice with ASIC; and
 - (b) give each other person (other than a related body corporate) who is a holder of securities in the class on the day on which the notice is lodged with ASIC:

- (i) the notice; and
- (ii) a copy of the expert's report, or of all experts' reports, under section 667A; and
- (iii) an objection form; and
- (c) give the company copies of those documents; and
- (d) give copies of those documents to the relevant securities exchange if the company is listed.

Note: Everyone who holds the securities on the day on which the notice is lodged with ASIC is entitled to notice. Under subsection 664E(1), anyone who acquires the securities during the objection period may object to the acquisition.

Time for dispatching notice to holders

- (3) The 90% holder must dispatch the notices under paragraph (2)(b) on the day the 90% holder lodges the notice with ASIC or on the next business day.

Manner of giving notice to holders

- (4) The 90% holder may give the notice to a holder:
 - (a) personally; or
 - (b) by sending it by post to the address for the holder in the register of members, debenture holders or option holders.A notice sent by post is taken to be given 3 days after it is posted.
- (5) The notice may be sent:
 - (a) if the notice is to be sent to the holder outside Australia—by pre-paid airmail post or by courier; or
 - (b) if the notice is to be sent to the holder in Australia—by pre-paid ordinary post or by courier.

This subsection does not limit the manner in which the document may be sent to the holder.

Note: Section 109X makes general provision for service of documents.

Notice not to be withdrawn

- (6) The 90% holder may not:
 - (a) withdraw a notice under this section; or
 - (b) if the 90% holder has given a notice under this section in relation to those securities and the objection period for that

Section 664D

notice has not ended—give another notice under this section in relation to securities.

664D Benefits outside compulsory acquisition procedure

- (1) If the 90% holder gives a notice under section 664C to compulsorily acquire securities, the 90% holder or an associate must not offer, give or agree to give a benefit to a person during the objection period if:
 - (a) the benefit is likely to induce the person, or an associate of the person, to:
 - (i) dispose of securities in that class; or
 - (ii) not object to the acquisition of those securities under the notice; and
 - (b) the benefit is not provided for in the notice.
- (2) If the 90% holder proposes to give a notice under section 664C to acquire securities within the next 4 months, the 90% holder or an associate must not offer, give or agree to give a benefit to a person if:
 - (a) the benefit is likely to induce the person, or an associate of the person, to:
 - (i) dispose of securities in that class; or
 - (ii) not object to the acquisition of those securities under the notice; and
 - (b) the benefit is not proposed to be provided for in the notice.
- (3) If the 90% holder gives a notice under section 664C to compulsorily acquire securities, the 90% holder or an associate must not give a benefit to a person:
 - (a) within 1 month after the end of the objection period (see subsection 664F(2)); or
 - (b) during any proceedings by the Court to determine an application under subsection 664F(1) by the 90% holder;if:
 - (c) the benefit is likely to induce the person, or an associate of the person, to:
 - (i) not object, or pursue an objection, to the acquisition of those securities under the notice; or

- (ii) dispose of securities in that class; and
 - (d) the benefit is not offered to all holders of securities in that class under the notice.
- (4) This section does not prohibit simultaneous notices under section 664C to compulsorily acquire different classes of securities in the company.

664E Holder's right to object to the acquisition

- (1) A person who holds securities covered by the compulsory acquisition notice may object to the acquisition of the securities by signing an objection form and returning it to the 90% holder. The objection:
- (a) relates to all securities that are covered by the notice and are held by the person at the end of the objection period; and
 - (b) cannot be withdrawn.
- (2) The 90% holder must lodge with ASIC a copy of any objection form returned under subsection (1) as soon as practicable after it is returned.
- (3) As soon as practicable after the end of the objection period, the 90% holder must:
- (a) prepare a list that sets out:
 - (i) the names of people who hold securities covered by the compulsory acquisition notice and have objected to the acquisition; and
 - (ii) details of the securities they hold; and
 - (b) lodge the list with ASIC; and
 - (c) give a copy of the list to the company; and
 - (d) if the company is listed—give a copy to the relevant securities exchange.
- (4) If people who hold at least 10% of the securities covered by the compulsory acquisition notice object to the acquisition before the end of the objection period, the 90% holder must give everyone to whom the compulsory acquisition notice was sent under section 664C:
- (a) a notice that the proposed acquisition will not occur; or

Section 664F

- (b) a notice that the 90% holder has applied to the Court for approval of the acquisition under section 664F; within 1 month after the end of the objection period.

664F The Court's power to approve acquisition

- (1) If people who hold at least 10% of the securities covered by the compulsory acquisition notice object to the acquisition before the end of the objection period, the 90% holder may apply to the Court for approval of the acquisition of the securities covered by the notice.
- (2) The 90% holder must apply within 1 month after the end of the objection period.
- (3) If the 90% holder establishes that the terms set out in the compulsory acquisition notice give a fair value for the securities, the Court must approve the acquisition of the securities on those terms. Otherwise it must confirm that the acquisition will not take place.

Note: See section 667C on valuation.

- (4) The 90% holder must bear the costs that a person incurs on legal proceedings in relation to the application unless the Court is satisfied that the person acted improperly, vexatiously or otherwise unreasonably. The 90% holder must bear their own costs.

664G Signpost—completing the acquisition of the securities

See section 666A for how to complete the acquisition.

Division 2—Compulsory buy-out of convertible securities by 100% holder

665A 100% holder must offer to buy out holders of convertible securities

- (1) A person is a 100% holder of securities in a class if the person, either alone or with a related body corporate, holds full beneficial interests in all the securities in the class.
- (2) A 100% holder in relation to a class of securities (the *main class*) who becomes a 100% holder through compulsory acquisitions under this Part must offer to buy out the holders of securities in another class that are convertible into main class securities in accordance with sections 665B and 665C. This subsection does not apply to securities if a notice is given in relation to the securities under section 661B, 662B or 664C.

Note: For when securities are convertible into main class securities, see the definition of *convertible securities* in section 9.

665B 100% holder to tell holders of convertible securities of their right to be bought out

Notice to holders of convertible securities

- (1) The 100% holder must:
 - (a) prepare a notice in the prescribed form that:
 - (i) states that the person giving the notice has acquired all the securities in the main class; and
 - (ii) sets out the information that was included in the compulsory acquisition notice given in relation to securities in the main class under paragraphs 664C(1)(d) and (e); and
 - (iii) sets out the cash sum for which they are willing to acquire the convertible securities; and
 - (iv) informs the holder of convertible securities about their right to be bought out under this Part; and
 - (b) lodge the notice with ASIC; and

Chapter 6A Compulsory acquisitions and buy-outs

Part 6A.2 General compulsory acquisitions and buy-outs

Division 2 Compulsory buy-out of convertible securities by 100% holder

Section 665B

- (c) give each other person who is a holder of convertible securities on the day on which the notice is lodged with ASIC:
 - (i) the notice; and
 - (ii) a copy of the expert's report, or all experts' reports, under section 667A; and
- (d) give a copy of the documents to the company that issued the securities; and
- (e) give a copy of the documents to each relevant securities exchange on the same day as it is lodged with ASIC if the company is listed.

Note 1: Subparagraph (a)(iv)—Section 667A deals with the contents of an expert's report.

Note 2: The notice is to be given to everyone who holds convertible securities on the day on which the notice is lodged with ASIC. Under section 665C, anyone who holds the securities after that day may require the 100% holder to acquire the securities.

Time for dispatching notice to holders

- (2) The 100% holder must dispatch the notices and reports under paragraph (1)(c):
 - (a) within 1 month after they become the 100% holder; and
 - (b) on the day the 100% holder lodges the notice with ASIC or on the next business day.

The notices cannot be withdrawn.

Manner of giving notice to holders

- (3) The 100% holder may give the notice or report to a holder:
 - (a) personally; or
 - (b) by sending it by post to the address for the holder in the register of members, debenture holders or option holders.

A notice or report sent by post is taken to be given 3 days after it is posted.

- (4) The notice may be sent:
 - (a) if the notice is to be sent to the holder outside Australia—by pre-paid airmail post or by courier; or
 - (b) if the notice is to be sent to the holder in Australia—by pre-paid ordinary post or by courier.

This subsection does not limit the manner in which the document may be sent to the holder.

Note: Section 109X makes general provision for service of documents.

665C Right of holders of convertible securities to be bought out

- (1) Within 1 month after notice under section 665B is given in relation to convertible securities, the holder of the convertible securities may give the 100% holder a notice requiring the 100% holder to acquire the securities.
- (2) The notice by the holder of convertible securities gives rise to a contract between the holder and the 100% holder for the sale of the securities on:
 - (a) terms agreed to by the 100% holder and the holder of the convertible securities; or
 - (b) the terms determined by the Court on application by the holder of the convertible securities.
- (3) If the Court makes a determination under paragraph (2)(b) in relation to the terms of sale for a holder's convertible securities of a particular class, the determination applies to all holders of convertible securities in that class who have applications to the Court pending for a determination under that paragraph in relation to the terms of sale of their convertible securities.

Division 3—Notice that person has become 85% holder of a class of securities

665D Notice by 85% holder to company

85% holder—holder of 85% of securities in particular class

- (1) A person is an 85% holder in relation to a class of securities of a company if the person holds, either alone or with a related body corporate, full beneficial interests in at least 85% of the securities (by number) in that class.

85% holder—holder with 85% voting power and 85% of whole company

- (2) A person is also an 85% holder in relation to a class of securities of a company if:
- (a) the securities in the class are shares or convertible into shares; and
 - (b) the person's voting power in the company is at least 85%; and
 - (c) the person holds, either alone or with a related body corporate, full beneficial interests in at least 85% by value of all the securities of the company that are either shares or convertible into shares.

Person becoming 85% holder to give notice to company

- (3) A person who becomes an 85% holder in relation to a class of securities of a company must notify the company in writing that they have become an 85% holder in relation to that class. The person must give the notice within 14 days after the person becomes aware of the information.

Person continuing to be 85% holder to give notice to company

- (4) A person who:
- (a) gives a company a notice under subsection (3) in relation to a class of securities; and

(b) is an 85% holder in relation to the class on any anniversary of becoming an 85% holder in relation to the class; must notify the company in writing that they continue to be an 85% holder in relation to the class. The person must give the notice within 14 days after the anniversary.

665E Notice by company to other members

Company to notify members

- (1) A company that is given a notice by a person under section 665D in relation to a class of securities must notify its members in writing that:
 - (a) the person:
 - (i) has become an 85% holder in relation to the class; or
 - (ii) continues to be an 85% holder in relation to the class; and
 - (b) the person will be able to acquire the securities in that class under this Part if the person becomes a 90% holder in relation to that class.

Time for notifying members

- (2) The company must notify its members before, or at the same time as, whichever of the following it first gives to its members after the company is given the notice under section 665D:
 - (a) a notice under another provision of this Act;
 - (b) a report under a provision of this Act.

Information about 85% holder to be prominent if included in other material given to members

- (3) If a company notifies its members under this section by including the information referred to in paragraphs (1)(a) and (b) in:
 - (a) a notice given to members under another provision of this Act; or
 - (b) a report given to members under a provision of this Act;the information must appear prominently in the notice or report.

Part 6A.3—Completion of compulsory acquisition of securities

666A Completing the acquisition of securities

Completion to be by private treaty or statutory procedure

- (1) A person entitled to acquire securities under section 661A or 664A must either:
 - (a) pay, issue or transfer the consideration to the holder, take a transfer of the securities from the holder and have the company that issued the securities register the transfer; or
 - (b) complete the procedure laid down in section 666B; by the end of the period referred to in subsection (2) or (3).

Time for completing compulsory acquisition following takeover

- (2) For an acquisition under section 661A, the period ends 14 days after the later of:
 - (a) the end of 1 month after the compulsory acquisition notice was lodged with ASIC under section 661B; or
 - (b) the end of 14 days after the last statement under section 661D was given if a request is made under that section; or
 - (c) if an application to stop the acquisition is made to the Court under section 661E—the application is finally determined.

Time for completing compulsory acquisition under Part 6A.2

- (3) For an acquisition under section 664A or 664F, the period ends 14 days after the later of:
 - (a) the end of the objection period; or
 - (b) if an application for approval of the acquisition is made to the Court under section 664F in relation to the securities—the application is finally determined.

666B Statutory procedure for completion

- (1) Under this section, the person acquiring the securities must:
- (a) give the company that issued the securities a copy of the compulsory acquisition notice under section 661B or 664C together with a transfer of the securities:
 - (i) signed as transferor by someone appointed by the person acquiring the securities; and
 - (ii) signed as transferee by the person acquiring the securities; and
 - (b) pay, issue or transfer the consideration for the transfer to the company that issued the securities.

The person appointed under subparagraph (a)(i) has authority to sign the transfer on behalf of the holder of the securities.

- (2) If the person acquiring the securities complies with subsection (1), the company that issued the securities must:
- (a) register the person as the holder of the securities; and
 - (b) hold the consideration received under subsection (1) in trust for the person who held the securities immediately before registration; and
 - (c) give written notice to the person referred to in paragraph (b) as soon as practicable that the consideration has been received and is being held by the company pending their instructions as to how it is to be dealt with.
- (3) If the consideration held under subsection (2) consists of, or includes, money, that money must be paid into a bank account opened and maintained for that purpose only.

Part 6A.4—Experts' reports and valuations

667A Expert's report

- (1) An expert's report under section 663B, 664C or 665B must:
 - (a) be prepared by a person nominated by ASIC under section 667AA; and
 - (b) state whether, in the expert's opinion, the terms proposed in the notice give a fair value for the securities concerned; and
 - (c) set out the reasons for forming that opinion.

Note: See section 667C on valuation.

- (2) If the person giving the compulsory acquisition notice is relying on paragraph 664A(2)(c) to give the notice, the expert's report under section 664C must also:
 - (a) state whether, in the expert's opinion, the person (either alone or together with a related body corporate) has full beneficial ownership in at least 90% by value of all the securities of the company that are shares or convertible into shares; and
 - (b) set out the reasons for forming that opinion.
- (3) If the person giving the compulsory acquisition notice obtains 2 or more reports, each of which were obtained for the purposes of that notice, a copy of each report must be given to the holder of the securities.

667AA Expert to be nominated

- (1) A person who proposes to obtain an expert's report for the purposes of section 663B, 664C or 665B must request ASIC in writing to nominate a person to prepare the expert's report.
- (2) Within 14 days after receiving a request under subsection (1), ASIC must nominate:
 - (a) an appropriate person to prepare the report; or
 - (b) up to 5 appropriate persons, one of whom the person making the request may choose to prepare the report.

- (3) In determining whether a person is an appropriate person to prepare an expert's report, and without limiting the matters that ASIC may consider, ASIC must consider the nature of the company to be valued.

667B Expert must not be an associate and must disclose prior dealings and relationships

- (1) The expert who provides the report must not be an associate of:
- (a) the person giving the notice; or
 - (b) the company that issued the securities.
- (2) The report must set out details of:
- (a) any relationship between the expert and:
 - (i) the person giving the notice or an associate of the person giving the notice; or
 - (ii) the company that issued the securities or an associate of the company;including any circumstances in which the expert gives them advice, or acts on their behalf, in the proper performance of the functions attaching to the expert's professional capacity or business relationship with them; and
 - (b) any financial or other interest of the expert that could reasonably be regarded as being capable of affecting the expert's ability to give an unbiased opinion in relation to the matter being reported on; and
 - (c) any fee, payment or other benefit (whether direct or indirect) that the expert has received or will or may receive in connection with the report.

667C Valuation of securities

- (1) To determine what is fair value for securities for the purposes of this Chapter:
- (a) first, assess the value of the company as a whole; and
 - (b) then allocate that value among the classes of issued securities in the company (taking into account the relative financial risk, and voting and distribution rights, of the classes); and

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- (c) then allocate the value of each class pro rata among the securities in that class (without allowing a premium or applying a discount for particular securities in that class).
- (2) Without limiting subsection (1), in determining what is fair value for securities for the purposes of this Chapter, the consideration (if any) paid for securities in that class within the previous 6 months must be taken into account.

Part 6A.5—Records of unclaimed consideration

668A Company's power to deal with unclaimed consideration for compulsory acquisition

Records of unclaimed compulsory acquisition consideration

- (1) If a company is paid consideration in respect of securities that are compulsorily acquired under Part 6A.1 or 6A.3, the company must maintain records of:
 - (a) the consideration paid (including any benefit accruing from the consideration and any property substituted for the whole or any part of that consideration); and
 - (b) the people who are entitled to that consideration; and
 - (c) any transfers of the consideration to the people entitled to it.
- (2) The company must keep the records at:
 - (a) its registered office; or
 - (b) its principal place of business in this jurisdiction; or
 - (c) another place in this jurisdiction approved by ASIC.
- (3) A person may ask the company to let the person inspect all or any of the records kept by the company under this section. The company must let the person inspect the records:
 - (a) if the company requires payment of an amount not exceeding the prescribed amount—within 7 days after the day on which the company receives that amount; or
 - (b) in any other case—within 7 days after the day on which the request is made.
- (4) By the end of February each year, the company must publish in the *Gazette* a copy of the records kept under subsection (1) as at the end of the previous December.

668B Unclaimed consideration to be transferred to ASIC

- (1) If the company has not transferred the unclaimed consideration to the person entitled to it within 12 months after the publication of a

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copy of the records in the *Gazette*, the company must transfer the consideration to ASIC within 1 month after the end of that 12 month period.

- (2) The company is then discharged from liability to any person in respect of the consideration.
- (3) ASIC must deal with the consideration under Part 9.7.
- (4) Except as provided by subsection (2), this Part does not deprive a person of any right or remedy to which the person is entitled against a liquidator or company.

Part 6A.6—ASIC powers

669 ASIC's power to exempt and modify

- (1) ASIC may:
 - (a) exempt a person from a provision of this Chapter; or
 - (b) declare that this Chapter applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.
- (2) The exemption or declaration may:
 - (a) apply to all or specified provisions of this Chapter; and
 - (b) apply to all persons, specified persons, or a specified class of persons; and
 - (c) relate to all securities, specified securities or a specified class of securities; and
 - (d) relate to any other matter generally or as specified.
- (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) The exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.
- (5) For the purposes of this section, the *provisions of this Chapter* include:
 - (a) regulations made for the purposes of this Chapter; and
 - (b) definitions in this Act or the regulations as they apply to references in:
 - (i) this Chapter; or
 - (ii) regulations made for the purposes of this Chapter; and
 - (c) the old Division 12 of Part 11.2 transitionals.

Chapter 6B—Rights and liabilities in relation to Chapter 6 and 6A matters

670A Misstatements in, or omissions from, takeover and compulsory acquisition and buy-out documents

- (1) A person must not give:
- (a) a bidder's statement;
 - (b) a takeover offer document;
 - (c) a notice of variation of a takeover offer;
 - (d) a target's statement;
 - (e) a compulsory acquisition notice under section 661B or 664C;
 - (f) a compulsory buy-out notice under section 662B, 663B or 665B;
 - (g) a report that is included in, or accompanies, a statement or notice referred to in paragraphs (a) to (f);
- if there is:
- (h) for all documents—a misleading or deceptive statement in the document; or
 - (i) for a bidder's statement or target's statement—an omission from the document of material required by section 636 or 638; or
 - (j) for a bidder's statement or a target's statement—a new circumstance that:
 - (i) has arisen since the document was lodged; and
 - (ii) would have been required by section 636 or 638 to be included in the document if it had arisen before the document was lodged; or
 - (k) for an expert's report under subsection 636(2) or section 640, 663B, 664C or 665B—an omission from the report of material required by subsection 648A(3) or 667B(2).

Note 1: See section 670D for defences.

Note 2: Section 995 imposes liabilities in respect of other conduct related to the dealings in securities.

Forecasts and other forward-looking statement

- (2) A person is taken to make a misleading statement about a future matter (including the doing of, or refusing to do, an act) if they do not have reasonable grounds for making the statement. This subsection does not limit the meaning of a reference to a misleading statement or a statement that is misleading in a material particular.

Offence if statement, omission or new matter materially adverse

- (3) A person commits an offence if they contravene subsection (1) and:
- (a) the misleading or deceptive statement; or
 - (b) the omission or new circumstance;
- is materially adverse from the point of view of the holder of securities to whom the document is given.

670B Right to recover for loss or damage resulting from contravention

- (1) A person who suffers loss or damage that results from a contravention of subsection 670A(1) may recover the amount of the loss or damage from a person referred to in the following table if the loss or damage is one that the table makes the person liable for. This is so even if the person did not commit, and was not involved in, the contravention.

People liable on the document		[operative table]
<i>For these documents</i>		
	these people...	...are liable for loss or damages caused by
<i>bidder's statement or takeover offer document</i>		
1	the bidder	any contravention of subsection 670A(1) in relation to the document
2	each director of a bidder that is a body if the consideration offered under the bid is not a cash sum only	any contravention of subsection 670A(1) in relation to the document

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People liable on the document		[operative table]
	<i>For these documents</i> these people...	...are liable for loss or damages caused by
3	a director of a bidder that is a body unless the director proves that they: (a) were not present when the directors resolved to adopt the statement or offer document; or (b) voted against the resolution; if the consideration offered under the bid is a cash sum only <i>notice of variation of a takeover offer</i>	any contravention of subsection 670A(1) in relation to the document See also items 10 and 11.
4	the bidder	any contravention of subsection 670A(1) in relation to the document
5	a director of a bidder that is a body	any contravention of subsection 670A(1) in relation to the document See also items 10 and 11.
	<i>a target's statement</i>	
6	the target	any contravention of subsection 670A(1) in relation to the document
7	a director of the target unless the director proves that they: (a) were not present when the directors resolved to adopt the statement; or (b) voted against the resolution	any contravention of subsection 670A(1) in relation to the document See also items 10 and 11.
	<i>a compulsory acquisition or compulsory buy-out notice</i>	
8	the person giving the notice	any contravention of subsection 670A(1) in relation to the document
9	a director of a body corporate giving the notice unless the director proves that they: (a) were not present when the directors resolved to give the notice; or (b) voted against the resolution	any contravention of subsection 670A(1) in relation to the document See also items 10 and 11.

People liable on the document		[operative table]
<i>For these documents</i>		
	these people...	...are liable for loss or damages caused by
10	<i>all documents</i> a person named in the document, with their consent, as having made a statement: (a) that is included in the document; or (b) on which a statement made in the document is based	the inclusion of the statement in the document
11	a person who contravenes, or is involved in a contravention of, subsection 670A(1)	that contravention

- (2) An action under subsection (1) may begin at any time within 6 years after the day on which the cause of action arose.
- (3) This Chapter does not affect any liability that a person has under any other law.

Note: Conduct that contravenes subsection 670A(1) is expressly excluded from the operation of section 995.

670C People liable on takeover or compulsory acquisition statement to inform maker about deficiencies in the statement

- (1) A person referred to in the table in subsection 670B(1) in relation to a document must notify the issuer of the document in writing as soon as practicable if they become aware during the bid period or objection period that:
- (a) a material statement in the document is misleading or deceptive; or
 - (b) there is a material omission from the document of information required by section 636, 638 or 640; or
 - (c) a material new circumstance that:
 - (i) has arisen since the document was lodged; and
 - (ii) would have been required by section 636, 638 or 640 to be included in the document if it had arisen before the document was lodged.

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- (2) An expert whose report accompanies, or is included in, a target's statement under section 640 must notify the target in writing as soon as practicable if they become aware during the takeover period that:
 - (a) a material statement in the report is misleading or deceptive;
or
 - (b) there has been a significant change affecting information included in the report.

- (3) An expert whose report accompanies, or is included in, a bidder's statement under subsection 636(2) must notify the bidder in writing as soon as practicable if they become aware during the takeover period that:
 - (a) a material statement in the report is misleading or deceptive;
or
 - (b) there has been a significant change affecting information included in the report.

670D Defences against prosecutions under subsection 670A(3) and actions under section 670B

Not knowing statement misleading or deceptive

- (1) A person does not commit an offence against subsection 670A(3), and is not liable under section 670B for a contravention of subsection 670A(1), because of a misleading or deceptive statement in a document if the person proves that they did not know that the statement was misleading or deceptive.

Not knowing there was an omission

- (2) A person does not commit an offence against subsection 670A(3), and is not liable under section 670B for a contravention of subsection 670A(1), because of an omission from a document in relation to a particular matter if the person proves that they did not know that there was an omission from the document in relation to that matter.

*Reasonable reliance on information given by someone else—
statements and omissions*

- (3) A person does not commit an offence against subsection 670A(3), and is not liable under section 670B for a contravention against subsection 670A(1), because of a misleading or deceptive statement in, or an omission from, a document if the person proves that they placed reasonable reliance on information given to them by:
- (a) if the person is a body—someone other than a director, employee or agent of the body; or
 - (b) if the person is an individual—someone other than an employee or agent of the individual.
- (4) For the purposes of subsection (3), a person is not the agent of a body or individual merely because they perform a particular professional or advisory function for the body or individual.

Withdrawal of consent—statements and omissions

- (5) A person who is named in a document as:
- (a) making a statement included in the document; or
 - (b) making a statement on the basis of which a statement is included in the document;
- does not commit an offence against subsection 670A(3), and is not liable under section 670B for a contravention against subsection 670A(1), because of a misleading or deceptive statement in, or an omission from, a document if the person proves that they publicly withdrew their consent to being named in the document in that way.

Unawareness of new matter

- (6) A person does not commit an offence against subsection 670A(3), and is not liable under section 670B for a contravention of subsection 670A(1), because of a new circumstance that has arisen since the document was lodged if the person proves that they were not aware of the matter.

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670E Liability for proposing a bid or not carrying through with bid

- (1) A person who:
 - (a) enters into a transaction relating to securities in reliance on:
 - (i) a public proposal for a takeover bid; or
 - (ii) an announcement of a market bid; and
 - (b) suffers loss or damage that results from a contravention of section 631:

may recover the amount of the loss or damage from:

 - (c) the person who contravened the section; or
 - (d) any person involved in the contravention.
- (2) To determine the amount of compensation payable under subsection (1), deduct the price of the securities at which the transaction was entered into from the price of the securities at which the transaction would have been likely to be entered into if the proposal or announcement had not been made.

670F Defences

A person does not commit an offence under subsection 631(1) or (2), and is not liable under section 670E for a contravention of those subsections if the person proves that they could not reasonably have been expected to comply with those subsections because:

- (a) at the time of the proposal or announcement, circumstances existed that the person did not know of and could not reasonably have been expected to know of; or
- (b) after the proposal or announcement, a change in circumstances occurred that was not caused, directly or indirectly, by the person.

Chapter 6C—Information about ownership of listed companies and managed investment schemes

671A Chapter extends to some listed bodies that are not companies

This Chapter applies to the acquisition of relevant interests in the securities of listed bodies that are not companies but are incorporated or formed in Australia in the same way as it applies to the acquisition of relevant interests in the securities of companies.

Note: Section 9 defines *company* and *listed*.

Part 6C.1—Substantial holding information

671B Information about substantial holdings must be given to company, responsible entity and relevant securities exchange

Requirement to give information

- (1) A person must give the information referred to in subsection (3) to a listed company, or the responsible entity for a listed registered managed investment scheme, if:
 - (a) the person begins to have, or ceases to have, a substantial holding in the company or scheme; or
 - (b) the person has a substantial holding in the company or scheme and there is a movement of at least 1% in their holding; or
 - (c) the person makes a takeover bid for securities of the company or scheme.

The person must also give the information to each relevant securities exchange.

Note 1: Section 9 defines *substantial holding* and *associate*.

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Note 2: The information must be given even if the situation changes by the time the information is to be given.

- (2) For the purposes of this section, there is a ***movement of at least 1%*** in a person's holding if the percentage worked out using the following formula increases or decreases by 1 or more percentage points from the percentage they last disclosed under this Part in relation to the company or scheme:

$$\frac{\text{Person's and associates' votes}}{\text{Total votes in company or scheme}} \times 100$$

where:

person's and associates' votes is the total number of votes attached to all the voting shares in the company or interests in the scheme (if any) that the person or an associate has a relevant interest in.

total votes in company or scheme is the total number of votes attached to all voting shares in the company or interests in the scheme.

Note: Subsection (7) expands the normal concept of relevant interest to take account of exchange traded options and conditional agreements.

Information that must be given

- (3) The information to be given is:
- (a) the person's name and address; and
 - (b) details of their relevant interest in:
 - (i) voting shares in the company; or
 - (ii) interests in the scheme; and
 - (c) details of any relevant agreement through which they would have a relevant interest in:
 - (i) voting shares in the company; or
 - (ii) interests in the scheme; and
 - (d) the name of each associate who has a relevant interest in voting shares in the company or interests in the scheme, together with details of:
 - (i) the nature of their association with the associate; and
 - (ii) the relevant interest of the associate; and
 - (iii) any relevant agreement through which the associate has the relevant interest; and

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- (e) if the information is being given because of a movement in their holding—the size and date of that movement; and
- (f) if the information is being given because a person has ceased to be an associate—the name of the person; and
- (g) any other particulars that are prescribed.

Note: Subsection (7) expands the normal concept of relevant interest to take account of exchange traded options and conditional agreements.

Information to be in prescribed form and accompanied by certain documents

- (4) The information must be given in the prescribed form and must be accompanied by:
 - (a) a copy of any document setting out the terms of any relevant agreement that:
 - (i) contributed to the situation giving rise to the person needing to provide the information; and
 - (ii) is in writing and readily available to the person; and
 - (b) a statement by the person giving full and accurate details of any contract, scheme or arrangement that:
 - (i) contributed to the situation giving rise to the person needing to provide the information; and
 - (ii) is not both in writing and readily available to the person.

If the person is required to give a copy of a contract, scheme or arrangement, the copy must be endorsed with a statement that the copy is a true copy.

- (5) The information does not need to be accompanied by the documents referred to in subsection (4) if the transaction that gives rise to the person needing to provide the information takes place on a stock exchange approved under section 769.

Deadline for giving information

- (6) The person must give the information:
 - (a) within 2 business days after they become aware of the information; or
 - (b) by 9.30 am on the next trading day of the relevant securities exchange after they become aware of the information if:

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- (i) a takeover bid is made for voting shares in the company or voting interests in the scheme; and
- (ii) the person becomes aware of the information during the bid period.

Relevant interests—exchange traded options and conditional agreements

- (7) For the purposes of this section, a person has a relevant interest in securities if the person would have a relevant interest in the securities but for subsection 609(6) (exchange traded options) or 609(7) (conditional agreements).

671C Civil liability

- (1) A person who contravenes section 671B is liable to compensate a person for any loss or damage the person suffers because of the contravention.
- (2) It is a defence in proceedings brought under this section if the person who contravenes section 671B proves that they contravened that section:
 - (a) because of inadvertence or mistake; or
 - (b) because they were not aware of a relevant fact or occurrence.In determining whether the defence is available, disregard the person's ignorance of, or a mistake on the person's part concerning, a matter of law.
- (3) If 2 or more persons each contravene section 671B because of the same act or omission, their liability under this section for the contravention is joint and individual.

Part 6C.2—Tracing beneficial ownership of shares

672A Disclosure notices

- (1) ASIC, a listed company or the responsible entity for a listed managed investment scheme, may direct:
 - (a) a member of the company or scheme; or
 - (b) a person named in a previous disclosure under section 672B as having a relevant interest in, or having given instructions about, voting shares in the company or interests in the scheme;to make the disclosure required by section 672B.
- (2) ASIC must exercise its powers under this section if requested to do so by a member of the company or scheme unless it considers that it would be unreasonable to do so in all the circumstances.

672B Disclosure by member of relevant interests and instructions

- (1) A person given a direction under section 672A must disclose to the person giving the direction:
 - (a) full details of their own relevant interest in the shares or interests in the scheme and of the circumstances that give rise to that interest; and
 - (b) the name and address of each other person who has a relevant interest in any of the shares or interests together with full details of:
 - (i) the nature and extent of the interest; and
 - (ii) the circumstances that give rise to the other person's interest; and
 - (c) the name and address of each person who has given the person instructions about:
 - (i) the acquisition or disposal of the shares or interests; or
 - (ii) the exercise of any voting or other rights attached to the shares or interests; or
 - (iii) any other matter relating to the shares or interests;

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together with full details of those instructions (including the date or dates on which they were given).

A matter referred to in paragraph (b) or (c) need only be disclosed to the extent to which it is known to the person required to make the disclosure.

- (2) The disclosure must be made within 2 business days after:
 - (a) the person is given the direction; or
 - (b) if the person applies for an exemption under section 673 from the obligation to make the disclosure and ASIC refuses to grant the exemption—ASIC notifies the person of its decision on the application; or
 - (c) if the direction is given by a company or responsible entity—the company or responsible entity pays any fee payable under the regulations made for the purposes of section 672D.
- (3) The person does not have to comply with a direction given by the company or the responsible entity if the person proves that the giving of the direction is vexatious.

672C ASIC may pass information on to person who made request

If ASIC receives information in response to a direction under section 672A about shares in a company or interests in a listed managed investment scheme, ASIC:

- (a) may pass the information on to the company or the responsible entity for the scheme; and
- (b) if ASIC gave the direction in response to a request under subsection 672A(2)—must pass the information on to the person who made the request unless ASIC considers it would be unreasonable in all the circumstances to do so.

672D Fee for complying with a direction given by a company or scheme under this Part

- (1) The regulations may prescribe fees that companies and responsible entities are to pay to persons for complying with directions given under this Part.

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- (2) A person is liable to repay a fee paid to the person for complying with a direction under section 672A if the person does not comply with the direction on time even if the person does so later. The fee may be recovered as a debt due to the company or responsible entity that paid it to the person.

672E No notice of rights

A company or responsible entity is not, because of anything done under this Part:

- (a) taken for any purpose to have notice of; or
- (b) put on inquiry as to;

a person's right in relation to a share in the company or an interest in the listed managed investment scheme.

672F Civil liability

- (1) A person who contravenes section 672B is liable to compensate a person for any loss or damage the person suffers because of the contravention.
- (2) It is a defence in proceedings brought under this section if the person who contravenes section 672B proves that they contravened that section:
- (a) because of inadvertence or mistake; or
 - (b) because they were not aware of a relevant fact or occurrence.
- In determining whether the defence is available, disregard the person's ignorance of, or a mistake on the person's part concerning, a matter of law.
- (3) If 2 or more persons each contravene section 672B because of the same act or omission, their liability under this section for the contravention is joint and individual.

Part 6C.3—ASIC powers

673 ASIC's power to exempt and modify

- (1) ASIC may:
 - (a) exempt a person from a provision of this Chapter; or
 - (b) declare that this Chapter applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.
- (2) In deciding whether to give the exemption or declaration, ASIC must consider the purposes of Chapter 6 set out in section 602.
- (3) The exemption or declaration may:
 - (a) apply to all or specified provisions of this Chapter; and
 - (b) apply to all persons, specified persons, or a specified class of persons; and
 - (c) relate to all securities, specified securities or a specified class of securities; and
 - (d) relate to any other matter generally or as specified.
- (4) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.
- (5) The exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.
- (6) For the purposes of this section, the *provisions of this Chapter* include:
 - (a) regulations made for the purposes of this Chapter; and
 - (b) definitions in this Act or the regulations as they apply to references in:
 - (i) this Chapter; or
 - (ii) regulations made for the purposes of this Chapter; and
 - (c) the old Division 12 of Part 11.2 transitionals.

Chapter 6D—Fundraising

Part 6D.1—Application of the fundraising provisions

700 Coverage of the fundraising rules

Securities covered

- (1) Subsection 92(3) defines *securities* for the purposes of this Chapter.

Offers and invitations both covered

- (2) For the purposes of this Chapter:
 - (a) offering securities for issue includes inviting applications for the issue of the securities; and
 - (b) offering securities for sale includes inviting offers to purchase the securities.

Person offering securities

- (3) For the purposes of this Chapter, the person who offers securities is the person who has the capacity, or who agrees, to issue or transfer the securities if the offer is accepted.

Geographical coverage of Chapter

- (4) This Chapter applies to offers of securities that are received in this jurisdiction, regardless of where any resulting issue, sale or transfer occurs.

701 Treatment of offers of interests in managed investment scheme

This Chapter applies to offers of interests in managed investment schemes as if:

- (a) making the interests available were issuing the interests; and

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- (b) the person making the interests available were the body whose securities were issued; and
- (c) the assets and liabilities, financial position and performance, profits and losses and prospects of the scheme were those of the body; and
- (d) a person who has the capacity to determine the outcome of decisions about the financial and operating policies governing the operation of the scheme were able to control the body.

702 Treatment of offers of options over securities

For the purposes of this Chapter:

- (a) an offer of an option over securities is not taken to be an offer of the underlying securities; and
- (b) the grant of an option without an offer of the option is taken to be an offer of the option; and
- (c) an offer to grant an option is taken to be an offer to issue the security constituted by the option.

Note 1: If a disclosure document is needed for the option and there is no further offer involved in exercising the option, the issue or sale of the underlying securities on the exercise of the option does not need a disclosure document.

Note 2: Paragraph (b)—the grant of the option will not require a disclosure document if no consideration is payable on the grant or the exercise of the option (see subsections 708(15) and (16)).

703 Chapter may not be contracted out of

A condition of a contract for the sale or issue of securities is void if it provides that a party to the contract is:

- (a) required or bound to waive compliance with any requirement of this Chapter; or
- (b) taken to have notice of any contract, document or matter not specifically referred to in the disclosure document for the offer.

Part 6D.2—Disclosure to investors about securities

Division 1—Overview

704 When disclosure to investors is needed

Sections 706, 707 and 708 say when an offer of securities needs disclosure to investors under this Part.

Note 1: Section 727 prohibits offering securities without disclosure.

Note 2: If the offer needs disclosure, section 734 applies advertising restrictions. These continue throughout the whole offer process. Different restrictions apply before and after the disclosure document is lodged.

Note 3: The way the offers are made to people must not breach the securities hawking prohibition in section 736.

705 Types of disclosure document

The following table shows what disclosure documents to use if an offer of securities needs disclosure to investors under this Part.

Disclosure document	
Type	Sections
1 <i>prospectus</i>	
The standard full-disclosure document.	content [710, 711, 713] procedure [717] liability [728 and 729] defences [731, 733]
2 <i>short form prospectus</i>	
May be used for any offer. Section 712 allows a prospectus to refer to material lodged with ASIC instead of setting it out. Investors are entitled to a copy of this material if they ask for it.	content [712]

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Disclosure document	
Type	Sections
3 <i>profile statement</i> Section 721 allows a brief profile statement (rather than the prospectus) to be sent out with offers with ASIC approval. The prospectus must still be prepared and lodged with ASIC. Investors are entitled to a copy of the prospectus if they ask for it.	content [714] procedure [717] liability [728 and 729] defences [732, 733]
4 <i>offer information statement</i> Section 709 allows an offer information statement to be used instead of a prospectus for an offer to issue securities if the amount raised from issues of securities is \$5 million or less.	content [715] procedure [717] liability [728 and 729] defences [732, 733]

Division 2—Offers that need disclosure to investors

706 Issue offers that need disclosure

An offer of securities for issue needs disclosure to investors under this Part unless section 708 says otherwise.

707 Sale offers that need disclosure

Only some sales need disclosure

- (1) An offer of securities for sale needs disclosure to investors under this Part only if disclosure is required by subsection (2), (3) or (5).

Off-market sale by controller

- (2) An offer of a body's securities for sale needs disclosure to investors under this Part if:
 - (a) the person making the offer controls the body; and
 - (b) either:
 - (i) the securities are not quoted; or
 - (ii) although the securities are quoted, they are not offered for sale in the ordinary course of trading on a stock market of a securities exchange;

and section 708 does not say otherwise.

Note: See section 50AA for when a person controls a body.

Sale amounting to indirect issue

- (3) An offer of a body's securities for sale within 12 months after their issue needs disclosure to investors under this Part if the body issued the securities:
 - (a) without disclosure to investors under this Part; and
 - (b) with the purpose of the person to whom they were issued:
 - (i) selling or transferring them; or
 - (ii) granting, issuing or transferring interests in, or options or warrants over, them;
- and section 708 does not say otherwise.

Chapter 6D Fundraising

Part 6D.2 Disclosure to investors about securities

Division 2 Offers that need disclosure to investors

Section 707

Note 1: Section 706 normally requires disclosure for the issue of securities. This subsection is intended to prevent avoidance of section 706. However, to establish a contravention of this subsection, the only purpose that needs to be shown is that referred to in paragraph (b).

Note 2: The issuer and the seller must both consent to the disclosure document (see section 720).

Evidence of intention—indirect issue

- (4) Unless the contrary is proved, a body is taken to issue securities with the purpose referred to in paragraph (3)(b) if any of the securities are subsequently sold, or offered for sale, within 12 months after their issue.

Sale amounting to indirect off-market sale by controller

- (5) An offer of a body's securities for sale within 12 months after their sale by a person who controlled the body at the time of the sale needs disclosure to investors under this Part if:
- (a) at the time of the sale by the controller either:
 - (i) the securities were not quoted; or
 - (ii) although the securities were quoted, they were not offered for sale in the ordinary course of trading on a stock market of a securities exchange; and
 - (b) the controller sold the securities without disclosure to investors under this Part; and
 - (c) the controller sold the securities with the purpose of the person to whom they were sold:
 - (i) selling or transferring them; or
 - (ii) granting, issuing or transferring interests in, or options or warrants over, them;
- and section 708 does not say otherwise.

Note 1: Subsection (2) normally requires disclosure for a sale by a controller. This subsection is intended to prevent avoidance of subsection (2). However, to establish a contravention of this subsection, the only purpose that needs to be shown is that referred to in paragraph (c).

Note 2: See section 50AA for when a person controls a body.

Note 3: The controller and the seller must both consent to the disclosure document (see section 720).

Evidence of intention—indirect sale by controller

- (6) Unless the contrary is proved, a person who controls a body is taken to sell securities with the purpose referred to in paragraph (5)(c) if any of the securities are subsequently sold, or offered for sale, within 12 months after their sale by the controller.

708 Offers that do not need disclosure

Small scale offerings (20 issues or sales in 12 months)

- (1) Personal offers of a body's securities by a person do not need disclosure to investors under this Part if:
- (a) none of the offers results in a breach of the 20 investors ceiling (see subsections (3) and (4)); and
 - (b) none of the offers results in a breach of the \$2 million ceiling (see subsections (3) and (4)).

This subsection does not apply to an offer for sale to which subsection 707(3) (sale amounting to indirect issue) or (5) (sale amounting to indirect sale by controller) applies.

Note 1: Subsection 727(4) makes it an offence to issue or transfer securities without disclosure to investors once 20 issues or transfers have occurred or \$2 million has been raised.

Note 2: Under section 740 ASIC may make a determination aggregating the transactions of bodies that ASIC considers to be closely related.

- (2) For the purposes of subsection (1), a personal offer is one that:
- (a) may only be accepted by the person to whom it is made; and
 - (b) is made to a person who is likely to be interested in the offer, having regard to:
 - (i) previous contact between the person making the offer and that person; or
 - (ii) some professional or other connection between the person making the offer and that person; or
 - (iii) statements or actions by that person that indicate that they are interested in offers of that kind.
- (3) An offer by a body to issue securities:
- (a) results in a breach of the 20 investors ceiling if it results in the number of people to whom securities of the body have been issued exceeding 20 in any 12 month period; and

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- (b) results in a breach of the \$2 million ceiling if it results in the amount raised by the body by issuing securities exceeding \$2 million in any 12 month period.
 - (4) An offer by a person to transfer a body's securities:
 - (a) results in a breach of the 20 investors ceiling if it results in the number of people to whom the person sells securities of the body exceeding 20 in any 12 month period; and
 - (b) results in a breach of the \$2 million ceiling if it results in the amount raised by the person from selling the body's securities exceeding \$2 million in any 12 month period.
 - (5) In counting issues and sales of the body's securities, and the amount raised from issues and sales, for the purposes of subsection (1), disregard issues and sales that result from offers that:
 - (a) do not need a disclosure document because of any other subsection of this section; or
 - (b) are not received in Australia; or
 - (c) are made under a disclosure document.
- Note: Also see provisions on restrictions on advertising (section 734) and securities hawking provisions (Part 6D.3).
- (6) In counting issues and sales of the body's securities, and the amount raised from issues and sales, for the purposes of subsection (1), disregard any issues and sales made by a body if:
 - (a) the body was a managed investment scheme (but not a registered managed investment scheme) at the time that the offer of interests in the scheme that resulted in the issues or sales was made; and
 - (b) the body became a registered managed investment scheme within 12 months after that offer was made; and
 - (c) the offer would have been exempted under any other subsection of this section if the managed investment scheme had been a registered managed investment scheme at the time that the offer was made.
 - (7) In working out the amount of money raised by the body by issuing securities, include the following:
 - (a) the amount payable for the securities at the time when they are issued;

- (b) if the securities are shares issued partly-paid—any amount payable at a future time if a call is made;
- (c) if the security is an option—any amount payable on the exercise of the option;
- (d) if the securities carry a right to convert the securities into other securities—any amount payable on the exercise of that right.

Sophisticated investors

- (8) An offer of a body's securities does not need disclosure to investors under this Part if:
 - (a) the minimum amount payable for the securities on acceptance of the offer by the person to whom the offer is made is at least \$500,000; or
 - (b) the amount payable for the securities on acceptance by the person to whom the offer is made and the amounts previously paid by the person for the body's securities of the same class that are held by the person add up to at least \$500,000; or
 - (c) it appears from a certificate given by a qualified accountant no more than 6 months before the offer is made that the person to whom the offer is made:
 - (i) has net assets of at least \$2.5 million; or
 - (ii) has a gross income for each of the last 2 financial years of at least \$250,000 a year.

Note 1: Section 9 defines *qualified accountant*.

Note 2: Paragraph (c)—A dealer has obligations under Division 3 of Part 7.4 when making recommendations about securities and ASIC has power under section 826 to revoke a dealer's licence if the dealer contravenes paragraph 708(8)(c).

- (9) In calculating the amount payable, or paid, for securities for the purposes of paragraph (8)(a) or (b), disregard any amount payable, or paid, to the extent to which it is to be paid, or was paid, out of money lent by the person offering the securities or an associate.
- (10) An offer of a body's securities does not need disclosure to investors under this Part if:
 - (a) the offer is made through a licensed dealer; and

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- (b) the dealer is satisfied on reasonable grounds that the person to whom the offer is made has previous experience in investing in securities that allows them to assess:
 - (i) the merits of the offer; and
 - (ii) the value of the securities; and
 - (iii) the risks involved in accepting the offer; and
 - (iv) their own information needs; and
 - (v) the adequacy of the information given by the person making the offer; and
- (c) the dealer gives the person before, or at the time when, the offer is made a written statement of the dealer's reasons for being satisfied as to those matters; and
- (d) the person to whom the offer is made signs a written acknowledgment before, or at the time when, the offer is made that the dealer has not given the person a disclosure document under this Part in relation to the offer.

Professional investors

- (11) An offer of securities does not need disclosure to investors under this Part if it is made to:
 - (a) a person who is a licensed or exempt dealer and is acting as principal; or
 - (b) a person who is a licensed or exempt investment adviser and is acting as principal; or
 - (c) a body registered under the *Life Insurance Act 1995*; or
 - (d) a body registered under the *Financial Corporations Act 1974*; or
 - (e) a regulated superannuation fund, an approved deposit fund, a pooled superannuation trust, or a public sector superannuation scheme within the meaning of the *Superannuation Industry (Supervision) Act 1993* if the fund, trust or scheme has net assets of at least \$10 million; or
 - (h) a person who controls at least \$10 million (including any amount held by an associate or under a trust that the person manages) for the purpose of investment in securities.

Note 1: Section 68 defines *exempt dealer* and *exempt investment adviser*.

Note 2: An underwriter to a securities issue or sale will generally be a licensed dealer.

Offers of securities to people associated with the body

- (12) An offer of a body's securities does not need disclosure to investors under this Part if it is made to:
- (a) an executive officer of the body or a related body or their spouse, parent, child, brother or sister; or
 - (b) a body corporate controlled by a person referred to in paragraph (a).

Certain offers to present holder of securities

- (13) An offer of securities for issue does not need disclosure to investors under this Part if it is:
- (a) an offer of fully-paid shares in a company to 1 or more existing holders of shares in the company under a dividend reinvestment plan or bonus share plan; or
 - (b) an offer of interests in a managed investment scheme to 1 or more existing holders of interests in the scheme if:
 - (i) the offer is made under a distribution reinvestment plan or switching facility; or
 - (ii) the scheme is of a kind commonly known as a cash common fund or cash management trust.
- (14) An offer of a disclosing entity's debentures for issue does not need disclosure to investors under this Part if the offer is made to 1 or more existing debenture holders.

Issues or sales for no consideration

- (15) An offer of securities (other than options) does not need disclosure to investors under this Part if no consideration is to be provided for the issue or transfer of the securities.
- (16) An offer of options does not need disclosure to investors under this Part if:
- (a) no consideration is to be provided for the issue or transfer of the options; and
 - (b) no consideration is to be provided for the underlying securities on the exercise of the option.

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Compromise or arrangement under Part 5.1

- (17) An offer of securities does not need disclosure to investors under this Part if it is made under a compromise or arrangement under Part 5.1 approved at a meeting held as a result of an order under subsection 411(1) or (1A).

Takeovers

- (18) An offer of securities does not need disclosure to investors under this Part if it is:
- (a) made as consideration for an offer to acquire securities under a takeover bid under Chapter 6; and
 - (b) accompanied by a bidder's statement.

Note: Although this offer does not need a disclosure document, similar disclosures must be made about the securities in the bidder's statement under section 636.

Debentures of certain bodies

- (19) An offer of a body's debentures for issue or sale does not need disclosure to investors under this Part if the body is:
- (a) an Australian ADI; or
 - (b) registered under the *Life Insurance Act 1995*.

Offers by exempt bodies

- (20) An offer of a body's securities in a State or Territory in this jurisdiction does not need disclosure to investors under this Part if the body is an exempt body of that State or Territory.

Note: Section 66A defines *exempt body*.

- (21) An offer of a body's securities for issue does not need disclosure to investors under this Part if the body is an exempt public authority of a State or Territory.

Note: Debentures, stock or bonds issued by a government are not securities for the purposes of this Chapter (see subsection 92(3)).

Division 3—Types of disclosure documents

709 Prospectuses, short-form prospectuses, profile statements and offer information statements

Prospectus or short-form prospectus

- (1) If an offer of securities needs disclosure to investors under this Part, a prospectus must be prepared for the offer unless subsection (4) allows an offer information statement to be used instead. Under section 712, the prospectus may simply refer to material already lodged with ASIC instead of including it.

Note: See sections 710 to 713 for the contents of a prospectus.

Profile statement

- (2) A profile statement for an offer may be prepared in addition to the prospectus if ASIC has approved the making of offers of that kind with a profile statement instead of a disclosure document.

Note 1: See section 714 for the contents of a profile statement.

Note 2: Subsection 729(2) provides that there is still liability to investors on the prospectus when a profile statement is used.

- (3) ASIC may approve the use of profile statements for offers of securities of a particular kind. The approval may specify information to be included in the profile statement (including information about a matter referred to in paragraphs 714(1)(a) to (d)).

Offer information statement

- (4) A body offering to issue securities may use an offer information statement for the offer instead of a prospectus if the amount of money to be raised by the body by issuing the securities, when added to all amounts previously raised by:
 - (a) the body; or
 - (b) a related body corporate; or
 - (c) an entity controlled by:
 - (i) a person who controls the body; or

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(ii) an associate of that person;
by issuing securities under an offer information statement is \$5 million or less.

Note 1: See section 715 for the contents of an offer information statement. The statement must include financial statements that are less than 6 months old.

Note 2: Under section 740, ASIC may make a determination aggregating the transactions of bodies that ASIC considers to be closely related.

- (5) In working out the amount of money to be raised by a body or entity by issuing securities, include the following:
- (a) the amount payable for the securities at the time when they are issued;
 - (b) if the securities are issued partly-paid—any amount payable at a future time if a call is made;
 - (c) if the securities are options—any amount payable on the exercise of the options;
 - (d) if the securities carry a right to convert the securities into other securities—any amount payable on the exercise of that right.

Division 4—Disclosure requirements

710 Prospectus content—general disclosure test

- (1) A prospectus for a body's securities must contain all the information that investors and their professional advisers would reasonably require to make an informed assessment of the matters set out in the table below. The prospectus must contain this information:
- (a) only to the extent to which it is reasonable for investors and their professional advisers to expect to find the information in the prospectus; and
 - (b) only if a person whose knowledge is relevant (see subsection (3)):
 - (i) actually knows the information; or
 - (ii) in the circumstances ought reasonably to have obtained the information by making enquiries.

Disclosures		[operative]
Offer	Matters	
1 offer to issue (or transfer) shares, debentures or interests in a managed investment scheme	<ul style="list-style-type: none">• the rights and liabilities attaching to the securities offered• the assets and liabilities, financial position and performance, profits and losses and prospects of the body that is to issue (or issued) the shares, debentures or interests	

Chapter 6D Fundraising

Part 6D.2 Disclosure to investors about securities

Division 4 Disclosure requirements

Section 710

Disclosures		[operative]
Offer	Matters	
2 offer to grant (or transfer) a legal or equitable interest in securities or grant (or transfer) an option over securities	<ul style="list-style-type: none">• the rights and liabilities attaching to:<ul style="list-style-type: none">- the interest or option- the underlying securities• for an option—the capacity of the person making the offer to issue or deliver the underlying securities• if the person making the offer is:<ul style="list-style-type: none">- the body that issued or is to issue the underlying securities; or- a person who controls that body;the assets and liabilities, financial position and performance, profits and losses and prospects of that body• if subsection 707(3) or (5) applies to the offer—the assets and liabilities, financial position and performance, profits and losses and prospects of the body whose securities are offered	

Note: Section 713 makes special provision for prospectuses for continuously quoted securities.

- (2) In deciding what information should be included under subsection (1), have regard to:
- (a) the nature of the securities and of the body; and
 - (b) if the securities are investments in a managed investment scheme—the nature of the scheme; and
 - (c) the matters that likely investors may reasonably be expected to know; and
 - (d) the fact that certain matters may reasonably be expected to be known to their professional advisers.
- (3) For the purposes of this section, a person's knowledge is relevant only if they are one of the following:
- (a) the person offering the securities;
 - (b) if the person offering the securities is a body—a director of the body;
 - (c) a proposed director of the body whose securities will be issued under the offer;

- (d) a person named in the prospectus as an underwriter of the issue or sale;
- (e) a person named in the prospectus as a stockbroker to the issue or sale if they participate in any way in the preparation of the prospectus;
- (f) a person named in the prospectus with their consent as having made a statement:
 - (i) that is included in the prospectus; or
 - (ii) on which a statement made in the prospectus is based;
- (g) a person named in the prospectus with their consent as having performed a particular professional or advisory function.

Note: Section 729 says who is liable for misstatements in, and omissions from, a disclosure document.

711 Prospectus content—specific disclosures

Terms and conditions of offer

- (1) The prospectus must set out the terms and conditions of the offer.

Disclosure of interests and fees of certain people involved in the offer

- (2) The prospectus must set out the nature and extent of the interests (if any) that each person referred to in subsection (4) holds, or held at any time during the last 2 years, in:
 - (a) the formation or promotion of the body; or
 - (b) property acquired or proposed to be acquired by the body in connection with:
 - (i) its formation or promotion; or
 - (ii) the offer of the securities; or
 - (c) the offer of the securities.
- (3) The prospectus must set out the amount that anyone has paid or agreed to pay, or the nature and value of any benefit anyone has given or agreed to give:
 - (a) to a director, or proposed director, to induce them to become, or to qualify as, a director of the body; and

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- (b) for services provided by a person referred to in subsection (4) in connection with:
 - (i) the formation or promotion of the body; or
 - (ii) the offer of the securities; and
- (c) if the prospectus is for interests in a managed investment scheme—to the responsible entity:
 - (i) to procure acquisitions of interests in the scheme; or
 - (ii) for services provided under the constitution of the scheme.

To comply with this subsection it is not sufficient merely to state in the prospectus that a person has been paid or will be paid normal, usual or standard fees.

- (4) Disclosures need to be made under subsections (2) and (3) in relation to:
 - (a) any directors and proposed directors of the body;
 - (b) a person named in the prospectus as performing a function in a professional, advisory or other capacity in connection with the preparation or distribution of the prospectus;
 - (c) if the securities are interests in a managed investment scheme—the person making the interests available and, if the person is a body, its directors;
 - (d) a promoter of the body;
 - (e) a stockbroker or underwriter (but not a sub-underwriter) to the issue or sale.

Quotation of securities

- (5) If the prospectus for an offer of securities states or implies that the securities are to be quoted on a stock market of a securities exchange (whether in Australia or elsewhere), the prospectus must state that:
 - (a) the securities have been admitted to quotation on that stock market; or
 - (b) an application for admission of the securities to quotation on that stock market has been made to that securities exchange; or

- (c) an application for admission of the securities to quotation on that stock market will be made to that securities exchange within 7 days after the date of the prospectus.

Note 1: Paragraph 724(1)(b) gives times within which the person should seek and obtain admission to quotation.

Note 2: Subsection 716(1) requires the prospectus to be dated.

Expiry date

- (6) The prospectus must state that no securities will be issued on the basis of the prospectus after the expiry date specified in the prospectus. The expiry date must not be later than 13 months after the date of the prospectus. The expiry date of a replacement prospectus must be the same as that of the original prospectus it replaces.

Note 1: Subsection 716(1) requires the prospectus to be dated.

Note 2: Section 719 deals with replacement prospectuses.

Lodgment with ASIC

- (7) The prospectus must state that:
- (a) a copy of the prospectus has been lodged with ASIC; and
 - (b) ASIC takes no responsibility for the content of the prospectus.

Prescribed information

- (8) The prospectus must set out the information required by the regulations.

712 Prospectus content—short form prospectuses

Prospectus may simply refer to material lodged with ASIC

- (1) Instead of setting out information that is contained in a document that has been lodged with ASIC, a prospectus may simply refer to the document. The reference must:
- (a) identify the document or the part of the document that contains the information; and
 - (b) inform people of their right to obtain a copy of the document (or part) under subsection (5).

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- (2) The reference must also include:
 - (a) if the information is primarily of interest to professional analysts or advisers or investors with similar specialist information needs:
 - (i) a description of the contents of the document (or part); and
 - (ii) a statement to the effect that the information in the document (or part) is primarily of interest to those people; or
 - (b) in any other case—sufficient information about the contents of the document to allow a person to whom the offer is made to decide whether to obtain a copy of the document (or part).
- (3) The document (or part) referred to under subsection (1) is taken to be included in the prospectus.
- (4) A person who wishes to take advantage of subsection (1) may lodge a document with ASIC even if this Act does not require the document to be lodged.
- (5) If the prospectus is taken to include a document, or part of a document, under subsection (1), the person making the offer must give a copy of the document (or part) free of charge to anyone who asks for it during the application period of the prospectus.

713 Special prospectus content rules for continuously quoted securities

Alternative general disclosure test

- (1) A prospectus for an offer of:
 - (a) continuously quoted securities of a body; or
 - (b) options to acquire continuously quoted securities of a body;satisfies section 710 if it complies with subsections (2), (3) and (4) of this section.
- (2) The prospectus must contain all the information investors and their professional advisers would reasonably require to make an informed assessment of:
 - (a) the effect of the offer on the body; and

- (b) if the securities are interests in a managed investment scheme—the effect of the offer on the scheme; and
- (c) the rights and liabilities attaching to the securities offered; and
- (d) if the securities are options—the rights and liabilities attaching to:
 - (i) the options themselves; and
 - (ii) the underlying securities.

The prospectus must contain this information only to the extent to which it is reasonable for investors and their professional advisers to expect to find the information in the prospectus.

- (3) The prospectus must state that:
 - (a) as a disclosing entity, the body or scheme is subject to regular reporting and disclosure obligations; and
 - (b) copies of documents lodged with ASIC in relation to the body may be obtained from, or inspected at, an ASIC office.
- (4) The prospectus must either:
 - (a) inform people of their right to obtain a copy of any of the following documents:
 - (i) the annual financial report most recently lodged with ASIC by the body or scheme;
 - (ii) any half-year financial report lodged with ASIC by the body or scheme after the lodgment of that annual financial report and before the lodgment of the copy of the prospectus with ASIC;
 - (iii) any continuous disclosure notices given by the body or scheme after the lodgment of that annual financial report and before the lodgment of the copy of the prospectus with ASIC; or
 - (b) include, or be accompanied by, a copy of the document.

If the prospectus informs people of their right to obtain a copy of the document, the person making the offer must give a copy of the document free of charge to anyone who asks for it during the application period for the prospectus.

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Information excluded from continuous disclosure notice

- (5) Information about the offer must also be set out in the prospectus if the information:
- (a) has been excluded from a continuous disclosure notice in accordance with the listing rules of the securities exchange to which the notice was given; and
 - (b) is information that investors and their professional advisers would reasonably require for the purpose of making an informed assessment of:
 - (i) the assets and liabilities, financial position and performance, profits and losses and prospects of the body; and
 - (ii) the rights and liabilities attaching to the securities being offered.

The prospectus must contain this information only to the extent to which it is reasonable for investors and their professional advisers to expect to find the information in the prospectus.

ASIC power to exclude entity from this section

- (6) ASIC may determine in writing that a body or scheme may not rely on this section if it is satisfied that, in the previous 12 months, any of the following provisions were contravened in relation to the body or scheme:
- (a) the provisions of Chapter 2M;
 - (b) section 724;
 - (c) section 728;
 - (d) section 1001A.

ASIC must publish a copy of the determination in the *Gazette*.

While the determination is in force, section 710 and not this section applies to securities of the body or scheme.

714 Contents of profile statement

- (1) A profile statement must:
- (a) identify the body and the nature of the securities; and
 - (b) state the nature of the risks involved in investing in the securities; and

- (c) give details of all amounts payable in respect of the securities (including any amounts by way of fee, commission or charge); and
 - (d) state that the person given the profile statement is entitled to a copy of the prospectus free of charge; and
 - (e) state that:
 - (i) a copy of the statement has been lodged with ASIC; and
 - (ii) ASIC takes no responsibility for the content of the statement; and
 - (f) give any other information required by the regulations or by ASIC approval under subsection 709(3).
- (2) The profile statement must state that no securities will be issued on the basis of the statement after the expiry date specified in the statement. The expiry date must not be later than 13 months after the date of the prospectus. The expiry date of a replacement statement must be the same as that of the original statement it replaces.

Note 1: Subsection 716(1) requires the profile statement to be dated.

Note 2: Section 719 deals with supplementary and replacement profile statements.

715 Contents of offer information statement

- (1) An offer information statement for the issue of a body's securities must:
- (a) identify the body and the nature of the securities; and
 - (b) describe the body's business; and
 - (c) describe what the funds raised by the offers are to be used for; and
 - (d) state the nature of the risks involved in investing in the securities; and
 - (e) give details of all amounts payable in respect of the securities (including any amounts by way of fee, commission or charge); and
 - (f) state that:
 - (i) a copy of the statement has been lodged with ASIC; and
 - (ii) ASIC takes no responsibility for the content of the statement; and

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- (g) state that the statement is not a prospectus and that it has a lower level of disclosure requirements than a prospectus; and
 - (h) state that investors should obtain professional investment advice before accepting the offer; and
 - (i) include a copy of a financial report for the body; and
 - (j) include any other information that the regulations require to be included in the statement.
- (2) The financial report included under paragraph (1)(i) must:
- (a) be a report for a 12 month period and have a balance date that occurs within the last 6 months before the securities are first offered under the statement; and
 - (b) be prepared in accordance with the accounting standards; and
 - (c) be audited.
- (3) The statement must state that no securities will be issued on the basis of the statement after the expiry date specified in the statement. The expiry date must not be later than 13 months after the date of the statement. The expiry date of a replacement statement must be the same as that of the original statement it replaces.

Note 1: Subsection 716(1) requires the statement to be dated.

Note 2: Section 719 deals with replacement statements.

716 Disclosure document date and consents

Date of disclosure document

- (1) A disclosure document must be dated. The date is the date on which it is lodged with ASIC.

Consent of person to whom statement attributed

- (2) A disclosure document may only include a statement by a person, or a statement said in the document to be based on a statement by a person, if:
- (a) the person has consented to the statement being included in the document in the form and context in which it is included; and

- (b) the document states that the person has given this consent;
and
- (c) the person has not withdrawn this consent before the
document is lodged with ASIC.

Division 5—Procedure for offering securities

717 Overview of procedure for offering securities

The following table summarises what a person who wants to offer securities must do to make an offer of securities that needs disclosure to investors under this Part and gives signposts to relevant sections:

Offering securities (disclosure documents and procedure)			
	Action required	Sections	Comments and related sections
1	Prepare disclosure document, making sure that it: <ul style="list-style-type: none">• sets out all the information required• does not contain any misleading or deceptive statements• is dated and that the directors consent to the disclosure document.	710 711 712 713 714 715 716	Section 728 prohibits offering securities under a disclosure document that is materially deficient. Section 729 deals with the liability for breaches of this prohibition. Sections 731, 732 and 733 set out defences.
2	Lodge the disclosure document with ASIC	718	Subsection 727(3) prohibits processing applications for non-quoted securities for 7 days after the disclosure document is lodged.

Offering securities (disclosure documents and procedure)

Action required	Sections	Comments and related sections
3 Offer the securities, making sure that the offer and any application form is either included in or accompanies: <ul style="list-style-type: none"> • the disclosure document; or • a profile statement if ASIC has approved the use of a profile statement for offers of that kind. 	721	Sections 727 and 728 make it an offence to: <ul style="list-style-type: none"> • offer securities without a disclosure document • offer securities if the disclosure document is materially deficient. Subsection 729(3) deals with liability on the prospectus if a profile statement is used. The securities hawking provisions (section 736) restrict the way in which the securities can be offered.
4 If it is found that the disclosure document lodged was deficient or a significant new matter arises, either: <ul style="list-style-type: none"> • lodge a supplementary or replacement document under section 719; or • return money to applicants under section 724. 	719 724	Section 728 prohibits making offers after becoming aware of a material deficiency in the disclosure document or a significant new matter. Section 730 requires people liable on the disclosure document to inform the person making the offer about material deficiencies and new matters.
5 Hold application money received on trust until the securities are issued or transferred or the money returned.	722	Investors may have a right to have their money returned if certain events occur (see sections 724, 737 and 738).

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Offering securities (disclosure documents and procedure)

	Action required	Sections	Comments and related sections
6	<p>Issue or transfer the securities, making sure that:</p> <ul style="list-style-type: none"> • the investor used an application form distributed with the disclosure document; and • the disclosure document is current and not materially deficient; and • any minimum subscription condition has been satisfied. 	723	<p>Section 721 says which disclosure document must be distributed with the application form.</p> <p>Section 729 identifies the people who may be liable if:</p> <ul style="list-style-type: none"> • securities are issued in response to an improper application form; or • the disclosure document is not current or is materially deficient. <p>Sections 731, 732 and 733 provide defences for the contraventions.</p> <p>Section 737 provides remedies for an investor.</p>

718 Lodging of disclosure document

A disclosure document to be used for an offer of securities must be lodged with ASIC.

Note 1: Subsection 727(3) makes it an offence to process applications for non-quoted securities under an offer that needs a disclosure document until 7 days after the disclosure document is lodged.

Note 2: See section 720 for the consents that need to be obtained before lodgment.

Note 3: Section 351 says what signatures are necessary for documents that are to be lodged with ASIC.

719 Lodging supplementary or replacement document

Need for a supplementary or replacement document

- (1) If the person making the offer becomes aware of:
- (a) a misleading or deceptive statement in the disclosure document; or
 - (b) an omission from the disclosure document of information required by section 710, 711, 712, 713, 714 or 715; or

- (c) a new circumstance that:
 - (i) has arisen since the disclosure document was lodged;
and
 - (ii) would have been required by section 710, 711, 712, 713, 714 or 715 to be included in the disclosure document if it had arisen before the disclosure document was lodged;

that is materially adverse from the point of view of an investor, the person may lodge a supplementary or replacement document with ASIC.

- Note 1: Section 728 makes it an offence to continue making offers after the person has become aware of a misleading or deceptive statement, omission or new circumstance that is materially adverse from the point of view of an investor unless the deficiency is corrected.
- Note 2: Because of section 712, a prospectus may be taken to include information in another document. This should be taken into account when considering whether the prospectus is deficient.
- Note 3: The power to issue a supplementary or replacement document is not limited to the situations dealt with in this section.
- Note 4: This section applies to a document that has already been previously supplemented or replaced.
- Note 5: See section 720 for the consents that need to be obtained before lodgment.

Form of supplementary document

- (2) At the beginning of a supplementary document, there must be:
 - (a) a statement that it is a supplementary document; and
 - (b) an identification of the disclosure document it supplements;
and
 - (c) an identification of any previous supplementary documents lodged with ASIC in relation to the offer; and
 - (d) a statement that it is to be read together with the disclosure document it supplements and any previous supplementary documents.

The supplementary document must be dated. The date is the date on which it is lodged with ASIC.

Form of replacement document

- (3) At the beginning of a replacement document, there must be:

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- (a) a statement that it is a replacement document; and
- (b) an identification of the disclosure document it replaces.

The replacement document must be dated. The date is the date on which it is lodged with ASIC.

Consequences of lodging a supplementary document

- (4) If a supplementary document is lodged with ASIC, the disclosure document is taken to be the disclosure document together with the supplementary document for the purposes of the application of this Chapter to events that occur after the lodgment.

Note: This subsection means, for example, that offers made after lodgment of the supplementary document must be accompanied by copies of both the original disclosure document and the supplementary document.

Consequences of lodging a replacement document

- (5) If a replacement document is lodged with ASIC, the disclosure document is taken to be the replacement document for the purposes of the application of this Chapter to events that occur after the lodgment.

Note: This subsection means, for example, that offers made after lodgment of the replacement document must be accompanied by copies of the replacement document and not the original disclosure document.

720 Consents needed for lodgment

Consents for issue offers

The lodgment of a disclosure document, or a supplementary or replacement document, for the offer of a body's securities requires the consent of:

Consents required for lodgment		[operative]
Type of offer	People whose consent is required	
<i>Issue offers</i>		
1	offer of securities for issue	every director of the body every person named in the document as a proposed director of the body if securities interests in a managed investment scheme made available by a body—every director of that body if securities interests in a managed investment scheme made available by an individual—that individual
<i>sale offers (sale by controller)</i>		
2	offer of securities for sale that needs a disclosure document because of subsection 707(2)	if seller an individual—that individual if seller a body—every director of the body
<i>sale offers (sale amounting to indirect issue)</i>		
3	offer of securities for sale that needs a disclosure document because of subsection 707(3)	every director of the body whose securities are offered for sale if seller an individual—that individual if seller a body—every director of the body

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Consents required for lodgment		[operative]
Type of offer	People whose consent is required	
4	<i>sale offers (sale amounting to indirect sale by controller)</i> offer of securities for sale that needs a disclosure document because of subsection 707(5)	if seller an individual—that individual if seller a body—every director of the body if individual controls the body whose securities are offered for sale—that individual if body controls the body whose securities are offered for sale—every director of the controlling body

721 Offer must be made in, or accompanied by, the disclosure document

Offers using prospectus alone

- (1) Offers of securities for which a prospectus is being used must be made in, or accompanied by, the prospectus unless subsection (2) allows a profile statement to be used instead.

Note 1: Subsection 727(1) makes it an offence to make an offer of securities unless the offer is made in or accompanied by the disclosure document and subsection 723(1) makes it an offence to issue securities unless they are applied for on a form that was issued in or together with the disclosure document.

Note 2: Section 736 makes it an offence to make unsolicited offers in a way that amounts to securities hawking.

Note 3: Section 728 makes it an offence for a person to offer securities if the disclosure document is deficient in a way that is material from the point of view of an investor.

Offers using prospectus and profile statement

- (2) An offer of securities may be made in, or accompanied by, a profile statement if:

- (a) under subsection 709(3), ASIC has approved the making of offers of that kind with a profile statement instead of a prospectus; and
 - (b) the profile statement complies with the requirements specified in ASIC approval.
- (3) If the offer that is made to a person is made in or accompanied by a profile statement, the person making the offer must give the person a copy of the prospectus free of charge if the person asks for it.

Offers using offer information statement

- (4) Offers for which an offer information statement is being used must be made in, or accompanied by, the offer information statement.

Note 1: Subsection 727(1) makes it an offence to make an offer of securities unless the offer is made in or accompanied by the disclosure document and subsection 723(1) makes it an offence to issue securities unless they are applied for on a form that was issued in or together with the disclosure document.

Note 2: Section 736 makes it an offence to make unsolicited offers in a way that amounts to securities hawking.

Note 3: Section 728 makes it an offence for a person to offer securities if the disclosure document is deficient in a way that is material from the point of view of an investor.

722 Application money to be held on trust

- (1) If a person offers securities for issue or sale under a disclosure document, the person must hold:
- (a) all application money received from people applying for securities under the disclosure document; and
 - (b) all other money paid by them on account of the securities before they are issued or transferred;
- in trust under this section for the applicants until:
- (c) the securities are issued or transferred; or
 - (d) the money is returned to the applicants.
- (2) If the application money needs to be returned to an applicant, the person must return the money as soon as practicable.

723 Issuing or transferring the securities under a disclosure document

Applications must be made on form included in, or accompanied by, disclosure document

- (1) If an offer of securities needs a disclosure document, the securities may only be issued or transferred in response to an application form. The securities may only be issued or transferred if the person issuing or transferring them has reasonable grounds to believe that:
 - (a) the form was included in, or accompanied by:
 - (i) the disclosure document; or
 - (ii) if subsection 721(2) allows a profile statement to be used—the prospectus or the profile statement; when the form was distributed by the person issuing or transferring the securities; or
 - (b) the form was copied, or directly derived, by the person making the application from a form referred to in paragraph (a).

Minimum subscription condition must be fulfilled before issue or transfer

- (2) If a disclosure document for an offer of securities states that the securities will not be issued or transferred unless:
 - (a) applications for a minimum number of the securities are received; or
 - (b) a minimum amount is raised;the person making the offer must not issue or transfer any of the securities until that condition is satisfied. For the purpose of working out whether the condition has been satisfied, a person who has agreed to take securities as underwriter is taken to have applied for those securities.

Note 1: Under section 722, the application money must be held in trust until the issue or transfer of the securities.

Note 2: This subsection prevents the issue or transfer of the securities not only to those who apply for them in response to the disclosure document but also to those who do not need to apply for them (for example, because they are to take the securities under an underwriting agreement).

Issue or transfer void if quotation condition not fulfilled

- (3) If a disclosure document for an offer of securities states or implies that the securities are to be quoted on a stock market of a securities exchange (whether in Australia or elsewhere) and:
- (a) an application for the admission of the securities to quotation is not made within 7 days after the date of the disclosure document; or
 - (b) the securities are not admitted to quotation within 3 months after the date of the disclosure document;
- then:
- (c) an issue or transfer of securities in response to an application made under the disclosure document is void; and
 - (d) the person offering the securities must return the money received by the person from the applicants as soon as practicable.

724 Choices open to person making the offer if disclosure document condition not met or disclosure document defective

- (1) If a person offers securities under a disclosure document and:
- (a) the disclosure document states that the securities will not be issued or transferred unless:
 - (i) applications for a minimum number of the securities are received; or
 - (ii) a minimum amount raised;and that condition is not satisfied within 4 months after the date of the disclosure document; or
 - (b) the disclosure document states or implies that the securities are to be quoted on a stock market of a securities exchange (whether in Australia or elsewhere) and:
 - (i) an application for the admission to quotation is not made within 7 days after the date of the disclosure document; or
 - (ii) the securities are not admitted to quotation within 3 months after the date of the disclosure document; or
 - (c) the person becomes aware that:
 - (i) the disclosure document contains a misleading or deceptive statement; or

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- (ii) there is an omission from the disclosure document of information required by section 710, 711, 712, 713, 714 or 715;

that is materially adverse from the point of view of an investor; or

- (d) the person becomes aware of a new circumstance that:
 - (i) has arisen since the disclosure document was lodged; and
 - (ii) would have been required by section 710, 711, 712, 713, 714 or 715 to be included in the disclosure document if it had arisen before the disclosure document was lodged; and
 - (iii) is materially adverse from the point of view of an investor;

the person must deal under subsection (2) with any applications for the securities made under the disclosure document that have not resulted in an issue or transfer of the securities. For the purpose of working out whether a condition referred to in paragraph (a) has been satisfied, a person who has agreed to take securities as underwriter is taken to have applied for those securities.

- (2) The person must either:
 - (a) repay the money received by the person from the applicants; or
 - (b) give the applicants:
 - (i) the documents required by subsection (3); and
 - (ii) 1 month to withdraw their application and be repaid; or
 - (c) issue or transfer the securities to the applicants and give them:
 - (i) the documents required by subsection (3); and
 - (ii) 1 month to withdraw their application and be repaid.

Note: Section 719 deals with lodging supplementary and replacement documents. Section 728 makes it an offence for a person to offer securities if the disclosure document is deficient in a way that is material from the point of view of an investor.

- (3) The documents to be given are set out in the following table:

Documents to be given		[operative]
Circumstances	Documents	
1	the sole disclosure document is a prospectus	a supplementary or replacement prospectus that corrects the deficiency or changes the terms of the offer
2	the disclosure documents are a prospectus and a profile statement and subsection (1) applies to the prospectus	a statement that sets out the changes needed to the prospectus to correct the deficiency or change the terms of offer; and a statement that the person is entitled to a copy of the prospectus free of charge
3	the disclosure documents are a prospectus and a profile statement and subsection (1) applies to the profile statement <i>Note that item 2 and this item may both apply to the offer.</i>	a supplementary or replacement profile statement that corrects the deficiency or changes the terms of the offer
4	the disclosure document is an offer information statement	a supplementary or replacement offer information statement that corrects the deficiency or changes the terms of the offer

725 Expiration of disclosure document

- (1) If a person offers securities under a disclosure document and the disclosure document passes its expiry date, the person must deal with applications for the securities under the document in accordance with subsections (2) and (3).
- (2) If an application is received on or before the expiry date, the person may issue or transfer securities to the applicant.

Note: Subsection 723(1) (when read with subsections 719(4) and (5)) requires the person issuing or transferring the securities to have

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reasonable grounds to believe that the application form was included in, or accompanied by, a disclosure document that was current at the time.

- (3) If an application is received after the expiry date, the person must either:
- (a) return any money received by the person from the applicant;
or
 - (b) give the applicant:
 - (i) a new disclosure document; and
 - (ii) 1 month to withdraw their application and be repaid; or
 - (c) issue or transfer the securities to the applicant and give them:
 - (i) a new disclosure document; and
 - (ii) 1 month to withdraw their application and be repaid.

Part 6D.3—Prohibitions, liabilities and remedies

Division 1—Prohibitions and liabilities

726 Offering securities in a body that does not exist

A person must not offer securities of:

- (a) a body that has not been formed or does not exist; or
- (b) a managed investment scheme that needs to be, or will need to be, registered and that has not been registered;

if the offer would need disclosure to investors under Part 6D.2 if the body or scheme did exist or had been registered. This is so even if it is proposed to form, incorporate or register the body or scheme.

727 Offering securities without a current disclosure document

Offer of securities needs lodged disclosure document

- (1) A person must not make an offer of securities, or distribute an application form for an offer of securities, that needs disclosure to investors under Part 6D.2 unless a disclosure document for the offer has been lodged with ASIC.

Offer form to be included in or accompanied by disclosure document

- (2) A person must not make an offer of securities, or distribute an application form for an offer of securities, that needs disclosure to investors under Part 6D.2 unless:
 - (a) if a prospectus is used for the offer—the offer or form is:
 - (i) included in the prospectus; or
 - (ii) accompanied by a copy of the prospectus; or
 - (b) if both a prospectus and a profile statement are used for the offer—the offer or form is:
 - (i) included in the prospectus or profile statement; or

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- (ii) accompanied by a copy of the prospectus or profile statement; or
- (c) if an offer information statement is used for the offer—the offer or form is:
 - (i) included in the statement; or
 - (ii) accompanied by a copy of the statement.

Note: Sections 706, 707 and 708 say when the offer needs disclosure to investors under Part 6D.2.

Non-quoted securities—waiting period after lodgment before processing applications for securities

- (3) A person must not accept an application for, or issue or transfer, non-quoted securities offered under a disclosure document until the period of 7 days after lodgment of the disclosure document has ended. ASIC may extend the period by notice in writing to the person offering the securities. The period as extended must end no more than 14 days after lodgment.

Issue or transfer not to breach section 708 ceiling

- (4) If a person relies on subsection 708(1) to make offers of securities without disclosure to investors under Part 6D.2, the person must not issue or transfer securities without disclosure to investors under that Part if the issue or transfer would result in a breach of the 20 investors ceiling or the \$2 million ceiling (see subsections 708(3), (4), (5), (6) and (7)).

728 Misstatement in, or omission from, disclosure document

Misleading or deceptive statements, omissions and new matters

- (1) A person must not offer securities under a disclosure document if there is:
 - (a) a misleading or deceptive statement in:
 - (i) the disclosure document; or
 - (ii) any application form that accompanies the disclosure document; or
 - (iii) any document that contains the offer if the offer is not in the disclosure document or the application form; or

- (b) an omission from the disclosure document of material required by section 710, 711, 712, 713, 714 or 715; or
- (c) a new circumstance that:
 - (i) has arisen since the disclosure document was lodged; and
 - (ii) would have been required by section 710, 711, 712, 713, 714 or 715 to be included in the disclosure document if it had arisen before the disclosure document was lodged.

Note 1: The person may make further offers after making up the deficiency in the current disclosure document by lodging a supplementary or replacement document.

Note 2: See sections 731, 732 and 733 for defences.

Note 3: Section 995 imposes liabilities in respect of other conduct related to the offering of the securities.

Forecasts and other forward-looking statements

- (2) A person is taken to make a misleading statement about a future matter (including the doing of, or refusing to do, an act) if they do not have reasonable grounds for making the statement. This subsection does not limit the meaning of a reference to a misleading statement or a statement that is misleading in a material particular.

Offence if statement, omission or new matter materially adverse

- (3) A person commits an offence if they contravene subsection (1) and:
 - (a) the misleading or deceptive statement; or
 - (b) the omission or new circumstance;is materially adverse from the point of view of an investor.

729 Right to recover for loss or damage resulting from contravention

Right to compensation

- (1) A person who suffers loss or damage because an offer of securities under a disclosure document contravenes subsection 728(1) may recover the amount of the loss or damage from a person referred to

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in the following table if the loss or damage is one that the table makes the person liable for. This is so even if the person did not commit, and was not involved in, the contravention.

People liable on disclosure document		[operative]
These people...	are liable for loss or damage caused by...	
1	the person making the offer	any contravention of subsection 728(1) in relation to the disclosure document
2	each director of the body making the offer if the offer is made by a body	any contravention of subsection 728(1) in relation to the disclosure document
3	a person named in the disclosure document with their consent as a proposed director of the body whose securities are being offered	any contravention of subsection 728(1) in relation to the disclosure document
4	an underwriter (but not a sub-underwriter) to the issue or sale named in the disclosure document with their consent	any contravention of subsection 728(1) in relation to the disclosure document
5	a person named in the disclosure document with their consent as having made a statement: (a) that is included in the disclosure document; or (b) on which a statement made in the disclosure document is based	the inclusion of the statement in the disclosure document
6	a person who contravenes, or is involved in the contravention of, subsection 728(1)	that contravention

Note: Item 2—*director* includes a shadow director (see section 9).

- (2) A person who acquires securities as a result of an offer that was accompanied by a profile statement is taken to have acquired the securities in reliance on both the profile statement and the prospectus for the offer.
- (3) An action under subsection (1) may begin at any time within 6 years after the day on which the cause of action arose.

- (4) This Part does not affect any liability that a person has under any other law.

Note: Conduct that contravenes subsection 728(1) is expressly excluded from the operation of section 995.

730 People liable on disclosure document to inform person making the offer about deficiencies in the disclosure document

A person referred to in the table in section 729 must notify the person making the offer in writing as soon as practicable if they become aware during the application period that:

- (a) a material statement in the disclosure document is misleading or deceptive; or
- (b) there is a material omission from the disclosure document of material required by section 710, 711, 712, 713, 714 or 715; or
- (c) a material new circumstance that:
 - (i) has arisen since the disclosure document was lodged; and
 - (ii) would have been required by section 710, 711, 712, 713, 714 or 715 to be included in the disclosure document if it had arisen before the disclosure document was lodged.

731 Due diligence defence for prospectuses

Reasonable inquiries and reasonable belief—statements

- (1) A person does not commit an offence against subsection 728(3), and is not liable under section 729 for a contravention of subsection 728(1), because of a misleading or deceptive statement in a prospectus if the person proves that they:
- (a) made all inquiries (if any) that were reasonable in the circumstances; and
 - (b) after doing so, believed on reasonable grounds that the statement was not misleading or deceptive.

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Reasonable inquiries and reasonable belief—omissions

- (2) A person does not commit an offence against subsection 728(3), and is not liable under section 729 for a contravention of subsection 728(1), because of an omission from a prospectus in relation to a particular matter if the person proves that they:
- (a) made all inquiries (if any) that were reasonable in the circumstances; and
 - (b) after doing so, believed on reasonable grounds that there was no omission from the prospectus in relation to that matter.

732 Lack of knowledge defence for offer information statements and profile statements

Not knowing statement misleading or deceptive

- (1) A person does not commit an offence against subsection 728(3), and is not liable under section 729 for a contravention of subsection 728(1), because of a misleading or deceptive statement in an offer information statement or profile statement if the person proves that they did not know that the statement was misleading or deceptive.

Not knowing there was an omission

- (2) A person does not commit an offence against subsection 728(3), and is not liable under section 729 for a contravention of subsection 728(1), because of an omission from an offer information statement or profile statement in relation to a particular matter if the person proves that they did not know that there was an omission from the statement in relation to that matter.

733 General defences for all disclosure documents

Reasonable reliance on information given by someone else—statements and omissions

- (1) A person does not commit an offence against subsection 728(3), and is not liable under section 729 for a contravention against subsection 728(1), because of a misleading or deceptive statement in, or an omission from, a disclosure document if the person proves

that they placed reasonable reliance on information given to them by:

- (a) if the person is a body—someone other than a director, employee or agent of the body; or
 - (b) if the person is an individual—someone other than an employee or agent of the individual.
- (2) For the purposes of subsection (1), a person is not the agent of a body or individual merely because they perform a particular professional or advisory function for the body or individual.

Withdrawal of consent—statements and omissions

- (3) A person who is named in a disclosure document as:
- (a) being a proposed director or underwriter; or
 - (b) making a statement included in the document; or
 - (c) making a statement on the basis of which a statement is included in the document;

does not commit an offence against subsection 728(3), and is not liable under section 729 for a contravention against subsection 728(1), because of a misleading or deceptive statement in, or an omission from, a disclosure document if the person proves that they publicly withdrew their consent to being named in the document in that way.

Unawareness of new matter

- (4) A person does not commit an offence against subsection 728(3), and is not liable under section 729 for a contravention of subsection 728(1), because of a new circumstance that has arisen since the disclosure document was lodged if the person proves that they were not aware of the matter.

734 Restrictions on advertising and publicity

No advertising or publicity for offers covered by the exception for 20 issues in 12 months

- (1) A person must not:
- (a) advertise; or
 - (b) publish a statement that directly or indirectly refers to;

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an offer, or intended offer, of securities that would need a disclosure document but for subsection 708(1) (exception for 20 issues in 12 months).

Advertising or publicity for offers that need a disclosure document

- (2) If an offer, or intended offer, of securities needs a disclosure document, a person must not:
- (a) advertise the offer or intended offer; or
 - (b) publish a statement that:
 - (i) directly or indirectly refers to the offer or intended offer; or
 - (ii) is reasonably likely to induce people to apply for the securities;

unless the advertisement or publication is authorised by subsection (4), (5), (6) or (7).

Image advertising

- (3) In deciding whether a statement:
- (a) indirectly refers to an offer, or intended offer, of securities; or
 - (b) is reasonably likely to induce people to apply for securities;
- have regard to whether the statement:
- (c) forms part of the normal advertising of a body's products or services and is genuinely directed at maintaining its existing customers, or attracting new customers, for those products or services; and
 - (d) communicates information that materially deals with the affairs of the body; and
 - (e) is likely to encourage investment decisions being made on the basis of the statement rather than on the basis of information contained in a disclosure document.

Dissemination of disclosure document

- (4) A person may disseminate a disclosure document that has been lodged with ASIC without contravening subsection (2). This does not apply if an order under section 739 is in force in relation to the offer.

Advertising and publicity before the disclosure document is lodged

- (5) Before the disclosure document is lodged, an advertisement or publication does not contravene subsection (2) if it:
- (a) if the offer is of securities in a class already quoted—includes a statement that:
 - (i) a disclosure document for the offer will be made available when the securities are offered; and
 - (ii) anyone who wishes to acquire the securities will need to complete the application form that will be in or will accompany the disclosure document; and
 - (b) in any other case—contains the following but nothing more:
 - (i) a statement that identifies the offeror and the securities
 - (ii) a statement that a disclosure document for the offer will be made available when the securities are offered
 - (iii) a statement that anyone who wants to acquire the securities will need to complete the application form that will be in or will accompany the disclosure document
 - (iv) a statement of how to arrange to receive a copy of the disclosure document.

To satisfy paragraph (b), the advertisement or publication must include all of the statements referred to in subparagraphs (i), (ii) and (iii). It may include the statement referred to in subparagraph (iv).

Advertising and publicity after the disclosure document is lodged

- (6) After the disclosure document is lodged, an advertisement or publication does not contravene subsection (2) if it includes a statement that:
- (a) the offers of the securities will be made in, or accompanied by, a copy of the disclosure document; and
 - (b) anyone wishing to acquire the securities will need to complete the application form that will be in or will accompany the disclosure document.

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General exceptions

- (7) An advertisement or publication does not contravene subsection (2) if it:
- (a) relates to an offer of securities of a listed body and consists of a notice or report by the body, or one of its officers, about its affairs to the relevant securities exchange; or
 - (b) consists solely of a notice or report of a general meeting of the body; or
 - (c) consists solely of a report about the body that is published by the body and:
 - (i) does not contain information that materially affects affairs of the body other than information previously made available in a disclosure document that has been lodged, an annual report or a report referred to in paragraph (a) or (b); and
 - (ii) does not refer (whether directly or indirectly) to the offer; or
 - (d) is a news report or is genuine comment, in a newspaper or periodical or on radio or television relating to:
 - (i) a disclosure document that has been lodged or information contained in such a disclosure document; or
 - (ii) a notice or report covered by paragraph (a), (b) or (c); or
 - (e) is a report about the securities of a body or proposed body published by someone who is not:
 - (i) the body; or
 - (ii) acting at the instigation of, or by arrangement with, the body; or
 - (iii) a director of the body; or
 - (iv) a person who has an interest in the success of the issue or sale of the securities.

Paragraphs (d) and (e) do not apply if anyone gives consideration or another benefit for publishing the report.

Liability of publishers

- (8) A person does not contravene subsection (1) or (2) by publishing an advertisement or statement if they publish it in the ordinary course of a business of:

- (a) publishing a newspaper or magazine; or
 - (b) broadcasting by radio or television;
- and the person did not know and had no reason to suspect that its publication would amount to a contravention of a provision of this Chapter.

Note: Depending on the circumstances of the publication, the person may, however, commit an offence by being involved in someone else's contravention of subsection (1) or (2).

Pathfinder documents

- (9) A person does not contravene subsection (1) or (2) by sending a draft disclosure document for securities to a person if an offer of the securities to the person would not require a disclosure document because of subsection 708(8) or (10) (sophisticated investors) or 708(11) (professional investors).

735 Obligation to keep consents and other documents

A person who offers securities under a disclosure document must keep a consent required in respect of the document by subsection 716(2) or section 720.

736 Securities hawking prohibited

- (1) A person must not offer securities for issue or sale in the course of, or because of, an unsolicited:
 - (a) meeting with another person; or
 - (b) telephone call to another person;unless the offer is exempted under subsection (2).

Note: Section 700 extends offers to include invitations and distributing application forms.

- (2) Subsection (1) does not prohibit an offer of securities if:
 - (a) the offer does not need a disclosure document because of subsection 708(8) or (10) (sophisticated investors); or
 - (b) the offer does not need a disclosure document because of subsection 708(11) (professional investors); or
 - (c) the offer is an offer of listed securities made by telephone by a licensed securities dealer; or

Chapter 6D Fundraising

Part 6D.3 Prohibitions, liabilities and remedies

Division 1 Prohibitions and liabilities

Section 736

- (d) the offer is made to a client by a licensed securities dealer through whom the client has bought or sold securities in the last 12 months.

Division 2—Remedies

737 Remedies for investors

Right to withdraw and have money returned

- (1) If securities are issued to a person in contravention of section 724 (situation calling for a supplementary or replacement document), the person has the right to return the securities and to have their application money repaid. This is so even if the company that issued the securities is being wound up.
- (2) A right referred to in subsection (1) is exercisable by written notice given to the company within 1 month after the date of the issue.
- (3) If the body or the seller does not repay the money as required by subsection (1), the directors of the body or seller are personally liable to repay the money.

738 Securities may be returned and refund obtained

If securities are issued or transferred to a person as a result of an offer that contravenes section 736, the person may return the securities within 1 month after the issue or transfer. If they do so, they are entitled to be repaid the amount they paid for the securities.

Part 6D.4—ASIC's powers

739 ASIC stop orders

- (1) If ASIC is satisfied that an offer of securities under a disclosure document lodged with ASIC would contravene section 728, ASIC may order that no offers, issues, sales or transfers of the securities be made while the order is in force.
- (2) Before making an order under subsection (1), ASIC must:
 - (a) hold a hearing; and
 - (b) give a reasonable opportunity to any interested people to make oral or written submissions to ASIC on whether an order should be made.
- (3) If ASIC considers that any delay in making an order under subsection (1) pending the holding of a hearing would be prejudicial to the public interest, ASIC may make an interim order that no offers, issues, sales or transfers of the securities be made while the interim order is in force. The interim order may be made without holding a hearing and lasts for 21 days after the day on which it is made unless revoked before then.
- (4) At any time during the hearing, ASIC may make an interim order that no offers, issues, sales or transfers of the securities be made while the interim order is in force. The interim order lasts until:
 - (a) ASIC makes an order under subsection (1) after the conclusion of the hearing; or
 - (b) the interim order is revoked;whichever happens first.
- (5) An order under subsection (1), (3) or (4) must be in writing and must be served on the person who is ordered not to offer, issue, sell or transfer securities under the disclosure document.

740 Anti-avoidance determinations

- (1) ASIC may determine in writing that a number of different bodies are closely related and that their transactions should be aggregated for the purposes of this Chapter. If ASIC does so:
 - (a) an issue, sale or transfer of securities in any other bodies is taken to also be an issue, sale or transfer of the securities of each of the other bodies by those bodies; and
 - (b) any money received from an issue, sale or transfer of securities in any of the bodies is taken to also be received by each of the other bodies from an issue, sale or transfer of its own securities.

ASIC must give written notice of the determination to each of the bodies.

- (2) ASIC may determine in writing that the transactions of a body and of a person who controls the body should be aggregated for the purposes of this Chapter. If ASIC does so:
 - (a) an issue of securities in the body is taken to also be the transfer of the securities by the controller; and
 - (b) any money received from an issue of securities in the body is taken to also be received by the controller from a transfer of the securities; and
 - (c) a sale or transfer of securities in the body by the controller is taken to also be the issue of the securities by the body; and
 - (d) any money received from a sale or transfer of securities in the body by the controller is taken to also be received by the body from an issue of the securities.

ASIC must give written notice of the determination to the body and the controller.

741 ASIC's power to exempt and modify

- (1) ASIC may:
 - (a) exempt a person from a provision of this Chapter; or
 - (b) declare that this Chapter applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.
- (2) The exemption or declaration may do all or any of the following:

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- (a) apply to all or specified provisions of this Chapter;
 - (b) apply to all persons, specified persons, or a specified class of persons;
 - (c) relate to all securities, specified securities or a specified class of securities;
 - (d) relate to any other matter generally or as specified.
- (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) The exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.
- (5) For the purposes of this section, the ***provisions of this Chapter*** include:
- (a) regulations made for the purposes of this Chapter; and
 - (b) definitions in this Act or the regulations as they apply to references in:
 - (i) this Chapter; or
 - (ii) regulations made for the purposes of this Chapter; and
 - (c) the old Division 12 of Part 11.2 transitionals.

Chapter 7—Securities

Part 7.1—Interpretation

760 Effect of this Part

The provisions of this Part have effect for the purposes of this Chapter, except so far as the contrary intention appears in this Chapter.

761 Definitions

Unless the contrary intention appears:

authority, in relation to a government, includes an instrumentality or agency.

business rules, in relation to a body corporate, means:

- (a) in the case of a body corporate that conducts, or proposes to conduct, a stock market—any rules, regulations or by-laws that are made by the body corporate, or that are contained in its constitution, and that govern:
 - (i) the activities or conduct of that stock market; or
 - (ii) the activities or conduct of persons in relation to that stock market;other than rules, regulations or by-laws that are listing rules of the body corporate; and
- (b) otherwise—the provisions of the constitution of the body corporate and any other rules, regulations or by-laws made by the body corporate.

comply with, in relation to the business rules or listing rules of a securities exchange, includes give effect to those rules.

eligible exchange means:

- (a) the Exchange; or
- (b) a securities exchange that is neither the Exchange nor an Exchange subsidiary.

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listing rules, in relation to a body corporate that conducts, or proposes to conduct, a stock market, means rules, regulations or by-laws governing or relating to:

- (a) the admission to, or removal from, the official list of the body corporate of bodies corporate, governments, unincorporate bodies or other persons for the purpose of the quotation on the stock market of the body corporate of securities of bodies corporate, governments, unincorporate bodies or other persons and for other purposes; or
- (b) the activities or conduct of bodies corporate, governments, unincorporate bodies and other persons who are admitted to that list;

whether those rules, regulations or by-laws:

- (c) are made by the body corporate or are contained in the constitution of the body corporate; or
- (d) are made by another person and adopted by the body corporate.

marketable parcel, in relation to securities that are listed for quotation on the stock market of a securities exchange, means a marketable parcel of those securities within the meaning of the relevant business rules or listing rules of that securities exchange.

odd lot has the meaning given by section 763.

participating exchange means an eligible exchange that is a member of SEGC.

shares, in relation to a body corporate, includes units in shares in the body.

trading day, in relation to a stock exchange, means:

- (a) in the case of the Exchange—a day on which a stock market of an Exchange subsidiary; or
- (b) in any case—a day on which a stock market of the stock exchange;

is open for trading in securities.

trust account, in relation to a person, means, in the case of a person who holds, or has at any time held, a dealers licence, an

account that a condition existing by virtue of section 866 provides or provided for the person to maintain.

762 Conduct

- (1) A reference to engaging in conduct is a reference to doing or refusing to do any act, including the making of, or the giving effect to a provision of, an agreement.
- (2) A reference to conduct, when that expression is used as a noun otherwise than as mentioned in subsection (1), is a reference to the doing of, or the refusing to do, any act, including the making of, or the giving effect to a provision of, an agreement.
- (3) Where, 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.
- (4) 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 to have been engaged in also by the body corporate.
- (5) Where, 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 a employee or agent of the person, being a 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.
- (6) Conduct engaged in on behalf of a person other than a body corporate:

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- (a) by a employee or agent of the person within the scope of the actual or apparent authority of the employee or agent; or
 - (b) by any other person at the direction or with the consent or agreement (whether express or implied) of a 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 to have been engaged in also by the first-mentioned person.
- (7) A reference in this section 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.

763 Odd lot

- (1) A parcel of securities constitutes an odd lot if the number of securities in that parcel is less than one marketable parcel of those securities.
- (2) When the number of securities in a parcel of securities is greater than one marketable parcel of those securities and, after excluding so many of the securities in that parcel as constitute a marketable parcel or marketable parcels of those securities, a number of securities remains, that remaining number of securities constitutes an odd lot.

764 References to doing acts

In this Chapter, unless the contrary intention appears, a reference to doing any act or thing includes a reference to causing, permitting or authorising the act or thing to be done.

765 Misleading representation

- (1) When a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act) and the person does not have reasonable grounds for making the representation, the representation is taken to be misleading.

- (3) Subsection (1) does not limit by implication the meaning of a reference to a misleading representation, a representation that is misleading in a material particular or conduct that is misleading or is likely or liable to mislead.

766 Trading in securities

A reference to a securities exchange permitting trading in securities on a stock market of the securities exchange includes a reference to the securities exchange listing the securities for quotation, or otherwise permitting the securities to be quoted, on a stock market of the securities exchange.

Part 7.1A—The Australian Stock Exchange Limited

Division 2—Limitations on holding shares in the Exchange

766E Unacceptable ownership situation

For the purposes of this Division, an unacceptable ownership situation exists if any one person's voting power in the Exchange exceeds 5%.

766F Causing an unacceptable ownership situation

A person or persons (the *acquirers*) are guilty of an offence if:

- (a) the acquirers acquire any shares in the Exchange, or enter into a relevant agreement to acquire shares in the Exchange; and
- (b) the acquisition has the result that:
 - (i) a person who was not previously entitled to more than 5% of the voting shares in the Exchange becomes entitled to more than 5% of the voting shares in the Exchange; or
 - (ii) a person who was previously entitled to more than 5% of the voting shares in the Exchange becomes entitled to a greater percentage of the voting shares in the Exchange; and
- (c) the acquirers knew the acquisition would have that result, or were reckless as to whether the acquisition would have that result.

766G Exchange's obligation to avoid unacceptable ownership situation

- (1) The Exchange must take all reasonable steps to ensure that an unacceptable ownership situation does not exist in relation to the Exchange.

- (2) If the Exchange knowingly or recklessly contravenes subsection (1), the Exchange is guilty of an offence.

766H Remedial orders

- (1) If an unacceptable ownership situation exists in relation to the Exchange, the Court may, on application by an eligible applicant, make such orders as the Court considers appropriate for the purpose of ensuring that the unacceptable ownership situation ceases to exist. For this purpose, *eligible applicant* means:
- (a) the Minister; or
 - (b) ASIC; or
 - (c) the Exchange; or
 - (d) a shareholder of the Exchange.
- (2) The Court's orders may include:
- (a) an order directing the disposal of shares; or
 - (b) an order restraining the exercise of any rights attached to shares; or
 - (c) an order prohibiting or deferring the payment of any sums due to a person in respect of shares held by the person; or
 - (d) an order that any exercise of rights attached to shares be disregarded; or
 - (e) an order directing any person to do or refrain from doing a specified act, for the purpose of securing compliance with any other order made under this section; or
 - (f) an order containing such ancillary or consequential provisions as the Court thinks just.
- (3) Subsection (2) does not, by implication, limit subsection (1).
- (4) 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.
- (5) 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.

Section 766I

766I This Division extends to things outside Australia etc.

This Division applies, according to its tenor, in relation to:

- (a) natural persons, whether resident in this jurisdiction or in Australia or not and whether Australian citizens or not; and
- (b) all bodies corporate and unincorporated bodies, whether formed or carrying on business in this jurisdiction or in Australia or not; and
- (c) acts and omissions outside this jurisdiction, whether in Australia or not.

Part 7.2—Securities exchanges and stock markets

767 Conducting unauthorised stock markets

A person must not:

- (a) establish or conduct; or
- (b) assist in establishing or conducting; or
- (c) hold out that the person conducts;
an unauthorised stock market.

769 Approval of stock exchange

- (1) A body corporate may apply to ASIC in writing for approval by the Minister as a stock exchange.
- (2) The Minister may by writing approve the body as a stock exchange if, and only if, he or she is satisfied that:
 - (b) the body's business rules make satisfactory provision:
 - (i) for the standards of training and experience, and other qualifications, for membership; and
 - (ii) for the exclusion from membership of:
 - (A) any person who is not of good character and high business integrity; and
 - (B) any body corporate where a director of the body corporate, a person concerned in the management of the body corporate or a person who has control, or substantial control, of the body corporate is not of good character and high integrity; and
 - (iii) for the expulsion, suspension or disciplining of a member for conduct inconsistent with just and equitable principles in the transaction of business or for a contravention of the body's business rules, of this Chapter or of the conditions of a licence held by the member; and
 - (iv) for the monitoring of compliance with, and for enforcement of, the body's business rules; and

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- (v) with respect to the conditions under which securities may be listed for trading on the stock market of the proposed stock exchange; and
- (vi) with respect to the conditions governing dealings in securities by members; and
- (vii) with respect to the class or classes of securities that may be dealt with by members; and
- (viii) generally for the carrying on of the business of the proposed stock exchange with due regard to the interests of the public; and
- (c) the body has made or adopted listing rules and, where the listing rules are adopted, has made provision to the effect that an amendment to the rules so adopted made by another person is of no effect until the body adopts the amendment; and
- (d) the listing rules made or adopted by the body make satisfactory provision:
 - (i) with respect to conditions under which securities may be traded on the stock market of the proposed stock exchange; and
 - (ii) generally for the protection of the interests of the public; and
- (e) either the body will be a participating exchange or there will be enough money in the body's fidelity fund to make the payments out of the fund that may reasonably be expected to be necessary for the purposes of Part 7.9; and
- (f) the interests of the public will be served by the granting of its approval.

769A Ongoing requirements to be observed by securities exchange

- (1) A securities exchange must:
 - (a) to the extent reasonably practicable, do all things that are necessary to ensure that each stock market of the exchange is an orderly and fair market; and
 - (b) have adequate arrangements for monitoring and enforcing compliance with its business rules and listing rules; and
 - (c) have adequate arrangements for the expulsion, suspension or disciplining of a member for conduct inconsistent with just

and equitable principles in the transaction of business or for a contravention of:

- (i) the exchange's business rules; or
 - (ii) this Chapter; or
 - (iii) the conditions of a licence held by the member; and
- (d) have adequate arrangements for the settlement of transactions that result from trading in securities on a stock market of the exchange; and
- (e) have adequate arrangements for investigating complaints by investors relating to the transaction of the business of investors on a stock market of the exchange.
- (2) A contravention of subsection (1) is not an offence.

769B Minister's directions to comply with ongoing requirements

- (1) If the Minister is of the opinion that a securities exchange is not complying with the requirements of section 769A, the Minister may publish a notice in the *Gazette*, directing the exchange to do specified things that the Minister believes will promote compliance by the exchange with those requirements.
- (2) A securities exchange must comply with a direction under subsection (1).
- (3) If a securities exchange contravenes a direction under subsection (1), the Court, on application by ASIC, may order the exchange to comply with the direction.

769C Annual report by securities exchange about compliance with ongoing requirements

- (1) Within 3 months after the end of each of its financial years, a securities exchange must prepare and give ASIC a report on the extent to which the exchange complied with the requirements of section 769A during the financial year. ASIC must give the report to the Minister.
- (2) The report must be accompanied by:
- (a) any other information and statements prescribed by the regulations; and

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- (b) any audit report required by the Minister under subsection (3).
- (3) The Minister may require a securities exchange to obtain an audit report on the annual report and on any information or statements required under paragraph (2)(a). The audit report must be prepared, as the Minister requires, either by ASIC or by some other person or body nominated by the Minister.

769D Special report by securities exchange about compliance with ongoing requirements

- (1) The Minister may, at any time, require a securities exchange to prepare and give ASIC a special report on the extent to which the exchange is complying with the requirements of section 769A. ASIC must give the report to the Minister.
- (2) The special report must be accompanied by any audit report required by the Minister under subsection (3).
- (3) The Minister may require a securities exchange to obtain an audit report on the special report. The audit report must be prepared, as the Minister requires, either by ASIC or by some other person or body nominated by the Minister.
- (4) A securities exchange must give the reports to ASIC, within the time required by the Minister.

770 Approval of approved securities organisation

- (1) A body corporate may apply to ASIC in writing for approval by the Minister as an approved securities organisation.
- (2) The Minister may by writing approve the body as an approved securities organisation if, and only if, he or she is satisfied that:
 - (b) the body's business rules make satisfactory provision:
 - (i) for efficient, honest, fair, competitive and informed trading in securities on the stock market or stock markets of the proposed approved securities organisation; and
 - (ii) for the expulsion, suspension or disciplining of a member for conduct inconsistent with just and equitable

principles in the transaction of business or for a contravention of the body's business rules, of this Chapter or of the conditions of a licence held by the member; and

- (iii) for the monitoring of compliance with, and for enforcement of, the body's business rules; and
- (iv) generally for the carrying on of the business of the organisation with due regard to the interests of the public;

and, without limiting the generality of the foregoing, make satisfactory provision in relation to such of the following matters as appear to the Minister to be relevant in relation to the application:

- (v) the admission of members;
 - (vi) dealings in securities by members;
 - (vii) the listing of securities for trading on the stock market or stock markets of the organisation;
 - (viii) trading in securities on that stock market or those stock markets;
 - (ix) the clearing and settlement of dealings in securities that result from trading in securities on that stock market or those stock markets;
 - (x) the quotation of securities on, and the reporting of trading in securities on, that stock market or those stock markets; and
- (c) the body has made or adopted listing rules and, where the listing rules are adopted, has made provision to the effect that an amendment of the rules so adopted made by another person is of no effect until the body adopts the amendment; and
 - (d) the listing rules made or adopted by the body make satisfactory provision:
 - (i) with respect to conditions under which securities may be traded on the stock market or stock markets of the organisation; and
 - (ii) generally for the protection of the interests of the public; and
 - (e) either the body will be a participating exchange or there will be enough money in the body's fidelity fund to make the

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payments out of the fund that may reasonably be expected to be necessary for the purposes of Part 7.9; and

- (f) the interests of the public will be served by the granting of its approval.

770A Approval of special stock markets for unquoted prescribed interests

- (1) The responsible entity in relation to unquoted interests in a registered scheme may apply to ASIC in writing for approval by the Minister of a stock market on which the interests (whether or not they remain unquoted) may be traded by means of an electronic trading facility.
- (2) The Minister may, by writing, approve the stock market if, and only if, the Minister is satisfied that:
 - (a) the responsible entity's business rules make satisfactory provision for the fair and orderly conduct of the stock market; and
 - (b) those business rules make satisfactory provision for a person or partnership (the *supervisor*) who or that, having regard to the regulations, is independent and appropriately qualified, to monitor compliance, in relation to the stock market, with the business rules; and
 - (c) the responsible entity has made or will make, and will maintain, satisfactory arrangements (including, for example, insurance) for meeting liabilities of the responsible entity that arise in the course of conducting the stock market; and
 - (d) the stock market will not be used except for trading the interests in the scheme (whether or not they remain unquoted) by means of the electronic trading facility.
- (3) The approval is subject to:
 - (a) the conditions (if any) specified in the instrument of approval; and
 - (b) a condition that the responsible entity will comply with the requirements (if any) of the regulations for the lodging of documents containing information relating to the interests in the scheme; and

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- (c) a condition that the supervisor must, if the supervisor becomes aware of a contravention of the responsible entity's business rules, notify ASIC of the contravention within 7 days of becoming aware of it; and
 - (d) a condition that the supervisor must properly perform the duties that the supervisor has under the responsible entity's business rules.
- (4) The Minister may, by writing, revoke the approval if:
- (a) the Minister is no longer satisfied as mentioned in subsection (2); or
 - (b) the Minister is satisfied that a condition mentioned in subsection (3) has been contravened; or
 - (c) the Minister is otherwise satisfied that the approval should be revoked.
- (5) In this section:

unquoted, in relation to interests in a registered scheme, means the interests are not included in any class of securities that are quoted on a stock market of a securities exchange.

770B Section 770A stock markets—separate markets exist in relation to different kinds of prescribed interests

- (1) For the purposes of subsections 770A(1) and (2), separate stock markets exist in relation to different kinds of interests in a registered scheme even though:
- (a) the stock markets are conducted by the same body corporate; and
 - (b) the same business rules of the body corporate apply to the conduct of the stock markets.
- (2) For the purposes of subsection (1):
- (a) unless paragraph (b) applies, the interests in a registered scheme constitute a kind of interest in the scheme; and
 - (b) if a particular scheme relates to a number of different undertakings in relation to interests—the interests in the scheme are taken to be divided into a number of kinds, with each kind consisting of the interests to which a particular one of those undertakings relates.

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770C Section 770A stock markets—regulations may make additional provision

The regulations may make provision, in relation to section 770A stock markets, for matters of a kind dealt with in sections 774 to 779 (inclusive) and section 1114.

771 Exempt stock market

- (1) The Minister may by writing declare a specified stock market to be, subject to any specified conditions, an exempt stock market.
- (2) Without limiting the matters to which the Minister may have regard in considering whether or not to vary or revoke a declaration in force under subsection (1), he or she may, in so considering, have regard to a breach of a condition specified in the declaration.

772 Publication of instruments executed under section 769, 770, 770A or 771

ASIC must cause a copy of an instrument executed under subsection 769(2), 770(2), 770A(2) or 771(1) to be published in the *Gazette*.

772A Business rules bind securities exchange and its members

The business rules of a securities exchange have effect, by force of this section, as a contract under seal:

- (a) between the exchange and each member; and
- (b) between a member and each other member;

under which each of those persons agrees to observe and perform the provisions of the business rules as in force for the time being, so far as those provisions are applicable to that person.

772B Self-listing by securities exchanges

Self-listing allowed

- (1) A body corporate that is a securities exchange may be included in its own official list.

Quotation of securities of securities exchange on its own stock market

- (2) Securities of a securities exchange may be granted quotation on a stock market of the exchange if the exchange has entered into such arrangements as ASIC requires:
 - (a) for dealing with possible conflicts of interest that might arise from the quotation of securities of the exchange on a stock market of the exchange; and
 - (b) for the purpose of ensuring the integrity of trading in securities of the exchange.

The exchange must comply with the arrangements.

- (3) An arrangement under subsection (2) may provide for the exchange to pay fees to ASIC (on behalf of the Commonwealth) for services provided by ASIC under the arrangement, or otherwise provided under, or for the purposes of, this section. The fees may be recovered by ASIC as a debt due to the Commonwealth.
- (4) The listing rules of a self-listing exchange must provide for ASIC, instead of the exchange, to make decisions and to take action (or require the exchange to take action on ASIC's behalf) on the following matters:
 - (a) the admission of the exchange to its own official list;
 - (b) the removal of the exchange from its own official list;
 - (c) granting, stopping or suspending the quotation of securities of the exchange on a stock market of the exchange.

ASIC's powers and functions

- (5) ASIC has such powers and functions as are provided for it in arrangements made for the purposes of subsection (2) or in listing rules made for the purposes of subsection (4).

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Note: Under section 776, ASIC may require a securities exchange to provide assistance to ASIC for the performance of ASIC's functions.

Exemptions and modifications for self-listing exchanges

- (6) ASIC may:
- (a) exempt a self-listing exchange from a modifiable provision; or
 - (b) declare that a modifiable provision applies to a self-listing exchange as if specified provisions were omitted, modified or varied as specified in the declaration.
- (7) An exemption or declaration under subsection (6) must be in writing and ASIC must publish notice of it in the *Gazette*.
- (8) An exemption under subsection (6) may apply unconditionally or subject to specified conditions.
- (9) If a self-listing exchange is subject to conditions under subsection (8), it must comply with those conditions.
- (10) The Court, on application by ASIC, may order a self-listing exchange to comply with a condition in a specified way.

Definitions

- (11) In this section:

modifiable provision means:

- (a) section 235 and any of the provisions of Chapters 6 and 7; or
- (b) regulations made for the purposes of any provision covered by paragraph (a).

self-listing exchange means a securities exchange whose securities have been granted quotation on a stock market of the exchange.

773 Auction, by licensed auctioneer, of forfeited shares

For the purposes of this Part, a holder of a licence under an Australian law relating to the licensing of auctioneers does not conduct a stock market merely by conducting, on a stock market of a securities exchange, an auction of forfeited shares.

774 ASIC to be notified of amendments to rules

- (1) As soon as practicable after:
 - (a) an amendment is made, by way of rescission, alteration or addition, to the business rules of a securities exchange; or
 - (b) a securities exchange makes or adopts an amendment, by way of rescission, alteration or addition, to its listing rules;the securities exchange must lodge written notice of the amendment.
- (2) The notice must:
 - (a) set out the text of the amendment; and
 - (b) specify the date on which the amendment was made or adopted; and
 - (c) contain an explanation of the purpose of the amendment.
- (3) If no notice is lodged under subsection (1) within 21 days after the amendment is made or adopted, the amendment ceases to have effect.
- (4) As soon as practicable after receiving a notice, ASIC must send a copy to the Minister.
- (5) Within 28 days after the receipt of a notice by ASIC under subsection (4), the Minister may disallow the whole or a specified part of the amendment to which the notice relates.
- (6) As soon as practicable after the whole or a part of an amendment is disallowed under subsection (5), ASIC must give notice of the disallowance to the securities exchange and, upon receipt by the securities exchange of the notice, the amendment, to the extent of the disallowance, ceases to have effect.

775 ASIC's power to prohibit trading in particular securities

- (1A) A reference in this section to trading in securities on a stock market is a reference to trading in securities on a stock market, whether in this jurisdiction or elsewhere.
- (1) Where ASIC forms the opinion that it is necessary to prohibit trading in particular securities of a body corporate on a stock market of a securities exchange in order to protect persons buying

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or selling the securities or in the interests of the public, ASIC may give written notice to the securities exchange stating that it has formed that opinion and setting out the reasons for that opinion.

- (2) If, after receiving the notice, the securities exchange does not take action to prevent trading in the securities on a stock market of the securities exchange and ASIC is still of the opinion that it is necessary to prohibit trading in the securities on such a stock market, ASIC may, by written notice to the securities exchange, prohibit trading in the securities on such a stock market during a period of not more than 21 days.
- (3) Where ASIC gives a notice to a securities exchange under subsection (2), ASIC must:
 - (a) at the same time send a copy of the notice to the body corporate together with a statement setting out the reasons for the giving of the notice; and
 - (b) as soon as practicable give to the Minister a written report setting out the reasons for the giving of the notice and send a copy of the report to the securities exchange.
- (4) The body corporate may request ASIC in writing to refer the matter to the Minister.
- (5) Where a request is made under subsection (4), ASIC must immediately refer the matter to the Minister, who may, if he or she thinks fit, direct ASIC to revoke the notice and, if such a direction is given, ASIC must immediately revoke the notice.
- (6) A securities exchange must not permit trading in securities on a stock market of the securities exchange in contravention of a notice under subsection (2).

776 Securities exchanges to provide assistance to ASIC

- (1) A securities exchange must provide such assistance to ASIC, or to a person acting on behalf of, or with the authority of, ASIC, as ASIC reasonably requires for the performance of its functions.
- (2) Where a securities exchange reprimands, fines, suspends, expels or otherwise takes disciplinary action against a member of the securities exchange, it must as soon as practicable lodge written

particulars of the name of the member, the reason for and nature of the action taken, the amount of the fine (if any) and the period of the suspension (if any).

- (2A) A securities exchange that believes a person has committed, is committing or is about to commit, a serious contravention of the securities exchange's business rules or listing rules, or this Act, must, as soon as practicable, lodge a statement setting out:
- (a) particulars of the contravention that it believes the person has committed, is committing or is about to commit; and
 - (b) its reasons for that belief.
- (2B) Subject to subsection (2C), a securities exchange that makes information about a listed disclosing entity available to a stock market conducted by the securities exchange must, as soon as practicable, give ASIC a document that contains the information.
- (2C) The regulations may provide that subsection (2B) does not apply to information of a specified kind.
- (3) A person authorised by ASIC is entitled at all reasonable times to full and free access for any of the purposes of this Chapter to the trading floor or trading floors of a securities exchange.
- (4) A person must not refuse or fail, without lawful excuse, to allow a person authorised by ASIC access in accordance with subsection (3) to a trading floor of a securities exchange.
- (5) In this section:

trading floor, in relation to a securities exchange, means a place or facility maintained or provided by the securities exchange for:

- (a) the making or acceptance, by members of the securities exchange, or by such members and other persons, of offers to sell, buy or exchange securities; or
- (b) the making, by members of the securities exchange, or by such members and other persons, of offers or invitations that are intended, or may reasonably be expected, to result, whether directly or indirectly, in the making or acceptance of offers to sell, buy or exchange securities; or
- (c) the provision of information concerning the prices at which, or the consideration for which, particular persons, or

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particular classes of persons, propose, or may reasonably be expected, to sell, buy or exchange securities.

777 Power of Court to order compliance with or enforcement of business rules or listing rules of securities exchange

- (1) Where a person who is under an obligation to comply with or enforce the business rules or listing rules of a securities exchange fails to comply with or enforce any of those business rules or listing rules, as the case may be, the Court may, on the application of ASIC, the securities exchange or a person aggrieved by the failure and after giving to the person aggrieved by the failure and the person against whom the order is sought an opportunity of being heard, make an order giving directions concerning compliance with, or enforcement of, those business rules or listing rules to:
 - (a) that last-mentioned person; and
 - (b) if that person is a body corporate—the directors of that body corporate.
- (2) For the purposes of subsection (1), a body corporate that is, with its agreement, consent or acquiescence, included in the official list of a securities exchange, or an associate of such a body corporate, is taken to be under an obligation to comply with the listing rules of that securities exchange to the extent to which those rules purport to apply in relation to the body corporate or associate, as the case may be.
- (3) For the purposes of subsection (1), 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 securities exchange, the responsible entity, or an associate of the responsible entity, is taken to be under an obligation to comply with the listing rules of that securities exchange to the extent to which those rules apply to the responsible entity or associate.
- (4) For the purposes of subsection (1), if a body corporate fails to comply with or enforce provisions of the business rules or listing rules of a securities exchange, a person who holds securities of the

body corporate that are quoted on a stock market of the securities exchange is taken to be a person aggrieved by the failure.

- (5) Subsection (4) does not limit the circumstances in which a person may be aggrieved by a failure for the purposes of subsection (1).

778 Gaming and wagering laws not applicable to certain contracts and relevant agreements

- (1) Despite any law of a State or Territory in this jurisdiction about gaming or wagering:
- (a) a person may enter into an option contract on:
 - (i) a stock market of a securities exchange; or
 - (ii) an exempt stock market; and
 - (b) the contract is valid and enforceable.
- (2) Despite any law of a State or Territory in this jurisdiction about gaming or wagering:
- (a) a person may enter into a relevant agreement of a kind prescribed for the purposes of paragraph 92A(1)(b); and
 - (b) the agreement is valid and enforceable.

779 Qualified privilege

- (1) In this section:

delisting or suspension decision means a decision by a securities exchange:

- (a) whether or not to remove an entity from an official list of the exchange; or
- (b) whether or not to stop or suspend quotation of securities on a stock market of the exchange.

disciplinary proceeding, in relation to a securities exchange, means:

- (a) a proceeding under the business rules of the securities exchange that may result in the disciplining of a member of the securities exchange; or
- (b) an appeal under the business rules of the securities exchange from a proceeding of a kind referred to in paragraph (a).

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disciplining, in relation to a member of a securities exchange, includes expulsion from, or suspension of, membership of the securities exchange.

information means information given orally, in a document or otherwise.

listed entity, in relation to a securities exchange, means an entity included in an official list of the exchange.

member, in relation to a securities exchange, includes a person who is under an obligation to comply with or enforce the business rules of the securities exchange.

rules, in relation to a securities exchange, means the exchange's business rules or listing rules.

- (2) A securities exchange, or a member, officer or employee of a securities exchange, has qualified privilege in respect of a statement made by a person, orally or in writing, in the course of, or otherwise for the purposes of or in connection with, a disciplinary proceeding of the securities exchange.
- (3) Where:
- (a) an Exchange subsidiary is acting on behalf of the Exchange; or
 - (b) an officer or employee of an Exchange subsidiary is acting on behalf of the Exchange or of a member, officer or employee of the Exchange;
- in connection with a disciplinary proceeding of the Exchange, the Exchange subsidiary and an officer or employee of the Exchange subsidiary have qualified privilege in respect of a statement made by a person, orally or in writing, in the course of, or otherwise for the purposes of or in connection with, the disciplinary proceeding.
- (4) A person has qualified privilege in respect of the publication of:
- (a) a statement made by a person, orally or in writing, in the course of, or otherwise for the purposes of or in connection with; or

- (b) a document prepared, given or produced by a person, in the course of, or otherwise for the purposes of or in connection with;
a disciplinary proceeding of a securities exchange.
- (5) A securities exchange has qualified privilege in respect of the publication of information, or a document, given to the exchange by a listed entity under a provision of this Act or of the exchange's rules.
- (6) Subsection (5) does not apply if:
 - (a) this Act, or the exchange's rules, as the case may be, expressly or impliedly authorised the entity to limit the purposes for which it gave the information or document to the exchange; and
 - (b) when giving the information or document, the entity limited those purposes as so authorised; and
 - (c) the publication is not solely for one or more of the limited purposes.
- (7) A securities exchange has qualified privilege in respect of the publication of:
 - (a) information about a request by the exchange to a listed entity for information in relation to compliance by the entity with, or a contravention by the entity of, this Act or the exchange's rules; or
 - (b) information, or a document, given to the exchange by a listed entity in response to such a request.
- (8) A securities exchange has qualified privilege in respect of the publication of:
 - (a) an oral or written statement describing a delisting or suspension decision or the reasons for, or action taken because of, such a decision; or
 - (b) an oral or written statement to the effect that the exchange is considering whether to make such a decision; or
 - (c) information given, or a document prepared, given or produced, by a person (whether an officer of the exchange or not) in the course of, for the purposes of, or otherwise in connection with, the exchange making such a decision.

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- (9) An officer of a securities exchange has qualified privilege in respect of an act:
 - (a) that is done in the course of performing functions or exercising powers as an officer of the exchange; and
 - (b) in respect of which the exchange would have qualified privilege under subsection (5), (7) or (8) if it had done the act.
- (10) Nothing in this section limits the generality of anything else in it.

Part 7.2A—The Securities Clearing House

779A Interpretation

In this Part, unless the contrary intention appears:

disciplinary proceeding, in relation to the securities clearing house, means:

- (a) a proceeding under the SCH business rules that may result in the disciplining of an SCH participant; or
- (b) an appeal under the SCH business rules from such a proceeding.

disciplining, in relation to a person in the person's capacity as an SCH participant, includes, but is not limited to, taking action that has the effect of revoking or suspending the person's status as an SCH participant.

779B Approval of securities clearing house

- (1) A body corporate may apply to ASIC in writing for approval by the Minister as the securities clearing house.
- (2) If a body so applies, the Minister may by writing approve the body as the securities clearing house if, and only if, he or she is satisfied that:
 - (a) the body's business rules:
 - (i) include satisfactory provisions about:
 - (A) the facilities that the body proposes to provide for the settlement of transactions involving quoted securities or quoted rights; and
 - (B) the facilities that the body proposes to provide for the registration of transfers (within the meaning of Division 3 of Part 7.13) of quoted securities or quoted rights; and
 - (C) any other facilities that the body proposes to provide (such as facilities in relation to dealings in quoted securities or quoted rights); and

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- (ii) include satisfactory provisions about the disciplining of persons (being persons who will be SCH participants if the approval is given) who contravene the business rules or this Chapter; and
 - (iii) are otherwise satisfactory; and
 - (b) the interests of the public will be served by granting the application.
- (3) An approval comes into force on the day specified in the instrument giving the approval, being the day on which the approval is given or a later day.
 - (4) In exercising his or her powers under subsection (2), the Minister must ensure that no more than one approval is in force at any particular time.
 - (5) ASIC must cause a copy of an instrument under this section to be published in the *Gazette*.

779C ASIC to be notified of amendments of business rules

- (1) As soon as practicable after the SCH business rules are amended (whether by way of rescission, alteration or addition), the securities clearing house must give written notice of the amendment to ASIC.
- (2) A notice must:
 - (a) set out the text of the amendment; and
 - (b) specify the day on which the amendment was made; and
 - (c) explain the purpose of the amendment.
- (3) If a notice is not given as required within 21 days after an amendment is made, the amendment ceases to have effect.
- (4) ASIC must send a copy of a notice to the Minister as soon as practicable after receiving it.
- (5) The Minister may, within 28 days after ASIC receives a notice, disallow the whole or a specified part of the amendment to which the notice relates.
- (6) If the Minister disallows the whole or a part of an amendment, ASIC must, as soon as practicable, give notice of the disallowance

to the securities clearing house and, when the securities clearing house receives the notice, the amendment ceases to have effect to the extent of the disallowance.

779D Securities clearing house to assist ASIC

The securities clearing house must provide such assistance to ASIC, or to a person acting on behalf of, or with the authority of, ASIC, as ASIC reasonably requires for the performance of its functions.

779E Securities clearing house to notify ASIC of disciplinary action

If the securities clearing house decides to discipline an SCH participant, it must, as soon as practicable, lodge written particulars of the participant's name and of the reason for, and nature of, the disciplinary action taken or to be taken.

779F SCH business rules have effect as contract

- (1) The SCH business rules have effect, by force of this section, as a contract under seal:
 - (a) between the SCH and each issuer; and
 - (b) between the SCH and each SCH participant; and
 - (c) between each issuer and each SCH participant; and
 - (d) between an SCH participant and each other SCH participant;under which each of the persons mentioned in paragraphs (a) to (d) agrees to observe and perform the provisions of the SCH business rules as in force for the time being to the extent, and in the manner, provided by the SCH business rules.

- (2) In this section:

issuer means an issuing body, within the meaning of Division 3 of Part 7.13, in relation to quoted securities or quoted rights.

779G Power of Court to order compliance with provisions of SCH business rules

- (1) If:
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- (a) a person is bound to comply with a provision of the SCH business rules; and
 - (b) the person contravenes the provision;
- then, subject to subsection (2), the Court may, on the application of the securities clearing house, of ASIC, or of a person aggrieved by the contravention, make an order giving directions to the first-mentioned person about complying with the provision.
- (2) The Court may not make an order giving directions to a person unless the person has been given an opportunity of being heard.

779H Qualified privilege in respect of disciplinary proceedings

- (1) The securities clearing house, or a member, officer or employee of the securities clearing house, or an SCH participant, has qualified privilege in respect of a statement made by a person, orally or in writing, in the course of, or otherwise for the purposes of or in connection with, a disciplinary proceeding of the securities clearing house.
- (2) A person has qualified privilege in respect of the publication of:
 - (a) a statement made by a person, orally or in writing, in the course of, or otherwise for the purposes of or in connection with; or
 - (b) a document prepared, given or produced by a person, in the course of, or otherwise for the purposes of or in connection with;a disciplinary proceeding of the securities clearing house.

779J Provision of settlement facilities not a securities business etc.

- (1) Nothing that the securities clearing house does in the course of, or in connection with, providing facilities for the settlement of transactions constitutes, for the purposes of this Act:
 - (a) a securities business; or
 - (b) an offer of securities for subscription or purchase; or
 - (c) an invitation to subscribe for or buy securities.

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- (2) The securities clearing house does not, for the purposes of this Act, have a relevant interest in a security merely because of its provision of facilities for the settlement of transactions.

Part 7.3—Participants in the securities industry

Division 1—Dealers, investment advisers and operators of managed investment schemes

780 Dealers

- (1) A person must not:
 - (a) carry on a securities business; or
 - (b) hold out that the person carries on a securities business; unless the person holds a dealers licence or is an exempt dealer.
- (2) A dealers licence may authorise a person to do either or both of the following:
 - (a) to carry on a securities business;
 - (b) to operate:
 - (i) a managed investment scheme; or
 - (ii) managed investment schemes of a particular kind.

Note: Only public companies that hold a dealers licence can be responsible entities for registered managed investment schemes (see section 601FA).

781 Investment advisers

- A person must not:
- (a) carry on an investment advice business; or
 - (b) hold out that the person is an investment adviser; unless the person is a licensee or an exempt investment adviser.

782 Application for a licence

- (1) A person may apply to ASIC, in the prescribed form and manner, for a dealers licence or an investment advisers licence.
- (2) ASIC may require an applicant for a licence to give ASIC such further information in relation to the application as ASIC thinks necessary.

783 Grant of licence to natural person

- (1) This section has effect where a natural person applies for a licence.
- (2) ASIC must grant the licence if:
 - (a) the application was made in accordance with section 782; and
 - (b) the person is not an insolvent under administration; and
 - (c) it is satisfied that the person's educational qualifications and experience are adequate having regard to the nature of the duties of a holder of a licence of the kind applied for; and
 - (d) it has no reason to believe that the person is not of good fame and character; and
 - (e) it has no reason to believe that the person will not perform those duties efficiently, honestly and fairly.
- (3) Otherwise, ASIC must refuse the application.
- (4) In determining whether or not it has reason to believe as mentioned in paragraph (2)(d) or (e), ASIC must have regard to any conviction of the person, during the 10 years ending on the day of the application, of serious fraud.

784 Grant of licence to body corporate

- (1) This section has effect where a body corporate applies for a licence.
- (2) ASIC must grant the licence if:
 - (a) the application was made in accordance with section 782; and
 - (b) the applicant is not an externally-administered body corporate; and
 - (c) ASIC is satisfied that the educational qualifications and experience of each responsible officer of the applicant are adequate having regard to the duties that the officer would perform in connection with the holding of the licence; and
 - (d) ASIC has no reason to believe that the applicant will not perform efficiently, honestly and fairly the duties of a holder of a licence of the kind applied for; and

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- (e) if the licence applied for is a licence to operate a managed investment scheme or schemes, the applicant meets the requirements of subsection (2A), and any additional requirements determined by ASIC under subsection (2B).
- (2A) For the purpose of paragraph (2)(e), ASIC must be satisfied that the value of the net tangible assets of the applicant is and will be maintained at a minimum of \$50,000 or, where the value of all scheme property is greater than \$10,000,000, an amount equal to 0.5% of those assets shown in the latest accounts of the scheme lodged with ASIC, up to a maximum of \$5,000,000.
- (2B) ASIC may determine additional requirements for the purpose of paragraph (2)(e), including, but not limited to, a requirement that scheme property be held by an agent in particular circumstances.
- (2C) In this section:
- net tangible assets* means the total tangible assets of the applicant, including any guarantee approved by ASIC, less any adjusted liabilities as shown in the latest accounts of the applicant lodged with ASIC.
- (2D) ASIC, or a member of ASIC, may exempt an applicant from the requirements of subsection (2A). This power may not be delegated. ASIC is to provide details of any exemptions granted under this section in its annual report.
- (3) Otherwise, ASIC must refuse the application.
- (4) In determining whether or not it has reason to believe as mentioned in paragraph (2)(d), ASIC must have regard, in relation to each responsible officer of the applicant, to:
- (a) whether or not the officer is an insolvent under administration; and
 - (b) any conviction of the officer, during the 10 years ending on the day of the application, of serious fraud; and
 - (c) any reason ASIC has to believe that the officer is not of good fame and character; and
 - (d) any reason ASIC has to believe that the officer will not perform efficiently, honestly and fairly the duties that the

officer would perform in connection with the holding of the licence.

785 Effect of certain provisions

- (1) Sections 783 and 784 apply subject to sections 836, 837 and 839 and the regulations.
- (2) Nothing in subsection 783(4) or 784(4) limits the matters to which ASIC may have regard:
 - (a) in deciding on an application for a licence; or
 - (b) in connection with performing or exercising any other function or power under this Part.

786 Conditions of licence

- (1) A licence is subject to:
 - (a) such conditions and restrictions as are prescribed; and
 - (b) subject to section 837, such conditions and restrictions as ASIC imposes when granting the licence or at any time when the licence is in force.
- (2) Without limiting the generality of subsection (1), conditions and restrictions referred to in paragraph (1)(a) or (b) may include:
 - (a) conditions and restrictions relating to the limitation of the liability that may be incurred by the holder of a dealers licence in connection with a business of dealing in securities; and
 - (b) conditions and restrictions relating to the incurring and disclosure of liabilities arising otherwise than in connection with a business of dealing in securities; and
 - (c) conditions and restrictions relating to the financial position of the holder of a dealers licence, whether in relation to the business of dealing in securities carried on by the holder or otherwise; and
 - (d) a condition requiring the holder of a dealers licence or of an investment advisers licence to lodge and maintain with ASIC a security approved by ASIC for such amount not exceeding the prescribed amount as is, from time to time, determined by ASIC in relation to the holder of that licence; and

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- (e) conditions about what the holder of a licence is to do, by way of supervision and otherwise, in order to prevent the holder's representatives from contravening:
 - (i) a securities law; or
 - (ii) another condition of the licence; and
 - (f) conditions about what the holder of a licence is to do to ensure that each representative of the holder has adequate qualifications and experience having regard to what the representative will do on the holder's behalf in connection with a securities business or investment advice business carried on by the holder.
- (3) Without limiting the generality of paragraph (2)(c), the conditions referred to in that paragraph may include:
- (a) a condition that the assets of the holder of a dealers licence include, or do not include, assets of a particular kind or kinds; and
 - (b) a condition that the sum of the values of the assets of a particular kind or kinds included in the assets of the holder of a dealers licence be not less than, or not more than, an amount ascertained in accordance with the condition.
- (4) A condition referred to in paragraph (3)(b) may provide for the values of assets of a dealer for the purposes of the application of that condition to be ascertained in a manner specified in, or determined in accordance with, the condition.
- (5) The provision that may be made in a condition referred to in paragraph (3)(b) for ascertaining the amount referred to in that paragraph may be, but is not limited to, a provision that the amount is to be:
- (a) a specified percentage of the sum of the values of all the assets of the holder of a dealers licence; or
 - (b) a specified percentage of the sum of the values of all the assets of the holder of the dealers licence that are included in a specified class or classes of those assets; or
 - (c) a specified percentage of the sum of the amounts of all the liabilities of the holder of the dealers licence; or

- (d) a specified percentage of the sum of the amounts of all the liabilities of the holder of the dealers licence that are included in a specified class or classes of those liabilities.
- (6) A reference in this section to the assets of the holder of a dealers licence is a reference to all the assets of the holder of the licence, whether or not the assets are used in, or in connection with, the business of dealing in securities carried on by the holder.
- (7) Subject to section 837, ASIC may, at any time, revoke or vary conditions or restrictions imposed under paragraph (1)(b).
- (8) Where ASIC imposes, or varies or revokes, conditions or restrictions under this section in relation to a licence granted to a member of a securities exchange, ASIC must inform the securities exchange and, if the member is a partner in a member firm, the member firm.
- (9) Where a security is lodged with ASIC pursuant to a condition to which a licence is subject in accordance with paragraph (2)(d), the security may be applied by ASIC in such circumstances, for such purposes and in such manner as is prescribed.

787 Licensee to notify breach of licence condition

- (1) Within 1 day after the happening of an event constituting a contravention of a condition of a licence, the licensee must lodge a written notice setting out particulars of the event.
- (2) It is a defence to a charge arising under subsection (1) if it is proved that:
 - (a) when the licensee was required to lodge the notice, the licensee was unaware of a fact or occurrence that gave rise to the requirement; and
 - (b) in a case where the licensee has since become aware of that fact or occurrence—the licensee lodged the notice as soon as practicable after becoming so aware.

788 Giving information and statements to ASIC

- (1) The holder of a dealers licence must lodge such written information or statements in relation to the securities business
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carried on, or the managed investment scheme operated, by the licensee as ASIC from time to time directs.

- (2) If ASIC requires the holder of a dealers licence to cause a statement specified in a direction given under subsection (1) to be audited by a registered company auditor before it is lodged, the licensee must comply with the requirement.
- (3) ASIC may extend the period for compliance with a direction given under subsection (1).

789 Register of Licence Holders

- (1) ASIC must keep a Register of Licence Holders for the purposes of this Chapter.
- (2) ASIC must include in the Register, in relation to each licence, a copy of:
 - (a) the licence; and
 - (b) each instrument that imposes conditions on the licence, or revokes or varies conditions of the licence, after the licence is granted.
- (3) ASIC must enter in the Register, in relation to each licence:
 - (a) the name of the licensee; and
 - (b) if the licensee is a body corporate—the name of each director, and of each secretary, of the body; and
 - (c) the day on which the licence was granted; and
 - (d) in relation to each business to which the licence relates:
 - (i) the address of the principal place at which the business is carried on; and
 - (ii) the addresses of the other places (if any) at which the business is carried on; and
 - (iii) if the business is carried on under a name or style other than the name of the holder of the licence—that name or style; and
 - (e) particulars of any suspension of the licence; and
 - (f) any other prescribed matters.

- (4) Where a person no longer holds a particular licence, ASIC must remove from the Register the documents included in it, and the particulars entered in it, in relation to that licence.
- (5) A person may inspect and make copies of, or take extracts from, the Register.

790 Notifying change in particulars

The holder of a licence must, within 21 days after:

- (a) in the case of a dealers licence—the licensee ceases to carry on the business to which the licence relates; or
- (b) in the case of an investment advisers licence—the licensee ceases to act as, or to hold himself, herself or itself out to be, an investment adviser; or
- (c) there is a change in a matter particulars of which are required by virtue of paragraph 789(3)(a), (b), (d) or (f) to be entered, in relation to the licence, in the Register of Licence Holders;

lodge written particulars, in the prescribed form, of that fact, or of that change, as the case may be.

791 Annual statement of licensee

- (1) The holder of a licence must lodge, in respect of each year or part of a year during which the licence is in force, a statement in the prescribed form that:
 - (a) sets out the number of persons who, when the statement is lodged, hold proper authorities from the licensee; and
 - (b) contains any other prescribed information.
- (2) A person who has been, but is no longer, a licensee must lodge, in respect of each year or part of a year during which the licence was in force, a statement in the prescribed form that:
 - (a) sets out the number of persons who, when the person last ceased to be a licensee, held proper authorities from the licensee; and
 - (b) contains any other prescribed information.

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792 Time for lodging annual statement

- (1) A person required by subsection 791(1) to lodge a statement must lodge the statement:
 - (a) if the licence is a dealers licence—during the period within which a profit and loss statement and balance sheet referred to in section 860 are required to be lodged; or
 - (b) otherwise—within 1 month immediately before the anniversary of the date on which the licence was granted.
- (2) A person required by subsection 791(2) to lodge a statement must lodge the statement within 1 month after ceasing to be a licensee.
- (3) A person who fails to lodge a statement required by section 791 within the period specified in subsection (1) or (2), as the case requires, contravenes this section.

793 ASIC may extend period for lodging statement

ASIC may extend the period for lodging a statement under section 791.

Division 2—Agreements with unlicensed persons

Subdivision A—Agreements affected

794 Certain persons not clients

A reference in this Division to a client does not include a reference to a person who is:

- (a) a dealer; or
- (b) an investment adviser; or
- (c) one of 2 or more persons who together constitute a dealer or investment adviser.

795 Agreements with unlicensed persons

- (1) Subdivision B applies where, during a period when a person (in this section and Subdivision B called the *non-licensee*) is unlicensed, the non-licensee and a client of the non-licensee enter into an agreement that:
 - (a) constitutes, or relates to, a dealing or proposed dealing in securities; or
 - (b) relates to advising the client about securities, or giving the client securities reports.
- (2) Subdivision B applies to an agreement mentioned in subsection (1) whether or not anyone else is a party to the agreement.
- (3) A person is unlicensed during a period when the person:
 - (a) in contravention of section 780, carries on, or holds out that the person carries on, a securities business; or
 - (b) in contravention of section 781, carries on an investment advice business or holds out that the person is an investment adviser.

Subdivision B—Effect on agreements

798 Client may give notice of rescission

- (1) Subject to this section, the client may, whether before or after completion of the agreement, give to the non-licensee a written notice stating that the client wishes to rescind the agreement.
- (2) The client may only give a notice under this section within a reasonable period after becoming aware of the facts entitling the client to give the notice.
- (3) The client is not entitled to give a notice under this section if the client engages in conduct by engaging in which the client would, if the entitlement so to give a notice were a right to rescind the agreement for misrepresentation by the non-licensee, be taken to have affirmed the agreement.
- (4) The client is not entitled to give a notice under this section if, within a reasonable period before the agreement was entered into, the non-licensee informed the client (whether or not in writing) that:
 - (a) the non-licensee did not hold a dealers licence; or
 - (b) the non-licensee did not hold a dealers licence and did not hold an investment advisers licence;as the case requires.
- (5) If, at a time when a dealers licence or investment advisers licence held by the non-licensee was suspended, the non-licensee informed the client that the licence was suspended, the non-licensee is taken for the purposes of subsection (4) to have informed the client at that time that the non-licensee did not hold a dealers licence or investment advisers licence, as the case may be.
- (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 799 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 800.

799 Effect of notice under section 798

A notice given under section 798 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.

799A Client may apply to Court for partial rescission

- (1) If the client gives a notice under section 798 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 799, 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 799 and the application were for orders under section 800.
- (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 taken for the purposes of section 800 to have been rescinded under section 799.

Section 800

- (6) An order under subsection (4) does not affect the application of section 802 or 804 in relation to the agreement as originally made or as varied by the order.

800 Court may make consequential orders

- (1) Subject to subsection (2), on rescission of the agreement under section 799, the Court, on the application of the client or the non-licensee, may make such orders as it would have power to make if the client had duly rescinded the agreement for 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.

801 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 798;
 - (ii) a notice so given will result under section 799 in rescission of the agreement; and
 - (b) applies after the agreement is rescinded under section 799; 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.

802 Non-licensee not entitled to recover commission

- (1) Without limiting the generality of section 801, this section:
 - (a) applies while the client is entitled to give a notice under section 798; and

- (b) applies after the client so gives a notice, even if the notice does not result under section 799 in rescission of the agreement;
but does not otherwise apply.
- (2) The non-licensee is not entitled to recover by any means (including, for example, set-off or a claim on a quantum meruit) any brokerage, commission or other fee for which the client would, but for this section, have been liable to the non-licensee under or in connection with the agreement.

803 Onus of establishing non-application of section 801 or 802

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 801(2) or 802(2), it is to be presumed, unless the contrary is proved, that section 801 or 802, as the case may be, applies, or applied at that time, as the case may be.

804 Client may recover commission paid to non-licensee

- (1) Without limiting the generality of section 800, if the client gives a notice under section 798, the client may, even if the notice does not result under section 799 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.

805 Remedies under this Division additional to other remedies

The client's rights and remedies under this Division are additional to, and do not prejudice, any other right or remedy of the client.

Division 3—Representatives

806 Representatives of dealers

A natural person must not do an act as a representative of a dealer (other than an exempt dealer) unless:

- (a) the dealer holds a dealers licence; and
- (b) the person holds a proper authority from the dealer.

807 Representatives of investment advisers

A natural person must not do an act as a representative of an investment adviser (other than an exempt investment adviser) unless:

- (a) the investment adviser:
 - (i) is also a dealer and holds a dealers licence; or
 - (ii) holds an investment advisers licence; and
- (b) the person holds a proper authority from the investment adviser.

808 Defence

It is a defence to a prosecution for a contravention of section 806 or 807 constituted by an act done by a person as a representative of another person if it is proved that:

- (a) but for the revocation or suspension of a licence held by the other person, the act would not have been such a contravention; and
- (b) when he or she did the act, the first-mentioned person:
 - (i) believed in good faith that the other person held the licence; and
 - (ii) was unaware of the revocation or suspension; and
- (c) in all the circumstances it was reasonable for the first-mentioned person so to believe and to be unaware of the revocation or suspension.

809 Body corporate not to act as representative

A body corporate must not do an act as a representative of a dealer or of an investment adviser.

810 Licensee to keep register of holders of proper authorities

- (1) A licensee must establish a register of the persons who hold proper authorities from the licensee and must keep it in accordance with this section.
- (2) The register must be in writing or in such other form as ASIC approves.
- (3) The register must contain, in relation to each person (if any) who holds a proper authority from the licensee:
 - (a) a copy of the proper authority; and
 - (b) the person's name; and
 - (c) the person's current residential address; and
 - (d) unless the person's current business address is the same as the licensee's—the person's current business address; and
 - (e) any other prescribed information.
- (4) A copy of a proper authority of a person from the licensee that subsection (3) provides for the register to contain must be included in the register within 2 business days after the person begins to hold that proper authority.
- (5) Information that subsection (3) provides for the register to contain in relation to a person must be entered in the register within 2 business days after:
 - (a) the person begins to hold a proper authority from the licensee; or
 - (b) the licensee receives the information;whichever happens later.
- (6) Within 2 business days after a person ceases to hold a proper authority from the licensee, the licensee must:
 - (a) in any case:

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- (i) include, in a part of the register separate from the part in which copies of proper authorities are included under subsection (4); and
 - (ii) remove from the last-mentioned part; the copy of the proper authority that was included in the last-mentioned part; and
 - (b) unless, at the end of those 2 business days, the person again holds a proper authority from the licensee:
 - (i) enter, in a part of the register separate from the part in which information is entered under subsection (5); and
 - (ii) remove from the last-mentioned part; the information that has been entered in the last-mentioned part in relation to the person.
- (7) Information that has been entered under paragraph (6)(b) in a separate part of the register is taken for the purposes of subsections (3) and (5) not to be contained or entered in the register.
- (8) If a licensee whom subsection (1) requires to establish a register already keeps one under this section, the licensee need not establish a new register but must keep the existing one in accordance with this section.

811 Licensee to notify ASIC of location and contents of register

- (1) In this section:
- register*, in relation to a licensee, means a register that the licensee keeps for the purposes of section 810.
- (2) Within 14 days after establishing a register, the licensee must lodge written notice of where the register is kept.
- (3) As soon as practicable after changing the place where a register is kept, the licensee must lodge written notice of the new place where the register is kept.
- (4) Within 2 business days after the day on which a person begins to hold a particular proper authority from a licensee, the licensee must, whether or not the person has previously held a proper authority from the licensee, lodge:

- (a) a copy of the first-mentioned proper authority; and
 - (b) a written notice stating that the person began to hold that proper authority on that day.
- (5) The licensee must lodge a written notice, within the period provided by subsection (6):
- (a) setting out the information that the register is required to contain by paragraph 810(3)(b), (c), (d) or (e); and
 - (b) stating that the information has been, or is to be, entered in the register.
- (6) A notice under subsection (5) must be lodged within the period within which subsection 810(5) requires the information to be entered in the register.
- (7) Within 2 business days after a person ceases to hold a proper authority from a licensee, the licensee must, unless at the end of those 2 business days the person again holds a proper authority from the licensee, lodge a written notice stating that the person has ceased to hold such a proper authority.

812 Inspection and copying of register

- (1) In this section:
- register* in relation to a licensee, means a register that the licensee keeps for the purposes of section 810.
- (2) A licensee must ensure that a register is open for inspection without charge.
- (3) Where a person requests a licensee in writing to give to the person a copy of the whole, or of a specified part, of a register, the licensee must comply with the request within 2 business days after:
- (a) if the licensee requires the person to pay for the copy an amount of not more than the prescribed amount—receiving the amount from the person; or
 - (b) in any other case—receiving the request.

813 Disclosure to non-dealer

A person (in this section called the *representative*) must not do as a representative of another person (in this section called the *principal*) an act by virtue of which the principal deals in securities with a non-dealer on the principal's own account unless the representative has informed the non-dealer that the principal is acting in the transaction as principal and not as agent.

814 ASIC may require production of authority

- (1) Where ASIC has reason to believe that a person:
 - (a) holds a proper authority from a licensee; or
 - (b) has done an act as a representative of another person;then, whether or not ASIC knows who the licensee or other person is, it may require the first-mentioned person to produce:
 - (c) any proper authority from a licensee; or
 - (d) any invalid securities authority from a person;that the first-mentioned person holds.
- (2) A person must not, without reasonable excuse, refuse or fail to comply with a requirement under this section.

815 ASIC may give licensee information about representative

- (1) Where ASIC believes on reasonable grounds that:
 - (a) a person (in this section called the *holder*) holds, or will hold, a proper authority from a licensee; and
 - (b) having regard to that fact, ASIC should give to the licensee particular information that ASIC has about the person; and
 - (c) the information is true;ASIC may give the information to the licensee.
- (2) Where ASIC gives information under subsection (1), the licensee or an officer of the licensee may, for a purpose connected with:
 - (a) the licensee making a decision about what action (if any) to take in relation to the holder, having regard to, or to matters including, the information; or

- (b) the licensee taking action pursuant to such a decision; or for 2 or more such purposes, and for no other purpose, give to another person, make use of, or make a record of, some or all of the information.
- (3) A person to whom information has been given, in accordance with subsection (2) or this subsection, for a purpose or purposes may, for that purpose or one or more of those purposes, and for no other purpose, give to another person, make use of, or make a record of, that information.
- (4) Subject to subsections (2) and (3), a person must not give to another person, make use of, or make a record of, information given by ASIC under subsection (1).
- (4A) Subsection 8(3) does not apply in relation to a reference in subsection (2), (3) or (4) of this section to a provision of this section.
- (5) A person has qualified privilege in respect of an act done by the person as permitted by subsection (2) or (3).
- (6) A person to whom information is given in accordance with this section must not:
 - (a) give any of the information to a court; or
 - (b) produce in a court a document that sets out some or all of the information;except:
 - (c) for a purpose connected with:
 - (i) the licensee making a decision about what action (if any) to take in relation to the holder, having regard to, or to matters including, some or all of the information; or
 - (ii) the licensee taking action pursuant to such a decision; or
 - (iii) proving in a proceeding in that court that particular action taken by the licensee in relation to the holder was so taken pursuant to such a decision;or for 2 or more such purposes, and for no other purpose; or
 - (d) in a proceeding in that court, in so far as the proceeding relates to an alleged contravention of this section; or

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- (e) in a proceeding in respect of an ancillary offence relating to an offence against this section; or
 - (f) in a proceeding in respect of the giving to a court of false information being or including some or all of the first-mentioned information.
- (7) A reference in this section to a person taking action in relation to another person is a reference to the first-mentioned person:
- (a) taking action by way of making, terminating or varying the terms and conditions of a relevant agreement; or
 - (b) otherwise taking action in relation to a relevant agreement; in so far as the relevant agreement relates to the other person being employed by, or acting for or by arrangement with, the first-mentioned person in connection with a securities business or investment advice business carried on by the first-mentioned person.
- (8) In addition, and without prejudice, to the effect it has of its own force, subsection (6) has by force of this subsection the effect it would have if:
- (a) the reference in it to information being given in accordance with this section were a reference to information being given in accordance with section 815; and
 - (b) a reference in it to a court were a reference to a court of an external Territory or of a country outside Australia and the external Territories; and
 - (c) paragraphs (6)(d) and (e) were omitted.

816 Holder of authority may be required to return it

- (1) Where a person holds a proper authority from a licensee but is neither employed by, nor authorised to act for or by arrangement with, the licensee, the licensee may, by writing given to the person, require the person to give the proper authority to the licensee within a specified period of not less than 2 business days.
- (2) Where a person holds an invalid securities authority from another person, the other person may, by writing given to the first-mentioned person, require the first-mentioned person to give the invalid securities authority to the other person within a specified period of not less than 2 business days.

- (3) A person must not, without reasonable excuse, refuse or fail to comply with a requirement made of the person in accordance with subsection (1) or (2).

Division 4—Liability of principals for representatives' conduct

817 Conduct engaged in as a representative

Where a person engages in conduct as a representative of another person (in this section called the *principal*), then, as between the principal and a third person (other than ASIC), the principal is liable in respect of that conduct in the same manner, and to the same extent, as if the principal had engaged in it.

818 Liability where identity of principal unknown

- (1) This section applies for the purposes of a proceeding in a court where:
 - (a) whether in or outside this jurisdiction, a person (in this section called the *representative*) engages in particular conduct while the person is a representative of 2 or more persons (in this section called the *indemnifying principals*); and
 - (b) it is proved for the purposes of the proceeding that the representative engaged in the conduct as a representative of some person (in this section called the *unknown principal*) but it is not proved for those purposes who the unknown principal is.
- (2) If only one of the indemnifying principals is a party to the proceeding, he, she or it is liable in respect of that conduct as if he, she or it were the unknown principal.
- (3) If 2 or more of the indemnifying principals are parties to the proceeding, each of those 2 or more is liable in respect of that conduct as if he, she or it were the unknown principal.

819 Liability of principals where act done in reliance on representative's conduct

- (1) This section applies where:

- (a) at a time when a person (in this section called the *representative*) is a representative of only one person (in this section called the *indemnifying principal*) or of 2 or more persons (in this section called the *indemnifying principals*), the representative, whether in or outside this jurisdiction:
- (i) engages in particular conduct; or
 - (ii) proposes, or represents that the representative proposes, to engage in particular conduct; and
- (b) another person (in this section called the *client*) does, or omits to do, a particular act, whether in or outside this jurisdiction, because the client believes at a particular time in good faith that the representative engaged in, or proposes to engage in, as the case may be, that conduct:
- (i) on behalf of some person (in this section called the *assumed principal*) whether or not identified, or identifiable, at that time by the client; and
 - (ii) in connection with a securities business or investment advice business carried on by the assumed principal; and
- (c) it is reasonable to expect that a person in the client's circumstances would so believe and would do, or omit to do, as the case may be, that act because of that belief;
- whether or not that conduct is or would be within the scope of the representative's employment by, or authority from, any person.
- (2) If:
- (a) subparagraph (1)(a)(i) applies; or
 - (b) subparagraph (1)(a)(ii) applies and the representative engages in that conduct;
- then, for the purposes of a proceeding in a court:
- (c) as between the indemnifying principal and the client or a person claiming through the client, the indemnifying principal is liable; or
 - (d) as between any of the indemnifying principals and the client or a person claiming through the client, each of the indemnifying principals is liable;
- as the case may be, in respect of that conduct in the same manner, and to the same extent, as if he, she or it had engaged in it.

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(3) Without limiting the generality of subsection (2), the indemnifying principal, or each of the indemnifying principals, as the case may be, is liable to pay damages to the client in respect of any loss or damage that the client suffers as a result of doing, or omitting to do, as the case may be, the act referred to in paragraph (1)(b).

(3A) Subsection (3) does not apply unless:

- (a) the conduct was engaged in, the proposed conduct would have been engaged in, or the representation was made, in this jurisdiction; or
- (b) the act referred to in paragraph (1)(b) was done, or would have been done, as the case may be, in this jurisdiction; or
- (c) some or all of the loss or damage was suffered in this jurisdiction.

(4) If:

- (a) there are 2 or more indemnifying principals; and
- (b) 2 or more of them are parties (in this subsection called the *indemnifying parties*) to a proceeding in a court; and
- (c) it is proved for the purposes of the proceeding:
 - (i) that the representative engaged in that conduct as a representative of some person; and
 - (ii) who that person is; and
- (d) that person is among the indemnifying parties;

subsections (2) and (3) do not apply, for the purposes of the proceeding, in relation to the indemnifying parties other than that person.

820 Presumptions about certain matters

(1) Where it is proved, for the purposes of a proceeding in a court, that a person (in this subsection called the *representative*) engaged in particular conduct, whether in or outside this jurisdiction, while the person was a representative of:

- (a) only one person (in this subsection called the *indemnifying principal*); or

- (b) 2 or more persons (in this subsection called the *indemnifying principals*);
- then, unless the contrary is proved for the purposes of the proceeding, it is to be presumed for those purposes that the representative engaged in the conduct as a representative of:
- (c) the indemnifying principal; or
 - (d) as a representative of some person among the indemnifying principals;
- as the case may be.
- (2) Where, for the purposes of establishing in a proceeding in a court that section 819 applies, it is proved that a person did, or omitted to do, a particular act because the person believed at a particular time in good faith that certain matters were the case, then, unless the contrary is proved for those purposes, it is to be presumed for those purposes that it is reasonable to expect that a person in the first-mentioned person's circumstances would so believe and would do, or omit to do, as the case may be, that act because of that belief.

821 No contracting out of liability for representative's conduct

- (1) For the purposes of this section, a liability of a person:
- (a) in respect of conduct engaged in by another person as a representative of the first-mentioned person; or
 - (b) arising under section 819 because another person has engaged in, proposed to engage in, or represented that the other person proposed to engage in, particular conduct;
- is a liability of the first-mentioned person in respect of the other person.
- (2) Subject to this section, an agreement is void in so far as it purports to exclude, restrict or otherwise affect a liability of a person in respect of another person, or to provide for a person to be indemnified in respect of a liability of the person in respect of another person.
- (3) Subsection (2) does not apply in relation to an agreement in so far as it:
- (a) is a contract of insurance; or

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Part 7.3 Participants in the securities industry

Division 4 Liability of principals for representatives' conduct

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- (b) provides for a representative of a person to indemnify the person in respect of a liability of the person in respect of the representative; or
 - (c) provides for a licensee from whom a person holds a proper authority to indemnify another such licensee in respect of a liability of the other licensee in respect of the person.
- (4) A person must not make, offer to make, or invite another person to offer to make, in relation to a liability of the first-mentioned person in respect of a person, an agreement that is or would be void, in whole or in part, by virtue of subsection (2).

822 Effect of Division

- (1) Where 2 or more persons are liable under this Division in respect of the same conduct or the same loss or damage, they are so liable jointly and severally.
- (2) Nothing in section 817, 818, or 819:
 - (a) affects a liability arising otherwise than by virtue of this Division; or
 - (b) notwithstanding paragraph (a) of this subsection, entitles a person to be compensated twice in respect of the same loss or damage; or
 - (c) makes a person guilty of an offence.

Division 5—Excluding persons from the securities industry

824 Power to revoke, without a hearing, licence held by natural person

ASIC may, by written order, revoke a licence held by a natural person if the person:

- (a) becomes an insolvent under administration; or
- (b) is convicted of serious fraud; or
- (c) becomes incapable, through mental or physical incapacity, of managing his or her affairs; or
- (d) asks ASIC to revoke the licence.

825 Power to revoke, without a hearing, licence held by body corporate

ASIC may, by written order, revoke a licence held by a body corporate if:

- (a) the body ceases to carry on business; or
- (b) the body becomes an externally-administered body corporate;
or
- (c) the body asks ASIC to revoke the licence; or
- (d) a director, secretary or executive officer of the body contravenes this Chapter because:
 - (i) he or she does not hold a licence; or
 - (ii) a licence held by him or her is suspended.

825A Power to revoke responsible entity's licence without a hearing

ASIC may, by written order, revoke a licence held by the responsible entity of a registered scheme if it is satisfied that the members of the scheme have suffered, or are likely to suffer, loss or damage because the responsible entity has contravened this Act.

826 Power to revoke licence after a hearing

- (1) Subject to section 837, ASIC may, by written order, revoke a licence if:
- (a) the application for the licence contained matter that was false in a material particular or materially misleading; or
 - (b) there was an omission of material matter from the application for the licence; or
 - (c) the licensee contravenes a securities law; or
 - (d) the licensee contravenes a condition of the licence; or
 - (e) the licensee is a natural person and ASIC has reason to believe that he or she is not of good fame and character; or
 - (f) the licensee is a body corporate and ASIC is satisfied that the educational qualifications or experience of a person who:
 - (i) is an officer of the body; and
 - (ii) was not an officer of the body when the licence was granted;are or is inadequate having regard to the duties that the officer performs, or will perform, in connection with the holding of the licence; or
 - (g) the licensee is a body corporate and ASIC is satisfied that:
 - (i) an officer of the body performs, or will perform, in connection with the holding of the licence, duties that are or include duties (in this paragraph called the *different duties*) other than those having regard to which ASIC was satisfied, before granting the licence, that the officer's educational qualifications and experience were adequate; and
 - (ii) the officer's educational qualifications or experience are or is inadequate having regard to the different duties; or
 - (h) the licensee is a body corporate and:
 - (i) a licence held by a director, secretary or executive officer of the body is suspended or revoked; or
 - (ii) an order is made under section 830 against such a director, secretary or executive officer; or
 - (j) ASIC has reason to believe that the licensee has not performed efficiently, honestly and fairly the duties of a

holder of a dealers licence or an investment advisers licence, as the case requires; or

- (k) ASIC has reason to believe that the licensee will not perform those duties efficiently, honestly and fairly.
- (2) In determining whether or not it has reason to believe as mentioned in paragraph (1)(e) or (k) in relation to a licensee, ASIC is not precluded from having regard to a matter that arose before the time when the licence was granted unless ASIC was aware of the matter at that time.

827 Power to suspend licence instead of revoking it

- (1) Subject to section 837, where:
- (a) section 824, 825 or 825A empowers ASIC to revoke a licence otherwise than because the licensee has asked for the revocation; or
 - (b) ASIC is empowered by virtue of paragraph 826(1)(c), (d), (f), (g), (h), (j) or (k) to revoke a licence;
- ASIC may, if it considers it desirable to do so, instead:
- (c) by written order, suspend the licence for a specified period; or
 - (d) by written order, prohibit the licensee, either permanently or for a specified period, from doing specified acts, being acts that section 780 or 781 would prohibit the licensee from doing if he, she or it did not hold the licence.
- (2) ASIC may at any time, by written order, vary or revoke an order in force under this section.
- (3) For the purposes of sections 780, 781, 806 and 807, a licensee is taken not to hold the licence at any time during a period for which the licence is suspended.
- (4) Where an order in force under this section prohibits the licensee as mentioned in paragraph (1)(d):
- (a) the licensee must not contravene the order; and
 - (b) in relation to the doing by a person, as a representative of the licensee, of an act specified in the order, sections 806 and 807 apply, or apply during the period specified in the order,

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as the case requires, as if the licensee did not hold the licence.

828 Power to make banning order where licence revoked or suspended

Subject to section 837, where ASIC:

- (a) revokes under section 824; or
- (b) revokes by virtue of paragraph 826(1)(a), (b), (c), (d), (j) or (k); or
- (c) revokes by virtue of paragraph 826(1)(e); or
- (d) suspends by virtue of paragraph 827(1)(a); or
- (e) suspends by virtue of paragraph 827(1)(b);

a licence held by a natural person, it may also make a banning order against the person.

829 Power to make banning order against unlicensed person

Subject to section 837, ASIC may make a banning order against a natural person (other than a licensee) if:

- (a) he or she becomes an insolvent under administration; or
- (b) he or she is convicted of serious fraud; or
- (c) he or she becomes incapable, through mental or physical incapacity, of managing his or her affairs; or
- (d) he or she contravenes a securities law; or
- (e) ASIC has reason to believe that he or she is not of good fame and character; or
- (f) ASIC has reason to believe that he or she has not performed efficiently, honestly and fairly the duties of:
 - (i) a representative of a dealer; or
 - (ii) a representative of an investment adviser; or
- (g) ASIC has reason to believe that he or she will not perform efficiently, honestly and fairly the duties of:
 - (i) a representative of a dealer; or
 - (ii) a representative of an investment adviser.

830 Nature of banning order

- (1) Where this Division empowers ASIC to make a banning order against a person, ASIC may, by written order, prohibit the person:
 - (a) in any case—permanently; or
 - (b) except where ASIC is empowered by virtue of paragraph 828(c) or 829(e) to make the order—for a specified period; from doing an act as:
 - (c) a representative of a dealer; or
 - (d) a representative of an investment adviser; or
 - (e) a representative of a dealer or of an investment adviser; whichever the order specifies.
- (2) ASIC must not vary or revoke a banning order except under section 831, 832, or 833.

831 Exceptions to banning order

- (1) An order made against a person under subsection 830(1) may include a provision that permits the person, subject to such conditions (if any) as are specified, to do, or to do in specified circumstances, specified acts that the order would otherwise prohibit the person from doing.
- (2) Subject to section 837, ASIC may, at any time, by written order, vary a banning order against a person:
 - (a) by adding a provision that permits the person as mentioned in subsection (1); or
 - (b) by varying such a provision in relation to conditions, circumstances or acts specified in the provision; or
 - (c) by omitting such a provision and substituting another such provision; or
 - (d) by omitting such a provision.

832 Variation or revocation of banning order on application

- (1) Subject to sections 833 and 837, this section has effect where a person applies to ASIC to vary or revoke a banning order relating to the person.

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(2) If:

- (a) the person is not an insolvent under administration; and
- (b) ASIC has no reason to believe that the person is not of good fame and character; and
- (c) ASIC has no reason to believe that the person will not perform efficiently, honestly and fairly the duties of:
 - (i) a representative of a dealer; or
 - (ii) a representative of an investment adviser;

ASIC must, by written order:

- (d) if only one of subparagraphs (c)(i) and (ii) applies—vary the banning order so that it no longer prohibits the person from doing an act as a representative of a dealer, or of an investment adviser, as the case may be; or
 - (e) in any other case—revoke the banning order.
- (3) Otherwise, ASIC must refuse the application.
- (4) In determining whether or not it has reason to believe as mentioned in paragraph (2)(b) or (c), ASIC must have regard to any conviction of the person, during the 10 years ending on the day of the application, of serious fraud.
- (5) Nothing in subsection (4) limits the matters to which ASIC may have regard:
- (a) in deciding on the application; or
 - (b) in connection with performing or exercising any other function or power under this Part.

833 Revocation of banning order in certain cases

Where:

- (a) section 832 requires ASIC to vary a banning order so that it no longer has a particular operation; and
- (b) the order has no other operation;

ASIC must, by written order, instead revoke the banning order.

834 Effect and publication of orders under this Division

- (1) An order by ASIC under this Division takes effect when served on the person to whom the order relates.

- (2) As soon as practicable on or after the day on which an order by ASIC under this Division takes effect, ASIC must publish in the *Gazette* a notice that sets out a copy of:
- (a) if the order is made under section 824, 825, 826, 827 or 830 or revokes a banning order—the first-mentioned order; or
 - (b) if the order varies a banning order—the banning order as in force immediately after the first-mentioned order takes effect;
- and states that the first-mentioned order, or the banning order as so in force, as the case may be, took effect on that day.
- (3) Where:
- (a) but for this subsection, subsection (2) would require publication of a notice setting out a copy of a banning order as in force at a particular time; and
 - (b) the banning order as so in force includes a provision that permits a person as mentioned in subsection 831(1); and
 - (c) in ASIC's opinion, the notice would be unreasonably long if it set out a copy of the whole of that provision;
- the notice may, instead of setting out a copy of that provision, set out a summary of the provision's effect.

835 Contravention of banning order

A person must not contravene a banning order relating to the person.

836 Banned person ineligible for licence

ASIC must not grant a dealers licence or an investment advisers licence to a person if a banning order prohibits the person (except as permitted by the order) from doing an act as a representative of a dealer, or of an investment adviser, as the case may be.

837 Opportunity for hearing

- (1) ASIC must not:
- (a) refuse, otherwise than by virtue of section 836 or subsection 839(1), an application for a licence; or
 - (b) impose conditions on a licence; or

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- (c) vary the conditions of a licence; or
 - (d) revoke or suspend a licence otherwise than by virtue of section 824, 825 or 825A or paragraph 827(1)(a); or
 - (e) make, otherwise than by virtue of paragraph 828(a) or (d) or 829(a), (b) or (c), an order under section 830 against a person; or
 - (f) make under subsection 831(2) an order varying a banning order against a person; or
 - (g) refuse an application by a person under section 832; unless ASIC complies with subsection (2) of this section.
- (2) ASIC must give the applicant, licensee or person, as the case may be, an opportunity:
- (a) to appear at a hearing before ASIC that takes place in private; and
 - (b) to make submissions and give evidence to ASIC in relation to the matter.

838 Disqualification by the Court

- (1) Where ASIC:
- (a) revokes under section 824, 825 or 825A or subsection 826(1) a licence held by a person; or
 - (b) makes under section 830 against a person an order that is to operate otherwise than only for a specified period;
- ASIC may apply to the Court for an order or orders under this section in relation to the person.
- (2) On an application under subsection (1), the Court may make one or more of the following:
- (a) an order disqualifying the person, permanently or for a specified period, from holding:
 - (i) a dealers licence; or
 - (ii) an investment advisers licence; or
 - (iii) a dealers licence or an investment advisers licence; whichever the order specifies;
 - (b) an order prohibiting the person, permanently or for a specified period, from doing an act as:
 - (i) a representative of a dealer; or

- (ii) a representative of an investment adviser; or
 - (iii) a representative of a dealer or of an investment adviser;
whichever the order specifies;
 - (c) such other order as it thinks fit;
- or may refuse the application.
- (3) The Court may revoke or vary an order in force under subsection (2).

839 Effect of orders under section 838

- (1) ASIC must not grant a dealers licence or an investment advisers licence to a person whom an order in force under section 838 disqualifies from holding a dealers licence or an investment advisers licence, as the case may be.
- (2) A person must not contravene an order that:
- (a) is of a kind referred to in paragraph 838(2)(b); and
 - (b) is in force under section 838; and
 - (c) relates to the person.

Part 7.4—Conduct of securities business

Division 1—Regulation of certain activities

841 Certain representations prohibited

- (1) A person who is the holder of a licence must not represent or imply, or knowingly permit to be represented or implied, in any way to a person that the abilities or qualifications of the holder of the licence have in any respect been approved by ASIC.
- (2) A statement that a person is the holder of a licence is not a contravention of this section.

842 Issue of contract notes

- (1) This section applies:
 - (a) in relation to a dealer (other than an exempt dealer) in relation to a transaction of sale or purchase of securities; or
 - (b) in relation to an exempt dealer, in relation to a transaction of sale or purchase of securities that is entered into in the course of a securities business that the exempt dealer carries on in the capacity of personal representative of a dead dealer.
- (2) A dealer must, in respect of a transaction of sale or purchase of securities, immediately give a contract note that complies with subsection (3) to:
 - (a) where the transaction took place in the ordinary course of business on a stock market and the dealer entered into the transaction otherwise than as principal—the person for whom the dealer entered into the transaction; and
 - (b) where the transaction did not take place in the ordinary course of business on a stock market and the dealer entered into the transaction otherwise than as principal—the person for whom the dealer entered into the transaction and the person with whom the dealer entered into the transaction; and
 - (c) where the transaction did not take place in the ordinary course of business on a stock market and the dealer entered

into the transaction as principal—the person with whom the dealer entered into the transaction.

- (3) A contract note given by a dealer under subsection (2) must specify:
- (a) the name or style under which the dealer carries on business as a dealer and the address of the principal place at which the dealer so carries on business; and
 - (b) each securities exchange (if any) of which the dealer is a member; and
 - (c) if the dealer is dealing as principal with a person who is not the holder of a dealers licence—that the dealer is so dealing; and
 - (d) the name of the person to whom the dealer gives the contract note; and
 - (e) the day on which the transaction took place and, if the transaction did not take place in the ordinary course of business on a stock market, a statement to that effect; and
 - (f) the number, or amount and description, of the securities that are the subject of the contract; and
 - (g) the price per unit of the securities; and
 - (h) the amount of the consideration; and
 - (j) the amount of commission charged; and
 - (k) the amounts of all stamp duties or other duties and taxes payable in connection with the contract; and
 - (m) if an amount is to be added to, or deducted from, the settlement amount in respect of the right to a benefit bought or sold together with the securities—the first-mentioned amount and the nature of the benefit.
- (4) A dealer must not include in a contract note given under subsection (2), as the name of the person with or for whom the dealer has entered into the transaction, a name that the dealer knows, or could reasonably be expected to know, is not the name by which that person is ordinarily known.
- (5) A reference in this section to a dealer dealing, or entering into a transaction, as principal includes a reference to a person:
- (a) dealing or entering into a transaction on behalf of an associate of the dealer; or

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- (b) dealing in securities on behalf of a body corporate in which the dealer has a controlling interest; or
 - (c) where the dealer carries on business as a dealer in partnership—dealing in securities on behalf of a body corporate in which the dealer’s interest and the interests of the dealer’s partners together constitute a controlling interest.
- (6) For the purposes of this section:
- (a) a dealer who is a member of a securities exchange is not taken to have entered into a transaction as principal merely because the transaction was entered into with another dealer who is a member of a securities exchange; and
 - (b) a transaction takes place in the ordinary course of business on a stock market if it takes place in prescribed circumstances or is a transaction that is a prescribed transaction for the purposes of this section.
- (7) Despite Division 2 of Part 1.2, a person is not an associate of another person for the purposes of this section merely because the first-mentioned person is:
- (a) a partner of the other person otherwise than because the first-mentioned person carries on a business of dealing in securities in partnership with the other person; or
 - (b) a director of a body corporate of which the other person is also a director, whether or not the body corporate carries on a business of dealing in securities.

843 Dealings and transactions on a dealer’s own account

- (2) Subject to subsection (5), a dealer must not, on the dealer’s own account, deal in securities with a non-dealer without first informing the non-dealer that the dealer is acting in the transaction as principal and not as agent.
- (3) A dealer who, on the dealer’s own account, enters into a transaction of sale or purchase of securities with a non-dealer must state in the contract note that the dealer is acting in the transaction as principal and not as agent.
- (4) Subject to subsections (5) and (6), a dealer who, on the dealer’s own account (otherwise than merely because the dealer enters into

a transaction on behalf of an associate of the dealer), enters into a transaction of sale or purchase of securities with a non-dealer must not charge the non-dealer brokerage, commission or any other fee in respect of the transaction.

- (5) Subsections (2) and (4) do not apply in relation to a transaction of sale or purchase of an odd lot of securities that is entered into by a dealer who is a member of a securities exchange and specialises in transactions relating to odd lots of securities.
- (7) Where a dealer contravenes subsection (2), (3) or (4) in relation to a contract, then:
 - (a) if the contract is for the sale of securities by the dealer to a person—the person may, if the person has not disposed of them; or
 - (b) if the contract is for the purchase of securities by the dealer from a person—the person may;rescind the contract by written notice given to the dealer within 14 days after the person receives the contract note.
- (8) Nothing in subsection (7) affects any right that a person has apart from that subsection.

844 Dealer to give priority to clients' orders

- (2) A dealer must not, except as permitted by subsection (3), enter into, as principal or on behalf of an associate of the dealer, a transaction of purchase or sale of securities that are permitted to be traded on a stock market of a securities exchange if a client of the dealer who is not an associate of the dealer has instructed the dealer to buy or sell, as the case may be, securities of the same class and the dealer has not complied with the instruction.
- (3) Subsection (2) does not apply in relation to the entering into of a transaction by a dealer as principal or on behalf of an associate of the dealer if:
 - (a) the instructions from the client concerned required the purchase or sale of securities on behalf of the client to be effected only on specified conditions relating to the price at which the securities were to be bought or sold and the dealer

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has been unable to buy or sell the securities because of those conditions; or

- (b) the transaction is entered into in prescribed circumstances.

845 Dealings by employees of holders of licences

- (1) A person who is a dealer or an investment adviser and an employee of that person must not, as principals, jointly buy or subscribe for, or agree to buy or subscribe for, securities.
- (2) A person who is a partner in a partnership that carries on a securities business or an investment advice business and an employee of the partnership must not, as principals, jointly buy or subscribe for, or agree to buy or subscribe for, securities.
- (3) A person who is a dealer or investment adviser, or who is a partner in a partnership that carries on a securities business or an investment advice business, must not give credit to an employee of the person or partnership, as the case may be, or to a person who the first-mentioned person knows is an associate of such an employee if:
 - (a) the credit is given for the purpose of enabling or assisting the person to whom the credit is given to buy or subscribe for securities; or
 - (b) the person giving the credit knows or has reason to believe that the credit will be used for the purpose of buying or subscribing for securities.
- (4) A person who is an employee of a sole trader or member firm in connection with a business of dealing in securities carried on by the sole trader or member firm must not, as principal, buy or agree to buy securities or rights or interests in securities unless the sole trader or member firm acts as the agent of the person in respect of the transaction.
- (5) A reference in subsection (1) or (3) to an employee of a person who is a dealer or investment adviser includes, in the case of a body corporate that is a dealer or investment adviser, a reference to an officer of the body.
- (6) The reference in subsection (4) to an employee of a sole trader or member firm includes, in the case of a sole trader that is a body

corporate or a member firm a partner in which is a body corporate,
a reference to an officer of the body.

Division 2—Short selling of securities

846 Short selling

- (1) Subject to this section and the regulations, a person must not sell securities to a buyer unless, at the time of the sale:
 - (a) the person has or, where the person is selling as agent, the person's principal has; or
 - (b) the person believes on reasonable grounds that the person has, or where the person is selling as agent, the person's principal has;
a presently exercisable and unconditional right to vest the securities in the buyer.
- (2) For the purposes of subsection (1):
 - (a) a person who, at a particular time, has a presently exercisable and unconditional right to have securities vested in the person or in accordance with the directions of the person has at that time a presently exercisable and unconditional right to vest the securities in another person; and
 - (b) a right of a person to vest securities in another person is not conditional merely because the securities are charged or pledged in favour of another person to secure the repayment of money.
- (3) Subsection (1) does not apply in relation to:
 - (a) a sale of securities by the holder of a dealers licence who is a member of a securities exchange and specialises in transactions relating to odd lots of securities, being a sale made by the holder as principal solely for the purpose of:
 - (i) accepting an offer to buy an odd lot of securities; or
 - (ii) disposing of a parcel of securities that is less than one marketable parcel of securities by means of a sale of one marketable parcel of those securities; or
 - (b) a sale of securities as part of an arbitrage transaction; or
 - (c) a sale of securities by a person who before the time of sale has entered into a contract to buy those securities and who

has a right to have those securities vested in the person that is conditional only upon all or any of the following:

- (i) payment of the consideration in respect of the purchase;
 - (ii) the receipt by the person of a proper instrument of transfer in respect of the securities;
 - (iii) the receipt by the person of the documents that are, or are documents of title to, the securities; or
- (d) a sale of securities where:
- (i) the person who sold the securities is not an associate of the body corporate that issued or made available the securities; and
 - (ii) arrangements are made before the time of the sale that will enable delivery of securities of the class sold to be made to the buyer within 3 business days after the date of the transaction effecting the sale; and
 - (iii) if the sale is made on the stock market of a securities exchange:
 - (A) the price per unit in respect of the sale is not below the price at which the immediately preceding ordinary sale was effected; and
 - (B) the price per unit is above the price at which the immediately preceding ordinary sale was made unless the price at which the immediately preceding ordinary sale was made was higher than the next preceding different price at which an ordinary sale had been made;and the securities exchange is informed as soon as practicable that the sale has been made short in accordance with this subparagraph; or
- (e) a sale of securities where:
- (i) the securities are included in a class of securities in relation to which there is in force a declaration, made by the board of a securities exchange as provided by the business rules of the securities exchange, to the effect that the class is a class of securities to which this paragraph applies; and
 - (ii) the sale is made as provided by the business rules of the securities exchange; and

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- (iii) at the time of the sale, neither the person who sold the securities, nor any person on behalf of whom the first-mentioned person sold the securities, was an associate, in relation to the sale, of the body corporate that issued or made available the securities.
- (4) A person who requests a holder of a dealers licence to make a sale of securities that would contravene subsection (1) but for paragraph (3)(b), (d) or (e) must, when making the request, inform the holder of the licence that the sale is a short sale.
- (5) A person who, on a stock market of a securities exchange, makes, whether as principal or agent, a sale of securities that would contravene subsection (1) but for paragraph (3)(d) must endorse on any document evidencing the sale that is given to the person who, whether as principal or agent, buys the securities a statement that the sale was a short sale.
- (6) For the purposes of this section, a person who:
 - (a) purports to sell securities; or
 - (b) offers to sell securities; or
 - (c) holds himself, herself or itself out as entitled to sell securities; or
 - (d) instructs a dealer to sell securities;is taken to sell the securities.

847 ASIC's power to prohibit short selling in certain cases

- (1) Where ASIC forms the opinion that it is necessary to prohibit securities, or a particular class of securities, from being sold on a stock market of a securities exchange in a manner that, but for paragraph 846(3)(e), would contravene subsection 846(1), in order to protect persons who might suffer financial loss if they were to buy or sell those securities in that manner or in order to protect the public interest, ASIC may give written notice to the securities exchange stating that it has formed that opinion and setting out the reasons for that opinion.
- (2) If, after receiving such a notice:
 - (a) the securities exchange does not take action to prevent the selling on a stock market of the securities exchange of the

securities, or class of securities, specified in the notice in the manner referred to in subsection (1); and

- (b) ASIC is still of the opinion that it is necessary to prohibit the selling on that stock market of the securities, or class of securities, in that manner;

ASIC may, by a further written notice given to the securities exchange, prohibit the selling on that stock market of the securities, or class of securities, in that manner during a period of not more than 21 days.

- (3) As soon as practicable after giving a notice to a securities exchange under subsection (2), ASIC must give to the Minister a written report setting out the reasons for the giving of the notice and send a copy of the report to the securities exchange.
- (4) On receiving the report, the Minister may direct ASIC to revoke the notice given under subsection (2), and, if such a direction is given, ASIC must immediately revoke the notice.
- (5) A securities exchange must not permit the selling of securities on a stock market of the securities exchange in a way that contravenes a notice given under subsection (2).

Division 3—Recommendations about securities

848 Recommendation made by partner or officer

For the purposes of this Division (other than section 851):

- (a) a recommendation made by a partner is taken to have been made by each partner in the partnership; and
- (b) a recommendation made by a director, executive officer or secretary of a body corporate is taken to have also been made by the body corporate.

849 Client to be told if adviser's interests may influence recommendation

- (1) This section applies where a securities adviser makes a securities recommendation to a person (in this section called the *client*) who may reasonably be expected to rely on it.
- (2) The securities adviser must:
 - (a) if the recommendation is made orally—when making the recommendation, disclose to the client orally; or
 - (b) if the recommendation is made in writing—set out in that writing, in such a way as to be no less legible than the other material in that writing;particulars of:
 - (c) any commission or fee, or any other benefit or advantage, whether pecuniary or not and whether direct or indirect, that the securities adviser or an associate has received, or will or may receive, in connection with the making of the recommendation or a dealing by the client in securities as a result of the recommendation; and
 - (d) any other pecuniary or other interest, whether direct or indirect, of the securities adviser or an associate, that may reasonably be expected to be capable of influencing the securities adviser in making the recommendation.
- (3) Subsection (2) does not apply in relation to a commission or fee that the securities adviser has received, or will or may receive, from the client.

- (4) If by making the recommendation the securities adviser does an act as a representative of another person, then:
- (a) without limiting the generality of Division 2 of Part 1.2, the other person is an associate for the purposes of subsection (2); and
 - (b) subsection (2) does not apply in relation to a commission or fee that the other person has received, or will or may receive, from the client.
- (5) For the purposes of Division 2 of Part 1.2, the making of securities recommendations is the matter to which a reference to an associate in subsection (2) relates.
- (6) Despite Division 2 of Part 1.2 and subsection (5), a person (in this subsection called the *alleged associate*) is not an associate for the purposes of subsection (2) merely because of being:
- (a) a partner of the securities adviser otherwise than because of carrying on a securities business in partnership with the securities adviser; or
 - (b) a director of a body corporate of which the securities adviser is also a director, whether or not the body carries on a securities business;
- unless the securities adviser and the alleged associate act jointly, or otherwise act together, or under an arrangement between them, in relation to making securities recommendations.

850 Defences to alleged breach of subsection 849(2)

- (1) Where:
- (a) a person:
 - (i) when making a recommendation orally, fails to disclose; or
 - (ii) when making a recommendation in writing, fails to set out in that writing;as required by subsection 849(2), particulars of a matter; and
 - (b) it is proved that the person was not, and could not reasonably be expected to have been, aware of that matter when making the recommendation;
- the failure is not a contravention of that subsection.

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(2) Where:

- (a) a dealer or investment adviser, or a representative of a dealer or investment adviser:
 - (i) when making a recommendation orally, fails to disclose; or
 - (ii) when making a recommendation in writing, fails to set out in that writing; as required by subsection 849(2), particulars of a matter; and
- (b) in the case of a representative of a dealer or investment adviser—by making the recommendation, the representative does an act as a representative of the dealer or investment adviser; and
- (c) it is proved that the dealer or investment adviser had in operation, throughout a period beginning before the decision to make the recommendation was made and ending after the recommendation was made, arrangements to ensure that:
 - (i) the natural person who made the decision knew nothing about that matter before the end of that period; and
 - (ii) no advice with respect to the making of the recommendation was given to the person by anyone who knew anything about that matter; and
- (d) it is also proved that:
 - (i) the person in fact knew nothing about that matter before the end of that period; and
 - (ii) no such advice was so given;the failure is not a contravention of that subsection.

(3) Neither of subsections (1) and (2) limits the generality of the other.

851 Adviser must have reasonable basis for recommendation

- (1) A securities adviser who:
 - (a) makes a securities recommendation to a person who may reasonably be expected to rely on it; and
 - (b) does not have a reasonable basis for making the recommendation to the person;contravenes this section.

- (2) For the purposes of subsection (1), a securities adviser does not have a reasonable basis for making a securities recommendation to a person unless:
 - (a) in order to ascertain that the recommendation is appropriate having regard to the information the securities adviser has about the person's investment objectives, financial situation and particular needs, the securities adviser has given such consideration to, and conducted such investigation of, the subject matter of the recommendation as is reasonable in all the circumstances; and
 - (b) the recommendation is based on that consideration and investigation.
- (3) A person who contravenes subsection (1) is not guilty of an offence.

852 Adviser who breaches this Division liable to compensate client

- (1) This section applies where:
 - (a) a securities adviser contravenes section 849 or 851 in relation to a securities recommendation to a person (in this section called the *client*); and
 - (b) the client, in reliance on the recommendation, does, or omits to do, a particular act; and
 - (c) it is reasonable, having regard to the recommendation and all other relevant circumstances, for the client to do, or omit to do, as the case may be, that act in reliance on the recommendation; and
 - (d) the client suffers loss or damage as a result of that act or omission.
- (2) Subject to subsections (3) and (4), the securities adviser is liable to pay damages to the client in respect of that loss or damage.
- (3) In the case of a contravention of section 849, the securities adviser is not so liable if it is proved that a reasonable person in the client's circumstances could be expected to have done, or omitted to do, as the case may be, that act in reliance on the recommendation even if the securities adviser had complied with that section in relation to the recommendation.

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- (4) In the case of a contravention of section 851, the securities adviser is not so liable if it is proved that the recommendation was, in all the circumstances, appropriate having regard to the information that, when making the recommendation, the securities adviser had about the client's investment objectives, financial situation and particular needs.

853 Qualified privilege for adviser when complying with this Division

A securities adviser who:

- (a) makes a securities recommendation in relation to securities to a person who may reasonably be expected to rely on it; and
- (b) in so making the recommendation, contravenes neither of subsections 849(2) and 851(1);

has qualified privilege in respect of a statement the securities adviser makes to the person, whether orally or in writing, in the course of, or in connection with, so making the recommendation.

Part 7.5—Dealers' financial statements and audit

854 Interpretation

In this Part, unless the contrary intention appears:

- (a) a reference to a licence is a reference to a dealers licence; and
- (b) a reference to a licensee is a reference to a person who holds a dealers licence; and
- (c) a reference to a book, security, trust account or business of or in relation to a dealer who carries on business in partnership is a reference to such a book, security, trust account or business of or in relation to the partnership.

855 Application of Part

- (1) This Part applies in relation to a licensee in relation to his, her or its securities business, whether carried on in this jurisdiction or elsewhere.
- (2) This Part does not affect, and is taken never to have affected, the operation of Chapter 2M in relation to a company that is the holder of a dealers licence or in relation to a securities business that is carried on by such a company.

856 Dealers' financial records

- (1) This section applies where a person (in this section called the *dealer*) holds a licence.
- (2) The dealer must:
 - (a) keep such financial records as correctly record and explain the transactions and financial position of the securities business carried on by the dealer; and
 - (b) keep those records (in this section called the *records*) as provided by this section.

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- (3) The records must be kept in such a way as will enable true and fair profit and loss statements and balance sheets to be prepared from time to time.
- (4) The records must be kept in such a way as will enable profit and loss statements and balance sheets of the securities business carried on by the dealer to be conveniently and properly audited.
- (5) The records must be kept in writing in the English language or in such a manner as will enable them to be readily accessible and readily converted into writing in the English language.
- (6) The records must be kept in sufficient detail to show particulars of:
 - (a) all money received or paid by the dealer, including money paid to, or disbursed from, a trust account; and
 - (b) all purchases and sales of securities made by the dealer, the charges and credits arising from them, and the names of the buyer and seller of each of those securities; and
 - (c) all income received from commissions, interest, and other sources, and all expenses, commissions, and interest paid, by the dealer; and
 - (d) all the assets and liabilities (including contingent liabilities) of the dealer; and
 - (e) all securities that are the property of the dealer, showing by whom the securities, or the documents of title to the securities, are held and, where they are held by some other person, whether or not they are held as security against loans or advances; and
 - (f) all securities that are not the property of the dealer and for which the dealer or a nominee controlled by the dealer is accountable, showing by whom, and for whom, the securities or the documents of title to the securities are held and 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 dealer; and
 - (g) all purchases and sales of options made by the dealer and all fees (being option money) arising from them; and
 - (h) all arbitrage transactions entered into by the dealer; and
 - (j) all underwriting transactions entered into by the dealer.

- (7) The records must be kept in sufficient detail to show separately particulars of every transaction by the dealer.
- (8) The records must specify the day on which, or the period during which, each transaction by the dealer took place.
- (9) The records must contain copies of acknowledgments of the receipt of securities or of documents of title to securities received by the dealer from clients for sale or safe custody clearly showing the name or names in which the particular securities are registered.
- (10) The records must be kept in sufficient detail to show separately particulars of all transactions by the dealer with, or for the account of:
 - (a) clients of the dealer, excluding, where the dealer carries on business in partnership, the partners of the firm; and
 - (b) the dealer or, where the dealer carries on business in partnership, the partners of the firm; and
 - (c) other dealers; and
 - (d) employees of the dealer.
- (11) An entry in the records is, unless the contrary is proved, taken to have been made by, or with the authority of, the dealer.
- (12) Where any of the records is not kept in writing in the English language, the dealer must, if required to convert the financial records concerned into writing in the English language by a person who is entitled to examine the record, comply with the requirement within a reasonable time.
- (13) The dealer does not contravene this section 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 dealer.
- (14) Where any of the records are kept outside this jurisdiction, the dealer 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

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- (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.

(15) Nothing in this section limits the generality of anything else in it.

857 Appointment of auditor by dealer

- (1) A 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;other than a person who, or a firm that, is ineligible by virtue of this section to act as auditor of the licensee.
- (2) Subject to this section, a person is ineligible to act as auditor of the holder of a licence if:
 - (a) the person is not a registered company auditor; or
 - (b) the person, or a body corporate in which the person has a substantial holding, is indebted in an amount exceeding \$5,000 to the holder or, if the holder is a body corporate, to a related body corporate; or
 - (c) the person is:
 - (i) in the case of a holder who is a natural person—a partner or employee of the holder; or
 - (ii) in the case of a holder that is a body corporate:
 - (A) an officer of the body corporate; or
 - (B) a partner, employer or employee of an officer of the body corporate; or
 - (C) a partner or employee of an employee of an officer of the body corporate.
- (3) Subject to this section, a firm is ineligible at a particular time to act as auditor of the holder of a licence, unless:
 - (a) at least one member of the firm is a registered company auditor who is ordinarily resident in a State or Territory; and
 - (b) where the business name under which the firm is carrying on business is not registered under a prescribed law of a State or

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Territory—there has been lodged a return in the prescribed form showing, in relation to each member of the firm, the member's full name and the member's address as at that time; and

- (c) no member of the firm, and no body corporate in which any member of the firm is a substantial shareholder for the purposes of Part 6.7, is indebted in an amount exceeding \$5,000 to the holder or, where the holder is a body corporate, to a related body corporate; and
 - (d) no member of the firm is:
 - (i) in the case of a holder who is a natural person—a partner or employee of the holder; or
 - (ii) in the case of a holder that is a body corporate:
 - (A) an officer of the body corporate; or
 - (B) a partner, employer or employee of an officer of the body corporate; or
 - (C) a partner or employee of an employee of an officer of the body corporate; and
 - (e) in the case of a holder that is a body corporate, no officer of the body corporate receives any remuneration from the firm for acting as a consultant to it on accounting or auditing matters.
- (4) For the purposes of paragraphs (2)(b) and (3)(c), disregard a debt owed by a natural person to a body corporate if:
- (a) the body corporate is:
 - (i) an Australian ADI; or
 - (ii) a body corporate registered under the *Life Insurance Act 1995*; and
 - (b) the debt arose because of a loan that the body corporate or entity made to the person in the ordinary course of its ordinary business; and
 - (c) the person used the amount of the loan to pay the whole or part of the purchase price of premises that the person uses as their principal place of residence.
- (5) For the purposes of subsections (2) and (3), a person is taken to be an officer of a body corporate if:

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- (a) in any case—the person is an officer of a related body corporate; or
 - (b) except where ASIC, if it thinks fit in the circumstances of the case, directs that this paragraph not apply in relation to the person in relation to the body corporate—the person has, at any time within the immediately preceding 12 months, been an officer or promoter of the body corporate or of a related body corporate.
- (6) For the purposes of this section, a person is not an officer of a body corporate merely because of being or having been the liquidator of that body corporate or of a related body corporate.
- (7) For the purposes of this section, a person is not an officer of a body corporate merely because of having been appointed as auditor of that body corporate or of a related body corporate or, for any purpose relating to taxation, a public officer of a body corporate or merely because of being or having been authorised to accept on behalf of the body corporate or a related body corporate service of process or any notices required to be served on the body corporate or related body corporate.
- (8) Subject to this section, a person or firm must not, while ineligible by virtue of this section to act as auditor of the holder of a licence:
- (a) consent to be appointed as auditor of the holder; or
 - (b) act as auditor of the holder; or
 - (c) prepare a report that an auditor of the holder is to prepare under this Chapter.
- (9) The appointment of a firm as auditor of the holder of a licence is taken to be an appointment of all persons who are members of the firm and are registered company auditors, whether resident in Australia or not, at the date of the appointment.
- (10) Where a firm that has been appointed as auditor of the holder of a licence is re-constituted because of the death, retirement or withdrawal of a member or members or because of the admission of a new member or new members, or both:
- (a) a person who was taken under subsection (9) to be an auditor of the holder and has so retired or withdrawn from the firm as previously constituted is taken to have resigned as auditor of the holder as from the day of the person's retirement or

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withdrawal but, unless that person was the only member of the firm who was a registered company auditor and, after the retirement or withdrawal of that person, there is no member of the firm who is a registered company auditor, section 858 does not apply to that resignation; and

- (b) a person who is a registered company auditor and is so admitted to the firm is taken to have been appointed as an auditor of the holder as from the date of the admission; and
- (c) the reconstitution of the firm does not affect the appointment of the continuing members of the firm who are registered company auditors as auditors of the holders;

but nothing in this subsection affects the operation of subsection (3).

- (11) Except as provided by subsection (10), the appointment of the members of a firm as auditors of the holder of a licence that is taken by subsection (9) to have been made because of the appointment of the firm as auditor of the holder is not affected by the dissolution of the firm.
- (12) A report or notice that purports to be made or given by a firm appointed as auditor of the holder of a licence is not duly made or given unless it is signed in the firm name and in his or her own name by a member of the firm who is a registered company auditor.
- (13) Where a person or firm is appointed as an auditor of the licensee under subsection (1) (other than an appointment that is taken to be made by virtue of subsection (10)) or under subsection (16), the licensee must within 14 days after the appointment lodge a written notice stating that the licensee has made the appointment and specifying the name of the person or firm.
- (14) A person must not:
 - (a) if the person has been appointed auditor of the holder of a licence—knowingly disqualify himself or herself while the appointment continues from acting as auditor of the holder; or
 - (b) if the person is a member of a firm that has been appointed auditor of the holder of a licence—knowingly disqualify the

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firm while the appointment continues from acting as auditor of the holder.

- (15) An auditor of the holder of a licence holds office until death, until removal or resignation from office in accordance with section 858 or until becoming prohibited by subsection (8) from acting as auditor of the holder.
- (16) Within 14 days after a vacancy occurs in the office of an auditor of a licensee, if there is no surviving or continuing auditor of the licensee, the licensee must appoint a person or persons, a firm or firms or a person or persons and a firm or firms to fill the vacancy, other than a person who, or a firm that, is ineligible by virtue of this section to act as auditor of the licensee.
- (17) While a vacancy in the office of an auditor continues, the surviving or continuing auditor or auditors (if any) may act.
- (18) A 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.
- (19) This section does not apply in relation to a body corporate (except a proprietary company) in relation to which section 327 applies.

858 Removal and resignation of auditors

- (1) A licensee:
 - (a) must remove an auditor of the licensee from office if the auditor becomes ineligible by virtue of section 857 to act as auditor of the licensee; and
 - (b) may, with ASIC's consent, remove an auditor of the licensee from office.
- (2) An auditor of the holder of a licence may, by written notice given to the holder, resign as auditor of the holder 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 to the holder of the application; and

- (b) the auditor has received the consent of ASIC.
- (3) ASIC must, as soon as practicable after receiving an application from an auditor under subsection (2), notify the auditor and the holder whether it consents to the resignation.
- (4) A statement by an auditor in an application under subsection (2) 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;and a certificate by ASIC that the statement was made in the application or in answer to an inquiry by ASIC is conclusive evidence that the statement was so made.
- (5) Subject to subsection (6), the resignation of an auditor takes effect on:
 - (a) the date (if any) specified for the purpose in the notice of resignation; or
 - (b) the date on which ASIC gives its consent to the resignation; or
 - (c) the date (if any) fixed by ASIC for the purpose;whichever last occurs.
- (6) Where, on the retirement or withdrawal from a firm of a member, the firm will no longer be capable, because of paragraph 857(3)(a), of acting as auditor of the holder of a licence, the member so retiring or withdrawing is, if not disqualified from acting as auditor of the holder, taken to be the auditor of the holder until the member obtains the consent of ASIC to the retirement or withdrawal.
- (7) This section does not apply in relation to a body corporate (except a proprietary company) in relation to which section 329 applies.

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859 Fees and expenses of auditors

The reasonable fees and expenses of an auditor of the holder of a licence are payable by the holder.

860 Dealer's accounts

(1) In this section:

financial year, in relation to a licensee, means:

- (a) where the licensee is not a body corporate—the year ending on 30 June; and
- (b) where the licensee is a body corporate—the financial year of the body corporate.

prescribed day, in relation to a financial year of a licensee, means:

- (a) where the licensee is not a body corporate—the day that is 2 months after the end of that financial year; or
- (b) where the licensee is a body corporate—the day that is 3 months after the end of that financial year;

or where, in either case, an extension of time is approved under subsection (3), the day on which the period of the extension ends.

- (2) A licensee must, in respect of each financial year, other than a financial year that ended before the date on which the licensee started to carry on business as a dealer, prepare a true and fair profit and loss statement and balance sheet on the basis of such accounting principles (if any) and containing such information and matters as are prescribed and lodge them before the prescribed day for that financial year, together with an auditor's report containing the prescribed information and matters.
 - (3) ASIC may, on application made by the holder of a licence and the holder's auditor before the end of the period of 2 months or, as the case requires, the period of 3 months referred to in the definition of *prescribed day* in subsection (1) or, if that period has been extended by an approval or approvals previously given under this subsection, before the end of the period as so extended, approve an extension of the period.
 - (4) An approval under subsection (3) may be given subject to such conditions (if any) as ASIC imposes.
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- (5) Where an approval under subsection (3) in relation to a licensee is given subject to conditions, the licensee must comply with those conditions.

861 Auditor to report to ASIC on certain matters

- (1) Where an auditor, in the performance of duties as auditor of the holder of a licence, becomes aware of a prescribed matter, the auditor must, within 7 days after becoming aware of the matter, lodge a written report on the matter and send a copy of the report to the holder and to each securities exchange of which the holder is a member.

- (2) In this section:

prescribed matter means a matter that, in the opinion of the auditor:

- (a) has adversely affected, is adversely affecting or may adversely affect the ability of the holder to meet the holder's obligations as a dealer; or
- (b) constitutes or may constitute a contravention of section 856, 866, 867, 868, 869, 870, 871, 872 or 873, or Part 7.7 or of a condition of the licence.

862 Securities exchange to report to ASIC on certain matters

- (1) Where, in relation to a dealer who is a member of a securities exchange, the securities exchange becomes aware of a prescribed matter, the securities exchange must, as soon as practicable after becoming aware of the matter, lodge a written report on the matter and send a copy of the report to the dealer.

- (2) In this section:

prescribed matter, in relation to a dealer, means a matter that, in the opinion of the securities exchange concerned:

- (a) has adversely affected, is adversely affecting or may adversely affect the ability of the dealer to meet the dealer's obligations as a dealer; or

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- (b) constitutes or may constitute a contravention of section 856, 866, 867, 868, 869, 870, 871, 872 or 873, or Part 7.7 or of a condition of a licence held by the dealer.

863 Qualified privilege for auditor

- (1) An auditor of the holder of a licence has qualified privilege in respect of:
 - (a) a statement that the auditor makes, orally or in writing, in the course of his or her duties as auditor; or
 - (b) the lodging of a report, or the sending of a report to the holder, or to a securities exchange, under section 861.
- (2) A person has qualified privilege:
 - (a) in respect of the publishing of a document prepared by an auditor of the holder of a licence in the course of the auditor's duties or required by or under this Chapter to be lodged, whether or not the document has been lodged; or
 - (b) in respect of the publishing of a statement made by such an auditor as mentioned in subsection (1).

864 Securities exchange may impose additional obligations on members

Nothing in this Part or in Part 7.6 prevents a securities exchange from imposing on a member of that securities exchange any obligations or requirements (other than obligations or requirements inconsistent with this Chapter or with a condition of a licence held by the member) that the securities exchange thinks fit with respect to:

- (a) the audit of books (including the audit of books by an auditor appointed by the securities exchange); or
- (b) the information to be given in reports from auditors; or
- (c) the keeping of books.

Part 7.6—Money and scrip of dealers' clients

865 Interpretation

In this Part, unless the contrary intention appears:

- (a) a reference to a licence is a reference to a dealers licence; and
- (b) a reference to a licensee is a reference to a person who holds a dealers licence; and
- (c) a reference to a book, security, trust account or business of or in relation to a dealer who carries on business in partnership is a reference to such a book, security, trust account or business of or in relation to the partnership.

865A Application of Part

This Part (other than section 872) applies in relation to a licensee in relation to his, her or its securities business, whether carried on in this jurisdiction or elsewhere.

866 Dealer to keep trust account

- (1) A licensee must open and maintain:
 - (a) an account, designated as a trust account, with an Australian ADI; or
 - (b) 2 or more such accounts.
- (2) Where a condition of a licence prohibits the licensee from holding money in trust for the licensee's clients, subsection (1) does not apply in relation to the licensee unless and until the licensee receives money that section 867 requires the licensee to pay into a trust account.
- (3) A person who contravenes subsection (1) is guilty of an offence.
- (4) A person who, with intent to defraud, contravenes subsection (1) is guilty of an offence.

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867 What is to be paid into dealer's trust account

- (1) A licensee must pay into a trust account:
 - (a) money held by the licensee in trust for a client; and
 - (b) without limiting the generality of paragraph (a), money received by the licensee from a client, other than:
 - (i) money received in respect of brokerage or any other proper charge; or
 - (ii) money received in payment or part payment for securities delivered to the licensee before the money is received; or
 - (iii) money in relation to which the licensee is required to comply with section 872.
- (2) Subsection (1) does not apply in relation to a payment order that:
 - (a) is payable to, or to the order of, a specified person or bearer; and
 - (b) the licensee receives from, or on behalf of, a client with express or implied instructions that it is to be delivered to the person to whom it is payable;unless the payee in the payment order is the licensee, a partner of the licensee or a firm in which the licensee is a partner.
- (3) A person who contravenes subsection (1) is guilty of an offence.
- (4) A person who, with intent to defraud, contravenes subsection (1) is guilty of an offence.

868 When money to be paid into trust account

- (1) Where section 867 requires a licensee to pay money into a trust account, the licensee must pay the money into a trust account on or before the next day after the licensee receives it on which it can be so paid.
- (2) A person who contravenes subsection (1) is guilty of an offence.
- (3) A person who, with intent to defraud, contravenes subsection (1) is guilty of an offence.

869 Withdrawals from trust account

- (1) A licensee must not withdraw money from a trust account except:
 - (a) to make a payment to, or in accordance with the written directions of, a person entitled to the money; or
 - (b) to make a payment under section 889 to a stock exchange; or
 - (c) to defray brokerage or any other proper charge; or
 - (d) to pay to the licensee money to which the licensee is entitled, being money that was paid into the trust account but need not have been so paid; or
 - (e) to make a payment that is otherwise authorised by any law of the Commonwealth or any law of a State or Territory in this jurisdiction.
- (2) Nothing in this Part affects a lawful claim or lien that a person:
 - (a) has against or on money held in a trust account of a person; or
 - (b) has, before money received for the purchase of securities or from the sale of securities is paid into a trust account of a person, against or on that money.
- (3) A person who contravenes subsection (1) is guilty of an offence.
- (4) A person who, with intent to defraud, contravenes subsection (1) is guilty of an offence.

870 Withdrawal against uncleared cheque

- (1) This section applies where the holder of a licence withdraws from a trust account of the holder some or all of the amount of a cheque:
 - (a) that has been paid into the account; and
 - (b) that has not been paid, and payment of which has not been refused, by the banker on which it is drawn.
- (2) The holder does not, merely because of the withdrawal, contravene section 869.
- (3) If the banker later refuses payment of the cheque, the holder must, within one business day after being notified of the refusal, pay into the trust account by cash, or by cheque that a bank or other

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institution draws on itself, an amount equal to the amount of the withdrawal.

871 Trust money not available in respect of dealer's own debts

- (1) Subject to this Part, money in a trust account of the holder of a licence is not available for the payment of a debt or liability of the licensee.
- (2) Subject to this Part, money in a trust account of the holder of a licence is not liable to be attached, or taken in execution, under the order or process of a court at the instance of a person suing in respect of such a debt or liability.

872 Money lent to dealer

- (1) This section applies where a person (in this section called the *client*) lends money to a dealer in connection with a securities business carried on by the dealer.
- (2) The dealer must pay the money into an account that:
 - (a) the dealer maintains with an Australian ADI; and
 - (b) contains no money other than money lent to the dealer;and must so pay the money on or before the next day after the dealer receives it on which it can be paid into that account.
- (3) The dealer must give to the client a document (in this section called the *disclosure document*), in the prescribed form, 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 dealer is to use the money.
- (4) The dealer must keep the money in the account until the client gives the dealer a written acknowledgment that the client has received the disclosure document.
- (5) The dealer must not use the money except:
 - (a) for the purpose, and in the manner, set out in the disclosure document; or

- (b) for any other purpose, or in any other manner, agreed on in writing by the dealer and the client after the dealer gives the disclosure document to the client.

873 Scrip in dealer's custody

- (1) This section applies where the holder of a licence (in this section called the *dealer*) receives for safe custody scrip that is the property of another person (in this section called the *client*) and for which the dealer, or a nominee controlled by the dealer, is accountable.
- (2) If the client requests that the body corporate that issued or made available the securities underlying the scrip register the scrip in the name of such a nominee, the dealer must cause the body corporate so to register them.
- (3) If the client requests that the scrip be deposited in safe custody with an Australian ADI with which the dealer maintains an account, the dealer must cause the scrip to be so deposited.
- (4) If:
 - (a) neither of subsections (2) and (3) applies; and
 - (b) the scrip is not registered in the client's name by the body corporate that issued or made available the securities underlying the scrip;the dealer must cause the scrip to be so registered.
- (5) A dealer must not deposit the scrip as security for a loan or advance to the dealer unless:
 - (a) the client owes the dealer an amount in connection with a transaction entered into by the dealer on the client's behalf; and
 - (b) the dealer gives the client a written notice that identifies the scrip and states that the dealer proposes so to deposit it; and
 - (c) the amount, or the total of the amounts, that the client so owes on the day of the deposit is not less than the amount of the loan or advance.
- (6) If the dealer deposits the scrip as permitted by subsection (5), the dealer:

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- (a) must, within one business day after the amount or amounts first referred to in paragraph (5)(c) are repaid, withdraw the scrip from that deposit; and
- (b) if, at the end of 3 months after the day of that deposit, or at the end of any subsequent interval of 3 months, the scrip has not been withdrawn from that deposit—give the client written notice of that fact.

874 Court may freeze certain bank accounts of dealers and former dealers

- (1) Subsection (3) of this section applies where, on application by ASIC, the Court is satisfied that a person holds, or has at any time held, a licence and that:
 - (a) there are reasonable grounds for believing that there is a deficiency in:
 - (i) a trust account of the person; or
 - (ii) an account maintained by the person under subsection 872(2);whether the account is maintained in this jurisdiction or elsewhere; or
 - (b) there has been undue delay, or unreasonable refusal, on the person's part in paying, applying or accounting for trust money as provided for by this Part by a condition of the licence or by the business rules of a securities exchange of which the person is or has been a member; or
 - (c) without limiting the generality of paragraph (b) of this subsection, the person has contravened:
 - (i) section 868; or
 - (ii) subsection 872(2).
- (2) Subsection (3) also applies where, on application by ASIC, the Court is satisfied that a person holds, or has at any time held, a licence and is carrying on, or last carried on, a securities business otherwise than in partnership 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 securities business; or

- (d) the person has died.
- (3) The Court may by order restrain dealings in respect of specified bank accounts that the person holds or maintains (whether in Australia or elsewhere), subject to such terms and conditions as the Court imposes.

875 Interim order freezing bank accounts

- (1) Before considering an application under section 874, 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.

876 Duty of banker to make full disclosure

Where an order made under section 874 is directed to a banker, the banker must:

- (a) disclose to ASIC every account kept at the bank in the name of the person to whom the order relates, and any account that the banker reasonably suspects is held or kept at the bank for the benefit of that person; and
- (b) permit ASIC to make a copy of, or to take an extract from, any account of the person to whom the order relates or any of the banker's books relating to that person.

877 Further orders and directions

- (1) Where an order is made under section 874 or 875, 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; or
 - (b) directs that specified amounts in a bank account affected by the first-mentioned order be paid to ASIC or a person nominated by ASIC; or

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- (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.

878 Power of Court to make order relating to payment of money

- (1) An order made under section 877 may include directions to the person to whom the money is paid directing that the person:
 - (a) must pay the money into a separate trust 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) where the money received is insufficient to pay all proved claims, may, notwithstanding any rule of law or equity to the contrary, apportion the money among the claimants in proportion to their proved claims and show in the scheme how the money is so apportioned.
- (2) Where 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 give such directions as to the money held in a separate trust account under subsection (1), as to the persons to whom and in what amounts the whole or any portion of that money must be paid, and as to the payment of the balance of the money (if any) remaining in the account, as the Court thinks fit.

Part 7.7—Registers of interests in securities

879 Interpretation

(1) In this Part:

financial journalist means a person who is not a licensee and, in the course of the person's business or employment contributes advice, or prepares analyses or reports, about securities for publication:

- (a) in a newspaper or periodical; or
- (b) in the course of, or by means of, transmissions made by means of an information service; or
- (c) in sound recordings, video recordings or data recordings.

Register, in relation to a person to whom this Part applies, means the Register required to be kept by the person under subsection 881(1).

securities means securities of:

- (a) a public company; or
- (b) a body corporate or other person included in the official list of a securities exchange.

(2) If:

- (a) there is in force a written certificate issued by or on behalf of a securities exchange certifying that a member of that securities exchange is recognised by that securities exchange as specialising in transactions relating to odd lots of securities; and
- (b) the member concerned enters into a transaction in relation to an odd lot of securities;

this Part does not apply in relation to any relevant interests in securities acquired by the member as a result of that transaction or in relation to any change effected by that transaction in the member's relevant interests in any securities.

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880 Application of Part

This Part applies to a person who:

- (a) holds a licence; or
- (b) holds a proper authority from a person who holds a licence;
or
- (c) is a financial journalist.

881 Register to be maintained

- (1) A person to whom this Part applies must keep a Register, in accordance with the prescribed form or in the prescribed manner, at a place in this jurisdiction for the purposes of this Part.
- (2) Where:
 - (a) a person becomes a person to whom this Part applies after the commencement of this Act; and
 - (b) the person is aware, upon becoming such a person, that the person has relevant interests in securities;the person must, within 7 days after the day on which the person becomes such a person, if the person has not already done so, enter, as prescribed, in the Register particulars of those securities and of the nature of the person's relevant interests in those securities.
- (3) Where a person to whom this Part applies becomes aware that the person has relevant interests in securities, the person must, within 7 days after the day on which the person becomes so aware, enter, as prescribed, in the Register particulars of those securities and of the nature of the person's relevant interests in those securities.
- (4) Where there is a change in the relevant interests of a person to whom this Part applies in securities, the person must, within 7 days after the day on which the person becomes aware of the change, enter particulars of the change in the Register.
- (5) For the purposes of this section, where a person to whom this Part applies begins or ceases to have relevant interests in securities, there is taken to be a change in the relevant interests of that person in those securities.

- (6) Where a person to whom this Part applies is required by this section to enter in the Register particulars of any securities and of the nature of the person's relevant interests in those securities, or particulars of a change in the person's relevant interests in any securities, the particulars to be entered include:
- (a) the date on which the person began or ceased to have the relevant interests or on which the change occurred; and
 - (b) the number of securities to which the relevant interests relate or related; and
 - (c) if the relevant interests were acquired or disposed of or the change occurred for valuable consideration—the amount of the consideration and, if the consideration did not consist wholly of money, the nature of the part of the consideration that did not consist of money; and
 - (d) if the securities are not registered in the name of the person—the name of the person who is registered as the holder of the securities or, if any other person is entitled to become registered as the holder of the securities, the name of that other person.
- (7) The Register may include particulars of matters relating to securities in relation to which this Part does not apply.

882 ASIC to be notified of certain matters on establishment of Register

- (1) An applicant for a licence must include in the application written notice of where the applicant intends to keep the Register under subsection 881(1).
- (2) Within 14 days after beginning to keep the Register, a person who holds a proper authority from a licensee must lodge written notice of:
 - (a) where the Register is kept; and
 - (b) the name and business address of each licensee from whom the first-mentioned person holds a proper authority.
- (3) Within 14 days after beginning to keep the Register, a financial journalist must lodge written notice of:
 - (a) where the Register is kept; and

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- (b) the name and business address of the financial journalist's employer (if any); and
- (c) the newspapers and periodicals to which the financial journalist contributes.

883 ASIC to be notified of changes in certain matters

- (1) As soon as practicable after changing the place where the Register is kept, a person to whom this Part applies must lodge written notice of the new place where the Register is kept.
- (2) Where, at a particular time during the period beginning when a person complies with subsection 882(2) and ending immediately after the person next ceases to be a person to whom this Part applies, the person begins or ceases to hold a proper authority from a particular licensee, the person must, as soon as practicable after that time, lodge written notice of that fact and of the licensee's name and business address.
- (3) Where, at a particular time during the period beginning when a person complies with subsection 882(3) and ending immediately after the person next ceases to be a person to whom this Part applies, the person:
 - (a) begins or ceases to be employed as a financial journalist by a particular employer; or
 - (b) begins or ceases to contribute as a financial journalist to a particular newspaper or periodical;the person must, as soon as practicable after that time, lodge written notice of that fact and of:
 - (c) the employer's name and business address; or
 - (d) the name of the newspaper or periodical;as the case may be.
- (4) As soon as practicable after:
 - (a) the name or business address of a licensee from whom a person to whom this Part applies holds a proper authority; or
 - (b) the name or business address of an employer who employs a person to whom this Part applies as a financial journalist; or

(c) the name of a newspaper or periodical to which a person to whom this Part applies contributes as a financial journalist; ceases to be the name or business address of the licensee or employer, or the name of the newspaper or periodical, as the case may be, as last notified by the person under section 882 or this section, the person must lodge written notice of the new name or business address.

884 Defences

- (1) It is a defence to a prosecution for contravening section 881, 882 or 883 if it is proved that the contravention was due to the defendant not being aware of a fact or occurrence the existence of which was necessary to constitute the contravention and that:
 - (a) the defendant was not so aware on the date of the information; or
 - (b) the defendant became so aware less than 14 days before the date of the information; or
 - (c) the defendant became so aware not less than 14 days before the date of the information and complied with the relevant section within 14 days after becoming so aware.
- (2) For the purposes of this Part, a person is, unless the contrary is proved, to be presumed to have been aware at a particular time of a fact or occurrence relating to securities if an employee or agent of the person, being an employee or agent having duties or acting in relation to the employer's or principal's interest in the relevant securities, was aware of that fact or occurrence at that time.

885 ASIC's power to require production of Register

- (1) ASIC may require a person to whom this Part applies to produce the Register for inspection by a person authorised by ASIC at such place and within such period as ASIC specifies and the authorised person may make a copy of, or take extracts from, the Register.
- (2) A person to whom this Part applies must comply with any requirement made of the person under subsection (1).

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886 ASIC's power to require certain information

ASIC may, by written notice, require a person (in this section called the *principal*) to supply ASIC with:

- (a) the name and address of the person who contributed or prepared specified advice or a specified analysis or report; or
- (b) the names and addresses of all persons who, during a specified period, contributed or prepared any advice, analysis or report;

being advice, or an analysis or report, about securities that was published:

- (c) in a newspaper or periodical owned or published by the principal; or
- (d) in the course of, or by means of, transmissions that:
 - (i) the principal makes by means of an information service; or
 - (ii) are made by means of an information service that the principal owns, operates or makes available; or
- (e) in sound recordings, video recordings, or data recordings, that the principal makes available as mentioned in paragraph 77(6)(c).

887 ASIC's power to supply copy of Register

ASIC may supply a copy of a Register or an extract from a Register to any person who, in the opinion of ASIC, should in the public interest be informed of the matters disclosed in the Register or extract.

Part 7.8—Deposits with stock exchanges

888 Interpretation

In this Part, unless the contrary intention appears:

stock exchange does not include an Exchange subsidiary.

889 Deposits to be lodged by member organisations

- (1) This section applies where a licensee is, or is a partner in a partnership that is, a member organisation of a stock exchange.
- (2) Subject to this section, the licensee or partnership, as the case may be, must, as provided in this section, lodge and keep a deposit with:
 - (a) if the licensee or partnership is a member organisation of each of 2 or more stock exchanges—the nominated stock exchange; or
 - (b) otherwise—the stock exchange referred to in subsection (1).
- (3) If:
 - (a) while the licensee or partnership, as the case may be, is a member organisation of at least one stock exchange, he, she or it becomes a member organisation of another stock exchange; or
 - (b) the licensee or partnership ceases to be a member organisation of a particular stock exchange but remains a member organisation of each of 2 or more other stock exchanges;

the licensee or partnership must as soon as practicable inform in writing each stock exchange of which he, she or it is a member organisation of the name of the stock exchange with which he, she or it proposes to lodge and keep a deposit.

- (4) In subsection (2):

nominated stock exchange means the stock exchange named in notices given as required by subsection (3) or, if notices have been

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so given on 2 or more occasions, in the most recent notices so given.

- (5) The deposit is payable out of money in a trust account of the licensee or partnership, as the case may be.
- (6) An amount paid from such a trust account as, or as part of, the deposit continues to be money in the trust account even though it has been lodged with a stock exchange.
- (7) A contravention of subsection (2) is to be disregarded if it was attributable to the making, out of a trust account of the licensee or partnership, as the case may be, of a payment that:
 - (a) paragraph 869(1)(a), (c), (d) or (e) authorised the licensee or partnership to make out of that trust account; and
 - (b) the licensee or partnership was unable to make without committing the contravention.

890 Deposit to be proportion of trust account balance

- (1) The deposit to be lodged and kept for the purposes of section 889 must be an amount equal to two-thirds (or, where a lesser proportion is prescribed, that proportion) of:
 - (a) if the licensee or partnership, as the case may be, keeps 2 or more trust accounts—the lowest aggregate of the balances in those trust accounts; or
 - (b) otherwise—the lowest balance in the trust account of the licensee or partnership;during the 3 months ending on the quarter day last past.
- (2) A deposit need not be lodged or kept for the purposes of this Part if, but for this subsection, the amount of the deposit would be less than \$3,000.
- (3) If, because of subsection (1), the amount of a deposit to be lodged and kept with a stock exchange increases, the licensee or partnership, as the case may be, must so lodge the amount of the increase within 5 trading days of that stock exchange after the relevant quarter day that is the last day of the period by reference to which the amount required to be so lodged is calculated.

891 Deposits to be invested by stock exchange

- (1) Where a stock exchange receives a deposit from a person or partnership under section 889, the stock exchange holds the deposit in trust for the person or partnership and must invest the deposit:
 - (a) on interest-bearing term deposit with an Australian ADI; or
 - (b) on deposit with an eligible money market dealer.
- (2) A participating exchange must pay into the Fund money received by way of interest in respect of amounts invested by it under subsection (1).
- (3) A stock exchange (other than a participating exchange) must pay money received by way of interest in respect of amounts invested by it under subsection (1) into its fidelity fund.
- (4) A stock exchange must, on demand being made by a person or partnership who has lodged a deposit with the stock exchange, pay to the person or partnership an amount on deposit with the stock exchange under section 889.
- (5) Nothing in subsection (4) affects section 889.
- (6) Where the licensee, or a partnership in which the licensee is a partner, receives an amount under subsection (4) from a stock exchange, the licensee or partnership, as the case may be, must pay the amount into a trust account of the licensee or partnership, as the case may be.
- (7) The Fund must guarantee the repayment by a participating exchange of the amount of a deposit received by the participating exchange from a person or partnership.
- (8) The fidelity fund of a stock exchange (other than a participating exchange) must guarantee the repayment by the stock exchange of the amount of a deposit received by the stock exchange from a person or partnership.

892 Accounts in respect of deposits

- (1) A stock exchange must establish and keep proper accounts of deposits received by the stock exchange under this Part and must,

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within 1 month after each quarter day, cause a balance-sheet to be made out as at that day.

- (2) A stock exchange must appoint a registered company auditor to audit its accounts relating to deposits.
- (3) An auditor appointed by a stock exchange must audit the accounts relating to deposits received by the stock exchange and each balance sheet and must cause a report on the accounts and balance-sheet to be given to the board of the stock exchange within one month after the balance-sheet is made out.
- (4) A stock exchange must lodge a copy of each report given to the board of the stock exchange under this section and of the balance-sheet to which the report relates within 14 days after the report was given to the board.

893 Claims not affected by this Part

Nothing done under this Part or under a condition existing by virtue of this Part affects:

- (a) a claim or lien that a member organisation of a stock exchange has in relation to a deposit; or
- (b) the rights or remedies of a person other than a member organisation of a stock exchange.

Part 7.9—Fidelity funds

894 Interpretation

In this Part:

participating exchange means:

- (a) a participating exchange for the purposes of Part 7.10; or
- (b) an Exchange subsidiary.

895 Fidelity funds

- (1) A securities exchange (other than a participating exchange) must keep a fidelity fund, which must be administered by the board on behalf of the securities exchange.
- (2) The assets of a fidelity fund of a securities exchange are the property of the securities exchange but must be kept separate from all other property and must be held in trust for the purposes set out in this Part.

896 Money constituting fidelity fund

The fidelity fund of a securities exchange consists of:

- (aa) in the case of a fidelity fund established before the commencement of this Act—the money, and other property, of which the fund consisted immediately before that commencement; and
- (a) in the case of a fidelity fund established after the commencement of this Act—any amount that is paid to the credit of the fund by the securities exchange on the establishment of the fund; and
- (b) money paid into the fidelity fund as required by paragraphs 902(4)(d) and 904(4)(d); and
- (c) the interest on money invested by the securities exchange under Part 7.8; and
- (d) the interest and profits from time to time accruing from the investment of the fidelity fund; and

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- (e) other money paid into the fidelity fund by the securities exchange; and
- (f) money recovered by or on behalf of the securities exchange in the exercise of a right of action conferred by this Part; and
- (g) money paid by an insurer under a contract of insurance or indemnity entered into by the securities exchange under section 917; and
- (h) any other money lawfully paid into the fund.

897 Fund to be kept in separate ADI account

The money in a fidelity fund, until invested or applied in accordance with this Part, must be kept in a separate account in an Australian ADI.

898 Payments out of fund

Subject to this Part, there must be paid out of the fidelity fund of a securities exchange in such order as the board of the securities exchange considers proper:

- (a) the amounts of all claims, including costs, allowed by the board or established against the securities exchange under this Part; and
- (b) all legal and other expenses incurred in investigating or defending claims made under this Part or incurred in relation to the fund or in the exercise by the securities exchange or the board of the securities exchange of the rights, powers and authorities vested in it by this Part in relation to the fund; and
- (c) all premiums payable in respect of contracts of insurance or indemnity entered into by the securities exchange under section 917; and
- (d) the expenses incurred in the administration of the fund, including the salaries and wages of persons employed by the securities exchange or the board in relation to the fund; and
- (e) all other moneys payable out of the fund in accordance with the provisions of this Chapter.

899 Payment to the credit of the fidelity fund of a futures exchange or futures association

Where a body corporate that is a securities exchange, or that is related to a securities exchange, becomes a futures organisation for the purposes of Part 8.6:

- (a) the Minister may approve in writing, on such conditions (if any) as are specified in the approval:
 - (i) the payment of an amount specified in the approval out of the fidelity fund kept under this Part by the body corporate, or by the securities exchange, as the case may be; and
 - (ii) the payment of that amount to the credit of the fidelity fund established or to be established by the body corporate under that Part; and
- (b) if the Minister does so, that amount must, in accordance with the conditions (if any) so specified:
 - (i) be paid out of the fidelity fund referred to in subparagraph (a)(i); and
 - (ii) be paid to the credit of the fidelity fund referred to in subparagraph (a)(ii).

900 Accounts of fund

- (1) A securities exchange must establish and keep proper accounts of its fidelity fund and must, before 31 August in each year, cause a balance sheet in respect of those accounts to be made out as at the preceding 30 June.
- (2) A securities exchange must appoint a registered company auditor to audit the accounts of the fidelity fund.
- (3) The auditor appointed by a securities exchange must audit the accounts of the fidelity fund and must audit each balance sheet and give a report on the accounts and balance sheet to the board of the securities exchange not later than one month after the balance sheet is made out.
- (4) A securities exchange must lodge a copy of each report given to the board of the securities exchange under this section and of the

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balance sheet to which the report relates within 14 days after the report was given to the board.

901 Management sub-committee

- (1) The board of a securities exchange may, by resolution, appoint a management sub-committee of not fewer than 3 nor more than 5 members of the securities exchange, at least one of whom is also a member of the board.
- (2) The board may, by resolution, delegate to a sub-committee all or any of its powers, authorities and discretions under a provision of this Part (other than this section, section 904, subsection 907(8), (10) or (11) or section 909).
- (3) A power, authority or discretion delegated under subsection (2) may be exercised by members forming a majority of the sub-committee as if that power, authority or discretion had been conferred by this Part on a majority of the members of the sub-committee.
- (4) A delegation under this section may at any time, by resolution of the board, be varied or revoked.
- (5) The board may at any time, by resolution, remove a member of a sub-committee and may, by resolution, fill a vacancy arising in the membership of the sub-committee.

902 Contributions to fund

- (1) A person is not to be admitted to:
 - (a) membership of a securities exchange; or
 - (b) membership of a partnership in a member firm recognised by a securities exchange;

unless the person has paid to the securities exchange, as agent for the Commonwealth, the levy known as securities exchange (application for membership) fidelity fund contribution.

Note: For the imposition and amount of the levy, see the *Corporations (Securities Exchanges Levies) Act 2001*.

- (2) A person who is a member of a securities exchange must, on or before 31 March in each year, pay to the securities exchange, as

agent for the Commonwealth, the levy known as futures organisation (annual membership) fidelity fund contribution.

Note: For the imposition and amount of the levy, see the *Corporations (Securities Exchanges Levies) Act 2001*.

- (3) Whenever an amount of levy (the **levy amount**) is paid under this section, or under subsection 8(3) of the *Corporations (Securities Exchanges Levies) Act 2001*, to a securities exchange as agent for the Commonwealth:
- (a) the securities exchange 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 securities exchange; and
 - (c) the Commonwealth must pay the amount so appropriated to the securities exchange; and
 - (d) the securities exchange must pay the amount it receives under paragraph (c) into its fidelity fund.
- (4) A payment of an amount to a securities exchange as required by paragraph (3)(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 securities exchange must pay to the Commonwealth an amount equal to the amount that the Commonwealth is liable to refund. The securities exchange may pay, out of its fidelity fund, any amount so required to be paid to the Commonwealth.
- (5) The *Financial Management and Accountability Act 1997* does not apply in relation to the payment of an amount of levy under this section to a securities exchange 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 (3)(a); or
 - (b) the payment of an amount by the Commonwealth as required by paragraph (3)(c).

The securities exchange must, in accordance with the regulations, notify the Commonwealth of payments of levy it receives as agent for the Commonwealth.

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- (6) An amount payable by a securities exchange as required by paragraph (3)(a) may be set off against an amount payable to the securities exchange as required by paragraph (3)(c).

903 Provisions where fund exceeds \$2,000,000

- (1) In this section:

relevant person, in relation to a securities exchange, means a member of the securities exchange:

- (a) who has made 20 or more annual payments of the levy referred to in subsection 902(2); and
- (b) in respect of whom a payment from the fund has not been made or, if such a payment has been made, has been repaid to the fund.
- (3) Where the amount in a fidelity fund of a securities exchange exceeds \$2,000,000 or such lesser amount as is prescribed, the following paragraphs apply in relation to relevant persons who are natural persons:
- (a) on the retirement from business of such a relevant person, the board may, in its discretion, pay to that person an amount determined in accordance with subsection (5);
- (b) on the death of such a relevant person without any payment having been made to that person under paragraph (a), the board may, in its discretion, pay an amount determined in accordance with subsection (5) to his or her personal representative or to any person who was wholly or partly dependent on the relevant person at the time of his or her death.
- (4) Where the amount in a fidelity fund of a securities exchange exceeds \$2,000,000 or such lesser amount as is prescribed, the board may, in its discretion, pay to a relevant person, being a body corporate, that ceases to be a member of the securities exchange an amount determined in accordance with subsection (5).
- (5) The amount that may, under subsection (3) or (4), be paid out of a fidelity fund to or in respect of a relevant person is the total amount of the annual payments made by the relevant person of the levy referred to in subsection 902(2) or such proportion of that amount

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as is for the time being determined by the board either generally or in relation to the particular relevant person, either with or without simple interest at a rate not exceeding 3% per annum.

- (6) A determination of the board under subsection (5) must be in writing and may be in respect of any person or any class of persons.
- (7) The securities exchange may, by written notice published in the *Gazette*:
 - (a) suspend the operation of paragraph (3)(a) or (b); or
 - (b) revoke any such suspension;but, where the operation of one of those paragraphs is for the time being suspended, the securities exchange must not suspend the operation of the other paragraph.

904 Levy in addition to annual contributions

- (1) If, at any time, the amount of a fidelity fund is insufficient to pay all amounts that, at that time are required to be paid under section 898, the securities exchange concerned may determine that levy known as securities exchange additional fidelity fund contribution is to be paid by each member of the securities exchange who is liable to pay the levy referred to in subsection 902(2). When such a determination is made, the levy is payable to the securities exchange, as agent for the Commonwealth, by each of those members.

Note: For the imposition and amount of the levy, see the *Corporations (Securities Exchanges Levies) Act 2001*.

- (2) An amount of levy payable under subsection (1) must be paid within the time and in the manner specified by the securities exchange either generally or in relation to a particular case.
- (3) If a levy is imposed by subsection 8(4) of the *Corporations (Securities Exchanges Levies) Act 2001* on a person, the levy must be paid by the time by which the levy under subsection 904(1) of the old Corporations Law referred to in that subsection was required to be paid.
- (4) Whenever an amount of levy (the *levy amount*) is paid under this section, or under subsection 8(4) of the *Corporations (Securities*

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Exchanges Levies) Act 2001, to a securities exchange as agent for the Commonwealth:

- (a) the securities exchange 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 securities exchange; and
 - (c) the Commonwealth must pay the amount so appropriated to the securities exchange; and
 - (d) the securities exchange must pay the amount it receives under paragraph (c) into its fidelity fund.
- (5) A payment of an amount to a securities exchange 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 securities exchange must pay to the Commonwealth an amount equal to the amount that the Commonwealth is liable to refund. The securities exchange may pay, out of its fidelity fund, any amount so required to be paid to the Commonwealth.
- (6) The *Financial Management and Accountability Act 1997* does not apply in relation to the payment of an amount of levy under this section to a securities exchange 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 securities exchange 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 a securities exchange as required by paragraph (4)(a) may be set off against an amount payable to the securities exchange as required by paragraph (4)(c).

905 Power of securities exchange to make advances to fund

- (1) A securities exchange may, from its general funds, give or advance, on such terms as the board thinks fit, any sums of money to its fidelity fund.
- (2) Money that is advanced under subsection (1) may at any time be repaid from the fidelity fund to the general funds of the securities exchange.

906 Investment of fund

Money in a fidelity fund that is not immediately required for its purposes may be invested by the securities exchange in any way in which trustees are for the time being authorised by a law of a State or Territory in this jurisdiction to invest trust funds or on deposit with an eligible money market dealer.

907 Application of fund

- (1) Subject to this Part, a securities exchange must hold and apply its fidelity fund for the purpose of compensating persons who have, whether before or after the commencement of this Part, suffered pecuniary loss because of a defalcation, or fraudulent misuse of securities or documents of title to securities or of other property, by:
 - (a) a member of the securities exchange who, when the loss was suffered, was a sole trader; or
 - (b) a person who, when the loss was suffered, was a partner in a member firm; or
 - (c) an employee of such a member or firm;in respect of money, securities, documents of title to securities or other property that, in the course of or in connection with that member's or firm's business of dealing in securities, was or were entrusted to or received by the member, a partner in the firm, or an employee of the member or firm (whether before or after the commencement of this Part):
 - (d) on behalf of another person; or

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- (e) because the member, or the firm or a partner in the firm, was a trustee of the money, securities, documents of title or other property.
- (2) Where a right to compensation does not arise under subsection (1), a fidelity fund may, subject to this Part, be applied for the purpose of paying to an official receiver or trustee within the meaning of the *Bankruptcy Act 1966* an amount not greater than the amount that the official receiver or trustee certifies is required to make up or reduce the total deficiency arising because the available assets of a bankrupt, being a member of a securities exchange who is a sole trader or being a partner in a member firm recognised by a securities exchange, are insufficient to satisfy the debts arising from dealings in securities that have been proved in the bankruptcy by creditors of the bankrupt.
- (3) Subsection (2) applies in the case of a member of a securities exchange or a partner in a member firm recognised by a securities exchange who has made a composition with creditors, or has executed a deed of assignment or a deed of arrangement, under Part X of the *Bankruptcy Act 1966* in the same way as that subsection applies in the case of such a member or partner who has become bankrupt.
- (4) For the purposes of subsection (2) as applying by virtue of subsection (3):
 - (a) the reference in subsection (2) to a trustee is a reference to a controlling trustee within the meaning of Part X of the *Bankruptcy Act 1966*; and
 - (b) the reference to debts proved in the bankruptcy is a reference to provable debts in relation to the composition or deed within the meaning of that Part; and
 - (c) references to the bankrupt are references to the person who made the composition or executed the deed.
- (5) Where a right to compensation does not arise under subsection (1), a fidelity fund may, subject to this Part, be applied for the purpose of paying to a liquidator of a body corporate that is being wound up (being a body corporate that is a member of a securities exchange) an amount not greater than the amount that the liquidator certifies is required to make up or reduce the total deficiency arising because the available assets of the body

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corporate are insufficient to satisfy the debts arising from dealings in securities that have been proved in the winding up by creditors of the body corporate.

- (6) Except as otherwise provided in the following provisions of this section, the amount or the sum of the amounts that may be paid under this Part:
- (a) for the purpose of compensating pecuniary loss as referred to in subsection (1); or
 - (b) for the purpose of making payments under subsection (2) or (5);
- must not exceed, in respect of a member of a securities exchange who is a sole trader or in respect of a member firm recognised by a securities exchange, \$500,000.
- (7) For the purpose of calculating the amount or sum referred to in subsection (6), an amount that is paid from a fidelity fund is, to the extent to which that amount is repaid to the fund, to be disregarded.
- (8) If a securities exchange considers, having regard to the ascertained or contingent liabilities of the fidelity fund, that the assets of the fund so permit, the securities exchange may, by notice published in the *Gazette*, increase the total amount that may be applied from the fund under subsection (6), and from the date of the publication of the notice until the notice is revoked or varied the amount specified in the notice is the total amount that may be applied as provided by this section.
- (10) A notice under subsection (8) may be revoked or varied by the securities exchange by notice published in the *Gazette*.
- (11) If a securities exchange, having regard to the ascertained or contingent liabilities of the fidelity fund, considers that the assets of the fund so permit, the securities exchange may apply out of the fund such sums in excess of the amount limited by or under this section as the securities exchange, in its discretion, thinks fit in or towards the compensation of persons who have suffered pecuniary loss as referred to in subsection (1) or making a payment under subsection (2) or (5).
- (12) If:

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- (a) any money, securities, documents of title to securities or other property has been entrusted to or received by, a former member of securities exchange or an employee of such a former member; and
- (b) because of a defalcation, or the fraudulent misuse of the securities, documents of title or other property, by the former member or employee, the person by or from whom the securities, documents of title or other property was so entrusted or received suffered pecuniary loss; and
- (c) when the money, securities, documents of title or other property was so entrusted or received, the person suffering the pecuniary loss had reasonable grounds for believing and did believe that the former member was a member of the securities exchange concerned;

a reference in this section to a member of a securities exchange includes a reference to that former member.

- (13) A reference in this section to an employee of a member or former member of a securities exchange includes, in the case of a member or former member that is a body corporate, a reference to an officer of the body corporate.
- (14) A reference in this section to a defalcation, or to a fraudulent misuse of securities or documents of title to securities or of other property, is a reference to a defalcation, or to such a fraudulent misuse, wherever occurring.

908 Claims against the fund

- (1) Subject to this Part, a person who has, whether before or after the commencement of this Part, suffered pecuniary loss as referred to in subsection 907(1) is entitled to claim compensation from the fidelity fund of the relevant securities exchange and to take proceedings in the Court as provided in this Part against the securities exchange to establish that claim.
- (2) A person does not have a claim against a fidelity fund of a securities exchange in respect of:
 - (a) pecuniary loss suffered before 1 July 1981 or on a day on which the securities exchange was a participating exchange;or

- (b) pecuniary loss in respect of money or other property suffered after the money or property had, in due course of the administration of a trust, ceased to be under the sole control of a member of the securities exchange or of a partner or partners in a member firm recognised by the securities exchange.
- (3) Subject to this Part, the amount that a claimant is entitled to claim as compensation from a fidelity fund of a securities exchange is the amount of the actual pecuniary loss suffered by the claimant (including the reasonable costs of, and disbursements incidental to, the making and proof of the claim) less the amount or value of all money or other benefits received or receivable by the claimant from a source other than the fund in reduction of the loss.
- (4) In addition to any compensation that is payable under this Part, interest is payable out of the fidelity fund on the amount of the compensation less any amount attributable to costs and disbursements, at the rate of 5% per annum (or, if another rate is prescribed, that other rate) calculated from and including the day on which the pecuniary loss was suffered until the day on which the claim is satisfied.

909 Rights of innocent partner in relation to fund

- (1) Where all persons who have submitted claims under section 908 have been fully compensated in accordance with the provisions of this Part for pecuniary loss as referred to in subsection 907(1) suffered in relation to money or other property entrusted to or received by a partner in a member firm recognised by a securities exchange, any other partner in that firm who has made payment to a person in compensation for loss suffered by that person in relation to that money or property is subrogated to the extent of that payment to all the rights and remedies of that person against the fidelity fund if the board, having regard to all the circumstances, determines that the partner was in no way a party to the loss and acted honestly and reasonably in the matter.
- (2) If a partner in a member firm feels aggrieved by the determination of a board under subsection (1), the partner may, within 28 days after receiving notice of the determination, appeal to the Court

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against the determination by lodging a notice of appeal in the prescribed form.

- (3) The appellant must, on the day on which notice of appeal is lodged with the Court, lodge a copy of the notice with the securities exchange.
- (4) The Court must inquire into and decide upon the appeal and, for that purpose, may do all such matters and things, and may do those matters and things in the same way and to the same extent, as it is empowered to do in the exercise of its ordinary jurisdiction.
- (5) Without limiting the generality of subsection (4), if the Court is of opinion having regard to all the circumstances that the appellant was not a party to the defalcation or fraudulent misuse of securities or documents of title to the securities or of other property from which the pecuniary loss arose and acted honestly and reasonably in the matter, it may order that the appellant is to be, to the extent of any payment made by the appellant, subrogated to the rights and remedies, in relation to the fidelity fund of the relevant securities exchange, of the person to whom the appellant made such a payment.

910 Notice calling for claims against fund

- (1) A securities exchange may publish, in each State and Territory, in a daily newspaper circulating generally in the State or Territory, a notice in the prescribed form specifying a date, not being earlier than 3 months after the publication of the notice, on or before which claims for compensation from the fidelity fund, in relation to the person specified in the notice, may be made.
- (2) A claim for compensation from a fidelity fund of a securities exchange in respect of a pecuniary loss must be made in writing to the securities exchange:
 - (a) where a notice under subsection (1) has been published, on or before the date specified in the notice; or
 - (b) where no such notice has been published, within 6 months after the claimant became aware of the pecuniary loss;and a claim that is not so made is barred unless the securities exchange otherwise determines.

- (3) A securities exchange, a member of a board of a securities exchange or a member or employee of a securities exchange has qualified privilege in respect of the publication of a notice under subsection (1).

911 Power of board to settle claims

- (1) Subject to this Part, a board may allow and settle a proper claim for compensation from a fidelity fund of a securities exchange at any time after the occurrence of the pecuniary loss in respect of which the claim arose.
- (2) Subject to subsection (3), a person must not bring proceedings under this Part against a securities exchange without leave of the board unless:
- (a) the board has disallowed the claim; and
 - (b) the claimant has exhausted all relevant rights of action and other legal remedies for the recovery of the money, securities, documents of title to securities or other property in respect of which the pecuniary loss occurred, being rights and remedies that are available against:
 - (i) the member of the securities exchange in relation to whom the claim arose; and
 - (ii) all other persons who are liable in respect of the loss suffered by the claimant;other than any right or remedy that the claimant may have under section 908 against another securities exchange.
- (3) A person who has been refused leave by the board of a securities exchange under subsection (2) may apply to the Court for leave to bring proceedings against the securities exchange and the Court may make such order in the matter as it thinks just.
- (4) A board, after disallowing, whether wholly or partly, a claim for compensation from a fidelity fund of a securities exchange, must serve notice of the disallowance in the prescribed form on the claimant or the claimant's solicitor.
- (5) Proceedings against a securities exchange in respect of a claim that has been disallowed by a board must not be brought after 3 months

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after the service of the notice of disallowance referred to in subsection (4).

- (6) In proceedings brought to establish a claim, evidence of an admission or confession by, or other evidence that would be admissible against, the person against whom a defalcation or fraudulent misuse of property is alleged is admissible to prove the defalcation or fraudulent misuse even if the person is not the defendant in or a party to those proceedings, and all defences that would have been available to that person are available to the securities exchange.
- (7) The board or, where proceedings are brought to establish a claim, the Court, if satisfied that there was a defalcation or fraudulent misuse of property on which to found the claim, may allow the claim and act accordingly, even if:
 - (a) the person against whom the defalcation or fraudulent misuse of property is alleged has not been convicted or prosecuted; or
 - (b) the evidence on which the board or Court, as the case may be, acts would not be sufficient to establish the guilt of that person on a criminal trial in respect of the defalcation or fraudulent misuse of property.

912 Form of order of Court establishing claim

- (1) Where in proceedings brought to establish a claim the Court is satisfied that there was a defalcation or fraudulent misuse of property on which to found the claim and that otherwise the claimant has a valid claim, the Court must, by order:
 - (a) declare the fact and the date of the defalcation or fraudulent misuse of property and the amount of the claim; and
 - (b) direct the board to allow the claim as so declared and deal with it in accordance with this Part.
- (2) In any such proceedings all questions of costs are in the discretion of the Court.

913 Power of securities exchange to require production of securities

A securities exchange may at any time require a person to produce and deliver any securities, documents or statements of evidence necessary to support a claim made or necessary for the purpose either of:

- (a) exercising its rights against a member of the securities exchange or a partner or the partners in a member firm recognised by the securities exchange or any other person; or
- (b) enabling criminal proceedings to be taken against a person in respect of a defalcation or fraudulent misuse of property;

and in default of delivery of any such securities, documents or statements of evidence by the first-mentioned person, the board of the securities exchange may disallow any claim by that person under this Part.

914 Subrogation of securities exchange to rights etc. of claimant on payment from fund

On payment out of a fidelity fund of a securities exchange of any money in respect of a claim under this Part, the securities exchange is subrogated to the extent of that payment to all the rights and remedies of the claimant in relation to the loss suffered by the claimant from the defalcation or fraudulent misuse of property.

915 Payment of claims only from fund

Money or other property belonging to a securities exchange, other than the fidelity fund, is not available for the payment of a claim under this Part, whether the claim is allowed by the board or is made the subject of an order of the Court.

916 Provision where fund insufficient to meet claims or where claims exceed total amount payable

- (1) Where the amount in a fidelity fund of a securities exchange is insufficient to pay the whole of the amount of all claims against it that have been allowed or in respect of which orders of the Court have been made:

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- (a) the amount in the fund must, subject to subsection (2), be apportioned among the claimants in such manner as the board thinks equitable; and
 - (b) such a claim so far as it then remains unpaid is taken to be charged against future receipts of the fund and paid out of the fund when moneys are available in the fund.
- (2) Where the total of all claims that have been allowed or in respect of which orders of the Court have been made in relation to defalcation or fraudulent misuses of property by or in connection with a sole trader or partner in a member firm recognised by a securities exchange exceeds the total amount that may, under section 907, be paid under this Part in respect of that sole trader or member firm:
- (a) the total amount must be apportioned among the claimants in such manner as the board thinks equitable; and
 - (b) on payment out of the fund of that total amount in accordance with that apportionment all such claims and any orders relating to those claims and all other claims against the fund that may subsequently arise or be made in respect of defalcations or fraudulent misuses of property by or in connection with that sole trader or member firm are discharged.

917 Power of securities exchange to enter into contracts of insurance or indemnity

- (1) A securities exchange may enter into a contract with a person carrying on fidelity insurance business under which the securities exchange will be insured or indemnified to the extent and in the manner provided by the contract against liability in respect of claims under this Part.
- (2) Such a contract may be entered into in relation to members of the securities exchange generally, in relation to particular members named in the contract, or in relation to members generally excluding particular members named in the contract.
- (3) Each of the following persons, namely, a securities exchange, a member or employee of a securities exchange or board and a member of a management sub-committee has qualified privilege in

respect of the publication of a statement that a contract entered into under this section does or does not apply with respect to a particular member of the securities exchange.

918 Application of insurance money

A claimant against a fidelity fund of a securities exchange does not have a right of action against a person with whom a contract of insurance or indemnity is made under this Part in respect of such a contract or a right or claim with respect to any money paid by the insurer in accordance with such a contract.

Part 7.10—The National Guarantee Fund

Division 1—Interpretation

920 Interpretation

- (1) In this Part, unless the contrary intention appears:

borrower, in relation to a guaranteed securities loan, has the meaning given by section 954B.

claim means a claim under Division 6, 6A, 6B, 6C, 7, 7A or 8.

clearing nominee, in relation to a settlement authority, means a subsidiary of the settlement authority operated for the purpose of facilitating the transfer of securities.

eligible exchange means:

- (a) the Exchange; or
- (b) a securities exchange that is neither the Exchange nor an Exchange subsidiary.

excluded person has the meaning given by section 921.

Fund provisions means the provisions of this Part.

guaranteed securities loan has the meaning given by section 954B.

minimum amount means:

- (a) if a determination is in force under section 936—the amount specified in the determination as the minimum amount of the Fund for the purposes of the Fund provisions; or
- (b) in any other case—\$15,000,000.

obligations, in relation to a member or member organisation of a participating exchange, in relation to a person, includes obligations arising under a law, under the participating exchange's business rules, under the SCH business rules or under an agreement between:

- (a) in any case—the member or member organisation and the person; or
- (b) if the member is a partner in a member organisation of the participating exchange—the last-mentioned member organisation and the person.

orderly market means an orderly market on a stock market of a participating exchange or of an Exchange subsidiary.

participating exchange means an eligible exchange that is a member of SEGC.

property includes money, securities and scrip.

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

relevant Act means the *Australian Stock Exchange and National Guarantee Fund Act 1987*.

relevant commencement means 1 April 1987.

replacement agreement, in relation to an agreement that has been novated, has the meaning given by section 924A.

reportable transaction means a sale or purchase, by a member organisation (in this definition called the **first dealer**) of a participating exchange, of securities, where the securities are quoted on a stock market of a participating exchange or of an Exchange subsidiary when the agreement for the sale or purchase is made and:

- (a) in any case—the participating exchange's business rules, as in force when the agreement for the sale or purchase is made, require the first dealer to report the sale or purchase to the participating exchange; or
- (b) if the sale or purchase is to or from, as the case may be, a member organisation (in this definition called the **second dealer**) of a participating exchange—the last-mentioned participating exchange's business rules, as in force when the agreement for the sale or purchase is made, require the second dealer to report to the last-mentioned participating

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exchange the purchase or sale of the securities by the second dealer from or to, as the case may be, the first dealer.

securities:

- (a) except in Division 7—includes marketable securities, or marketable rights, within the meaning of Division 3 of Part 7.13; and
- (b) in Division 7—has the meaning given by subsection 955(1).

settlement authority means a participating exchange or the securities clearing house.

settlement documents, in relation to a transaction (other than a guaranteed securities loan), means documents the supply of which in accordance with the agreement for the transaction:

- (a) if the agreement has not been discharged—is sufficient; or
- (b) if the agreement has been discharged, whether by performance or otherwise—would, if the agreement had not been discharged, be sufficient;

to discharge the obligations of the seller under the agreement, in so far as those obligations relate to the supply of documents in connection with the transaction.

TDS nominee, in relation to the transfer delivery service provisions of a settlement authority, means the clearing nominee referred to in the definition of **transfer delivery service provisions**.

transaction, except in Division 6B, means a sale or purchase of securities or a guaranteed securities loan.

transfer, except in Division 7, has a meaning affected by section 924.

transfer delivery service provisions, in relation to a settlement authority, means provisions of the business rules of the settlement authority under which a person or partnership may elect to bring about a transfer of securities of a particular kind and number to another person or partnership by:

- (a) the first-mentioned person or partnership transferring securities of that kind and number to a clearing nominee of the settlement authority; and

- (b) the clearing nominee transferring securities of that kind and number to the other person or partnership.

transfer documents, except in Division 7, has the meaning given by section 924.

- (2) For the purposes of this Part, a sale and purchase of securities are taken to consist of 2 distinct transactions, namely, the sale of the securities by the seller to the buyer and the purchase of the securities by the buyer from the seller.
- (3) Except so far as the contrary intention appears, a reference in this Part to a sale, or to a purchase, includes a reference to a sale or purchase the agreement for which is made outside this jurisdiction, whether in Australia or not.
- (5) A reference in this Part to a business being carried on in this jurisdiction includes a reference to the business being carried on both in this jurisdiction and outside it, whether in Australia or not.
- (6) A person who, or a partner in a partnership that, contravenes a provision of this Part is not guilty of an offence.

921 Excluded persons

- (1) In this Part, *excluded person*, in relation to a member of a participating exchange, means:
 - (a) in any case—the member; or
 - (b) if the member is a member organisation of the participating exchange and is not a body corporate:
 - (i) a person who is the spouse, or who is a relative, of the member; or
 - (ii) a trustee of a trust in relation to which the member or a person of a kind referred to in subparagraph (i) is capable of benefiting; or
 - (iii) a body corporate of which the member is an officer, or in which the member or a person of a kind referred to in subparagraph (i) has, or the member and such a person, the member and 2 or more such persons, or 2 or more such persons, together have, a controlling interest; or

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- (c) if the member is a member organisation of the participating exchange and is a body corporate:
 - (i) a person who is an officer of the body corporate; or
 - (ii) a body corporate that is related to the first-mentioned body corporate; or
 - (iii) a person who is the spouse, or who is a relative, of a person of a kind referred to in subparagraph (i); or
 - (iv) a trustee of a trust in relation to which a person of a kind referred to in subparagraph (i) or (iii) is capable of benefiting; or
 - (v) a body corporate in which a person of a kind referred to in subparagraph (i) or (iii) has, or 2 or more such persons together have, a controlling interest; or
- (d) if the member is a partner in a member organisation of the participating exchange and is not a body corporate:
 - (i) a person who is a partner in the member organisation; or
 - (ii) a person who is the spouse, or who is a relative, of a partner (not being a body corporate) in the member organisation; or
 - (iii) a trustee of a trust in relation to which a person of a kind referred to in subparagraph (i) or (ii) is capable of benefiting; or
 - (iv) a person who is an officer of a body corporate that is a partner in the member organisation; or
 - (v) a body corporate of which a person of a kind referred to in subparagraph (i), (ii) or (iii) is an officer, or in which such a person has, or 2 or more such persons together have, a controlling interest; or
- (e) if the member is a partner in a member organisation of the participating exchange and is a body corporate:
 - (i) a person who is an officer of a body corporate that is a partner in the member organisation; or
 - (ii) a body corporate that is related to the first-mentioned body corporate; or
 - (iii) a person who is a partner in the member organisation; or
 - (iv) a person who is the spouse, or who is a relative, of a person (other than a body corporate) of a kind referred to in subparagraph (i) or (iii); or

- (v) a trustee of a trust in relation to which a person of a kind referred to in subparagraph (i), (iii) or (iv) is capable of benefiting; or
 - (vi) a body corporate in which a person of a kind referred to in subparagraph (i), (iii) or (iv) has, or 2 or more such persons together have, a controlling interest.
- (2) A reference in subsection (1) to a relative of a person includes a reference to a relative of the spouse (if any) of the person.
- (3) A reference in subsection (1) to an officer of a body corporate is a reference to:
- (a) a director, secretary or executive officer of the body corporate; or
 - (b) a person who is an officer of the body corporate by virtue of paragraph (b), (c), (d) or (e) of the definition of *officer* in section 9.

922 Becoming insolvent

- (1) For the purposes of this Part, a body corporate becomes insolvent at a particular time if, and only if, at that time:
- (aa) an administrator of the body corporate is appointed under section 436A, 436B or 436C; or
 - (a) the body corporate commences to be wound up or ceases to carry on business; or
 - (b) a receiver, or a receiver and manager, of property of the body corporate is appointed, whether by a court or otherwise; or
 - (c) the body corporate enters into a compromise or arrangement with its creditors or a class of them.
- (3) For the purposes of this Part, a natural person becomes insolvent at a particular time if, and only if, at that time:
- (a) a creditor's petition or a debtor's petition is presented under Division 2 or 3, as the case may be, of Part IV of the *Bankruptcy Act 1966* against:
 - (i) the person; or
 - (ii) a partnership in which the person is a partner; or
 - (iii) 2 or more joint debtors who include the person; or

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- (b) the person's property becomes subject to control under Division 2 of Part X of the *Bankruptcy Act 1966*; or
 - (c) the person executes a deed of assignment or deed of arrangement under Part X of the *Bankruptcy Act 1966*; or
 - (d) the person's creditors accept a composition under Part X of the *Bankruptcy Act 1966*.
- (4) A reference in subsection (3) to a Division or Part of the *Bankruptcy Act 1966* includes a reference to provisions of a law of an external Territory, or a country other than Australia or an external Territory, that correspond to that Division or Part.

923 Permitted investments

For the purposes of this Part, money is taken to be invested in a permitted manner if, and only if, it is invested:

- (a) in a way in which trustees are for the time being authorised by a law of a State or Territory in this jurisdiction to invest trust funds; or
- (b) on deposit with an eligible money market dealer.

924 Transfer of securities etc. and payment of money

- (1) This section has effect for the purposes of this Part (other than Division 7).
- (2) A person (the *transferor*) transfers securities to another person (the *transferee*) if, and only if:
 - (a) in the case of an SCH-regulated transfer—the transferor does, or causes to be done, all things that the SCH business rules require to be done by or on behalf of the transferor to effect the transfer; or
 - (b) in any other case—the transferor delivers, or causes to be delivered, to the transferee documents (*transfer documents*) that are sufficient to enable the transferee:
 - (i) except in the case of marketable rights within the meaning of Division 3 of Part 7.13—to become registered as the holder of the securities; or

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- (ii) in the case of such marketable rights—to obtain the issue to the transferee of the securities to which the marketable rights relate;
without the transferor doing anything more, or causing anything more to be done, by way of executing or supplying documents.
- (3) If a person:
 - (a) causes property (other than securities or money) to be transferred to another person; or
 - (b) causes documents that are sufficient to enable another person to become the legal owner of property (other than securities or money) to be delivered to another person;the first-mentioned person is taken to have transferred the property to the other person.
- (4) If a person causes money to be paid to another person, the first-mentioned person is taken to have paid the money to the other person.
- (5) In this section:
person includes a partnership.

924A Novation of agreements

For the purposes of this Part, an agreement is novated if, and only if, because of the operation of a settlement authority's business rules, the agreement is discharged and replaced with one or more other agreements (each of which is called a *replacement agreement*).

924B Attributing securities and payments to transactions

- If:
- (a) either:
 - (i) a number of securities are transferred to a participating exchange or a member organisation of a participating exchange in respect of a number of transactions; or

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- (ii) a payment is made to a participating exchange or a member organisation of a participating exchange in respect of a number of transactions; and
 - (b) apart from this section, it is not possible to tell, for the purposes of this Part, how many of the securities are transferred, or how much of the payment is made, in respect of each of the transactions; and
 - (c) the business rules of the participating exchange include provisions determining how many of the securities are transferred, or how much of the payment is made, in respect of each of the transactions;
- those provisions have effect accordingly for the purposes of this Part.

925A Minister to nominate SEGC

- (1) Subject to subsection (3), the Minister may nominate in writing as the Securities Exchanges Guarantee Corporation a body corporate (whenever incorporated) that is, for the purposes of the national corporate laws, a company limited by guarantee.
- (2) ASIC must cause a copy of a nomination by the Minister under subsection (1) to be published in the *Gazette*.
- (3) The Minister may only nominate a body corporate under subsection (1) if he or she is satisfied that:
 - (a) the Exchange is a member of the body corporate; and
 - (b) none of the members of the body corporate is a person other than an eligible exchange; and
 - (c) the body corporate's constitution provides that no person, other than a person of a kind referred to in paragraph (b), may become or remain a member of the body corporate; and
 - (d) the body corporate will, if nominated under subsection (1), be able to perform and exercise SEGC's functions and powers under the Fund provisions adequately and with due regard to the interests of the public; and
 - (e) the body corporate has obtained, or will within a reasonable period after being nominated under subsection (1) obtain, indemnity insurance in respect of its liabilities for:
 - (i) negligence in; and

- (ii) defalcation, or fraudulent misuse of property, by an officer, employee or agent of the body corporate in connection with;
the performance or exercise of SEGC's functions or powers under the Fund provisions, 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.

926 SEGC's functions and powers under this Part

- (1) In addition to the legal capacity and powers it has because of section 124, SEGC has such functions and powers as are conferred, or expressed to be conferred, on it by 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) SEGC must perform the functions, and may exercise the powers, that are conferred, or expressed to be conferred, on it by or under this Part.

927 Management sub-committee

- (1) The Board may, by resolution, appoint a management sub-committee of not fewer than 3 nor more than 5 persons, at least one of whom is a member of the Board.
- (2) The Board may, by resolution, delegate to a sub-committee appointed by it under this section all or any of its powers, authorities and discretions under a provision of this Part (other than this section, section 944, and subsections 954(5), 954F(2), 954Q(2), 954Y(2), 959(3), 961E(3) and 969(3)).
- (3) A power, authority or discretion delegated under subsection (2) may be exercised by members forming a majority of the sub-committee as if that power, authority or discretion had been

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conferred by this Part on a majority of the members of the sub-committee.

- (4) A delegation by the Board under this section may, at any time, by resolution of the Board, be varied or revoked.
- (5) The Board may at any time, by resolution, remove a member of a sub-committee appointed by it under this section and may, by resolution, fill a vacancy arising in the membership of the sub-committee.
- (5A) A delegation under this section continues in force even if there is a change in the membership of the Board or of the sub-committee.
- (6) Any power, authority or discretion exercised under this section by, or by a majority of, a sub-committee is taken to have been exercised by the Board.
- (7) Any remuneration or expenses paid to a member of a sub-committee appointed under this section are taken to be expenses incurred in the administration of the Fund.

927A Sub-delegation by management sub-committee

- (1) A management sub-committee may delegate to:
 - (a) a member of the Board; or
 - (b) a member of the sub-committee; or
 - (c) an officer of SEGC;all or any of the powers, authorities and discretions that have been delegated under subsection 927(2) to the sub-committee.
- (2) A delegation must be in writing signed by a majority of the members of the sub-committee.
- (3) A delegation may be varied or revoked at any time by writing signed by a majority of the members of the sub-committee.
- (4) A delegation continues in force even if there is a change in the membership of the sub-committee.
- (5) A power, authority or discretion performed or exercised by a person under a delegation is taken to have been exercised by the Board.

- (6) A delegation of a power, authority or discretion does not prevent the performance or exercise of the power, authority or discretion by the Board or by the sub-committee that made the delegation.
- (7) Section 109ZE has effect in relation to a delegation subject to this section.
- (8) In this section:

delegation means a delegation under this section.

management sub-committee means a management sub-committee appointed under subsection 927(1).

928 ASIC to be notified of amendments to business rules

- (1) Where an amendment is made, by way of rescission, alteration or addition, to its business rules, SEGC must, as soon as practicable after the making of the amendment, give written notice of the amendment to ASIC.
- (2) A notice under subsection (1) must:
 - (a) set out the text of the amendment; and
 - (b) specify the date on which the amendment was made; and
 - (c) contain an explanation of the purpose of the amendment.
- (3) If the notice required to be given by subsection (1) is not given within 21 days after the making of the amendment, the amendment ceases to have effect.
- (4) Where ASIC receives a notice under this section, it must as soon as practicable send a copy of the notice to the Minister.
- (5) The Minister may, within 28 days after the receipt by ASIC of a notice under this section, disallow the whole or a specified part of the amendment to which the notice relates.
- (6) Where the Minister disallows the whole or a part of an amendment to which a notice under this section relates, ASIC must as soon as practicable give notice of the disallowance to SEGC and, upon receipt by SEGC of the notice of disallowance, the amendment, to the extent of the disallowance, ceases to have effect.

Division 3—The National Guarantee Fund

928A Interpretation—borrowing

In this Division, a reference to borrowing money includes a reference to obtaining credit.

928B Continuation of National Guarantee Fund

- (1) The National Guarantee Fund established by the SEGC under the old Corporations Laws of the States and Territories continues in existence as the National Guarantee Fund for the purposes of this Part.
- (2) Without limiting subsection (1), the assets of the National Guarantee Fund kept under the old Corporations Laws of the States and Territories immediately before the commencement of this Act are assets of the National Guarantee Fund kept under this Part.

929 SEGC to keep Fund

- (1) SEGC must keep the Fund and the Board must administer it on SEGC's behalf.
- (2) The assets of the Fund are the property of SEGC, but must be kept separate from all other property and must be held in trust for the purposes set out in the Fund provisions.

930 Property constituting Fund

The Fund consists of:

- (a) the assets covered by subsection 928B(2); and
- (b) money paid into the Fund under subsection 985(1); and
- (c) property that has vested in SEGC, and become part of the Fund by virtue of subsection 985(2); and
- (d) money paid into the Fund under subsection 891(2); and
- (e) money paid into the Fund under section 938 or 940; and

- (f) the interest and profits from time to time accruing from the investment of the Fund and paid into the Fund under subsection 935(2); and
- (fa) money paid into the Fund under subsection 930B(2); and
- (g) money recovered by or on behalf of SEGC in the exercise of a right of action that SEGC has by virtue of the Fund provisions; and
- (h) money paid by an insurer under a contract of insurance or indemnity entered into by SEGC under section 982; and
- (j) money paid to SEGC for the purposes of a claim under Division 6, 6A or 6C; and
- (k) all other money or other property lawfully paid into, or forming part of, the Fund.

930A Power to borrow etc. for purposes of the Fund

- (1) If the Board considers that, in the interests of the sound financial management of the Fund, money should be borrowed for the purpose of meeting a payment due out of the Fund, SEGC may borrow money for that purpose on such terms and conditions as the Board thinks appropriate.
- (2) SEGC may give security, including security over the assets of the Fund, in respect of SEGC's obligations in relation to a borrowing under subsection (1).
- (3) If:
 - (a) money borrowed under subsection (1) is a loan from a participating exchange; and
 - (b) the participating exchange borrowed money for the purpose of making the loan to SEGC;SEGC may give security, including security over the assets of the Fund, in relation to the participating exchange's obligations in respect of the borrowing referred to in paragraph (b).

930B Money borrowed and paid to SEGC

- (1) This section applies where money borrowed by SEGC under subsection 930A(1) is paid to SEGC.

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- (2) SEGC must pay the money into the Fund.
- (3) If:
 - (a) the money was borrowed for the purpose of meeting a payment due out of the Fund; and
 - (b) the borrowed money has been paid into the Fund; and
 - (c) the payment due out of the Fund has not yet been made;then, for the purposes of Division 4, the amount in the Fund is taken to be reduced by the amount of the borrowed money.

930C Money borrowed and not paid to SEGC

- (1) This section applies where money borrowed by SEGC under subsection 930A(1) is not paid to SEGC but is payable to other persons at the direction of SEGC.
- (2) 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 932, be made out of the Fund.

931 Fund to be kept in separate ADI account

The money in the Fund must, until invested or applied in accordance with the Fund provisions, be kept in an account, or, at the discretion of the Board, in 2 accounts, in an Australian ADI separate from any account or accounts in which money not forming part of the Fund is kept.

932 Payments out of Fund

- (1) Subject to this Part, there must be paid out of the Fund, in such order as the Board considers appropriate:
 - (a) amounts, including costs, disbursements and interest, that the Fund provisions require to be paid in connection with claims; and
 - (b) all legal and other expenses incurred in investigating or defending claims or incurred in relation to the Fund or in the exercise by SEGC or the Board of the rights and powers vested in it by the Fund provisions in relation to the Fund; and

- (ba) money payable to a person or partnership under section 972A; and
 - (c) money payable to a participating exchange under section 944; and
 - (da) to the extent that the money referred to in section 935 is insufficient for the purpose, payments of principal, interest and other amounts payable by SEGC in respect of money borrowed, and security given, under section 930A; and
 - (d) to the extent that the money referred to in section 935 is insufficient for the purpose, premiums payable in respect of contracts of insurance or indemnity entered into by SEGC under section 982; and
 - (e) to the extent that the money referred to in section 935 is insufficient for the purpose, the expenses incurred in the administration of the Fund, including the salaries and wages of persons employed by SEGC or the Board in relation to the Fund; and
 - (f) any other money payable out of the Fund in accordance with this Chapter.
- (2) In paragraphs (1)(a) and (b), **claim** means a claim under Division 6, 6A, 6B, 6C, 7, 7A or 8 or a claim that, for the purposes of Division 10, is a transferred claim in relation to a joining exchange.
- (3) Where:
- (a) an amount is payable out of the Fund in connection with a claim by a person against SEGC under Division 6, 6A, 6B, 6C, 7 or 7A that has been allowed; and
 - (b) an amount is payable out of the Fund in connection with a claim by a person against SEGC under Division 8 that has been allowed;

then, regardless of the order in which those persons became respectively entitled to make those claims, the amount referred to in paragraph (a) must be paid out of the Fund in priority to the amount referred to in paragraph (b).

933 Accounts of Fund

- (1) SEGC must establish and keep proper accounts of the Fund and must, before 31 August in each year, cause a balance sheet in respect of those accounts to be made out as at the preceding 30 June.
- (2) SEGC must appoint a registered company auditor to audit the accounts of the Fund.
- (3) The auditor must audit the accounts of the Fund and each balance sheet and must give a report on the accounts and balance sheet to the Board within one month after the balance sheet is made out.
- (4) SEGC must, within 14 days after a report is given to the Board, give to ASIC a copy of the report and a copy of the balance sheet.
- (5) SEGC must cause a copy of each report, and a copy of the balance sheet to which it relates, to be laid before the annual general meeting of each participating exchange next following the making of that report.

934 Investment of Fund

- (1) Money in the Fund that, in the opinion of the Board, is not immediately required for the purposes of SEGC may be invested by SEGC in a permitted manner.
- (2) Property in which money is invested under subsection (1) forms part of the Fund.
- (3) Subject to subsection (4), the Board may, with the approval of ASIC, appoint a person to invest on behalf of SEGC money to which subsection (1) applies.
- (4) ASIC must not grant approval to the appointment of a person under subsection (3) unless it is satisfied that:
 - (a) the person has appropriate qualifications and expertise to perform the duties of the appointment; and
 - (b) SEGC 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.

- (5) A person appointed under subsection (3) must perform the duties of the appointment in accordance with the directions of the Board and subject to such conditions (if any) as the Board imposes.

935 Interest and profits from investment of Fund

- (1) The interest and profits from time to time accruing from the investment of the Fund must be applied by SEGC to pay:
 - (a) the expenses incurred in the administration of the Fund, including the salaries and wages of persons employed by SEGC or the Board in relation to the Fund; and
 - (b) all premiums payable in respect of contracts of insurance or indemnity entered into by SEGC under section 982; and
 - (c) principal, interest and other amounts payable by SEGC in respect of money borrowed, and security given, under section 930A.
- (2) An amount of interest or profit that accrues from the investment of the Fund and is not immediately required for the purposes referred to in subsection (1) must be paid into the Fund.

936 Minimum amount of Fund

SEGC may, with the written approval of the Minister, determine, by notice published in the *Gazette*, an amount (whether greater than, or less than, \$15,000,000) to be the minimum amount of the Fund for the purposes of the Fund provisions.

Division 4—Levies where Fund less than minimum amount

937 Definition

In this Division:

dealer means a member organisation of a participating exchange.

938 Levy on transactions

(1) In this section:

leviable dealer, in relation to a transaction, means:

- (a) if, when the transaction is entered into, a determination under subsection (10) is in force in relation to a class of transactions that includes the first-mentioned transaction—the dealer prescribed by the determination; or
- (b) otherwise:
 - (i) in the case of a sale of securities—the dealer selling the securities; or
 - (ii) in the case of a purchase of securities—the dealer buying the securities; or
 - (iii) in the case of a guaranteed securities loan—the borrower.

leviable transaction means:

- (a) a sale or purchase of securities by a person or partnership where, as at the time when the agreement for the sale or purchase is made:
 - (i) the sale or purchase is a reportable transaction as defined in subsection 920(1); and
 - (ii) the person or partnership is a member organisation of a participating exchange and carries on a securities business in this jurisdiction; or
- (b) a guaranteed securities loan where, as at the time when the loan is entered into, the borrower carries on a securities business in this jurisdiction.

- (2) If the amount in the Fund is less than the minimum amount, SEGC may, whether or not it also makes a determination under section 940, determine in writing that a levy is payable on leviable transactions. The levy is payable to the Commonwealth in accordance with this section.

Note: For the imposition and rate of the levy, see the *Corporations (National Guarantee Fund Levies) Act 2001*.

- (3) A levy under subsection (2) is payable in respect of a leviable transaction included in a class of transactions, or in any of 2 or more classes of transactions, determined in writing by SEGC for the purposes of the levy.
- (4) If SEGC makes or varies a determination under subsection (3), it must give to each participating exchange a copy of the determination, or of the variation and of the determination as varied, as the case may be.
- (5) If an amount of levy is payable under this section in respect of a leviable transaction, the leviable dealer in relation to the transaction must:
- (a) pay the amount of the levy to a participating exchange of which the dealer is a member, as agent for the Commonwealth; and
 - (b) if, but for this subsection, the dealer would not be required by a provision of a law or by the participating exchange's business rules to give to the participating exchange particulars of the transaction sufficient to enable the participating exchange to ascertain the amount of levy—so give such particulars to the participating exchange; within the period, and in the manner, specified by the participating exchange in writing either generally or in relation to a class of transactions that includes the first-mentioned transaction.
- (6) Whenever an amount of levy (the **levy amount**) is paid under this section, or under subsection 6(1) of the *Corporations (National Guarantee Fund Levies) Act 2001*, to a participating exchange as agent for the Commonwealth:
- (a) the participating exchange must pay an amount equal to the levy amount to SEGC, as agent for the Commonwealth; and

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- (b) 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 SEGC; and
 - (d) the Commonwealth must pay the amount so appropriated to SEGC; and
 - (e) SEGC must pay the amount it receives under paragraph (d) into the Fund.
- (7) A payment of an amount to SEGC as required by paragraph (6)(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, SEGC must pay to the Commonwealth an amount equal to the amount that the Commonwealth is liable to refund. SEGC may pay, out of the Fund, any amount so required to be paid to the Commonwealth.
- (8) The *Financial Management and Accountability Act 1997* does not apply in relation to the payment of an amount of levy under this section to a participating exchange, or to SEGC, 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 (6)(b); or
 - (b) the payment of an amount by the Commonwealth as required by paragraph (6)(d).
- The participating exchange must, in accordance with the regulations, notify the Commonwealth of payments of levy it receives as agent for the Commonwealth.
- (9) An amount payable by SEGC as required by paragraph (6)(b) may be set off against an amount payable to SEGC as required by paragraph (6)(d).
- (10) SEGC may make a written determination prescribing, in relation to a class or classes of transactions, the dealer who is to be the leviable dealer in relation to a transaction in that class or in any of those classes.

939 Revocation of levy on transactions

If SEGC revokes a determination made under subsection 938(2), the revocation does not affect a liability to pay an amount of levy that became payable before the revocation.

940 Levy on participating exchanges

- (1) If the amount in the Fund is less than the minimum amount, SEGC may, whether or not it also makes a determination under subsection 938(2), determine in writing:
 - (a) if there are 2 or more participating exchanges that are securities exchanges:
 - (i) that a specified participating exchange that is a securities exchange must pay a levy; or
 - (ii) that each of 2 or more specified participating exchanges that are securities exchanges must pay a levy; or
 - (b) otherwise—that the Exchange must pay a levy

The levy is payable to SEGC, as agent for the Commonwealth, in accordance with this section.

Note: For the imposition and rate of the levy, see the *Corporations (National Guarantee Fund Levies) Act 2001*.

- (2) A levy payable under this section by a securities exchange must be paid within the period and in the manner determined in writing by SEGC for the purposes of the levy.
- (3) If a levy is payable under this section, SEGC must give to each participating exchange a notice setting out the name of the participating exchange that must pay the levy and the amount of the levy.
- (4) For the purpose of paying the whole or a part of a levy under this section, a participating exchange may borrow money on such terms as the board of the participating exchange thinks fit.
- (5) 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 SEGC as agent for the Commonwealth:

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- (a) 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 SEGC; and
 - (c) the Commonwealth must pay the amount so appropriated to SEGC; and
 - (d) SEGC must pay the amount it receives under paragraph (c) into the Fund.
- (6) A payment of an amount to SEGC as required by paragraph (5)(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, SEGC must pay to the Commonwealth an amount equal to the amount that the Commonwealth is liable to refund. SEGC may pay, out of the Fund, 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 SEGC 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 (5)(a); or
 - (b) the payment of an amount by the Commonwealth as required by paragraph (5)(c).
- SEGC must, in accordance with the regulations, notify the Commonwealth of payments of levy it receives as agent for the Commonwealth.
- (8) An amount payable by SEGC as required by paragraph (5)(a) may be set off against an amount payable to SEGC as required by paragraph (5)(c).

941 Levy by participating exchange on members or member organisations

- (1) A participating exchange by which a levy is payable under section 940 may determine that members, or member organisations, of the participating exchange must pay a levy for

payment towards the first-mentioned levy. The levy is payable to the participating exchange as agent for the Commonwealth.

Note: For the imposition and rate of the levy, see the *Corporations (National Guarantee Fund Levies) Act 2001*.

- (2) If a determination is made under subsection (1), a levy is payable by a member, or member organisation, as the case requires, of the participating exchange who or that, when the determination is made:
- (a) carries on a securities business; and
 - (b) is included in a class, or in any of 2 or more classes, of members, or of member organisations, of the participating exchange determined in writing by the participating exchange for the purposes of the levy.
- (3) The amount of a levy payable under a determination by a participating exchange under subsection (1) must be paid within the period, and in the manner, specified in writing by the participating exchange either generally or in relation to:
- (a) particular members; or
 - (b) particular classes of members; or
 - (c) particular member organisations; or
 - (d) particular classes of member organisations;
- of the participating exchange.
- (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 a participating exchange as agent for the Commonwealth:
- (a) the participating exchange 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 participating exchange; and
 - (c) the Commonwealth must pay the amount so appropriated to the participating exchange; and
 - (d) the participating exchange must pay an amount equal to the amount it receives under paragraph (c) in payment of the levy payable by it under section 940.

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- (5) A payment of an amount to a participating exchange 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 participating exchange must pay to the Commonwealth an amount equal to the amount that the Commonwealth is liable to refund.
- (6) The *Financial Management and Accountability Act 1997* does not apply in relation to the payment of an amount of levy under this section to a participating exchange 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 participating exchange 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 a participating exchange as required by paragraph (5)(a) may be set off against an amount payable to the participating exchange as required by paragraph (5)(c).

Division 5—Securities industry development accounts

943 Interpretation

In this Division:

development account means an account kept for the purposes of subsection 945(1).

944 Payments where Fund exceeds minimum amount

- (1) Where the amount in the Fund exceeds the minimum amount, the Board may, in its discretion, determine in writing that a specified amount equal to the whole or a part of the excess be paid out of the Fund:
 - (a) if the Exchange is the only participating exchange—to the Exchange; or
 - (b) if there are 2 or more participating exchanges:
 - (i) to a specified participating exchange; or
 - (ii) to 2 or more specified participating exchanges in specified proportions.
- (2) Where there are 2 or more participating exchanges, a determination under subsection (1) must be fair and equitable having regard, in relation to each participating exchange, to:
 - (a) the amounts that have been paid into the Fund and that are attributable to, or to members or member organisations of, that participating exchange; and
 - (b) the amounts that have been paid out of the Fund and that are so attributable.
- (3) Where a determination is made in accordance with this section, the amount specified in the determination must be paid out of the Fund in accordance with the determination.
- (4) For the purposes of subsection (2), where:
 - (a) money in the fidelity fund of a securities exchange has been paid into the Fund under subsection 985(1); or

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- (b) property of the fidelity fund of a securities exchange (other than money in that fidelity fund) has vested in SEGC, and become part of the Fund, by virtue of subsection 985(2); the amount of that money is taken, or an amount equal to the value of that property is taken, as the case may be, to have been paid into the Fund and to be attributable to:
 - (c) in the case of an Exchange subsidiary—the Exchange; or
 - (d) otherwise—that securities exchange.
- (5) For the purposes of subsection (2), where an amount is paid out of the Fund in connection with a claim that is, for the purposes of Division 10, a transferred claim in relation to a securities exchange, the amount is taken to be attributable to:
 - (a) in the case of an Exchange subsidiary—the Exchange; or
 - (b) otherwise—that securities exchange.

945 Payments into and out of development account

- (1) Subject to this section, a participating exchange must keep money paid to it under section 944 in a separate account designated as a securities industry development account.
- (2) A participating exchange must not make a payment out of a development account unless the payment is made:
 - (a) for a purpose in relation to which an approval is in force under subsection (3) in relation to the payment; or
 - (b) into the Fund.
- (3) The Minister may approve in writing, in relation to payments to be made out of development accounts, purposes that are permitted purposes when the approval is given.
- (4) An approval under subsection (3) may include conditions relating to the payments to which the approval relates.
- (5) A participating exchange that makes, in contravention of subsection (2), a payment out of a development account must pay into the account, from its general funds, an amount equal to the amount of the first-mentioned payment.
- (6) A participating exchange that:

- (a) makes as permitted by virtue of paragraph (2)(a) a payment out of a development account; and
 - (b) contravenes a condition that, when the payment was made, was included in an approval in force under subsection (3) in relation to the payment;
- must pay into the account, from its general funds, an amount equal to the amount of the first-mentioned payment.
- (7) In this section:

permitted purpose means:

- (a) a purpose relating to the development of the securities industry in Australia or in a part of Australia; or
- (b) a prescribed purpose; or
- (c) without limiting the generality of paragraph (a) or (b), a purpose of reimbursing a person in respect of money that the person spent, before the relevant commencement, for a purpose of a kind referred to in paragraph (a) or (b).

946 Investment

- (1) Money that is in a development account kept by a participating exchange and is not immediately required for the purpose of making payments as permitted by subsection 945(2) may be invested by the participating exchange in a permitted manner.
- (2) The interest and profits from time to time accruing from the investment of money in a development account must be paid into the account.

947 Accounts

A participating exchange that is a securities exchange must, in respect of each financial year at any time during which there is money in a development account kept by the participating exchange, lodge with ASIC, within 3 months after the end of that financial year, a statement containing, in relation to payments out of such an account during that year, such information as is prescribed.

Division 6—Contract guarantees

948 Definitions

In this Division, unless the contrary intention appears:

claim means a claim under this Division against SEGC.

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

- (a) if the business rules of a participating exchange of which the dealer is a member organisation, being those business rules as in force when the agreement for the sale or purchase is made, prescribe a period, for the purposes of this paragraph, in relation to a class of sales or purchases that includes the sale or purchase—that period; or
- (b) otherwise—a period that is reasonable, having regard to all the circumstances relating to the sale or purchase.

dealer means a person who, or a partnership that, is or has at any time been a member organisation of a participating exchange.

Exchange body means the Exchange or a subsidiary of the Exchange.

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

- (a) if the business rules of a participating exchange of which the dealer is a member organisation, being those business rules as in force when the agreement for the sale or purchase is made, prescribe a period, for the purposes of this paragraph, in relation to a class of sales or purchases that includes the sale or purchase—that period; or
- (b) otherwise—a period that is reasonable, having regard to all the circumstances relating to the sale or purchase.

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

- (a) the amount of the consideration for the purchase; and

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

reportable transaction means a transaction, entered into before or after the commencement of this Act in relation to securities, that is or has at any time been a reportable transaction as defined in subsection 920(1).

948A Effect of using a transfer delivery service

If:

- (a) under an agreement for the sale or purchase of securities, or under a replacement agreement in relation to such an agreement that has been novated, a person or partnership is obliged to transfer securities of a particular kind and number to another person or partnership; and
- (b) for the purpose of discharging the obligation, the first-mentioned person or partnership:
 - (i) elects, in accordance with the transfer delivery service provisions of a settlement authority, to bring about a transfer of securities of that kind and number to the other person or partnership by the means provided for in those provisions; and
 - (ii) for the purpose of so bringing about that transfer, transfers securities of that kind and number to the TDS nominee;

then, for the purposes of the application of this Division in relation to the sale or purchase, the obligation of the first-mentioned person or partnership to supply settlement documents in relation to the sale or purchase is taken to be discharged by the transfer of securities to the TDS nominee.

949 Claim by selling dealer in respect of default by buying dealer

- (1) Where, as at the end of the completion period in relation to a reportable transaction that is a sale by a dealer to another dealer:
 - (a) the first-mentioned dealer:
 - (i) if a transfer of the securities concerned pursuant to the sale would be an SCH-regulated transfer—has done, or

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- is ready, willing and able to do, all things that that dealer is required to do under the SCH business rules to effect a transfer of the securities pursuant to the sale; or
- (ii) in any other case—has supplied, or is ready, willing and able to supply, to the other dealer, under the agreement for the sale, settlement documents in relation to the sale; and
- (b) the other dealer has not paid to the first-mentioned dealer, under that agreement, the consideration for the sale; the first-mentioned dealer may make a claim in respect of the sale.
- (2) A dealer may make a single claim under this section in respect of the total amount of the unpaid consideration in respect of 2 or more sales.
- (3) If the business rules of an Exchange body purport to authorise that body to make under this section on behalf of a dealer who is a member organisation of the Exchange a claim that the dealer is entitled to make, that body is entitled to make that claim on behalf of that dealer.
- (4) If an Exchange body is entitled under subsection (3) to make claims under this section on behalf of 2 or more dealers, that body is entitled to make a single claim under this section on behalf of both or all of those dealers in respect of the sum of the amounts in respect of which it is entitled to make separate claims on behalf of each of those dealers.
- (4A) If the SCH business rules purport to authorise the securities clearing house to make under this section on behalf of a dealer who is or was an SCH participant a claim that the dealer is entitled to make, the securities clearing house is entitled to make that claim on behalf of that dealer.
- (4B) If the securities clearing house is entitled under subsection (4A) to make claims under this section on behalf of 2 or more dealers, the securities clearing house is entitled to make a single claim under this section on behalf of both or all of those dealers in respect of the sum of the amounts in respect of which it is entitled to make separate claims on behalf of each of those dealers.

- (5) Where a dealer, or an Exchange body or the securities clearing house on behalf of a dealer, makes a claim in respect of a sale of securities by the dealer to another dealer and the Board is satisfied that:
- (a) subsection (1), (3) or (4A) entitles the claimant to make the claim; and
 - (aa) if a transfer of the securities pursuant to the sale would be an SCH-regulated transfer—the dealer:
 - (i) has done all things that the dealer is required to do under the SCH business rules to effect a transfer of the securities pursuant to the sale; or
 - (ii) has, for the purposes of the claim, in accordance with the SCH business rules, transferred to SEGC or to an Exchange body securities of the same kind and number as the first-mentioned securities; and
 - (b) if paragraph (aa) does not apply—the dealer has:
 - (i) for the purposes of the claim, supplied to SEGC; or
 - (ii) under the agreement for the sale, supplied to the other dealer;settlement documents in relation to the sale; and
 - (c) the consideration for the sale has not been paid to the dealer under the agreement for the sale; and
 - (d) the agreement has not been discharged or otherwise terminated;
- SEGC must allow the claim and pay to the claimant an amount equal to the amount of the consideration.
- (6) A claim made under subsection (2), (4) or (4B) is treated for the purposes of subsection (5) as if it consisted of a separate claim in respect of each of the sales to which it relates.
- (7) If a dealer transfers securities to an Exchange body as mentioned in subparagraph (5)(aa)(ii), the Exchange body must account to SEGC for those securities in accordance with the SCH business rules.

Section 950

950 Claim by buying dealer in respect of default by selling dealer

- (1) Where, as at the end of the completion period in relation to a reportable transaction that is a purchase by a dealer from another dealer:
 - (a) the first-mentioned dealer has supplied, or is ready, willing and able to supply, to the other dealer, under the agreement for the purchase, the consideration for the purchase; and
 - (b) the other dealer:
 - (i) if a transfer of the securities concerned pursuant to the purchase would be an SCH-regulated transfer—has not done all things that that dealer is required to do under the SCH business rules to effect a transfer of the securities pursuant to the purchase; or
 - (ii) in any other case—has not supplied to the first-mentioned dealer, under that agreement, settlement documents in relation to the purchase;

the first-mentioned dealer may make a claim in respect of the purchase.
- (1A) A dealer may make a single claim under this section in respect of 2 or more purchases.
- (1B) A claim made under subsection (1A) is to be treated for the purposes of subsection (2) as if it consisted of a separate claim in respect of each of the purchases to which it relates.
- (2) Where a dealer makes a claim in respect of a purchase of securities by the claimant from another dealer and the Board is satisfied that:
 - (a) subsection (1) entitles the claimant to make the claim; and
 - (b) the claimant has:
 - (i) for the purposes of the claim, paid to SEGC; or
 - (ii) under the agreement for the purchase, paid to the other dealer;

the amount of the consideration for the purchase; and

 - (ba) if a transfer of the securities pursuant to the purchase would be an SCH-regulated transfer—the other dealer has not done all things that that dealer is required to do under the SCH business rules to effect a transfer of the securities pursuant to the purchase; and

- (c) if paragraph (ba) does not apply—settlement documents in relation to the purchase have not been supplied to the claimant under the agreement for the purchase; and
- (d) the agreement has not been discharged or otherwise terminated;

SEGC must allow the claim.

(3) If:

- (a) SEGC allows under subsection (2) a claim in respect of a purchase of securities; and
- (b) a transfer of the securities pursuant to the purchase would be an SCH-regulated transfer;

SEGC must, subject to section 952A, transfer to the claimant securities of the same kind and number as the first-mentioned securities.

(4) If:

- (a) SEGC allows under subsection (2) a claim in respect of a purchase of securities; and
- (b) subsection (3) does not apply;

SEGC must, subject to section 953, supply to the claimant settlement documents in relation to the purchase.

950A Effect of novation, under business rules, of agreement for purchase

(1) Where:

- (a) a dealer (in this section called the *buyer*) agrees to buy securities from another dealer (in this section called the *seller*); and
- (b) the purchase is a reportable transaction; and
- (c) the agreement for the purchase is novated; and
- (d) under a replacement agreement, the seller becomes obliged to transfer securities to the buyer;

this section has effect for the purposes of:

- (e) making a claim under section 950 in respect of the purchase; and
- (f) the application of this Part (other than section 980) in relation to such a claim.

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- (2) Subject to subsections (3) and (4), the novation is to be disregarded.
- (3) If:
 - (a) the buyer's obligation to supply to the seller, under the agreement for the purchase, the consideration for the purchase is replaced by an obligation under a replacement agreement to pay an amount; and
 - (b) that obligation under the replacement agreement has been, or is to be, taken into account for the purposes of provisions of the business rules of a settlement authority that are of the kind referred to in subsection 954N(1);the buyer is taken to have so supplied the consideration for the purchase.
- (4) If the replacement agreement or agreements is or are discharged or otherwise terminated, the agreement for the purchase is taken to be discharged or otherwise terminated.

951 Claim by selling client in respect of default by selling dealer

- (1) Where, as at the end of the prescribed period in relation to a reportable transaction that is a sale by a dealer on behalf of a person:
 - (aa) if a transfer of the securities concerned pursuant to the sale would be an SCH-regulated transfer—the person:
 - (i) in a case to which subparagraph (ii) does not apply—has done all things necessary to enable the dealer to do all things that the dealer is required to do under the SCH business rules to effect a transfer of the securities pursuant to the sale; or
 - (ii) if the dealer has been suspended by the participating exchange concerned, or the dealer's status as an SCH participant has been suspended under the SCH business rules, and that suspension has not been removed—has done, or is ready, willing and able to do, all things necessary to enable the dealer to do all things that the dealer is required to do under the SCH business rules to effect a transfer of the securities pursuant to the sale; and

- (a) if paragraph (aa) does not apply—the person:
 - (i) in a case to which subparagraph (ii) does not apply—has supplied to the dealer settlement documents for the purposes of the sale; or
 - (ii) if the dealer has been suspended by the participating exchange concerned and the suspension has not been removed—has supplied, or is ready, willing and able to supply, to the dealer settlement documents for the purposes of the sale; and
 - (b) the dealer’s obligations to the person in respect of the sale, in so far as they relate to the consideration for the sale, have not been discharged;
- the person may make a claim in respect of the sale.
- (2) Where a person is entitled to make claims under subsection (1) in respect of 2 or more sales by the one dealer, the person may make a single claim in respect of 2 or more of those sales but a claim so made is treated for the purposes of subsection (3) as if it consisted of a separate claim in respect of each of those sales.
 - (3) Where a person makes a claim in respect of a sale of securities by a dealer on behalf of the claimant and the Board is satisfied that:
 - (a) subsection (1) entitles the claimant to make the claim; and
 - (aa) if a transfer of the securities pursuant to the sale would be an SCH-regulated transfer—the claimant:
 - (i) has done all things necessary to enable the dealer to do all things that the dealer is required to do under the SCH business rules to effect a transfer of the securities pursuant to the sale; or
 - (ii) has, for the purposes of the claim, in accordance with the SCH business rules, transferred to SEGC or to an Exchange body securities of the same kind and number as the first-mentioned securities; and
 - (b) if paragraph (aa) does not apply—the claimant has:
 - (i) under the agreement for the sale, supplied to the dealer; or
 - (ii) for the purposes of the claim, supplied to SEGC; settlement documents in relation to the sale; and

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- (c) the dealer's obligations to the claimant in respect of the sale, in so far as they relate to the consideration for the sale, have not been discharged;

SEGC must allow the claim and pay to the claimant the amount of that consideration less so much (if any) of the total of any brokerage fees and other charges, and any stamp duty and other duties and taxes, payable by the claimant in connection with the sale as has not already been paid by the claimant.

- (4) If a person transfers securities to an Exchange body as mentioned in subparagraph (3)(aa)(ii), the Exchange body must account to SEGC for those securities in accordance with the SCH business rules.

952 Claim by buying client in respect of default by buying dealer

- (1) Where, as at the end of the prescribed period in relation to a reportable transaction that is a purchase by a dealer on behalf of a person:

- (a) the person:

- (i) in a case to which subparagraph (ii) does not apply—has paid to the dealer the purchase price in relation to the purchase; or

- (ii) if the dealer has been suspended by the participating exchange concerned, or the dealer's status as an SCH participant has been suspended under the SCH business rules, and that suspension has not been removed—has paid, or is ready, willing and able to pay, to the dealer the purchase price in relation to the purchase; and

- (aa) if a transfer of the securities concerned pursuant to the purchase would be an SCH-regulated transfer—the dealer's obligations to the person in respect of the purchase, in so far as they relate to the transfer of securities to the person, have not been discharged; and

- (b) if paragraph (aa) does not apply—the dealer's obligations to the person in respect of the purchase, in so far as they relate to settlement documents in relation to the purchase, have not been discharged;

the person may make a claim in respect of the purchase.

- (2) Where a person is entitled to make claims under subsection (1) in respect of 2 or more purchases by the one dealer, the person may make a single claim in respect of 2 or more of those purchases but a claim so made is treated for the purposes of subsection (3) as if it consisted of a separate claim in respect of each of those purchases.
- (3) Where a person makes a claim in respect of a purchase of securities by a dealer on behalf of the claimant and the Board is satisfied that:
- (a) subsection (1) entitles the claimant to make the claim; and
 - (b) the claimant has:
 - (i) under the agreement for the purchase, paid to the dealer; or
 - (ii) for the purposes of the claim, paid to SEGC; the amount of the consideration for the purchase; and
 - (ba) if a transfer of the securities pursuant to the purchase would be an SCH-regulated transfer—the dealer’s obligations to the claimant in respect of the purchase, in so far as they relate to the transfer of securities to the claimant, have not been discharged; and
 - (c) if paragraph (ba) does not apply—the dealer’s obligations to the claimant in respect of the purchase, in so far as they relate to settlement documents in relation to the purchase, have not been discharged;
- SEGC must allow the claim.
- (4) If:
- (a) SEGC allows under subsection (3) a claim in respect of a purchase of securities by a dealer on behalf of a person; and
 - (b) a transfer of the securities pursuant to the purchase would be an SCH-regulated transfer;
- SEGC must, subject to section 952A, transfer to the claimant securities of the same kind and number as the first-mentioned securities.
- (5) If:
- (a) SEGC allows under subsection (3) a claim in respect of a purchase of securities by a dealer on behalf of a person; and
 - (b) subsection (4) does not apply;
- SEGC must, subject to section 953, supply to the claimant settlement documents in relation to the purchase.
-

Section 952A

952A Cash settlement of claims—SCH-regulated transfers

If:

- (a) SEGC:
 - (i) allows under subsection 950(2) a claim in respect of a purchase of securities by the claimant from a dealer; or
 - (ii) allows under subsection 952(3) a claim in respect of a purchase of securities by a dealer on behalf of the claimant; and
- (b) a transfer of the securities pursuant to the purchase would be an SCH-regulated transfer; and
- (c) it is not reasonably practicable for SEGC to obtain securities of the same kind and number as the first-mentioned securities from the dealer before the end of:
 - (i) if the SCH business rules, as in force when the Board allows the claim, prescribe a period, for the purposes of this section, in relation to a class of claims that includes the claim—that period; or
 - (ii) otherwise—such period as the Board, having regard to all the circumstances of the claim, considers reasonable; and
- (d) it is not reasonably practicable for SEGC to obtain, otherwise than from the dealer, securities of that kind and number before the end of that period because:
 - (i) whether because that dealing in those securities is suspended or for any other reason, there exists at no time during that period an orderly market in those securities; or
 - (ii) the total number of those securities offered for sale on stock markets of participating exchanges or Exchange subsidiaries at times during that period when there exists an orderly market in those securities is insufficient;

SEGC must satisfy the claim by paying to the claimant the amount that, when the claimant became entitled to make the claim, was the amount of the actual pecuniary loss suffered by the claimant in respect of the purchase.

953 Cash settlement of claims—transfers other than SCH-regulated transfers

Where:

(a) SEGC:

- (i) allows under subsection 950(2) a claim in respect of a purchase of securities by the claimant from a dealer; or
- (ii) allows under subsection 952(3) a claim in respect of a purchase of securities by a dealer on behalf of the claimant; and

(aa) a transfer of the securities pursuant to the purchase would not be an SCH-regulated transfer; and

(b) it is not reasonably practicable for SEGC to obtain from the dealer, before the end of:

- (i) if the business rules of a participating exchange of which the dealer is a member organisation, being those business rules as in force when the Board allows the claim, prescribe a period, for the purposes of this section, in relation to a class of claims that includes the claim—that period; or
- (ii) otherwise—such period as the Board, having regard to all the circumstances relating to the claim, considers reasonable;

settlement documents in relation to the purchase; and

(c) because:

- (i) whether by reason that dealing in those securities is suspended or for any other reason, there exists at no time during that period an orderly market in those securities; or
- (ii) the total number of those securities offered for sale on stock markets of participating exchanges or Exchange subsidiaries at times during that period when there exists an orderly market in those securities is insufficient; and

it is not reasonably practicable for SEGC to obtain before the end of that period, otherwise than from the dealer, settlement documents in relation to the purchase;

SEGC must satisfy the claim by paying to the claimant the amount that, when the claimant became entitled to make the claim, was the

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amount of the actual pecuniary loss suffered by the claimant in respect of the purchase.

954 Making of claims

- (1) Neither subsection 949(1) nor 950(1) entitles a person to make a claim in respect of:
 - (a) a sale of securities by the person to another person; or
 - (b) a purchase of securities by the person from another person;as the case may be, unless, on the day on which the agreement for the sale or purchase was entered into:
 - (c) the first-mentioned person was a member organisation of a participating exchange and carried on in this jurisdiction a securities business; and
 - (d) the other person was a member organisation of a participating exchange.
- (2) Neither subsection 951(1) nor 952(1) entitles a person to make a claim in respect of:
 - (a) a sale of securities by another person on behalf of the first-mentioned person; or
 - (b) a purchase of securities by another person on behalf of the first-mentioned person;as the case may be, unless, on the day on which the agreement for the sale or purchase was entered into, the other person was a member organisation of a participating exchange and carried on in this jurisdiction a securities business.
- (3) In subsections (1), (2) and (2A):

person includes a partnership.
- (4) A claim must be in writing and must be served on SEGC within 6 months after the day on which the claimant became entitled to make the claim.
- (5) A claim that is not made within the period prescribed by subsection (4) is barred unless the Board otherwise determines.

Division 6A—Securities loans guarantees

954A Interpretation—general definitions

(1) In this Division:

borrower, in relation to a guaranteed securities loan, has the meaning given by section 954B.

claim means a claim under this Division against SEGC.

compliance period, in relation to an obligation under a guaranteed securities loan, means:

- (a) if the business rules of the lender as in force when the loan is made prescribe a period in relation to the obligation for the purposes of this paragraph—that period; or
- (b) otherwise—a period that is reasonable having regard to the obligation and all the circumstances relating to the loan.

excluded amount, in relation to a guaranteed securities loan, means an amount payable by the borrower by way of a fee or charge, or by way of interest or a penalty, in respect of the loan.

guaranteed securities loan has the meaning given by section 954B.

lender, in relation to a guaranteed securities loan, has the meaning given by section 954B.

security benefit means:

- (a) property (other than securities) or money transferred or paid to a person because the person is or was the holder of a security; or
- (b) a right that a person has because the person is or was the holder of a security, including, for example:
 - (i) a right to be paid an amount or to be issued with additional securities; or
 - (ii) a right that arises out of a reduction in share capital, a scheme of arrangement or compromise or a takeover bid.

Section 954B

- (2) A reference in the definition of *security benefit* in subsection (1) to a right is a reference to a right, whether existing or future, and whether contingent or not.

954B Interpretation—guaranteed securities loan and related concepts

- (1) For the purposes of this Part, an agreement is a guaranteed securities loan if:
- (a) under the agreement:
 - (i) a participating exchange is to transfer securities of a specified kind and number to, or as directed by, a person or partnership; and
 - (ii) in order to put the participating exchange in the same position (as nearly as practicable) as if the agreement had not been made, the person or partnership is later to transfer to, or as directed by, the participating exchange such securities and security benefits as the agreement requires; and
 - (b) the person or partnership is a member organisation of the participating exchange on the day when the agreement is entered into; and
 - (c) the agreement is or was entered into after 18 December 1991; and
 - (d) the agreement is of a kind that, according to the business rules of the participating exchange, is to be guaranteed under this Division.
- (2) For the purposes of the application of this Part in relation to a guaranteed securities loan:
- (a) the participating exchange referred to in subparagraph (1)(a)(i) is the *lender*; and
 - (b) the person or partnership referred to in subparagraph (1)(a)(i) is the *borrower*; and
 - (c) the securities transferred as mentioned in subparagraph (1)(a)(i) are *borrowed securities*.
- (3) The fact that an agreement includes obligations in addition to those mentioned in subsection (1) does not prevent the agreement from being a guaranteed securities loan.

954C Effect of using a transfer delivery service

If:

- (a) under a guaranteed securities loan, or under a replacement agreement in relation to a guaranteed securities loan that has been novated, a person or partnership is obliged to transfer securities of a particular kind to, or as directed by, another person or partnership; and
- (b) for the purpose of wholly or partly discharging the obligation, the first-mentioned person or partnership:
 - (i) elects, in accordance with the transfer delivery service provisions of a settlement authority, to bring about a transfer of a particular number of securities of that kind to, or as directed by, the other person or partnership by the means provided for in those provisions; and
 - (ii) for the purpose of so bringing about that transfer, transfers that number of securities of that kind to the TDS nominee;

then, for the purposes of the application of this Division in relation to the guaranteed securities loan, the obligations of the first-mentioned person or partnership to transfer securities under the loan are taken to be discharged, to the extent of that number of securities of that kind, by the transfer of securities to the TDS nominee.

954D Claim by lender in respect of borrower's failure to discharge obligation

- (1) If, as at the end of the compliance period in relation to an obligation of the borrower under a guaranteed securities loan to transfer or pay securities or security benefits, or to pay some other amount (except an excluded amount):
 - (a) the lender has transferred borrowed securities in accordance with the agreement; and
 - (b) the obligation remains undischarged to any extent;the lender may make a claim in respect of the obligation.
- (2) A participating exchange may make a single claim under this section in respect of a number of obligations, whether arising under the same or different guaranteed securities loans.

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- (3) A claim made under subsection (2) is to be treated for the purposes of sections 954G and 954H as if it were a separate claim in respect of each of the obligations to which it relates.

954E Effect of novation, under business rules, of guaranteed securities loan

- (1) Where:
- (a) an agreement is novated; and
 - (b) before the novation, the agreement was a guaranteed securities loan;
- this section has effect for the purposes of:
- (c) making a claim under section 954D in respect of the loan; and
 - (d) the application of this Part (other than section 980) in relation to such a claim.
- (2) Subject to subsections (3) and (4), the novation is to be disregarded.
- (3) If:
- (a) an obligation under the loan to pay an amount is replaced by an obligation under a replacement agreement to pay an amount; and
 - (b) that obligation under the replacement agreement has been, or is to be, taken into account for the purposes of provisions of the business rules of a settlement authority that are of the kind referred to in subsection 954N(1);
- the obligation to pay that amount under the loan is taken to be discharged.
- (4) If the replacement agreement or agreements is or are discharged or otherwise terminated, the loan agreement is taken to be discharged or otherwise terminated.

954F How and when claim to be made

- (1) A claim must be in writing and must be served on SEGC within 6 months after the day when the claimant became entitled to make the claim.

- (2) A claim that is not made within the period required by subsection (1) is barred unless the Board otherwise determines.

954G How claim in respect of securities or non-money security benefits is to be satisfied

- (1) SEGC must allow a claim in respect of an obligation under a guaranteed securities loan to transfer securities or security benefits (other than money) if the Board is satisfied that:
- (a) the claimant is entitled to make the claim; and
 - (b) the obligation is still undischarged to the extent of a particular number of securities or security benefits of a particular kind (in this section called the *outstanding items*).
- (2) Subject to subsection (3), if:
- (a) SEGC allows the claim; and
 - (b) the claimant has:
 - (i) under the guaranteed securities loan, paid as directed by the borrower; or
 - (ii) for the purposes of the claim, paid to SEGC; each amount (if any) required to be paid under the loan by the claimant upon the discharge of the obligation;
- SEGC must transfer to, or as directed by, the claimant, securities or security benefits of the same kind and number as the outstanding items.
- (3) If:
- (a) SEGC allows the claim; and
 - (b) either:
 - (i) paragraph (2)(b) is not satisfied; or
 - (ii) paragraph (2)(b) is satisfied but the Board is satisfied that it is not reasonably practicable for SEGC to obtain securities or security benefits of the same kind and number as the outstanding items within the pre-cash settlement period;
- SEGC must satisfy the claim by paying to the claimant the amount that, as at the time when the Board decides it is so satisfied, is the actual pecuniary loss suffered by the claimant in respect of the failure to discharge the obligation.

Section 954H

(4) In working out the amount of the actual pecuniary loss suffered in respect of the failure to discharge the obligation, regard may be had to the cost to the claimant of any securities or security benefits of the same kind as the outstanding items that the claimant obtained because the obligation was not discharged.

(5) In this section:

pre-cash settlement period means:

- (a) if the business rules of the claimant, as in force when the Board allows the claim, prescribe a period, for the purposes of this section, in relation to a class of claims that includes the claim—that period; or
- (b) otherwise—such period as the Board, having regard to all the circumstances of the claim, considers reasonable.

954H How claim in respect of an amount of money is to be satisfied

- (1) SEGC must allow a claim in respect of an obligation under a guaranteed securities loan to pay a security benefit that is an amount of money, or to pay some other amount, if the Board is satisfied that:
 - (a) the claimant is entitled to make the claim; and
 - (b) the obligation is still undischarged to the extent of a particular amount (in this section called the *outstanding amount*).
- (2) If SEGC allows the claim, it must pay to, or as directed by, the claimant an amount equal to the outstanding amount.

Division 6B—Claims in respect of net obligations

954L Interpretation

In this Division:

claim means a claim under this Division against SEGC.

dealer, in relation to a participating exchange, means the participating exchange or a member organisation of the participating exchange.

954M Effect of using a transfer delivery service

If:

- (a) a person or partnership (in this section called the *transferor*) is, under provisions of a kind referred to in subsection 954P(1), obliged to transfer securities of a particular kind to another person or partnership (in this section called the *transferee*); and
- (b) for the purpose of wholly or partly discharging the obligation, the transferor:
 - (i) elects, in accordance with the transfer delivery service provisions of a settlement authority, to bring about a transfer of a particular number of securities of that kind to the transferee by the means provided for in those provisions; and
 - (ii) for the purpose of so bringing about the transfer, transfers that number of securities of that kind to the TDS nominee;

then, for the purposes of the application of this Division, the obligation is taken to have been discharged, to the extent of that number of securities of that kind, by the transfer of securities to the TDS nominee.

954N Claim in respect of failure to pay net amount in respect of transactions

(1) If:

Section 954P

- (a) under provisions of the business rules of a settlement authority, the total of the amounts that become due and payable to a dealer by a subsidiary of the settlement authority on a particular day in respect of transactions (as defined in the business rules) of a kind or kinds specified in the business rules is set off against the total of the amounts that become due and payable by the dealer to the subsidiary on that day in respect of transactions (as so defined) of that kind or those kinds; and
 - (b) depending on which of those totals is the greater, the provisions oblige:
 - (i) the dealer to pay to the subsidiary, or to some other person or persons nominated under the provisions; or
 - (ii) the subsidiary, or some other dealer or dealers nominated under the provisions, to pay to the dealer, or to some other person or persons nominated under the provisions;within a specified period, the difference between those totals; and
 - (c) as at the end of that period, that obligation remains undischarged to the extent of a particular amount; the person to which the amount is payable may make a claim in respect of the obligation.
- (2) Entitlement to make the claim is not affected by a dealer ceasing to be a member organisation of a participating exchange after the obligation arose.
 - (3) For the purposes of this section, a total may be a nil amount.
 - (4) In this section:

person includes a partnership.

954P Claim in respect of failure to transfer net number of securities in respect of transactions

- (1) This section applies if:
 - (a) under provisions of the business rules of a settlement authority, the total number of securities of a particular kind to be transferred on a particular day to a dealer by a subsidiary

- of the settlement authority in respect of transactions (as defined in the business rules) of a kind or kinds specified in the business rules is set off against the total number of securities of that kind to be transferred on that day by the dealer to the subsidiary in respect of transactions (as so defined) of that kind or those kinds; and
- (b) depending on which of those totals is the greater, the provisions oblige:
- (i) the dealer to transfer to some other person or persons nominated under the provisions; or
 - (ii) some other dealer or dealers nominated under the provisions to transfer to the dealer, or to some other person or persons nominated under the provisions;
- within a specified period, securities of that kind equal in number to the difference between those totals; and
- (c) as at the end of that period, the obligation to transfer, or any of the obligations to transfer, as the case requires, remains undischarged to the extent of a particular number of securities of that kind (in this section called the ***default securities***).
- (2) If the settlement authority has not taken action as mentioned in subsection (3), the person to which the default securities should have been transferred may make a claim in respect of the failure to transfer the default securities.
- (3) If, for the purpose of remedying the failure to transfer the default securities, the settlement authority has transferred securities of the same kind and number as the default securities to the person to which the default securities should have been transferred:
- (a) the settlement authority is subrogated to all the rights and remedies of the person in relation to the failure to transfer the default securities; and
 - (b) the settlement authority may make a claim in respect of its actions to remedy the failure; and
 - (c) any claim made under subsection (2) in respect of the failure is taken not to have been entitled to be made.
- (4) Entitlement to make a claim is not affected by a dealer ceasing to be a member organisation of a participating exchange after the obligation to transfer arose.
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Section 954Q

(5) For the purposes of this section, a total number of marketable securities of a particular kind may be zero.

(6) In this section:

person includes a partnership.

954Q How and when claim to be made

(1) A claim must be in writing and must be served on SEGC within 6 months after the day on which the claimant became entitled to make the claim.

(2) A claim that is not made within the period required by subsection (1) is barred unless the Board otherwise determines.

954R How claim under subsection 954N(1) is to be satisfied

(1) SEGC must allow a claim under subsection 954N(1) if the Board is satisfied that:

- (a) the claimant is entitled to make the claim; and
- (b) the obligation referred to in paragraph 954N(1)(c) still remains undischarged to the extent of a particular amount.

(2) If SEGC allows the claim, SEGC must pay to the claimant the amount referred to in paragraph (1)(b).

954S How claim under subsection 954P(2) is to be satisfied

(1) SEGC must allow a claim under subsection 954P(2) if the Board is satisfied that:

- (a) the claimant is entitled to make the claim; and
- (b) the obligation referred to in paragraph 954P(1)(c) still remains undischarged to the extent of a particular number of securities of a particular kind (in this section called the *outstanding securities*).

(2) Subject to subsection (3), if SEGC allows the claim, it must transfer to the claimant securities of the same kind and number as the outstanding securities.

- (3) If the Board is satisfied that it is not reasonably practicable for SEGC to obtain securities of the same kind and number as the outstanding securities within the pre-cash settlement period, SEGC must satisfy the claim by paying to the claimant the amount that, as at the time when the Board decides it is so satisfied, is the actual pecuniary loss suffered by the claimant in respect of the failure to transfer the outstanding securities.
- (4) In working out the amount of the actual pecuniary loss suffered in respect of the failure to transfer the outstanding securities, regard may be had to the cost to the claimant of any securities of the same kind as the outstanding securities that the claimant obtained because the outstanding securities were not transferred.
- (5) In this section:
pre-cash settlement period means:
 - (a) if the business rules of the settlement authority that is referred to in paragraph 954P(1)(a), as in force when the Board allows the claim, prescribe a period, for the purposes of this section, in relation to a class of claims that includes the claim—that period; or
 - (b) otherwise—such period as the Board, having regard to all the circumstances of the claim, considers reasonable.

954T How claim under subsection 954P(3) is to be satisfied

- (1) SEGC must allow a claim by a settlement authority under subsection 954P(3) if the Board is satisfied that:
 - (a) the settlement authority is entitled to make the claim; and
 - (b) the settlement authority has paid or transferred to SEGC any money or property it has obtained because of the right of subrogation given by paragraph 954P(3)(a) in relation to the failure to transfer the default securities.
- (2) If SEGC allows the claim, it must pay to the settlement authority the amount that, as at the time when the claim is allowed, is the actual pecuniary loss suffered by the settlement authority because of the actions it has taken to remedy its subsidiary's default.
- (3) In working out the amount of the actual pecuniary loss suffered in respect of the actions taken by the settlement authority to remedy

Chapter 7 Securities

Part 7.10 The National Guarantee Fund

Division 6B Claims in respect of net obligations

Section 954T

its subsidiary's default, regard may be had to the cost to the settlement authority of obtaining the securities transferred as mentioned in subsection 954P(3).

- (4) Money or property paid or transferred to SEGC under paragraph (1)(b) forms part of the Fund.

Division 6C—Transfer delivery service guarantees

954W Interpretation

In this Division:

claim means a claim under this Division against SEGC.

claimable obligation means:

- (a) an obligation to transfer securities under an agreement for the purchase of securities, where the purchase is, for the purposes of Division 6, a reportable transaction; or
- (b) an obligation to transfer securities under a replacement agreement in relation to an agreement of the kind referred to in paragraph (a) that has been novated; or
- (c) an obligation to transfer securities under a guaranteed securities loan; or
- (d) an obligation to transfer securities under a replacement agreement in relation to a guaranteed securities loan that has been novated; or
- (e) an obligation to transfer securities that arose as mentioned in paragraph 954P(1)(b).

discharge, in relation to an obligation, means:

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

purchase obligation means an obligation of the kind referred to in paragraph (a) of the definition of *claimable obligation*.

954X Claims in respect of default by TDS nominee

- (1) This section applies if:
 - (a) a person or partnership (in this Division called the *transferor*) is obliged to transfer securities of a particular kind to, or as directed by, another person or partnership (in this Division called the *transferee*); and

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- (b) the obligation is a claimable obligation; and
 - (c) for the purpose of discharging the obligation, the transferor:
 - (i) elects, in accordance with the transfer delivery service provisions of a settlement authority, to bring about a transfer of a particular number of securities of that kind to, or as directed by, the transferee by the means provided for in those provisions; and
 - (ii) for the purpose of so bringing about the transfer, transfers that number of securities of that kind to the TDS nominee; and
 - (d) for the purpose of bringing about the transfer of securities referred to in subparagraph (c)(i) by the means provided for in those provisions, the TDS nominee later purports to transfer that number of securities of that kind to, or as directed by, the transferee; and
 - (e) the TDS nominee is in default under the transfer delivery service provisions because the transfer documents in relation to the purported transfer, so far as they relate to a particular number of securities of that kind (in this Division called the *default securities*), are not sufficient for the purpose referred to in subsection 924(2); and
 - (f) if the obligation is a purchase obligation—the transferee has paid, or is ready, willing and able to pay, to the transferor, under the agreement for the purchase, the consideration for the purchase.
- (2) If the settlement authority has not taken action as mentioned in paragraph (3)(a) or (b), the transferee (even if it is the settlement authority) may make a claim in respect of the TDS nominee's default.
- (3) If the settlement authority has, for the purpose of remedying the TDS nominee's default:
- (a) where the settlement authority is also the transferee—obtained marketable securities of the same kind and number as the default securities; or
 - (b) otherwise—transferred securities of the same kind and number as the default securities to, or as directed by, the transferee;
- the following provisions have effect:
-

- (c) unless the settlement authority is also the transferee—the settlement authority is subrogated to all the rights and remedies of the transferee in relation to the purported transfer of securities by the TDS nominee; and
 - (d) the settlement authority may make a claim in respect of its actions to remedy the default; and
 - (e) any claim made under subsection (2) in respect of the TDS nominee's default is taken not to have been entitled to be made.
- (4) A person or partnership may make a single claim under subsection (2) or (3) in respect of 2 or more defaults.
 - (5) A claim made under subsection (4) is to be treated for the purposes of sections 954Z and 954ZA as if it were a separate claim in respect of each of the defaults to which it relates.
 - (6) Entitlement to make a claim in respect of a claimable obligation is not affected by a person or partnership ceasing after the obligation arose to be a member organisation of a participating exchange.

954Y How and when claim to be made

- (1) A claim must be in writing and must be served on SEGC within 6 months after the day on which the claimant became entitled to make the claim.
- (2) A claim that is not made within the period required by subsection (1) is barred unless the Board otherwise determines.

954Z How claim under subsection 954X(2) is to be satisfied

- (1) SEGC must allow a claim under subsection 954X(2) if the Board is satisfied that:
 - (a) the claimant is entitled to make the claim; and
 - (b) if paragraph 954X(1)(f) applies—the claimant has:
 - (i) paid to the transferor; or
 - (ii) for the purposes of the claim, paid to SEGC; the consideration, under the agreement for the purchase, for the purchase.

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- (2) Subject to subsection (3), if SEGC allows the claim, it must transfer to, or as directed by, the claimant securities of the same kind and number as the default securities.
- (3) If the Board is satisfied that it is not reasonably practicable for SEGC to obtain securities of the same kind and number as the default securities within the pre-cash settlement period, SEGC must satisfy the claim by paying to the claimant the amount that, as at the time when the Board decides that it is so satisfied, is the actual pecuniary loss suffered by the claimant in respect of the TDS nominee's default.
- (4) In working out the amount of the actual pecuniary loss suffered in respect of the TDS nominee's default, regard may be had to the cost to the claimant of any securities of the same kind as the default securities that the claimant obtained because the TDS nominee failed to transfer the default securities.
- (5) In this section:

pre-cash settlement period means:

- (a) if the business rules of the settlement authority concerned, as in force when the Board allows the claim, prescribe a period, for the purposes of this section, in relation to a class of claims that includes the claim—that period; or
- (b) otherwise—such period as the Board, having regard to all the circumstances of the claim, considers reasonable.

954ZA How claim under subsection 954X(3) is to be satisfied

- (1) Subject to section 954ZD, SEGC must allow a claim under subsection 954X(3) if the Board is satisfied that:
 - (a) the claimant is entitled to make the claim; and
 - (b) if paragraph 954X(1)(f) applies—the transferee has paid to the transferor the consideration payable, under the agreement for the purchase, for the purchase; and
 - (c) the claimant has paid or transferred to SEGC any money or property it has obtained because of the right of subrogation given by paragraph 954X(3)(c) in relation to the purported transfer of securities by the TDS nominee.

- (2) If SEGC allows the claim, it must pay to the claimant the amount that, as at the time when the claim is allowed, is the actual pecuniary loss suffered by the claimant because of the actions it has taken to remedy the TDS nominee's default.
- (3) In working out the amount of the actual pecuniary loss suffered in respect of actions taken by the claimant to remedy the TDS nominee's default, regard may be had to the cost to the claimant of obtaining the securities obtained or transferred as mentioned in paragraph 954X(3)(a) or (b), as the case requires.
- (4) Money or property paid or transferred to SEGC under paragraph (1)(c) forms part of the Fund.

Division 7—Unauthorised transfer

955 Interpretation

- (1) In this Division, unless the contrary intention appears:
- claim* means a claim under this Division against SEGC.
- dealer* means a member of a participating exchange.
- securities* means marketable securities or marketable rights within the meaning of Division 3 of Part 7.13.
- transferor* has the meaning given by paragraph 956(3)(b).
- transferred securities* has the meaning given by paragraph 956(3)(c).
- unauthorised execution* has the meaning given by paragraph 956(3)(a).
- (2) For the purposes of subsection 956(1), a dealer is taken to have executed a document of transfer in relation to securities on behalf of a person as transferor of the securities if the document states that the person is the transferor of the securities and purports to have been stamped with the dealer's stamp as the transferor's broker.

955A Extended application of Division to non-marketable securities

- (1) If a declaration by ASIC under subsection 1113A(1) is in force in relation to particular non-marketable securities, or a particular class of non-marketable securities:
- (a) this Division, including the regulations made for the purposes of the provisions of this Division, applies in relation to those non-marketable securities, or non-marketable securities of that class, as if they were securities as defined in subsection 955(1); and
- (b) ASIC may, by writing, declare that this Division, and regulations made for the purposes of this Division, are to have effect in relation to their application to those non-marketable securities, or non-marketable securities of

that class, subject to modifications specified in the declaration.

- (2) A declaration under paragraph (1)(b) has effect accordingly.
- (3) ASIC must cause a copy of a declaration under paragraph (1)(b) to be published in the *Gazette*.

- (4) In this section:

non-marketable securities has the same meaning as in section 1113A.

956 Situations to which Division applies

- (1) This Division applies if:
 - (a) a dealer executes a document of transfer of securities on behalf of a person as transferor of the securities; and
 - (b) the transfer is not an SCH-regulated transfer; and
 - (c) apart from the effect of paragraph 1105(3)(a), the person did not authorise the dealer to execute the document.
- (2) This Division also applies if:
 - (a) a dealer effects, or purports to effect, a proper SCH transfer of securities on behalf of a person; and
 - (b) apart from the effect of section 1109B, the person did not authorise the dealer to effect the transfer.
- (3) In this Division:
 - (a) the dealer's action referred to in whichever of paragraphs (1)(a) and (2)(a) is applicable is called the *unauthorised execution*; and
 - (b) the person referred to in whichever of those paragraphs is applicable is called the *transferor*; and
 - (c) the securities referred to in whichever of those paragraphs is applicable are called the *transferred securities*.

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957 Claim by transferor

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

958 Claim by transferee or sub-transferee

- (1) If, as a result of the unauthorised execution, a person (in this section called the *claimant*), being:
 - (a) in any case:
 - (i) if subsection 956(1) applies—the person stated in the document as the transferee of the transferred securities; or
 - (ii) if subsection 956(2) applies—the person in whose favour the proper SCH transfer was effected, or purported to be effected; or
 - (b) if that person has disposed of any of the transferred securities—a successor in title of that person to any of the transferred securities;suffers loss in respect of any of the transferred securities, the claimant may make a claim in respect of that loss.
- (2) A person is not entitled to make a claim under this section if the person:
 - (a) had actual knowledge that the transferor did not in fact authorise the unauthorised execution; or
 - (b) is an excluded person in relation to the dealer.

959 How and when claim may be made

- (1) A claim must:
 - (a) be in writing; and
 - (b) be served on SEGC:
 - (i) if a notice under subsection (4) applies to the claim—before the end of the last application day specified in the notice; or
 - (ii) in any other case—within 6 months after the day on which the claimant first became aware that the claimant

had suffered loss as a result of the unauthorised execution.

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

960 How claim is to be satisfied

- (1) Where the Board is satisfied that a claimant under section 957 or 958 is entitled to make the claim, SEGC must allow the claim.
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- (2) If SEGC allows the claim and the claimant has, as a result of the unauthorised execution, ceased to hold some or all of the transferred securities, SEGC must:
 - (a) subject to paragraph (b), supply to the claimant securities of the same kind and number as those of the transferred securities that the claimant has so ceased to hold; or
 - (b) if the Board is satisfied that it is not practicable for SEGC to obtain such securities, or to obtain such securities within a reasonable time—pay to the claimant the amount that, as at the time when the Board decides that it is so satisfied, is the actual pecuniary loss suffered by the claimant, in respect of the transferred securities, as a result of the unauthorised execution (other than loss suffered as mentioned in subsection (3)).
- (3) If SEGC allows the claim, it must pay to the claimant the amount that, as at the time when the claim is allowed, or when the Board decides as mentioned in paragraph (2)(b), as the case requires, is the actual pecuniary loss suffered by the claimant, as a result of the unauthorised execution, in respect of payments or other benefits:
 - (a) in any case—to which the claimant would have become entitled, as the holder of such of the transferred securities as the claimant has, as a result of the unauthorised execution, ceased to hold, if the claimant had continued to hold the securities concerned until that time; or
 - (b) if the claim was made under section 958—that the claimant has received as holder of any of the transferred securities.
- (4) For the purposes of this section, where securities are purportedly transferred from a person to another person, the first-mentioned person is taken to cease to hold, and the other person is taken to hold, the securities even if the other person did not by virtue of the transfer get a good title to the securities.

961 Discretionary further compensation to transferor

- (1) If SEGC allows a claim made under section 957 and the Board is satisfied that the supply of securities, or the payment of money, or both, as the case requires, to the claimant in accordance with section 960 will not adequately compensate the claimant in respect of a pecuniary or other gain that the claimant might, if the claimant

had continued to hold the transferred securities, have made but did not in fact make, the Board may determine in writing that there be paid to the claimant in respect of that gain a specified amount that the Board considers to be fair and reasonable in all the circumstances.

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

Division 7A—Contraventions of SCH certificate cancellation provisions

961C Interpretation

In this Division:

claim means a claim under this Division against SEGC.

dealer means a member of a participating exchange.

961D Claim in respect of contravention of SCH certificate cancellation provisions

- (1) Subject to this section, a person who suffers pecuniary loss in respect of a contravention, by a dealer, of the SCH certificate cancellation provisions may make a claim in respect of the loss.
- (2) The loss must not be a loss in respect of an unauthorised execution (within the meaning of section 956) in respect of which the person has made, or is entitled to make, a claim under Division 7.
- (3) The person must not have been involved in the contravention.
- (4) The dealer must have been a member of a participating exchange on the day of the contravention.

961E How and when claim may be made

- (1) A claim must:
 - (a) be in writing; and
 - (b) be served on SEGC:
 - (i) if a notice under subsection (4) applies to the claim—before the end of the last application day specified in the notice; or
 - (ii) in any other case—within 6 months after the day on which the claimant first became aware that the claimant had suffered loss as a result of the dealer's contravention of the SCH certificate cancellation provisions.

- (2) For the purposes of subsection (1), a notice under subsection (4) applies to a claim if the claim is in respect of a contravention of the SCH certificate cancellation provisions, by the dealer named in the notice, during the applicable period specified in the notice.
- (3) A claim that is not served on SEGC by the time required by paragraph (1)(b) is barred unless the Board otherwise determines.
- (4) SEGC may publish, in each State and Territory in a daily newspaper circulating in that State or Territory, a notice that:
 - (a) is in the prescribed form; and
 - (b) names a particular dealer; and
 - (c) requires that all claims in respect of contraventions of the SCH certificate cancellation provisions, by the named dealer, during a period (the *applicable period*) specified in the notice in accordance with subsection (5) must be served on SEGC before the day (the *last application day*) specified in the notice in accordance with subsection (6).
- (5) The applicable period must be a period that starts and ends before:
 - (a) if each publication of the notice occurs on the same day—the day on which the notice is published; or
 - (b) in any other case—the first day on which the notice is published.
- (6) The last application day must be at least 3 months after:
 - (a) if each publication of the notice occurs on the same day—the day on which the notice is published; or
 - (b) in any other case—the last day on which the notice is published.
- (7) SEGC, a member of the Board and any employee of, or person acting on behalf of, SEGC each have qualified privilege in respect of the publication of a notice under subsection (4).

961F How claim is to be satisfied

- (1) SEGC must allow a claim if the Board is satisfied that the claimant is entitled to make the claim.
- (2) If SEGC allows the claim, it must pay to the claimant the amount that, when the claim is allowed, is the actual pecuniary loss

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suffered by the claimant because of the contravention in respect of which the claim was made.

- (3) For the purposes of subsection (2), the actual pecuniary loss suffered by the claimant does not include any loss in respect of an unauthorised execution (within the meaning of section 956) in respect of which the claimant has made, or is entitled to make, a claim under Division 7.

961G Discretionary further compensation

- (1) If:
- (a) SEGC allows a claim; and
 - (b) the Board is satisfied that the payment of money to the claimant under section 961F will not adequately compensate the claimant for a pecuniary or other gain that the claimant did not make, but might have made, were it not for the contravention in respect of which the claim was made;
- the Board may determine in writing that the claimant should be paid in respect of that gain a specified amount that the Board considers to be fair and reasonable in all the circumstances.
- (2) If a determination is made under subsection (1), SEGC must pay the claimant the specified amount.

Division 8—Claims in respect of insolvent members

962 Interpretation

- (1) In this Division, unless the contrary intention appears:
- claim* means a claim against SEGC under this Division.
- dealer* means a member of a participating exchange.
- member organisation* means a member organisation of a participating exchange.
- (2) A reference in this Part to property being entrusted to, or received by, a person or partnership includes a reference to the property being entrusted to, or received by, the person or partnership outside this jurisdiction, whether in Australia or not.

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

- (1) Subject to this Division, where:
- (a) a dealer has at a particular time, whether before or after the commencement of this Part, become insolvent; and
- (b) at an earlier time (whether before or after that commencement), property was, in the course of, or in connection with, the dealer's business of dealing in securities, entrusted to, or received by:
- (i) if the dealer was, at the earlier time, a partner in a member organisation—the member organisation, or a partner in, or an employee of, the member organisation; or
- (ii) otherwise—the dealer or an employee of the dealer; and was so entrusted or received on behalf of, or because the dealer was a trustee of the property for, a person (other than an excluded person in relation to the dealer); and
- (c) as at the first-mentioned time, the obligations of the dealer, or of a member organisation in which the dealer is a partner, as

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the case requires, to the person in respect of the property have not been discharged;

the person may make a claim in respect of the property.

- (2) Where a person makes a claim in respect of property and, at a particular time, the Board is satisfied that:
- (a) because of a dealer having become insolvent, this Division entitles the claimant to make the claim; and
 - (b) as at that time, the obligations of the dealer, or of a member organisation in which the dealer is a partner, as the case requires, to the claimant in respect of the property have not been discharged;

SEGC must allow the claim and:

- (c) if the property is, or includes, money—pay to the claimant an amount equal to the amount of that money; and
 - (d) if the property is, or includes, property other than money—subject to subsection (3) and section 964, supply the last-mentioned property to the claimant.
- (3) Where:
- (a) SEGC allows a claim that, because of a dealer having become insolvent, this Division entitles a person to make in respect of property that is, or includes, a number of securities of a particular kind or documents of title to a number of securities of a particular kind; and
 - (b) it is not reasonably practicable for SEGC to obtain those securities, or those documents of title to securities, as the case may be, from the dealer or, if the dealer has disposed of them, from the dealer's successor in title, before the end of:
 - (i) if the business rules of a participating exchange of which the dealer is a member, being those business rules as in force when the Board allows the claim, prescribe a period, for the purposes of this section, in relation to a class of claims that includes that claim—that period; or
 - (ii) otherwise—such period as the Board, having regard to all the circumstances relating to the claim, considers reasonable;

SEGC must, subject to section 964, supply to the person, instead of those securities, or those documents of title to securities, that

number of securities of that kind, or documents of title to that number of securities of that kind, as the case may be.

964 Cash settlement of claims where property unobtainable

(1) Where:

- (a) SEGC allows a claim that, because of a dealer having become insolvent, this Division entitles a person to make in respect of property that is, or includes, a number of securities of a particular kind or documents of title to a number of securities of a particular kind; and
- (b) it is not reasonably practicable for SEGC to obtain those securities, or those documents of title to securities, as the case may be, from the dealer or, if the dealer has disposed of them, from the dealer's successor in title, before the end of:
 - (i) if the business rules of a participating exchange of which the dealer is a member, being those business rules as in force when the Board allows the claim, prescribe a period, for the purposes of this section, in relation to a class of claims that includes the claim—that period; or
 - (ii) otherwise—such period as the Board, having regard to all the circumstances relating to the claim, considers reasonable; and
- (c) because:
 - (i) whether by reason that dealing in securities of that kind is suspended or for any other reason, there exists at no time during that period an orderly market in such securities; or
 - (ii) the total number of securities of that kind offered for sale on stock markets of participating exchanges or Exchange subsidiaries at times during that period when there exists an orderly market in such securities is insufficient; and

it is not reasonably practicable for SEGC to obtain that number of securities of that kind, or documents of title to that number of securities of that kind, as the case may be, before the end of that period;

the Board may decide to pay to the claimant the amount that, when the decision is made, is the actual pecuniary loss suffered by the

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claimant in respect of the first-mentioned securities, or the first-mentioned documents of title, as the case may be, and if the Board does so, SEGC must pay that amount to the claimant.

(2) Where:

(a) the Board allows a claim that, because of a dealer having become insolvent, this Division entitles a person to make in respect of property that is, or includes, property (in this subsection called the *relevant property*) other than money, securities or documents of title to securities; and

(b) it is not reasonably practicable for SEGC to obtain the relevant property from the dealer or, if the dealer has disposed of it, from the dealer's successor in title, before the end of such period as the Board considers reasonable;

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

965 Ordering of alternative claims and prevention of double recovery

(1) Where:

(a) a member organisation has received under the agreement for a sale or purchase of securities by the member organisation on behalf of a person, the consideration for the sale or settlement documents in relation to the purchase, as the case may be; and

(b) subsection 951(1) or 952(1), as the case may be, entitles the person to make a claim against SEGC under Division 6 in respect of the sale or purchase;

subsection (2) applies.

(2) This Division does not, because of:

(a) a dealer, being the member organisation or a partner in the member organisation, having become insolvent at a particular time; and

(b) the member organisation having received, under the agreement, the consideration or the settlement documents; entitle the person to make a claim in respect of the consideration or the settlement documents, as the case may be, unless the member organisation's obligations to the person in respect of the sale or purchase, as the case may be, in so far as those obligations related to the consideration or the settlement documents, were discharged before that time.

(3) Where:

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

SEGC must not allow the other claim unless:

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

(4) Where:

- (a) at a particular time, SEGC allows a claim made by a person under this Division in respect of property; and
- (b) because of:
 - (i) a dealer having become insolvent (whether before, at or after that time); and
 - (ii) the property having, before that time, been entrusted or received as mentioned in paragraph 963(1)(b);this Division entitles the person to make another claim in respect of the property;

SEGC must not allow the other claim.

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966 No claim in respect of money lent to dealer

Where, as at the time when a dealer becomes insolvent:

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

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

967 No claim in certain other cases

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

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

968 Limits of compensation

- (1) The total amounts paid out of the Fund in connection with claims that:
 - (a) because of:
 - (i) a dealer having become insolvent on a particular day; or
 - (ii) if 2 or more partners in the same member organisation have become insolvent on a particular day—those partners having become insolvent on that day;
this Division entitles persons to make; and
 - (b) are allowed by SEGC;must not exceed an amount equal to 14% of the minimum amount of the Fund as at the end of that day.

- (2) In determining, for the purposes of subsection (1), the total of the amounts paid out of the Fund in connection with claims in respect of property:
- (a) an amount paid out of the Fund in connection with any of the claims is, to the extent to which it is repaid to the Fund, to be disregarded; and
 - (b) where, by virtue of the exercise of a right or remedy in relation to property that is, or is included in, the first-mentioned property, being a right or remedy of the claimant, or of any of the claimants, to which SEGC is, by virtue of section 980, subrogated, money or other property has been recovered by, or on behalf, of SEGC—so much of the amount, or of the total of the amounts, paid out of the Fund in connection with any of the claims as does not exceed:
 - (i) the amount of that money; or
 - (ii) the value of so much (if any) of that other property as has not been, and is not required to be, supplied under subsection 963(2) in respect of any of the claims; as the case may be, is to be disregarded.
- (3) In order to ensure compliance with subsection (1) as it applies in relation to particular claims:
- (a) the Board may, in relation to each of those claims, determine in writing an amount to be the maximum amount in relation to the claim; and
 - (b) where paragraph (a) empowers the Board to make determinations in relation to the respective claims of 2 or more claimants—the Board must, in making those determinations:
 - (i) take into account, in relation to each of those claimants, any money or other property that the claimant has received, or is likely to receive, from sources other than the Fund as compensation for property to which the claimant's claim relates; and
 - (ii) strive to ensure that the proportion of the property to which a claim relates that is represented by the money and other property received from all sources (including the Fund) as compensation for property to which the

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claim relates is, as nearly as practicable, the same for each of those claimants.

- (4) Where a determination of an amount as the maximum amount in relation to a claim is in force under subsection (3), the amount, or the total of the amounts, paid out of the Fund in connection with the claim must not exceed the first-mentioned amount.
- (5) In this section, *claim* means a claim under this Division.

969 Making of claims

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

Division 9—General provisions relating to claims

970 Power of SEGC to allow and settle claim

Subject to this Part, SEGC may, at any time after a person becomes entitled to make a claim, allow and settle the claim.

970A Claimant may be required to exercise right of set-off

If:

- (a) a person (in this section called the *claimant*) has made a claim in respect of a liability of another person (in this section called the *defaulter*); and
- (b) the claimant has a right, whether under an agreement or otherwise, to set off a liability of the claimant to the defaulter against the liability referred to in paragraph (a);

SEGC may refuse to allow the claim until the claimant has exercised the right.

970B Effect of set-off on claim

(1) If:

- (a) SEGC allows a claim by a person (in this section called the *claimant*) in respect of a liability of another person (in this section called the *defaulter*); and
- (b) the liability of the defaulter to the claimant has been reduced, by an amount of money or a number of securities (in this section called the *set-off reduction*), because of:
 - (i) the exercise by the claimant or the defaulter of a right of set-off, whether under an agreement or otherwise; or
 - (ii) the operation of an agreement so far as it provides for the automatic set-off of liabilities; and
- (c) but for this section, the reduction of the defaulter's liability would not be taken into account when working out the obligations of SEGC in respect of the claim;

this section applies for the purposes of working out those obligations.

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(2) If:

(a) SEGC is required to satisfy the claim by paying an amount;
and

(b) the set-off reduction consists of an amount;

the amount SEGC must pay in respect of the claim is reduced by the amount of the set-off reduction.

(3) If:

(a) SEGC is required to satisfy the claim by paying an amount;
and

(b) the set-off reduction consists of a number of securities;

then:

(c) the Board must work out the value of the securities; and

(d) the amount SEGC must pay in respect of the claim is reduced by the value worked out under paragraph (c).

(4) If:

(a) SEGC is required to satisfy the claim by transferring securities of a particular kind; and

(b) the set-off reduction consists of a number of securities of that kind;

the number of securities that SEGC must transfer in respect of the claim is reduced by the number referred to in paragraph (b).

(5) If:

(a) SEGC is required to satisfy the claim by transferring securities of a particular kind; and

(b) the set-off reduction consists of a number of securities that are not of that kind;

then:

(c) the Board must work out:

(i) the value of the securities that constitute the set-off reduction; and

(ii) the number of securities of the kind referred to in paragraph (a) that are equal in value to the value worked out under subparagraph (i); and

(d) the number of securities that SEGC is required to transfer in respect of the claim is reduced by the number worked out under subparagraph (c)(ii).

- (6) If:
- (a) SEGC is required to satisfy the claim by transferring securities of a particular kind; and
 - (b) the set-off reduction consists of an amount of money;
- then:
- (c) the Board must work out the number of securities of that kind that are equal in value to that amount; and
 - (d) the number of securities that SEGC must transfer in respect of the claim is reduced by the number worked out under paragraph (c).

971 Successful claimant entitled to costs and disbursements

Where a claim is allowed, then, in addition to the claimant's other rights under this Part, the claimant is entitled to be paid out of the Fund an amount equal to the total of the reasonable costs of, and the reasonable disbursements incidental to, the making and proof of the claim.

972 Interest

- (1) In addition to an amount that is payable to a person out of the Fund in respect of a claim, interest at the rate of 5% per annum or, if another rate is determined in writing by the Board, at that other rate, is payable to the person out of the Fund, on so much of that amount as is not attributable to costs and disbursements, in respect of the period beginning on the day on which the person became entitled to make the claim and ending on:
- (a) if the Board has made a determination under subsection 983(1) to pay that amount in instalments—the day on which that amount would, if no such determination had been made and the money in the Fund were unlimited, have been paid to the person; or
 - (b) if, because of insufficiency of the Fund, no part of that amount is paid to the person on the day on which that amount would, if the money in the Fund were unlimited, have been so paid—that day; or
 - (c) otherwise—the day on which that amount is paid to the person.

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- (1A) A rate of interest determined by the Board for the purposes of subsection (1):
- (a) must not exceed the rate that, when the determination is made, is fixed by Rules of Court for the purposes of paragraph 52(2)(a) of the *Federal Court of Australia Act 1976*; and
 - (b) must not be less than 5% per year.
- (1B) As soon as practicable after determining a rate of interest for the purposes of subsection (1), the Board must cause a copy of the determination to be published in the *Gazette*.
- (2) Where:
- (a) under subsection (1), interest is payable to a person on an amount in respect of a period; and
 - (b) that amount, or a part of that amount, remains unpaid throughout a period beginning immediately after the period referred to in paragraph (a);
- then, in addition to that amount and that interest, interest at the prescribed rate is payable to the person out of the Fund on that amount, or on that part of that amount, as the case may be, in respect of that period first referred to in paragraph (b).

972A Discretion to pay amounts not received etc. because of failure to transfer securities

- (1) If the Board is satisfied that:
- (a) a person or partnership (in this section called the *defaulter*) has failed to discharge an obligation to transfer securities to another person or partnership (in this section called the *entitled entity*); and
 - (b) the entitled entity:
 - (i) has made a claim under Division 6, 6A, 6B or 6C in respect of the failure and has had securities transferred to it, or an amount paid to it, in satisfaction of the claim; or
 - (ii) unless it is a settlement authority—would have been entitled to make a claim under Division 6B or 6C in respect of the failure if a settlement authority had not

transferred securities to it for the purpose of remedying the failure; or

(iii) if it is a settlement authority—would have been entitled to make a claim under Division 6C in respect of the failure if it had not obtained securities for the purpose of remedying the failure; and

(c) if the defaulter had duly transferred securities in accordance with the obligation, an amount would have been paid, or property would have been transferred, to the entitled entity as the holder of the securities; and

(d) the entitled entity has not received, and is not entitled to receive (otherwise than from the defaulter):

(i) the amount or property; or

(ii) an equivalent amount or equivalent property in respect of securities transferred or obtained as mentioned in paragraph (b); and

(e) if subparagraph (b)(i) applies and an amount has been paid in satisfaction of the claim—the amount paid does not adequately compensate the entitled entity for the loss of the amount or property referred to in paragraph (c);

the Board may determine in writing that there be paid to the entitled entity, in respect of the loss of the amount or property referred to in paragraph (c), a specified amount that the Board considers to be fair and reasonable in all the circumstances.

(2) If a determination is made under subsection (1), SEGC must pay to the entitled entity the amount specified in it.

973 Application of Fund in respect of certain claims

(1) SEGC:

(a) may buy securities for the purpose of complying with subsection 950(3), 950(4), 952(4), 952(5), 954G(2), 954S(2) or 954Z(2), paragraph 960(2)(a) or subsection 963(3); and

(b) may pay money out of the Fund for the purpose of so buying securities or for any other purpose connected with complying with that subsection or paragraph.

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- (2) Securities bought by SEGC as mentioned in subsection (1) form part of the Fund until they are supplied in accordance with this Part to a claimant or sold in accordance with subsection (3).
- (3) If:
 - (a) SEGC buys securities for the purpose of complying, in relation to a claim, with a provision referred to in paragraph (1)(a); and
 - (b) SEGC satisfies the claim by paying an amount to the claimant;SEGC must, as soon as practicable after satisfying the claim, sell the securities and pay the proceeds of the sale into the Fund.
- (4) In this section:

securities includes security benefits, within the meaning of Division 6A, other than amounts of money.

974 Allowing of claim not to constitute admission

Where SEGC allows a claim, neither the allowing of the claim, nor any act done by SEGC as a result of allowing the claim, is taken for any purpose to constitute an admission by any person of liability in respect of any matter, other than an admission of SEGC of its liability in respect of the claim.

975 SEGC to notify claimant where claim disallowed

SEGC must, after wholly or partly disallowing a claim, serve on the claimant, or on the claimant's solicitor, notice of the disallowance in the prescribed form.

976 Proceedings in the Court

- (1) Where SEGC has disallowed a claim, the claimant may, within 3 months after notice of the disallowance has been served on the claimant, or on the claimant's solicitor, in accordance with section 975, bring proceedings in the Court to establish the claim.

- (2) Where, as at the end of a reasonable period after a claim was made, SEGC has neither allowed nor disallowed the claim, the claimant may bring proceedings in the Court to establish the claim.

977 Arbitration of amount of cash settlement of certain claims

- (1) Where:
- (a) a cash settlement provision requires SEGC to pay an amount in respect of a claim; and
 - (b) that amount cannot be determined by agreement between SEGC and the claimant;
- that amount must be determined by arbitration in accordance with this section.
- (1A) Where:
- (a) in relation to a claim, paragraph 970B(3)(c), (5)(c) or (6)(c) requires the Board to work out the value of securities, or the number of securities that are equal in value to some other value or amount; and
 - (b) the value or number cannot be determined by agreement between the Board and the claimant;
- the value or number is to be determined by arbitration in accordance with this section.
- (2) The reference to arbitration must be made to persons appointed, in accordance with subsection (3), for the purposes of the reference and the agreed arbitration law applies in relation to the reference.
- (2A) Parties to the arbitration may agree on the State or Territory whose law is to govern the arbitration. The *agreed arbitration law* is the law of that State or Territory relating to commercial arbitration.
- (3) The participating exchange must appoint, or the participating exchanges must jointly appoint, as the case requires, for the purposes of the reference to arbitration, 3 persons whose appointment under this subsection has been approved in writing by the Minister and at least 2 of whom are neither members of a participating exchange nor officers or employees of SEGC, of a participating exchange, or of a member organisation of a participating exchange.

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(7) In this section:

cash settlement provision means section 952A or 953, subsection 954G(3), 954H(2), 954R(2), 954S(3), 954T(2), 954Z(3) or 954ZA(2), section 960 or 961F or subsection 964(1) or (2).

978 Form of order of Court establishing claim

- (1) Where, in a proceeding to establish a claim, the Court is satisfied that the claim should be allowed, the Court:
 - (a) must, by order, make a declaration accordingly and direct SEGC to allow the claim and deal with it in accordance with this Chapter; and
 - (b) may, at any time after making the order, give, upon application made by the claimant or SEGC, such directions relating to the claim as the Court thinks just and reasonable.
- (2) In a proceeding to establish a claim, or in an application under paragraph (1)(b), all questions of costs are in the discretion of the Court.

979 Power of Board to require production of securities etc.

- (1) The Board may, by notice served on a person, require the person to give to SEGC specified securities, documents, or statements of evidence, necessary to support a claim or necessary for the purpose of:
 - (a) exercising SEGC's rights against a member, or a member organisation, of a participating exchange or against any other person; or
 - (b) enabling criminal proceedings to be taken against a person.
- (1A) The Board may, for the purposes of section 970A or 970B, by notice in writing served on a person, require the person to give SEGC specified information relating to the existence or exercise of rights of set-off.
- (2) Where a person fails, without reasonable excuse, to comply with a requirement under subsection (1) or (1A), SEGC may disallow a claim made by the person.

980 Subrogation of SEGC to claimant's rights etc.

- (1) Where SEGC:
 - (a) allows under subsection 949(5) or 951(3) a claim made under Division 6 in respect of a sale of securities; or
 - (b) allows under subsection 950(2) or 952(3) a claim made under Division 6 in respect of a purchase of securities;SEGC is subrogated to all the claimant's rights and remedies in relation to the sale or purchase, as the case may be.
 - (1A) Where SEGC allows a claim under section 950 in respect of a purchase the agreement for which has been novated, SEGC is subrogated to all the rights and remedies of the claimant in relation to the replacement agreement or agreements.
 - (1B) Where SEGC allows a claim under Division 6A in respect of an obligation under a guaranteed securities loan, SEGC is subrogated to all the claimant's rights and remedies in relation to that obligation.
 - (1C) Where SEGC allows a claim under section 954D in respect of an obligation under a guaranteed securities loan that has been novated, SEGC is subrogated to all the claimant's rights and remedies in relation to the obligation, under a replacement agreement, that replaced the first-mentioned obligation.
 - (1D) Where SEGC allows a claim under subsection 954N(1) or 954P(2) in respect of an obligation to pay an amount or to transfer securities, SEGC is subrogated to all the claimant's rights and remedies in relation to that obligation.
 - (1E) Where SEGC allows a claim under subsection 954P(3) in respect of a failure to transfer securities, SEGC is subrogated to all the rights and remedies that the claimant has in relation to that failure because of the subrogation effected by paragraph 954P(3)(a).
 - (1F) Where SEGC allows a claim under subsection 954Y(2) in respect of a purported transfer of securities, SEGC is subrogated to all the claimant's rights and remedies in relation to that purported transfer.
 - (1G) Where SEGC allows a claim under subsection 954Y(3) in respect of a purported transfer of securities, SEGC is subrogated to:
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- (a) if the claimant is also the transferee referred to in that subsection—all the claimant’s rights and remedies in relation to that purported transfer; or
 - (b) otherwise—all the rights and remedies that the claimant has in relation to that purported transfer because of the subrogation effected by paragraph 954Y(3)(c).
- (2) Where SEGC allows a claim made under Division 7 in respect of an unauthorised execution (within the meaning of that Division), SEGC is subrogated to all the claimant’s rights and remedies in relation to the conduct that constitutes the unauthorised execution.
- (2A) Where SEGC allows a claim made under Division 7A in respect of a contravention of the SCH certificate cancellation provisions, SEGC is subrogated to all the claimant’s rights and remedies in relation to the contravention.
- (3) Where SEGC allows a claim made under Division 8 in respect of property, SEGC is subrogated to all the claimant’s rights and remedies in relation to the property.
- (4) Where, by virtue of this section, SEGC is subrogated to a right or remedy that a person has against another person, then:
 - (a) if SEGC has reason to believe that an insurer may be liable to indemnify the other person in respect of the subject matter of the right or remedy—SEGC must serve a notice on the insurer setting out particulars of the right or remedy and stating that SEGC is, by virtue of this section, subrogated to the right or remedy; and
 - (b) an insurer that considers that it may be liable so to indemnify the other person may, whether or not SEGC has served a notice on the insurer under paragraph (a), apply to be joined as a party to a proceeding that relates to the right or remedy and to which the first-mentioned person or SEGC is a party; and
 - (c) the first-mentioned person or SEGC may, to the extent of the liability of an insurer so to indemnify the other person, enforce against the insurer a judgment or order obtained in such a proceeding in so far as the proceeding relates to the right or remedy.

- (5) Except as provided in this section, nothing in this Part affects a right or remedy that a claimant under Division 6, 6A, 6B, 6C, 7, 7A or 8 has against a person other than SEGC.

981 Payment of claims only from Fund

Property of SEGC, other than property forming part of the Fund, is not available to be applied in respect of a claim that has been allowed by SEGC, whether or not under an order of the Court.

982 SEGC may enter into contracts of insurance or indemnity

- (1) SEGC may enter into a contract with a person carrying on fidelity insurance business under which SEGC will be insured or indemnified, to the extent and in the manner provided by the contract, against liability in respect of claims.
- (2) A contract entered into under subsection (1) may relate to dealers generally, particular classes of dealers specified in the contract, particular dealers so specified, or dealers generally with the exclusion of particular classes of dealers, or particular dealers, so specified.
- (3) SEGC, a participating exchange, a member of the Board and any employee of SEGC or of a participating exchange each have qualified privilege in respect of the publication of a statement that a contract entered into under subsection (1) does or does not apply with respect to a dealer.
- (4) Where SEGC has entered into a contract of insurance or indemnity with an insurer under this section, 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.
- (5) In this section:
- dealer* means a member, or a member organisation, of a participating exchange.

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983 Instalment payments

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

claim means a claim under Division 6, 6A, 6B, 6C, 7, 7A or 8 or a claim that, for the purposes of Division 10, is a transferred claim in relation to a joining exchange.
- (3) A determination under subsection (1) applies subject to subsection 932(3).

983A ASIC's power to modify effect of claims Divisions

- (1) ASIC may, in writing, declare that the provisions of a claims Division are to have effect in their application in relation to a particular transaction, or a particular class of transactions, either generally or as otherwise provided in the declaration, as if specified modifications were made to the provisions.
- (2) A declaration may relate to transactions whether entered into before or after the making of the declaration.
- (3) A declaration has effect accordingly.
- (4) ASIC must cause a copy of a declaration to be published in the *Gazette*.
- (5) A reference in this section to the provisions of a claims Division includes a reference to regulations made for the purposes of the provisions, or any of the provisions, of the Division.
- (6) In this section:

claims Division means Division 6, 6A, 6B, 6C, 7, 7A or 8.

Division 10—Transitional

984 Definitions

In this Division, unless the contrary intention appears:

joining day, in relation to a joining exchange, means the day on which the joining exchange became:

- (a) an Exchange subsidiary; or
- (b) a participating exchange.

joining exchange means:

- (a) a securities exchange that:
 - (i) at a particular time after 1 January 1991 became or becomes an Exchange subsidiary; and
 - (ii) was not, immediately before that time, an exchange subsidiary; or
- (b) a securities exchange that:
 - (i) at a particular time after the commencement of this Part becomes a participating exchange; and
 - (ii) was not, immediately before that time, a participating exchange.

liability provisions means sections 907 to 916, inclusive.

transferred claim, in relation to a joining exchange, means:

- (a) a claim made, before the joining day in relation to the joining exchange, for compensation from the joining exchange's fidelity fund; or
- (b) a claim that, as at the time immediately before the joining day in relation to the joining exchange, the liability provisions entitled a person to make for compensation from the joining exchange's fidelity fund, but that, as at that time, had not been made; or
- (c) a claim that purports to be a claim of a kind referred to in paragraph (b).

985 Assets and liabilities of joining exchange's fidelity fund

- (1) The money that at the end of the joining day in relation to a joining exchange was in the joining exchange's fidelity fund must, as soon as practicable after that day, be paid out of that fidelity fund and into the Fund.
- (2) At the beginning of the next day after the joining day in relation to a joining exchange:
 - (a) the investments and other property of the joining exchange's fidelity fund that at the end of the joining day were vested in the joining exchange vest in SEGC and become part of the Fund; and
 - (b) the rights that at the end of the joining day the joining exchange had, whether under a previous law or otherwise, in connection with the administration of the joining exchange's fidelity fund vest in SEGC; and
 - (c) SEGC becomes liable to pay and discharge the debts, liabilities and obligations of the joining exchange that arose, whether under a previous law or otherwise, in connection with the administration of the joining exchange's fidelity fund and that existed at the end of the joining day.
- (3) A reference in subsection (2) to rights or to debts, liabilities and obligations does not include a reference to rights, or to debts, liabilities and obligations, as the case may be, arising under a contract of employment or under a contract for services.
- (4) Investments that at the end of the joining day in relation to a joining exchange were held, by a person other than the joining exchange, for the purposes of the joining exchange's fidelity fund are held after that day for the purposes of the Fund.
- (5) After the joining day in relation to a joining exchange, an agreement (other than a contract of employment or a contract for services) that was entered into:
 - (a) by or on behalf of the joining exchange as a party; and
 - (b) in connection with the administration of the joining exchange's fidelity fund;and was in force at the end of that day applies, with such modifications as the circumstances require, as if:

- (c) SEGC were substituted for the joining exchange as a party to the agreement; and
 - (d) a reference in the agreement to the joining exchange were, except in relation to a time on or before that day, a reference to SEGC.
- (6) Without limiting the generality of another provision of this section, where, as at the end of the joining day in relation to a joining exchange, an amount advanced under subsection 905(1) by the joining exchange to its fidelity fund has not been repaid, an amount equal to the first-mentioned amount is, after that day, payable, on demand, by SEGC to the joining exchange.
- (7) Where, at the end of the joining day in relation to a joining exchange, proceedings:
- (a) to which the joining exchange was a party; and
 - (b) that arose out of, or were otherwise connected with, the administration of the joining exchange's fidelity fund; were pending in a court or tribunal, SEGC is, at the beginning of the next day after the joining day, substituted for the joining exchange as a party to the proceedings and has the same rights in the proceedings as the party for which it was substituted.
- (8) An amount that, as a result of the operation of this section, is or becomes payable by SEGC is payable out of the Fund.
- (9) This section applies subject to section 987.

986 Final accounts in respect of joining exchange's fidelity fund

- (1) A joining exchange must, as soon as practicable, and in any event within 2 months, after the joining day in relation to the joining exchange:
- (a) prepare a statement of the assets and liabilities of its fidelity fund as on that day; and
 - (b) appoint a registered company auditor to audit the statement.
- (2) Without limiting the generality of subsection (1), a statement prepared under that subsection must set out full particulars, so far as known when the statement is prepared, of all liabilities

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(including contingent liabilities) of the joining exchange's fidelity fund in respect of transferred claims.

- (3) An auditor appointed to audit a statement prepared under subsection (1) in relation to a joining exchange's fidelity fund must, within 1 month after the statement is prepared:
 - (a) audit the statement; and
 - (b) cause a report on the statement to be given to the Board and a copy of the report to be given to the board of the joining exchange.
- (4) The Board must give to ASIC a copy of a report given to the Board under this section, and a copy of the statement to which the report relates, within 14 days after the report is given to the Board.

987 Application of liability provisions in relation to transferred claims

On and after the joining day in relation to a joining exchange, the liability provisions apply, for the purposes of a transferred claim in relation to the joining exchange, as if, except in relation to a time before that day:

- (a) a reference in those provisions to the fidelity fund of a securities exchange were a reference to the Fund; and
- (b) a reference in those provisions to the board of a securities exchange were a reference to the Board; and
- (c) a reference in those provisions to a securities exchange were a reference to SEGC;

and with such other modifications as the circumstances require.

Part 7.11—Conduct in relation to securities

Division 2—Prohibited conduct

995 Misleading or deceptive conduct

- (2) A person must not, in or in connection with:
- (a) any dealing in securities; or
 - (b) without limiting the generality of paragraph (a):
 - (i) the allotment or issue of securities; or
 - (ii) a notice published in relation to securities; or
 - (iii) the making of, or the making of an evaluation of, or of a recommendation in relation to, offers under a takeover bid; or
 - (iv) the carrying on of any negotiations, the making of any arrangements or the doing of any other act preparatory to or in any other way related to any matter referred to in subparagraph (i), (ii) or (iii);
- engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
- (2A) Conduct that contravenes:
- (a) section 670A (misleading or deceptive takeover document);
or
 - (b) section 728 (misleading or deceptive fundraising document);
- does not contravene subsection (2). For this purpose, conduct contravenes the provision even if the conduct does not constitute an offence, or does not lead to any liability, because of the availability of a defence.
- (3) A person who contravenes this section is not guilty of an offence.
- (4) Nothing in the following provisions of this Part or in the provisions of Chapter 6D is taken as limiting by implication the generality of subsection (2).

995A Application of State Fair Trading Acts provisions

This Division operates in relation to dealings in securities in this jurisdiction to the exclusion of the provisions of the State Fair Trading Act of any State or Territory.

997 Stock market manipulation

- (1) A person must not enter into or carry out, either directly or indirectly, 2 or more transactions in securities of a body corporate, being transactions that have, or are likely to have, the effect of increasing the price of securities of the body corporate on a stock market, with intention to induce other persons to buy or subscribe for securities of the body corporate or of a related body corporate.
- (4) A person must not enter into, or carry out, either directly or indirectly, 2 or more transactions in securities of a body corporate, being transactions that have, or are likely to have, the effect of reducing the price of securities of the body corporate on a stock market, with intent to induce other persons to sell securities of the body corporate or of a related body corporate.
- (7) A person must not enter into, or carry out, either directly or indirectly, 2 or more transactions in securities of a body corporate, being transactions that have, or are likely to have, the effect of maintaining or stabilising the price of securities of the body corporate on a stock market, with intent to induce other persons to sell, buy or subscribe for securities of the body corporate or of a related body corporate.
- (10) A reference in this section to a transaction, in relation to securities, includes:
 - (a) a reference to the making of an offer to sell or buy securities; and
 - (b) a reference to the making of an invitation, however expressed, that expressly or impliedly invites a person to offer to sell or buy securities.

998 False trading and market rigging transactions

- (1) A person must not create, or do anything that is intended or likely to create, a false or misleading appearance of active trading in any securities on a stock market or a false or misleading appearance with respect to the market for, or the price of, any securities.
- (3) A person must not, by means of purchases or sales of any securities that do not involve a change in the beneficial ownership of those securities or by any fictitious transactions or devices, maintain, increase, reduce, or cause fluctuations in, the market price of any securities.
- (5) Without limiting the generality of subsection (1), a person who:
 - (a) enters into, or carries out, either directly or indirectly, any transaction of sale or purchase of any securities, being a transaction that does not involve any change in the beneficial ownership of the securities; or
 - (b) offers to sell any securities at a specified price where the person has made or proposes to make, or knows that an associate of the person has made or proposes to make, an offer to buy the same number, or substantially the same number, of securities at a price that is substantially the same as the first-mentioned price; or
 - (c) offers to buy any securities at a specified price where the person has made or proposes to make, or knows that an associate of the person has made or proposes to make, an offer to sell the same number, or substantially the same number, of securities at a price that is substantially the same as the first-mentioned price;is taken to have created a false or misleading appearance of active trading in those securities on a stock market.
- (6) In a prosecution of a person for a contravention of subsection (1) constituted by an act referred to in subsection (5), it is a defence if it is proved that the purpose or purposes for which the person did the act was not, or did not include, the purpose of creating a false or misleading appearance of active trading in securities on a stock market.

Section 999

- (7) A purchase or sale of securities does not involve a change in the beneficial ownership for the purposes of this section if a person who had an interest in the securities before the purchase or sale, or an associate of the person in relation to those securities, has an interest in the securities after the purchase or sale.
- (8) In a prosecution for a contravention of subsection (3) in relation to a purchase or sale of securities that did not involve a change in the beneficial ownership of those securities, it is a defence if it is proved that the purpose or purposes for which the securities were bought or sold was not, or did not include, the purpose of creating a false or misleading appearance with respect to the market for, or the price of, securities.
- (9) The reference in paragraph (5)(a) to a transaction of sale or purchase of securities includes:
 - (a) a reference to the making of an offer to sell or buy securities; and
 - (b) a reference to the making of an invitation, however expressed, that expressly or impliedly invites a person to offer to sell or buy securities.

999 False or misleading statements in relation to securities

A person must not make a statement, or disseminate information, that is false in a material particular or materially misleading and:

- (aa) is likely to induce other persons to subscribe for securities; or
- (a) is likely to induce the sale or purchase of securities by other persons; or
- (b) is likely to have the effect of increasing, reducing, maintaining or stabilising the market price of securities;

if, when the person makes the statement or disseminates the information:

- (c) the person does not care whether the statement or information is true or false; or
- (d) the person knows or ought reasonably to have known that the statement or information is false in a material particular or materially misleading.

1000 Fraudulently inducing persons to deal in securities

- (1) A person must not:
 - (a) by making or publishing a statement, promise or forecast that the person knows to be misleading, false or deceptive; or
 - (b) by a dishonest concealment of material facts; or
 - (c) by the reckless making or publishing (dishonestly or otherwise) of a statement, promise or forecast that is misleading, false or deceptive; or
 - (d) by recording or storing in, or by means of, any mechanical, electronic or other device information that the person knows to be false in a material particular or materially misleading;induce or attempt to induce another person to deal in securities.
- (3) It is a defence to a prosecution for a contravention of subsection (1) constituted by recording or storing information as mentioned in paragraph (1)(d) if it is proved that, when the information was so recorded or stored, the defendant had no reasonable grounds for expecting that the information would be available to any other person.

1001 Dissemination of information about illegal transactions

A person must not circulate or disseminate any statement or information to the effect that the price of any securities of a body corporate will or is likely to rise or fall or be maintained because of any transaction entered into or other act or thing done in relation to securities of that body corporate or of a body corporate that is related to that body corporate, in contravention of section 997, 998, 999 or 1000 if:

- (a) the person, or an associate of the person, has entered into any such transaction or done any such act or thing; or
- (b) the person, or an associate of the person, has received, or expects to receive, directly or indirectly, any consideration or benefit in respect of the circulation or dissemination of the statement or information.

Section 1001A

1001A Continuous disclosure—listed disclosing entities

- (1) This section applies to a listed disclosing entity if provisions of the listing rules of a securities exchange:
 - (a) apply to the entity; and
 - (b) require the entity to notify the securities exchange of information about specified events or matters as they arise for the purpose of the securities exchange making that information available to a stock market conducted by the securities exchange.
- (2) The disclosing entity must not contravene those provisions by intentionally, recklessly or negligently failing to notify the securities exchange of information:
 - (a) that is not generally available; and
 - (b) that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity.
- (3) A contravention of subsection (2) is only an offence if the failure concerned is intentional or reckless.
- (4) For the purposes of the application of this section to a listed disclosing entity that is an undertaking to which interests in a registered scheme relate, the obligation of the entity not to contravene provisions as mentioned in subsection (2) is an obligation of the responsible entity.

1001B Continuous disclosure—unlisted disclosing entities

- (1) If:
 - (a) an unlisted disclosing entity becomes aware of information:
 - (i) that is not generally available; and
 - (ii) that a reasonable person would expect, if it were generally available, to have a material effect on the price or value of ED securities of the entity; and

- (b) the information is not required to be included in a supplementary disclosure document or a replacement disclosure document in relation to the entity;
the entity must, as soon as practicable, lodge a document containing the information.
- (2) An unlisted disclosing entity does not contravene subsection (1) except by an intentional, reckless or negligent act or omission.
- (3) A contravention of subsection (1) is only an offence if the failure concerned is intentional or reckless.
- (4) For the purposes of the application of this section to an unlisted disclosing entity that is an undertaking to which interests in a registered scheme relate:
 - (a) the entity is aware of information if, and only if, the responsible entity is aware of the information; and
 - (b) the obligation of the entity to lodge a document under subsection (1) is an obligation of the responsible entity; and
 - (c) subsection (2) applies as if the reference in it to an unlisted disclosing entity were instead a reference to the responsible entity.

1001C Sections 1001A and 1001B—when information is generally available

- (1) This section has effect for the purposes of sections 1001A and 1001B.
- (2) Information is generally available if:
 - (a) it consists of readily observable matter; or
 - (b) without limiting the generality of paragraph (a), both the following subparagraphs apply:
 - (i) it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of a kind whose price or value might be affected by the information; and
 - (ii) since it was so made known, a reasonable period for it to be disseminated among such persons has elapsed.

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Division 2 Prohibited conduct

Section 1001D

- (3) Information is also generally available if it consists of deductions, conclusions or inferences made or drawn from either or both of the following:
- (a) information referred to in paragraph (2)(a);
 - (b) information made known as mentioned in subparagraph (2)(b)(i).

1001D Sections 1001A and 1001B—material effect on price or value

For the purposes of sections 1001A and 1001B, a reasonable person would be taken to expect information to have a material effect on the price or value of securities if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether or not to subscribe for, or buy or sell, the first-mentioned securities.

Division 2A—Insider trading

1002 Application of Division

This Division applies to:

- (a) acts and omissions in this jurisdiction in relation to securities of any body corporate, whether formed or carrying on business in this jurisdiction or in Australia or not; and
- (b) acts and omissions outside this jurisdiction, whether in Australia or not, in relation to securities of a body corporate that is formed or carries on business in this jurisdiction.

1002A Securities

- (1) In this Division and in section 1013:

information includes:

- (a) matters of supposition and other matters that are insufficiently definite to warrant being made known to the public; and
- (b) matters relating to the intentions, or the likely intentions, of a person.

purchase, in relation to securities, includes, in the case of an option contract under which a party acquires an option or right from another party, acquire the option or right under the contract, or take an assignment of the option or right, whether or not on another's behalf.

securities, in relation to a body corporate, means any of the following:

- (a) shares in the body corporate;
- (b) debentures (including convertible notes) issued by the body corporate;
- (c) interests in a managed investment scheme made available by the body corporate;

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Section 1002B

- (d) units of shares referred to in paragraph (a);
- (e) an option contract under which a party acquires from another party an option or right, exercisable at or before a specified time, to buy from, or sell to, that other party a number of securities of a kind referred to in paragraph (a), (b), (c) or (d) at a price specified in, or to be determined in accordance with, the contract;

but does not include a futures contract or an excluded security.

sell, in relation to securities, includes, in the case of an option contract under which a party acquires an option or right from another party:

- (a) grant or assign the option or right; or
- (b) take, or cause to be taken, such action as releases the option or right;

whether or not on another's behalf.

- (2) A provision of this Division or of section 1013 that applies in relation to securities of a body corporate:
 - (a) also applies in relation to securities (as defined by subsection 92(1)) issued by a government, an unincorporated body or any other person; and
 - (b) applies, in relation to securities so issued, in the same way, as nearly as practicable, as if the government, body or person were a body corporate.

1002B Information generally available

- (1) This section has effect for the purposes of this Division and section 1013.
- (2) Information is generally available if:
 - (a) it consists of readily observable matter; or
 - (b) without limiting the generality of paragraph (a), both the following subparagraphs apply:
 - (i) it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of bodies corporate of a kind whose price or value might be affected by the information; and

- (ii) since it was so made known, a reasonable period for it to be disseminated among such persons has elapsed.
- (3) Information is also generally available if it consists of deductions, conclusions or inferences made or drawn from either or both of the following:
 - (a) information referred to in paragraph (2)(a);
 - (b) information made known as mentioned in subparagraph (2)(b)(i).

1002C Material effect on price or value of securities

For the purposes of this Division and section 1013, a reasonable person would be taken to expect information to have a material effect on the price or value of securities of a body corporate if the information would, or would be likely to, influence persons who commonly invest in securities in deciding whether or not to subscribe for, buy or sell the first-mentioned securities.

1002D Trading, and procuring trading, in securities

- (1) Trading in securities of a body corporate that is ordinarily permitted on the stock market of a securities exchange is taken for the purposes of this Division to be permitted on that stock market even though trading in any such securities on that stock market is suspended by action taken by that securities exchange or is prohibited by a notice given to that securities exchange by ASIC under subsection 775(2).
- (2) For the purposes of this Division and section 1013 but without limiting the meaning that the expression *procure* has apart from this section, if a person incites, induces, or encourages an act or omission by another person, the first-mentioned person is taken to procure the act or omission by the other person.

1002E Information in possession of officer of body corporate

For the purposes of this Division and section 1013:

- (a) a body corporate is taken to possess any information which an officer of the body corporate possesses and which came

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into his or her possession in the course of the performance of duties as such an officer; and

- (b) if an officer of a body corporate knows or ought reasonably to know any matter or thing because he or she is an officer of the body corporate, it is to be presumed that the body corporate knows or ought reasonably to know that matter or thing.

1002F Information in possession of partner or employee of partnership

For the purposes of this Division and section 1013:

- (a) a member of a partnership is taken to possess any information:
 - (i) which another member of the partnership possesses and which came into the other member's possession in the other member's capacity as a member of the partnership; or
 - (ii) which an employee of the partnership possesses and which came into his or her possession in the course of the performance of duties as such an employee; and
- (b) if a member or employee of a partnership knows or ought reasonably to know any matter or thing because the member or employee is such a member or employee, it is to be presumed that every member of the partnership knows or ought reasonably to know that matter or thing.

1002G Prohibited conduct by person in possession of inside information

- (1) Subject to this Division, where:
 - (a) a person (in this section called the *insider*) possesses information that is not generally available but, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of securities of a body corporate; and
 - (b) the person knows, or ought reasonably to know, that:
 - (i) the information is not generally available; and

(ii) if it were generally available, it might have a material effect on the price or value of those securities;
the following subsections apply.

- (2) The insider must not (whether as principal or agent):
- (a) subscribe for, purchase or sell, or enter into an agreement to subscribe for, purchase or sell, any such securities; or
 - (b) procure another person to subscribe for, purchase or sell, or to enter into an agreement to subscribe for, purchase or sell, any such securities.
- (3) Where trading in the securities referred to in subsection (1) is permitted on the stock market of a securities exchange, the insider must not, directly or indirectly, communicate the information, or cause the information to be communicated, to another person if the insider knows, or ought reasonably to know, that the other person would or would be likely to:
- (a) subscribe for, purchase or sell, or enter into an agreement to subscribe for, purchase or sell, any such securities; or
 - (b) procure a third person to subscribe for, purchase or sell, or to enter into an agreement to subscribe for, purchase or sell, any such securities.

1002H Exception for withdrawal from registered scheme

Subsection 1002G(2) does not apply in respect of a member's withdrawal from a registered scheme if the amount paid to the member on withdrawal is calculated (so far as is reasonably practicable) by reference to the underlying value of the assets of the financial or business undertaking or scheme, common enterprise, investment contract or time-sharing scheme to which the member's interest relates, less any reasonable charge for buying the member's interest.

1002J Exception for underwriters

- (1) Subsection 1002G(2) does not apply in respect of:
- (a) subscribing for securities under an underwriting agreement or a sub-underwriting agreement; or
 - (b) entering into an agreement referred to in paragraph (a); or

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- (c) selling securities subscribed for under an agreement referred to in paragraph (a).
- (2) Subsection 1002G(3) does not apply in respect of:
 - (a) the communication of information in relation to securities to a person solely for the purpose of procuring the person to enter into an underwriting agreement in relation to any such securities; or
 - (b) the communication of information in relation to securities by a person who may be required under an underwriting agreement to subscribe for any such securities if the communication is made to another person solely for the purpose of procuring the other person to do either or both of the following:
 - (i) enter into a sub-underwriting agreement in relation to any such securities;
 - (ii) subscribe for any such securities.

1002K Exception for purchase pursuant to legal requirement

Subsection 1002G(2) does not apply in respect of the purchase of securities pursuant to a requirement imposed by this Act.

1002L Exception for information communicated pursuant to a legal requirement

Subsection 1002G(3) does not apply in respect of the communication of information pursuant to a requirement imposed by the Commonwealth, a State, a Territory or any regulatory authority.

1002M Chinese wall arrangements by bodies corporate

A body corporate does not contravene subsection 1002G(2) by entering into a transaction or agreement at any time merely because of information in the possession of an officer of the body corporate if:

- (a) the decision to enter into the transaction or agreement was taken on its behalf by a person or persons other than that officer; and

- (b) it had in operation at that time arrangements that could reasonably be expected to ensure that the information was not communicated to the person or persons who made the decision and that no advice with respect to the transaction or agreement was given to that person or any of those persons by a person in possession of the information; and
- (c) the information was not so communicated and no such advice was so given.

1002N Chinese wall arrangements by partnerships etc.

- (1) The members of a partnership do not contravene subsection 1002G(2) by entering into a transaction or agreement at any time merely because one or more (but not all) of the members, or an employee or employees of the partnership, are in actual possession of information if:
 - (a) the decision to enter into the transaction or agreement was taken on behalf of the partnership by any one or more of the following persons:
 - (i) a member or members who are taken to have possessed the information merely because another member or other members, or an employee or employees of the partnership, were in possession of the information;
 - (ii) an employee or employees of the partnership who was not or were not in possession of the information; and
 - (b) the partnership had in operation at that time arrangements that could reasonably be expected to ensure that the information was not communicated to the person or persons who made the decision and that no advice with respect to the transaction or agreement was given to that person or any of those persons by a person in possession of the information; and
 - (c) the information was not so communicated and no such advice was so given.
- (2) A member of a partnership does not contravene subsection 1002G(2) by entering into a transaction or agreement otherwise than on behalf of the partnership merely because the member is taken to possess information that is in the possession of another member or an employee of the partnership.

Section 1002P

1002P Exception for knowledge of person's own intentions or activities

A natural person does not contravene subsection 1002G(2) by entering into a transaction or agreement in relation to securities of a body corporate merely because the person is aware that he or she proposes to enter into, or has previously entered into, one or more transactions or agreements in relation to securities of that body corporate.

1002Q Exception for bodies corporate

- (1) A body corporate does not contravene subsection 1002G(2) by entering into a transaction or agreement in relation to securities of another body corporate merely because the first-mentioned body corporate is aware that it proposes to enter into or has previously entered into, one or more transactions or agreements in relation to securities of the other body corporate.
- (2) Subject to subsection (3), a body corporate does not contravene subsection 1002G(2) by entering into a transaction or agreement in relation to securities of another body corporate merely because an officer of the first-mentioned body corporate is aware that the first-mentioned body corporate proposes to enter into, or has previously entered into, one or more transactions or agreements in relation to securities of the other body corporate.
- (3) Subsection (2) does not apply unless the officer of the body corporate first-mentioned in that subsection became aware of the matters referred to in that subsection in the course of the performance of duties as such an officer.

1002R Exception for officers or agents of body corporate

- (1) Subject to subsection (2), a person does not contravene subsection 1002G(2) by entering into a transaction or agreement on behalf of a body corporate in relation to securities of another body corporate merely because the person is aware that the first-mentioned body corporate proposes to enter into, or has previously entered into, one or more transactions or agreements in relation to securities of the other body corporate.

- (2) Subsection (1) does not apply unless the person became aware of the matters referred to in that subsection in the course of the performance of duties as an officer of the first-mentioned body corporate or in the course of acting as an agent of the first-mentioned body corporate.

1002S Transactions by holder of dealers licence or a representative of the holder of such a licence

A person (in this section called the *agent*) does not contravene subsection 1002G(2) by subscribing for, purchasing or selling, or entering into an agreement to subscribe for, purchase or sell, securities of a body corporate that are permitted by a securities exchange to be traded on the stock market of that securities exchange if:

- (a) the agent is the holder of a dealers licence or a representative of the holder of such a licence; and
- (b) the agent entered into the transaction or agreement concerned on behalf of another person (in this section called the *principal*) under a specific instruction by the principal to enter into that transaction or agreement; and
- (c) the holder of the dealers licence had in operation at the time when that transaction or agreement was entered into arrangements that could reasonably be expected to ensure that any information in the possession of the holder or of any representative of the holder as a result of which the person in possession of the information would be prohibited by subsection 1002G(2) from entering into that transaction or agreement was not communicated to the agent and that no advice with respect to the transaction or agreement was given to the principal or to the agent by a person in possession of the information; and
- (d) the information was not so communicated and no such advice was so given; and
- (e) the principal is not an associate of the holder or of any representative of the holder;

but nothing in this section affects the application of subsection 1002G(2) in relation to the principal.

Section 1002T

1002T Prosecutions and defences

- (1) In a prosecution of a person for an act or omission that is alleged to constitute a contravention of subsection 1002G(2) or (3), it is not necessary for the prosecution to prove the non-existence of facts or circumstances which, if they existed, would, by virtue of section 1002H, 1002J, 1002K, 1002L, 1002M, 1002N, 1002P, 1002Q, 1002R or 1002S, preclude the act or omission from constituting a contravention of subsection 1002G(2) or (3), as the case may be, but it is a defence if the Court is satisfied that the facts or circumstances existed.
- (2) In a prosecution brought against a person for an offence against subsection 1002G(2) because the person entered into, or procured another person to enter into, a transaction or agreement at a time when certain information was in the first-mentioned person's possession:
 - (a) it is a defence if the Court is satisfied that the information came into the first-mentioned person's possession solely as a result of the information having been made known as mentioned in subparagraph 1002B(2)(b)(i); and
 - (b) it is a defence if the Court is satisfied that the other party to the transaction or agreement knew, or ought reasonably to have known, of the information before entering into the transaction or agreement.
- (3) In a prosecution against a person for an offence against subsection 1002G(3) because the person communicated information, or caused information to be communicated, to another person:
 - (a) it is a defence if the Court is satisfied that the information came into the first-mentioned person's possession solely as a result of the information having been made known as mentioned in subparagraph 1002B(2)(b)(i); and
 - (b) it is a defence if the Court is satisfied that the other person knew, or ought reasonably to have known, of the information before the information was communicated.

1002U Powers of court

Where, in a proceeding instituted under this Act, the Court finds that a contravention of section 1002G has occurred, the Court may,

in addition to any other orders that it may make under any other provision of this Act, make such order or orders as it thinks just, including, but without limiting the generality of the above, any one or more of the following orders:

- (a) an order restraining the exercise of any voting or other rights attached to shares;
- (b) an order restraining the exercise of any rights attached to securities other than shares;
- (c) an order restraining the issue or allotment of shares;
- (d) an order restraining the issue of securities other than shares;
- (e) an order restraining the acquisition or disposal of securities;
- (f) an order directing the disposal of securities;
- (g) an order vesting securities in ASIC;
- (h) an order cancelling an agreement for the acquisition or disposal of securities;
- (j) an order cancelling a securities licence;
- (k) for the purpose of securing compliance with any other order made under this section, an order directing a person to do or refrain from doing a specified act.

Division 4—Civil liability

Subdivision A—General

1005 Civil liability for contravention of this Part

- (1) Subject to the following sections of this Division, a person who suffers loss or damage by conduct of another person that was engaged in contravention of a provision of this Part may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention, whether or not that other person or any person involved in the contravention has been convicted of an offence in respect of the contravention.
- (2) An action under subsection (1) or under subsection 1013(5) may be begun at any time within 6 years after the day on which the cause of action arose.
- (3) This Division does not affect any liability that a person has under any other law.
- (4) In a proceeding under this Part in relation to a contravention of this Part committed by the publication of an advertisement, it is a defence if it is proved that the defendant is a person whose business it is to publish or arrange for the publication of advertisements and that the person received the advertisement for publication in the ordinary course of business and did not know and had no reason to suspect that its publication would amount to a contravention of a provision of this Part.

Subdivision C—Liability in respect of unlawful market activity

1013 Liability for insider trading

- (1) Where:
 - (a) a person (in this section called the *insider*) possesses information that is not generally available but, if the information were generally available, a reasonable person

would expect it to have a material effect on the price or value of securities of a body corporate (other than an option contract); and

- (b) the person knows, or ought reasonably to know, that:
 - (i) the information is not generally available; and
 - (ii) if the information were generally available, it might have a material effect on the price or value of those securities; and
- (c) the insider (whether as principal or agent) in contravention of subsection 1002G(2):
 - (i) subscribes for, purchases or sells, or enters into an agreement to subscribe for, purchase or sell, any such securities; or
 - (ii) procures another person to subscribe for, purchase or sell, or to enter into an agreement to subscribe for, purchase or sell, any such securities;

the following subsections apply.

- (2) Where the insider subscribed for or agreed to subscribe for, or procured another person to subscribe for or to agree to subscribe for, the securities, the body corporate that issued the securities may, by action under section 1005 against the insider, the other person or any other person involved in the contravention, recover, as a loss suffered by the body corporate, the amount (if any) by which the price at which the securities were subscribed for, or agreed to be subscribed for, by the insider or the other person was less than the price at which they would have been likely to have been sold in a sale made at the time of the subscription or the time of the agreement, as the case may be, if the information had been generally available.
- (3) Where the insider purchased or agreed to purchase, or procured another person to purchase or to agree to purchase, the securities from a person (in this subsection and subsection (5) called the *seller*) who did not possess the information, the seller may, by action under section 1005 against the insider, the other person or any other person involved in the contravention, recover, as a loss suffered by the seller, the amount (if any) by which the price at which the securities were purchased, or agreed to be purchased, by the insider or the other person from the seller was less than the

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price at which they would have been likely to have been purchased in a purchase made at the time of the first-mentioned purchase or the time of the agreement, as the case may be, if the information had been generally available.

- (4) Where the insider sold or agreed to sell, or procured another person to sell or to agree to sell, the securities to a person (in this subsection and subsection (5) called the *buyer*) who did not possess the information, the buyer may, by action under section 1005 against the insider, the other person or any other person involved in the contravention, recover, as a loss suffered by the buyer, the amount (if any) by which the price at which the securities were sold, or agreed to be sold, by the insider or the other person to the buyer was greater than the price at which they would have been likely to have been sold at the time of the first-mentioned sale or the time of the agreement, as the case may be, if the information had been generally available.
- (5) In addition to any action that may be brought by a person as provided by subsection (3) or (4), the body corporate may, in the case of a purchase or sale of, or an agreement to purchase or sell, securities by the insider or another person in the circumstances mentioned in that subsection, by action under section 1005 against the insider, the other person or any other person involved in the contravention, recover:
 - (a) in the case of a purchase or agreement to purchase securities—the amount (if any) by which the price at which the securities were purchased, or agreed to be purchased, by the insider or other person from the seller was less than the price at which they were likely to have been purchased in a purchase made at the time of the first-mentioned purchase or the time of the agreement, as the case may be, if the information had been generally available; or
 - (b) in the case of a sale or an agreement to sell securities—the amount (if any) by which the price at which the securities were sold, or agreed to be sold, by the insider or other person to the buyer was greater than the price at which they would have been likely to have been sold at the time of the first-mentioned sale or the time of the agreement, as the case may be, if the information had been generally available.

- (6) ASIC may, if it considers that it is in the public interest to do so, bring an action in accordance with subsection (2) or (5) in the name of, and for the benefit of, a body corporate for the recovery of an amount that the body is entitled to recover by virtue of that subsection.
- (7) In an action brought against a person in accordance with this section because the person entered into, or procured another person to enter into, a transaction or agreement at a time when certain information was in the first-mentioned person's possession, it is a defence if the Court is satisfied that the information came into the first-mentioned person's possession solely as a result of the information having been made known as mentioned in subparagraph 1002B(2)(b)(i).
- (8) If:
- (a) the responsible entity for a registered scheme; or
 - (b) ASIC in the name of, and for the benefit of, the responsible entity for a registered scheme;
- brings an action in accordance with subsection (2) in respect of a subscription for, or any agreement to subscribe for, any interests in the scheme, any amount recovered in the action:
- (c) is to be held by the responsible entity on behalf of the persons who, at the time of the subscription or agreement, had rights or interests in the relevant financial or business undertaking or scheme, common enterprise, investment contract or time-sharing scheme; and
 - (d) is to be held on their behalf in the respective proportions that, at that time, their individual rights or interests bore to the total of all those rights or interests.
- (8A) If:
- (a) the responsible entity for a registered scheme; or
 - (b) ASIC in the name of, and for the benefit of, the responsible entity for a registered scheme;
- brings an action in accordance with subsection (5) in respect of a purchase or sale of, or an agreement to purchase or sell, interests in the scheme, any amount recovered in the action:
- (c) is to be held by the responsible entity on behalf of the persons who, at the time of the sale, purchase or agreement,

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had rights or interests in the relevant financial or business undertaking or scheme, common enterprise, investment contract or time-sharing scheme; and

- (d) is to be held on their behalf in the respective proportions that, at that time, their individual rights or interests bore to the total of all those rights or interests.
- (9) Any right of action that a person has by virtue of this section is in addition to any right that any other person has under section 1005.

1014 Liability for other unlawful market activity

Where a person contravenes section 997, 998, 999, 1000 or 1001, then, without limiting the generality of section 1005, any other person who entered into a transaction for the sale or purchase of securities with the first-mentioned person or with a person acting on behalf of the first-mentioned person may, by action under section 1005 against the first-mentioned person or against any person involved in the contravention, recover the amount of any loss suffered by the person bringing the action because of the difference between the price at which the securities were dealt in that transaction and the price at which they would have been likely to have been dealt in such a transaction when the first-mentioned transaction took place if the contravention had not occurred.

1015 Amount recoverable

- (1) The amount that a person may recover by action against another person in the circumstances mentioned in section 1013 or 1014 is:
 - (a) if the second-mentioned person has been found by a court to be liable, or has been ordered by a court, to pay an amount or amounts to any other person or persons under this Part or under Part 9.4B because of the same act or transaction—the amount of the loss suffered by the first-mentioned person or the amount of the profit referred to in paragraph 1013(1)(d), as the case may be, less the amount or the sum of the amounts that the second-mentioned person has been so found to be liable, or has been so ordered, to pay; or
 - (b) otherwise—the amount of that loss or profit.

- (2) For the purposes of subsection (1), the onus of proving that the liability of a person to pay an amount to another person arose from the same act or transaction from which another liability arose lies on the person liable to pay the amount.

Part 7.13—Title to, and transfer of, securities

Division 1—Title to securities

1085 Nature of shares and other interests

- (1) A share or other interest of a member in a company:
 - (a) is personal property; and
 - (b) is transferable or transmissible as provided by the company's constitution, or, if they are applicable, the SCH business rules; and
 - (c) subject to the company's constitution (if any) and any replaceable rules that apply to the company, and, if they are applicable, the SCH business rules, is capable of devolution by will or by operation of law.
- (2) Subject to subsection (1):
 - (a) the laws applicable to ownership of and dealing with personal property apply to a share or other interest of a member in a company as they apply to other property; and
 - (b) equitable interests in respect of a share or other interest of a member in a company may be created, dealt with and enforced as in the case of other personal property.
- (3) For the purposes of any law, a share or other interest of a member in a company is taken to be situated:
 - (a) if the share or other interest is entered on the register kept under section 169—in the State or Territory where that register is kept; or
 - (b) if the share or other interest is entered on an overseas branch register kept under section 178—in the foreign country where that register is kept.

1086 Numbering shares

- (1) Each share in a company must be distinguished by an appropriate number.

- (2) Despite subsection (1):
- (a) if at any time all the issued shares in a company, or all the issued shares in a company of a particular class, are fully paid up and rank equally for all purposes, none of those shares is required to have a distinguishing number so long as each of those shares remains fully paid up and ranks equally for all purposes with all shares of the same class for the time being issued and fully paid up; and
 - (b) if all the issued shares in a company are evidenced by certificates in accordance with the provisions of section 1087, each certificate is distinguished by an appropriate number and that number is recorded in the register of members, none of those shares is required to have a distinguishing number; and
 - (c) a share need not have a distinguishing number if the SCH business rules provide that it need not have such a number.

1087 Certificate to be evidence of title

- (1) A certificate specifying the shares held by a member of a company must state:
 - (a) the name of the company and the fact that it is registered under this Act; and
 - (b) the class of the shares; and
 - (c) the amount (if any) unpaid on the shares.
- (2) A certificate issued in accordance with subsection (1) specifying shares held by a member of a company is prima facie evidence of the title of the member to the shares.
- (3) A failure to comply with subsection (1) does not affect the rights of a holder of shares.

1089 Loss or destruction of certificates

- (1) Subject to subsection (2), where a certificate or other document of title to shares, debentures or interests in a managed investment scheme is lost or destroyed, the company must, on application by the owner of the shares, debentures or interests, issue a duplicate certificate or document to the owner:

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- (a) if the company requires the payment of an amount not exceeding the prescribed amount—within 21 days after the payment is received by the company or within such longer period as ASIC approves; or
 - (b) in a case to which paragraph (a) does not apply—within 21 days after the application is made or within such longer period as ASIC approves.
- (2) The application must be accompanied by:
- (a) a statement in writing that the certificate or document has been lost or destroyed, and has not been pledged, sold or otherwise disposed of, and, if lost, that proper searches have been made; and
 - (b) an undertaking in writing that if it is found or received by the owner it will be returned to the company.
- (3) The directors of a company may, before accepting an application for the issue of a duplicate certificate or document, require the applicant:
- (a) to cause an advertisement to be inserted in a daily newspaper circulating in a place specified by the directors stating that the certificate or document has been lost or destroyed and that the owner intends, after the end of 14 days after the publication of the advertisement, to apply to the company for a duplicate; or
 - (b) to give a bond for an amount equal to at least the current market value of the shares, debentures or interests indemnifying the company against loss following the production of the original certificate or document;
- or to do both those things.
- (4) If:
- (a) a certificate of title to shares, debentures or interests is cancelled under the SCH certificate cancellation provisions; and
 - (b) having regard to those provisions, the certificate should not have been cancelled;
- this section applies to the certificate as though it were destroyed on its cancellation.

Division 2—Transfer of securities

1090 Definition

In this Division:

interest includes an interest in a managed investment scheme.

1091 Instrument of transfer

(1AA) This section does not apply to an SCH-regulated transfer.

(1) Notwithstanding anything in its constitution or in a deed relating to debentures or interests, a company must not register a transfer of shares, debentures or interests unless a proper instrument of transfer has been delivered to the company.

(1A) An instrument of transfer is not a proper instrument of transfer for the purposes of subsection (1) unless:

- (a) in the case of a transfer of marketable securities (within the meaning of Division 3 of Part 7.13)—it is a sufficient transfer of the marketable securities under that Division; or
- (b) in any case—it shows the prescribed details in relation to the company concerned.

(2) Subsection (1) does not prejudice the power of the company to register as a shareholder, debenture holder or interest holder a person to whom the right to any shares in, debentures of, or interests made available by, the company has devolved by will or by operation of law.

(3) Subsections (4) to (11) deal with a transfer of a share, debenture or interest of a dead holder by the dead holder's personal representative.

(4) The rules depend on whether the personal representative is a local representative or not.

(5) The personal representative is a *local representative* if the representative is duly constituted as personal representative under

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the law of the State or Territory in which the share, debenture or interest is situated.

Note: Subsection 1085(3) provides that the share, debenture or interest is situated where the relevant register is kept.

- (6) If the personal representative is a local representative, a transfer of the share, debenture or interest by the representative is as valid as if the representative had been registered as the holder of the share, debenture or interest at the time when the instrument of transfer was executed.
- (7) If:
- (a) the personal representative is not a local representative; and
 - (b) the representative:
 - (i) executes an instrument of transfer of the share, debenture or interest to the representative or to another person; and
 - (ii) delivers the instrument to the company; and
 - (iii) delivers to the company with the instrument a statement in writing made by the representative to the effect that, to the best of the representative's knowledge, information and belief, no grant of representation of the estate of the deceased holder has been applied for or made in the State or Territory in which the share, debenture or interest is located and no application for such a grant will be made; and
 - (c) the statement is made within the period of 3 months immediately before the date on which the statement is delivered to the company;
- the company must register the transfer and pay to the representative any dividends or other money accrued in respect of the share, debenture or interest up to the time when the instrument was executed.
- (8) Subsection (7) does not operate so as to require the company to do anything that it would not have been required to do if the personal representative were a local representative.
- (9) A transfer or payment made under subsection (7) and a receipt or acknowledgment of such a payment is, for all purposes, as valid

and effectual as if the personal representative were a local representative.

- (10) For the purposes of this section, an application by a personal representative of a dead person for registration as the holder of a share, debenture or interest in place of the dead person is taken to be an instrument of transfer effecting a transfer of the share, debenture or interest to the personal representative.
- (11) The production to a company of a document that is, under the law of a State or Territory, sufficient evidence of probate of the will, or letters of administration of the estate, of a dead person having been granted to a person must be accepted by the company, notwithstanding anything in its constitution, or in a deed relating to debentures or interests, as sufficient evidence of the grant.

1091AA Transmission of shares on death (*replaceable rule—see section 135*)

If shares not held jointly

- (1) If a shareholder who does not own shares jointly dies, the company will recognise only the personal representative of the deceased shareholder as being entitled to the deceased shareholder's interest in the shares.
- (2) If the personal representative gives the directors the information they reasonably require to establish the representative's entitlement to be registered as holder of the shares:
 - (a) the personal representative may:
 - (i) by giving a written and signed notice to the company, elect to be registered as the holder of the shares; or
 - (ii) by giving a completed transfer form to the company, transfer the shares to another person; and
 - (b) the personal representative is entitled, whether or not registered as the holder of the shares, to the same rights as the deceased shareholder.
- (3) On receiving an election under subparagraph (2)(a)(i), the company must register the personal representative as the holder of the shares.

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- (4) A transfer under subparagraph (2)(a)(ii) is subject to the same rules (for example, about entitlement to transfer and registration of transfers) as apply to transfers generally.

If shares held jointly

- (5) If a shareholder who owns shares jointly dies, the company will recognise only the survivor as being entitled to the deceased shareholder's interest in the shares. The estate of the deceased shareholder is not released from any liability in respect of the shares.

1091AB Transmission of shares on bankruptcy (*replaceable rule—see section 135*)

- (1) If a person entitled to shares because of the bankruptcy of a shareholder gives the directors the information they reasonably require to establish the person's entitlement to be registered as holder of the shares, the person may:
- (a) by giving a written and signed notice to the company, elect to be registered as the holder of the shares; or
 - (b) by giving a completed transfer form to the company, transfer the shares to another person.
- (2) On receiving an election under paragraph (1)(a), the company must register the person as the holder of the shares.
- (3) A transfer under paragraph (1)(b) is subject to the same rules (for example, about entitlement to transfer and registration of transfers) as apply to transfers generally.
- (4) This section has effect subject to the *Bankruptcy Act 1966*.

1091A Rights of trustee of estate of bankrupt shareholder

- (1) Where:
- (a) because of the *Bankruptcy Act 1966*, a share in a company, being part of the property of a bankrupt, vests in the trustee of the bankrupt's estate; and

- (b) the bankrupt is the registered holder of that share;
this section applies whether or not the trustee has been registered as the holder of the share.
- (2) On producing such information as the company's directors properly require, the trustee is entitled to:
- (a) the same dividends and other benefits; and
 - (b) the same rights, for example, but without limitation, rights in relation to:
 - (i) meetings of the company; or
 - (ii) documents, including notices of such meetings; or
 - (iii) voting; or
 - (iv) inspection of the company's records;
- as the bankrupt would be entitled to if he or she were not a bankrupt.
- (3) The trustee has the same rights:
- (a) to transfer the share; and
 - (b) to require a person to do an act or give a consent in connection with completing or registering a transfer of the share;
- as the bankrupt would have if he or she were not a bankrupt.
- (4) If the trustee transfers the share, the transfer is as valid as if the trustee had been registered as the holder of the share when the trustee executed the instrument of transfer.
- (5) A person or body whose consent or approval is required for the transfer of shares in the company must not unreasonably withhold consent or approval for the transfer of the share by the trustee.
- (6) A person who contravenes subsection (5) is not guilty of an offence.
- (7) If:
- (a) the company's constitution requires:
 - (i) the share to be offered for purchase to a member of the company; or
 - (ii) an invitation to buy the share to be issued to such a member; and

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- (b) as at the end of a reasonable period after the trustee so offers the share, or so issues such an invitation, no such member has agreed to buy the share from the trustee at a reasonable price;
the trustee may sell and transfer the share to a person other than such a member.
- (8) A provision of the company's constitution is void as against the trustee in so far as, apart from this section, it would affect rights attached to the share:
 - (a) because the bankrupt is a bankrupt; or
 - (b) because of some event that led to the bankrupt becoming, or that indicated that the bankrupt was about to become, or might be about to become, a bankrupt; or
 - (c) for reasons including a reason referred to in paragraph (a) or (b).
- (9) Nothing in this section limits the generality of anything else in it.
- (10) This section has effect despite anything in the company's constitution.

1091B Transmission of shares on mental incapacity (*replaceable rule—see section 135*)

- (1) If a person entitled to shares because of the mental incapacity of a shareholder gives the directors the information they reasonably require to establish the person's entitlement to be registered as the holder of the shares:
 - (a) the person may:
 - (i) by giving a written and signed notice to the company, elect to be registered as the holder of the shares; or
 - (ii) by giving a completed transfer form to the company, transfer the shares to another person; and
 - (b) the person is entitled, whether or not registered as the holder of the shares, to the same rights as the shareholder.
- (2) On receiving an election under subparagraph (1)(a)(i), the company must register the person as the holder of the shares.

- (3) A transfer under subparagraph (1)(a)(ii) is subject to the same rules (for example, about entitlement to transfer and registration of transfers) as apply to transfers generally.

1091C Trustee etc. may be registered as owner of shares

- (1) In this section:

share, in relation to a body corporate, means a share in the body that is registered in a register kept in this jurisdiction.

- (2) A trustee, executor or administrator of the estate of a dead person who was the registered holder of a share in a corporation may be registered as the holder of that share as trustee, executor or administrator of that estate.
- (3) A trustee, executor or administrator of the estate of a dead person who was entitled in equity to a share in a corporation may, with the consent of the corporation and of the registered holder of that share, be registered as the holder of that share as trustee, executor or administrator of that estate.

- (4) Where:

- (a) a person is appointed, under a law of a State or Territory relating to the administration of the estates of persons who, through mental or physical infirmity, are incapable of managing their affairs, to administer the estate of a person who is so incapable; and
- (b) the incapable person is the registered holder of a share in a corporation;

the first-mentioned person may be registered as the holder of that share as administrator of that estate.

- (5) Where:

- (a) a person is appointed, under a law of a State or Territory relating to the administration of the estates of a person who, through mental or physical infirmity, are incapable of managing their affairs, to administer the estate of a person who is so incapable; and

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- (b) the incapable person is entitled in equity to a share in a corporation;
the first-mentioned person may, with the consent of the corporation and of the registered holder of that share, be registered as the holder of the share as administrator of that estate.
- (6) Where:
- (a) by virtue of the *Bankruptcy Act 1966*, a share in a body corporate, being the property of a bankrupt, vests in the Official Trustee in Bankruptcy; and
- (b) the bankrupt is the registered holder of that share;
the Official Trustee may be registered as the holder of that share as the Official Trustee in Bankruptcy.
- (7) Where:
- (a) by virtue of the *Bankruptcy Act 1966*, a share in a body corporate, being the property of a bankrupt, vests in the Official Trustee in Bankruptcy; and
- (b) the bankrupt is entitled in equity to that share;
the Official Trustee may, with the consent of the body and of the registered holder of that share, be registered as the holder of that share as the Official Trustee in Bankruptcy.
- (8) A person registered under subsection (2), (3), (4), (5), (6) or (7), is, while registered as mentioned in that subsection, subject:
- (a) to the same liabilities in respect of the share as those to which he, she or it would have been subject if the share had remained, or had been, as the case requires, registered in the name of the dead person, the incapable person or the bankrupt, as the case may be; and
- (b) to no other liabilities in respect of the share.
- (9) Shares in a corporation registered in a register and held by a trustee in respect of a particular trust may, with the consent of the corporation, be marked in the register in such a way as to identify them as being held in respect of the trust.
- (10) Except as provided in this section and section 216B:
- (a) no notice of a trust, whether express, implied or constructive, is to be entered on a register kept in this jurisdiction or be receivable by ASIC; and

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- (b) no liabilities are affected by anything done under a preceding subsection of this section or under section 216B; and
 - (c) nothing so done affects the body corporate concerned with notice of a trust.
- (11) A person must, within one month after beginning to hold shares in a proprietary company as trustee for, or otherwise on behalf of or on account of, a body corporate, serve on the company notice in writing that the person so hold the shares.

1091D Registration of transfers (*replaceable rule—see section 135*)

- (1) A person transferring shares remains the holder of the shares until the transfer is registered and the name of the person to whom they are being transferred is entered in the register of members in respect of the shares.
- (2) The directors are not required to register a transfer of shares in the company unless:
 - (a) the transfer and any share certificate have been lodged at the company's registered office; and
 - (b) any fee payable on registration of the transfer has been paid; and
 - (c) the directors have been given any further information they reasonably require to establish the right of the person transferring the shares to make the transfer.
- (3) The directors may refuse to register a transfer of shares in the company if:
 - (a) the shares are not fully-paid; or
 - (b) the company has a lien on the shares.
- (4) The directors may suspend registration of transfers of shares in the company at the times and for the periods they determine. The periods of suspension must not exceed 30 days in any 1 calendar year.

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1091E Additional general discretion for directors of proprietary companies to refuse to register transfers (*replaceable rule—see section 135*)

The directors of a proprietary company may refuse to register a transfer of shares in the company for any reason.

1092 Registration of transfer at request of transferor

- (1) On the written request of the transferor of a share in, debenture of, or interest made available by, a company, the company must enter in the appropriate register the name of the transferee in the same manner and subject to the same conditions as if the application for the entry were made by the transferee.
- (2) On the request in writing of the transferor of a share in, debenture of, or interest made available by, a company, the company must, by written notice, require the person having the possession, custody or control of the share certificate or debenture or any document evidencing title to the interest (as the case may be) and the instrument of transfer of the share, debenture or interest, or either of them, to bring it or them into the office of the company within a stated period, being not less than 7 and not more than 28 days after the date of the notice, to have the share certificate, debenture or document cancelled or rectified and the transfer registered or otherwise dealt with.
- (3) If a person refuses or fails to comply with a notice given under subsection (2), the transferor may apply to the Court for the issue of a summons for that person to appear before the Court and show cause why the documents mentioned in the notice should not be delivered up or produced as required by the notice.
- (4) Upon appearance of a person so summoned, the Court may examine the person upon oath or affirmation and receive other evidence or, if the person does not appear after being duly served with the summons, the Court may receive evidence in the person's absence, and, in either case, the Court may order the person to deliver up such documents to the company upon such terms or conditions as the Court considers just and reasonable, and the costs of the summons and of proceedings on the summons are in the discretion of the Court.

- (5) Lists of share certificates, debentures and other documents required to be brought in under this section and not brought in must be exhibited in the office of the company and must be advertised in the *Gazette* and in such newspapers and at such times as the company thinks fit.

1093 Notice of refusal to register transfer

If a company refuses to register a transfer of any shares in, debentures of, or interests made available by, the company, it must, within 2 months after the date on which the transfer was lodged with it, send to the transferee notice of the refusal.

1094 Remedy for refusal to register transfer or transmission

- (1) Where a relevant authority in relation to a company refuses or fails to register, or refuses or fails to give its consent or approval to the registration of, a transfer or transmission of shares in, debentures of, or an interest made available by, the company, the transferee or transmittee may apply to the Court for an order under this section.
- (2) Where, on an application made under subsection (1), the Court is satisfied that the refusal or failure was without just cause, the Court may:
- (a) order that the transfer or transmission be registered; or
 - (b) make such other order as it thinks just and reasonable, including, in the case of a transfer or transmission of shares, an order providing for the purchase of the shares by a specified member of the company or by the company and, in the case of a purchase by the company, providing for the reduction accordingly of the capital of the company.
- (3) In this section:
- relevant authority**, in relation to a company, means:
- (a) a person who has, 2 or more persons who together have, or a body that has, authority to register a transfer or transmission of shares in, debentures of, or interests made available by, the company; or
 - (b) a person, 2 or more persons, or a body, whose consent or approval is required before a transfer or transmission of

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shares in, debentures of, or interests made available by, the company is registered.

1095 Certification of transfers

- (1) The certification by a company of an instrument of transfer of shares in, debentures of, or interests made available by, the company is taken to be a representation by the company to any person acting on the faith of the certification that there have been produced to the company such documents as on the face of them show prima facie title to the shares, debentures or interests in the transferor named in the instrument of transfer but not as a representation that the transferor has any title to the shares, debentures or interests.
- (2) Where a person acts on the faith of a false certification by a company made negligently, the company is under the same liability to the person as if the certification had been made fraudulently.
- (3) Where a certification is expressed to be limited to 42 days or any longer period from the date of certification, the company and its officers are not, in the absence of fraud, liable in respect of the registration of any transfer of shares, debentures or interests comprised in the certification after the end of the period so limited or any extension of that period given by the company if the instrument of transfer has not, within that period, been lodged with the company for registration.
- (4) For the purposes of this section:
 - (a) an instrument of transfer is taken to be certified if it bears the words “certificate lodged” or words to the like effect; and
 - (b) the certification of an instrument of transfer is taken to be made by a company if:
 - (i) the person issuing the instrument is a person authorised to issue certified instruments of transfer on the company’s behalf; and
 - (ii) the certification is signed by a person authorised to certify transfers on the company’s behalf or by an officer of the company or of a body corporate so authorised; and

- (c) a certification that purports to be authenticated by a person's signature or initials (whether handwritten or not) is taken to be signed by the person unless it is shown that the signature or initials was not or were not placed there by the person and was not or were not placed there by any other person authorised to use the signature or initials for the purpose of certifying transfers on the company's behalf.

1096 Duties of company with respect to issue of certificates

- (1) Subject to subsection (1A), within 2 months after the allotment of any shares in, the issue of debentures of, or the making available of interests by, a company, the company must:
 - (a) complete and have ready for delivery to the allottee, debenture holder or interest holder, as the case may be, (in this subsection called the *relevant person*), all the appropriate certificates, debentures or other documents in connection with the allotment of the shares, the issue of the debentures or the making available of the interests unless, in the case of shares, the conditions of the allotment otherwise provide; and
 - (b) unless otherwise instructed by the relevant person, send or deliver the completed certificates, debentures or other documents to the relevant person or, where the relevant person has instructed the company in writing to send them to a nominated person, to that person.
- (1A) If the SCH business rules include a provision to the effect that:
 - (a) no document is required by subsection (1) to be completed and delivered by a company in relation to the allotment, issue or making available of a share, debenture or interest in specified circumstances; or
 - (b) the only document required by subsection (1) to be completed and delivered by a company in relation to the allotment, issue or making available of a share, debenture or interest in specified circumstances is such document as the provision requires;the provision has effect accordingly.
- (2) Within one month after the date on which a transfer of any shares, debentures or interests is lodged with a company (other than a

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transfer that the company is for any reason entitled to refuse to register and does not register) the company must:

- (a) complete and have ready for delivery to the transferee all the appropriate certificates, debentures or other documents in connection with the transfer; and
 - (b) unless otherwise instructed by the transferee, send or deliver the completed certificates, debentures or other documents to the transferee or, where the transferee has instructed the company in writing to send them to a nominated person, to that person.
- (2A) The only document required by subsection (2) to be completed and delivered by a company in relation to an SCH-regulated transfer is such document (if any) as the SCH business rules require to be so completed and delivered.
- (3) A company need not comply:
- (a) with subsection (1) in relation to the allotment of any shares in, the issue of debentures of, or the making available of interests by, the company; or
 - (b) with subsection (2) in relation to a transfer of shares, debentures or interests;
- if the allottee, debenture holder or interest holder, or the transferee, as the case may be, is a person who has applied to ASIC for the making of a declaration under this subsection and has been declared by ASIC, by writing published in the *Gazette*, to be a person in relation to whom this section does not apply.
- (4) If a company on which a notice has been served requiring the company to remedy any contravention of a provision of this section fails to remedy the contravention within 10 days after the service of the notice, the Court may, on the application of the person entitled to have the certificates, debentures or other documents delivered to him, her or it, make an order directing the company and any officer of the company to remedy the contravention within such period as is specified in the order, and the order may provide that all costs of and incidental to the application must be borne by the company or by any officer of the company who was involved in the contravention in such proportions as the Court thinks just and reasonable.

1096A Notices relating to non-beneficial and beneficial ownership of shares

- (1) Where, at a particular time:
 - (a) an instrument of transfer of shares in a company is lodged, by or on behalf of the transferee, with the company for registration of the transfer; and
 - (b) having regard to all relevant circumstances, it may reasonably be expected that, upon registration of the transfer, the transferee will hold non-beneficially particular shares (in this subsection called the *relevant shares*), being any of the shares to which the instrument of transfer relates; and
 - (c) the instrument of transfer does not include a notice that:
 - (i) contains a statement to the effect that, upon registration of the transfer, the transferee will hold the relevant shares non-beneficially; and
 - (ii) sets out particulars of the relevant shares; and
 - (iii) is signed by or on behalf of the transferee;the transferee contravenes this subsection.
- (2) The fact that a person has contravened subsection (1) does not affect the validity of the registration of a transfer of shares in a company.
- (3) Where:
 - (a) an instrument of transfer of shares in a company includes a notice of the kind referred to in paragraph (1)(c) and is lodged with the company for registration of the transfer; and
 - (b) upon registration of the transfer, the transferee holds beneficially particular shares (in this subsection called the *relevant shares*), being any of the shares particulars of which are set out in the notice;then, before the end of the period of 14 days beginning on registration of the transfer, the transferee must, whether or not the transferee begins before the end of that period to hold any of the relevant shares non-beneficially, give to the company a notice that:
 - (c) sets out the name and address of the transferee; and
 - (d) contains a statement to the effect that, as from registration of the transfer, the transferee holds the relevant shares beneficially; and

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- (e) sets out particulars of the relevant shares; and
- (f) is signed by or on behalf of the transferee.

(4) Where:

- (a) an instrument of transfer of shares in a company is lodged with the company for registration of the transfer; and
- (b) upon registration of the transfer, the transferee holds non-beneficially particular shares (in this subsection called the *relevant shares*), being any of the shares to which the instrument of transfer relates (other than, in a case where the instrument of transfer includes a notice of the kind referred to in paragraph (1)(c), the shares particulars of which are set out in the notice);

then, before the end of the period of 14 days beginning on registration of the transfer, the transferee must, whether or not the transferee begins before the end of that period to hold any of the relevant shares beneficially, give to the company a notice that:

- (c) sets out the name and address of the transferee; and
- (d) contains a statement to the effect that, as from registration of the transfer, the transferee holds the relevant shares non-beneficially; and
- (e) sets out particulars of the relevant shares; and
- (f) is signed by or on behalf of the transferee.

(5) Where:

- (a) at a particular time, a person holds beneficially shares in a company; and
- (b) immediately after that time, the person holds non-beneficially particular shares (in this subsection called the *relevant shares*), being any of the shares referred to in paragraph (a);

then, before the end of the period of 14 days beginning at that time, the person must, whether or not the person recommences before the end of that period to hold any of the relevant shares beneficially, give to the company a notice that:

- (c) sets out the name and address of the person; and
- (d) contains a statement to the effect that, after that time, the person holds the relevant shares non-beneficially; and
- (e) specifies that time and sets out particulars of the relevant shares; and

- (f) is signed by or on behalf of the person.
- (6) Where:
- (a) at a particular time, a person holds non-beneficially shares in a company; and
 - (b) immediately after that time, the person holds beneficially particular shares (in this subsection called the *relevant shares*), being any of the shares referred to in paragraph (a); then, before the end of the period of 14 days beginning at that time, the person must, whether or not the person recommences before the end of that period to hold any of the relevant shares non-beneficially, give to the company a notice that:
 - (c) sets out the name and address of the person; and
 - (d) contains a statement to the effect that, after that time, the person holds the relevant shares beneficially; and
 - (e) specifies that time and sets out particulars of the relevant shares; and
 - (f) is signed by or on behalf of the person.
- (7) In proceedings under this section, a person is, unless the contrary is established, presumed to have been aware at a particular time of a circumstance of which an employee or agent of the person, being an employee or agent having duties or acting in relation to the transfer to, or ownership by, the person of a share or shares in the company concerned, was aware at that time.
- (8) In this section, unless the contrary intention appears:
any includes all.
- (9) For the purposes of this section and of section 216B:
- (a) where, at a particular time, a person:
 - (i) holds shares in a capacity other than that of sole beneficial owner; or
 - (ii) without limiting the generality of subparagraph (i), holds shares as trustee for, as nominee for, or otherwise on behalf of or on account of, another person;the first-mentioned person is taken to hold the shares non-beneficially at that time; and

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- (b) a person who holds shares at a particular time is taken to hold the shares beneficially at that time unless the person holds the shares non-beneficially at that time.

Division 3—Transfer of marketable securities and marketable rights

Subdivision A—Interpretation

1097 Interpretation

- (1) In this Division, unless the contrary intention appears:

associate, in relation to a broker, means:

- (a) if the broker is a member of a firm of brokers and is not a broker's agent—any other member of the firm; or
- (b) if the broker is another broker's agent or employee—the other broker or, if the other broker is a member of a firm of brokers, any member of that firm.

beneficial owner, in relation to a marketable security or a marketable right, means a person for whom an authorised trustee corporation holds (whether alone or together with any other person or persons) the security or right in trust in the ordinary course of its business.

broker means a member of a securities exchange.

broker's agent means a broker's agent or employee.

Division 3 transfer means:

- (a) a sufficient transfer under this Division of marketable securities or marketable rights; or
- (b) a proper SCH transfer.

document, in relation to a transfer, includes, in the case of an SCH-regulated transfer, an electronic message or other electronic communication.

duly completed, in relation to a document, has a meaning affected by section 1098.

duly completed Part 1 means a document that has been duly completed in accordance with Part 1 of Form 1, 2, 3, 5, 6 or 7.

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eligible body means:

- (a) a company; or
- (b) a body corporate (other than a company) that:
 - (i) is incorporated in a State or Territory in this jurisdiction; and
 - (ii) is prescribed for the purposes of this paragraph; or
- (c) an unincorporated society, association or body, that:
 - (i) is formed or established in a State or Territory in this jurisdiction; and
 - (ii) is included in the official list of a securities exchange; and
 - (iii) is prescribed for the purposes of this paragraph.

execution time, in relation to a document, means the time:

- (a) in the case of a sufficient transfer under section 1101—when the document was stamped with a stamp purporting to be that of the transferee's broker; or
- (b) in the case of a sufficient transfer under section 1102—when the document was executed by the transferor.

identification code, in relation to a member organisation, means a code that, for the purposes of the SCH business rules, is the member organisation's identification code, or one of its identification codes, as the case may be.

in accordance with includes to the effect of.

issuing body, in relation to a marketable security or a marketable right, means the body (whether incorporated or not) that, or other person who, issued or made available, or proposes to issue or make available, the security or right.

legal representative means the executor, original or by representation, of a will, or the administrator of the estate, of a dead person.

marketable right means a right, whether existing or future, and whether contingent or not, of a person to have a marketable security issued to the person, whether or not on payment of any money or for any other consideration.

marketable security means:

- (a) a share in, or a debenture of, an eligible body; or
- (b) a prescribed security.

member organisation means a member organisation of a securities exchange.

prescribed security means an interest in a managed investment scheme that is prescribed for the purposes of this definition.

securities exchange means a prescribed body corporate.

stamp has the meaning given by section 1099.

transfer, in relation to a marketable security or a marketable right, includes:

- (a) in the case of a quoted security or a quoted right—any change in the ownership of the security or right; and
- (b) in the case of a marketable right—the renunciation and transfer of the right.

transfer document, in relation to a proper SCH transfer, means the document that is taken under the SCH business rules to effect the transfer.

- (2) A reference in this Division to a form by number is a reference to the form so numbered in Schedule 2 or to a form to the like effect.
- (3) A reference in a form in Schedule 2 to the full name of the transferor of marketable securities or marketable rights includes a reference to the name of the person shown in the records of the issuing body in relation to those securities or rights as the holder of those securities or rights.
- (4) If the SCH business rules include provisions determining:
 - (a) which member organisation effected a proper SCH transfer; or
 - (b) when a proper SCH transfer takes effect;those provisions have effect for the purposes of this Division.

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1097A Quoted securities and rights

- (1) A quoted security is a marketable security in a class of marketable securities listed for quotation on a stock market of a securities exchange.
- (2) A quoted right is a marketable right in a class of marketable rights listed for quotation on a stock market of a securities exchange.
- (3) For the purposes of subsections (1) and (2), securities or rights in a class of marketable securities or marketable rights are not taken to have stopped being listed for quotation on a stock market of a securities exchange merely because of a temporary suspension of quotation of securities or rights in that class.
- (4) If:
 - (a) there is a suspension of the quotation, on a stock market of a securities exchange, of marketable securities in a class of marketable securities, or of marketable rights in a class of marketable rights; and
 - (b) during the suspension, the issuing body in relation to the securities or rights ceases to be included in an official list of the securities exchange;then, for the purposes of subsections (1) and (2), marketable securities or marketable rights in that class are taken to stop being listed for quotation on a stock market of the securities exchange when the issuing body ceases to be so included.
- (5) Subsection (4) does not limit the circumstances in which marketable securities in a class of marketable securities, or marketable rights in a class of marketable rights, may be taken to have stopped being listed for quotation on a stock market of a securities exchange.

1097B SCH business rules may extend meaning of quoted securities or quoted rights

- (1) If the SCH business rules provide that marketable securities or marketable rights that stop being quoted securities or quoted rights are taken to continue to be quoted securities or quoted rights for a specified period, then, for the purposes of the provisions mentioned

in subsection (3), those securities or rights are taken to be quoted securities or quoted rights during that period.

- (2) If the SCH business rules provide that marketable securities or marketable rights that:
 - (a) are approved, by a securities exchange, to be listed for quotation on a stock market of a securities exchange, but that are not yet so listed; and
 - (b) have been issued;are taken to be quoted securities or quoted rights for a specified period, then, for the purposes of the provisions mentioned in subsection (3), those securities or rights are taken to be quoted securities or quoted rights during that period.
- (3) These are the provisions:
 - (a) the definitions of *proper SCH transfer*, *SCH certificate cancellation provisions*, *SCH-regulated transfer* and *SCH subregister* in section 9; and
 - (b) section 653A and the provisions of Parts 7.2A and 7.13, and of any regulations made for the purposes of those Parts.

1097C ASIC may declare that Act applies to securities as if they were quoted securities or rights

- (1) ASIC may, by writing, declare that this Act, and the regulations, or that specified provisions of this Act and the regulations, have effect (subject to any modifications specified in the declaration) in relation to particular securities, or a particular class of securities, that are not quoted securities or quoted rights as if those securities, or securities of that class, were quoted securities or quoted rights.
- (2) A declaration under subsection (1) has effect accordingly.
- (3) ASIC must cause a copy of a declaration under subsection (1) to be published in the *Gazette*.

1097D Transfer that substantially complies with SCH business rules

For the purposes of this Division, if the securities clearing house determines under the SCH business rules that an SCH-regulated transfer substantially complies with the applicable provisions of

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those business rules, the transfer is taken to be, and always to have been, a proper SCH transfer.

1098 Document duly completed in accordance with a particular form

- (1) For the purposes of this Division, a document is not duly completed in accordance with one of Forms 1, 2, 3, 4, 5, 6, 7 and 8, or a part of one of those forms, unless it:
 - (a) where the form or part refers to the name and address of the transferee—purports to state that name and address; and
 - (b) where the form or part refers to the transferor's broker's stamp—bears a stamp that purports to be such a stamp; and
 - (c) where the form or part refers to the transferee's broker's stamp—bears a stamp that purports to be such a stamp; and
 - (d) where the form or part refers to a securities exchange stamp—bears a stamp that purports to be a stamp of a securities exchange.
- (2) Where a document (in this section called the *first document*) relates to particular marketable securities or marketable rights, subsections (3), (4) and (5) apply for the purposes of determining whether the first document and another document (in this section called the *second document*) are, or together with another document or documents are, a sufficient transfer of the securities or rights.
- (3) The first document is not duly completed in accordance with Part 3 of Form 1, 2, 3, 5, 6 or 7 unless, where that part refers to the transferee's broker's stamp, the first document bears a stamp that purports to be such a stamp and includes a string of characters that purports to be the transfer consolidation number of the first document.
- (4) The second document is not duly completed in accordance with Part 1 of Form 4 or 8 unless, where that part refers to a transfer consolidation number or transfer consolidation numbers, the second document sets out the string of characters referred to in subsection (3).

- (5) The second document is not taken not to be duly completed in accordance with Part 1 of Form 4 or 8 merely because of either or both of the following:
- (a) the second document sets out, where that part refers to a transfer consolidation number or transfer consolidation numbers, a string or strings of characters other than the string referred to in subsection (3);
 - (b) the second document fails to set out correctly the number of marketable securities or marketable rights to which it relates.

1099 Stamping of documents

- (1) In this Division (other than section 1112):
- (a) a reference to the stamping of a document is a reference to stamping in ink; and
 - (b) a reference to a stamp on a document, or to a stamp borne by a document, is a reference to a stamp stamped on the document in ink.
- (2) A reference in section 1112 to the stamping of a document is a reference to stamping the document:
- (a) in ink; or
 - (b) by affixing a stamp; or
 - (c) by impressing a stamp; or
 - (d) in any other manner.

Subdivision B—Sufficient transfers (transfers other than SCH-regulated transfers)

1099A Subdivision does not apply to SCH-regulated transfers

Nothing in this Subdivision applies in relation to:

- (a) an SCH-regulated transfer; or
- (b) a document that relates to such a transfer.

1100 Sufficient transfers

- (1) A document that is under this Division a sufficient transfer of marketable securities may be used:
-

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- (a) as a proper instrument of transfer for the purposes of section 1091; and
 - (b) as an instrument of transfer for the purposes of any other law or instrument governing or relating to those securities.
- (2) A document that is under this Division a sufficient transfer of marketable rights may be used as an instrument of transfer of those rights for the purposes of any law or instrument governing or relating to those rights or the marketable securities to which those rights relate.

1101 What is a sufficient transfer of marketable securities or marketable rights: generally

- (1) A document is a sufficient transfer of marketable securities if it relates to those securities and is duly completed in accordance with:
- (a) Parts 1 and 2 of Form 1; or
 - (b) Part 1 of Form 1 and Parts 1 and 2 of Form 2 or 3; or
 - (c) Parts 1 and 3 of Form 1 and both parts of Form 4; or
 - (d) Part 1 of Form 1, Parts 1 and 3 of Form 2 or 3 and both parts of Form 4.
- (2) A document is a sufficient transfer of marketable rights if it relates to those rights and is duly completed in accordance with:
- (a) Parts 1 and 2 of Form 5; or
 - (b) Part 1 of Form 5 and Parts 1 and 2 of Form 6 or 7; or
 - (c) Parts 1 and 3 of Form 5 and both parts of Form 8; or
 - (d) Part 1 of Form 5, Parts 1 and 3 of Form 6 or 7 and both parts of Form 8.

1102 What is a sufficient transfer by an authorised trustee corporation

- (1) In respect of the transfer of marketable securities, otherwise than by way of sale, gift or exchange, by an authorised trustee corporation (whether alone or together with any other person or persons) to the beneficial owner of the securities, a document is a sufficient transfer if it relates to those securities and is duly completed in accordance with Form 9.

- (2) In respect of the transfer of marketable rights, otherwise than by way of sale, gift or exchange, by an authorised trustee corporation (whether alone or together with any other person or persons) in favour of the beneficial owner of those rights, a document is a sufficient instrument of transfer if it relates to those rights and is duly completed in accordance with Form 10.

1103 Transferee's execution of transfer of marketable securities

- (1) This section applies where marketable securities are transferred by means of a sufficient transfer under this Division.
- (2) The transferee is taken to have agreed at the execution time to accept the securities subject to the terms and conditions on which the transferor held them at that time, being the terms and conditions applicable as between the issuing body in relation to, and the holder for the time being of, the securities.
- (3) If the securities are shares, the transferee is taken to have agreed at the execution time to become a member of the issuing body and to be bound, on being registered as the holder of the shares, by the issuing body's constitution.

1104 Transferee's execution of transfer of marketable rights

- (1) This section has effect where marketable rights relating to marketable securities are transferred by means of a sufficient transfer under this Division.
- (2) The transferee is taken:
 - (a) to have applied at the execution time to the issuing body in relation to the securities for the allotment to him, her or it of the securities; and
 - (b) to have agreed at the execution time to accept the securities subject to the terms and conditions on which the issuing body offers them for subscription.
- (3) If the securities are shares, the transferee is taken to have agreed at the execution time to become a member of the issuing body and to be bound, on being registered as the holder of the shares, by the issuing body's constitution.

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1105 Effect where document purports to bear transferor's broker's stamp

- (1) This section applies where a document relating to marketable securities or marketable rights:
 - (a) is a duly completed Part 1; and
 - (b) bears a stamp that purports to be that of the transferor's broker.
- (2) Each associate (if any) of the broker (in this section called the *designated broker*) of whom the stamp referred to in paragraph (1)(b) purports to be the stamp and, unless the designated broker is a broker's agent, the designated broker is taken to have warranted:
 - (a) that the statements in the document that purport to be certified by the transferor's broker are accurate; and
 - (b) that the transferor:
 - (i) is the registered holder of, or entitled to be registered as the holder of, the securities; or
 - (ii) is entitled to the rights;as the case may be, and is legally entitled or authorised to sell or dispose of the securities or rights.
- (3) If the document has been duly completed in accordance with Part 1 of Form 1 or 5, then:
 - (a) if, when the document was stamped with the stamp referred to in paragraph (1)(b), the designated broker had authority to sell the securities or rights, on the transferor's behalf, to:
 - (i) the transferee; or
 - (ii) particular persons who include, or particular classes of persons at least one of which includes, the transferee; or
 - (iii) any person at all;the designated broker is taken to have been authorised to execute, and to have executed, the document on the transferor's behalf; and
 - (b) each associate (if any) of the designated broker and, unless the designated broker is a broker's agent, the designated broker is or are, as the case requires, liable to indemnify:

- (i) the issuing body in relation to the securities or rights;
and
 - (ii) the transferor; and
 - (iii) the transferee; and
 - (iv) the transferee's broker;
- against any loss or damage arising if:
- (v) the stamp referred to in paragraph (1)(b) is not in fact the designated broker's stamp; or
 - (vi) apart from the effect of paragraph (a) of this subsection, the designated broker was not authorised to execute the document on the transferor's behalf.

1106 Warranties by securities exchange where document purports to bear its stamp

- (1) This section applies where a document:
 - (a) has been duly completed in accordance with Part 1 of Form 3 or 7; and
 - (b) bears a stamp that purports to be that of a securities exchange.
- (2) The securities exchange is taken to have warranted that:
 - (a) the statements in the document that purport to be certified by a securities exchange are accurate; and
 - (b) the transferor is:
 - (i) the registered holder of, or entitled to be registered as the holder of, the securities; or
 - (ii) entitled to the rights;as the case may be, and is legally entitled or authorised to sell or dispose of the securities or rights.

1107 Indemnities by securities exchange and broker where documents purport to bear their stamps

- (1) This section applies where:
 - (a) a document (in this section called the *first document*) relating to marketable securities or marketable rights:
 - (i) has been duly completed in accordance with Part 1 of Form 1 or 5; and
-

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- (ii) bears a stamp that purports to be that of the transferor's broker; and
- (b) another document:
 - (i) relates to any or all of the securities or rights; and
 - (ii) has been duly completed in accordance with Part 1 of Form 3 or 7; and
 - (iii) bears a stamp that purports to be that of a particular securities exchange.
- (2) The securities exchange is liable to indemnify:
 - (a) the issuing body in relation to the securities or rights; and
 - (b) the transferor in relation to the other document; and
 - (c) the transferee in relation to the other document; and
 - (d) the broker of the transferee in relation to the other document; against any loss or damage arising if:
 - (e) the stamp referred to in subparagraph (1)(a)(ii) is not in fact the stamp of the broker (in this section called the *designated broker*) of whom it purports to be the stamp; or
 - (f) apart from the effect of paragraph 1105(3)(a), the designated broker was not authorised to execute the first document on behalf of the transferor in relation to the first document.
- (3) Each associate (if any) of the designated broker and, unless the designated broker is a broker's agent, the designated broker is or are, as the case requires, liable to indemnify the securities exchange against any loss or damage arising as mentioned in subsection (2).
- (4) Nothing in this section limits the operation of anything in section 1105 or 1106 or of anything else in this section.

1108 Joint and several warranties and liabilities

- (1) If 2 or more persons are taken to have warranted as mentioned in paragraph 1105(2)(a) or (b), they are taken to have so warranted jointly and severally.
- (2) If 2 or more persons are liable as mentioned in paragraph 1105(3)(b) or subsection 1107(3), they are so liable jointly and severally.

1109 Registration of certain instruments

An eligible body with which a sufficient transfer under this Division is lodged for the purpose of registering a transfer, or obtaining the allotment or issue, of marketable securities is, and its officers are, in the absence of knowledge to the contrary, entitled to assume without inquiry that:

- (a) in the case of a sufficient transfer under section 1101:
 - (i) a stamp on the document that purports to be the transferor's broker's stamp is the stamp of that broker; and
 - (ii) a stamp on the document that purports to be the transferee's broker's stamp is the stamp of that broker; and
 - (iii) a stamp on the document that purports to be the stamp of a securities exchange is the stamp of that securities exchange; or
- (b) in the case of a sufficient transfer under section 1102:
 - (i) at the execution time, the authorised trustee corporation named in the instrument held (whether alone or together with any other person or persons) in the ordinary course of its business, in trust for or on behalf of the transferee, the marketable securities or marketable rights to which the sufficient transfer relates; and
 - (ii) the transfer was not made by way of a sale, gift or exchange of the securities or rights.

Subdivision C—SCH-regulated transfers

1109A Member organisation's authority to enter into transaction continues despite client's death

If:

- (a) a person authorises a member organisation to enter into a transaction (for example, a sale) involving the disposal of quoted securities or quoted rights; and
- (b) the person dies before the member organisation enters into the transaction; and

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(c) the authority is still in force immediately before the person dies;

then:

(d) the authority continues, despite the person's death, as if the person were still alive, but can be revoked by the person's legal representative just as the person could revoke it if the person were still alive; and

(e) if the member organisation enters into the transaction while the authority so continues—the transaction is binding on the person's legal representative.

1109B Authority to enter into transaction gives authority to transfer

(1) If a person authorises a member organisation to enter into a transaction (for example, a sale) involving the disposal of quoted securities or quoted rights, the person is taken also to have authorised the member organisation to effect any proper SCH transfer of all or any of those securities or rights that the member organisation effects, even if the transfer has no connection with the transaction.

Note: The transfer may have no connection with the transaction because of the operation of the provisions of the SCH business rules referred to in subsection 954P(1).

(2) The authority that the person is taken, by subsection (1), to have given:

(a) is revoked if, before the transaction is entered into, the authority to enter into the transaction is revoked or otherwise ceases to have effect; and

(b) cannot otherwise be revoked; and

(c) if the person dies after the transaction is entered into—continues in force, despite the person's death, as if the person were still alive (but cannot be revoked).

1109C Effect of proper SCH transfer

(1) A proper SCH transfer of quoted securities is valid and effective for the purposes of any law or instrument governing or relating to the way in which the securities may be transferred.

- (2) A proper SCH transfer of quoted rights is valid and effective for the purposes of any law or instrument governing or relating to the way in which the rights may be transferred.

1109D Effect of proper SCH transfer on transferee

- (1) If a proper SCH transfer of quoted securities takes effect at a particular time:
- (a) the transferee is taken to have agreed at that time to accept the securities subject to the terms and conditions on which the transferor held them immediately before that time, being the terms and conditions applicable as between the issuing body in relation to, and the holder for the time being of, the securities; and
 - (b) if the securities are shares—the transferee is also taken to have agreed at that time to become a member of the issuing body and to be bound by the issuing body’s constitution.
- (2) If a proper SCH transfer of quoted rights relating to marketable securities takes effect at a particular time:
- (a) the transferee is taken:
 - (i) to have applied at that time to the issuing body in relation to the securities for the allotment to him, her or it of the marketable securities; and
 - (ii) to have agreed at that time to accept the marketable securities subject to the terms and conditions on which the issuing body offers them for subscription; and
 - (b) if the marketable securities are shares—the transferee is also taken to have agreed, at that time, to become a member of the issuing body and to be bound, on being registered as the holder of the shares, by the issuing body’s constitution.

1109E Warranties by member organisation whose identification code is included in transfer document

- (1) This section applies if the transfer document for a proper SCH transfer of quoted securities or quoted rights includes a member organisation’s identification code as the identification code of the member organisation effecting the transfer.

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- (2) If the member organisation is the transferor, the member organisation or, if it is a partnership, each of the partners in the member organisation, is taken to have warranted that:
- (a) the transfer was effected by the member organisation; and
 - (b) the transferor was legally entitled or authorised to transfer the securities or rights.

(3) If:

- (a) the member organisation is not the transferor; and
- (b) the transfer is pursuant to a transaction in relation to which, or to transactions in relation to each of which, one of the following conditions is satisfied:
 - (i) the transaction was entered into in the ordinary course of trading on a stock market; and
 - (ii) the transaction is, under the business rules or listing rules of a stock exchange, described, or to be described, as “special” when it is reported to the stock exchange;

the member organisation or, if it is a partnership, each of the partners in the member organisation, is taken to have warranted that:

- (c) the transferor was legally entitled or authorised to transfer the securities or rights; and
- (d) the transfer was effected by the member organisation; and
- (e) the member organisation was authorised by the transferor to effect the transfer.

(4) If:

- (a) the member organisation is not the transferor; and
- (b) subsection (3) does not apply;

the member organisation or, if it is a partnership, each of the partners in the member organisation, is taken to have warranted that:

- (c) the transfer was effected by the member organisation; and
- (d) the member organisation was authorised by the transferor to effect the transfer.

1109F Indemnities in respect of warranted matters

(1) If:

- (a) a member organisation, or each of the partners in a partnership that is a member organisation, is taken by section 1109E to have warranted, in relation to a proper SCH transfer of quoted securities or quoted rights, that the transfer was effected by the member organisation; and
 - (b) the transfer was not effected by the member organisation; the member organisation, or, if it is a partnership, each of the partners in the member organisation, is liable to indemnify:
 - (c) the issuing body in relation to the securities or rights; and
 - (d) the transferor; and
 - (e) the transferee; and
 - (f) if a member organisation acted as the transferee's agent in the transfer—that member organisation; and
 - (g) the securities clearing house;against any loss or damage arising from the transfer not having been effected by the first-mentioned member organisation.
- (2) If:
- (a) a member organisation, or each of the partners in a partnership that is a member organisation, is taken by section 1109E to have warranted, in relation to a proper SCH transfer of quoted securities or quoted rights, that the transferor was legally entitled or authorised to transfer the securities or rights; and
 - (b) the transferor was not legally entitled or authorised to transfer the securities or rights;
- the member organisation, or, if it is a partnership, each of the partners in the member organisation, is liable to indemnify:
- (c) the issuing body in relation to the securities or rights; and
 - (d) the transferee; and
 - (e) if a member organisation acted as the transferee's agent in the transfer—that member organisation; and
 - (f) the securities clearing house;
- against any loss or damage arising from the transferor not having been legally entitled or authorised to transfer the securities or rights.
- (3) If:

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- (a) a member organisation, or each of the partners in a partnership that is a member organisation, is taken by section 1109E to have warranted, in relation to a proper SCH transfer of quoted securities or quoted rights, that the member organisation was authorised by the transferor to effect the transfer; and
 - (b) the member organisation was not authorised by the transferor to effect the transfer;
- the member organisation or, if it is a partnership, each of the partners in the member organisation, is liable to indemnify:
- (c) the issuing body in relation to the securities or rights; and
 - (d) the transferor; and
 - (e) the transferee; and
 - (f) if a member organisation acted as the transferee's agent in the transfer—that member organisation; and
 - (g) the securities clearing house;
- against any loss or damage arising from the first-mentioned member organisation not having been authorised by the transferor to effect the transfer.
- (4) The effect of section 1109B is to be disregarded in determining, for the purposes of this section, whether a person or partnership:
 - (a) was legally entitled or authorised to transfer quoted securities or quoted rights; or
 - (b) was authorised by another person or partnership to effect a transfer of quoted securities or quoted rights.

1109G Joint and several warranties and liabilities

- (1) If 2 or more persons are taken to have warranted as mentioned in subsection 1109E(2), (3) or (4), they are taken to have so warranted jointly and severally.
- (2) If 2 or more persons are liable as mentioned in subsection 1109F(1), (2) or (3), they are so liable jointly and severally.

1109J Securities clearing house entitled to assume its business rules complied with

- (1) The securities clearing house is entitled to assume without inquiry, in the absence of knowledge to the contrary, that anything purporting to be done under the SCH business rules in connection with a transfer of a quoted security or quoted right has been done in accordance with those rules.
- (2) If, in reliance on subsection (1), the securities clearing house assumes that a thing was done in accordance with the SCH business rules then, for the purposes of this Act (including the definition of *proper SCH transfer* in section 9), the thing is taken to have been done in accordance with those rules.
- (3) If the securities clearing house is acting on behalf of the issuing body in relation to quoted securities or quoted rights when, in reliance on subsection (1), it assumes that a thing was done in accordance with the SCH business rules, then the issuing body is also taken to assume, and to be entitled to assume, that the thing was so done.

1109K SCH-regulated transfer not to be registered unless proper SCH transfer

- (1) The issuing body in relation to a quoted security or quoted right must not register, or otherwise give effect to, an SCH-regulated transfer of the security or right unless the transfer is a proper SCH transfer.
- (2) Subsection (1) has effect despite anything in:
 - (a) the body's constitution; or
 - (b) a deed relating to debentures; or
 - (c) the constitution of a registered scheme; or
 - (d) a deed relating to interests.

1109L Issuing body not to refuse to register proper SCH transfer

The issuing body in relation to a quoted security or a quoted right must not refuse or fail to register, or to give effect to, a proper SCH transfer of the security or right.

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1109M Trustees and legal representatives may be SCH participants etc.

- (1) A trustee, or a legal representative of a dead person, who, as trustee or legal representative, holds a quoted security or a quoted right may:
 - (a) subject to the requirements of the SCH business rules, be an SCH participant; and
 - (b) have the security or right converted into, and hold it in, a form in which it may be transferred in accordance with the SCH business rules.
- (2) Nothing in subsection (1) authorises the trustee or legal representative to do a thing that the trustee or legal representative is expressly prohibited from doing by any law or by the terms and conditions on which he, she or it holds office.

1109N Determination of who holds quoted securities for the purposes of a meeting

- (1) This section applies to a meeting of:
 - (a) the holders of securities of a body corporate, provided some or all of the securities are quoted securities; or
 - (b) the holders of a class of securities of a body corporate, provided some or all of the securities in that class are quoted securities.
- (2) The convener of the meeting may determine that:
 - (a) if paragraph (1)(a) applies—all the securities of the body corporate that are quoted securities at a specified time before the meeting; or
 - (b) if paragraph (1)(b) applies—all the securities of the body corporate in the relevant class that are quoted securities at a specified time before the meeting;are taken, for the purposes of the meeting, to be held by the persons who held them at the specified time.
- (3) The specified time must not be more than 48 hours before the meeting.

- (4) Subject to subsection (3), the specified time must satisfy any applicable requirements of the SCH business rules.
- (5) The determination must be made in accordance with any applicable requirements of the SCH business rules as to the way in which it must be made.
- (6) The determination must be made before notice of the meeting is given.
- (7) Particulars of the determination must be included in the notice of the meeting, but a failure to do so does not invalidate the determination.
- (8) The determination has effect accordingly despite anything in:
 - (a) this Act or the regulations; and
 - (b) any other laws (written or unwritten) that apply to the meeting; and
 - (c) any documents (for example, the body corporate's constitution or any relevant trust deed) that apply to the meeting.

1109P Determination of who holds quoted securities for the purposes of conferring security benefits

- (1) If the SCH business rules include provisions relating to the determination, for the purposes of conferring security benefits, of who holds or is taken to hold quoted securities at a particular time, those provisions have effect accordingly despite anything in:
 - (a) this Act or the regulations; and
 - (b) any other laws (written or unwritten) that apply to the conferral; and
 - (c) any documents (for example, the body corporate's constitution or any relevant trust deed) that apply to the conferral.
- (2) For the purposes of this section, *conferring a security benefit* means:
 - (a) paying or transferring money or property to a person because the person holds or held a security; or

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- (b) issuing securities to a person because the person holds or held a security; or
- (c) conferring a right on a person because the person holds or held a security.

Subdivision D—Miscellaneous

1110 Operation of Division

- (1) This Division applies in relation to a transfer of marketable securities or marketable rights despite anything to the contrary in this Act (other than this Division) or in another law or instrument relating to the transfer of the securities or rights.
- (2) Except as provided in this Division, this Division does not affect the terms and conditions on which marketable securities or marketable rights are sold.
- (3) Nothing in this Division (other than section 1109L) affects any right of an eligible body to refuse:
 - (a) to acknowledge or register a person as the holder of marketable securities; or
 - (b) to allot or issue marketable securities to a person; on a ground other than an objection to the form of document that is lodged with or sent to the eligible body and purports to transfer to the person the securities, or marketable rights relating to the securities.
- (4) The registration of a transfer, or the allotment or issue, of a marketable security by means of a Division 3 transfer does not breach any law, constitution, trust deed or other instrument relating to marketable securities.
- (5) Nothing in this Division (except section 1109K) prevents or affects the use of:
 - (a) any other form of transfer of marketable securities or marketable rights; or
 - (b) any other mode of executing a document transferring marketable securities or marketable rights; that is otherwise permitted by law.

- (6) A transfer of marketable securities or marketable rights by or to a trustee or legal representative may be effected by means of a Division 3 transfer despite any law or the provisions of the instrument (if any) creating, or having effect in relation to, the trust or will under which the trustee or legal representative is appointed.

1111 Occupation need not appear in transfer document, register etc.

- (1) A document transferring marketable securities or marketable rights need not state the occupation of the transferor or transferee and, if the document is signed by a person, the signature need not be witnessed.
- (2) Subsection (1) applies despite anything in:
- (a) the constitution of an eligible body; or
 - (b) the terms and conditions on which marketable securities or marketable rights are created or issued.
- (3) The omission from a register, certificate or other document relating to marketable securities of a statement of the occupation of a person who is, or is entitled to be, registered as the holder of the securities does not breach any law, constitution, trust deed or other document relating to the securities.

1112 Offences: stamping of broker's stamp on sufficient transfer

- (1) A broker must not, in this jurisdiction or elsewhere, stamp with a broker's stamp a document that relates to marketable securities or marketable rights and may be used as a sufficient transfer under this Division unless the document relates to a sale or purchase of the securities or rights, in the ordinary course of the broker's business, for a consideration of not less than their unencumbered market value at the time of the sale or purchase.
- (2) A person, must not, in this jurisdiction or elsewhere, stamp with a stamp that purports to be that of the transferor's broker a document that relates to marketable securities or marketable securities or marketable rights and may be used as a sufficient transfer under this Division unless:
- (a) the stamp is in fact that of the transferor's broker; and

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- (b) apart from the effect of paragraph 1105(3)(a), the transferor's broker is authorised to execute the document on the transferor's behalf; and
 - (c) the person is the transferor's broker or is authorised so to stamp the document on the transferor's broker's behalf.
- (3) A securities exchange must not, in this jurisdiction or elsewhere, stamp with a stamp of the securities exchange a document that may be used as a sufficient transfer under this Division of marketable securities or marketable rights, unless:
 - (a) there has been lodged; or
 - (b) the securities exchange holds a duly completed Part 1 bearing a certificate that purports to be that of the transferor's broker and states that there has been or will be lodged; with the issuing body in relation to the securities or rights a duly completed Part 1 relating to the securities or rights.
- (4) A person must not, in this jurisdiction or elsewhere execute a document that may be used as a sufficient transfer under section 1102 and relates to a transfer of marketable securities or of marketable rights:
 - (a) made by way of a sale, gift or exchange of the securities or rights; or
 - (b) to or in favour of a person who is not the beneficial owner of the securities or rights.
- (5) A person other than an authorised trustee corporation must not, in this jurisdiction or elsewhere, knowingly cause, authorise or permit to be executed a document that relates to marketable securities or marketable rights and may be used as a sufficient transfer under section 1102 but is not in fact a sufficient transfer under that section.
- (6) A person must not, in this jurisdiction or elsewhere, knowingly lodge or cause to be lodged with an eligible body a document that has been stamped in contravention of subsection (1), (2) or (3), or that has been executed in contravention of subsection (4), for the purpose of securing the registration of the transfer of, or the allotment or issue of, marketable securities to the transferee named in the document.

1112A Offences: inclusion of identification codes in proper SCH transfers

A person must not, in this jurisdiction or elsewhere, include a member organisation's identification code in a document that may be used to effect a proper SCH transfer unless:

- (a) the person:
 - (i) is the member organisation or, if it is a partnership, is a partner in the member organisation; or
 - (ii) is authorised so to include the identification code by the member organisation; and
- (b) if:
 - (i) the identification code is so included as the identification code of the member organisation effecting the transfer; and
 - (ii) the member organisation is not the transferor; the member organisation is, apart from the effect of section 1109B, authorised by the transferor to effect the transfer.

1112B Offences: contravention by broker of the SCH certificate cancellation provisions relating to use of cancellation stamps

A broker must not, intentionally or recklessly, contravene the SCH certificate cancellation provisions by affixing, or failing to affix, a cancellation stamp to a certificate or other document of title to quoted securities or quoted rights.

1112C Civil liability: contravention by broker of the SCH certificate cancellation provisions

- (1) A person who suffers loss or damage because of conduct of a broker that was engaged in contravention of the SCH certificate cancellation provisions may, unless the person was involved in the contravention, recover the amount of the loss or damage by action against the broker, whether or not the broker has been convicted of an offence in respect of the contravention.

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- (2) An action under subsection (1) must be begun within 6 years after the day on which the cause of action arose.
- (3) This section does not affect a liability that a person has under any other law.

**1112D Issuer protected from civil liability for broker's
contravention of SCH certificate cancellation provisions**

If:

- (a) a broker contravenes the SCH certificate cancellation provisions in relation to particular quoted securities or quoted rights; and
- (b) the issuing body in relation to the securities or rights is not involved in the contravention;

the issuing body is not liable to an action or other proceeding for damages in relation to the broker's contravention.

Division 4—Exemptions and modifications

1113 ASIC’s general powers

- (1) This section applies to Divisions 1, 2 and 3.
- (1A) In this section:

securities includes marketable securities, and marketable rights, within the meaning of Division 3.
- (2) The power of ASIC to grant an exemption or make a declaration under this section may be exercised in relation to securities or a class of securities only where ASIC is satisfied that:
 - (a) if the exemption were granted or the declaration were made, the interests of the holders of those securities or of securities in that class would continue to have adequate protection; and
 - (b) the granting of the exemption or the making of the declaration would make transfer of those securities, or of securities in that class, more efficient.
- (3) ASIC may, by writing, exempt particular securities, or a particular class of securities, either generally or as otherwise provided in the exemption, and either unconditionally or subject to such conditions (if any) as are specified in the exemption, from the operation of all or any of the provisions of:
 - (a) the Divisions of this Part to which this section applies; and
 - (b) regulations made for the purposes of the provisions of those Divisions or any of them.
- (4) A person must not contravene a condition to which an exemption under subsection (3) is subject.
- (5) Where a person has contravened a condition to which an exemption under subsection (3) is subject, the Court may, on the application of ASIC, order the person to comply with the condition.
- (6) ASIC may, by writing, declare that a Division to which this section applies, and regulations made for the purposes of the provisions of that Division or any of them, have effect in their application in

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relation to particular securities, or a particular class of securities, either generally or otherwise as provided in the declaration, as if a specified provision or provisions of that Division or of those regulations were omitted, modified or varied in a manner specified in the declaration, and, where such a declaration is made, that Division and those regulations have effect accordingly.

- (6A) Subsection (6) applies in relation to Division 3 as if the forms in Schedule 2 were provisions of that Division.

1113A ASIC's power to extend application of Division 3

- (1) ASIC may, by writing, declare that Division 3, and regulations made for the purposes of the provisions of that Division, are to apply to particular non-marketable securities, or a particular class of non-marketable securities, as if those securities, or securities of that class, were marketable securities or marketable rights within the meaning of that Division.
- (2) In a declaration under subsection (1), ASIC may also specify modifications of Division 3, and of regulations made for the purposes of the provisions of that Division, that are to have effect in relation to the application of that Division and those regulations to the non-marketable securities, or the class of non-marketable securities, to which the declaration relates.
- (3) A declaration under subsection (1) has effect accordingly.
- (4) ASIC must cause a copy of a declaration under subsection (1) to be published in the *Gazette*.
- (5) In this section:

non-marketable securities means securities that are not marketable securities or marketable rights within the meaning of Division 3.
- (7) ASIC must cause a copy of an exemption or declaration under this section to be published in the *Gazette*.

Part 7.14—Miscellaneous

1114 Power of Court to make certain orders

(1) Where:

- (a) on the application of ASIC, it appears to the Court that a person:
 - (i) has contravened this Chapter, or any other law relating to trading or dealing in securities; or
 - (ii) has contravened the conditions or restrictions of a licence, the business rules or listing rules of a securities exchange, or the SCH business rules; or
 - (iii) is about to do an act with respect to trading or dealing in securities that, if done, would be such a contravention; or
- (b) on the application of a securities exchange, it appears to the Court that a person has contravened the business rules or listing rules of the securities exchange; or
- (ba) on the application of the securities clearing house, it appears to the Court that a person has contravened the SCH business rules; or
- (bb) on the application of a person claiming to be aggrieved by an alleged contravention by another person of the business rules or listing rules of a securities exchange, it appears to the Court that:
 - (i) the other person did contravene those rules; and
 - (ii) the applicant is aggrieved by the contravention;

the Court may make such order or orders as it thinks fit, including, but without limiting the generality of the foregoing, one or more of the following orders:

- (c) in the case of persistent or continuing contraventions of this Chapter, or of any other law relating to trading or dealing in securities, of the conditions or restrictions of a licence, of the business rules or listing rules of a securities exchange, or of the SCH business rules—an order restraining a person from carrying on a business, or doing an act or classes of acts, in relation to securities;

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- (ca) in the case of a contravention by a person of the business rules or listing rules of a securities exchange:
 - (i) an order giving directions concerning compliance with or enforcement of those rules to:
 - (A) the person; and
 - (B) if the person is a body corporate—the directors of the body corporate; and
 - (ii) if the contravention relates to the disclosure or provision of information—an order of either or both of the following kinds:
 - (A) an order requiring the person, or a person involved in the contravention, to disclose to the public or to specified persons, in accordance with the order, specified information which the person to whom the order is directed possesses or to which that person has access;
 - (B) an order requiring the person, or a person involved in the contravention, to publish advertisements in accordance with the order at that person's expense;
 - (d) an order restraining a person from acquiring, disposing of or otherwise dealing with any securities that are specified in the order;
 - (e) an order appointing a receiver of the property of a dealer or of property that is held by a dealer on behalf of another person, whether in trust or otherwise;
 - (f) an order declaring a contract relating to securities to be void or voidable;
 - (g) for the purpose of securing compliance with any other order under this section, an order directing a person to do or refrain from doing a specified act;
 - (h) any ancillary order considered to be just and reasonable in consequence of the making of an order under any of the preceding provisions of this subsection.
- (1A) For the purposes of paragraph (1)(bb), if a body corporate contravenes provisions of the business rules or listing rules of a securities exchange, a person who holds securities of the body

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corporate that are quoted on a stock market of the securities exchange is taken to be a person aggrieved by the contravention.

- (1B) Subsection (1A) does not limit the circumstances in which a person may be aggrieved by a contravention for the purposes of paragraph (1)(bb).
- (2) Where an application is made to the Court for an order under subsection (1), the Court may, if in the opinion of the Court it is desirable to do so, before considering the application, make an interim order, being an order of the kind applied for that is expressed to apply pending the determination of the application.
- (3) Where ASIC or the Exchange applies to the Court for an order under subsection (1), the Court must not require the applicant or any other person, as a condition of making an interim order under subsection (2), to give any undertakings as to damages.
- (4) The Court must not make an order under subsection (1) if it is satisfied that the order would unfairly prejudice any person.
- (5) Before making an order under subsection (1), the Court may direct that notice of the application be given to such persons as it thinks fit or direct that notice of the application be published in such manner as it thinks fit, or both.
- (6) A person appointed by order of the Court under subsection (1) as a receiver of the property of a dealer:
- (a) may require the dealer to deliver to the person any property of which the person has been appointed receiver or to give to the person all information concerning that property that may reasonably be required; and
 - (b) may acquire and take possession of any property of which the person has been appointed receiver; and
 - (c) may deal with any property that the person has acquired or of which the person has taken possession in any way in which the dealer might lawfully have dealt with the property; and
 - (d) has such other powers in respect of the property as the Court specifies in the order.
- (7) In paragraph (1)(e) and subsection (6):

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property, in relation to a dealer, includes money, securities and documents of title to securities or other property entrusted to or received on behalf of any other person by the dealer or another person in the course of or in connection with a securities business carried on by the dealer.

- (8) A person must not, without reasonable excuse, contravene:
- (a) an order under this section; or
 - (b) a requirement of a receiver appointed by order of the Court under subsection (1).
- (9) The Court may rescind or vary an order made by it under this section or suspend the operation of such an order.
- (10) In this section:

securities includes marketable securities and marketable rights within the meaning of Division 3 of Part 7.10.

1115 Restrictions on use of titles “stockbroker”, “sharebroker” and “stock exchange”

- (1) A person who is not a member of a stock exchange must not take or use, or by inference adopt, the name or title of stockbroker or sharebroker or take or use or have attached to or exhibited at any place a name, title or description implying or tending to create the belief that the person is a stockbroker or a sharebroker.
- (3) A body corporate that is not a stock exchange must not take or use, or by inference adopt, the name or title of stock exchange or take or use or have attached to or exhibited at any place a name, title or description implying or tending to create the belief that the body corporate is a stock exchange.

1116 Preservation and disposal of records etc.

- (1) A person who is required by a provision of this Chapter to maintain, make or keep a register or any financial record or other record in relation to a business carried on by the person must preserve that register or record for the prescribed period, whether or not the person ceases to carry on that business before the end of that period.

- (2) The prescribed period for the purposes of subsection (1) is:
 - (a) in relation to a register or a record other than a financial record, the 5 years next after the day on which the last entry was made in the register or record; or
 - (b) in relation to a financial record, the 7 years after the transactions covered by the record are completed.
- (3) Subsections (1) and (2) do not apply in relation to a contract note or copy of a contract note received or issued by a dealer who is a member of a securities exchange if the matters referred to in subsection 842(3) in relation to the contract note are recorded:
 - (a) by the securities exchange; or
 - (b) subject to such conditions (if any) as ASIC imposes, by the dealer;
in a manner approved by ASIC and the record of those matters is retained for not less than 5 years.
- (4) A matter that a securities exchange records under subsection (3) is taken to have been so recorded with the member's authority.
- (5) ASIC may, if of the opinion that it is no longer necessary or desirable to retain it, destroy or otherwise dispose of any document that is lodged under or for the purposes of this Chapter and has been in the possession of ASIC for such period as is prescribed for the purposes of this subsection, either generally or in relation to a particular document or class of documents.

1117 Concealing etc. of books relating to securities

- (1) A person must not:
 - (a) conceal, destroy, mutilate or alter a book relating to the business carried on by a dealer or required under this Chapter to be kept by the holder of a licence, by a person who holds a proper authority from the holder of a licence or by a financial journalist within the meaning of Part 7.7; or
 - (b) send the book out of this jurisdiction or out of Australia.
- (2) In a prosecution of a person for a contravention of subsection (1), it is a defence if it is proved that the person did not act with intent to defraud, to defeat the purposes of this Chapter or to prevent, delay

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or obstruct the carrying out of an examination, investigation or audit, or the exercise of a power, under this Chapter.

1118 Falsification of records

- (1) Where matter that is used or intended to be used in connection with the keeping of a book required to be kept under this Chapter or a register or any accounting or other record referred to in section 1116 is recorded or stored in an illegible form by means of a mechanical device, an electronic device or any other device, a person must not:
 - (a) record or store by means of that device matter that the person knows to be false in a material particular or materially misleading; or
 - (b) destroy, remove or falsify matter that is recorded or stored by means of that device, or has been prepared for the purpose of being recorded or stored, or for use in compiling other matter to be recorded or stored, by means of that device; or
 - (c) fail to record or store matter by means of that device with intent to falsify any entry made or intended to be compiled, wholly or in part, from that matter.
- (2) In a prosecution of a person for a contravention of subsection (1), it is a defence if it is proved that the person acted honestly and that in all the circumstances the act or omission constituting the offence should be excused.

1119 Precautions against falsification of records

A person required by this Chapter to keep a book or record must take reasonable precautions for guarding against falsification of the book or record and for facilitating discovery of any falsification.