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No. , 2001

(Treasury)

**A Bill for an Act to make provision in relation to
corporations, securities, the futures industry and
financial products and services, and for other
purposes**

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1 **Division 3—Futures representatives**

2 **1172 Representatives of futures brokers**

3 A natural person must not do an act as a representative of a futures
4 broker (other than an exempt broker) unless:

- 5 (a) the broker holds a futures brokers licence; and
6 (b) the person holds a proper authority from the broker.

7 **1173 Representatives of futures advisers**

8 A natural person must not do an act as a representative of a futures
9 adviser (other than an exempt futures adviser) unless the futures
10 adviser:

- 11 (a) is also a futures broker and holds a futures brokers licence; or
12 (b) holds a futures advisers licence;
13 and the person holds a proper authority from the futures adviser.

14 **1174 Defence**

15 It is a defence to a prosecution for a contravention of section 1172
16 or 1173 constituted by an act done by a person as a representative
17 of another person if it is proved that:

- 18 (a) but for the revocation or suspension of a licence held by the
19 other person, the act would not have been such a
20 contravention; and
21 (b) when he or she did the act, the first-mentioned person:
22 (i) believed in good faith that the other person held the
23 licence; and
24 (ii) was unaware of the revocation or suspension; and
25 (c) in all the circumstances it was reasonable for the
26 first-mentioned person so to believe and to be unaware of the
27 revocation or suspension.

1 **1175 Body corporate not to act as representative**

2 A body corporate must not do an act as a representative of a
3 person.

4 **1176 Licensee to keep register of holders of proper authorities**

5 (1) A licensee must establish a register of the persons who hold proper
6 authorities from the licensee and must keep it in accordance with
7 this section.

8 (2) The register must be in writing or in such other form as ASIC
9 approves.

10 (3) The register must contain, in relation to each person (if any) who
11 holds a proper authority from the licensee:

- 12 (a) a copy of the proper authority; and
13 (b) the person's name; and
14 (c) the person's current residential address; and
15 (d) unless the person's current business address is the same as
16 the licensee's—the person's current business address; and
17 (e) such other information (if any) as is prescribed.

18 (4) A copy of a proper authority of a person from the licensee that
19 subsection (3) requires the register to contain must be included in
20 the register within 2 business days after the person begins to hold
21 that proper authority.

22 (5) Information that subsection (3) requires the register to contain in
23 relation to a person must be entered in the register within 2
24 business days after:

- 25 (a) the person begins to hold a proper authority from the
26 licensee; or
27 (b) the licensee receives the information;
28 whichever happens later.

29 (6) Within 2 business days after a person ceases to hold a proper
30 authority from the licensee, the licensee must:

- 31 (a) in any case:

Section 1177

- 1 (i) include, in a part of the register separate from the part in
2 which copies of proper authorities are included under
3 subsection (4); and
4 (ii) remove from the last-mentioned part;
5 the copy of the proper authority that was included in the
6 last-mentioned part; and
7 (b) unless, at the end of those 2 business days, the person again
8 holds a proper authority from the licensee:
9 (i) enter, in a part of the register separate from the part in
10 which information is entered under subsection (5); and
11 (ii) remove from the last-mentioned part;
12 the information that has been entered in the last-mentioned
13 part in relation to the person.
- 14 (7) Information that has been entered under paragraph (6) (b) in a
15 separate part of the register is taken the purposes of subsections (3)
16 and (5) not to be contained or entered in the register.
- 17 (8) Where a licensee whom subsection (1) requires to establish a
18 register already keeps one under this section, the licensee need not
19 establish a new register but must keep the existing one in
20 accordance with this section.

21 **1177 Licensee to notify ASIC of location and contents of register**

- 22 (1) This section has effect where a licensee keeps a register under
23 section 1176.
- 24 (2) Within 14 days after establishing the register, the licensee must
25 lodge written notice of where the register is kept.
- 26 (3) As soon as practicable after changing the place where the register
27 is kept, the licensee must lodge written notice of the new place
28 where the register is kept.
- 29 (4) Within 2 business days after the day on which a person begins to
30 hold a particular proper authority from the licensee, the licensee
31 must, whether or not the person has previously held a proper
32 authority from the licensee, lodge:

Section 1178

- 1 (a) a copy of the first-mentioned proper authority; and
2 (b) a written notice stating that the person began to hold that
3 proper authority on that day.
- 4 (5) Within the period within which subsection 1176(5) requires the
5 licensee to enter in the register information that the register is
6 required by virtue of paragraph 1176(3)(b), (c), (d) or (e) to
7 contain, the licensee must lodge a written notice setting out the
8 information and stating that the information has been, or is to be,
9 entered in the register.
- 10 (6) Within 2 business days after a person ceases to hold a proper
11 authority from the licensee, the licensee must, unless at the end of
12 those 2 business days the person again holds a proper authority
13 from the licensee, lodge a written notice stating that the person has
14 ceased to hold such a proper authority.

15 **1178 Inspection and copying of register**

- 16 (1) A licensee must ensure that a register kept by it under section 1176
17 is open for inspection without charge.
- 18 (2) A person may by writing request a licensee to give the person a
19 copy of the whole, or of a specified part, of a register kept by the
20 licensee under section 1176.
- 21 (3) A licensee must comply with a request under subsection (2) within
22 2 business days after:
- 23 (a) if the licensee requires the person to pay for the copy an
24 amount of not more than the prescribed amount—receiving
25 the amount from the person; or
26 (b) otherwise—receiving the request.

27 **1180 ASIC may require production of authority**

- 28 (1) Where ASIC has reason to believe that a person:
29 (a) holds a proper authority from a licensee; or

Section 1181

- 1 (b) has done an act as a representative of another person;
2 then, whether or not ASIC knows who the licensee or other person
3 is, it may require the first-mentioned person to produce:
4 (c) any proper authority from a licensee; or
5 (d) any invalid futures authority from a person;
6 that the first-mentioned person holds.
- 7 (2) A person must not, without reasonable excuse, refuse or fail to
8 comply with a requirement under this section.

9 **1181 ASIC may give licensee information about representative**

- 10 (1) Where ASIC believes on reasonable grounds that:
11 (a) a person (in this section called the *holder*) holds, or will hold,
12 a proper authority from a licensee; and
13 (b) having regard to that fact, ASIC should give to the licensee
14 particular information that ASIC has about the person; and
15 (c) the information is true;
16 ASIC may give the information to the licensee.
- 17 (2) Where ASIC gives information under subsection (1), the licensee
18 or an officer of the licensee may, for a purpose connected with:
19 (a) the licensee making a decision about what action (if any) to
20 take in relation to the holder, having regard to, or to matters
21 including, the information; or
22 (b) the licensee taking action pursuant to such a decision;
23 or for 2 or more such purposes, and for no other purpose, give to
24 another person, make use of, or make a record of, some or all of
25 the information.
- 26 (3) A person to whom information has been given, in accordance with
27 subsection (2) or this subsection, for a purpose or purposes may,
28 for that purpose or one or more of those purposes, and for no other
29 purpose, give to another person, make use of, or make a record of,
30 that information.

Section 1181

- 1 (4) Subject to subsections (2) and (3), a person must not give to
2 another person, make use of, or make a record of, information
3 given by ASIC under subsection (1).
- 4 (4A) Subsection 8(3) does not apply in relation to a reference in
5 subsection (2), (3) or (4) of this section to a provision of this
6 section.
- 7 (5) A person has qualified privilege in respect of an act done by the
8 person as permitted by subsection (2) or (3).
- 9 (6) A person to whom information is given in accordance with this
10 section must not:
11 (a) give any of the information to a court; or
12 (b) produce in a court a document that sets out some or all of the
13 information;
14 except:
15 (c) for a purpose connected with:
16 (i) the licensee making a decision about what action (if
17 any) to take in relation to the holder, having regard to,
18 or to matters including, some or all of the information;
19 or
20 (ii) the licensee taking action pursuant to such a decision; or
21 (iii) proving in a proceeding in that court that particular
22 action taken by the licensee in relation to the holder was
23 so taken pursuant to such a decision;
24 or for 2 or more such purposes, and for no other purpose;
25 (d) in a proceeding in that court, in so far as the proceeding
26 relates to an alleged contravention of this section; or
27 (e) in a proceeding in respect of an ancillary offence relating to
28 an offence against this section; or
29 (f) in a proceeding in respect of the giving to a court of false
30 information being or including some or all of the
31 first-mentioned information.
- 32 (7) A reference in this section to a person taking action in relation to
33 another person is a reference to the first-mentioned person:

Section 1182

- 1 (a) taking action by way of making, terminating, or varying the
2 terms and conditions of; or
3 (b) otherwise taking action in relation to;
4 a relevant agreement, in so far as the relevant agreement relates to
5 the other person being employed by, or acting for or by
6 arrangement with, the first-mentioned person in connection with a
7 futures broking business or futures advice business carried on by
8 the first-mentioned person.
- 9 (8) In addition, and without prejudice, to the effect it has of its own
10 force, subsection (6) has by force of this subsection the effect it
11 would have if:
12 (a) the reference in it to information being given in accordance
13 with this section were a reference to information being given
14 in accordance with section 1181; and
15 (b) a reference in it to a court were a reference to a court of an
16 external Territory or of a country outside Australia and the
17 external Territories; and
18 (c) paragraphs (6)(d) and (e) were omitted.

19 **1182 Holder of authority may be required to return it**

- 20 (1) Where a person holds a proper authority from a licensee but is
21 neither employed by, nor authorised to act for or by arrangement
22 with, the licensee, the licensee may, by writing given to the person,
23 require the person to give the proper authority to the licensee
24 within a specified period of not less than 2 business days.
- 25 (2) Where a person holds an invalid futures authority from another
26 person, the other person may, by writing given to the
27 first-mentioned person, require the first-mentioned person to give
28 the invalid futures authority to the other person within a specified
29 period of not less than 2 business days.
- 30 (3) A person must not, without reasonable excuse, refuse or fail to
31 comply with a requirement made of the person in accordance with
32 subsection (1) or (2).

1

2 **Division 4—Liability of principals for representatives'**
3 **conduct**

4 **1183 Conduct engaged in as a representative**

5 Where a person engages in conduct as a representative of another
6 person (in this section called the *principal*), then, as between the
7 principal and a third person (other than ASIC), the principal is
8 liable in respect of that conduct in the same manner, and to the
9 same extent, as if the principal had engaged in it.

10 **1184 Liability where identity of principal unknown**

- 11 (1) This section applies for the purposes of a proceeding in a court
12 where:
- 13 (a) in this jurisdiction or elsewhere, a person (in this section
14 called the *representative*) engages in particular conduct while
15 the person is a representative of 2 or more persons (in this
16 section called the *indemnifying principals*); and
- 17 (b) it is proved for the purposes of the proceeding that the
18 representative engaged in the conduct as a representative of
19 some person (in this section called the *unknown principal*)
20 but it is not proved for those purposes who the unknown
21 principal is.
- 22 (2) If only one of the indemnifying principals is a party to the
23 proceeding, he, she or it is liable in respect of that conduct as if he,
24 she or it were the unknown principal.
- 25 (3) If 2 or more of the indemnifying principals are parties to the
26 proceeding, each of those parties is liable in respect of that conduct
27 as if he, she or it were the unknown principal.

28 **1185 Liability of principals where act done in reliance on**
29 **representative's conduct**

- 30 (1) This section applies where:

- 1 (a) at a time when a person (in this section called the
2 **representative**) is a representative of only one person (in this
3 section called the **indemnifying principal**) or of 2 or more
4 persons (in this section called the **indemnifying principals**),
5 the representative, in this jurisdiction or elsewhere:
6 (i) engages in particular conduct; or
7 (ii) proposes, or represents that the representative proposes,
8 to engage in particular conduct; and
9 (b) another person (in this section called the **client**) does, or
10 omits to do, a particular act, in this jurisdiction or elsewhere,
11 because the client believes at a particular time in good faith
12 that the representative engaged in, or proposes to engage in,
13 as the case may be, that conduct:
14 (i) on behalf of some person (in this section called the
15 **assumed principal**) whether or not identified, or
16 identifiable, at that time by the client; and
17 (ii) in connection with a futures broking business or futures
18 advice business carried on by the assumed principal;
19 and
20 (c) it is reasonable to expect that a person in the client's
21 circumstances would so believe and would do, or omit to do,
22 as the case may be, that act because of that belief;
23 whether or not that conduct is or would be within the scope of the
24 representative's employment by, or authority from, any person.
- 25 (2) If:
26 (a) subparagraph (1)(a)(i) applies; or
27 (b) subparagraph (1)(a)(ii) applies and the representative engages
28 in that conduct;
29 then, for the purposes of a proceeding in a court:
30 (c) as between the indemnifying principal and the client or a
31 person claiming through the client, the indemnifying
32 principal is liable; or

- 1 (d) as between any of the indemnifying principals and the client
2 or a person claiming through the client, each of the
3 indemnifying principals is liable;
4 as the case may be, in respect of that conduct in the same manner,
5 and to the same extent, as if he, she or it had engaged in it.
- 6 (3) Without limiting the generality of subsection (2), the indemnifying
7 principal, or each of the indemnifying principals, as the case may
8 be, is liable to pay damages to the client in respect of any loss or
9 damage that the client suffers as a result of doing, or omitting to
10 do, as the case may be, the act referred to in paragraph (1)(b).
- 11 (3A) Subsection (3) does not apply unless:
- 12 (a) the conduct was engaged in, the proposed conduct would
13 have been engaged in, or the representation was made, in this
14 jurisdiction; or
15 (b) the act referred to in paragraph (1)(b) was done, or would
16 have been done, as the case may be, in this jurisdiction; or
17 (c) some or all of the loss or damage was suffered in this
18 jurisdiction.
- 19 (4) If:
- 20 (a) there are 2 or more indemnifying principals; and
21 (b) 2 or more of them are parties (in this subsection called the
22 *indemnifying parties*) to a proceeding in a court; and
23 (c) it is proved for the purposes of the proceeding:
24 (i) that the representative engaged in that conduct as a
25 representative of some person; and
26 (ii) who that person is; and
27 (d) that person is among the indemnifying parties;
28 subsections (2) and (3) do not apply, for the purposes of the
29 proceeding, in relation to the indemnifying parties other than that
30 person.

31 **1186 Presumptions about certain matters**

- 32 (1) Where it is proved, for the purposes of a proceeding in a court, that
33 a person (in this subsection called the *representative*) engaged in

1 particular conduct, in this jurisdiction or elsewhere, while the
2 person was a representative of:

- 3 (a) only one person (in this subsection called the *indemnifying*
4 *principal*); or
5 (b) 2 or more persons (in this subsection called the *indemnifying*
6 *principals*);

7 then, unless the contrary is proved for the purposes of the
8 proceeding, it is presumed for those purposes that the
9 representative engaged in the conduct as a representative of:

- 10 (c) the indemnifying principal; or
11 (d) as a representative of some person among the indemnifying
12 principals;

13 as the case may be.

- 14 (2) Where, for the purposes of establishing in a proceeding in a court
15 that section 1185 applies, it is proved that a person did, or omitted
16 to do, a particular act because the person believed at a particular
17 time in good faith that certain matters were the case, then, unless
18 the contrary is proved for those purposes, it is presumed for those
19 purposes that it is reasonable to expect that a person in the
20 first-mentioned person's circumstances would so believe and
21 would do, or omit to do, as the case may be, that act because of that
22 belief.

23 **1187 No contracting out of liability for representative's conduct**

- 24 (1) For the purposes of this section, a liability of a person:
25 (a) in respect of conduct engaged in by another person as a
26 representative of the first-mentioned person; or
27 (b) arising under section 1185 because another person has
28 engaged in, proposed to engage in, or represented that the
29 other person proposed to engage in, particular conduct;
30 is a liability of the first-mentioned person in respect of the other
31 person.
- 32 (2) Subject to this section, an agreement is void in so far as it purports
33 to exclude, restrict or otherwise affect a liability of a person in
34 respect of another person, or to provide for a person to be

- 1 indemnified in respect of a liability of the person in respect of
2 another person.
- 3 (3) Subsection (2) does not apply in relation to an agreement in so far
4 as it:
- 5 (a) is a contract of insurance; or
6 (b) provides for a representative of a person to indemnify the
7 person in respect of a liability of the person in respect of the
8 representative; or
9 (c) provides for a licensee from whom a person holds a proper
10 authority to indemnify another such licensee in respect of a
11 liability of the other licensee in respect of the person.
- 12 (4) A person must not make, offer to make, or invite another person to
13 offer to make, in relation to a liability of the first-mentioned person
14 in respect of a person, an agreement that is or would be void, in
15 whole or in part, by virtue of subsection (2).

16 **1188 Effect of Division**

- 17 (1) Where 2 or more persons are liable under this Division in respect
18 of the same conduct or the same loss or damage, they are so liable
19 jointly and severally.
- 20 (2) Nothing in section 1183, 1184 or 1185:
- 21 (a) affects a liability arising otherwise than by virtue of this
22 Division; or
23 (b) notwithstanding paragraph (a) of this subsection, entitles a
24 person to be compensated twice in respect of the same loss or
25 damage; or
26 (c) makes a person guilty of an offence.

1

2 **Division 5—Excluding persons from the futures industry**

3 **1189A Power to revoke, without a hearing, licence held by natural**
4 **person**

5 ASIC may, by written order, revoke a licence held by a natural
6 person if the person:

- 7 (a) becomes an insolvent under administration; or
8 (b) is convicted of serious fraud; or
9 (c) becomes incapable, through mental or physical incapacity, of
10 managing his or her affairs; or
11 (d) asks ASIC to revoke the licence.

12 **1190 Power to revoke, without a hearing, licence held by body**
13 **corporate**

14 ASIC may, by written order, revoke a licence held by a body
15 corporate if:

- 16 (a) the body ceases to carry on business; or
17 (b) the body becomes an externally-administered body corporate;
18 or
19 (c) the body asks ASIC to revoke the licence; or
20 (d) a director, secretary or executive officer of the body
21 contravenes this Act because:
22 (i) he or she does not hold a licence; or
23 (ii) a licence he or she holds is suspended.

24 **1191 Power to revoke licence after a hearing**

25 (1) Subject to section 1200, ASIC may, by written order, revoke a
26 licence if:

- 27 (a) the application for the licence contained matter that was false
28 in a material particular or materially misleading; or
29 (b) there was an omission of material matter from the application
30 for the licence; or
31 (c) the licensee contravenes a futures law; or

Section 1191

- 1 (d) the licensee contravenes a condition of the licence; or
2 (ea) the licensee is a natural person and ASIC has reason to
3 believe that he or she is not of good fame and character; or
4 (e) the licensee is a body corporate and ASIC is satisfied that the
5 educational qualifications or experience of a person who:
6 (i) is an officer of the licensee; and
7 (ii) was not an officer of the licensee when the licence was
8 granted;
9 are or is inadequate having regard to the duties that the
10 officer performs, or will perform, in connection with the
11 holding of the licence; or
12 (f) the licensee is a body corporate and ASIC is satisfied that:
13 (i) an officer of the licensee performs, or will perform, in
14 connection with the holding of the licence, duties that
15 are or include duties (in this paragraph called the
16 *different duties*) other than those having regard to
17 which ASIC was satisfied, before granting the licence,
18 that the officer's educational qualifications and
19 experience were adequate; and
20 (ii) the officer's educational qualifications or experience are
21 or is inadequate having regard to the different duties; or
22 (g) the licensee is a body corporate and:
23 (i) a licence held by a director, secretary or executive
24 officer of the body is suspended or revoked; or
25 (ii) an order is made under section 1194 against such a
26 director, secretary or executive officer; or
27 (h) ASIC has reason to believe that the licensee has not
28 performed efficiently, honestly and fairly the duties of a
29 holder of a futures brokers licence or a futures advisers
30 licence, as the case requires; or
31 (j) ASIC has reason to believe that the licensee will not perform
32 those duties efficiently, honestly and fairly.
- 33 (2) In determining whether or not it has reason to believe as mentioned
34 in paragraph (1)(ea) or (j) in relation to a licensee, ASIC is not
35 precluded from having regard to a matter that arose before the time

1 when the licence was granted unless ASIC was aware of the matter
2 at that time.

3 **1192 Power to suspend licence instead of revoking it**

4 (1) Subject to section 1200, where:

5 (a) section 1189A or 1190 empowers ASIC to revoke a licence
6 otherwise than because the licensee has asked for the
7 revocation; or

8 (b) ASIC is empowered by virtue of paragraph 1191(1)(c), (d),
9 (e), (f), (g), (h) or (j) to revoke a licence;

10 ASIC may, if it considers it desirable to do so, instead:

11 (c) by written order, suspend the licence for a specified period;
12 or

13 (d) by written order, prohibit the licensee, either permanently or
14 for a specified period, from doing specified acts, being acts
15 that section 1142 or 1143 would prohibit the licensee from
16 doing if the licensee did not hold the licence.

17 (2) ASIC may at any time, by written order, vary or revoke an order in
18 force under this section.

19 (3) For the purposes of sections 1142, 1143, 1172 and 1173 a licensee
20 is taken not to hold the licence at any time during a period for
21 which the licence is suspended.

22 (4) Where an order in force under this section prohibits the licensee as
23 mentioned in paragraph (1)(d):

24 (a) the licensee must not contravene the order; and

25 (b) in relation to the doing by a person, as a representative of the
26 licensee, of an act specified in the order, sections 1172 and
27 1173 apply, or apply during the period specified in the order,
28 as the case requires, as if the licensee did not hold the
29 licence.

30 **1192A Power to make banning order where licence revoked or**
31 **suspended**

32 Subject to section 1200, where ASIC:

- 1 (a) revokes under section 1189A; or
2 (b) revokes because of paragraph 1191(1)(a), (b), (c), (d), (h) or
3 (j); or
4 (c) revokes because of paragraph 1191(1)(ea); or
5 (d) suspends because of paragraph 1192(1)(a); or
6 (e) suspends because of paragraph 1192(1)(b);
7 a licence held by a natural person, it may also make a banning
8 order against the person.

9 **1193 Power to make banning order against unlicensed person**

10 Subject to section 1200, ASIC may make a banning order against a
11 natural person (other than a licensee) if:

- 12 (a) he or she becomes an insolvent under administration; or
13 (b) he or she is convicted of serious fraud; or
14 (c) he or she becomes incapable, through mental or physical
15 incapacity, of managing his or her affairs; or
16 (d) he or she contravenes a futures law; or
17 (e) ASIC has reason to believe that he or she is not of good fame
18 and character; or
19 (f) ASIC has reason to believe that he or she has not performed
20 efficiently, honestly and fairly the duties of:
21 (i) a representative of a futures broker; or
22 (ii) a representative of a futures adviser; or
23 (g) ASIC has reason to believe that he or she will not perform
24 efficiently, honestly and fairly the duties of:
25 (i) a representative of a futures broker; or
26 (ii) a representative of a futures adviser.

27 **1194 Nature of banning order**

- 28 (1) Where this Division empowers ASIC to make a banning order
29 against a person, ASIC may, by written order, prohibit the person:
30 (a) in any case—permanently; or

Section 1195

- 1 (b) except where ASIC is empowered by virtue of paragraph
2 1193(e) to make the order—for a specified period;
3 from doing an act as:
4 (c) a representative of a futures broker; or
5 (d) a representative of a futures adviser; or
6 (e) a representative of a futures broker or a futures adviser;
7 whichever the order specifies.
- 8 (2) ASIC must not vary or revoke a banning order except under
9 section 1195, 1196 or 1197.

10 **1195 Exceptions to banning order**

- 11 (1) An order made against a person under subsection 1194(1) may
12 include a provision that permits the person, subject to such
13 conditions (if any) as are specified, to do, or to do in specified
14 circumstances, specified acts that the order would otherwise
15 prohibit the person from doing.
- 16 (2) Subject to section 1200, ASIC may, at any time, by written order,
17 vary a banning order against a person:
18 (a) by adding a provision that permits the person as mentioned in
19 subsection (1); or
20 (b) by varying such a provision in relation to conditions,
21 circumstances or acts specified in the provision; or
22 (c) by omitting such a provision and substituting another such
23 provision; or
24 (d) by omitting such a provision.

25 **1196 Variation or revocation of banning order on application**

- 26 (1) Subject to sections 1197 and 1200, this section has effect where a
27 person applies to ASIC to vary or revoke a banning order relating
28 to the person.
- 29 (2) If:
30 (a) the person is not an insolvent under administration; and

Section 1197

- 1 (b) ASIC has no reason to believe that the person is not of good
2 fame and character; and
3 (c) ASIC has no reason to believe that the person will not
4 perform efficiently, honestly and fairly the duties of:
5 (i) a representative of a futures broker; or
6 (ii) a representative of a futures adviser;
7 ASIC must, by written order:
8 (d) if only one of subparagraphs (c)(i) and (ii) applies—vary the
9 banning order so that it no longer prohibits the person from
10 doing an act as a representative of a futures broker or of a
11 futures adviser, as the case may be; or
12 (e) in any other case—revoke the banning order.
- 13 (3) Otherwise, ASIC must refuse the application.
- 14 (4) In determining whether or not it has reason to believe as mentioned
15 in paragraph (2)(b) or (c), ASIC must have regard to any
16 conviction of the person, during the 10 years ending on the day of
17 the application, of serious fraud.
- 18 (5) Nothing in subsection (4) limits the matters to which ASIC may
19 have regard:
20 (a) in deciding on the application; or
21 (b) in connection with performing or exercising any other
22 function or power under this Part.

23 **1197 Revocation of banning order in certain cases**

24 Where:

- 25 (a) section 1196 requires ASIC to vary a banning order so that it
26 no longer has a particular operation; and
27 (b) the order has no other operation;

28 ASIC must, by written order, instead revoke the banning order.

29 **1198 Effect and publication of orders under this Division**

- 30 (1) An order by ASIC under this Division takes effect when served on
31 the person to whom the order relates.

- 1 (2) As soon as practicable on or after the day on which an order by
2 ASIC under this Division takes effect, ASIC must publish in the
3 *Gazette* a notice that sets out a copy of:
4 (a) if the order is made under section 1189A, 1190, 1191, 1192
5 or 1194 or revokes a banning order—the first-mentioned
6 order; or
7 (b) if the order varies a banning order—the banning order as in
8 force immediately after the first-mentioned order takes
9 effect;
10 and states that the first-mentioned order, or the banning order as so
11 in force, as the case may be, took effect on that day.
- 12 (3) Where:
13 (a) but for this subsection, subsection (2) would require
14 publication of a notice setting out a copy of a banning order
15 as in force at a particular time; and
16 (b) the banning order as so in force includes a provision that
17 permits a person as mentioned in subsection 1195(1); and
18 (c) in ASIC’s opinion, the notice would be unreasonably long if
19 it set out a copy of the whole of that provision;
20 the notice may, instead of setting out a copy of that provision, set
21 out a summary of the provision’s effect.

22 **1199 Contravention of banning order**

23 A person must not contravene a banning order relating to the
24 person.

25 **1199A Banned person ineligible for licence**

26 ASIC must not grant a futures brokers licence or a futures advisers
27 licence to a person if a banning order prohibits the person (except
28 as permitted by the order) from doing an act as a representative of
29 a futures broker, or of a futures adviser, as the case may be.

30 **1200 Opportunity for hearing**

- 31 (1) ASIC must not:

Section 1201

- 1 (a) refuse an application for a licence on the ground, or grounds
2 including the ground, that paragraph 1144A(2)(d), (e) or (f)
3 or 1145(2)(e) or (f) does not apply in relation to the
4 applicant; or
5 (b) impose conditions on a licence; or
6 (c) vary the conditions of a licence; or
7 (d) revoke or suspend a licence otherwise than by virtue of
8 section 1189A or 1190 or paragraph 1192(1)(a); or
9 (e) make, otherwise than by virtue of paragraph 1192A(a) or (d)
10 or 1193(a), (b) or (c), an order under section 1194 against a
11 person; or
12 (f) make under subsection 1195(2) an order varying a banning
13 order against a person; or
14 (g) refuse an application by a person under section 1196;
15 unless ASIC complies with subsection (2) of this section.
- 16 (2) ASIC must give the applicant, licensee or person, as the case may
17 be, an opportunity:
18 (a) to appear at a hearing before ASIC that takes place in private;
19 and
20 (b) to make submissions and give evidence to ASIC in relation to
21 the matter.

22 **1201 Disqualification by the Court**

- 23 (1) Where ASIC:
24 (a) revokes under section 1189A, 1190 or 1191 a licence held by
25 a person; or
26 (b) makes under section 1194 against a person an order that is to
27 operate otherwise than only for a specified period;
28 ASIC may apply to the Court for an order or orders under this
29 section in relation to the person.
- 30 (2) On an application under subsection (1), the Court may make one or
31 more of the following:
32 (a) an order disqualifying the person, permanently or for a
33 specified period, from holding:

Section 1202

- 1 (i) a futures brokers licence;
2 (ii) a futures advisers licence; or
3 (iii) a futures brokers licence or a futures advisers licence;
4 whichever the order specifies;
5 (b) an order prohibiting the person, permanently or for a
6 specified period, from doing an act as:
7 (i) a representative of a futures broker;
8 (ii) a representative of a futures adviser; or
9 (iii) a representative of a futures broker or of a futures
10 adviser;
11 whichever the order specifies;
12 (c) such other order as it thinks fit;
13 or may refuse the application.
14 (3) The Court may revoke or vary an order in force under
15 subsection (2).

16 **1202 Effect of orders under section 1201**

- 17 (1) ASIC must not grant a futures brokers licence or a futures advisers
18 licence to a person whom an order in force under section 1201
19 disqualifies from holding a futures brokers licence or a futures
20 advisers licence, as the case may be.
21 (2) A person must not contravene an order that:
22 (a) is of a kind referred to in paragraph 1201 (2) (b); and
23 (b) is in force under section 1201; and
24 (c) relates to the person.

1
2 **Part 8.4—Conduct of futures business**
3

4 **1204 Certain representations prohibited**

- 5 (1) A person who is the holder of a licence must not represent or
6 imply, or knowingly permit to be represented or implied, in any
7 manner to a person that the abilities or qualifications of the holder
8 of the licence have in any respect been approved by ASIC.
- 9 (2) A statement that a person is the holder of a licence is not a
10 contravention of this section.

11 **1205 Undesirable advertising**

- 12 (1) In this section:

13 ***broadcast***, in relation to a statement, means broadcast the
14 statement by wireless transmission or television or cause it to be so
15 broadcast.

16 ***publish***, in relation to a statement, means:

- 17 (a) insert the statement in a newspaper or periodical or cause it
18 to be so inserted; or
19 (b) publicly exhibit the statement or cause it to be publicly
20 exhibited; or
21 (c) include the statement, or cause it to be included, in a
22 document that, whether or not in response to a request, is sent
23 or delivered to a person, or thrown or left upon premises in
24 the occupation of a person.

- 25 (2) Where ASIC considers that, having regard to conduct that a person
26 has engaged in, is engaging in, or proposes to engage in, it is in the
27 public interest to do so, it may, by written order given to the
28 person, prohibit the person from publishing or broadcasting
29 statements about:
30 (a) futures contracts; or

Section 1205A

- 1 (b) businesses carried on, or proposed to be carried on, by
2 persons and involving dealing in futures contracts on behalf
3 of other persons; or
4 (c) futures advice businesses or proposed futures advice
5 businesses;
6 unless the form and content of the statements have first been
7 approved by ASIC.
- 8 (3) An order under subsection (2) must not be made unless ASIC has
9 first given the person in relation to whom it proposes to make the
10 order an opportunity to appear at a hearing before ASIC (being a
11 hearing that takes place in private) and make submissions and give
12 evidence to ASIC in relation to the matter.
- 13 (4) A person the subject of an order under subsection (2) must comply
14 with the order.
- 15 (5) For the purposes of this section, where a statement is published or
16 broadcast and there is also published or broadcast in relation to the
17 statement:
18 (a) the name or address of a person; or
19 (b) the telephone or telex number of a person; or
20 (c) the post office or other delivery box number of a person;
21 it is presumed, unless the contrary is proved, that the statement was
22 published or broadcast by that person.

23 **1205A Application of sections 1206 and 1207: exempt brokers**

24 Neither of sections 1206 and 1207 applies in relation to an exempt
25 broker, except in so far as the exempt broker carries on a futures
26 broking business as a personal representative of a dead futures
27 broker.

28 **1206 Issue of contract notes**

- 29 (1) A futures broker must, in respect of a transaction, being the
30 acquisition or disposal of a futures contract, that is entered into by
31 the broker on behalf of another person, give as soon as practicable:

Section 1206

- 1 (a) in a case where the transaction is not an operation by the
2 broker on a discretionary account—to that other person; or
3 (b) in a case where the transaction is an operation by the broker
4 on a discretionary account—to the person, or to each person,
5 as the case requires, who gave instructions to the broker
6 authorising the broker to operate on the discretionary
7 account, other than a person who agrees in the prescribed
8 manner to waive the operation of this paragraph;
9 a contract note that complies with subsection (3), (4) or (5), as the
10 case requires.
- 11 (2) Subsection (1) does not require a futures broker to give a contract
12 note to a person in respect of a transaction if the person was at the
13 time of the transaction the holder of a futures brokers licence.
- 14 (3) A contract note given by a futures broker under subsection (1) in
15 respect of a transaction, being the acquisition or disposal of a
16 futures contract (other than a futures option or an eligible
17 exchange-traded option), must include:
- 18 (a) the name or style under which the broker carries on business
19 as a futures broker and the address of the principal place at
20 which the broker so carries on business; and
21 (b) the name of the person to whom the broker gives the contract
22 note; and
23 (c) the day on which the transaction took place; and
24 (d) a description of the futures contract sufficient to identify the
25 nature of the transaction, including:
- 26 (i) in a case where the futures contract is a commodity
27 agreement—a description of the commodity and a
28 statement of the contract price; and
29 (ii) in a case where the futures contract is an adjustment
30 agreement:
- 31 (A) a description of the class of adjustment
32 agreements in which the futures contract is
33 included; and
34 (B) a statement of the contract price; and
35 (C) if the transaction is the completion of the
36 futures contract—the value or worth (as

- 1 determined in accordance with the futures
2 contract) of the futures contract at the time of
3 that completion; and
- 4 (iii) in a case where the transaction is a liquidating trade—
5 details of the liquidating trade and of the futures
6 contract that is intended to be closed out following the
7 entering into of the liquidating trade; and
- 8 (e) the deposit paid or payable in respect of the transaction; and
- 9 (f) the month and year for the performance or settlement of the
10 contract; and
- 11 (g) in a case where the transaction took place on a futures market
12 of a futures exchange or of a recognised futures exchange, or
13 on an exempt futures market—a name or abbreviation by
14 which the futures exchange, recognised futures exchange or
15 exempt futures market, as the case may be, is generally
16 known; and
- 17 (h) a statement of the amount of commission charged or the rate
18 (if any) at which ASIC was charged; and
- 19 (j) a statement of the amounts (if any) of all stamp duties and
20 other duties and taxes payable in connection with the
21 transaction.
- 22 (4) A contract note given by a futures broker under subsection (1) in
23 respect of a transaction, being the acquisition or disposal of a
24 futures option, must include:
- 25 (a) the matters specified in paragraphs (3)(a), (b), (c), (g), (h)
26 and (j); and
- 27 (b) a description of the class of futures contracts in which is
28 included the futures contract to which the futures option
29 relates; and
- 30 (c) the month and year for performance or settlement of the
31 futures contract to which the futures option relates; and
- 32 (d) the date by which the purchaser of the futures option, in order
33 to exercise the futures option, must declare an intention to
34 exercise the futures option; and
- 35 (e) a statement of the amount of the premium; and

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- 1 (f) details of the price at which the purchaser of the futures
2 option has, by virtue of the futures option, an option or
3 Chapter 8 right to assume a bought position, or sold position,
4 as the case requires, in relation to the futures contract to
5 which the futures option relates.
- 6 (5) A contract note given by a futures broker under subsection (1) in
7 respect of a transaction, being the acquisition or disposal of an
8 eligible exchange-traded option (in this subsection called the
9 **option**), must include:
- 10 (a) the matters specified in paragraphs (3)(a), (b), (c), (g), (h)
11 and (j); and
- 12 (b) a description of the commodity or index to which the option
13 relates; and
- 14 (c) the date by which the purchaser of the option, in order to
15 exercise the option, must declare an intention to exercise the
16 option; and
- 17 (d) a statement of the amount of the premium; and
- 18 (e) details of:
- 19 (i) in a case where the option relates to a commodity—the
20 price at which the purchaser of the option has, by virtue
21 of the option, an option or right to purchase, or sell, as
22 the case requires, that commodity; or
- 23 (ii) in a case where the purchaser of the option has, by
24 virtue of the option, an option or right to be paid an
25 amount of money to be determined by reference to the
26 amount by which a specified number is greater or less
27 than the number of a specified index—the specified
28 number and the manner in which that amount of money
29 is to be determined.
- 30 (6) A futures broker must not include in a contract note given under
31 subsection (1), as the name of a person with or on behalf of whom
32 the broker has entered into the transaction, a name that the broker
33 knows, or could reasonably be expected to know, is not a name by
34 which that person is ordinarily known.
- 35 (7) For the purposes of this section, a futures contract is included in
36 the same class of futures contracts as another futures contract if,

1 and only if, the first-mentioned futures contract is of the same kind
2 as the other futures contract.

3 **1207 Futures broker to give monthly statement to client**

4 (1) Where:

- 5 (a) a futures broker has, at any time during a particular month,
6 held money or property on account of a client; or
7 (b) a futures broker has, before or during a particular month,
8 acquired a futures contract on behalf of a client, and, as at the
9 end of that month, the futures contract has not been disposed
10 of;

11 the broker must, within 7 days after the end of that month, send to
12 the client a written statement setting out:

- 13 (c) the name or style under which the broker carries on business
14 as a futures broker and the address of the principal place at
15 which the broker so carries on business; and
16 (d) the opening cash balance for that month in the client's
17 account; and
18 (e) all deposits, credits, withdrawals and debits affecting the
19 account during that month; and
20 (f) the cash balance in the account at the end of that month; and
21 (g) in relation to each futures contract that the broker has, before
22 or during that month, acquired on behalf of the client and
23 that, as at the end of that month, has not been disposed of,
24 particulars of the futures contract, including the particulars
25 required by virtue of paragraph 1206(3)(d), or paragraphs
26 1206(4)(b), (e) and (f) or (5)(b), (d) and (e), as the case
27 requires, to be included in a contract note relating to the
28 acquisition of the futures contract; and
29 (h) details of each outstanding call for a deposit or margin in
30 respect of a futures contract that the broker has acquired on
31 behalf of the client.

32 (2) Where a futures broker has, during a particular month, authority to
33 operate on a discretionary account, the broker must, within 7 days
34 after the end of that month, send to the person, or to each person,
35 as the case requires, who gave instructions to the broker

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1 authorising the broker to operate on the discretionary account a
2 written statement setting out:

- 3 (a) the name or style under which the broker carries on business
4 as a futures broker and the address of the principal place at
5 which the broker so carries on business; and
6 (b) the opening cash balance for that month in the account (in
7 this subsection called the *account*) maintained by the broker
8 in respect of the discretionary account; and
9 (c) all deposits, credits, withdrawals and debits affecting the
10 account during that month; and
11 (d) the cash balance in the account at the end of that month; and
12 (e) in relation to each futures contract:
13 (i) that the broker has acquired before or during that
14 month; and
15 (ii) the acquisition of which was an operation by the broker
16 on the discretionary account; and
17 (iii) that, as at the end of that month, has not been disposed
18 of;
19 particulars of the futures contract, including the particulars
20 required by virtue of paragraph 1206(3)(d), or paragraphs
21 1206(4)(b), (e) and (f) or (5)(b), (d) and (e), as the case
22 requires, to be included in a contract note relating to the
23 acquisition of the futures contract; and
24 (f) details of each outstanding call for a deposit or margin in
25 respect of a futures contract that the broker has acquired on
26 behalf of the client and the acquisition of which was an
27 operation by the broker on the discretionary account.

28 **1208 Dealings by futures broker on own account**

- 29 (1) A futures broker must maintain separately from other records such
30 records as correctly record and explain dealings in futures contracts
31 by the broker on the broker's own account including, but not
32 limited to, records specifying:
33 (a) a description of each of those dealings together with the date
34 on which and the time at which:

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- 1 (i) the instructions (if any) for each of those dealings were
2 received by the futures broker; and
3 (ii) the instructions (if any) for each of those dealings were
4 transmitted to the futures market on which the dealing
5 was effected; and
6 (iii) the dealing was effected; and
7 (b) the source of the funds used for effecting those dealings.
- 8 (2) A futures broker is taken not to have maintained records in
9 compliance with subsection (1) unless the entries in the records are
10 made in writing in the English language or are made in such a
11 manner as will enable them to be readily accessible and to be
12 readily converted into writing in the English language.
- 13 (3) A futures broker must not knowingly take the other side of an order
14 of a client of the broker in relation to a futures contract unless:
15 (a) the client has consented to the broker taking the other side of
16 the order in relation to that futures contract; or
17 (b) in dealing in that futures contract on behalf of the client, the
18 broker is taken, for the purposes of this Act, to be dealing in
19 that futures contract on the broker's own account.
- 20 (4) For the purposes of subsection (3), a futures broker takes the other
21 side of an order of a client of the broker in relation to a futures
22 contract where the broker:
23 (a) when dealing on the broker's own account, assumes a bought
24 position or sold position in relation to the contract; and
25 (b) when dealing on the instructions of the client, assumes the
26 opposite sold position or bought position in relation to the
27 contract.

28 **1209 Segregation of client money and property**

- 29 (1) In this section:
30 *client*, in relation to a futures broker, means a person on behalf of
31 whom the broker deals, or from whom the broker accepts
32 instructions to deal, in futures contracts, but does not include:
33 (a) the broker; or

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- 1 (b) if the broker is a body corporate—a director, or an officer, of
2 the broker; or
3 (c) an employee of the broker; or
4 (d) if the broker is a body corporate—a body corporate that is
5 related to the broker; or
6 (e) a person who is associated with, or who is a partner of, the
7 broker; or
8 (f) a body corporate in which the broker has, or the broker and
9 partners of the broker together have, a controlling interest.

10 **credit facility** means a document evidencing the right of a person
11 to obtain money on credit from another person, and, without
12 limiting the generality of the foregoing, includes a letter of credit
13 and a bank guarantee.

14 **property** includes credit facilities and securities.

15 **relevant credit balance**, in relation to a client of a futures broker,
16 means the total of:

- 17 (a) the amounts deposited by the broker in respect of the client in
18 a clients' segregated account, or clients' segregated accounts,
19 of the broker, less so much of those amounts as has been
20 withdrawn from the account or accounts; and
21 (b) the values of the items of property that:
22 (i) have, in respect of the client, been deposited by the
23 broker in safe custody pursuant to subsection (3); and
24 (ii) have not been withdrawn from safe custody; and
25 (iii) under the terms and conditions on which they were
26 deposited with, or received by, the broker, are available
27 to meet, or to provide security in connection with the
28 meeting of, relevant liabilities of the client.

29 **relevant liabilities**, in relation to a client of a futures broker, means
30 debts and liabilities of the client arising out of dealings in futures
31 contracts effected by the broker on behalf of the client.

32 **settling**, in relation to a dealing in a futures contract, includes
33 making delivery, or taking delivery, of a commodity to which the
34 futures contract relates.

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- 1 (2) For the purposes of the definition of *relevant credit balance* in
2 subsection (1), the value of an item of property at a particular time
3 is:
4 (a) in the case of a credit facility—the amount of money that the
5 person entitled to the right evidenced by the credit facility
6 can, at that time or within a reasonable period after that time,
7 obtain by virtue of that right; or
8 (b) in any other case—the market value of the property as at the
9 end of the last business day before that time.
- 10 (3) Where, in connection with:
11 (a) dealings in futures contracts effected, whether in this
12 jurisdiction or elsewhere or proposed to be effected, by a
13 futures broker on behalf of a client of the broker; or
14 (b) instructions by a client of a futures broker to deal in futures
15 contracts, whether in this jurisdiction or elsewhere;
16 money or property (other than property to which section 1214
17 applies) is deposited with the broker by the client, or is received by
18 the broker for, or on behalf of, the client, the broker must:
19 (c) in the case of money—deposit the money in a clients'
20 segregated account of the broker maintained in this
21 jurisdiction or in the place where the money was deposited
22 with, or received by, the broker; or
23 (d) in the case of property—deposit the property in safe custody,
24 in this jurisdiction or in the place where the property was
25 deposited with, or received by, the broker, in such a manner
26 that the property is segregated from property other than
27 property deposited by the broker in safe custody pursuant to
28 this subsection;
29 on or before the next day after the money or property is deposited
30 with, or received by, the broker that is a day on which the money
31 or property can be deposited as first mentioned in paragraph (c) or
32 (d).
- 33 (4) Without limiting the generality of subsection (3), where, in
34 connection with dealings in futures contracts effected, whether in
35 this jurisdiction or elsewhere, by a futures broker, the broker
36 receives from a person an amount of money some or all of which is

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- 1 attributable to dealings in futures contracts so effected on behalf of
2 clients of the broker, the broker must, on the next day on which the
3 amount can be so deposited, deposit the amount in a clients'
4 segregated account of the broker maintained in this jurisdiction or
5 in the place where the broker receives the amount.
- 6 (4A) A clients' segregated account of a futures broker must be
7 designated as a clients' segregated account, unless it is maintained
8 outside this jurisdiction and the law in force in the place where it is
9 maintained requires it to be designated in some other way.
- 10 (4B) If:
- 11 (a) a clients' segregated account of a futures broker is required
12 by subsection (4A) to be designated as a clients' segregated
13 account; and
14 (b) the account is designated in a way that complies
15 substantially, but not completely, with that requirement;
16 subsection (4A) is taken to be complied with in relation to the
17 account.
- 18 (5) Where, pursuant to this section, a futures broker deposits money in
19 respect of a client in a clients' segregated account of the broker, the
20 broker must not withdraw any of the money except for the purpose
21 of:
- 22 (a) making a payment to, or in accordance with the written
23 direction of, a person entitled to the money; or
24 (b) making a payment for, or in connection with, the entering
25 into, margining, guaranteeing, securing, transferring,
26 adjusting or settling of dealings in futures contracts effected
27 by the broker on behalf of clients only; or
28 (c) defraying brokerage and other proper charges incurred in
29 respect of dealings in futures contracts effected by the broker
30 on behalf of the client; or
31 (d) investing it:
- 32 (i) in any manner in which trustees are for the time being
33 authorised by law to invest trust funds; or
34 (ii) on deposit with an eligible money market dealer; or
35 (iii) on deposit at interest with:

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- 1 (A) an Australian ADI; or
2 (B) an approved foreign bank in relation to the
3 broker; or
4 (iv) on deposit with a clearing house for a futures exchange;
5 or
6 (v) in the purchase of cash management trust interests; or
7 (e) paying to the broker the amount of a fee that the broker may
8 charge, or an amount to which the broker is entitled, under an
9 agreement with the client made under subsection (7); or
10 (f) making a payment that is otherwise authorised by law;
11 or as permitted by subsection (10).
- 12 (5A) If, under subsection (5), a broker (the *paying broker*) withdraws
13 money from a clients' segregated account and pays it to another
14 broker (the *receiving broker*):
15 (a) the paying broker must ensure that the receiving broker is
16 notified, at the same time as the payment is made or as close
17 to that time as is practicable, of the fact that the money has
18 been withdrawn from a clients' segregated account of the
19 paying broker and should be paid into a clients' segregated
20 account of the receiving broker; and
21 (b) on or before the next day after the receiving broker receives
22 the payment, the receiving broker must pay the money into a
23 clients' segregated account of the receiving broker.
- 24 (5B) A notification under paragraph (5A)(a) may be in writing or in an
25 electronic or other form and may convey its message by express
26 words, or by a code or some other means understood by the
27 brokers concerned.
- 28 (6) A futures broker must not deal with property deposited by the
29 broker in safe custody under subsection (3) except:
30 (a) in accordance with the terms and conditions on which it was
31 deposited with, or received by, the broker; or
32 (b) for the purpose of meeting obligations incurred by the broker
33 in connection with margining, guaranteeing, securing,
34 transferring, adjusting or settling dealings in futures contracts
35 effected by the broker on behalf of clients only.

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- 1 (7) A futures broker who invests as mentioned in paragraph (5)(d)
2 money that was, in respect of a client of the broker, deposited by
3 the broker under subsection (3):
4 (a) may charge such fee (if any) for so investing the money; and
5 (b) is entitled to so much (if any) of the return on the money so
6 invested;
7 as the broker and the client agree in writing.
- 8 (8) A futures broker must not invest an amount pursuant to
9 paragraph (5)(d) by depositing it with a person for that person to
10 invest unless:
11 (a) the broker:
12 (i) has informed the person that the amount has been
13 withdrawn from a clients' segregated account of the
14 broker and is money to which clients of the broker are
15 entitled; and
16 (ii) has obtained from the person a written statement that is
17 signed by the person, sets out the amount and
18 acknowledges that the broker has informed the person
19 as mentioned in subparagraph (i); or
20 (b) the investment is made by the broker paying the amount into
21 an account maintained with the person in relation to which
22 the following conditions are satisfied:
23 (i) the account is maintained for the sole purpose of having
24 amounts invested in it pursuant to paragraph (5)(d);
25 (ii) the broker has informed the person that amounts paid
26 into the account will be amounts withdrawn from a
27 clients' segregated account of the broker and will be
28 moneys to which clients of the broker are entitled;
29 (iii) the broker has obtained from the person a written
30 statement signed by the person that acknowledges that
31 the broker has informed the person as mentioned in
32 subparagraph (ii).
- 33 (9) Where, at a particular time, the total amount of the relevant
34 liabilities of a client of a futures broker exceeds the relevant credit
35 balance of the client, the broker may, in respect of the client,
36 deposit in a clients' segregated account of the broker an amount of

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1 money not greater than the amount of the excess, and, if the broker
2 does so, the amount so deposited is, subject to subsection (10),
3 taken to be money to which the client is entitled.

4 (10) Where:

5 (a) a futures broker has, in respect of a client of the broker,
6 deposited an amount pursuant to subsection (9) in a clients'
7 segregated account of the broker; and

8 (b) the relevant credit balance of the client exceeds by a
9 particular amount the total amount of the relevant liabilities
10 of the client;

11 the broker may withdraw from the account so much of the amount
12 referred to in paragraph (a) as does not exceed the amount first
13 referred to in paragraph (b).

14 (11) A futures broker must keep in relation to the clients' segregated
15 account, or clients' segregated accounts, of the broker financial
16 records that:

17 (a) are separate from any other financial records of the broker;
18 and

19 (b) record separately in respect of each client of the broker
20 particulars of the amounts deposited in, and the amounts
21 withdrawn from, the account or accounts in respect of the
22 client; and

23 (c) record, separately from the particulars referred to in
24 paragraph (b):

25 (i) particulars (including particulars of withdrawals) of so
26 much of the amounts deposited as required by
27 subsection (4) in the account or accounts as was not
28 attributable to dealings in futures contracts effected by
29 the broker on behalf of clients of the broker; and

30 (ii) particulars of all amounts deposited in the account or
31 accounts pursuant to subsection (9); and

32 (iii) particulars of all amounts withdrawn from the account
33 or accounts pursuant to subsection (10).

34 (12) A futures broker must keep records that:

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- 1 (a) relate to deposits of property in safe custody by the broker
2 pursuant to subsection (3); and
3 (b) record separately in respect of each client of the broker
4 particulars of the property deposited in respect of the client.
- 5 (13) Section 1213 applies, so far as it is capable of application, in
6 relation to financial records, and other records, that are required by
7 subsections (11) and (12), respectively, of this section to be kept by
8 a futures broker, and so applies as if those accounting records and
9 other records were financial records required by that section to be
10 kept by the broker.
- 11 (14) Subject to subsections (15) and (16), none of the following:
12 (a) money deposited by a futures broker pursuant to this section
13 in a clients' segregated account of the broker;
14 (b) property in which money deposited by a futures broker as
15 mentioned in paragraph (a) of this subsection has been
16 invested pursuant to paragraph (5)(d);
17 (c) property deposited by a futures broker in safe custody
18 pursuant to subsection (3);
19 is available for the payment of a debt or liability of the broker or is
20 liable to be attached, or taken in execution, under the order or
21 process of a court at the instance of a person suing in respect of
22 such a debt or liability.
- 23 (15) Nothing in subsection (14) affects the right of a client of a futures
24 broker to recover money or property to which the client is entitled.
- 25 (16) Where a futures broker is entitled to withdraw money from a
26 clients' segregated account of the broker for the purpose of making
27 a payment to the broker, subsection (14) does not apply in relation
28 to that money.
- 29 (17) Where a futures broker invests money pursuant to paragraph (5)(d)
30 by depositing it with a person for the person to invest, neither that
31 money, nor any property in which the person invests any of that
32 money, is available for the payment of a debt or liability of the
33 person or is liable to be attached, or taken in execution, under the
34 order or process of a court at the instance of a person suing in
35 respect of such a debt or liability.

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- 1 (18) Nothing in this section affects a claim or lien that a futures broker
2 has, under an agreement, under an Australian law or otherwise,
3 against or on:
4 (a) money deposited by the broker pursuant to this section in a
5 clients' segregated account of the broker; or
6 (b) property in which such money has been invested pursuant to
7 paragraph (5)(d); or
8 (c) property deposited by the broker in safe custody pursuant to
9 subsection (3).
- 10 (19) A futures broker must not pay an amount into a client's segregated
11 account of the broker except as required or authorised by this
12 section or the regulations.

13 **1210 Futures broker to give certain information to prospective**
14 **clients**

- 15 A futures broker must, before accepting a person as a client of the
16 broker, give to the person:
17 (a) a document that:
18 (i) explains the nature of futures contracts; and
19 (ii) explains the nature of the obligations assumed by a
20 person who instructs a futures broker to enter into a
21 futures contract; and
22 (iii) sets out a risk disclosure statement in the prescribed
23 form; and
24 (iv) sets out the specifications, and details of the essential
25 terms, of each kind of futures contract in which the
26 broker deals on behalf of clients; and
27 (b) a copy of each agreement into which the broker proposes, if
28 the broker agrees to accept instructions from the person in
29 relation to dealings in futures contracts, to require the person
30 to enter.

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Part 8.5—Financial statements and audit

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1211 Interpretation

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In this Part, unless the contrary intention appears, a reference to a book, futures contract or business of or in relation to a futures broker who carries on business in partnership is a reference to such a book, futures contract or business of or in relation to the partnership.

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1212 Application of Part

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(1) This Part applies in relation to a futures broker in relation to his, her or its business of dealing in futures contracts, whether carried on in this jurisdiction or elsewhere.

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(2) This Part does not affect the operation of Chapter 2M in relation to a company that holds a futures brokers licence or in relation to a business of dealing in futures contracts that such a company carries on.

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1213 Accounts to be kept by futures brokers

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(1) A futures broker must:

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(a) keep such financial records as correctly record and explain the transactions and financial position of the business of dealing in futures contracts carried on by the broker; and

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22

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(b) keep financial records in such a manner as will enable true and fair profit and loss statements and balance sheets to be prepared from time to time; and

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25

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(c) keep financial records in such a manner as will enable profit and loss statements and balance sheets of the business of dealing in futures contracts carried on by the broker to be conveniently and properly audited.

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- 1 (2) Without limiting the generality of subsection (1), a futures broker
2 is taken not to have complied with that subsection in relation to
3 records if those records:
- 4 (a) are not kept in writing in the English language or in such a
5 manner as will enable them to be readily accessible and
6 readily converted into writing in the English language; or
7 (b) are not kept in sufficient detail to show particulars of:
- 8 (i) all money received or paid by the broker, including
9 money paid to, or disbursed from, an account of the
10 kind referred to in paragraph 1209(3)(c); and
11 (ii) all dealings in futures contracts made by the broker, the
12 charges and credits arising from them, and the name of
13 the person on whose behalf each dealing was effected;
14 and
15 (iii) all income received from commissions, interest and
16 other sources, and all expenses, commissions and
17 interest paid, by the broker; and
18 (iv) all the assets and liabilities (including contingent
19 liabilities) of the broker; and
20 (v) all futures contracts to which the broker has become a
21 party as a result of trading on the broker's own account;
22 and
23 (vi) all futures contracts dealt with by the broker pursuant to
24 instructions given by another person, showing who gave
25 the instructions; and
26 (vii) all property that is property of the broker and in respect
27 of which the business rules of a futures exchange
28 authorise the making of a futures contract in the futures
29 market of the futures exchange, showing by whom the
30 property is held and, if held by some other person,
31 whether or not the property is so held as security against
32 loans or advances; and
33 (viii) all such property that is not property of the broker and
34 for which the broker or any nominee controlled by the
35 broker is accountable, showing by whom, and for
36 whom, the property is held and the extent to which the
37 property is either held for safe custody or deposited with

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- 1 a third party as security for loans or advances made to
2 the broker; or
- 3 (c) are not kept in sufficient detail to show separately particulars
4 of every transaction by the broker; or
- 5 (d) do not specify the day on which or the period during which
6 each transaction by the broker took place; or
- 7 (e) do not contain copies of acknowledgments of the receipts of
8 property received by the broker from clients.
- 9 (3) Without affecting the operation of subsections (1) and (2), a futures
10 broker is taken not to have complied with subsection (1) in relation
11 to records if, in respect of a discretionary account on which the
12 broker operates, those records are not kept in sufficient detail to
13 show the particulars that the broker is required to give to clients in
14 order to comply with subsection 1207(2).
- 15 (4) Without affecting the operation of subsection (2) or (3), a futures
16 broker must keep records in sufficient detail to show separately
17 particulars of all transactions by the broker:
- 18 (a) with, on behalf of, or on the account of, clients of the broker,
19 excluding, in a case where the broker carries on business in
20 partnership, the partners in the firm; and
- 21 (b) in a case where the broker carries on business in
22 partnership—on the broker's own account or with, on behalf
23 of, or on the account of, the partners in the firm; and
- 24 (c) in a case where the broker does not carry on business in
25 partnership—on the broker's own account; and
- 26 (d) with, on behalf of, or on the account of, other futures brokers;
27 and
- 28 (e) with, on behalf of, or on the account of, representatives of the
29 broker; and
- 30 (f) with, on behalf of, or on the account of, employees of the
31 broker.
- 32 (5) An entry in the financial and other records of a futures broker
33 required to be kept in accordance with this section, and any matter
34 recorded by a futures exchange in relation to a member pursuant to

Section 1214

- 1 subsection 1270(3) is taken to have been made by, or with the
2 authority of, the broker or member.
- 3 (6) Where a record required by this section to be kept is not kept in
4 writing in the English language, the futures broker must, if required
5 to convert the record into writing in the English language by a
6 person who is entitled to examine the record, comply with the
7 requirement within a reasonable time.
- 8 (7) Notwithstanding any other provision of this section, a futures
9 broker is not taken to have failed to keep a record referred to in
10 subsection (1) by reason only that the record is kept as a part of, or
11 in conjunction with, the records relating to any business other than
12 dealing in futures contracts that is carried on by the broker.
- 13 (8) If financial records or other records are kept by a futures broker at
14 a place outside this jurisdiction, the broker must cause to be sent to
15 and kept at a place in this jurisdiction such particulars with respect
16 to the business dealt with in those records as will enable true and
17 fair profit and loss statements and balance-sheets to be prepared.
- 18 (9) If any financial records of a futures broker are kept at a place
19 outside this jurisdiction, the broker must, if required by ASIC to
20 produce those records at a place in this jurisdiction, comply with
21 the requirement not later than 28 days after the requirement is
22 made.

23 **1214 Property in custody of futures broker**

- 24 (1) Where a futures broker receives for safe custody property:
25 (a) that is the property of another person (in this section called
26 the *client*); and
27 (b) that is, or is to be, delivered in accordance with a futures
28 contract; and
29 (c) for which the broker or a nominee of the broker is
30 accountable;
31 the broker must forthwith:
32 (d) if the client requests that the property be deposited in safe
33 custody with the broker's bankers—cause it to be so

Section 1214

- 1 deposited or notify the client of any failure to comply with
2 the request, whether or not caused by a refusal by the bankers
3 to comply with the request; or
4 (e) if the client does not make, or the bankers refuse to comply
5 with, such a request and the business rules of the futures
6 exchange that maintained or provided the futures market on
7 which the contract was made enable the property to be
8 deposited in safe custody—cause the property to be so
9 deposited in accordance with those rules.
- 10 (2) A futures broker must not deposit as security for a loan or advance
11 made to the broker property of a kind referred to in subsection (1)
12 unless an amount is owed to the broker by the client in connection
13 with a transaction entered into on the instructions of the client and
14 the broker:
- 15 (a) gives a written notice to the client identifying the property
16 and stating that the broker intends to deposit the property as
17 security for a loan or advance to the broker; and
18 (b) deposits the property as security for a loan or advance to the
19 broker, being a loan or advance of an amount that does not
20 exceed the amount owed to the broker by the client on the
21 day of the receipt by the broker of the property.
- 22 (3) Where:
- 23 (a) a futures broker has given a notice to a person as mentioned
24 in subsection (2) and has deposited the property referred to in
25 the notice as security for a loan or advance; and
26 (b) the person:
27 (i) has paid to the broker the amount owed by the person to
28 the broker at the time the property was so deposited; and
29 (ii) requests the broker to withdraw the property from
30 deposit;
- 31 the broker must, as soon as practicable after the request, withdraw
32 the property from deposit, but nothing in this subsection prevents
33 the broker from redepositing the property, as permitted by
34 subsection (2), as a security for a loan or advance.

Section 1215

- 1 (4) Where a futures broker deposits as security for a loan or advance
2 made to the broker property of a kind referred to in subsection (1),
3 the broker must, at the end of the period of 3 months after the day
4 on which the property is deposited, and at the end of each
5 subsequent period of 3 months if the property is still on deposit,
6 send to the person whose property it is written notice to that effect.

7 **1215 Appointment of auditor by futures broker**

- 8 (1) Within 1 month after becoming the holder of a futures brokers
9 licence, a futures broker (other than an Australian ADI) must
10 appoint a person or persons, a firm or firms, or a person or persons
11 and a firm or firms, as auditor or auditors to audit the broker's
12 financial statements.
- 13 (2) Subject to this section, a person must not:
- 14 (a) consent to be appointed as auditor of a futures broker; or
15 (b) act as auditor of a futures broker; or
16 (c) prepare a report required by this Act to be prepared by an
17 auditor of a futures broker;
- 18 if:
- 19 (d) the person is not a registered company auditor; or
20 (e) the person, or a body corporate in which the person has a
21 substantial holding, is indebted in an amount exceeding
22 \$5,000 to the futures broker or, if the futures broker is a body
23 corporate, to a body corporate related to the futures broker;
24 or
25 (f) the person is a partner or employee of the futures broker; or
26 (g) in a case where the futures broker is a body corporate—the
27 person is:
- 28 (i) an officer of the body; or
29 (ii) a partner, employer or employee of an officer of the
30 body; or
31 (iii) a partner or employee of an employee of an officer of
32 the body.
- 33 (3) Subject to this section, a firm must not:
- 34 (a) consent to be appointed as an auditor of a futures broker; or

Section 1215

- 1 (b) act as auditor of a futures broker; or
2 (c) prepare a report required by this Act to be prepared by an
3 auditor of a futures broker;
4 unless:
5 (d) at least one member of the firm is a registered company
6 auditor who is ordinarily resident in Australia; and
7 (e) where the business name under which the firm is carrying on
8 business is not registered under a law of a State or Territory
9 relating to the registration of business names—there has been
10 lodged a return in the prescribed form showing, in relation to
11 each member of the firm, the member's full name and
12 address as at the time when the firm so consents, acts or
13 prepares a report; and
14 (f) no member of the firm, and no body corporate in which any
15 member of the firm has a substantial holding, is indebted in
16 an amount not exceeding \$5,000 to the futures broker or, if
17 the futures broker is a body corporate, to a body corporate
18 that is related to the futures broker; and
19 (ga) no member of the firm is a partner or employee of the futures
20 broker; and
21 (g) in a case where the futures broker is a body corporate—no
22 member of the firm is:
23 (i) an officer of the body; or
24 (ii) a partner, employer or employee of an officer of the
25 body; or
26 (iii) a partner or employee of an employee of an officer of
27 the body; and
28 (h) in a case where the futures broker is a body corporate—no
29 officer of the body receives any remuneration from the firm
30 for acting as a consultant to it on accounting or auditing
31 matters.
- 32 (4) For the purposes of paragraphs (2)(e) and (3)(f), disregard a debt
33 owed by a natural person to a body corporate if:
34 (a) the body corporate is:
35 (i) an Australian ADI; or

Section 1215

- 1 (ii) a body corporate registered under the *Life Insurance Act*
2 *1995*; and
- 3 (b) the debt arose because of a loan that the body corporate or
4 entity made to the person in the ordinary course of its
5 ordinary business; and
- 6 (c) the person used the amount of the loan to pay the whole or
7 part of the purchase price of premises that the person uses as
8 their principal place of residence.
- 9 (5) For the purposes of subsections (2) and (3), a person is taken to be
10 an officer of a body corporate if:
- 11 (a) the person is an officer of a related body corporate; or
12 (b) except where ASIC, if it thinks fit in the circumstances of the
13 case, directs that this paragraph not apply in relation to the
14 person—the person has, at any time within the immediately
15 preceding period of 12 months, been an officer or promoter
16 of the body corporate or of a related body corporate.
- 17 (6) For the purposes of this section, a person is not taken to be an
18 officer of a body corporate by reason only of being or having been
19 the liquidator of the body corporate or of a related body corporate.
- 20 (7) For the purposes of this section, a person is not taken to be an
21 officer of a body corporate by reason only of having been
22 appointed as an auditor of that body corporate or of a related body
23 corporate or, for any purpose relating to taxation, a public officer
24 of a body corporate or by reason only of being or having been
25 authorised to accept on behalf of the body corporate or a related
26 body corporate service of process or any notices required to be
27 served on the body corporate or related body corporate.
- 28 (8) The appointment of a firm as auditor of a futures broker is taken to
29 be an appointment of all persons who are members of the firm and
30 are registered company auditors, whether resident in Australia or
31 not, at the date of the appointment.
- 32 (9) Where a firm that has been appointed as auditor of a futures broker
33 is reconstituted by reason of the death, retirement or withdrawal of
34 a member or members or by reason of the admission of a new
35 member or new members, or both:

Section 1215

- 1 (a) a person who was taken under subsection (8) to be an auditor
2 of the broker and who has so retired or withdrawn from the
3 firm as previously constituted is taken to have resigned as
4 auditor of the company as from the day of the person's
5 retirement or withdrawal but, unless that person was the only
6 member of the firm who was a registered company auditor
7 and, after the retirement or withdrawal of that person, there is
8 no member of the firm who is a registered company auditor,
9 section 1216 does not apply to that resignation; and
- 10 (b) a person who is a registered company auditor and who is so
11 admitted to the firm is taken to have been appointed as an
12 auditor of the broker as from the day of admission; and
- 13 (c) the reconstitution of the firm does not affect the appointment
14 of the continuing members of the firm who are registered
15 company auditors as auditors of the broker;
- 16 but nothing in this subsection affects the operation of
17 subsection (3).
- 18 (10) Except as provided by subsection (9), the appointment of the
19 members of a firm as auditors of a futures broker that is taken by
20 subsection (8) to have been made by reason of the appointment of
21 the firm as auditor of the broker is not affected by the dissolution
22 of the firm.
- 23 (11) A report or notice that purports to be made or given by a firm
24 appointed as auditor of a futures broker is not taken to be duly
25 made or given unless it is signed, in the firm name and in the name
26 of the member concerned, by a member of the firm who is a
27 registered company auditor.
- 28 (12) Where a person or firm is appointed as an auditor under
29 subsection (1) (not being an appointment that is taken to be made
30 by virtue of subsection (9)) or under subsection (16), the futures
31 broker must, within 14 days after the appointment, lodge with
32 ASIC a notice in writing stating that the broker has made the
33 appointment and specifying the name of the person or firm.
- 34 (13) Without limiting the generality of section 1311, if, in contravention
35 of this section, a firm consents to be appointed, or acts as, an
36 auditor of a futures broker or prepares a report required by this Act

Section 1216

- 1 to be prepared by an auditor of a futures broker, each member of
2 the firm is guilty of an offence.
- 3 (14) A person must not:
- 4 (a) if the person has been appointed auditor of a futures broker—
5 knowingly disqualify himself or herself while the
6 appointment continues from acting as auditor of the broker;
7 or
8 (b) if the person is a member of a firm that has been appointed
9 auditor of a futures broker—knowingly disqualify the firm
10 while the appointment continues from acting as auditor of the
11 broker.
- 12 (15) An auditor of a futures broker holds office until death, until
13 removal or resignation from office in accordance with section 1216
14 or until becoming prohibited from acting as auditor by reason of
15 subsection (2) or (3).
- 16 (16) Within 14 days after a vacancy occurs in the office of an auditor of
17 a futures broker, if there is no surviving or continuing auditor of
18 the broker, the broker must appoint a person or persons, a firm or
19 firms or a person or persons and a firm or firms to fill the vacancy.
- 20 (17) While a vacancy in the office of an auditor continues, the surviving
21 or continuing auditor or auditors (if any) may act.
- 22 (18) A futures broker must not appoint a person or firm as auditor of the
23 broker unless that person or firm has, before the appointment,
24 consented by notice in writing given to the broker to act as auditor
25 and has not withdrawn the consent by notice in writing given to the
26 broker.
- 27 (19) This section does not apply in relation to a body corporate (except
28 a proprietary company) in relation to which section 327 applies.

29 **1216 Removal and resignation of auditors**

- 30 (1) A futures broker may, with the consent of ASIC, remove an auditor
31 of the broker from office.

Section 1216

- 1 (2) An auditor of a futures broker may, by notice in writing given to
2 the broker, resign as auditor of the broker if:
3 (a) the auditor has, by notice in writing given to ASIC, applied
4 for consent to the resignation and, at or about the same time
5 as the notice was given to ASIC, notified the broker in
6 writing of the application to ASIC; and
7 (b) the auditor has received the consent of ASIC.
- 8 (3) ASIC must, as soon as practicable after receiving a notice from an
9 auditor under subsection (2), notify the auditor and the futures
10 broker whether it consents to the resignation of the auditor.
- 11 (4) A statement made by an auditor in an application to ASIC under
12 subsection (2) or in answer to an inquiry by ASIC relating to the
13 reasons for the application:
14 (a) is not admissible in evidence in any civil or criminal
15 proceedings against the auditor other than proceedings for an
16 offence against section 1308; and
17 (b) may not be made the ground of a prosecution (other than a
18 prosecution for an offence against section 1308), action or
19 suit against the auditor;
20 and a certificate by ASIC that the statement was made in the
21 application or in answer to an inquiry by ASIC is conclusive
22 evidence that the statement was so made.
- 23 (5) Subject to subsection (6), the resignation of an auditor takes effect:
24 (a) on the date (if any) specified for the purpose in the notice of
25 resignation; or
26 (b) on the date on which ASIC gives its consent to the
27 resignation; or
28 (c) on the date (if any) fixed by ASIC for the purpose;
29 whichever last occurs.
- 30 (6) Where, on the retirement or withdrawal from a firm of a member,
31 the firm will no longer be capable, by reason of the provisions of
32 paragraph 1215(3)(d), of acting as auditor of a futures broker, the
33 member so retiring or withdrawing is, if not disqualified from
34 acting as auditor of the broker, taken to be the auditor of the broker

Section 1217

1 until the member obtains the consent of ASIC to the retirement or
2 withdrawal.

3 (7) This section does not apply in relation to a body corporate (except
4 a proprietary company) in relation to which section 329 applies.

5 **1217 Fees and expenses of auditors**

6 The reasonable fees and expenses of an auditor of a futures broker
7 are payable by the broker.

8 **1218 Futures brokers' accounts**

9 (1) In this section:

10 *financial year*, in relation to a futures broker, means:

11 (a) if the broker is a natural person—a period of 12 months
12 ending on 30 June in a year; or

13 (b) if the broker is a body corporate—a period that is a financial
14 year of the body corporate because of the definition of
15 *financial year* in section 9.

16 *prescribed day*, in relation to a financial year of a futures broker,
17 means the day that is:

18 (a) if the broker is a natural person—2 months; or

19 (b) if the broker is a body corporate—3 months;

20 after the end of that financial year or, if an extension is approved
21 under subsection (3), the day on which the extended period ends.

22 (2) A futures broker (other than an Australian ADI) must, in respect of
23 each financial year, other than a financial year that ended before
24 the date on which the broker commenced to carry on business as a
25 futures broker, prepare a true and fair profit and loss statement and
26 balance sheet on the basis of such accounting principles (if any)
27 and containing such information and matters as are prescribed for
28 the purposes of this subsection and lodge them with ASIC before
29 the prescribed day for that financial year, together with an auditor's
30 report containing such information and matters as are prescribed
31 for the purposes of this subsection and such other information and
32 matters as the auditor thinks fit to include in the report.

Section 1219

- 1 (3) ASIC may, on application made by a futures broker and the auditor
2 of the broker before the end of the period referred to in
3 paragraph (a) or (b), as the case requires, of the definition of
4 **prescribed day** in subsection (1) or, if that period has been
5 extended pursuant to an approval or approvals previously given
6 under this subsection, before the end of the period as so extended,
7 approve an extension or further extension of the period, and such
8 an approval may be given subject to such conditions (if any) as
9 ASIC imposes.
- 10 (4) Where an approval under subsection (3) in relation to a futures
11 broker is given subject to conditions, the broker must comply with
12 those conditions.

13 **1219 Auditor's right of access to records, information etc.**

- 14 (1) An auditor of a futures broker has a right of access at all reasonable
15 times to the financial records and other records, including any
16 register, of the broker, and is entitled to require from the broker or,
17 in the case of a futures broker that is a body corporate, from any
18 executive officer of the broker, such information and explanations
19 as the auditor desires for the purposes of audit.
- 20 (2) A futures broker, or an executive officer of a futures broker that is
21 a body corporate, must not, without lawful excuse:
- 22 (a) refuse or fail to allow an auditor of the broker access, in
23 accordance with subsection (1), to financial records or other
24 records, including any register, of the broker; or
- 25 (b) refuse or fail to give information, or an explanation, as and
26 when required under subsection (1); or
- 27 (c) otherwise hinder, obstruct or delay an auditor of the broker in
28 the performance or exercise of the auditor's duties or powers.

29 **1220 Auditor to report to ASIC in certain cases**

- 30 (1) Where an auditor, in the performance of the duties of auditor of a
31 futures broker, becomes aware of a prescribed matter, the auditor
32 must, within 7 days after becoming aware of that matter, lodge a
33 written report on the matter and send a copy of the report to:

Section 1221

- 1 (a) the broker; and
2 (b) each futures exchange of which the broker is a member and
3 to each clearing house (if any) for that futures exchange; and
4 (c) each futures association of which the broker is a member,
5 unless the futures association is also a futures exchange of
6 which the broker is a member.
- 7 (2) In this section, *prescribed matter* means a matter that, in the
8 opinion of the auditor:
9 (a) has adversely affected, is adversely affecting, or may
10 adversely affect, the ability of the futures broker to meet the
11 broker's obligations as a broker; or
12 (b) constitutes or may constitute a contravention of section 1209,
13 1213 or 1214; or
14 (c) constitutes or may constitute a contravention of a condition
15 of a licence held by the futures broker.

16 **1221 Certain matters to be reported to ASIC**

- 17 (1) Where, in relation to a futures broker who is a member of a futures
18 exchange, the futures exchange becomes aware of a prescribed
19 matter, the futures exchange must, as soon as practicable after
20 becoming aware of the matter, lodge a written report on the matter
21 and send a copy of the report to the broker.
- 22 (2) Subsection (1) applies:
23 (a) in relation to a clearing house for a futures exchange and a
24 member of the clearing house; and
25 (b) in relation to a futures association and a member of the
26 futures association (unless the futures association is also a
27 futures exchange);
28 in the same manner as it applies in relation to a futures exchange
29 and a member of the futures exchange.
- 30 (3) In this section, *prescribed matter*, in relation to a futures broker,
31 means a matter that, in the opinion of the futures exchange,
32 clearing house or futures association concerned:

Section 1222

- 1 (a) has adversely affected, is adversely affecting, or may
2 adversely affect, the ability of the broker to meet the broker's
3 obligations as a broker; or
4 (b) constitutes or may constitute a contravention of section 1209,
5 1213 or 1214; or
6 (c) constitutes or may constitute a contravention of a condition
7 of a licence held by the broker; or
8 (d) constitutes a failure to make, in accordance with Part 8.6,
9 contributions to a fidelity fund.

10 **1222 Defamation**

- 11 (1) An auditor of a futures broker has qualified privilege in respect of:
12 (a) any statement made, orally or in writing, in the course of
13 performing the duties of an auditor; or
14 (b) the lodging of a report, or the sending of a report under
15 section 1220 to the futures broker, a futures exchange, a
16 clearing house for a futures exchange, or a futures
17 association.
- 18 (2) A futures exchange, a clearing house for a futures exchange, a
19 futures association, or an officer of a futures exchange, of a
20 clearing house for a futures exchange, or of a futures association,
21 has qualified privilege in respect of:
22 (a) any statement made, orally or in writing, in the course of
23 performing the duties imposed by section 1221; or
24 (b) the lodging of any report with ASIC, or the sending of any
25 report to a futures broker, under section 1221.
- 26 (3) A person has qualified privilege in respect of the publishing of:
27 (a) a statement made by an auditor of a futures broker as
28 mentioned in paragraph (1)(a), or by a futures exchange, a
29 clearing house for a futures exchange, a futures association,
30 or an officer, as mentioned in paragraph (2)(a); or
31 (b) a document prepared by an auditor of a futures broker in the
32 course of performing the duties of an auditor; or
33 (c) a document prepared by a futures exchange, a clearing house
34 for a futures exchange, a futures association, or an officer of

- 1 a futures exchange, of a clearing house for a futures
2 exchange, or of a futures association, in the course of
3 performing the duties imposed by section 1221; or
4 (d) a document required by or under this Chapter to be lodged,
5 whether or not the document has been lodged.

6 **1223 This Part not to affect right of futures exchange or futures**
7 **association to impose obligations etc. on members**

- 8 Nothing in this Part prevents a futures exchange or futures
9 association imposing on members of that futures exchange or
10 futures association any obligations or requirements (not being
11 obligations or requirements inconsistent with this Act) that the
12 futures exchange or futures association thinks fit with respect to:
13 (a) the audit of financial statements (including the audit of
14 financial statements by an auditor appointed by the futures
15 exchange or futures association); or
16 (b) the information to be given in reports from auditors; or
17 (c) the keeping of books.

18 **1224 Power of Court to restrain dealings with futures broker's bank**
19 **accounts**

- 20 (1) Where the Court is satisfied that:
21 (a) there are reasonable grounds for believing that:
22 (i) there is a deficiency in an account that is, or has at any
23 time been, a clients' segregated account of a person; and
24 (ii) the person was, when the deficiency occurred, a futures
25 broker or a member of a futures organisation; or
26 (b) there has been, at a time when a person was a futures broker
27 or a member of a futures organisation, undue delay, or
28 unreasonable refusal, on the person's part in paying, applying
29 or accounting for money as required by this Chapter; or
30 (c) a person has, at a time when the person was a futures broker
31 or a member of a futures organisation, failed to pay money
32 into a clients' segregated account of the person as required by
33 this Chapter; or

Section 1225

1 (d) a person who is, or has at any time been, a futures broker or a
2 member of a futures organisation, is carrying on, or last
3 carried on, as the case requires, a futures broking business
4 otherwise than in partnership and:
5 (i) in any case—the last futures brokers licence held by the
6 person has been revoked or suspended; or
7 (ii) in any case—the person no longer carries on a futures
8 broking business; or
9 (iii) if the person is a natural person—the person has died, or
10 is incapable, because of physical or mental incapacity,
11 of managing his or her affairs;
12 the Court may by order restrain dealings in respect of specified
13 bank accounts that the person holds or maintains (whether in
14 Australia or elsewhere), subject to such terms and conditions as the
15 Court imposes.

16 (2) An order under subsection (1) may only be made on an application
17 by ASIC or by the futures organisation (if any) concerned.

18 (4) Where an application is made to the Court for an order under
19 subsection (1), the Court may, if in the opinion of the Court it is
20 desirable to do so, before considering the application, grant an
21 interim order, being an order of the kind applied for that is
22 expressed to have effect pending the determination of the
23 application.

24 (5) Where ASIC makes an application to the Court for the making of
25 an order under subsection (1), the Court must not require ASIC, as
26 a condition of granting an interim order under subsection (4), to
27 give any undertaking as to damages.

28 **1225 Duty of banker or body corporate to make full disclosure**

29 Where an order made under section 1224 is directed to a banker or
30 a body corporate, the banker or body corporate must:

31 (a) disclose to the applicant for the order every account kept by
32 the bank or body corporate in the name of the person to
33 whom the order relates, and any account that the banker or

Section 1226

- 1 body corporate reasonably suspects is held or kept by the
2 bank or body corporate for the benefit of that person; and
3 (b) permit the applicant for the order to make a copy of, or to
4 take an extract from, any account of the person to whom the
5 order relates or any of the banker's books relating to that
6 person or the like books in the possession of the body
7 corporate.

8 **1226 Power of Court to make further orders and give directions**

9 Where an order is made under section 1224, the Court may, on the
10 application of ASIC, a futures organisation or a person affected by
11 the order, make further orders:

- 12 (a) dealing with such ancillary matters as the Court considers
13 necessary or desirable; and
14 (b) directing that all or any of the money in an account affected
15 by an order so made be paid by the bank or body corporate to
16 ASIC or a person nominated by ASIC, on such terms and
17 conditions as the Court thinks fit; and
18 (c) discharging or varying the order.

19 **1227 Power of Court to make order relating to payment of money**

- 20 (1) An order made under section 1226 may include directions to the
21 person to whom the money is paid directing that that person:
22 (a) must cause the money to be paid into a trust account; or
23 (b) is authorised to prepare a scheme for distributing the money
24 to persons who claim, during a period of 6 months after
25 ASIC or that other person receives the money, to be entitled
26 to the money and satisfy ASIC or that other person that they
27 are so entitled; or
28 (c) where the money received is insufficient to pay all proved
29 claims, may, notwithstanding any rule of law or equity to the
30 contrary, apportion the money among the claimants in
31 proportion to their proved claims and show in the scheme
32 how the money is so apportioned.

Section 1227

- 1 (2) Where a person prepares a scheme for distribution of money
2 pursuant to subsection (1), the person must apply to the Court for
3 approval of the scheme and for directions with respect to it.
- 4 (3) The Court may give such directions as to the money held in a trust
5 account pursuant to subsection (1), as to the persons to whom and
6 in what amounts the whole or any portion of that money must be
7 paid, and as to the payment of the balance of the money (if any)
8 remaining in the account, as the Court thinks fit.

1

2

Part 8.6—Fidelity funds

3

4

1228 Establishment of fidelity funds

5

(1) A futures organisation must keep a fidelity fund, and the board of the futures organisation must administer the fidelity fund.

6

7

(2) The assets of a fidelity fund of a futures organisation are the property of the futures organisation, but must be kept separately from all other property of the futures organisation and must be held in trust for the purposes set out in this Part.

8

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10

11

1229 Money constituting fidelity fund

12

(1) The fidelity fund of a futures organisation consists of:

13

(a) 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

14

15

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(b) 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 futures organisation on the establishment of the fund; and

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(ba) money paid into the fidelity fund as required by paragraphs 1234(4)(d) and 1235(4)(d); and

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(c) money paid to the futures organisation, in accordance with this Part or the business rules of the futures organisation, by contributing members of the futures organisation; and

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(d) the interests and profits from time to time accruing from the investment of the fidelity fund; and

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(e) money paid into the fidelity fund by the futures organisation; and

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(f) money recovered by or on behalf of the futures organisation in the exercise of a right of action conferred by this Part; and

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- 1 (g) money paid by an insurer pursuant to a contract of insurance
2 or indemnity entered into by the futures organisation under
3 section 1249; and
4 (h) all other money lawfully paid into the fund.
- 5 (2) Where a futures organisation has, under paragraph (1)(b), paid an
6 amount to the credit of its fidelity fund:
- 7 (a) the Minister may approve in writing, on such conditions (if
8 any) as are specified in the approval, the repayment of the
9 whole, or a specified part, of the amount from the fidelity
10 fund to the general funds of the futures organisation; and
11 (b) if the Minister does so, the whole, or the specified part, as the
12 case may be, of the amount may, in accordance with the
13 conditions (if any) so specified, be so repaid.

14 **1230 Fund to be kept in separate ADI account**

15 The money in a fidelity fund must, until invested or applied in
16 accordance with this Part, be kept in a separate account with an
17 Australian ADI.

18 **1231 Payments out of fund**

19 Subject to this Part, there must be paid out of the fidelity fund of a
20 futures organisation in such order as the board of the futures
21 organisation deems proper:

- 22 (a) the amount of all claims, including costs, allowed by the
23 board or established against the futures organisation under
24 this Part; and
25 (b) all legal and other expenses incurred in investigating or
26 defending claims made under this Part or incurred in relation
27 to the fund or in the exercise by the futures organisation or
28 the board of the rights, powers and authorities vested in it by
29 this Part in relation to the fund; and
30 (c) all premiums payable in respect of contracts of insurance or
31 indemnity entered into by the futures organisation under
32 section 1249; and

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- 1 (d) the expenses incurred in the administration of the fund,
2 including the salaries and wages of persons employed by the
3 futures organisation or the board in relation to the fund; and
4 (e) all other money payable out of the fund in accordance with
5 the provisions of this Chapter.

6 **1232 Accounts of fund**

- 7 (1) A futures organisation must establish and keep proper accounts of
8 its fidelity fund and must, within the period of 3 months that next
9 succeeds the end of its financial year, cause a balance-sheet in
10 respect of those accounts to be made out as at the end of that
11 financial year.
- 12 (2) A futures organisation must appoint a registered company auditor
13 to audit the accounts of the fidelity fund.
- 14 (3) The auditor appointed by a futures organisation must audit the
15 accounts of the fidelity fund and must audit each balance-sheet and
16 cause a report on the accounts and balance-sheet to be laid before
17 the board of the futures organisation not later than 1 month after
18 the balance-sheet is made out.
- 19 (4) A futures organisation must give to ASIC a copy of each report
20 laid before the board of the futures organisation under this section
21 and of the balance-sheet to which the report relates within 14 days
22 after the report was so laid before the board.

23 **1233 Management sub-committee**

- 24 (1) The board of a futures organisation may, by resolution, appoint a
25 management sub-committee of not fewer than 3 and not more than
26 5 persons, at least one of whom is also a member of the board.
- 27 (2) The board of a futures organisation may, by resolution, delegate to
28 a sub-committee appointed by it under this section all or any of its
29 powers, authorities and discretions under a provision of this Part
30 (other than this section).

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- 1 (3) A power, authority or discretion delegated under subsection (2)
2 may be exercised by members forming a majority of the
3 sub-committee as if that power, authority or discretion had been
4 conferred by this Part on a majority of the members of the
5 sub-committee.
- 6 (4) A delegation by the board of a futures organisation under this
7 section may at any time, by resolution of the board, be varied or
8 revoked.
- 9 (5) The board of a futures organisation may at any time, by resolution,
10 remove a member of a sub-committee appointed by it under this
11 section and may, by resolution, fill a vacancy arising in the
12 membership of the sub-committee.
- 13 (6) A delegation by the board of a futures organisation under this
14 section does not prevent the exercise of a power, authority or
15 discretion by that board.

16 **1234 Contributions to fund**

- 17 (1) A person is not to be admitted to membership of a futures
18 organisation unless:
19 (a) in any case—the person has paid to the futures organisation,
20 as agent for the Commonwealth, the levy known as futures
21 organisation (application for membership) fidelity fund
22 contribution; or
23 (b) if the organisation is not a futures exchange—the person is
24 already a member of a futures exchange.
- 25 Note: For the imposition and amount of the levy referred to in paragraph (a),
26 see the *Corporations (Futures Organisations Levies) Act 2001*.
- 27 (2) A contributing member of a futures organisation must, on or before
28 31 March in each year, pay to the futures organisation, as agent for
29 the Commonwealth, the levy known as futures organisation
30 (annual membership) fidelity fund contribution.
- 31 Note: For the imposition and amount of the levy, see the *Corporations*
32 *(Futures Organisations Levies) Act 2001*.

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- 1 (3) Whenever an amount of levy (the *levy amount*) is paid under this
2 section, or under subsection 6(1) of the *Corporations (Futures*
3 *Organisations Levies) Act 2001*, to a futures organisation as agent
4 for the Commonwealth:
- 5 (a) the futures organisation must pay an amount equal to the levy
6 amount to the Commonwealth; and
7 (b) the Consolidated Revenue Fund is appropriated by that
8 amount for the purpose of payment to the futures
9 organisation; and
10 (c) the Commonwealth must pay the amount so appropriated to
11 the futures organisation; and
12 (d) the futures organisation must pay the amount it receives
13 under paragraph (c) into its fidelity fund.
- 14 (4) A payment of an amount to a futures organisation as required by
15 paragraph (3)(c) in respect of a particular levy amount is subject to
16 a condition that, if the Commonwealth becomes liable to refund the
17 whole or a part of the levy amount, the future organisation must
18 pay to the Commonwealth an amount equal to the amount that the
19 Commonwealth is liable to refund. The futures organisation may
20 pay, out of its fidelity fund, any amount so required to be paid to
21 the Commonwealth.
- 22 (5) The *Financial Management and Accountability Act 1997* does not
23 apply in relation to the payment of an amount of levy under this
24 section to a futures organisation as agent for the Commonwealth.
25 However, the operation of that Act in relation to the following
26 payments is not affected.
- 27 (a) the payment of an amount to the Commonwealth as required
28 by paragraph (3)(a); or
29 (b) the payment of an amount by the Commonwealth as required
30 by paragraph (3)(c).
- 31 The futures organisation must, in accordance with the regulations,
32 notify the Commonwealth of payments of levy it receives as agent
33 for the Commonwealth.
- 34 (6) An amount payable by a futures organisation as required by
35 paragraph (3)(a) may be set off against an amount payable to the
36 futures organisation as required by paragraph (3)(c).

1 **1235 Levy in addition to annual contributions**

2 (1) If, at any time, the amount of a fidelity fund is insufficient to pay
3 all amounts that, at that time, are required to be paid under
4 section 1231, the futures organisation concerned may determine
5 that levy known as futures organisation additional fidelity fund
6 contribution is to be paid by specified contributing members of the
7 futures organisation. When such a determination is made, the levy
8 is payable to futures organisation, as agent for the Commonwealth
9 in accordance with this section.

10 Note: For the imposition and amount of the levy, see the *Corporations*
11 (*Futures Organisations Levies*) Act 2001.

12 (2) An amount of levy payable under subsection (1) must be paid
13 within the time and in the manner specified by the futures
14 organisation either generally or in relation to a particular case.

15 (3) If a levy is imposed by subsection 6(2) of the *Corporations*
16 (*Futures Organisations Levies*) Act 2001 on a person, the levy
17 must be paid by the time by which the levy under subsection
18 1235(1) of the old Corporations Law referred to in that subsection
19 was required to be paid.

20 (4) Whenever an amount of levy (the **levy amount**) is paid under this
21 section, or under subsection 6(2) of the *Corporations (Futures*
22 *Organisations Levies*) Act 2001, to a futures organisation as agent
23 for the Commonwealth:

- 24 (a) the futures organisation must pay an amount equal to the levy
25 amount to the Commonwealth; and
26 (b) the Consolidated Revenue Fund is appropriated by that
27 amount for the purpose of payment to the futures
28 organisation; and
29 (c) the Commonwealth must pay the amount so appropriated to
30 the futures organisation; and
31 (d) the futures organisation must pay the amount it receives
32 under paragraph (c) into its fidelity fund.

33 (5) A payment of an amount to a futures organisation as required by
34 paragraph (4)(c) in respect of a particular levy amount is subject to
35 a condition that, if the Commonwealth becomes liable to refund the

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1 whole or a part of the levy amount, the futures organisation must
2 pay to the Commonwealth an amount equal to the amount that the
3 Commonwealth is liable to refund. The futures organisation may
4 pay, out of its fidelity fund, any amount so required to be paid to
5 the Commonwealth.

6 (6) The *Financial Management and Accountability Act 1997* does not
7 apply in relation to the payment of an amount of levy under this
8 section to a futures organisation as agent for the Commonwealth.
9 However, the operation of that Act in relation to the following
10 payments is not affected.

- 11 (a) the payment of an amount to the Commonwealth as required
12 by paragraph (4)(a); or
13 (b) the payment of an amount by the Commonwealth as required
14 by paragraph (4)(c).

15 The futures organisation must, in accordance with the regulations,
16 notify the Commonwealth of payments of levy it receives as agent
17 for the Commonwealth.

18 (7) An amount payable by a futures organisation as required by
19 paragraph (4)(a) may be set off against an amount payable to the
20 futures organisation as required by paragraph (4)(c).

21 **1236 Levy not payable in certain cases**

22 (3) A futures organisation may determine in writing that subsection
23 1234(1) does not apply in relation to the futures organisation in
24 relation to specified persons.

25 (4) A futures organisation may determine in writing that subsection
26 1234(2) does not apply in relation to the futures organisation in
27 relation to specified contributing members of the futures
28 organisation.

29 (5) A determination in force under subsection (3) or (4) has effect
30 accordingly.

1 **1237 Power of futures organisation to make advances to fund**

- 2 (1) A futures organisation may, from its general funds, give or
3 advance, on such terms as the board of the futures organisation
4 thinks fit, any sums of money to its fidelity fund.
- 5 (2) Money that is advanced under subsection (1) may at any time be
6 repaid from the fidelity fund to the general funds of the futures
7 organisation.

8 **1238 Investment of fund**

9 Money in a fidelity fund of a futures organisation that is not
10 immediately required for the purposes of the fund may be invested
11 by the futures organisation in any manner in which trustees are for
12 the time being authorised by a law in force in a State or Territory in
13 this jurisdiction to invest trust funds or on deposit with an eligible
14 money market dealer.

15 **1239 Application of fund**

- 16 (1) Subject to this Part, where:
- 17 (a) a person (in this subsection called the *futures person*) suffers
18 pecuniary loss at a particular time because of a defalcation,
19 or because of fraudulent misuse of money or other property,
20 by:
- 21 (i) a person who is at that time a contributing member of a
22 futures organisation; or
- 23 (ii) a director, partner, officer or employee of a person who
24 is at that time a contributing member of a futures
25 organisation; or
- 26 (iii) a partner in, or employee of, a partnership that is at that
27 time a contributing member of a futures organisation;
28 and
- 29 (b) the loss is suffered in respect of money or other property that
30 was, in connection with the contributing member's dealings
31 in futures contracts (whether or not any of those dealings was
32 effected on a futures market), entrusted to or received by the
33 contributing member, or a director, partner, officer or

- 1 employee of the contributing member (whether before or
2 after the commencement of this section):
- 3 (i) for or on behalf of the futures person or another person;
4 or
5 (ii) because the contributing member was trustee of the
6 money or other property;
- 7 the fidelity fund of the futures organisation must be applied for the
8 purpose of compensating the futures person.
- 9 (2) The reference in paragraph (1)(b) to a partner of a contributing
10 member of a futures organisation is, in a case where the
11 contributing member is a partnership, a reference to a partner in the
12 partnership.
- 13 (3) Subject to this Part, where a right to compensation does not arise
14 under subsection (1), a fidelity fund of a futures organisation may,
15 if the board of the futures organisation thinks fit, be applied for the
16 purpose of paying to an official receiver or trustee within the
17 meaning of the *Bankruptcy Act 1966* an amount not greater than
18 the amount that the official receiver or trustee, as the case may be,
19 certifies is required in order to make up or reduce the total
20 deficiency arising because the available assets of a bankrupt who is
21 a contributing member of the futures organisation are insufficient
22 to satisfy the debts arising from dealings in futures contracts that
23 have been proved in the bankruptcy by creditors of the bankrupt.
- 24 (4) Subsection (3) applies in the case of a contributing member of a
25 futures organisation who has made a composition with the
26 member's creditors, or has executed a deed of assignment or a deed
27 of arrangement, under Part X of the *Bankruptcy Act 1966* in like
28 manner as that subsection applies in the case of a contributing
29 member of a futures organisation who has become bankrupt and,
30 for the purposes of that subsection as so applying by virtue of this
31 subsection:
- 32 (a) the reference in that subsection to a trustee is taken to be a
33 reference to a controlling trustee within the meaning of that
34 Part; and

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- 1 (b) the reference to debts proved in the bankruptcy is taken to be
2 a reference to provable debts in relation to the composition or
3 deed within the meaning of that Part; and
- 4 (c) a reference to the bankrupt is taken to be a reference to the
5 person who made the composition or executed the deed.
- 6 (5) Subject to this Part, where a right to compensation does not arise
7 under subsection (1), a fidelity fund of a futures organisation may,
8 if the board of the futures organisation thinks fit, be applied for the
9 purpose of paying to the liquidator of a body corporate that is a
10 contributing member of the futures organisation and that has
11 commenced to be wound up, an amount not greater than the
12 amount that the liquidator certifies is required to make up or reduce
13 the total deficiency arising because the available assets of the body
14 corporate are insufficient to satisfy the debts of the body corporate
15 arising from dealings in futures contracts that have been proved in
16 the winding up by creditors of the body corporate.
- 17 (6) Money paid pursuant to subsection (3) or (5) is so paid only on
18 condition that it is applied by the official receiver, trustee or
19 liquidator towards satisfaction of debts arising from dealings in
20 futures contracts and for no other purpose.
- 21 (7) Subject to subsection (9), the amount, or the sum of the amounts,
22 paid under this Part out of a fidelity fund of a futures organisation:
23 (a) for the purpose of compensating pecuniary loss as mentioned
24 in subsection (1); or
25 (b) for the purpose of making payments under subsection (3) or
26 (5);
27 must not exceed, in respect of a particular contributing member of
28 the futures organisation:
29 (c) unless paragraph (d) applies—\$500,000; or
30 (d) if some other amount is prescribed, for the purposes of this
31 subsection, in relation to the futures organisation, a class of
32 futures organisations that includes the futures organisation, or
33 futures organisations generally—that amount.

- 1 (8) For the purposes of calculating the sum referred to in
2 subsection (7), an amount that is paid from a fidelity fund is, to the
3 extent to which that amount is repaid to the fund, to be disregarded.
- 4 (9) If a futures organisation considers, having regard to the ascertained
5 or contingent liabilities of its fidelity fund, that the assets of the
6 fund so permit, the futures organisation may apply out of the fund
7 such sums in excess of the amount limited by or under this section
8 as the futures organisation, in its discretion, thinks fit in or towards
9 the compensation of persons who have suffered pecuniary loss as
10 mentioned in subsection (1) or making a payment under
11 subsection (3) or (5).
- 12 (10) Where:
- 13 (a) money or other property has been entrusted to, or received
14 by:
- 15 (i) a person or partnership; or
16 (ii) a director, partner, officer or employee of a person; or
17 (iii) a partner in or employee of, a partnership;
18 being a person who, or a partnership that, has at any time
19 been but is no longer a contributing member of a futures
20 organisation; and
- 21 (b) immediately before that person or partnership last ceased to
22 be a member or member organisation of the futures
23 organisation, he, she or it was a contributing member of the
24 futures organisation; and
- 25 (c) because of a defalcation, or the fraudulent misuse of money
26 or other property by:
- 27 (i) that person or a director, partner, officer or employee of
28 that person; or
29 (ii) a partner in, or employee of, that partnership;
30 as the case may be, the person by or from whom the money
31 or other property was so entrusted or received suffered
32 pecuniary loss; and
- 33 (d) at the time when the money or other property was so
34 entrusted or received, the person suffering the pecuniary loss
35 believed, on reasonable grounds, that that person or

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1 partnership was at that time a member or member
2 organisation of the futures organisation;
3 that person or partnership is, for the purposes of this section (other
4 than this subsection and subsection (11)), taken to have been, when
5 the pecuniary loss was suffered, a contributing member of the
6 futures organisation.

7 (11) Where:

8 (a) a person who or a partnership that has at any time been, but is
9 no longer, a contributing member of a futures organisation
10 has incurred a debt arising from dealings in futures contracts;
11 and

12 (b) at the time when the debt was incurred, the creditor, or one or
13 more of the creditors, in relation to the debt believed on
14 reasonable grounds that that person or partnership was at that
15 time a member or member organisation of the futures
16 organisation;

17 a reference in this section (other than subsection (10) and this
18 subsection) to a contributing member of the futures organisation is,
19 for the purpose of determining the application of subsection (3) or
20 (5) in relation to that creditor or those creditors, as the case may be,
21 in relation to that debt, taken to include a reference to that person
22 or partnership.

23 (12) A reference in this section to a defalcation, or to a fraudulent
24 misuse of money or other property, is a reference to a defalcation,
25 or to such a fraudulent misuse, wherever and whenever occurring.

26 **1240 Claims against fund**

27 (1) Subject to this Part, a person who suffers pecuniary loss as
28 mentioned in subsection 1239(1) is entitled to claim compensation
29 from the fidelity fund of a futures organisation whose fidelity fund
30 is, pursuant to that subsection, required to be applied to
31 compensate the person, and to take proceedings in the Court as
32 provided in this Part against the futures organisation to establish
33 that claim.

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- 1 (2) A person does not have a claim against a fidelity fund of a futures
2 organisation in respect of:
3 (a) pecuniary loss suffered before 1 July 1986; or
4 (b) pecuniary loss in respect of money or other property suffered
5 after the money or property had, in due course of the
6 administration of a trust, ceased to be under the sole control
7 of a member organisation of the futures organisation.
- 8 (3) Subject to this Part, the amount that a claimant is entitled to claim
9 as compensation from a fidelity fund of a futures organisation is
10 the amount of the actual pecuniary loss suffered by the claimant
11 (including the reasonable costs of, and disbursements incidental to,
12 the making and proof of the claim) less the total amount or value of
13 all amounts or other benefits received or receivable by the claimant
14 from a source other than the fund in reduction of the loss.
- 15 (4) In addition to any compensation that is payable under this Part,
16 interest is payable out of the fidelity fund on the amount of the
17 compensation, less any amount attributable to costs and
18 disbursements, at the prescribed rate calculated from and including
19 the day on which the pecuniary loss was suffered until the day on
20 which the claim is satisfied.

21 **1241 Rights of innocent partner in relation to fund**

- 22 (1) Where all persons who have submitted claims pursuant to
23 section 1240 have been fully compensated in accordance with the
24 provisions of this Part for pecuniary loss in relation to a
25 contributing member of a futures organisation, being pecuniary
26 loss as mentioned in subsection 1239(1) suffered in relation to
27 money or other property, any partner of the contributing member
28 who has made payment to a person in compensation for loss
29 suffered by the person in relation to that money or property is taken
30 to be subrogated to the extent of that payment to all the rights and
31 remedies of that person against the fidelity fund of the futures
32 organisation if the board of the futures organisation, having regard
33 to all the circumstances, determines that the partner was in no way
34 a party to the loss and acted honestly and reasonably in the matter.

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- 1 (2) If a partner of a contributing member of a futures organisation feels
2 aggrieved by the determination of a board under subsection (1), the
3 partner may, within 28 days after receipt of notice of the
4 determination, appeal to the Court against the determination by
5 lodging a notice of appeal in the prescribed form.
- 6 (3) The appellant must, on the day on which the appellant lodges
7 notice of appeal with the Court, lodge a copy of the notice with the
8 futures organisation concerned.
- 9 (4) The Court must inquire into and decide upon the appeal and, for
10 that purpose, may do all such matters and things, and may do those
11 matters and things in the same manner and to the same extent, as it
12 is empowered to do in the exercise of its ordinary jurisdiction and
13 if the Court is of the opinion having regard to all the circumstances
14 that the appellant was not a party to the defalcation or fraudulent
15 misuse of money or other property from which the pecuniary loss
16 arose and that the appellant acted honestly and reasonably in the
17 matter, it may order that the appellant, to the extent of any payment
18 made by the appellant, be subrogated to the rights and remedies, in
19 relation to the fidelity fund of the futures organisation concerned,
20 of the person to whom the appellant made such a payment.

21 **1242 Notice calling for claims against fund**

- 22 (1) A futures organisation may cause to be published in a daily
23 newspaper circulating generally in each State and Territory, a
24 notice in the prescribed form specifying a date, not being earlier
25 than 3 months after the publication of the notice, on or before
26 which claims for compensation from the fidelity fund, in relation to
27 the person specified in the notice, may be made.
- 28 (2) A claim for compensation from a fidelity fund of a futures
29 organisation in respect of a pecuniary loss must be made in writing
30 to the futures organisation:
- 31 (a) where a notice under subsection (1) has been published, on or
32 before the date specified in the notice; or

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- 1 (b) where no such notice has been published, within 6 months
2 after the claimant became aware of the pecuniary loss;
3 and a claim that is not so made is barred unless the futures
4 organisation otherwise determines.
- 5 (3) A futures organisation, a member of a board of a futures
6 organisation, or a member or employee of a futures organisation,
7 has qualified privilege in respect of the publication of a notice
8 under subsection (1).

9 **1243 Power of board to settle claims**

- 10 (1) Subject to this Part, the board of a futures organisation may allow
11 and settle a proper claim for compensation from a fidelity fund of
12 the futures organisation at any time after the occurrence of the
13 pecuniary loss in respect of which the claim arose.
- 14 (2) Subject to subsection (3), a person must not commence
15 proceedings under this Part against a futures organisation without
16 leave of the board unless:
17 (a) the board has disallowed the person's claim; and
18 (b) the claimant has exhausted all relevant rights of action and
19 other legal remedies for the recovery of the money or other
20 property in respect of which the pecuniary loss occurred,
21 being rights and remedies that are available against the
22 member of the futures organisation in relation to whom the
23 claim arose and all other persons who are liable in respect of
24 the loss suffered by the claimant, other than any right or
25 remedy that the claimant may have, under section 1240,
26 against a person other than the futures organisation.
- 27 (3) A person who has been refused leave by the board of a futures
28 organisation under subsection (2) may apply to the Court for leave
29 to commence proceedings against the futures organisation and the
30 Court may make such order in the matter as it thinks fit.
- 31 (4) The board of a futures organisation, after disallowing, whether
32 wholly or partly, a claim for compensation from the fidelity fund of
33 the futures organisation, must serve notice of the disallowance in
34 the prescribed form on the claimant or on the claimant's solicitor.

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- 1 (5) Proceedings against a futures organisation in respect of a claim that
2 has been disallowed by the board of the futures organisation must
3 not be commenced after the end of 3 months after the service of the
4 notice of disallowance referred to in subsection (4).
- 5 (6) In proceedings brought to establish a claim, evidence of an
6 admission or confession by, or other evidence that would be
7 admissible against, the person against whom a defalcation or
8 fraudulent misuse of property is alleged is admissible to prove the
9 defalcation or fraudulent misuse notwithstanding that the person is
10 not the defendant in or a party to those proceedings, and all
11 defences that would have been available to that person are
12 available to the futures organisation.
- 13 (7) The board or, where proceedings are brought to establish a claim,
14 the Court, if satisfied that there was a defalcation or fraudulent
15 misuse of property on which to found the claim, may allow the
16 claim and act accordingly notwithstanding that the person against
17 whom the defalcation or fraudulent misuse of property is alleged
18 has not been convicted or prosecuted or that the evidence on which
19 the board or the Court, as the case may be, acts would not be
20 sufficient to establish the guilt of that person on a criminal trial in
21 respect of the defalcation or fraudulent misuse of property.

22 **1244 Form of order of Court establishing claim**

- 23 (1) Where, in proceedings brought to establish a claim, the Court is
24 satisfied that there was a defalcation or fraudulent misuse of
25 property on which to found the claim and that otherwise the
26 claimant has a valid claim, the Court must, by order:
27 (a) declare the fact and the date of the defalcation or fraudulent
28 misuse of property and the amount of the claim; and
29 (b) direct the board to allow the claim as so declared and deal
30 with it in accordance with the provisions of this Part.
- 31 (2) In any such proceedings all questions of costs are in the discretion
32 of the Court.

1 **1245 Power of Board to require production of documents etc.**

2 The board of a futures organisation may at any time require a
3 person to produce and deliver any documents or statements of
4 evidence necessary to support a claim made or necessary for the
5 purpose either of exercising its rights against a contributing
6 member of the futures organisation or a partner or the partners in a
7 partnership that is a contributing member of the futures
8 organisation or any other person or of enabling criminal
9 proceedings to be taken against a person in respect of a defalcation
10 or fraudulent misuse of property, and in default of delivery of such
11 documents or statements of evidence by the first-mentioned
12 person, the board may disallow any claim by the first-mentioned
13 person under this Part.

14 **1246 Subrogation of futures organisation to rights etc. of claimant**
15 **on payment from fund**

16 On payment out of a fidelity fund of a futures organisation of any
17 money in respect of a claim under this Part, the futures
18 organisation is subrogated to the extent of that payment to all the
19 rights and remedies of the claimant in relation to the loss suffered
20 by the claimant from the defalcation or fraudulent misuse of
21 property.

22 **1247 Payment of claims only from fund**

23 Money or other property belonging to a futures organisation, other
24 than its fidelity fund, is not available for the payment of a claim
25 under this Part, whether the claim is allowed by the board of the
26 futures organisation or is made the subject of an order of the Court.

27 **1248 Provisions where fund insufficient to meet claims or where**
28 **claims exceed total amount payable**

29 (1) Where the amount in a fidelity fund of a futures organisation is
30 insufficient to pay the whole of the amount of all claims against it
31 that have been allowed or in respect of which orders of the Court
32 have been made, the amount in the fund must, subject to

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1 subsection (2), be apportioned among the claimants in such manner
2 as the board of the futures organisation thinks equitable, and such a
3 claim so far as it then remains unpaid is taken to be charged against
4 future receipts of the fund and paid out of the fund when money is
5 available in the fund.

6 (2) Where the aggregate of all claims that have been allowed or in
7 respect of which orders of the Court have been made in relation to
8 defalcations or fraudulent misuses of property by or in connection
9 with a contributing member of a futures organisation exceeds the
10 total amount that may, pursuant to section 1239, be paid under this
11 Part in respect of that contributing member, the total amount must
12 be apportioned among the claimants in such manner as the board
13 thinks equitable, and on payment out of the fund of that total
14 amount in accordance with that apportionment all such claims and
15 any orders relating to those claims and all other claims against the
16 fund that may thereafter arise or be made in respect of defalcations
17 or fraudulent misuses of property by or in connection with that
18 contributing member are discharged.

19 **1249 Power of futures organisation to enter into contracts of**
20 **insurance or indemnity**

21 (1) A futures organisation may enter into a contract with a person
22 carrying on fidelity insurance business whereby the futures
23 organisation will be insured or indemnified, to the extent and in the
24 manner provided by the contract, against liability in respect of
25 claims under this Part.

26 (2) Such a contract may be entered into in relation to contributing
27 members of the futures organisation generally, or in relation to
28 particular contributing members named in the contract, or in
29 relation to contributing members generally with the exclusion of
30 particular contributing members named in the contract.

31 (3) A futures organisation, a member or employee of a futures
32 organisation or of the board of a futures organisation, or a member
33 of the management sub-committee of the board of a futures
34 organisation, has qualified privilege in respect of the publication of

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1 a statement that a contract entered into under this section does, or
2 does not, as the case may be, apply in relation to that member.

3 **1250 Application of insurance money**

4 A claimant against a fidelity fund of a futures organisation does not
5 have a right of action against a person with whom a contract of
6 insurance or indemnity is made under this Part in respect of such a
7 contract or a right or claim with respect to any money paid by the
8 insurer in accordance with such a contract.

1

2 **Part 8.7—Offences**

3 **Division 1—Insider dealing**

4 **1251 Futures contract concerning a body corporate**

5 For the purposes of this Division, a futures contract concerns a
6 body corporate if, and only if:

- 7 (a) the futures contract is a commodity agreement and a
8 commodity to which it relates is securities of the body; or
9 (b) the futures contract is an adjustment agreement and a state of
10 affairs to which it relates concerns the price of securities of
11 the body, or the prices of a class of securities that includes
12 securities of the body, at a particular time.

13 **1252 Person connected with a body corporate**

14 (1) For the purposes of this Division, a person is connected with a
15 body corporate (in this subsection called the *relevant body*
16 *corporate*) if the person is a natural person and:

- 17 (a) is an officer of the relevant body corporate or of a related
18 body corporate; or
19 (b) has a substantial holding in the relevant body corporate or in
20 a related body corporate; or
21 (c) occupies a position that may reasonably be expected to give
22 the person access to information of a kind referred to in
23 subsection 1253(1) or (2) by virtue of:
24 (i) any professional or business relationship existing
25 between the person (or the person's employer or a body
26 corporate of which the person is an officer) and the
27 relevant body corporate or a related body corporate; or
28 (ii) the person being an officer of a body corporate that has
29 a substantial holding in the relevant body corporate or in
30 a related body corporate.

31 (2) For the purposes of subsection (1), *officer*, in relation to a body
32 corporate, includes:

- 1 (a) a director, secretary, executive officer or employee of the
2 body corporate; and
3 (b) a receiver, or a receiver and manager, of property of the body
4 corporate; and
5 (c) an administrator of the body corporate; and
6 (ca) an administrator of a deed of company arrangement executed
7 by the body corporate; and
8 (d) a liquidator of the body corporate; and
9 (e) a trustee or other person administering a compromise or
10 arrangement made between the body corporate and another
11 person or other persons.

12 **1253 Persons precluded from dealing**

- 13 (1) For the purposes of this Part, a person is precluded on a particular
14 day from dealing in a futures contract concerning a body corporate
15 if, by virtue of being, or having been at any time during the 6
16 months ending on that day, connected with the body, the person
17 has inside information in relation to that futures contract.
- 18 (2) For the purposes of this Part, a person is also precluded on a
19 particular day from dealing in a futures contract concerning a body
20 corporate if, by virtue of being, or having been at any time during
21 the 6 months ending on that day, connected with another body
22 corporate, the person has information that:
23 (a) is inside information in relation to that futures contract; and
24 (b) relates to any transaction (actual or expected) involving both
25 those bodies, or involving one of them and securities of the
26 other.
- 27 (3) For the purposes of this Part, a person is also precluded from
28 dealing in a futures contract if the person:
29 (a) has inside information in relation to the futures contract; and
30 (b) obtained the information, directly or indirectly, from another
31 person; and
32 (c) is aware, or ought reasonably to be aware, of facts or
33 circumstances by virtue of which that other person is

- 1 precluded by subsection (1) or (2) from dealing in the futures
2 contract; and
3 (d) when the information was so obtained:
4 (i) was an associate of the other person; or
5 (ii) had with the other person an arrangement for the
6 communication of information of a kind referred to in
7 subsection (1) or (2) with a view to a dealing, by the
8 first-mentioned person, by the other person, or by both
9 of them together, in that futures contract or a futures
10 contract of the same kind as that futures contract.

11 **1254 Body corporate precluded from dealing when officer precluded**

- 12 (1) Without prejudice to subsection 1253(3), but subject to this
13 section, while an officer of a body corporate is precluded from
14 dealing in a futures contract, the body is, for the purposes of this
15 Part, also precluded from dealing in the futures contract.
- 16 (2) A body corporate is not, merely because of information that an
17 officer of the body has, precluded by subsection (1) from dealing at
18 a particular time in a futures contract if:
19 (a) the decision to deal in the futures contract at that time was
20 taken on the body's behalf by a person other than the officer;
21 and
22 (b) the body had in operation at that time arrangements to ensure
23 that the information was not communicated to that person
24 and that no advice with respect to the transaction was given
25 to that person by a person who had the information; and
26 (c) the information was not so communicated and no such advice
27 was so given.
- 28 (3) A body corporate is not, merely because of information that an
29 officer of the body has, precluded by subsection (1) from dealing in
30 a futures contract concerning another body corporate if the
31 information:
32 (a) was obtained by the officer in the course of performing duties
33 as an officer of the first-mentioned body; and

- 1 (b) relates only to a proposed dealing by the first-mentioned
2 body in securities of, or a futures contract concerning, the
3 other body.

4 **1255 Exceptions: licensed futures brokers**

5 For the purposes of this Part, a person who holds a futures brokers
6 licence is not precluded from dealing in a futures contract
7 concerning a body corporate if:

- 8 (a) the licensee enters into the dealing as agent for another
9 person pursuant to a specific instruction by that other person
10 to enter into that dealing; and
11 (b) the licensee has not given any advice to the other person in
12 relation to dealing in a futures contract concerning the body
13 corporate; and
14 (c) the other person is not, in relation to the dealing, an associate
15 of the licensee.

16 **1256 Prohibitions where dealing precluded**

- 17 (1) A person must not, while precluded from dealing in a futures
18 contract, deal in that futures contract.
19 (2) A person who, because of having particular information, is
20 precluded from dealing in a futures contract, must not, while so
21 precluded, communicate the information to another person if the
22 first-mentioned person knows, or ought reasonably to know, that
23 the other person will make use of the information for the purpose
24 of dealing in that futures contract.

25 **1257 Defence where other party to dealing also had the inside
26 information**

27 Where a prosecution is begun against a person for an offence
28 because the person had particular information and dealt in a futures
29 contract in contravention of section 1256, it is a defence if it is
30 proved that the other party to the dealing knew, or ought
31 reasonably to have known, the information before entering into the
32 dealing.

1

2 **Division 2—General**

3 **1258 Dealings by futures broker on behalf of others**

4 A futures broker must not deal in a futures contract on behalf of
5 another person unless the dealing is effected:

- 6 (a) on a futures market of a futures exchange or recognised
7 futures exchange; or
8 (b) on an exempt futures market; or
9 (c) as permitted by the business rules of a futures organisation of
10 which the broker is a member.

11 **1259 Futures market manipulation**

12 A person must not, in this jurisdiction or elsewhere, take part in, be
13 concerned in, or carry out, whether directly or indirectly:

- 14 (a) a transaction (whether a dealing in a futures contract or not)
15 that has, is intended to have, or is likely to have; or
16 (b) 2 or more transactions (whether any of them is a dealing in a
17 futures contract or not) that have, are intended to have, or are
18 likely to have:
19 the effect of:
20 (c) creating an artificial price for dealings in futures contracts on
21 a futures market in this jurisdiction; or
22 (d) maintaining at a level that is artificial (whether or not it was
23 previously artificial) a price for dealings in futures contracts
24 on a futures market in this jurisdiction.

25 **1260 False trading and market rigging**

- 26 (1) A person must not, in this jurisdiction or elsewhere, create, cause
27 to be created, or do anything that is calculated to create, a false or
28 misleading appearance:
29 (a) of active dealing in futures contracts on a futures market in
30 this jurisdiction; or

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- 1 (b) with respect to the market for, or the price for dealings in,
2 futures contracts on a futures market in this jurisdiction.
- 3 (2) A person must not, in this jurisdiction or elsewhere, by any
4 fictitious or artificial transactions or devices, maintain, inflate,
5 depress, or cause fluctuations in, the price for dealings in futures
6 contracts on a futures market in this jurisdiction.
- 7 (3) In determining whether a transaction is fictitious or artificial for the
8 purposes of subsection (2), the fact that the transaction is, or was at
9 any time, intended by the parties who entered into it to have effect
10 according to its terms is not conclusive.

11 **1261 False or misleading statements etc.**

12 A person contravenes this section if the person:

- 13 (a) in this jurisdiction or elsewhere, makes a statement, or
14 disseminates information, that is false or misleading in a
15 material particular and is likely:
- 16 (i) to induce other persons to deal in futures contracts on a
17 futures market in this jurisdiction; or
- 18 (ii) to have the effect of raising, lowering, maintaining or
19 stabilising the price for dealings in futures contracts, or
20 in a class of futures contracts, on a futures market in this
21 jurisdiction; and
- 22 (b) when making the statement, or disseminating the
23 information:
- 24 (i) is recklessly indifferent as to whether the statement or
25 information is true or false; or
- 26 (ii) knows, or ought reasonably to know, that the statement
27 is false or misleading in a material particular.

28 **1262 Fraudulently inducing person to deal in futures contracts**

- 29 (1) A person must not:
- 30 (a) by making or publishing any statement, promise or forecast
31 that the person knows to be misleading, false or deceptive;
- 32 (b) by any dishonest concealment of material facts;

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- 1 (c) by the reckless making or publishing (dishonestly or
2 otherwise) of any statement, promise or forecast that is
3 misleading, false or deceptive; or
4 (d) by recording or storing in, or by means of, any mechanical,
5 electronic or other device information that the person knows
6 to be false or misleading in a material particular;
7 induce or attempt to induce another person to deal in a futures
8 contract or a class of futures contracts.
- 9 (7) It is a defence to a prosecution for an offence under this section
10 constituted by recording or storing information as mentioned in
11 paragraph (1)(d) if it is proved that, when the defendant so
12 recorded or stored the information, the defendant had no
13 reasonable grounds for expecting that the information would be
14 available to any person.

15 **1263 Dissemination of information about illegal transactions**

16 Where:

- 17 (a) in this jurisdiction or elsewhere, a person circulates or
18 disseminates, or authorises or is concerned in the circulation
19 or dissemination of, any statement or information to the
20 effect that the price for dealings in futures contracts, or in a
21 class of futures contracts, on a futures market in this
22 jurisdiction will, or is likely to, rise or fall or be maintained
23 because of a transaction, or other act or thing done, in
24 relation to such futures contracts or futures contracts included
25 in that class, being a transaction, or other act or thing, that
26 constitutes a contravention of section 1259, 1260, 1261 or
27 1262; and
28 (b) the person, or an associate of the person:
29 (i) has entered into such a transaction or done such an act
30 or thing; or

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- 1 (ii) has received, or expects to receive, directly or
2 indirectly, a consideration or benefit for circulating or
3 disseminating, or authorising or being concerned in the
4 circulation or dissemination of, the statement or
5 information;
6 the first-mentioned person contravenes this section.

7 **1264 Fraud in connection with dealings in futures contracts**

- 8 Where, in connection with a dealing or proposed dealing in a
9 futures contract by a futures broker on behalf of a client of the
10 broker, a person who:
11 (a) is the broker or an employee or agent of the broker; or
12 (b) has an interest, or is otherwise concerned in, the dealing or
13 proposed dealing;
14 does any of the following:
15 (c) defrauds the client;
16 (d) does an act, or omits to do an act, knowing that the client will
17 be deceived or misled, or with reckless indifference as to
18 whether or not the client will be deceived or misled, as a
19 result of the act or omission;
20 (e) (without limiting the generality of paragraph (d)) makes a
21 statement, promise or forecast to the client, or makes an entry
22 in a record relating to the client or persons including the
23 client:
24 (i) knowing that the statement, promise, forecast or entry is
25 false, misleading or deceptive in a material particular; or
26 (ii) with reckless indifference as to whether or not the
27 statement, promise, forecast or entry is false, misleading
28 or deceptive in a material particular;
29 the person contravenes this section.

30 **1265 Compensation for loss etc.**

- 31 (1) Where:
32 (a) a person who, because of having particular information, is
33 precluded by section 1253 from dealing in a futures contract

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- 1 deals, in contravention of section 1256, in that futures
2 contract; or
- 3 (b) a person, being a body corporate, deals, in contravention of
4 section 1256, in a futures contract at a time when an officer
5 of the body is, because of having particular information,
6 precluded from dealing in that futures contract;
7 the person is liable (whether or not the person has been convicted
8 of an offence in respect of the contravention) to compensate any
9 other party to the dealing who did not have that information for any
10 loss sustained by that party because of any difference between the
11 price at which the dealing took place and the price at which it
12 would be likely to have taken place if that information had been
13 generally available.
- 14 (2) A person who contravenes any of sections 1259 to 1264 (inclusive)
15 (whether or not the person has been convicted of an offence in
16 respect of the contravention) is liable to pay compensation to any
17 other person who, in dealing in futures contracts, suffers loss
18 because of the difference between the price at which the dealing
19 takes place and the price at which it would be likely to have taken
20 place if the contravention had not occurred.
- 21 (3) The amount of compensation for which a person is liable under
22 subsection (1) or (2) is:
- 23 (a) in a case to which paragraph (b) does not apply—the amount
24 of the loss sustained by the person claiming the
25 compensation; or
- 26 (b) if the first-mentioned person has been found by a court to be
27 liable, or has been ordered by a court, to pay an amount or
28 amounts to any other person or persons under this Part or
29 under Part 9.4B because of the same act or transaction—the
30 amount of that loss less the amount or the sum of the
31 amounts that the first-mentioned person has been so found to
32 be liable, or has been so ordered, to pay.
- 33 (4) For the purposes of subsection (3), the onus of proving that the
34 liability of a person to pay an amount to another person arose from
35 the same act or transaction from which another liability arose lies
36 on the person liable to pay the amount.

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- 1 (5) An action under this section for recovery of compensation for a
2 loss is not maintainable after the end of the period of 2 years
3 commencing on the day of completion of the dealing in which the
4 loss occurred.
- 5 (6) ASIC may, if it considers it to be in the public interest to do so,
6 bring an action in the name of, and for the benefit of, a person for
7 recovery of compensation for a loss referred to in subsection (1)
8 and suffered by that person.
- 9 (7) Nothing in subsection (1) affects any liability that a person may
10 incur under any other law.

11 **1266 Sequence of transmission and execution of orders**

- 12 (1) In this section, a reference to the transmission by a futures broker
13 of instructions to deal in a class of futures contracts is a reference:
14 (a) where the broker has direct access to the futures market on
15 which the instructions are to be executed—to the
16 transmission of the instructions to that futures market; or
17 (b) where the broker has access to the futures market on which
18 the instructions are to be executed only through another
19 futures broker—to the transmission of the instructions to that
20 other futures broker.
- 21 (2) Subject to subsection (3), a futures broker must transmit in the
22 sequence in which they are received by the broker all instructions
23 to deal in a class of futures contracts at or near the market price for
24 a futures contract of that class prevailing immediately before
25 execution of the instructions.
- 26 (3) Where a futures broker proposes to deal in a class of futures
27 contracts on the broker's own account and the person by whom or
28 on whose instructions the instructions for the dealing are to be
29 transmitted is aware of instructions of a client of the broker to deal
30 in that class of futures contracts at or near the market price for a
31 futures contract of that class prevailing at that time (being
32 instructions that have not been transmitted), that person must not
33 transmit, and must not give instructions to any other person to
34 transmit, the instructions to give effect to the proposal of the broker

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- 1 to deal in that class of futures contracts before the instructions of
2 the client are transmitted.
- 3 (4) A futures broker, or a director, partner, officer or employee of a
4 futures broker, must not, except:
- 5 (a) to the extent necessary to execute the instructions concerned;
6 or
7 (b) as required by this Act or any other law; or
8 (c) as required by the business rules of a futures organisation of
9 which the broker is a member;
- 10 disclose to any other futures broker, or to a person engaged or
11 employed in the business of the first-mentioned broker or of any
12 other futures broker, instructions of a client to deal in a class of
13 futures contracts.
- 14 (5) A member of a futures exchange who is concerned in the
15 execution, on a trading floor of the futures exchange, of
16 instructions to deal in futures contracts must execute in the order in
17 which they are received by the member all instructions to deal in a
18 class of futures contracts at or near the market price for a futures
19 contract of that class prevailing immediately before execution of
20 the instructions.
- 21 (6) Where:
- 22 (a) during a particular period, a futures broker transmits
23 instructions (whether or not those instructions consist of, or
24 include, instructions giving effect to a proposal of the broker
25 to deal in the class of contracts concerned on the broker's
26 own account) to deal in a class of futures contracts at or near
27 the market price for a futures contract of that class prevailing
28 immediately before execution of the instructions; and
29 (b) dealings in that class of futures contracts are effected
30 pursuant to those instructions;
- 31 the broker must, except so far as the business rules of a futures
32 organisation of which the broker is a member otherwise provide,
33 allocate the dealings to those instructions:
- 34 (c) in the sequence in which the dealings were effected; and

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- 1 (d) in the sequence in which the broker transmitted those
2 instructions.
- 3 (7) A futures broker must maintain, in accordance with the regulations,
4 records that set out the prescribed particulars of:
- 5 (a) instructions by a client to deal in futures contracts; and
6 (b) the date and time of receipt, transmission and execution of
7 those instructions; and
8 (c) the person by whom those instructions are received, the
9 person by whom they are transmitted and the person by
10 whom they are executed; and
11 (d) the date and time of receipt, transmission and execution of
12 instructions to deal in futures contracts on the broker's own
13 account; and
14 (e) the person by whom instructions of the kind referred to in
15 paragraph (d) are received, the person by whom they are
16 transmitted and the person by whom they are executed;
17 and must retain those records for the prescribed period.
- 18 (8) Where:
- 19 (a) a futures broker transmits for execution on a futures market
20 outside Australia and the external Territories instructions to
21 deal in futures contracts; and
22 (b) it is not reasonably practicable for the broker to set out in the
23 records maintained by the broker pursuant to subsection (7)
24 the prescribed particulars of the date and time of execution of
25 those instructions;
- 26 the broker must so set out those particulars as precisely as is
27 reasonably practicable.

28 **1267 Dealings by employees of futures brokers and futures advisers**

- 29 (1) A person who is a futures broker or a futures adviser and an
30 employee of that person must not, as principals, jointly deal in, or
31 agree to deal in, futures contracts.
- 32 (2) A person who is a partner in a partnership that carries on a business
33 of dealing in futures contracts and an employee of the partnership

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- 1 must not, as principals, jointly deal in, or agree to deal in, futures
2 contracts.
- 3 (3) A person who is a partner in a partnership that carries on a futures
4 advice business and an employee of the partnership must not, as
5 principals, jointly deal in, or agree to deal in, futures contracts.
- 6 (4) A person who is a futures broker or a futures adviser must not give
7 credit to an employee of that person or to a person who, to the
8 knowledge of the first-mentioned person, is associated with such
9 an employee if:
- 10 (a) the credit is given for the purpose of enabling or assisting the
11 person to whom the credit is given to deal in futures
12 contracts; or
- 13 (b) the person giving the credit knows or has reason to believe
14 that the credit will be used for the purpose of dealing in
15 futures contracts.
- 16 (5) A person who is a partner in a partnership that carries on a business
17 of dealing in futures contracts must not give credit to an employee
18 of the partnership or to a person who, to the knowledge of the
19 first-mentioned person, is associated with such an employee if:
- 20 (a) the credit is given for the purpose of enabling or assisting the
21 person to whom the credit is given to deal in futures
22 contracts; or
- 23 (b) the person giving the credit knows or has reason to believe
24 that the credit will be used for the purpose of dealing in
25 futures contracts.
- 26 (6) A person who is a partner in a partnership that carries on a futures
27 advice business must not give credit to an employee of the
28 partnership or to a person who, to the knowledge of the
29 first-mentioned person, is associated with such an employee if:
- 30 (a) the credit is given for the purpose of enabling or assisting the
31 person to whom the credit is given to deal in futures
32 contracts; or
- 33 (b) the person giving the credit knows or has reason to believe
34 that the credit will be used for the purpose of dealing in
35 futures contracts.

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- 1 (7) A person who is an employee of a member organisation of a
2 futures exchange in connection with a business of dealing in
3 futures contracts carried on by the member organisation must not,
4 as principal, deal, or agree to deal, in futures contracts unless the
5 member organisation acts as the agent of the person in respect of
6 the transaction.
- 7 (8) A reference in subsection (1) or (4) to an employee of a person
8 who is a futures broker or a futures adviser includes, in the case of
9 a body corporate that is a futures broker or a futures adviser, a
10 reference to an officer of the body corporate.
- 11 (9) The reference in subsection (7) to an employee of a member
12 organisation of a futures exchange includes:
13 (a) in the case of a member organisation that is a body corporate;
14 and
15 (b) in the case of a member organisation that is a partnership in
16 which a partner is a body corporate;
17 a reference to an officer of the body corporate.
- 18 (10) A reference in this section to an employee of a futures broker, a
19 futures adviser, a partnership or a member organisation of a futures
20 exchange includes a reference to a person who, pursuant to a
21 subsisting agreement, performs services for the futures broker,
22 futures adviser, partnership or member organisation in connection
23 with dealings in futures contracts by the futures broker, futures
24 adviser, partnership or member organisation.

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Part 8.8—Miscellaneous

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1268 Power of Court to make certain orders

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(1) Where:

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(a) on the application of ASIC, it appears to the Court that a person:

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(i) has contravened this Chapter, or any other law of a State or Territory in this jurisdiction relating to dealing in futures contracts; or

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(ii) has contravened the conditions of a licence, the business rules of a futures exchange, a clearing house or a futures association; or

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(iii) is about to do an act with respect to dealing in futures contracts that, if done, would be such a contravention; or

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(b) on the application of a futures exchange, clearing house or futures association, it appears to the Court that a person has contravened the business rules of the futures exchange, clearing house or futures association, as the case may be;

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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:

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(c) in the case of persistent or continuing breaches of this Chapter, or of a law of a State or Territory in this jurisdiction relating to dealing in futures contracts, or the conditions or restrictions of a licence, or of the business rules of a futures exchange, clearing house or futures association—an order restraining a person from carrying on a business of dealing in futures contracts, acting as a futures adviser, holding himself, herself or itself out as so carrying on business or so acting, or from doing an act as a representative of a futures broker or of a futures adviser;

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- 1 (d) an order restraining a person from acquiring, disposing of or
2 otherwise dealing in any class of futures contracts that is
3 specified in the order;
- 4 (e) an order appointing a receiver of property of a futures broker
5 or of property that is held by a futures broker for or on behalf
6 of another person, whether as trustee or otherwise;
- 7 (f) an order declaring a futures contract to be void or voidable;
- 8 (g) for the purpose of securing compliance with any other order
9 under this section, an order directing a person to do or refrain
10 from doing a specified act;
- 11 (h) any ancillary order deemed to be desirable in consequence of
12 the making of an order under any of the preceding
13 paragraphs.
- 14 (2) Where an application is made to the Court for an order under
15 subsection (1), the Court may, if in the opinion of the Court it is
16 desirable to do so, before considering the application, grant an
17 interim order, being an order of the kind applied for that is
18 expressed to have effect pending the determination of the
19 application.
- 20 (3) Where ASIC makes an application to the Court for the making of
21 an order under subsection (1), the Court must not require ASIC or
22 any other person, as a condition of granting an interim order under
23 subsection (2), to give any undertaking as to damages.
- 24 (4) The Court must not make an order under subsection (1) if it is
25 satisfied that the order would unfairly prejudice a person.
- 26 (5) The Court may, before making an order under subsection (1),
27 direct that notice of the application be given to such persons as it
28 thinks fit or direct that notice of the application be published in
29 such manner as it thinks fit, or both.
- 30 (6) A person appointed by order of the Court under subsection (1) as a
31 receiver of property of a futures broker:
- 32 (a) may require the broker to deliver to the person any property
33 of which the person has been appointed receiver or to give to
34 the person all information concerning that property that may
35 reasonably be required; and

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- 1 (b) may acquire and take possession of any property of which the
2 person has been appointed receiver; and
3 (c) may deal with any property that the person has acquired or of
4 which the person has taken possession in any manner in
5 which the broker might lawfully have dealt with the property;
6 and
7 (d) has such other powers in respect of the property as the Court
8 specifies in the order.
- 9 (7) In paragraph (1)(e) and subsection (6), *property*, in relation to a
10 futures broker, includes money or other property entrusted to or
11 received on behalf of any other person by the broker or another
12 person in the course of or in connection with a business of dealing
13 in futures contracts carried on by the futures broker.
- 14 (8) A person must not, without reasonable excuse, contravene:
15 (a) an order under this section that is applicable to the person; or
16 (b) a requirement of a receiver appointed by order of the Court
17 under subsection (1).
- 18 (9) The Court may rescind, vary or discharge an order made by it
19 under this section or suspend the operation of such an order.

20 **1269 Restrictions on use of titles “futures broker”, “futures**
21 **exchange” etc.**

- 22 (1) A person who is not the holder of a futures brokers licence must
23 not take or use, or by inference adopt, the name or title of futures
24 broker, or take or use, or have attached to, or exhibited at, any
25 place, a name, title or description implying, or tending to create the
26 belief, that the person is a futures broker.
- 27 (2) A person who is not the holder of a futures brokers licence must
28 not:
29 (a) take or use, or by inference adopt; or
30 (b) have attached to, or exhibited at, any place;
31 a name, title or description implying, or tending to create the belief,
32 that the person is the holder of a futures brokers licence.

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- 1 (3) A body corporate that is not:
2 (a) a futures exchange; or
3 (b) a recognised futures exchange;
4 must not take or use, or by inference adopt, the name or title of
5 futures exchange, or take or use, or have attached to, or exhibited
6 at, any place, a name, title or description implying, or tending to
7 create the belief, that the body is:
8 (c) a futures exchange; or
9 (d) a recognised futures exchange.
- 10 (4) A body corporate that is not a futures association must not take or
11 use, or by inference adopt, the name or title of futures association,
12 or take or use, or have attached to, or exhibited at, any place, a
13 name, title or description implying, or tending to create the belief,
14 that the body is a futures association.

15 **1270 Preservation and disposal of records etc.**

- 16 (1) A person who is required by a provision of this Act to maintain,
17 make or keep a register or a financial or other record in relation to
18 a business carried on by the person must preserve that register or
19 record for the prescribed period, whether or not the person ceases
20 to carry on that business before the end of that period.
- 21 (2) The prescribed period for the purposes of subsection (1) is:
22 (a) in relation to a register or a record other than a financial
23 record, the period of 5 years next after the day on which the
24 last entry was made in the register or record; or
25 (b) in relation to a financial record, the 7 years after the
26 transactions covered by the record are completed.
- 27 (3) Subsections (1) and (2) do not apply in relation to a contract note
28 or copy of a contract note received or issued by a futures broker
29 who is a member of a futures exchange if the matters required by
30 subsection 1206(4), (5) or (6), as the case requires, to be included
31 in the contract note are recorded:
32 (a) by the futures exchange; or

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1 (b) subject to such conditions (if any) as ASIC imposes, by the
2 broker;
3 in a manner approved by ASIC and the record of those matters is
4 retained for not less than 5 years.

5 (4) ASIC may, if of the opinion that it is no longer necessary or
6 desirable to retain it, destroy or otherwise dispose of any document
7 that is given to or lodged with ASIC under or for the purposes of
8 this Act and that has been in the possession of ASIC for such
9 period as is prescribed for the purposes of this subsection, either
10 generally or in relation to a particular document or class of
11 documents.

12 **1271 Concealing etc. books relating to futures contracts**

- 13 (1) A person who:
- 14 (a) in any case—conceals, destroys, mutilates or alters a book
15 relating to the business carried on by a futures broker or
16 required under this Act to be kept by the holder of a licence;
17 or
18 (b) sends or takes, or causes the sending or taking of, the book
19 out of this jurisdiction or out of Australia;
20 contravenes this subsection.
- 21 (2) In a prosecution of a person for an offence under subsection (1), it
22 is a defence if it is established that the person did not act with
23 intent to defraud, to defeat the purposes of this Act or the ASIC
24 Act or to prevent, delay or obstruct the carrying out of an
25 examination, investigation or audit, or the exercise of a power or
26 authority, under this Act or the ASIC Act.

27 **1272 Falsification of records**

- 28 (1) Where matter that is used or intended to be used in connection with
29 the keeping of a book required to be kept under this Act or a
30 register or any accounting or other record referred to in
31 section 1270 is recorded or stored in an illegible form by means of
32 a mechanical device, an electronic device or any other device, a
33 person who:

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- 1 (a) records or stores by means of that device matter that the
2 person knows to be false or misleading in a material
3 particular; or
4 (b) destroys, removes or falsifies matter that is recorded or stored
5 by means of that device, or has been prepared for the purpose
6 of being recorded or stored, or for use in compiling other
7 matter to be recorded or stored, by means of that device; or
8 (c) fails to record or store matter by means of that device with
9 intent to falsify any entry made or intended to be compiled,
10 wholly or in part, from that matter;
11 contravenes this subsection.
- 12 (2) In a prosecution of a person for an offence under subsection (1), it
13 is a defence if it is established that the person acted honestly and
14 that in all the circumstances the act or omission constituting the
15 offence should be excused.

16 **1273 Precautions against falsification of records**

17 A person required by this Chapter to keep a book or record must
18 take reasonable precautions for guarding against falsification of the
19 book or record and for facilitating discovery of any falsification.

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Chapter 8—The Futures Industry

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Part 8.1—Interpretation

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1120 Business rules: futures association

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For the purposes of this Chapter, the business rules of a body corporate that is, or proposes to be, a futures association are such of the rules, regulations and by-laws made by the body or contained in its constitution as govern the activities and conduct of the body and its members in relation to the body's operation as a futures association.

1121 Business rules: clearing house

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For the purposes of this Chapter, the business rules of a body corporate that provides, or proposes to provide, clearing house facilities for a futures market are such of the rules, regulations and by-laws made by the body or contained in its constitution as govern:

- (a) the activities and conduct of the body and its members; and
- (b) the activities and conduct of other persons in relation to the body's provision of clearing house facilities for a futures market.

1122 Business rules: futures exchange

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For the purposes of this Chapter, the business rules of a body corporate that conducts, or proposes to establish or conduct, a futures market are such of the rules, regulations and by-laws made by the body corporate or contained in its constitution as govern:

- (a) the activities and conduct of the body and its members; and
- (b) the activities and conduct of each clearing house for the body; and
- (c) the activities and conduct of other persons in relation to each futures market run by the body.

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2 **Part 8.2—Futures exchanges, clearing houses and**
3 **futures associations**

4 **Division 1—Futures exchanges and exempt futures**
5 **markets**

6 **1123 Conducting unauthorised futures markets**

7 A person must not establish or conduct, assist in establishing or
8 conducting, or hold out that the person conducts, an unauthorised
9 futures market.

10 **1126 Approval of futures exchange**

- 11 (1) A body corporate may apply to ASIC in writing for approval by the
12 Minister as a futures exchange.
- 13 (2) Where a body applies under subsection (1) of this section, the
14 Minister may by writing approve the body as a futures exchange if,
15 and only if, he or she is satisfied that:
- 16 (c) the body's business rules make satisfactory provision:
- 17 (i) for the admission as members of persons licensed, or
18 proposing to apply to be licensed, under Part 8.3, or of a
19 specified class of such persons; and
- 20 (ii) for the qualifications for membership, including the
21 necessary standards of training and experience for:
- 22 (A) responsible officers of bodies corporate that;
23 and
24 (B) natural persons who;
25 are, or propose to be, members;
- 26 (iii) for the manner in which members are to conduct their
27 business of dealing in futures contracts so as to ensure
28 efficiency, honesty and fair practice in relation to such
29 dealing; and

- 1 (iiia) for the exclusion of a body corporate from membership
2 where a responsible officer of the body corporate would
3 be excluded from membership; and
4 (iv) for the exclusion of a person from membership where:
5 (A) if the person is a body corporate—a responsible
6 officer, or an employee, of the body corporate;
7 or
8 (B) otherwise—the person or an employee of the
9 person;
10 is not of good character and high business integrity; and
11 (v) for the expulsion, suspension or disciplining of a
12 member for conduct inconsistent with just and equitable
13 principles in the transaction of business or for a
14 contravention of the body's business rules or of this
15 Chapter; and
16 (vi) for an appropriate mechanism whereby a person whose
17 application for membership of the body is refused, or
18 whose membership of the body is cancelled or
19 suspended, in circumstances where the person does not
20 have a right to appeal to the Court under subsection
21 1135(1) against the decision to refuse the application, or
22 to cancel or suspend the membership, as the case may
23 be, may appeal against the decision; and
24 (vii) for an appropriate mechanism whereby a person who
25 has been disciplined by the body otherwise than by way
26 of cancellation or suspension of the person's
27 membership of the body may appeal against the
28 decision to discipline the person; and
29 (viii) for the inspection and audit of the financial records that
30 this Chapter requires members to keep; and
31 (ix) with respect to the classes of futures contracts that may
32 be dealt in by members; and
33 (xi) prohibiting a member from accepting or executing,
34 otherwise than in accordance with the business rules,
35 instructions from another person to deal in futures
36 contracts; and

- 1 (xii) prohibiting a member from dealing in futures contracts
2 on behalf of another person otherwise than in
3 accordance with instructions accepted by the member
4 from the person; and
- 5 (xiii) prohibiting a member from dealing in futures contracts,
6 on behalf of another person, on a futures market of a
7 futures exchange or of a recognised futures exchange,
8 otherwise than in accordance with the business rules of
9 the futures exchange or recognised futures exchange, as
10 the case may be; and
- 11 (xiv) prohibiting a member, except as permitted by the
12 business rules, from executing the instructions of
13 another person to deal in futures contracts unless the
14 instructions are executed in such a manner that the
15 dealing is effected on a futures market of a futures
16 exchange or of a recognised futures exchange or on an
17 exempt futures market; and
- 18 (xv) with respect to the conditions under which members
19 may deal in futures contracts; and
- 20 (xvi) for the equitable and expeditious settlement of claims
21 and grievances between members, being claims and
22 grievances relating to the transaction of business by
23 members in their capacity as members; and
- 24 (xvii) for appropriate mechanisms for the conciliation and
25 settlement of disputes between members and their
26 clients, being disputes concerning dealings in futures
27 contracts by members on behalf of their clients or
28 concerning transactions between members and their
29 clients in connection with such dealings; and
- 30 (xviii) generally for carrying on the business of the proposed
31 futures exchange with due regard for the interests and
32 protection of the public; and
- 33 (d) there will be enough money in the body's fidelity fund to
34 make the payments out of the fund that may reasonably be
35 expected to be necessary for the purposes of Part 8.6; and
- 36 (e) the interests of the public will be served by granting the
37 application.

1 **1127 Exempt futures market**

2 (1) The Minister may by writing declare a specified futures market to
3 be, subject to any specified conditions, an exempt futures market.

4 (1A) A person must not contravene a condition specified in a declaration
5 in force under this section.

6 (1B) If a person has contravened a condition specified in a declaration in
7 force under this section, the Court may, on ASIC's application,
8 order the person to comply with the condition.

9 (2) Without limiting the matters to which the Minister may have
10 regard in considering whether to vary or revoke a declaration in
11 force under this section, he or she may, in so considering, have
12 regard to a breach of a condition specified in the declaration.

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2 **Division 2—Clearing houses**

3 **1128 When a person may provide clearing house facilities**

4 A person must not provide, or hold out that the person provides,
5 clearing house facilities for a futures market (other than an exempt
6 futures market) unless:

- 7 (a) the futures market is conducted by a futures exchange; and
8 (b) the person is a body corporate; and
9 (c) an approval of the person under section 1131 as a clearing
10 house for that futures exchange is in force.

11 **1131 Approval of clearing house**

12 (1) A body corporate that proposes to provide clearing house facilities
13 for a futures market of a futures exchange may apply to ASIC in
14 writing for approval by the Minister as a clearing house for that
15 futures exchange.

16 (2) Where a body applies under subsection (1), the Minister may by
17 writing approve the body as a clearing house for the futures
18 exchange if, and only if, he or she is satisfied that:

- 19 (b) the body's business rules are satisfactory, in particular such
20 of those business rules as relate to the registration of futures
21 contracts made on a futures market of the futures exchange;
22 and
23 (c) the body's business rules make satisfactory provision for the
24 expulsion, suspension or disciplining of members for a
25 contravention of the business rules or for a contravention of
26 this Chapter; and
27 (d) the interests of the public will be served by granting the
28 application.

29 (3) Without limiting the matters to which the Minister may have
30 regard in considering an application under subsection (1), he or she
31 may, in considering the application, have regard to any business
32 rules of the applicant that relate to the guaranteeing, to members of

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1 the applicant, of the performance of futures contracts made on a
2 futures market of the futures exchange.

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2 **Division 3—Futures associations**

3 **1132 Approval of futures association**

- 4 (1) A body corporate that proposes to be a futures association may
5 apply to ASIC in writing for approval by the Minister as a futures
6 association.
- 7 (2) Where a body applies under subsection (1), the Minister may by
8 writing approve the body as a futures association if, and only if, he
9 or she is satisfied:
- 10 (c) that the body's nature is such that the body may properly
11 exercise its functions as a futures association, being the
12 functions of:
- 13 (i) regulating the association's affairs in the interests of the
14 public; and
- 15 (ii) administering and enforcing the association's business
16 rules; and
- 17 (d) that the body's business rules make satisfactory provision:
- 18 (i) for the admission as members of persons licensed, or
19 proposing to apply to be licensed, under Part 8.3, or of a
20 specified class of such persons; and
- 21 (ii) for the qualifications for membership, including the
22 necessary standards of training and experience for:
- 23 (A) responsible officers of bodies corporate that;
24 and
- 25 (B) natural persons who;
26 are, or propose to be, members; and
- 27 (iii) for the manner in which members are to conduct their
28 business of dealing in futures contracts so as to ensure
29 efficient, honest and fair practices in relation to such
30 dealing; and
- 31 (iiia) for the exclusion of a body corporate from membership
32 where a responsible officer of the body corporate would
33 be excluded from membership; and
- 34 (iv) for the exclusion of a person from membership where:

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- 1 (A) if the person is a body corporate—a responsible
2 officer, or an employee, of the body corporate;
3 or
4 (B) otherwise—the person or an employee of the
5 person;
6 is not of good character and high business integrity; and
7 (v) for the expulsion, suspension or disciplining of a
8 member for conduct inconsistent with just and equitable
9 principles in the transaction of business or for a
10 contravention of the body’s business rules or of this
11 Chapter; and
12 (vi) for an appropriate mechanism whereby a person whose
13 application for membership of the body is refused, or
14 whose membership of the body is cancelled or
15 suspended, in circumstances where the person does not
16 have a right to appeal to the Court under subsection
17 1135(1) against the decision to refuse the application, or
18 to cancel or suspend the membership, as the case may
19 be, may appeal against the decision; and
20 (vii) for an appropriate mechanism whereby a person who
21 has been disciplined by the body otherwise than by way
22 of cancellation or suspension of the person’s
23 membership of the body may appeal against the
24 decision to discipline the person; and
25 (viii) for the inspection and audit of the financial records that
26 this Chapter requires members to keep; and
27 (x) prohibiting a member from accepting or executing,
28 otherwise than in accordance with the business rules,
29 instructions from another person to deal in futures
30 contracts; and
31 (xi) prohibiting a member from dealing in futures contracts
32 on behalf of another person otherwise than in
33 accordance with instructions accepted by the member
34 from the person; and
35 (xii) prohibiting a member from dealing in futures contracts,
36 on behalf of another person, on a futures market of a
37 futures exchange or of a recognised futures exchange,

- 1 otherwise than in accordance with the business rules of
2 the futures exchange or recognised futures exchange, as
3 the case may be; and
- 4 (xiii) prohibiting a member, except as permitted by the
5 business rules, from executing the instructions of
6 another person to deal in futures contracts unless the
7 instructions are executed in such a manner that the
8 dealing is effected on a futures market of a futures
9 exchange or of a recognised futures exchange or on an
10 exempt futures market; and
- 11 (xiv) for the equitable and expeditious settlement of claims
12 and grievances between members, being claims and
13 grievances relating to the transaction of business by
14 members in their capacity as members; and
- 15 (xv) for appropriate mechanisms for the conciliation and
16 settlement of disputes between members and their
17 clients, being disputes concerning dealings in futures
18 contracts by members on behalf of their clients or
19 concerning transactions between members and their
20 clients in connection with such dealings;
- 21 (e) if the body is expected to be a futures organisation within the
22 meaning of Part 8.6—that:
- 23 (i) there will be enough money in the body's fidelity fund
24 to make the payments out of the fund that may
25 reasonably be expected to be necessary for the purposes
26 of Part 8.6; or
- 27 (ii) the body will enter into a contract, in a form approved
28 by the Minister, with an insurer approved by the
29 Minister, under which the insurer undertakes to
30 supplement the fund, if a claim is made on the fund, so
31 that the total amount available to satisfy the claim will
32 be not less than an amount so approved; and
- 33 (f) that the interests of the public will be served by granting the
34 application.

1 **1133 Suspension or cancellation of approval**

- 2 (1) The Minister may cause to be served on a body corporate a written
3 notice requiring the body to show cause, at a hearing before a
4 specified person, why the body's approval as a futures association
5 should not be suspended or cancelled on specified grounds.
- 6 (2) A notice under subsection (1) must specify, and give reasonable
7 notice of, the time and place at which the hearing is to occur, but
8 the specified person may, with the body's consent, fix a different
9 time, a different place, or both, for the hearing.
- 10 (3) Where a notice is served under subsection (1), the specified person
11 must, after giving the body an opportunity to be heard at the
12 hearing, submit to the Minister a report about the hearing and a
13 recommendation about the matters to which the notice related.
- 14 (4) After considering a report and recommendation under
15 subsection (3), the Minister may:
16 (a) decide to take no further action in relation to the matter; or
17 (b) by writing, suspend for a specified period, or cancel, the
18 body's approval as a futures association.
- 19 (5) A body corporate is taken not to be a futures association at any
20 time during a period for which the body's approval as a futures
21 association is suspended.
- 22 (6) A body corporate's approval as a futures association must not be
23 suspended or cancelled except under this section.

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2 **Division 4—General**

3 **1134 Publication of certain instruments**

4 ASIC must cause a copy of an instrument executed under
5 subsection 1126(2), 1127(1), 1131(2), 1132(2) or 1133(4) to be
6 published in the *Gazette*.

7 **1135 Appeal to the Court against certain decisions of futures**
8 **exchanges and futures associations**

- 9 (1) Where a body corporate, being a futures exchange or futures
10 association:
- 11 (a) decides, at a time when a person is a member of no futures
12 organisation, to refuse an application by the person for
13 membership of the body corporate; or
14 (b) decides, at a time when a person is a member of no other
15 futures organisation, to suspend or cancel the person's
16 membership of the body corporate;
- 17 the body corporate must, within 14 days after so deciding, give to
18 the person, and to ASIC, a notice in writing setting out the decision
19 and the reasons for the decision, and the person may, within the
20 period of 21 days beginning when the notice is so given or within
21 that period as extended by the Court, appeal to the Court against
22 the decision by filing a written notice of appeal.
- 23 (2) A person whose membership of a futures organisation is suspended
24 for a period:
- 25 (a) is taken, for the purposes of paragraph (1)(a), to be a member
26 of that futures organisation throughout that period; and
27 (b) is taken, for the purposes of paragraph (1)(b), not to be a
28 member of that futures organisation at any time during that
29 period.
- 30 (3) A person must, on the day on which the person files a notice of
31 appeal with the Court under subsection (1), lodge a copy of the
32 notice.

- 1 (4) Where a body corporate decides as mentioned in paragraph (1)(b),
2 then:
3 (a) subject to paragraph (c) of this subsection and to
4 subsection (6), the decision takes effect at the end of the day
5 on which a notice relating to the decision is given by the
6 body corporate in accordance with subsection (1); and
7 (b) if the person to whom the decision relates appeals to the
8 Court under subsection (1) against the decision—the Court
9 may, at any time before it determines the appeal, make such
10 order as it thinks fit concerning the effect, pending
11 determination of the appeal, of the decision, including,
12 without limiting the generality of the foregoing, an order that
13 is subject to conditions specified in the order; and
14 (c) an order made by the Court under paragraph (b) has effect
15 accordingly.
- 16 (5) The Court may, after hearing an appeal under subsection (1),
17 dismiss the appeal or:
18 (a) in the case of an appeal against a decision to refuse an
19 application for membership—decide that the application
20 should be granted, or should be granted subject to specified
21 conditions; or
22 (b) in the case of an appeal against a decision to suspend for a
23 period a person's membership—decide that the person's
24 membership:
25 (i) should not be suspended; or
26 (ii) should be suspended for a specified lesser period; or
27 (c) in the case of an appeal against a decision to cancel a
28 person's membership—decide that the person's membership:
29 (i) should not be cancelled; or
30 (ii) should not be cancelled, but should be suspended for a
31 specified period.
- 32 (6) Where, on an appeal against a decision of a body corporate, the
33 Court decides as mentioned in paragraph (5)(a), (b) or (c), then, as
34 from the day on which the appeal is decided:
35 (a) the first-mentioned decision ceases to have effect; and

- 1 (b) the decision of the Court has effect, except for the purposes
2 of subsection (1), as a decision of the body corporate and
3 takes effect accordingly.

4 **1136 ASIC to be notified of amendments of business rules**

- 5 (1) Where an amendment is made by way of rescission or alteration of,
6 or addition to, the business rules of a futures exchange, of a
7 clearing house for a futures exchange, or of a futures association,
8 the futures exchange, clearing house or futures association, as the
9 case may be, must, forthwith after the making of the amendment,
10 give written notice of the amendment to ASIC.
- 11 (2) A notice under subsection (1) must:
- 12 (a) set out the text of the amendment to which it relates; and
13 (b) specify the date on which the amendment was made; and
14 (c) contain an explanation of the purpose of the amendment.
- 15 (3) If a notice required by subsection (1) to be given in relation to an
16 amendment is not given within 21 days after the making of the
17 amendment, the amendment ceases to have effect.
- 18 (4) Where ASIC receives a notice under this section, ASIC must
19 forthwith send a copy of the notice to the Minister.
- 20 (5) The Minister may, within 28 days after the receipt by ASIC of a
21 notice under this section, disallow the whole or a specified part of
22 the amendment to which the notice relates.
- 23 (6) Where the Minister disallows under this section the whole or a part
24 of an amendment of the business rules of a body corporate, ASIC
25 must forthwith give notice of the disallowance to the body
26 corporate and, upon receipt by the body corporate of the notice of
27 disallowance, the amendment ceases, to the extent of the
28 disallowance, to have effect.

1 **1137 Orderly markets in futures contracts—functions and powers of**
2 **futures exchanges and clearing houses**

- 3 (1) A futures exchange, and a clearing house for a futures exchange,
4 must, to the extent that it is reasonably practicable to do so, take all
5 steps, and do all things, necessary to ensure an orderly and fair
6 market for dealings in futures contracts on a futures market of the
7 futures exchange.
- 8 (2) A futures exchange may, for the purpose of performing its
9 functions under subsection (1), give to a person who is not a
10 member of the futures exchange but in whose name a futures
11 contract entered into on a futures market of the futures exchange is
12 registered a direction:
13 (a) to do a particular act or thing; or
14 (b) to refrain from doing a particular act or thing.
- 15 (3) A person must comply with a direction given to the person in
16 accordance with subsection (2), but a person who contravenes this
17 subsection is not guilty of an offence.

18 **1138 Orderly markets in futures contracts—ASIC's powers**

- 19 (1) Subject to subsections (2) and (6), ASIC may, in relation to a
20 futures market of a futures exchange, give a direction in writing to
21 the futures exchange:
22 (a) to close the futures market; or
23 (b) to suspend dealing on the futures market in a specified class
24 of futures contracts; or
25 (c) to limit transactions on the futures market to the closing out
26 of futures contracts; or
27 (d) to defer for a specified period the completion date for all
28 futures contracts, or for a specified class of futures contracts,
29 made on the futures market; or
30 (e) to cause a specified futures contract made on the futures
31 market, or each futures contract included in a specified class
32 of futures contracts so made, to be:

- 1 (i) closed out forthwith as the result of the matching up of
2 the futures contract with a futures contract of the same
3 kind whose price or value is equal to a price or value
4 determined by the futures exchange; or
5 (ii) invoiced back to a specified date at a price or value
6 determined by the futures exchange; or
7 (f) to require a futures contract made on the futures market, or
8 each futures contract included in a specified class of futures
9 contracts so made, to be discharged by:
10 (i) the tendering of a merchantable lot of a commodity
11 determined by the futures exchange, being a commodity
12 of a quality or standard that is:
13 (A) different from the quality or standard of the
14 commodity specified in the futures contract;
15 and
16 (B) determined by the futures exchange; and
17 (ii) the tendering of a price adjusted by an amount that is:
18 (A) appropriate having regard to the quality or
19 standard of the commodity referred to in
20 subparagraph (i); and
21 (B) determined by the futures exchange; or
22 (g) to require a member of the futures exchange to act in a
23 specified manner in relation to dealings in futures contracts
24 on the futures market, or in relation to a specified class of
25 such dealings.
- 26 (2) ASIC must not give a direction under subsection (1) in relation to a
27 futures market of a futures exchange unless:
28 (a) it has determined that a direction should be so given because
29 it is of the opinion that:
30 (i) subsection 1137(1) has not been complied with in
31 relation to that futures market; and
32 (ii) it is necessary to protect the interests of persons on
33 behalf of whom futures contracts are or may be dealt
34 with on that futures market; and
35 (iii) it would be in the public interest for a direction to be so
36 given; and

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- 1 (b) it has given to the futures exchange a notice in writing stating
2 that it has formed that opinion and specifying:
3 (i) its reasons for forming that opinion; and
4 (ii) the direction that it considers should be so given; and
5 (iii) a time, or a date and time, before which it will not so
6 give the direction; and
7 (c) it has given a copy of the notice to each clearing house for
8 that futures market; and
9 (d) the direction is so given after the time, or date and time, as
10 the case may be, specified pursuant to subparagraph (b)(iii).
- 11 (3) ASIC must, before determining in relation to a futures market of a
12 futures exchange as mentioned in paragraph (2)(a), consult the
13 futures exchange and each clearing house for that futures market.
- 14 (4) A failure by ASIC to comply with subsection (3) does not affect
15 the validity of:
16 (a) a determination under paragraph (2)(a); or
17 (b) a direction given under subsection (1) pursuant to such a
18 determination.
- 19 (5) ASIC must, as soon as practicable after giving a notice under
20 paragraph (2)(b) in relation to a futures market of a futures
21 exchange:
22 (a) give to the Minister a copy of the notice and a written report
23 setting out the reasons for the giving of the notice; and
24 (b) give a copy of the report to the futures exchange; and
25 (c) give a copy of the report to each clearing house for that
26 futures market.
- 27 (6) ASIC must not give a direction under subsection (1) in relation to a
28 futures market of a futures exchange if:
29 (a) the Minister has directed ASIC not to give the direction; or
30 (b) the futures exchange has acted as if the direction had been
31 given.
- 32 (7) ASIC must, as soon as practicable after giving a direction under
33 subsection (1) in relation to a futures market of a futures exchange:

- 1 (a) give to the Minister a copy of the direction; and
2 (b) give to each clearing house for that futures market:
3 (i) a copy of the direction; and
4 (ii) a direction in writing prohibiting the clearing house
5 from acting in a manner inconsistent with, and requiring
6 the clearing house to do all that it is reasonably capable
7 of doing to give effect to, the direction under
8 subsection (1) while the last-mentioned direction
9 remains in force.
- 10 (8) The Minister may determine in writing the period throughout
11 which a particular direction under subsection (1) is to remain in
12 force.
- 13 (9) A direction given under subsection (1) remains in force:
14 (a) in a case where a determination under subsection (8) is in
15 force—throughout the period specified in the determination;
16 or
17 (b) in any other case—unless sooner revoked, until the end of the
18 period of 21 days, or such shorter period (if any) as is
19 specified in the direction, commencing when the direction is
20 given.
- 21 (10) A futures exchange must not, while a direction given under
22 subsection (1) in relation to a futures market of the futures
23 exchange remains in force, fail to comply with the direction.
- 24 (11) A clearing house for a futures exchange must not fail to comply
25 with a direction given to the clearing house under
26 subparagraph (7)(b)(ii).
- 27 (12) A document may be given to a person under this section by
28 sending to the person, by telegraph, telex, facsimile service or
29 other similar means of communication, a message to the effect of
30 the document.

31 **1139 Futures exchanges and others to assist ASIC**

- 32 (1) A futures exchange, a clearing house for a futures exchange, and a
33 futures association, must each provide such assistance to ASIC, or

- 1 to a person acting on behalf of, or with the authority of, ASIC, as
2 ASIC reasonably requires for the performance of its functions
3 under this Chapter.
- 4 (2) Where:
- 5 (a) a body corporate, being a futures exchange, a clearing house
6 for a futures exchange, or a futures association, decides to
7 reprimand, fine, suspend, expel or otherwise take disciplinary
8 action against, a member of the body corporate; and
9 (b) subsection 1135(1) does not require the body corporate to
10 give to ASIC a notice relating to the decision;
11 the body corporate must, within 14 days after so deciding, give to
12 ASIC a notice in writing setting out particulars of the name of the
13 member, the decision, the reasons for the decision and, in the case
14 of a decision to fine a member, the amount of the fine.
- 15 (2A) A futures exchange, a clearing house for a futures exchange or a
16 futures association that believes that a person has committed, is
17 committing or is about to commit a serious contravention of its
18 business rules, or this Act, must, as soon as practicable, lodge a
19 statement setting out:
- 20 (a) particulars of the contravention that it believes the person has
21 committed, is committing or is about to commit; and
22 (b) its reasons for that belief.
- 23 (3) Where a clearing house for a futures exchange:
- 24 (a) refuses to register a dealing in a futures contract; or
25 (b) closes out a futures contract because of a failure to meet a
26 call for deposit or margin;
27 it must forthwith give ASIC particulars of its action.
- 28 (4) A person authorised by ASIC is entitled at all reasonable times to
29 full and free access for any of the purposes of this Act to the
30 trading floor of a futures market of a futures exchange.
- 31 (5) A person who refuses or fails, without lawful excuse, to allow a
32 person authorised by ASIC access in accordance with
33 subsection (4) to the trading floor of a futures market of a futures
34 exchange contravenes this subsection.

1 **1140 Power of Court to order observance or enforcement of business**
2 **rules of futures exchange, clearing house or futures**
3 **association**

4 Where a person who is under an obligation to comply with,
5 observe, enforce or give effect to the business rules of a futures
6 exchange, of a clearing house for a futures exchange, or of a
7 futures association, fails to comply with, observe, enforce or give
8 effect to those rules, the Court may, on the application of the
9 futures exchange, clearing house or futures association, as the case
10 may be, of ASIC, or of a person aggrieved by the failure, and after
11 giving to the person against whom the order is sought an
12 opportunity of being heard, make an order giving directions to the
13 last-mentioned person concerning compliance with, observance or
14 enforcement of, or giving effect to, those rules.

15 **1141 Gaming and wagering laws not applicable to certain futures**
16 **contracts and Chapter 8 agreements**

- 17 (1) Despite any law of a State or Territory in this jurisdiction about
18 gaming or wagering:
19 (a) a person may enter into a futures contract:
20 (i) on a futures market of a futures exchange or of a
21 recognised futures exchange; or
22 (ii) on an exempt futures market; or
23 (iii) as permitted by the business rules of a futures
24 association, of a futures exchange or of a recognised
25 futures exchange; and
26 (b) the contract is valid and enforceable.
- 27 (2) Despite any law of a State or Territory in this jurisdiction about
28 gaming or wagering:
29 (a) a person may enter into a Chapter 8 agreement of a kind
30 prescribed for the purposes of paragraph 72A(1)(b); and
31 (b) the agreement is valid and enforceable.

1 **1141A Qualified privilege in respect of disciplinary proceedings**

2 (1) In this section:

3 *disciplinary proceeding*, in relation to a futures organisation,
4 means:

- 5 (a) a proceeding under the business rules of the futures
6 organisation that may result in the disciplining of a member
7 of the futures organisation; or
8 (b) an appeal under the business rules of the futures organisation
9 from a proceeding of a kind referred to in paragraph (a).

10 *disciplining*, in relation to a member of a futures organisation,
11 includes expulsion from, or suspension of, membership of the
12 futures organisation.

13 *member*, in relation to a futures organisation, includes a person
14 who is under an obligation to comply with or enforce the business
15 rules of the futures organisation.

16 (2) A futures organisation, or a member, officer or employee of a
17 futures organisation, has qualified privilege in respect of a
18 statement made by a person, orally or in writing, in the course of,
19 or otherwise for the purposes of or in connection with, a
20 disciplinary proceeding of the futures organisation.

21 (3) A person has qualified privilege in respect of the publication of:

- 22 (a) a statement made by a person, orally or in writing, in the
23 course of, or otherwise for the purposes of or in connection
24 with; or
25 (b) a document prepared, given or produced by a person, in the
26 course of, or otherwise for the purposes of or in connection
27 with;

28 a disciplinary proceeding of a futures organisation.

1

2 **Part 8.3—Participants in the futures industry**

3 **Division 1—Futures brokers and futures advisers**

4 **1142 Futures brokers**

5 A person must not:

- 6 (a) deal in a futures contract on another person's behalf; or
7 (b) hold out that the person carries on a futures broking business;
8 unless the first-mentioned person holds a futures brokers licence or
9 is an exempt broker.

10 **1143 Futures advisers**

11 A person must not:

- 12 (a) carry on a futures advice business; or
13 (b) hold out that the person is a futures adviser;
14 unless the person is a licensee or an exempt futures adviser.

15 **1144 Application for a licence**

- 16 (1) A person may apply to ASIC, in the prescribed form and manner,
17 for a futures brokers licence or a futures advisers licence.
18 (2) ASIC may require an applicant for a licence to give ASIC such
19 further information in relation to the application as ASIC thinks
20 necessary.

21 **1144A Grant of licence to natural person**

- 22 (1) This section applies where a natural person applies for a licence.
23 (2) ASIC must grant the licence if:
24 (a) the application was made in accordance with section 1144;
25 and
26 (b) the person is not an insolvent under administration; and

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- 1 (c) if the application is for a futures brokers licence—the person
2 is a member of a futures organisation; and
3 (d) ASIC is satisfied that the person’s educational qualifications
4 and experience are adequate having regard to the nature of
5 the duties of a holder of a licence of the kind applied for; and
6 (e) ASIC has no reason to believe that the person is not of good
7 fame and character; and
8 (f) ASIC has no reason to believe that the person will not
9 perform those duties efficiently, honestly and fairly.
- 10 (3) Otherwise, ASIC must refuse the application.
- 11 (4) In determining whether or not it has reason to believe as mentioned
12 in paragraph (2)(e) or (f), ASIC must have regard to any conviction
13 of the person, during the 10 years ending on the day of the
14 application, of serious fraud.

15 **1145 Grant of licence to body corporate**

- 16 (1) This section applies where a body corporate applies for a licence.
- 17 (2) ASIC must grant the licence if:
- 18 (a) the application was made in accordance with section 1144;
19 and
20 (c) the applicant is not an externally-administered body
21 corporate; and
22 (d) if the application is for a futures brokers licence—the
23 applicant is a member of a futures organisation; and
24 (e) ASIC is satisfied that the educational qualifications and
25 experience of each responsible officer of the applicant are
26 adequate having regard to the duties that the officer would
27 perform in connection with the holding of the licence; and
28 (f) ASIC has no reason to believe that the applicant will not
29 perform efficiently, honestly and fairly the duties of a holder
30 of a licence of the kind applied for.
- 31 (3) Otherwise, ASIC must refuse the application.

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- 1 (4) In determining whether or not it has reason to believe as mentioned
2 in paragraph (2)(f), ASIC must have regard, in relation to each
3 responsible officer of the applicant, to:
4 (a) whether or not the officer is an insolvent under
5 administration; and
6 (b) any conviction of the officer, during the 10 years ending on
7 the day of the application, of serious fraud; and
8 (c) any reason ASIC has to believe that the officer is not of good
9 fame and character; and
10 (d) any reason ASIC has to believe that the officer will not
11 perform efficiently, honestly and fairly the duties that the
12 officer would perform in connection with the holding of the
13 licence.

14 **1145A Effect of certain provisions**

- 15 (1) Sections 1144A and 1145 apply subject to sections 1199A, 1200
16 and 1202 and the regulations.
17 (2) Nothing in subsection 1144A(4) or 1145(4) limits the matters to
18 which ASIC may have regard:
19 (a) in deciding on an application for a licence; or
20 (b) in connection with performing or exercising any other
21 function or power under this Part.

22 **1147 Conditions of licence: general**

- 23 A licence is subject to:
24 (a) such conditions and restrictions as are prescribed; and
25 (b) subject to section 1200, such conditions and restrictions as
26 ASIC imposes when granting the licence or while it is in
27 force.

28 **1148 Conditions of futures brokers licence: membership of futures**
29 **organisation**

- 30 (1) A futures brokers licence is subject to:

- 1 (a) a condition that the licensee be, throughout the currency of
2 the licence, a member of a futures organisation; and
3 (b) a condition that the licence is suspended throughout a period
4 throughout which the licensee:
5 (i) is a member of no futures organisation; and
6 (ii) would, but for the suspension of the licensee's
7 membership of a futures organisation, be a member of
8 the last-mentioned futures organisation.
- 9 (2) A person whose membership of a futures organisation is suspended
10 for a period:
11 (a) is, for the purposes of paragraph (1)(a), a member of that
12 futures organisation throughout that period; and
13 (b) is, for the purposes of paragraph (1)(b), a member of that
14 futures organisation at no time during that period.

15 **1149 Conditions of futures brokers licence: assets and liabilities**

- 16 (1) Without limiting the generality of section 1147, one or more of the
17 following may be imposed under that section on a futures brokers
18 licence:
19 (a) a condition or restriction about limiting the liability that the
20 licensee may incur in connection with a business of dealing
21 in futures contracts;
22 (b) a condition or restriction about incurring, or a condition
23 about disclosing, liabilities of the licensee that arise
24 otherwise than in connection with such a business;
25 (c) a condition or restriction about the licensee's financial
26 position, whether or not in relation to such a business;
27 (d) without limiting the generality of paragraph (c), a condition
28 that the licensee's assets include, or not include, specified
29 assets;
30 (e) without limiting the generality of paragraph (c), a condition
31 that the sum of the values of specified assets included in the
32 licensee's assets be not less than, or not greater than, an
33 amount ascertained in accordance with the condition.

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- 1 (2) A condition imposed by virtue of paragraph (1)(e) may provide for
2 the values of assets to be ascertained, for the purposes of applying
3 the condition, in a manner specified in, or determined in
4 accordance with, the condition.
- 5 (3) Without limiting the generality of paragraph (1)(e), a condition
6 imposed by virtue of that paragraph may provide for the amount
7 referred to in that paragraph to be a specified percentage of the sum
8 of:
- 9 (a) the values of all the licensee's assets; or
 - 10 (b) the values of specified assets included in the licensee's
11 assets; or
 - 12 (c) the amounts of all the licensee's liabilities; or
 - 13 (d) the amounts of specified liabilities included in the licensee's
14 liabilities.

15 **1150 Conditions of licence: supervision of representatives**

16 Without limiting the generality of section 1147, one or more of the
17 following may be imposed under that section on a licence:

- 18 (a) a condition about what the licensee is to do to, by way of
19 supervision or otherwise, in order to prevent the licensee's
20 representatives from contravening:
 - 21 (i) a futures law; or
 - 22 (ii) other conditions of the licence;
- 23 (b) a condition about what the licensee is to do to ensure that
24 each representative of the licensee has adequate
25 qualifications and experience having regard to what the
26 representative will do on the licensee's behalf in connection
27 with a futures broking business or futures advice business
28 carried on by the licensee.

29 **1151 Revocation and variation of licence conditions**

30 Subject to section 1200, ASIC may at any time revoke or vary a
31 condition of a licence unless it was imposed by the regulations.

1 **1152 Futures organisations to be informed about conditions of**
2 **futures brokers licence**

- 3 (1) As soon as practicable after imposing a condition on, or revoking
4 or varying a condition of, a futures brokers licence, ASIC must
5 inform in writing:
6 (a) each futures organisation of which the licensee is a member;
7 and
8 (b) each corporation that is a clearing house for a futures
9 exchange of which the licensee is a member.
- 10 (2) A contravention of subsection (1) does not affect the validity of an
11 act done by ASIC.

12 **1153 Licensee to notify breach of licence condition**

- 13 (1) Within one business day after the happening of an event
14 constituting a contravention of a condition of a licence held by a
15 corporation, the licensee must give to:
16 (a) ASIC; and
17 (b) each futures organisation of which the licensee is a member;
18 a written notice setting out particulars of the event.
- 19 (2) It is a defence to a prosecution for failing to give a particular notice
20 to a person as required by this section if it is proved that:
21 (a) when the requirement arose, the defendant was unaware of
22 the event that gave rise to the requirement; and
23 (b) the defendant:
24 (i) did not become aware of the event before the date of the
25 information; or
26 (ii) did become so aware before that date but gave the
27 notice to that person as soon as reasonably practicable
28 after becoming so aware.

29 **1154 ASIC may require licensed futures broker to give information**

- 30 (1) ASIC may, by writing given to the holder of a futures brokers
31 licence, direct the holder to give ASIC specified information about,

1 or a specified statement relating to, a business of dealing in futures
2 contracts that the holder carries on or has carried on.

3 (2) A direction under subsection (1) to give a specified statement may
4 also direct the holder to cause the statement to be audited by a
5 registered company auditor before it is given to ASIC.

6 (3) A person must comply with a direction under this section:

7 (a) if the direction specifies a reasonable period for
8 compliance—within that period; or

9 (b) in any other case—within a reasonable period;

10 or within that period as extended by ASIC by writing given to the
11 person.

12 **1155 Register of Futures Licensees**

13 (1) ASIC must keep a Register of Futures Licensees for the purposes
14 of this Part.

15 (2) ASIC must include in the Register, in relation to each licence, a
16 copy of:

17 (a) the licence; and

18 (b) each instrument that imposes conditions on the licence, or
19 revokes or varies conditions of the licence, after the licence is
20 granted.

21 (3) ASIC must enter in the Register, in relation to each licence:

22 (a) the name of the licensee; and

23 (b) if the licensee is a body corporate—the name of each
24 director, and of each secretary, of the licensee; and

25 (c) the day on which the licence was granted; and

26 (d) in relation to each business to which the licence relates:

27 (i) the address of the principal place of business at which
28 the business is carried on; and

29 (ii) the addresses of the other places (if any) at which the
30 business is carried on; and

31 (iii) if the business is carried on under a name or style other
32 than the name of the licensee—that name or style; and

- 1 (e) in the case of a futures brokers licence—the name, and the
2 address of the principal place of business, of each futures
3 organisation of which the licensee is a member; and
4 (f) particulars of any suspension of the licence; and
5 (g) such other matters (if any) as are prescribed.
- 6 (4) Where a person ceases to hold a particular licence, ASIC must
7 remove from the Register the documents included in it, and the
8 particulars entered in it, in relation to that licence.
- 9 (5) A person may inspect, and may make copies of, or take extracts
10 from, the Register.

11 **1156 Notifying change in particulars**

12 Within 21 days after:

- 13 (a) the holder of a futures brokers licence ceases to carry on the
14 business to which the licence relates; or
15 (b) the holder of a futures advisers licence ceases to act as, or to
16 hold out that the holder is, a futures adviser; or
17 (c) there is a change in a matter particulars of which are required
18 by virtue of any of paragraphs 1155(3)(a) to (e), inclusive, to
19 be entered, in relation to a licence, in the Register of Futures
20 Licensees;
- 21 the holder of the licence must give ASIC written particulars, in the
22 prescribed form, of that fact, or of that change, as the case may be.

23 **1157 Annual statement of licensee**

- 24 (1) A person who is or has been a licensee must lodge, in respect of
25 each year or part of a year during which the licence is or was in
26 force, a statement in the prescribed form that complies with this
27 section.
- 28 (2) The statement must set out the number of persons:
29 (a) who, when the statement is lodged, hold; or
30 (b) who, when the person last ceased to be a licensee, held;
31 as the case may be, proper authorities from the person.

1 (3) The statement must also contain such information as is prescribed.

2 **1158 Time for lodging annual statement**

3 A person required by section 1157 to lodge a statement must lodge
4 the statement:

5 (a) if the licence is a futures brokers licence—within the period
6 within which the person must lodge with ASIC a profit and
7 loss statement and balance sheet referred to in section 1218;
8 or

9 (b) if the licence is a futures advisers licence—within the period
10 of 1 month immediately before the anniversary of the day on
11 which the licence was granted;

12 or within that period as extended by ASIC by writing given to the
13 person.

1

2 **Division 2—Agreements with unlicensed persons**

3 **Subdivision A—Agreements affected**

4 **1159 Excluded clients**

5 In this Division:

6 *excluded client* means a person who is:

- 7 (a) a futures broker; or
8 (b) a futures adviser; or
9 (c) one of 2 or more persons who together constitute a futures
10 broker or futures adviser.

11 **1160 Agreement about a dealing in breach of section 1142**

12 Where a person (in this section and Subdivision B called the
13 *non-licensee*) and another person (in this section and Subdivision
14 B called the *client*), not being an excluded client, enter into an
15 agreement relating to a dealing or proposed dealing in a futures
16 contract by the non-licensee on the client's behalf, being a dealing
17 or proposed dealing involving a contravention by the non-licensee
18 of section 1142, Subdivision B applies, whether or not anyone else
19 is a party to the agreement.

20 **1161 Agreement with corporation acting in breach of section 1143**

21 Where, during a period when a person (in this section and
22 Subdivision B called the *non-licensee*), in contravention of
23 section 1143, carries on a futures advice business or holds out that
24 the person is a futures adviser, the non-licensee and a client (other
25 than an excluded client) of the non-licensee enter into an
26 agreement that relates to advising the client about futures contracts
27 or to giving the client futures reports, Subdivision B applies,
28 whether or not anyone else is a party to the agreement.

1 **Subdivision B—Effect on agreements**

2 **1164 Client may give notice of rescission**

- 3 (1) Subject to this section, the client may, whether before or after
4 completion of the agreement, give to the non-licensee a written
5 notice stating that the client wishes to rescind the agreement.
- 6 (2) The client may only give a notice under this section within a
7 reasonable period after becoming aware of the facts entitling the
8 client to give the notice.
- 9 (3) The client is not entitled to give a notice under this section if the
10 client engages in conduct by engaging in which the client would, if
11 the entitlement so to give a notice were a right to rescind the
12 agreement for misrepresentation by the non-licensee, be taken to
13 have affirmed the agreement.
- 14 (4) The client is not entitled to give a notice under this section if,
15 within a reasonable period before the agreement was entered into,
16 the non-licensee informed the client (whether or not in writing)
17 that:
18 (a) the non-licensee did not hold a futures brokers licence; or
19 (b) the non-licensee did not hold a futures brokers licence and
20 did not hold a futures advisers licence;
21 as the case requires.
- 22 (5) If, at a time when a futures brokers licence or futures advisers
23 licence held by the non-licensee was suspended, the non-licensee
24 informed the client that the licence was suspended, the
25 non-licensee is taken for the purposes of subsection (4) to have
26 informed the client at that time that the non-licensee did not hold a
27 futures brokers licence or futures advisers licence, as the case may
28 be.
- 29 (6) None of subsections (2), (3) and (4) limits the generality of either
30 of the others.
- 31 (7) Subject to this section, the client may give a notice under this
32 section whether or not:

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- 1 (a) the notice will result under section 1165 in rescission of the
2 agreement; or
3 (b) the Court will, if the notice so results, be empowered to make
4 a particular order, or any order at all, under section 1166.

5 **1165 Effect of notice under section 1164**

6 A notice given under section 1164 rescinds the agreement unless
7 rescission of the agreement would prejudice a right, or an estate in
8 property, acquired by a person (other than the non-licensee) in
9 good faith, for valuable consideration and without notice of the
10 facts entitling the client to give the notice.

11 **1165A Client may apply to Court for partial rescission**

- 12 (1) If the client gives a notice under section 1164 but the notice does
13 not rescind the agreement because rescission of it would prejudice
14 a right or estate of the kind referred to in section 1165, the client
15 may, within a reasonable period after giving the notice, apply to
16 the Court for an order under subsection (4) of this section.
- 17 (2) The Court may extend the period for making an application under
18 subsection (1).
- 19 (3) If an application is made under subsection (1), the Court may make
20 such orders expressed to have effect until the determination of the
21 application as it would have power to make if the notice had
22 rescinded the agreement under section 1165 and the application
23 were for orders under section 1166.
- 24 (4) On an application under subsection (1), the Court may make an
25 order:
- 26 (a) varying the agreement in such a way as to put the client in
27 the same position, as nearly as can be done without
28 prejudicing such a right or estate acquired before the order is
29 made, as if the agreement had not been entered into; and
30 (b) declaring the agreement to have had effect as so varied at and
31 after the time when it was originally made.

1 (5) If the Court makes an order under subsection (4), the agreement is
2 taken for the purposes of section 1166 to have been rescinded
3 under section 1165.

4 (6) An order under subsection (4) does not affect the application of
5 section 1168 or 1170 in relation to the agreement as originally
6 made or as varied by the order.

7 **1166 Court may make consequential orders**

8 (1) Subject to subsection (2), on rescission of the agreement under
9 section 1165, the Court may, on the application of the client or the
10 non-licensee, make such orders as it would have power to make if
11 the client had duly rescinded the agreement for misrepresentation
12 by the non-licensee.

13 (2) The Court is not empowered to make a particular order under
14 subsection (1) if the order would prejudice a right, or an estate in
15 property, acquired by a person (other than the non-licensee) in
16 good faith, for valuable consideration and without notice of the
17 facts entitling the client to give the notice.

18 **1167 Agreement unenforceable against client**

- 19 (1) This section:
20 (a) applies while both of the following are the case:
21 (i) the client is entitled to give a notice under section 1164;
22 (ii) a notice so given will result under section 1165 in
23 rescission of the agreement; and
24 (b) applies after the agreement is rescinded under section 1165;
25 but does not otherwise apply.
- 26 (2) The non-licensee is not entitled, as against the client:
27 (a) to enforce the agreement, whether directly or indirectly; or
28 (b) to rely on the agreement, whether directly or indirectly and
29 whether by way of defence or otherwise.

1 **1168 Non-licensee not entitled to recover commission**

- 2 (1) Without limiting the generality of section 1167, this section:
3 (a) applies while the client is entitled to give a notice under
4 section 1164; and
5 (b) applies after the client so gives a notice, even if the notice
6 does not result under section 1165 in rescission of the
7 agreement;
8 but does not otherwise apply.
- 9 (2) The non-licensee is not entitled to recover by any means
10 (including, for example, set-off or a claim on a quantum meruit)
11 any brokerage, commission or other fee for which the client would,
12 but for this section, have been liable to the non-licensee under or in
13 connection with the agreement.

14 **1169 Onus of establishing non-application of section 1167 or 1168**

15 For the purposes of determining, in a proceeding in a court,
16 whether or not the non-licensee is, or was at a particular time,
17 entitled as mentioned in subsection 1167(2) or 1168(2), it is
18 presumed, unless the contrary is proved, that section 1167 or 1168,
19 as the case may be, applies, or applied at that time, as the case may
20 be.

21 **1170 Client may recover commission paid to non-licensee**

- 22 (1) Without limiting the generality of section 1166, if the client gives a
23 notice under section 1164, the client may, even if the notice does
24 not result under section 1165 in rescission of the agreement,
25 recover from the non-licensee as a debt the amount of any
26 brokerage, commission or other fee that the client has paid to the
27 non-licensee under or in connection with the agreement.
- 28 (2) ASIC may, if it considers that it is in the public interest to do so,
29 bring an action under subsection (1) in the name of, and for the
30 benefit of, the client.

1 **1171 Remedies under this Division additional to other remedies**

2 The client's rights and remedies under this Division are additional
3 to, and do not prejudice, any other right or remedy of the client.

1

2 **Division 3—Futures representatives**

3 **1172 Representatives of futures brokers**

4 A natural person must not do an act as a representative of a futures
5 broker (other than an exempt broker) unless:

- 6 (a) the broker holds a futures brokers licence; and
7 (b) the person holds a proper authority from the broker.

8 **1173 Representatives of futures advisers**

9 A natural person must not do an act as a representative of a futures
10 adviser (other than an exempt futures adviser) unless the futures
11 adviser:

- 12 (a) is also a futures broker and holds a futures brokers licence; or
13 (b) holds a futures advisers licence;

14 and the person holds a proper authority from the futures adviser.

15 **1174 Defence**

16 It is a defence to a prosecution for a contravention of section 1172
17 or 1173 constituted by an act done by a person as a representative
18 of another person if it is proved that:

- 19 (a) but for the revocation or suspension of a licence held by the
20 other person, the act would not have been such a
21 contravention; and
22 (b) when he or she did the act, the first-mentioned person:
23 (i) believed in good faith that the other person held the
24 licence; and
25 (ii) was unaware of the revocation or suspension; and
26 (c) in all the circumstances it was reasonable for the
27 first-mentioned person so to believe and to be unaware of the
28 revocation or suspension.

1 **1175 Body corporate not to act as representative**

2 A body corporate must not do an act as a representative of a
3 person.

4 **1176 Licensee to keep register of holders of proper authorities**

- 5 (1) A licensee must establish a register of the persons who hold proper
6 authorities from the licensee and must keep it in accordance with
7 this section.
- 8 (2) The register must be in writing or in such other form as ASIC
9 approves.
- 10 (3) The register must contain, in relation to each person (if any) who
11 holds a proper authority from the licensee:
12 (a) a copy of the proper authority; and
13 (b) the person's name; and
14 (c) the person's current residential address; and
15 (d) unless the person's current business address is the same as
16 the licensee's—the person's current business address; and
17 (e) such other information (if any) as is prescribed.
- 18 (4) A copy of a proper authority of a person from the licensee that
19 subsection (3) requires the register to contain must be included in
20 the register within 2 business days after the person begins to hold
21 that proper authority.
- 22 (5) Information that subsection (3) requires the register to contain in
23 relation to a person must be entered in the register within 2
24 business days after:
25 (a) the person begins to hold a proper authority from the
26 licensee; or
27 (b) the licensee receives the information;
28 whichever happens later.
- 29 (6) Within 2 business days after a person ceases to hold a proper
30 authority from the licensee, the licensee must:
31 (a) in any case:

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- 1 (i) include, in a part of the register separate from the part in
2 which copies of proper authorities are included under
3 subsection (4); and
4 (ii) remove from the last-mentioned part;
5 the copy of the proper authority that was included in the
6 last-mentioned part; and
7 (b) unless, at the end of those 2 business days, the person again
8 holds a proper authority from the licensee:
9 (i) enter, in a part of the register separate from the part in
10 which information is entered under subsection (5); and
11 (ii) remove from the last-mentioned part;
12 the information that has been entered in the last-mentioned
13 part in relation to the person.
- 14 (7) Information that has been entered under paragraph (6) (b) in a
15 separate part of the register is taken the purposes of subsections (3)
16 and (5) not to be contained or entered in the register.
- 17 (8) Where a licensee whom subsection (1) requires to establish a
18 register already keeps one under this section, the licensee need not
19 establish a new register but must keep the existing one in
20 accordance with this section.

21 **1177 Licensee to notify ASIC of location and contents of register**

- 22 (1) This section has effect where a licensee keeps a register under
23 section 1176.
- 24 (2) Within 14 days after establishing the register, the licensee must
25 lodge written notice of where the register is kept.
- 26 (3) As soon as practicable after changing the place where the register
27 is kept, the licensee must lodge written notice of the new place
28 where the register is kept.
- 29 (4) Within 2 business days after the day on which a person begins to
30 hold a particular proper authority from the licensee, the licensee
31 must, whether or not the person has previously held a proper
32 authority from the licensee, lodge:

- 1 (a) a copy of the first-mentioned proper authority; and
2 (b) a written notice stating that the person began to hold that
3 proper authority on that day.
- 4 (5) Within the period within which subsection 1176(5) requires the
5 licensee to enter in the register information that the register is
6 required by virtue of paragraph 1176(3)(b), (c), (d) or (e) to
7 contain, the licensee must lodge a written notice setting out the
8 information and stating that the information has been, or is to be,
9 entered in the register.
- 10 (6) Within 2 business days after a person ceases to hold a proper
11 authority from the licensee, the licensee must, unless at the end of
12 those 2 business days the person again holds a proper authority
13 from the licensee, lodge a written notice stating that the person has
14 ceased to hold such a proper authority.

15 **1178 Inspection and copying of register**

- 16 (1) A licensee must ensure that a register kept by it under section 1176
17 is open for inspection without charge.
- 18 (2) A person may by writing request a licensee to give the person a
19 copy of the whole, or of a specified part, of a register kept by the
20 licensee under section 1176.
- 21 (3) A licensee must comply with a request under subsection (2) within
22 2 business days after:
- 23 (a) if the licensee requires the person to pay for the copy an
24 amount of not more than the prescribed amount—receiving
25 the amount from the person; or
26 (b) otherwise—receiving the request.

27 **1180 ASIC may require production of authority**

- 28 (1) Where ASIC has reason to believe that a person:
29 (a) holds a proper authority from a licensee; or

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- 1 (b) has done an act as a representative of another person;
2 then, whether or not ASIC knows who the licensee or other person
3 is, it may require the first-mentioned person to produce:
4 (c) any proper authority from a licensee; or
5 (d) any invalid futures authority from a person;
6 that the first-mentioned person holds.
- 7 (2) A person must not, without reasonable excuse, refuse or fail to
8 comply with a requirement under this section.

9 **1181 ASIC may give licensee information about representative**

- 10 (1) Where ASIC believes on reasonable grounds that:
11 (a) a person (in this section called the *holder*) holds, or will hold,
12 a proper authority from a licensee; and
13 (b) having regard to that fact, ASIC should give to the licensee
14 particular information that ASIC has about the person; and
15 (c) the information is true;
16 ASIC may give the information to the licensee.
- 17 (2) Where ASIC gives information under subsection (1), the licensee
18 or an officer of the licensee may, for a purpose connected with:
19 (a) the licensee making a decision about what action (if any) to
20 take in relation to the holder, having regard to, or to matters
21 including, the information; or
22 (b) the licensee taking action pursuant to such a decision;
23 or for 2 or more such purposes, and for no other purpose, give to
24 another person, make use of, or make a record of, some or all of
25 the information.
- 26 (3) A person to whom information has been given, in accordance with
27 subsection (2) or this subsection, for a purpose or purposes may,
28 for that purpose or one or more of those purposes, and for no other
29 purpose, give to another person, make use of, or make a record of,
30 that information.

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- 1 (4) Subject to subsections (2) and (3), a person must not give to
2 another person, make use of, or make a record of, information
3 given by ASIC under subsection (1).
- 4 (4A) Subsection 8(3) does not apply in relation to a reference in
5 subsection (2), (3) or (4) of this section to a provision of this
6 section.
- 7 (5) A person has qualified privilege in respect of an act done by the
8 person as permitted by subsection (2) or (3).
- 9 (6) A person to whom information is given in accordance with this
10 section must not:
11 (a) give any of the information to a court; or
12 (b) produce in a court a document that sets out some or all of the
13 information;
14 except:
15 (c) for a purpose connected with:
16 (i) the licensee making a decision about what action (if
17 any) to take in relation to the holder, having regard to,
18 or to matters including, some or all of the information;
19 or
20 (ii) the licensee taking action pursuant to such a decision; or
21 (iii) proving in a proceeding in that court that particular
22 action taken by the licensee in relation to the holder was
23 so taken pursuant to such a decision;
24 or for 2 or more such purposes, and for no other purpose;
25 (d) in a proceeding in that court, in so far as the proceeding
26 relates to an alleged contravention of this section; or
27 (e) in a proceeding in respect of an ancillary offence relating to
28 an offence against this section; or
29 (f) in a proceeding in respect of the giving to a court of false
30 information being or including some or all of the
31 first-mentioned information.
- 32 (7) A reference in this section to a person taking action in relation to
33 another person is a reference to the first-mentioned person:

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- 1 (a) taking action by way of making, terminating, or varying the
2 terms and conditions of; or
3 (b) otherwise taking action in relation to;
4 a relevant agreement, in so far as the relevant agreement relates to
5 the other person being employed by, or acting for or by
6 arrangement with, the first-mentioned person in connection with a
7 futures broking business or futures advice business carried on by
8 the first-mentioned person.
- 9 (8) In addition, and without prejudice, to the effect it has of its own
10 force, subsection (6) has by force of this subsection the effect it
11 would have if:
12 (a) the reference in it to information being given in accordance
13 with this section were a reference to information being given
14 in accordance with section 1181; and
15 (b) a reference in it to a court were a reference to a court of an
16 external Territory or of a country outside Australia and the
17 external Territories; and
18 (c) paragraphs (6)(d) and (e) were omitted.

19 **1182 Holder of authority may be required to return it**

- 20 (1) Where a person holds a proper authority from a licensee but is
21 neither employed by, nor authorised to act for or by arrangement
22 with, the licensee, the licensee may, by writing given to the person,
23 require the person to give the proper authority to the licensee
24 within a specified period of not less than 2 business days.
- 25 (2) Where a person holds an invalid futures authority from another
26 person, the other person may, by writing given to the
27 first-mentioned person, require the first-mentioned person to give
28 the invalid futures authority to the other person within a specified
29 period of not less than 2 business days.
- 30 (3) A person must not, without reasonable excuse, refuse or fail to
31 comply with a requirement made of the person in accordance with
32 subsection (1) or (2).

1

2 **Division 4—Liability of principals for representatives'**
3 **conduct**

3

4 **1183 Conduct engaged in as a representative**

5

Where a person engages in conduct as a representative of another
6 person (in this section called the *principal*), then, as between the
7 principal and a third person (other than ASIC), the principal is
8 liable in respect of that conduct in the same manner, and to the
9 same extent, as if the principal had engaged in it.

10

1184 Liability where identity of principal unknown

11

(1) This section applies for the purposes of a proceeding in a court
12 where:

13

(a) in this jurisdiction or elsewhere, a person (in this section
14 called the *representative*) engages in particular conduct while
15 the person is a representative of 2 or more persons (in this
16 section called the *indemnifying principals*); and

17

(b) it is proved for the purposes of the proceeding that the
18 representative engaged in the conduct as a representative of
19 some person (in this section called the *unknown principal*)
20 but it is not proved for those purposes who the unknown
21 principal is.

22

(2) If only one of the indemnifying principals is a party to the
23 proceeding, he, she or it is liable in respect of that conduct as if he,
24 she or it were the unknown principal.

25

(3) If 2 or more of the indemnifying principals are parties to the
26 proceeding, each of those parties is liable in respect of that conduct
27 as if he, she or it were the unknown principal.

28

1185 Liability of principals where act done in reliance on
29 **representative's conduct**

29

30

(1) This section applies where:

- 1 (a) at a time when a person (in this section called the
2 **representative**) is a representative of only one person (in this
3 section called the **indemnifying principal**) or of 2 or more
4 persons (in this section called the **indemnifying principals**),
5 the representative, in this jurisdiction or elsewhere:
6 (i) engages in particular conduct; or
7 (ii) proposes, or represents that the representative proposes,
8 to engage in particular conduct; and
9 (b) another person (in this section called the **client**) does, or
10 omits to do, a particular act, in this jurisdiction or elsewhere,
11 because the client believes at a particular time in good faith
12 that the representative engaged in, or proposes to engage in,
13 as the case may be, that conduct:
14 (i) on behalf of some person (in this section called the
15 **assumed principal**) whether or not identified, or
16 identifiable, at that time by the client; and
17 (ii) in connection with a futures broking business or futures
18 advice business carried on by the assumed principal;
19 and
20 (c) it is reasonable to expect that a person in the client's
21 circumstances would so believe and would do, or omit to do,
22 as the case may be, that act because of that belief;
23 whether or not that conduct is or would be within the scope of the
24 representative's employment by, or authority from, any person.
- 25 (2) If:
26 (a) subparagraph (1)(a)(i) applies; or
27 (b) subparagraph (1)(a)(ii) applies and the representative engages
28 in that conduct;
29 then, for the purposes of a proceeding in a court:
30 (c) as between the indemnifying principal and the client or a
31 person claiming through the client, the indemnifying
32 principal is liable; or

- 1 (d) as between any of the indemnifying principals and the client
2 or a person claiming through the client, each of the
3 indemnifying principals is liable;
4 as the case may be, in respect of that conduct in the same manner,
5 and to the same extent, as if he, she or it had engaged in it.
- 6 (3) Without limiting the generality of subsection (2), the indemnifying
7 principal, or each of the indemnifying principals, as the case may
8 be, is liable to pay damages to the client in respect of any loss or
9 damage that the client suffers as a result of doing, or omitting to
10 do, as the case may be, the act referred to in paragraph (1)(b).
- 11 (3A) Subsection (3) does not apply unless:
- 12 (a) the conduct was engaged in, the proposed conduct would
13 have been engaged in, or the representation was made, in this
14 jurisdiction; or
15 (b) the act referred to in paragraph (1)(b) was done, or would
16 have been done, as the case may be, in this jurisdiction; or
17 (c) some or all of the loss or damage was suffered in this
18 jurisdiction.
- 19 (4) If:
- 20 (a) there are 2 or more indemnifying principals; and
21 (b) 2 or more of them are parties (in this subsection called the
22 *indemnifying parties*) to a proceeding in a court; and
23 (c) it is proved for the purposes of the proceeding:
24 (i) that the representative engaged in that conduct as a
25 representative of some person; and
26 (ii) who that person is; and
27 (d) that person is among the indemnifying parties;
28 subsections (2) and (3) do not apply, for the purposes of the
29 proceeding, in relation to the indemnifying parties other than that
30 person.

31 **1186 Presumptions about certain matters**

- 32 (1) Where it is proved, for the purposes of a proceeding in a court, that
33 a person (in this subsection called the *representative*) engaged in

1 particular conduct, in this jurisdiction or elsewhere, while the
2 person was a representative of:

- 3 (a) only one person (in this subsection called the *indemnifying*
4 *principal*); or
5 (b) 2 or more persons (in this subsection called the *indemnifying*
6 *principals*);

7 then, unless the contrary is proved for the purposes of the
8 proceeding, it is presumed for those purposes that the
9 representative engaged in the conduct as a representative of:

- 10 (c) the indemnifying principal; or
11 (d) as a representative of some person among the indemnifying
12 principals;

13 as the case may be.

- 14 (2) Where, for the purposes of establishing in a proceeding in a court
15 that section 1185 applies, it is proved that a person did, or omitted
16 to do, a particular act because the person believed at a particular
17 time in good faith that certain matters were the case, then, unless
18 the contrary is proved for those purposes, it is presumed for those
19 purposes that it is reasonable to expect that a person in the
20 first-mentioned person's circumstances would so believe and
21 would do, or omit to do, as the case may be, that act because of that
22 belief.

23 **1187 No contracting out of liability for representative's conduct**

- 24 (1) For the purposes of this section, a liability of a person:
25 (a) in respect of conduct engaged in by another person as a
26 representative of the first-mentioned person; or
27 (b) arising under section 1185 because another person has
28 engaged in, proposed to engage in, or represented that the
29 other person proposed to engage in, particular conduct;
30 is a liability of the first-mentioned person in respect of the other
31 person.
- 32 (2) Subject to this section, an agreement is void in so far as it purports
33 to exclude, restrict or otherwise affect a liability of a person in
34 respect of another person, or to provide for a person to be

- 1 indemnified in respect of a liability of the person in respect of
2 another person.
- 3 (3) Subsection (2) does not apply in relation to an agreement in so far
4 as it:
- 5 (a) is a contract of insurance; or
6 (b) provides for a representative of a person to indemnify the
7 person in respect of a liability of the person in respect of the
8 representative; or
9 (c) provides for a licensee from whom a person holds a proper
10 authority to indemnify another such licensee in respect of a
11 liability of the other licensee in respect of the person.
- 12 (4) A person must not make, offer to make, or invite another person to
13 offer to make, in relation to a liability of the first-mentioned person
14 in respect of a person, an agreement that is or would be void, in
15 whole or in part, by virtue of subsection (2).

16 **1188 Effect of Division**

- 17 (1) Where 2 or more persons are liable under this Division in respect
18 of the same conduct or the same loss or damage, they are so liable
19 jointly and severally.
- 20 (2) Nothing in section 1183, 1184 or 1185:
- 21 (a) affects a liability arising otherwise than by virtue of this
22 Division; or
23 (b) notwithstanding paragraph (a) of this subsection, entitles a
24 person to be compensated twice in respect of the same loss or
25 damage; or
26 (c) makes a person guilty of an offence.

1

2 **Division 5—Excluding persons from the futures industry**

3 **1189A Power to revoke, without a hearing, licence held by natural**
4 **person**

5 ASIC may, by written order, revoke a licence held by a natural
6 person if the person:

- 7 (a) becomes an insolvent under administration; or
8 (b) is convicted of serious fraud; or
9 (c) becomes incapable, through mental or physical incapacity, of
10 managing his or her affairs; or
11 (d) asks ASIC to revoke the licence.

12 **1190 Power to revoke, without a hearing, licence held by body**
13 **corporate**

14 ASIC may, by written order, revoke a licence held by a body
15 corporate if:

- 16 (a) the body ceases to carry on business; or
17 (b) the body becomes an externally-administered body corporate;
18 or
19 (c) the body asks ASIC to revoke the licence; or
20 (d) a director, secretary or executive officer of the body
21 contravenes this Act because:
22 (i) he or she does not hold a licence; or
23 (ii) a licence he or she holds is suspended.

24 **1191 Power to revoke licence after a hearing**

25 (1) Subject to section 1200, ASIC may, by written order, revoke a
26 licence if:

- 27 (a) the application for the licence contained matter that was false
28 in a material particular or materially misleading; or
29 (b) there was an omission of material matter from the application
30 for the licence; or
31 (c) the licensee contravenes a futures law; or

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- 1 (d) the licensee contravenes a condition of the licence; or
2 (ea) the licensee is a natural person and ASIC has reason to
3 believe that he or she is not of good fame and character; or
4 (e) the licensee is a body corporate and ASIC is satisfied that the
5 educational qualifications or experience of a person who:
6 (i) is an officer of the licensee; and
7 (ii) was not an officer of the licensee when the licence was
8 granted;
9 are or is inadequate having regard to the duties that the
10 officer performs, or will perform, in connection with the
11 holding of the licence; or
12 (f) the licensee is a body corporate and ASIC is satisfied that:
13 (i) an officer of the licensee performs, or will perform, in
14 connection with the holding of the licence, duties that
15 are or include duties (in this paragraph called the
16 *different duties*) other than those having regard to
17 which ASIC was satisfied, before granting the licence,
18 that the officer's educational qualifications and
19 experience were adequate; and
20 (ii) the officer's educational qualifications or experience are
21 or is inadequate having regard to the different duties; or
22 (g) the licensee is a body corporate and:
23 (i) a licence held by a director, secretary or executive
24 officer of the body is suspended or revoked; or
25 (ii) an order is made under section 1194 against such a
26 director, secretary or executive officer; or
27 (h) ASIC has reason to believe that the licensee has not
28 performed efficiently, honestly and fairly the duties of a
29 holder of a futures brokers licence or a futures advisers
30 licence, as the case requires; or
31 (j) ASIC has reason to believe that the licensee will not perform
32 those duties efficiently, honestly and fairly.
- 33 (2) In determining whether or not it has reason to believe as mentioned
34 in paragraph (1)(ea) or (j) in relation to a licensee, ASIC is not
35 precluded from having regard to a matter that arose before the time

1 when the licence was granted unless ASIC was aware of the matter
2 at that time.

3 **1192 Power to suspend licence instead of revoking it**

4 (1) Subject to section 1200, where:

5 (a) section 1189A or 1190 empowers ASIC to revoke a licence
6 otherwise than because the licensee has asked for the
7 revocation; or

8 (b) ASIC is empowered by virtue of paragraph 1191(1)(c), (d),
9 (e), (f), (g), (h) or (j) to revoke a licence;

10 ASIC may, if it considers it desirable to do so, instead:

11 (c) by written order, suspend the licence for a specified period;
12 or

13 (d) by written order, prohibit the licensee, either permanently or
14 for a specified period, from doing specified acts, being acts
15 that section 1142 or 1143 would prohibit the licensee from
16 doing if the licensee did not hold the licence.

17 (2) ASIC may at any time, by written order, vary or revoke an order in
18 force under this section.

19 (3) For the purposes of sections 1142, 1143, 1172 and 1173 a licensee
20 is taken not to hold the licence at any time during a period for
21 which the licence is suspended.

22 (4) Where an order in force under this section prohibits the licensee as
23 mentioned in paragraph (1)(d):

24 (a) the licensee must not contravene the order; and

25 (b) in relation to the doing by a person, as a representative of the
26 licensee, of an act specified in the order, sections 1172 and
27 1173 apply, or apply during the period specified in the order,
28 as the case requires, as if the licensee did not hold the
29 licence.

30 **1192A Power to make banning order where licence revoked or**
31 **suspended**

32 Subject to section 1200, where ASIC:

- 1 (a) revokes under section 1189A; or
2 (b) revokes because of paragraph 1191(1)(a), (b), (c), (d), (h) or
3 (j); or
4 (c) revokes because of paragraph 1191(1)(ea); or
5 (d) suspends because of paragraph 1192(1)(a); or
6 (e) suspends because of paragraph 1192(1)(b);
7 a licence held by a natural person, it may also make a banning
8 order against the person.

9 **1193 Power to make banning order against unlicensed person**

10 Subject to section 1200, ASIC may make a banning order against a
11 natural person (other than a licensee) if:

- 12 (a) he or she becomes an insolvent under administration; or
13 (b) he or she is convicted of serious fraud; or
14 (c) he or she becomes incapable, through mental or physical
15 incapacity, of managing his or her affairs; or
16 (d) he or she contravenes a futures law; or
17 (e) ASIC has reason to believe that he or she is not of good fame
18 and character; or
19 (f) ASIC has reason to believe that he or she has not performed
20 efficiently, honestly and fairly the duties of:
21 (i) a representative of a futures broker; or
22 (ii) a representative of a futures adviser; or
23 (g) ASIC has reason to believe that he or she will not perform
24 efficiently, honestly and fairly the duties of:
25 (i) a representative of a futures broker; or
26 (ii) a representative of a futures adviser.

27 **1194 Nature of banning order**

- 28 (1) Where this Division empowers ASIC to make a banning order
29 against a person, ASIC may, by written order, prohibit the person:
30 (a) in any case—permanently; or

- 1 (b) except where ASIC is empowered by virtue of paragraph
2 1193(e) to make the order—for a specified period;
3 from doing an act as:
4 (c) a representative of a futures broker; or
5 (d) a representative of a futures adviser; or
6 (e) a representative of a futures broker or a futures adviser;
7 whichever the order specifies.
- 8 (2) ASIC must not vary or revoke a banning order except under
9 section 1195, 1196 or 1197.

10 **1195 Exceptions to banning order**

- 11 (1) An order made against a person under subsection 1194(1) may
12 include a provision that permits the person, subject to such
13 conditions (if any) as are specified, to do, or to do in specified
14 circumstances, specified acts that the order would otherwise
15 prohibit the person from doing.
- 16 (2) Subject to section 1200, ASIC may, at any time, by written order,
17 vary a banning order against a person:
18 (a) by adding a provision that permits the person as mentioned in
19 subsection (1); or
20 (b) by varying such a provision in relation to conditions,
21 circumstances or acts specified in the provision; or
22 (c) by omitting such a provision and substituting another such
23 provision; or
24 (d) by omitting such a provision.

25 **1196 Variation or revocation of banning order on application**

- 26 (1) Subject to sections 1197 and 1200, this section has effect where a
27 person applies to ASIC to vary or revoke a banning order relating
28 to the person.
- 29 (2) If:
30 (a) the person is not an insolvent under administration; and

- 1 (b) ASIC has no reason to believe that the person is not of good
2 fame and character; and
3 (c) ASIC has no reason to believe that the person will not
4 perform efficiently, honestly and fairly the duties of:
5 (i) a representative of a futures broker; or
6 (ii) a representative of a futures adviser;
7 ASIC must, by written order:
8 (d) if only one of subparagraphs (c)(i) and (ii) applies—vary the
9 banning order so that it no longer prohibits the person from
10 doing an act as a representative of a futures broker or of a
11 futures adviser, as the case may be; or
12 (e) in any other case—revoke the banning order.
- 13 (3) Otherwise, ASIC must refuse the application.
- 14 (4) In determining whether or not it has reason to believe as mentioned
15 in paragraph (2)(b) or (c), ASIC must have regard to any
16 conviction of the person, during the 10 years ending on the day of
17 the application, of serious fraud.
- 18 (5) Nothing in subsection (4) limits the matters to which ASIC may
19 have regard:
20 (a) in deciding on the application; or
21 (b) in connection with performing or exercising any other
22 function or power under this Part.

23 **1197 Revocation of banning order in certain cases**

24 Where:

- 25 (a) section 1196 requires ASIC to vary a banning order so that it
26 no longer has a particular operation; and
27 (b) the order has no other operation;

28 ASIC must, by written order, instead revoke the banning order.

29 **1198 Effect and publication of orders under this Division**

- 30 (1) An order by ASIC under this Division takes effect when served on
31 the person to whom the order relates.

- 1 (2) As soon as practicable on or after the day on which an order by
2 ASIC under this Division takes effect, ASIC must publish in the
3 *Gazette* a notice that sets out a copy of:
4 (a) if the order is made under section 1189A, 1190, 1191, 1192
5 or 1194 or revokes a banning order—the first-mentioned
6 order; or
7 (b) if the order varies a banning order—the banning order as in
8 force immediately after the first-mentioned order takes
9 effect;
10 and states that the first-mentioned order, or the banning order as so
11 in force, as the case may be, took effect on that day.
- 12 (3) Where:
13 (a) but for this subsection, subsection (2) would require
14 publication of a notice setting out a copy of a banning order
15 as in force at a particular time; and
16 (b) the banning order as so in force includes a provision that
17 permits a person as mentioned in subsection 1195(1); and
18 (c) in ASIC’s opinion, the notice would be unreasonably long if
19 it set out a copy of the whole of that provision;
20 the notice may, instead of setting out a copy of that provision, set
21 out a summary of the provision’s effect.

22 **1199 Contravention of banning order**

23 A person must not contravene a banning order relating to the
24 person.

25 **1199A Banned person ineligible for licence**

26 ASIC must not grant a futures brokers licence or a futures advisers
27 licence to a person if a banning order prohibits the person (except
28 as permitted by the order) from doing an act as a representative of
29 a futures broker, or of a futures adviser, as the case may be.

30 **1200 Opportunity for hearing**

- 31 (1) ASIC must not:

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- 1 (a) refuse an application for a licence on the ground, or grounds
2 including the ground, that paragraph 1144A(2)(d), (e) or (f)
3 or 1145(2)(e) or (f) does not apply in relation to the
4 applicant; or
5 (b) impose conditions on a licence; or
6 (c) vary the conditions of a licence; or
7 (d) revoke or suspend a licence otherwise than by virtue of
8 section 1189A or 1190 or paragraph 1192(1)(a); or
9 (e) make, otherwise than by virtue of paragraph 1192A(a) or (d)
10 or 1193(a), (b) or (c), an order under section 1194 against a
11 person; or
12 (f) make under subsection 1195(2) an order varying a banning
13 order against a person; or
14 (g) refuse an application by a person under section 1196;
15 unless ASIC complies with subsection (2) of this section.
- 16 (2) ASIC must give the applicant, licensee or person, as the case may
17 be, an opportunity:
18 (a) to appear at a hearing before ASIC that takes place in private;
19 and
20 (b) to make submissions and give evidence to ASIC in relation to
21 the matter.

22 **1201 Disqualification by the Court**

- 23 (1) Where ASIC:
24 (a) revokes under section 1189A, 1190 or 1191 a licence held by
25 a person; or
26 (b) makes under section 1194 against a person an order that is to
27 operate otherwise than only for a specified period;
28 ASIC may apply to the Court for an order or orders under this
29 section in relation to the person.
- 30 (2) On an application under subsection (1), the Court may make one or
31 more of the following:
32 (a) an order disqualifying the person, permanently or for a
33 specified period, from holding:

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- 1 (i) a futures brokers licence;
2 (ii) a futures advisers licence; or
3 (iii) a futures brokers licence or a futures advisers licence;
4 whichever the order specifies;
5 (b) an order prohibiting the person, permanently or for a
6 specified period, from doing an act as:
7 (i) a representative of a futures broker;
8 (ii) a representative of a futures adviser; or
9 (iii) a representative of a futures broker or of a futures
10 adviser;
11 whichever the order specifies;
12 (c) such other order as it thinks fit;
13 or may refuse the application.
14 (3) The Court may revoke or vary an order in force under
15 subsection (2).

16 **1202 Effect of orders under section 1201**

- 17 (1) ASIC must not grant a futures brokers licence or a futures advisers
18 licence to a person whom an order in force under section 1201
19 disqualifies from holding a futures brokers licence or a futures
20 advisers licence, as the case may be.
21 (2) A person must not contravene an order that:
22 (a) is of a kind referred to in paragraph 1201 (2) (b); and
23 (b) is in force under section 1201; and
24 (c) relates to the person.

1
2 **Part 8.4—Conduct of futures business**
3

4 **1204 Certain representations prohibited**

- 5 (1) A person who is the holder of a licence must not represent or
6 imply, or knowingly permit to be represented or implied, in any
7 manner to a person that the abilities or qualifications of the holder
8 of the licence have in any respect been approved by ASIC.
- 9 (2) A statement that a person is the holder of a licence is not a
10 contravention of this section.

11 **1205 Undesirable advertising**

- 12 (1) In this section:

13 ***broadcast***, in relation to a statement, means broadcast the
14 statement by wireless transmission or television or cause it to be so
15 broadcast.

16 ***publish***, in relation to a statement, means:

- 17 (a) insert the statement in a newspaper or periodical or cause it
18 to be so inserted; or
19 (b) publicly exhibit the statement or cause it to be publicly
20 exhibited; or
21 (c) include the statement, or cause it to be included, in a
22 document that, whether or not in response to a request, is sent
23 or delivered to a person, or thrown or left upon premises in
24 the occupation of a person.

- 25 (2) Where ASIC considers that, having regard to conduct that a person
26 has engaged in, is engaging in, or proposes to engage in, it is in the
27 public interest to do so, it may, by written order given to the
28 person, prohibit the person from publishing or broadcasting
29 statements about:
30 (a) futures contracts; or

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- 1 (b) businesses carried on, or proposed to be carried on, by
2 persons and involving dealing in futures contracts on behalf
3 of other persons; or
4 (c) futures advice businesses or proposed futures advice
5 businesses;
6 unless the form and content of the statements have first been
7 approved by ASIC.
- 8 (3) An order under subsection (2) must not be made unless ASIC has
9 first given the person in relation to whom it proposes to make the
10 order an opportunity to appear at a hearing before ASIC (being a
11 hearing that takes place in private) and make submissions and give
12 evidence to ASIC in relation to the matter.
- 13 (4) A person the subject of an order under subsection (2) must comply
14 with the order.
- 15 (5) For the purposes of this section, where a statement is published or
16 broadcast and there is also published or broadcast in relation to the
17 statement:
18 (a) the name or address of a person; or
19 (b) the telephone or telex number of a person; or
20 (c) the post office or other delivery box number of a person;
21 it is presumed, unless the contrary is proved, that the statement was
22 published or broadcast by that person.

23 **1205A Application of sections 1206 and 1207: exempt brokers**

24 Neither of sections 1206 and 1207 applies in relation to an exempt
25 broker, except in so far as the exempt broker carries on a futures
26 broking business as a personal representative of a dead futures
27 broker.

28 **1206 Issue of contract notes**

- 29 (1) A futures broker must, in respect of a transaction, being the
30 acquisition or disposal of a futures contract, that is entered into by
31 the broker on behalf of another person, give as soon as practicable:

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- 1 (a) in a case where the transaction is not an operation by the
2 broker on a discretionary account—to that other person; or
3 (b) in a case where the transaction is an operation by the broker
4 on a discretionary account—to the person, or to each person,
5 as the case requires, who gave instructions to the broker
6 authorising the broker to operate on the discretionary
7 account, other than a person who agrees in the prescribed
8 manner to waive the operation of this paragraph;
9 a contract note that complies with subsection (3), (4) or (5), as the
10 case requires.
- 11 (2) Subsection (1) does not require a futures broker to give a contract
12 note to a person in respect of a transaction if the person was at the
13 time of the transaction the holder of a futures brokers licence.
- 14 (3) A contract note given by a futures broker under subsection (1) in
15 respect of a transaction, being the acquisition or disposal of a
16 futures contract (other than a futures option or an eligible
17 exchange-traded option), must include:
- 18 (a) the name or style under which the broker carries on business
19 as a futures broker and the address of the principal place at
20 which the broker so carries on business; and
21 (b) the name of the person to whom the broker gives the contract
22 note; and
23 (c) the day on which the transaction took place; and
24 (d) a description of the futures contract sufficient to identify the
25 nature of the transaction, including:
- 26 (i) in a case where the futures contract is a commodity
27 agreement—a description of the commodity and a
28 statement of the contract price; and
29 (ii) in a case where the futures contract is an adjustment
30 agreement:
- 31 (A) a description of the class of adjustment
32 agreements in which the futures contract is
33 included; and
34 (B) a statement of the contract price; and
35 (C) if the transaction is the completion of the
36 futures contract—the value or worth (as

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- 1 determined in accordance with the futures
2 contract) of the futures contract at the time of
3 that completion; and
- 4 (iii) in a case where the transaction is a liquidating trade—
5 details of the liquidating trade and of the futures
6 contract that is intended to be closed out following the
7 entering into of the liquidating trade; and
- 8 (e) the deposit paid or payable in respect of the transaction; and
- 9 (f) the month and year for the performance or settlement of the
10 contract; and
- 11 (g) in a case where the transaction took place on a futures market
12 of a futures exchange or of a recognised futures exchange, or
13 on an exempt futures market—a name or abbreviation by
14 which the futures exchange, recognised futures exchange or
15 exempt futures market, as the case may be, is generally
16 known; and
- 17 (h) a statement of the amount of commission charged or the rate
18 (if any) at which ASIC was charged; and
- 19 (j) a statement of the amounts (if any) of all stamp duties and
20 other duties and taxes payable in connection with the
21 transaction.
- 22 (4) A contract note given by a futures broker under subsection (1) in
23 respect of a transaction, being the acquisition or disposal of a
24 futures option, must include:
- 25 (a) the matters specified in paragraphs (3)(a), (b), (c), (g), (h)
26 and (j); and
- 27 (b) a description of the class of futures contracts in which is
28 included the futures contract to which the futures option
29 relates; and
- 30 (c) the month and year for performance or settlement of the
31 futures contract to which the futures option relates; and
- 32 (d) the date by which the purchaser of the futures option, in order
33 to exercise the futures option, must declare an intention to
34 exercise the futures option; and
- 35 (e) a statement of the amount of the premium; and

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- 1 (f) details of the price at which the purchaser of the futures
2 option has, by virtue of the futures option, an option or
3 Chapter 8 right to assume a bought position, or sold position,
4 as the case requires, in relation to the futures contract to
5 which the futures option relates.
- 6 (5) A contract note given by a futures broker under subsection (1) in
7 respect of a transaction, being the acquisition or disposal of an
8 eligible exchange-traded option (in this subsection called the
9 **option**), must include:
- 10 (a) the matters specified in paragraphs (3)(a), (b), (c), (g), (h)
11 and (j); and
- 12 (b) a description of the commodity or index to which the option
13 relates; and
- 14 (c) the date by which the purchaser of the option, in order to
15 exercise the option, must declare an intention to exercise the
16 option; and
- 17 (d) a statement of the amount of the premium; and
- 18 (e) details of:
- 19 (i) in a case where the option relates to a commodity—the
20 price at which the purchaser of the option has, by virtue
21 of the option, an option or right to purchase, or sell, as
22 the case requires, that commodity; or
- 23 (ii) in a case where the purchaser of the option has, by
24 virtue of the option, an option or right to be paid an
25 amount of money to be determined by reference to the
26 amount by which a specified number is greater or less
27 than the number of a specified index—the specified
28 number and the manner in which that amount of money
29 is to be determined.
- 30 (6) A futures broker must not include in a contract note given under
31 subsection (1), as the name of a person with or on behalf of whom
32 the broker has entered into the transaction, a name that the broker
33 knows, or could reasonably be expected to know, is not a name by
34 which that person is ordinarily known.
- 35 (7) For the purposes of this section, a futures contract is included in
36 the same class of futures contracts as another futures contract if,

1 and only if, the first-mentioned futures contract is of the same kind
2 as the other futures contract.

3 **1207 Futures broker to give monthly statement to client**

4 (1) Where:

- 5 (a) a futures broker has, at any time during a particular month,
6 held money or property on account of a client; or
7 (b) a futures broker has, before or during a particular month,
8 acquired a futures contract on behalf of a client, and, as at the
9 end of that month, the futures contract has not been disposed
10 of;

11 the broker must, within 7 days after the end of that month, send to
12 the client a written statement setting out:

- 13 (c) the name or style under which the broker carries on business
14 as a futures broker and the address of the principal place at
15 which the broker so carries on business; and
16 (d) the opening cash balance for that month in the client's
17 account; and
18 (e) all deposits, credits, withdrawals and debits affecting the
19 account during that month; and
20 (f) the cash balance in the account at the end of that month; and
21 (g) in relation to each futures contract that the broker has, before
22 or during that month, acquired on behalf of the client and
23 that, as at the end of that month, has not been disposed of,
24 particulars of the futures contract, including the particulars
25 required by virtue of paragraph 1206(3)(d), or paragraphs
26 1206(4)(b), (e) and (f) or (5)(b), (d) and (e), as the case
27 requires, to be included in a contract note relating to the
28 acquisition of the futures contract; and
29 (h) details of each outstanding call for a deposit or margin in
30 respect of a futures contract that the broker has acquired on
31 behalf of the client.

32 (2) Where a futures broker has, during a particular month, authority to
33 operate on a discretionary account, the broker must, within 7 days
34 after the end of that month, send to the person, or to each person,
35 as the case requires, who gave instructions to the broker

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1 authorising the broker to operate on the discretionary account a
2 written statement setting out:

- 3 (a) the name or style under which the broker carries on business
4 as a futures broker and the address of the principal place at
5 which the broker so carries on business; and
6 (b) the opening cash balance for that month in the account (in
7 this subsection called the *account*) maintained by the broker
8 in respect of the discretionary account; and
9 (c) all deposits, credits, withdrawals and debits affecting the
10 account during that month; and
11 (d) the cash balance in the account at the end of that month; and
12 (e) in relation to each futures contract:
13 (i) that the broker has acquired before or during that
14 month; and
15 (ii) the acquisition of which was an operation by the broker
16 on the discretionary account; and
17 (iii) that, as at the end of that month, has not been disposed
18 of;
19 particulars of the futures contract, including the particulars
20 required by virtue of paragraph 1206(3)(d), or paragraphs
21 1206(4)(b), (e) and (f) or (5)(b), (d) and (e), as the case
22 requires, to be included in a contract note relating to the
23 acquisition of the futures contract; and
24 (f) details of each outstanding call for a deposit or margin in
25 respect of a futures contract that the broker has acquired on
26 behalf of the client and the acquisition of which was an
27 operation by the broker on the discretionary account.

28 **1208 Dealings by futures broker on own account**

- 29 (1) A futures broker must maintain separately from other records such
30 records as correctly record and explain dealings in futures contracts
31 by the broker on the broker's own account including, but not
32 limited to, records specifying:
33 (a) a description of each of those dealings together with the date
34 on which and the time at which:

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- 1 (i) the instructions (if any) for each of those dealings were
2 received by the futures broker; and
3 (ii) the instructions (if any) for each of those dealings were
4 transmitted to the futures market on which the dealing
5 was effected; and
6 (iii) the dealing was effected; and
7 (b) the source of the funds used for effecting those dealings.
- 8 (2) A futures broker is taken not to have maintained records in
9 compliance with subsection (1) unless the entries in the records are
10 made in writing in the English language or are made in such a
11 manner as will enable them to be readily accessible and to be
12 readily converted into writing in the English language.
- 13 (3) A futures broker must not knowingly take the other side of an order
14 of a client of the broker in relation to a futures contract unless:
15 (a) the client has consented to the broker taking the other side of
16 the order in relation to that futures contract; or
17 (b) in dealing in that futures contract on behalf of the client, the
18 broker is taken, for the purposes of this Act, to be dealing in
19 that futures contract on the broker's own account.
- 20 (4) For the purposes of subsection (3), a futures broker takes the other
21 side of an order of a client of the broker in relation to a futures
22 contract where the broker:
23 (a) when dealing on the broker's own account, assumes a bought
24 position or sold position in relation to the contract; and
25 (b) when dealing on the instructions of the client, assumes the
26 opposite sold position or bought position in relation to the
27 contract.

28 **1209 Segregation of client money and property**

- 29 (1) In this section:
30 *client*, in relation to a futures broker, means a person on behalf of
31 whom the broker deals, or from whom the broker accepts
32 instructions to deal, in futures contracts, but does not include:
33 (a) the broker; or

- 1 (b) if the broker is a body corporate—a director, or an officer, of
2 the broker; or
3 (c) an employee of the broker; or
4 (d) if the broker is a body corporate—a body corporate that is
5 related to the broker; or
6 (e) a person who is associated with, or who is a partner of, the
7 broker; or
8 (f) a body corporate in which the broker has, or the broker and
9 partners of the broker together have, a controlling interest.

10 **credit facility** means a document evidencing the right of a person
11 to obtain money on credit from another person, and, without
12 limiting the generality of the foregoing, includes a letter of credit
13 and a bank guarantee.

14 **property** includes credit facilities and securities.

15 **relevant credit balance**, in relation to a client of a futures broker,
16 means the total of:

- 17 (a) the amounts deposited by the broker in respect of the client in
18 a clients' segregated account, or clients' segregated accounts,
19 of the broker, less so much of those amounts as has been
20 withdrawn from the account or accounts; and
21 (b) the values of the items of property that:
22 (i) have, in respect of the client, been deposited by the
23 broker in safe custody pursuant to subsection (3); and
24 (ii) have not been withdrawn from safe custody; and
25 (iii) under the terms and conditions on which they were
26 deposited with, or received by, the broker, are available
27 to meet, or to provide security in connection with the
28 meeting of, relevant liabilities of the client.

29 **relevant liabilities**, in relation to a client of a futures broker, means
30 debts and liabilities of the client arising out of dealings in futures
31 contracts effected by the broker on behalf of the client.

32 **settling**, in relation to a dealing in a futures contract, includes
33 making delivery, or taking delivery, of a commodity to which the
34 futures contract relates.

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- 1 (2) For the purposes of the definition of *relevant credit balance* in
2 subsection (1), the value of an item of property at a particular time
3 is:
4 (a) in the case of a credit facility—the amount of money that the
5 person entitled to the right evidenced by the credit facility
6 can, at that time or within a reasonable period after that time,
7 obtain by virtue of that right; or
8 (b) in any other case—the market value of the property as at the
9 end of the last business day before that time.
- 10 (3) Where, in connection with:
11 (a) dealings in futures contracts effected, whether in this
12 jurisdiction or elsewhere or proposed to be effected, by a
13 futures broker on behalf of a client of the broker; or
14 (b) instructions by a client of a futures broker to deal in futures
15 contracts, whether in this jurisdiction or elsewhere;
16 money or property (other than property to which section 1214
17 applies) is deposited with the broker by the client, or is received by
18 the broker for, or on behalf of, the client, the broker must:
19 (c) in the case of money—deposit the money in a clients'
20 segregated account of the broker maintained in this
21 jurisdiction or in the place where the money was deposited
22 with, or received by, the broker; or
23 (d) in the case of property—deposit the property in safe custody,
24 in this jurisdiction or in the place where the property was
25 deposited with, or received by, the broker, in such a manner
26 that the property is segregated from property other than
27 property deposited by the broker in safe custody pursuant to
28 this subsection;
29 on or before the next day after the money or property is deposited
30 with, or received by, the broker that is a day on which the money
31 or property can be deposited as first mentioned in paragraph (c) or
32 (d).
- 33 (4) Without limiting the generality of subsection (3), where, in
34 connection with dealings in futures contracts effected, whether in
35 this jurisdiction or elsewhere, by a futures broker, the broker
36 receives from a person an amount of money some or all of which is

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1 attributable to dealings in futures contracts so effected on behalf of
2 clients of the broker, the broker must, on the next day on which the
3 amount can be so deposited, deposit the amount in a clients'
4 segregated account of the broker maintained in this jurisdiction or
5 in the place where the broker receives the amount.

6 (4A) A clients' segregated account of a futures broker must be
7 designated as a clients' segregated account, unless it is maintained
8 outside this jurisdiction and the law in force in the place where it is
9 maintained requires it to be designated in some other way.

10 (4B) If:

11 (a) a clients' segregated account of a futures broker is required
12 by subsection (4A) to be designated as a clients' segregated
13 account; and

14 (b) the account is designated in a way that complies
15 substantially, but not completely, with that requirement;
16 subsection (4A) is taken to be complied with in relation to the
17 account.

18 (5) Where, pursuant to this section, a futures broker deposits money in
19 respect of a client in a clients' segregated account of the broker, the
20 broker must not withdraw any of the money except for the purpose
21 of:

22 (a) making a payment to, or in accordance with the written
23 direction of, a person entitled to the money; or

24 (b) making a payment for, or in connection with, the entering
25 into, margining, guaranteeing, securing, transferring,
26 adjusting or settling of dealings in futures contracts effected
27 by the broker on behalf of clients only; or

28 (c) defraying brokerage and other proper charges incurred in
29 respect of dealings in futures contracts effected by the broker
30 on behalf of the client; or

31 (d) investing it:

32 (i) in any manner in which trustees are for the time being
33 authorised by law to invest trust funds; or

34 (ii) on deposit with an eligible money market dealer; or

35 (iii) on deposit at interest with:

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- 1 (A) an Australian ADI; or
2 (B) an approved foreign bank in relation to the
3 broker; or
4 (iv) on deposit with a clearing house for a futures exchange;
5 or
6 (v) in the purchase of cash management trust interests; or
7 (e) paying to the broker the amount of a fee that the broker may
8 charge, or an amount to which the broker is entitled, under an
9 agreement with the client made under subsection (7); or
10 (f) making a payment that is otherwise authorised by law;
11 or as permitted by subsection (10).
- 12 (5A) If, under subsection (5), a broker (the *paying broker*) withdraws
13 money from a clients' segregated account and pays it to another
14 broker (the *receiving broker*):
15 (a) the paying broker must ensure that the receiving broker is
16 notified, at the same time as the payment is made or as close
17 to that time as is practicable, of the fact that the money has
18 been withdrawn from a clients' segregated account of the
19 paying broker and should be paid into a clients' segregated
20 account of the receiving broker; and
21 (b) on or before the next day after the receiving broker receives
22 the payment, the receiving broker must pay the money into a
23 clients' segregated account of the receiving broker.
- 24 (5B) A notification under paragraph (5A)(a) may be in writing or in an
25 electronic or other form and may convey its message by express
26 words, or by a code or some other means understood by the
27 brokers concerned.
- 28 (6) A futures broker must not deal with property deposited by the
29 broker in safe custody under subsection (3) except:
30 (a) in accordance with the terms and conditions on which it was
31 deposited with, or received by, the broker; or
32 (b) for the purpose of meeting obligations incurred by the broker
33 in connection with margining, guaranteeing, securing,
34 transferring, adjusting or settling dealings in futures contracts
35 effected by the broker on behalf of clients only.

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- 1 (7) A futures broker who invests as mentioned in paragraph (5)(d)
2 money that was, in respect of a client of the broker, deposited by
3 the broker under subsection (3):
4 (a) may charge such fee (if any) for so investing the money; and
5 (b) is entitled to so much (if any) of the return on the money so
6 invested;
7 as the broker and the client agree in writing.
- 8 (8) A futures broker must not invest an amount pursuant to
9 paragraph (5)(d) by depositing it with a person for that person to
10 invest unless:
11 (a) the broker:
12 (i) has informed the person that the amount has been
13 withdrawn from a clients' segregated account of the
14 broker and is money to which clients of the broker are
15 entitled; and
16 (ii) has obtained from the person a written statement that is
17 signed by the person, sets out the amount and
18 acknowledges that the broker has informed the person
19 as mentioned in subparagraph (i); or
20 (b) the investment is made by the broker paying the amount into
21 an account maintained with the person in relation to which
22 the following conditions are satisfied:
23 (i) the account is maintained for the sole purpose of having
24 amounts invested in it pursuant to paragraph (5)(d);
25 (ii) the broker has informed the person that amounts paid
26 into the account will be amounts withdrawn from a
27 clients' segregated account of the broker and will be
28 moneys to which clients of the broker are entitled;
29 (iii) the broker has obtained from the person a written
30 statement signed by the person that acknowledges that
31 the broker has informed the person as mentioned in
32 subparagraph (ii).
- 33 (9) Where, at a particular time, the total amount of the relevant
34 liabilities of a client of a futures broker exceeds the relevant credit
35 balance of the client, the broker may, in respect of the client,
36 deposit in a clients' segregated account of the broker an amount of

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1 money not greater than the amount of the excess, and, if the broker
2 does so, the amount so deposited is, subject to subsection (10),
3 taken to be money to which the client is entitled.

4 (10) Where:

5 (a) a futures broker has, in respect of a client of the broker,
6 deposited an amount pursuant to subsection (9) in a clients'
7 segregated account of the broker; and

8 (b) the relevant credit balance of the client exceeds by a
9 particular amount the total amount of the relevant liabilities
10 of the client;

11 the broker may withdraw from the account so much of the amount
12 referred to in paragraph (a) as does not exceed the amount first
13 referred to in paragraph (b).

14 (11) A futures broker must keep in relation to the clients' segregated
15 account, or clients' segregated accounts, of the broker financial
16 records that:

17 (a) are separate from any other financial records of the broker;
18 and

19 (b) record separately in respect of each client of the broker
20 particulars of the amounts deposited in, and the amounts
21 withdrawn from, the account or accounts in respect of the
22 client; and

23 (c) record, separately from the particulars referred to in
24 paragraph (b):

25 (i) particulars (including particulars of withdrawals) of so
26 much of the amounts deposited as required by
27 subsection (4) in the account or accounts as was not
28 attributable to dealings in futures contracts effected by
29 the broker on behalf of clients of the broker; and

30 (ii) particulars of all amounts deposited in the account or
31 accounts pursuant to subsection (9); and

32 (iii) particulars of all amounts withdrawn from the account
33 or accounts pursuant to subsection (10).

34 (12) A futures broker must keep records that:

Section 1209

- 1 (a) relate to deposits of property in safe custody by the broker
2 pursuant to subsection (3); and
3 (b) record separately in respect of each client of the broker
4 particulars of the property deposited in respect of the client.
- 5 (13) Section 1213 applies, so far as it is capable of application, in
6 relation to financial records, and other records, that are required by
7 subsections (11) and (12), respectively, of this section to be kept by
8 a futures broker, and so applies as if those accounting records and
9 other records were financial records required by that section to be
10 kept by the broker.
- 11 (14) Subject to subsections (15) and (16), none of the following:
12 (a) money deposited by a futures broker pursuant to this section
13 in a clients' segregated account of the broker;
14 (b) property in which money deposited by a futures broker as
15 mentioned in paragraph (a) of this subsection has been
16 invested pursuant to paragraph (5)(d);
17 (c) property deposited by a futures broker in safe custody
18 pursuant to subsection (3);
19 is available for the payment of a debt or liability of the broker or is
20 liable to be attached, or taken in execution, under the order or
21 process of a court at the instance of a person suing in respect of
22 such a debt or liability.
- 23 (15) Nothing in subsection (14) affects the right of a client of a futures
24 broker to recover money or property to which the client is entitled.
- 25 (16) Where a futures broker is entitled to withdraw money from a
26 clients' segregated account of the broker for the purpose of making
27 a payment to the broker, subsection (14) does not apply in relation
28 to that money.
- 29 (17) Where a futures broker invests money pursuant to paragraph (5)(d)
30 by depositing it with a person for the person to invest, neither that
31 money, nor any property in which the person invests any of that
32 money, is available for the payment of a debt or liability of the
33 person or is liable to be attached, or taken in execution, under the
34 order or process of a court at the instance of a person suing in
35 respect of such a debt or liability.

Section 1210

- 1 (18) Nothing in this section affects a claim or lien that a futures broker
2 has, under an agreement, under an Australian law or otherwise,
3 against or on:
4 (a) money deposited by the broker pursuant to this section in a
5 clients' segregated account of the broker; or
6 (b) property in which such money has been invested pursuant to
7 paragraph (5)(d); or
8 (c) property deposited by the broker in safe custody pursuant to
9 subsection (3).
- 10 (19) A futures broker must not pay an amount into a client's segregated
11 account of the broker except as required or authorised by this
12 section or the regulations.

13 **1210 Futures broker to give certain information to prospective**
14 **clients**

- 15 A futures broker must, before accepting a person as a client of the
16 broker, give to the person:
17 (a) a document that:
18 (i) explains the nature of futures contracts; and
19 (ii) explains the nature of the obligations assumed by a
20 person who instructs a futures broker to enter into a
21 futures contract; and
22 (iii) sets out a risk disclosure statement in the prescribed
23 form; and
24 (iv) sets out the specifications, and details of the essential
25 terms, of each kind of futures contract in which the
26 broker deals on behalf of clients; and
27 (b) a copy of each agreement into which the broker proposes, if
28 the broker agrees to accept instructions from the person in
29 relation to dealings in futures contracts, to require the person
30 to enter.

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Part 8.5—Financial statements and audit

3

4

1211 Interpretation

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In this Part, unless the contrary intention appears, a reference to a book, futures contract or business of or in relation to a futures broker who carries on business in partnership is a reference to such a book, futures contract or business of or in relation to the partnership.

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1212 Application of Part

11

(1) This Part applies in relation to a futures broker in relation to his, her or its business of dealing in futures contracts, whether carried on in this jurisdiction or elsewhere.

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(2) This Part does not affect the operation of Chapter 2M in relation to a company that holds a futures brokers licence or in relation to a business of dealing in futures contracts that such a company carries on.

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1213 Accounts to be kept by futures brokers

19

(1) A futures broker must:

20

(a) keep such financial records as correctly record and explain the transactions and financial position of the business of dealing in futures contracts carried on by the broker; and

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22

23

(b) keep financial records in such a manner as will enable true and fair profit and loss statements and balance sheets to be prepared from time to time; and

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25

26

(c) keep financial records in such a manner as will enable profit and loss statements and balance sheets of the business of dealing in futures contracts carried on by the broker to be conveniently and properly audited.

27

28

29

- 1 (2) Without limiting the generality of subsection (1), a futures broker
2 is taken not to have complied with that subsection in relation to
3 records if those records:
- 4 (a) are not kept in writing in the English language or in such a
5 manner as will enable them to be readily accessible and
6 readily converted into writing in the English language; or
7 (b) are not kept in sufficient detail to show particulars of:
- 8 (i) all money received or paid by the broker, including
9 money paid to, or disbursed from, an account of the
10 kind referred to in paragraph 1209(3)(c); and
11 (ii) all dealings in futures contracts made by the broker, the
12 charges and credits arising from them, and the name of
13 the person on whose behalf each dealing was effected;
14 and
15 (iii) all income received from commissions, interest and
16 other sources, and all expenses, commissions and
17 interest paid, by the broker; and
18 (iv) all the assets and liabilities (including contingent
19 liabilities) of the broker; and
20 (v) all futures contracts to which the broker has become a
21 party as a result of trading on the broker's own account;
22 and
23 (vi) all futures contracts dealt with by the broker pursuant to
24 instructions given by another person, showing who gave
25 the instructions; and
26 (vii) all property that is property of the broker and in respect
27 of which the business rules of a futures exchange
28 authorise the making of a futures contract in the futures
29 market of the futures exchange, showing by whom the
30 property is held and, if held by some other person,
31 whether or not the property is so held as security against
32 loans or advances; and
33 (viii) all such property that is not property of the broker and
34 for which the broker or any nominee controlled by the
35 broker is accountable, showing by whom, and for
36 whom, the property is held and the extent to which the
37 property is either held for safe custody or deposited with

Section 1213

- 1 a third party as security for loans or advances made to
2 the broker; or
- 3 (c) are not kept in sufficient detail to show separately particulars
4 of every transaction by the broker; or
- 5 (d) do not specify the day on which or the period during which
6 each transaction by the broker took place; or
- 7 (e) do not contain copies of acknowledgments of the receipts of
8 property received by the broker from clients.
- 9 (3) Without affecting the operation of subsections (1) and (2), a futures
10 broker is taken not to have complied with subsection (1) in relation
11 to records if, in respect of a discretionary account on which the
12 broker operates, those records are not kept in sufficient detail to
13 show the particulars that the broker is required to give to clients in
14 order to comply with subsection 1207(2).
- 15 (4) Without affecting the operation of subsection (2) or (3), a futures
16 broker must keep records in sufficient detail to show separately
17 particulars of all transactions by the broker:
- 18 (a) with, on behalf of, or on the account of, clients of the broker,
19 excluding, in a case where the broker carries on business in
20 partnership, the partners in the firm; and
- 21 (b) in a case where the broker carries on business in
22 partnership—on the broker's own account or with, on behalf
23 of, or on the account of, the partners in the firm; and
- 24 (c) in a case where the broker does not carry on business in
25 partnership—on the broker's own account; and
- 26 (d) with, on behalf of, or on the account of, other futures brokers;
27 and
- 28 (e) with, on behalf of, or on the account of, representatives of the
29 broker; and
- 30 (f) with, on behalf of, or on the account of, employees of the
31 broker.
- 32 (5) An entry in the financial and other records of a futures broker
33 required to be kept in accordance with this section, and any matter
34 recorded by a futures exchange in relation to a member pursuant to

Section 1214

- 1 subsection 1270(3) is taken to have been made by, or with the
2 authority of, the broker or member.
- 3 (6) Where a record required by this section to be kept is not kept in
4 writing in the English language, the futures broker must, if required
5 to convert the record into writing in the English language by a
6 person who is entitled to examine the record, comply with the
7 requirement within a reasonable time.
- 8 (7) Notwithstanding any other provision of this section, a futures
9 broker is not taken to have failed to keep a record referred to in
10 subsection (1) by reason only that the record is kept as a part of, or
11 in conjunction with, the records relating to any business other than
12 dealing in futures contracts that is carried on by the broker.
- 13 (8) If financial records or other records are kept by a futures broker at
14 a place outside this jurisdiction, the broker must cause to be sent to
15 and kept at a place in this jurisdiction such particulars with respect
16 to the business dealt with in those records as will enable true and
17 fair profit and loss statements and balance-sheets to be prepared.
- 18 (9) If any financial records of a futures broker are kept at a place
19 outside this jurisdiction, the broker must, if required by ASIC to
20 produce those records at a place in this jurisdiction, comply with
21 the requirement not later than 28 days after the requirement is
22 made.

23 **1214 Property in custody of futures broker**

- 24 (1) Where a futures broker receives for safe custody property:
25 (a) that is the property of another person (in this section called
26 the *client*); and
27 (b) that is, or is to be, delivered in accordance with a futures
28 contract; and
29 (c) for which the broker or a nominee of the broker is
30 accountable;
31 the broker must forthwith:
32 (d) if the client requests that the property be deposited in safe
33 custody with the broker's bankers—cause it to be so

Section 1214

- 1 deposited or notify the client of any failure to comply with
2 the request, whether or not caused by a refusal by the bankers
3 to comply with the request; or
4 (e) if the client does not make, or the bankers refuse to comply
5 with, such a request and the business rules of the futures
6 exchange that maintained or provided the futures market on
7 which the contract was made enable the property to be
8 deposited in safe custody—cause the property to be so
9 deposited in accordance with those rules.
- 10 (2) A futures broker must not deposit as security for a loan or advance
11 made to the broker property of a kind referred to in subsection (1)
12 unless an amount is owed to the broker by the client in connection
13 with a transaction entered into on the instructions of the client and
14 the broker:
- 15 (a) gives a written notice to the client identifying the property
16 and stating that the broker intends to deposit the property as
17 security for a loan or advance to the broker; and
18 (b) deposits the property as security for a loan or advance to the
19 broker, being a loan or advance of an amount that does not
20 exceed the amount owed to the broker by the client on the
21 day of the receipt by the broker of the property.
- 22 (3) Where:
- 23 (a) a futures broker has given a notice to a person as mentioned
24 in subsection (2) and has deposited the property referred to in
25 the notice as security for a loan or advance; and
26 (b) the person:
27 (i) has paid to the broker the amount owed by the person to
28 the broker at the time the property was so deposited; and
29 (ii) requests the broker to withdraw the property from
30 deposit;
- 31 the broker must, as soon as practicable after the request, withdraw
32 the property from deposit, but nothing in this subsection prevents
33 the broker from redepositing the property, as permitted by
34 subsection (2), as a security for a loan or advance.

Section 1215

- 1 (4) Where a futures broker deposits as security for a loan or advance
2 made to the broker property of a kind referred to in subsection (1),
3 the broker must, at the end of the period of 3 months after the day
4 on which the property is deposited, and at the end of each
5 subsequent period of 3 months if the property is still on deposit,
6 send to the person whose property it is written notice to that effect.

7 **1215 Appointment of auditor by futures broker**

- 8 (1) Within 1 month after becoming the holder of a futures brokers
9 licence, a futures broker (other than an Australian ADI) must
10 appoint a person or persons, a firm or firms, or a person or persons
11 and a firm or firms, as auditor or auditors to audit the broker's
12 financial statements.
- 13 (2) Subject to this section, a person must not:
- 14 (a) consent to be appointed as auditor of a futures broker; or
15 (b) act as auditor of a futures broker; or
16 (c) prepare a report required by this Act to be prepared by an
17 auditor of a futures broker;
- 18 if:
- 19 (d) the person is not a registered company auditor; or
20 (e) the person, or a body corporate in which the person has a
21 substantial holding, is indebted in an amount exceeding
22 \$5,000 to the futures broker or, if the futures broker is a body
23 corporate, to a body corporate related to the futures broker;
24 or
25 (f) the person is a partner or employee of the futures broker; or
26 (g) in a case where the futures broker is a body corporate—the
27 person is:
- 28 (i) an officer of the body; or
29 (ii) a partner, employer or employee of an officer of the
30 body; or
31 (iii) a partner or employee of an employee of an officer of
32 the body.
- 33 (3) Subject to this section, a firm must not:
- 34 (a) consent to be appointed as an auditor of a futures broker; or

Section 1215

- 1 (b) act as auditor of a futures broker; or
2 (c) prepare a report required by this Act to be prepared by an
3 auditor of a futures broker;
4 unless:
5 (d) at least one member of the firm is a registered company
6 auditor who is ordinarily resident in Australia; and
7 (e) where the business name under which the firm is carrying on
8 business is not registered under a law of a State or Territory
9 relating to the registration of business names—there has been
10 lodged a return in the prescribed form showing, in relation to
11 each member of the firm, the member's full name and
12 address as at the time when the firm so consents, acts or
13 prepares a report; and
14 (f) no member of the firm, and no body corporate in which any
15 member of the firm has a substantial holding, is indebted in
16 an amount not exceeding \$5,000 to the futures broker or, if
17 the futures broker is a body corporate, to a body corporate
18 that is related to the futures broker; and
19 (ga) no member of the firm is a partner or employee of the futures
20 broker; and
21 (g) in a case where the futures broker is a body corporate—no
22 member of the firm is:
23 (i) an officer of the body; or
24 (ii) a partner, employer or employee of an officer of the
25 body; or
26 (iii) a partner or employee of an employee of an officer of
27 the body; and
28 (h) in a case where the futures broker is a body corporate—no
29 officer of the body receives any remuneration from the firm
30 for acting as a consultant to it on accounting or auditing
31 matters.
- 32 (4) For the purposes of paragraphs (2)(e) and (3)(f), disregard a debt
33 owed by a natural person to a body corporate if:
34 (a) the body corporate is:
35 (i) an Australian ADI; or

Section 1215

- 1 (ii) a body corporate registered under the *Life Insurance Act*
2 *1995*; and
- 3 (b) the debt arose because of a loan that the body corporate or
4 entity made to the person in the ordinary course of its
5 ordinary business; and
- 6 (c) the person used the amount of the loan to pay the whole or
7 part of the purchase price of premises that the person uses as
8 their principal place of residence.
- 9 (5) For the purposes of subsections (2) and (3), a person is taken to be
10 an officer of a body corporate if:
- 11 (a) the person is an officer of a related body corporate; or
12 (b) except where ASIC, if it thinks fit in the circumstances of the
13 case, directs that this paragraph not apply in relation to the
14 person—the person has, at any time within the immediately
15 preceding period of 12 months, been an officer or promoter
16 of the body corporate or of a related body corporate.
- 17 (6) For the purposes of this section, a person is not taken to be an
18 officer of a body corporate by reason only of being or having been
19 the liquidator of the body corporate or of a related body corporate.
- 20 (7) For the purposes of this section, a person is not taken to be an
21 officer of a body corporate by reason only of having been
22 appointed as an auditor of that body corporate or of a related body
23 corporate or, for any purpose relating to taxation, a public officer
24 of a body corporate or by reason only of being or having been
25 authorised to accept on behalf of the body corporate or a related
26 body corporate service of process or any notices required to be
27 served on the body corporate or related body corporate.
- 28 (8) The appointment of a firm as auditor of a futures broker is taken to
29 be an appointment of all persons who are members of the firm and
30 are registered company auditors, whether resident in Australia or
31 not, at the date of the appointment.
- 32 (9) Where a firm that has been appointed as auditor of a futures broker
33 is reconstituted by reason of the death, retirement or withdrawal of
34 a member or members or by reason of the admission of a new
35 member or new members, or both:

Section 1215

- 1 (a) a person who was taken under subsection (8) to be an auditor
2 of the broker and who has so retired or withdrawn from the
3 firm as previously constituted is taken to have resigned as
4 auditor of the company as from the day of the person's
5 retirement or withdrawal but, unless that person was the only
6 member of the firm who was a registered company auditor
7 and, after the retirement or withdrawal of that person, there is
8 no member of the firm who is a registered company auditor,
9 section 1216 does not apply to that resignation; and
- 10 (b) a person who is a registered company auditor and who is so
11 admitted to the firm is taken to have been appointed as an
12 auditor of the broker as from the day of admission; and
- 13 (c) the reconstitution of the firm does not affect the appointment
14 of the continuing members of the firm who are registered
15 company auditors as auditors of the broker;
- 16 but nothing in this subsection affects the operation of
17 subsection (3).
- 18 (10) Except as provided by subsection (9), the appointment of the
19 members of a firm as auditors of a futures broker that is taken by
20 subsection (8) to have been made by reason of the appointment of
21 the firm as auditor of the broker is not affected by the dissolution
22 of the firm.
- 23 (11) A report or notice that purports to be made or given by a firm
24 appointed as auditor of a futures broker is not taken to be duly
25 made or given unless it is signed, in the firm name and in the name
26 of the member concerned, by a member of the firm who is a
27 registered company auditor.
- 28 (12) Where a person or firm is appointed as an auditor under
29 subsection (1) (not being an appointment that is taken to be made
30 by virtue of subsection (9)) or under subsection (16), the futures
31 broker must, within 14 days after the appointment, lodge with
32 ASIC a notice in writing stating that the broker has made the
33 appointment and specifying the name of the person or firm.
- 34 (13) Without limiting the generality of section 1311, if, in contravention
35 of this section, a firm consents to be appointed, or acts as, an
36 auditor of a futures broker or prepares a report required by this Act

Section 1216

- 1 to be prepared by an auditor of a futures broker, each member of
2 the firm is guilty of an offence.
- 3 (14) A person must not:
- 4 (a) if the person has been appointed auditor of a futures broker—
5 knowingly disqualify himself or herself while the
6 appointment continues from acting as auditor of the broker;
7 or
8 (b) if the person is a member of a firm that has been appointed
9 auditor of a futures broker—knowingly disqualify the firm
10 while the appointment continues from acting as auditor of the
11 broker.
- 12 (15) An auditor of a futures broker holds office until death, until
13 removal or resignation from office in accordance with section 1216
14 or until becoming prohibited from acting as auditor by reason of
15 subsection (2) or (3).
- 16 (16) Within 14 days after a vacancy occurs in the office of an auditor of
17 a futures broker, if there is no surviving or continuing auditor of
18 the broker, the broker must appoint a person or persons, a firm or
19 firms or a person or persons and a firm or firms to fill the vacancy.
- 20 (17) While a vacancy in the office of an auditor continues, the surviving
21 or continuing auditor or auditors (if any) may act.
- 22 (18) A futures broker must not appoint a person or firm as auditor of the
23 broker unless that person or firm has, before the appointment,
24 consented by notice in writing given to the broker to act as auditor
25 and has not withdrawn the consent by notice in writing given to the
26 broker.
- 27 (19) This section does not apply in relation to a body corporate (except
28 a proprietary company) in relation to which section 327 applies.

29 **1216 Removal and resignation of auditors**

- 30 (1) A futures broker may, with the consent of ASIC, remove an auditor
31 of the broker from office.

Section 1216

- 1 (2) An auditor of a futures broker may, by notice in writing given to
2 the broker, resign as auditor of the broker if:
3 (a) the auditor has, by notice in writing given to ASIC, applied
4 for consent to the resignation and, at or about the same time
5 as the notice was given to ASIC, notified the broker in
6 writing of the application to ASIC; and
7 (b) the auditor has received the consent of ASIC.
- 8 (3) ASIC must, as soon as practicable after receiving a notice from an
9 auditor under subsection (2), notify the auditor and the futures
10 broker whether it consents to the resignation of the auditor.
- 11 (4) A statement made by an auditor in an application to ASIC under
12 subsection (2) or in answer to an inquiry by ASIC relating to the
13 reasons for the application:
14 (a) is not admissible in evidence in any civil or criminal
15 proceedings against the auditor other than proceedings for an
16 offence against section 1308; and
17 (b) may not be made the ground of a prosecution (other than a
18 prosecution for an offence against section 1308), action or
19 suit against the auditor;
20 and a certificate by ASIC that the statement was made in the
21 application or in answer to an inquiry by ASIC is conclusive
22 evidence that the statement was so made.
- 23 (5) Subject to subsection (6), the resignation of an auditor takes effect:
24 (a) on the date (if any) specified for the purpose in the notice of
25 resignation; or
26 (b) on the date on which ASIC gives its consent to the
27 resignation; or
28 (c) on the date (if any) fixed by ASIC for the purpose;
29 whichever last occurs.
- 30 (6) Where, on the retirement or withdrawal from a firm of a member,
31 the firm will no longer be capable, by reason of the provisions of
32 paragraph 1215(3)(d), of acting as auditor of a futures broker, the
33 member so retiring or withdrawing is, if not disqualified from
34 acting as auditor of the broker, taken to be the auditor of the broker

Section 1217

1 until the member obtains the consent of ASIC to the retirement or
2 withdrawal.

3 (7) This section does not apply in relation to a body corporate (except
4 a proprietary company) in relation to which section 329 applies.

5 **1217 Fees and expenses of auditors**

6 The reasonable fees and expenses of an auditor of a futures broker
7 are payable by the broker.

8 **1218 Futures brokers' accounts**

9 (1) In this section:

10 *financial year*, in relation to a futures broker, means:

11 (a) if the broker is a natural person—a period of 12 months
12 ending on 30 June in a year; or

13 (b) if the broker is a body corporate—a period that is a financial
14 year of the body corporate because of the definition of
15 *financial year* in section 9.

16 *prescribed day*, in relation to a financial year of a futures broker,
17 means the day that is:

18 (a) if the broker is a natural person—2 months; or

19 (b) if the broker is a body corporate—3 months;
20 after the end of that financial year or, if an extension is approved
21 under subsection (3), the day on which the extended period ends.

22 (2) A futures broker (other than an Australian ADI) must, in respect of
23 each financial year, other than a financial year that ended before
24 the date on which the broker commenced to carry on business as a
25 futures broker, prepare a true and fair profit and loss statement and
26 balance sheet on the basis of such accounting principles (if any)
27 and containing such information and matters as are prescribed for
28 the purposes of this subsection and lodge them with ASIC before
29 the prescribed day for that financial year, together with an auditor's
30 report containing such information and matters as are prescribed
31 for the purposes of this subsection and such other information and
32 matters as the auditor thinks fit to include in the report.

Section 1219

- 1 (3) ASIC may, on application made by a futures broker and the auditor
2 of the broker before the end of the period referred to in
3 paragraph (a) or (b), as the case requires, of the definition of
4 **prescribed day** in subsection (1) or, if that period has been
5 extended pursuant to an approval or approvals previously given
6 under this subsection, before the end of the period as so extended,
7 approve an extension or further extension of the period, and such
8 an approval may be given subject to such conditions (if any) as
9 ASIC imposes.
- 10 (4) Where an approval under subsection (3) in relation to a futures
11 broker is given subject to conditions, the broker must comply with
12 those conditions.

13 **1219 Auditor's right of access to records, information etc.**

- 14 (1) An auditor of a futures broker has a right of access at all reasonable
15 times to the financial records and other records, including any
16 register, of the broker, and is entitled to require from the broker or,
17 in the case of a futures broker that is a body corporate, from any
18 executive officer of the broker, such information and explanations
19 as the auditor desires for the purposes of audit.
- 20 (2) A futures broker, or an executive officer of a futures broker that is
21 a body corporate, must not, without lawful excuse:
- 22 (a) refuse or fail to allow an auditor of the broker access, in
23 accordance with subsection (1), to financial records or other
24 records, including any register, of the broker; or
- 25 (b) refuse or fail to give information, or an explanation, as and
26 when required under subsection (1); or
- 27 (c) otherwise hinder, obstruct or delay an auditor of the broker in
28 the performance or exercise of the auditor's duties or powers.

29 **1220 Auditor to report to ASIC in certain cases**

- 30 (1) Where an auditor, in the performance of the duties of auditor of a
31 futures broker, becomes aware of a prescribed matter, the auditor
32 must, within 7 days after becoming aware of that matter, lodge a
33 written report on the matter and send a copy of the report to:

Section 1221

- 1 (a) the broker; and
2 (b) each futures exchange of which the broker is a member and
3 to each clearing house (if any) for that futures exchange; and
4 (c) each futures association of which the broker is a member,
5 unless the futures association is also a futures exchange of
6 which the broker is a member.
- 7 (2) In this section, *prescribed matter* means a matter that, in the
8 opinion of the auditor:
9 (a) has adversely affected, is adversely affecting, or may
10 adversely affect, the ability of the futures broker to meet the
11 broker's obligations as a broker; or
12 (b) constitutes or may constitute a contravention of section 1209,
13 1213 or 1214; or
14 (c) constitutes or may constitute a contravention of a condition
15 of a licence held by the futures broker.

16 **1221 Certain matters to be reported to ASIC**

- 17 (1) Where, in relation to a futures broker who is a member of a futures
18 exchange, the futures exchange becomes aware of a prescribed
19 matter, the futures exchange must, as soon as practicable after
20 becoming aware of the matter, lodge a written report on the matter
21 and send a copy of the report to the broker.
- 22 (2) Subsection (1) applies:
23 (a) in relation to a clearing house for a futures exchange and a
24 member of the clearing house; and
25 (b) in relation to a futures association and a member of the
26 futures association (unless the futures association is also a
27 futures exchange);
28 in the same manner as it applies in relation to a futures exchange
29 and a member of the futures exchange.
- 30 (3) In this section, *prescribed matter*, in relation to a futures broker,
31 means a matter that, in the opinion of the futures exchange,
32 clearing house or futures association concerned:

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- 1 (a) has adversely affected, is adversely affecting, or may
2 adversely affect, the ability of the broker to meet the broker's
3 obligations as a broker; or
4 (b) constitutes or may constitute a contravention of section 1209,
5 1213 or 1214; or
6 (c) constitutes or may constitute a contravention of a condition
7 of a licence held by the broker; or
8 (d) constitutes a failure to make, in accordance with Part 8.6,
9 contributions to a fidelity fund.

10 **1222 Defamation**

- 11 (1) An auditor of a futures broker has qualified privilege in respect of:
12 (a) any statement made, orally or in writing, in the course of
13 performing the duties of an auditor; or
14 (b) the lodging of a report, or the sending of a report under
15 section 1220 to the futures broker, a futures exchange, a
16 clearing house for a futures exchange, or a futures
17 association.
- 18 (2) A futures exchange, a clearing house for a futures exchange, a
19 futures association, or an officer of a futures exchange, of a
20 clearing house for a futures exchange, or of a futures association,
21 has qualified privilege in respect of:
22 (a) any statement made, orally or in writing, in the course of
23 performing the duties imposed by section 1221; or
24 (b) the lodging of any report with ASIC, or the sending of any
25 report to a futures broker, under section 1221.
- 26 (3) A person has qualified privilege in respect of the publishing of:
27 (a) a statement made by an auditor of a futures broker as
28 mentioned in paragraph (1)(a), or by a futures exchange, a
29 clearing house for a futures exchange, a futures association,
30 or an officer, as mentioned in paragraph (2)(a); or
31 (b) a document prepared by an auditor of a futures broker in the
32 course of performing the duties of an auditor; or
33 (c) a document prepared by a futures exchange, a clearing house
34 for a futures exchange, a futures association, or an officer of

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- 1 a futures exchange, of a clearing house for a futures
2 exchange, or of a futures association, in the course of
3 performing the duties imposed by section 1221; or
4 (d) a document required by or under this Chapter to be lodged,
5 whether or not the document has been lodged.

6 **1223 This Part not to affect right of futures exchange or futures**
7 **association to impose obligations etc. on members**

- 8 Nothing in this Part prevents a futures exchange or futures
9 association imposing on members of that futures exchange or
10 futures association any obligations or requirements (not being
11 obligations or requirements inconsistent with this Act) that the
12 futures exchange or futures association thinks fit with respect to:
13 (a) the audit of financial statements (including the audit of
14 financial statements by an auditor appointed by the futures
15 exchange or futures association); or
16 (b) the information to be given in reports from auditors; or
17 (c) the keeping of books.

18 **1224 Power of Court to restrain dealings with futures broker's bank**
19 **accounts**

- 20 (1) Where the Court is satisfied that:
21 (a) there are reasonable grounds for believing that:
22 (i) there is a deficiency in an account that is, or has at any
23 time been, a clients' segregated account of a person; and
24 (ii) the person was, when the deficiency occurred, a futures
25 broker or a member of a futures organisation; or
26 (b) there has been, at a time when a person was a futures broker
27 or a member of a futures organisation, undue delay, or
28 unreasonable refusal, on the person's part in paying, applying
29 or accounting for money as required by this Chapter; or
30 (c) a person has, at a time when the person was a futures broker
31 or a member of a futures organisation, failed to pay money
32 into a clients' segregated account of the person as required by
33 this Chapter; or

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- 1 (d) a person who is, or has at any time been, a futures broker or a
2 member of a futures organisation, is carrying on, or last
3 carried on, as the case requires, a futures broking business
4 otherwise than in partnership and:
5 (i) in any case—the last futures brokers licence held by the
6 person has been revoked or suspended; or
7 (ii) in any case—the person no longer carries on a futures
8 broking business; or
9 (iii) if the person is a natural person—the person has died, or
10 is incapable, because of physical or mental incapacity,
11 of managing his or her affairs;

12 the Court may by order restrain dealings in respect of specified
13 bank accounts that the person holds or maintains (whether in
14 Australia or elsewhere), subject to such terms and conditions as the
15 Court imposes.

16 (2) An order under subsection (1) may only be made on an application
17 by ASIC or by the futures organisation (if any) concerned.

18 (4) Where an application is made to the Court for an order under
19 subsection (1), the Court may, if in the opinion of the Court it is
20 desirable to do so, before considering the application, grant an
21 interim order, being an order of the kind applied for that is
22 expressed to have effect pending the determination of the
23 application.

24 (5) Where ASIC makes an application to the Court for the making of
25 an order under subsection (1), the Court must not require ASIC, as
26 a condition of granting an interim order under subsection (4), to
27 give any undertaking as to damages.

28 **1225 Duty of banker or body corporate to make full disclosure**

29 Where an order made under section 1224 is directed to a banker or
30 a body corporate, the banker or body corporate must:

- 31 (a) disclose to the applicant for the order every account kept by
32 the bank or body corporate in the name of the person to
33 whom the order relates, and any account that the banker or

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- 1 body corporate reasonably suspects is held or kept by the
2 bank or body corporate for the benefit of that person; and
3 (b) permit the applicant for the order to make a copy of, or to
4 take an extract from, any account of the person to whom the
5 order relates or any of the banker's books relating to that
6 person or the like books in the possession of the body
7 corporate.

8 **1226 Power of Court to make further orders and give directions**

9 Where an order is made under section 1224, the Court may, on the
10 application of ASIC, a futures organisation or a person affected by
11 the order, make further orders:

- 12 (a) dealing with such ancillary matters as the Court considers
13 necessary or desirable; and
14 (b) directing that all or any of the money in an account affected
15 by an order so made be paid by the bank or body corporate to
16 ASIC or a person nominated by ASIC, on such terms and
17 conditions as the Court thinks fit; and
18 (c) discharging or varying the order.

19 **1227 Power of Court to make order relating to payment of money**

- 20 (1) An order made under section 1226 may include directions to the
21 person to whom the money is paid directing that that person:
22 (a) must cause the money to be paid into a trust account; or
23 (b) is authorised to prepare a scheme for distributing the money
24 to persons who claim, during a period of 6 months after
25 ASIC or that other person receives the money, to be entitled
26 to the money and satisfy ASIC or that other person that they
27 are so entitled; or
28 (c) where the money received is insufficient to pay all proved
29 claims, may, notwithstanding any rule of law or equity to the
30 contrary, apportion the money among the claimants in
31 proportion to their proved claims and show in the scheme
32 how the money is so apportioned.

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- 1 (2) Where a person prepares a scheme for distribution of money
2 pursuant to subsection (1), the person must apply to the Court for
3 approval of the scheme and for directions with respect to it.
- 4 (3) The Court may give such directions as to the money held in a trust
5 account pursuant to subsection (1), as to the persons to whom and
6 in what amounts the whole or any portion of that money must be
7 paid, and as to the payment of the balance of the money (if any)
8 remaining in the account, as the Court thinks fit.

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Part 8.6—Fidelity funds

4

1228 Establishment of fidelity funds

5

(1) A futures organisation must keep a fidelity fund, and the board of the futures organisation must administer the fidelity fund.

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(2) The assets of a fidelity fund of a futures organisation are the property of the futures organisation, but must be kept separately from all other property of the futures organisation and must be held in trust for the purposes set out in this Part.

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1229 Money constituting fidelity fund

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(1) The fidelity fund of a futures organisation consists of:

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(a) 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

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(b) 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 futures organisation on the establishment of the fund; and

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(ba) money paid into the fidelity fund as required by paragraphs 1234(4)(d) and 1235(4)(d); and

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(c) money paid to the futures organisation, in accordance with this Part or the business rules of the futures organisation, by contributing members of the futures organisation; and

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(d) the interests and profits from time to time accruing from the investment of the fidelity fund; and

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(e) money paid into the fidelity fund by the futures organisation; and

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(f) money recovered by or on behalf of the futures organisation in the exercise of a right of action conferred by this Part; and

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- 1 (g) money paid by an insurer pursuant to a contract of insurance
2 or indemnity entered into by the futures organisation under
3 section 1249; and
4 (h) all other money lawfully paid into the fund.
- 5 (2) Where a futures organisation has, under paragraph (1)(b), paid an
6 amount to the credit of its fidelity fund:
- 7 (a) the Minister may approve in writing, on such conditions (if
8 any) as are specified in the approval, the repayment of the
9 whole, or a specified part, of the amount from the fidelity
10 fund to the general funds of the futures organisation; and
11 (b) if the Minister does so, the whole, or the specified part, as the
12 case may be, of the amount may, in accordance with the
13 conditions (if any) so specified, be so repaid.

14 **1230 Fund to be kept in separate ADI account**

15 The money in a fidelity fund must, until invested or applied in
16 accordance with this Part, be kept in a separate account with an
17 Australian ADI.

18 **1231 Payments out of fund**

19 Subject to this Part, there must be paid out of the fidelity fund of a
20 futures organisation in such order as the board of the futures
21 organisation deems proper:

- 22 (a) the amount of all claims, including costs, allowed by the
23 board or established against the futures organisation under
24 this Part; and
25 (b) all legal and other expenses incurred in investigating or
26 defending claims made under this Part or incurred in relation
27 to the fund or in the exercise by the futures organisation or
28 the board of the rights, powers and authorities vested in it by
29 this Part in relation to the fund; and
30 (c) all premiums payable in respect of contracts of insurance or
31 indemnity entered into by the futures organisation under
32 section 1249; and

- 1 (d) the expenses incurred in the administration of the fund,
2 including the salaries and wages of persons employed by the
3 futures organisation or the board in relation to the fund; and
4 (e) all other money payable out of the fund in accordance with
5 the provisions of this Chapter.

6 **1232 Accounts of fund**

- 7 (1) A futures organisation must establish and keep proper accounts of
8 its fidelity fund and must, within the period of 3 months that next
9 succeeds the end of its financial year, cause a balance-sheet in
10 respect of those accounts to be made out as at the end of that
11 financial year.
- 12 (2) A futures organisation must appoint a registered company auditor
13 to audit the accounts of the fidelity fund.
- 14 (3) The auditor appointed by a futures organisation must audit the
15 accounts of the fidelity fund and must audit each balance-sheet and
16 cause a report on the accounts and balance-sheet to be laid before
17 the board of the futures organisation not later than 1 month after
18 the balance-sheet is made out.
- 19 (4) A futures organisation must give to ASIC a copy of each report
20 laid before the board of the futures organisation under this section
21 and of the balance-sheet to which the report relates within 14 days
22 after the report was so laid before the board.

23 **1233 Management sub-committee**

- 24 (1) The board of a futures organisation may, by resolution, appoint a
25 management sub-committee of not fewer than 3 and not more than
26 5 persons, at least one of whom is also a member of the board.
- 27 (2) The board of a futures organisation may, by resolution, delegate to
28 a sub-committee appointed by it under this section all or any of its
29 powers, authorities and discretions under a provision of this Part
30 (other than this section).

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- 1 (3) A power, authority or discretion delegated under subsection (2)
2 may be exercised by members forming a majority of the
3 sub-committee as if that power, authority or discretion had been
4 conferred by this Part on a majority of the members of the
5 sub-committee.
- 6 (4) A delegation by the board of a futures organisation under this
7 section may at any time, by resolution of the board, be varied or
8 revoked.
- 9 (5) The board of a futures organisation may at any time, by resolution,
10 remove a member of a sub-committee appointed by it under this
11 section and may, by resolution, fill a vacancy arising in the
12 membership of the sub-committee.
- 13 (6) A delegation by the board of a futures organisation under this
14 section does not prevent the exercise of a power, authority or
15 discretion by that board.

16 **1234 Contributions to fund**

- 17 (1) A person is not to be admitted to membership of a futures
18 organisation unless:
19 (a) in any case—the person has paid to the futures organisation,
20 as agent for the Commonwealth, the levy known as futures
21 organisation (application for membership) fidelity fund
22 contribution; or
23 (b) if the organisation is not a futures exchange—the person is
24 already a member of a futures exchange.
- 25 Note: For the imposition and amount of the levy referred to in paragraph (a),
26 see the *Corporations (Futures Organisations Levies) Act 2001*.
- 27 (2) A contributing member of a futures organisation must, on or before
28 31 March in each year, pay to the futures organisation, as agent for
29 the Commonwealth, the levy known as futures organisation
30 (annual membership) fidelity fund contribution.
- 31 Note: For the imposition and amount of the levy, see the *Corporations*
32 *(Futures Organisations Levies) Act 2001*.

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- 1 (3) Whenever an amount of levy (the *levy amount*) is paid under this
2 section, or under subsection 6(1) of the *Corporations (Futures*
3 *Organisations Levies) Act 2001*, to a futures organisation as agent
4 for the Commonwealth:
- 5 (a) the futures organisation must pay an amount equal to the levy
6 amount to the Commonwealth; and
7 (b) the Consolidated Revenue Fund is appropriated by that
8 amount for the purpose of payment to the futures
9 organisation; and
10 (c) the Commonwealth must pay the amount so appropriated to
11 the futures organisation; and
12 (d) the futures organisation must pay the amount it receives
13 under paragraph (c) into its fidelity fund.
- 14 (4) A payment of an amount to a futures organisation as required by
15 paragraph (3)(c) in respect of a particular levy amount is subject to
16 a condition that, if the Commonwealth becomes liable to refund the
17 whole or a part of the levy amount, the future organisation must
18 pay to the Commonwealth an amount equal to the amount that the
19 Commonwealth is liable to refund. The futures organisation may
20 pay, out of its fidelity fund, any amount so required to be paid to
21 the Commonwealth.
- 22 (5) The *Financial Management and Accountability Act 1997* does not
23 apply in relation to the payment of an amount of levy under this
24 section to a futures organisation as agent for the Commonwealth.
25 However, the operation of that Act in relation to the following
26 payments is not affected.
- 27 (a) the payment of an amount to the Commonwealth as required
28 by paragraph (3)(a); or
29 (b) the payment of an amount by the Commonwealth as required
30 by paragraph (3)(c).
- 31 The futures organisation must, in accordance with the regulations,
32 notify the Commonwealth of payments of levy it receives as agent
33 for the Commonwealth.
- 34 (6) An amount payable by a futures organisation as required by
35 paragraph (3)(a) may be set off against an amount payable to the
36 futures organisation as required by paragraph (3)(c).

1 **1235 Levy in addition to annual contributions**

- 2 (1) If, at any time, the amount of a fidelity fund is insufficient to pay
3 all amounts that, at that time, are required to be paid under
4 section 1231, the futures organisation concerned may determine
5 that levy known as futures organisation additional fidelity fund
6 contribution is to be paid by specified contributing members of the
7 futures organisation. When such a determination is made, the levy
8 is payable to futures organisation, as agent for the Commonwealth
9 in accordance with this section.

10 Note: For the imposition and amount of the levy, see the *Corporations*
11 (*Futures Organisations Levies*) Act 2001.

- 12 (2) An amount of levy payable under subsection (1) must be paid
13 within the time and in the manner specified by the futures
14 organisation either generally or in relation to a particular case.
- 15 (3) If a levy is imposed by subsection 6(2) of the *Corporations*
16 (*Futures Organisations Levies*) Act 2001 on a person, the levy
17 must be paid by the time by which the levy under subsection
18 1235(1) of the old Corporations Law referred to in that subsection
19 was required to be paid.
- 20 (4) Whenever an amount of levy (the **levy amount**) is paid under this
21 section, or under subsection 6(2) of the *Corporations (Futures*
22 *Organisations Levies*) Act 2001, to a futures organisation as agent
23 for the Commonwealth:
24 (a) the futures organisation must pay an amount equal to the levy
25 amount to the Commonwealth; and
26 (b) the Consolidated Revenue Fund is appropriated by that
27 amount for the purpose of payment to the futures
28 organisation; and
29 (c) the Commonwealth must pay the amount so appropriated to
30 the futures organisation; and
31 (d) the futures organisation must pay the amount it receives
32 under paragraph (c) into its fidelity fund.
- 33 (5) A payment of an amount to a futures organisation as required by
34 paragraph (4)(c) in respect of a particular levy amount is subject to
35 a condition that, if the Commonwealth becomes liable to refund the

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1 whole or a part of the levy amount, the futures organisation must
2 pay to the Commonwealth an amount equal to the amount that the
3 Commonwealth is liable to refund. The futures organisation may
4 pay, out of its fidelity fund, any amount so required to be paid to
5 the Commonwealth.

6 (6) The *Financial Management and Accountability Act 1997* does not
7 apply in relation to the payment of an amount of levy under this
8 section to a futures organisation as agent for the Commonwealth.
9 However, the operation of that Act in relation to the following
10 payments is not affected.

- 11 (a) the payment of an amount to the Commonwealth as required
12 by paragraph (4)(a); or
13 (b) the payment of an amount by the Commonwealth as required
14 by paragraph (4)(c).

15 The futures organisation must, in accordance with the regulations,
16 notify the Commonwealth of payments of levy it receives as agent
17 for the Commonwealth.

18 (7) An amount payable by a futures organisation as required by
19 paragraph (4)(a) may be set off against an amount payable to the
20 futures organisation as required by paragraph (4)(c).

21 **1236 Levy not payable in certain cases**

22 (3) A futures organisation may determine in writing that subsection
23 1234(1) does not apply in relation to the futures organisation in
24 relation to specified persons.

25 (4) A futures organisation may determine in writing that subsection
26 1234(2) does not apply in relation to the futures organisation in
27 relation to specified contributing members of the futures
28 organisation.

29 (5) A determination in force under subsection (3) or (4) has effect
30 accordingly.

1 **1237 Power of futures organisation to make advances to fund**

- 2 (1) A futures organisation may, from its general funds, give or
3 advance, on such terms as the board of the futures organisation
4 thinks fit, any sums of money to its fidelity fund.
- 5 (2) Money that is advanced under subsection (1) may at any time be
6 repaid from the fidelity fund to the general funds of the futures
7 organisation.

8 **1238 Investment of fund**

9 Money in a fidelity fund of a futures organisation that is not
10 immediately required for the purposes of the fund may be invested
11 by the futures organisation in any manner in which trustees are for
12 the time being authorised by a law in force in a State or Territory in
13 this jurisdiction to invest trust funds or on deposit with an eligible
14 money market dealer.

15 **1239 Application of fund**

- 16 (1) Subject to this Part, where:
- 17 (a) a person (in this subsection called the *futures person*) suffers
18 pecuniary loss at a particular time because of a defalcation,
19 or because of fraudulent misuse of money or other property,
20 by:
- 21 (i) a person who is at that time a contributing member of a
22 futures organisation; or
- 23 (ii) a director, partner, officer or employee of a person who
24 is at that time a contributing member of a futures
25 organisation; or
- 26 (iii) a partner in, or employee of, a partnership that is at that
27 time a contributing member of a futures organisation;
28 and
- 29 (b) the loss is suffered in respect of money or other property that
30 was, in connection with the contributing member's dealings
31 in futures contracts (whether or not any of those dealings was
32 effected on a futures market), entrusted to or received by the
33 contributing member, or a director, partner, officer or

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- 1 employee of the contributing member (whether before or
2 after the commencement of this section):
- 3 (i) for or on behalf of the futures person or another person;
4 or
5 (ii) because the contributing member was trustee of the
6 money or other property;
- 7 the fidelity fund of the futures organisation must be applied for the
8 purpose of compensating the futures person.
- 9 (2) The reference in paragraph (1)(b) to a partner of a contributing
10 member of a futures organisation is, in a case where the
11 contributing member is a partnership, a reference to a partner in the
12 partnership.
- 13 (3) Subject to this Part, where a right to compensation does not arise
14 under subsection (1), a fidelity fund of a futures organisation may,
15 if the board of the futures organisation thinks fit, be applied for the
16 purpose of paying to an official receiver or trustee within the
17 meaning of the *Bankruptcy Act 1966* an amount not greater than
18 the amount that the official receiver or trustee, as the case may be,
19 certifies is required in order to make up or reduce the total
20 deficiency arising because the available assets of a bankrupt who is
21 a contributing member of the futures organisation are insufficient
22 to satisfy the debts arising from dealings in futures contracts that
23 have been proved in the bankruptcy by creditors of the bankrupt.
- 24 (4) Subsection (3) applies in the case of a contributing member of a
25 futures organisation who has made a composition with the
26 member's creditors, or has executed a deed of assignment or a deed
27 of arrangement, under Part X of the *Bankruptcy Act 1966* in like
28 manner as that subsection applies in the case of a contributing
29 member of a futures organisation who has become bankrupt and,
30 for the purposes of that subsection as so applying by virtue of this
31 subsection:
- 32 (a) the reference in that subsection to a trustee is taken to be a
33 reference to a controlling trustee within the meaning of that
34 Part; and

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- 1 (b) the reference to debts proved in the bankruptcy is taken to be
2 a reference to provable debts in relation to the composition or
3 deed within the meaning of that Part; and
- 4 (c) a reference to the bankrupt is taken to be a reference to the
5 person who made the composition or executed the deed.
- 6 (5) Subject to this Part, where a right to compensation does not arise
7 under subsection (1), a fidelity fund of a futures organisation may,
8 if the board of the futures organisation thinks fit, be applied for the
9 purpose of paying to the liquidator of a body corporate that is a
10 contributing member of the futures organisation and that has
11 commenced to be wound up, an amount not greater than the
12 amount that the liquidator certifies is required to make up or reduce
13 the total deficiency arising because the available assets of the body
14 corporate are insufficient to satisfy the debts of the body corporate
15 arising from dealings in futures contracts that have been proved in
16 the winding up by creditors of the body corporate.
- 17 (6) Money paid pursuant to subsection (3) or (5) is so paid only on
18 condition that it is applied by the official receiver, trustee or
19 liquidator towards satisfaction of debts arising from dealings in
20 futures contracts and for no other purpose.
- 21 (7) Subject to subsection (9), the amount, or the sum of the amounts,
22 paid under this Part out of a fidelity fund of a futures organisation:
23 (a) for the purpose of compensating pecuniary loss as mentioned
24 in subsection (1); or
25 (b) for the purpose of making payments under subsection (3) or
26 (5);
27 must not exceed, in respect of a particular contributing member of
28 the futures organisation:
29 (c) unless paragraph (d) applies—\$500,000; or
30 (d) if some other amount is prescribed, for the purposes of this
31 subsection, in relation to the futures organisation, a class of
32 futures organisations that includes the futures organisation, or
33 futures organisations generally—that amount.

- 1 (8) For the purposes of calculating the sum referred to in
2 subsection (7), an amount that is paid from a fidelity fund is, to the
3 extent to which that amount is repaid to the fund, to be disregarded.
- 4 (9) If a futures organisation considers, having regard to the ascertained
5 or contingent liabilities of its fidelity fund, that the assets of the
6 fund so permit, the futures organisation may apply out of the fund
7 such sums in excess of the amount limited by or under this section
8 as the futures organisation, in its discretion, thinks fit in or towards
9 the compensation of persons who have suffered pecuniary loss as
10 mentioned in subsection (1) or making a payment under
11 subsection (3) or (5).
- 12 (10) Where:
- 13 (a) money or other property has been entrusted to, or received
14 by:
- 15 (i) a person or partnership; or
16 (ii) a director, partner, officer or employee of a person; or
17 (iii) a partner in or employee of, a partnership;
18 being a person who, or a partnership that, has at any time
19 been but is no longer a contributing member of a futures
20 organisation; and
- 21 (b) immediately before that person or partnership last ceased to
22 be a member or member organisation of the futures
23 organisation, he, she or it was a contributing member of the
24 futures organisation; and
- 25 (c) because of a defalcation, or the fraudulent misuse of money
26 or other property by:
- 27 (i) that person or a director, partner, officer or employee of
28 that person; or
29 (ii) a partner in, or employee of, that partnership;
30 as the case may be, the person by or from whom the money
31 or other property was so entrusted or received suffered
32 pecuniary loss; and
- 33 (d) at the time when the money or other property was so
34 entrusted or received, the person suffering the pecuniary loss
35 believed, on reasonable grounds, that that person or

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1 partnership was at that time a member or member
2 organisation of the futures organisation;
3 that person or partnership is, for the purposes of this section (other
4 than this subsection and subsection (11)), taken to have been, when
5 the pecuniary loss was suffered, a contributing member of the
6 futures organisation.

7 (11) Where:

8 (a) a person who or a partnership that has at any time been, but is
9 no longer, a contributing member of a futures organisation
10 has incurred a debt arising from dealings in futures contracts;
11 and

12 (b) at the time when the debt was incurred, the creditor, or one or
13 more of the creditors, in relation to the debt believed on
14 reasonable grounds that that person or partnership was at that
15 time a member or member organisation of the futures
16 organisation;

17 a reference in this section (other than subsection (10) and this
18 subsection) to a contributing member of the futures organisation is,
19 for the purpose of determining the application of subsection (3) or
20 (5) in relation to that creditor or those creditors, as the case may be,
21 in relation to that debt, taken to include a reference to that person
22 or partnership.

23 (12) A reference in this section to a defalcation, or to a fraudulent
24 misuse of money or other property, is a reference to a defalcation,
25 or to such a fraudulent misuse, wherever and whenever occurring.

26 **1240 Claims against fund**

27 (1) Subject to this Part, a person who suffers pecuniary loss as
28 mentioned in subsection 1239(1) is entitled to claim compensation
29 from the fidelity fund of a futures organisation whose fidelity fund
30 is, pursuant to that subsection, required to be applied to
31 compensate the person, and to take proceedings in the Court as
32 provided in this Part against the futures organisation to establish
33 that claim.

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- 1 (2) A person does not have a claim against a fidelity fund of a futures
2 organisation in respect of:
3 (a) pecuniary loss suffered before 1 July 1986; or
4 (b) pecuniary loss in respect of money or other property suffered
5 after the money or property had, in due course of the
6 administration of a trust, ceased to be under the sole control
7 of a member organisation of the futures organisation.
- 8 (3) Subject to this Part, the amount that a claimant is entitled to claim
9 as compensation from a fidelity fund of a futures organisation is
10 the amount of the actual pecuniary loss suffered by the claimant
11 (including the reasonable costs of, and disbursements incidental to,
12 the making and proof of the claim) less the total amount or value of
13 all amounts or other benefits received or receivable by the claimant
14 from a source other than the fund in reduction of the loss.
- 15 (4) In addition to any compensation that is payable under this Part,
16 interest is payable out of the fidelity fund on the amount of the
17 compensation, less any amount attributable to costs and
18 disbursements, at the prescribed rate calculated from and including
19 the day on which the pecuniary loss was suffered until the day on
20 which the claim is satisfied.

21 **1241 Rights of innocent partner in relation to fund**

- 22 (1) Where all persons who have submitted claims pursuant to
23 section 1240 have been fully compensated in accordance with the
24 provisions of this Part for pecuniary loss in relation to a
25 contributing member of a futures organisation, being pecuniary
26 loss as mentioned in subsection 1239(1) suffered in relation to
27 money or other property, any partner of the contributing member
28 who has made payment to a person in compensation for loss
29 suffered by the person in relation to that money or property is taken
30 to be subrogated to the extent of that payment to all the rights and
31 remedies of that person against the fidelity fund of the futures
32 organisation if the board of the futures organisation, having regard
33 to all the circumstances, determines that the partner was in no way
34 a party to the loss and acted honestly and reasonably in the matter.

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- 1 (2) If a partner of a contributing member of a futures organisation feels
2 aggrieved by the determination of a board under subsection (1), the
3 partner may, within 28 days after receipt of notice of the
4 determination, appeal to the Court against the determination by
5 lodging a notice of appeal in the prescribed form.
- 6 (3) The appellant must, on the day on which the appellant lodges
7 notice of appeal with the Court, lodge a copy of the notice with the
8 futures organisation concerned.
- 9 (4) The Court must inquire into and decide upon the appeal and, for
10 that purpose, may do all such matters and things, and may do those
11 matters and things in the same manner and to the same extent, as it
12 is empowered to do in the exercise of its ordinary jurisdiction and
13 if the Court is of the opinion having regard to all the circumstances
14 that the appellant was not a party to the defalcation or fraudulent
15 misuse of money or other property from which the pecuniary loss
16 arose and that the appellant acted honestly and reasonably in the
17 matter, it may order that the appellant, to the extent of any payment
18 made by the appellant, be subrogated to the rights and remedies, in
19 relation to the fidelity fund of the futures organisation concerned,
20 of the person to whom the appellant made such a payment.

21 **1242 Notice calling for claims against fund**

- 22 (1) A futures organisation may cause to be published in a daily
23 newspaper circulating generally in each State and Territory, a
24 notice in the prescribed form specifying a date, not being earlier
25 than 3 months after the publication of the notice, on or before
26 which claims for compensation from the fidelity fund, in relation to
27 the person specified in the notice, may be made.
- 28 (2) A claim for compensation from a fidelity fund of a futures
29 organisation in respect of a pecuniary loss must be made in writing
30 to the futures organisation:
- 31 (a) where a notice under subsection (1) has been published, on or
32 before the date specified in the notice; or

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- 1 (b) where no such notice has been published, within 6 months
2 after the claimant became aware of the pecuniary loss;
3 and a claim that is not so made is barred unless the futures
4 organisation otherwise determines.
- 5 (3) A futures organisation, a member of a board of a futures
6 organisation, or a member or employee of a futures organisation,
7 has qualified privilege in respect of the publication of a notice
8 under subsection (1).

9 **1243 Power of board to settle claims**

- 10 (1) Subject to this Part, the board of a futures organisation may allow
11 and settle a proper claim for compensation from a fidelity fund of
12 the futures organisation at any time after the occurrence of the
13 pecuniary loss in respect of which the claim arose.
- 14 (2) Subject to subsection (3), a person must not commence
15 proceedings under this Part against a futures organisation without
16 leave of the board unless:
17 (a) the board has disallowed the person's claim; and
18 (b) the claimant has exhausted all relevant rights of action and
19 other legal remedies for the recovery of the money or other
20 property in respect of which the pecuniary loss occurred,
21 being rights and remedies that are available against the
22 member of the futures organisation in relation to whom the
23 claim arose and all other persons who are liable in respect of
24 the loss suffered by the claimant, other than any right or
25 remedy that the claimant may have, under section 1240,
26 against a person other than the futures organisation.
- 27 (3) A person who has been refused leave by the board of a futures
28 organisation under subsection (2) may apply to the Court for leave
29 to commence proceedings against the futures organisation and the
30 Court may make such order in the matter as it thinks fit.
- 31 (4) The board of a futures organisation, after disallowing, whether
32 wholly or partly, a claim for compensation from the fidelity fund of
33 the futures organisation, must serve notice of the disallowance in
34 the prescribed form on the claimant or on the claimant's solicitor.

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- 1 (5) Proceedings against a futures organisation in respect of a claim that
2 has been disallowed by the board of the futures organisation must
3 not be commenced after the end of 3 months after the service of the
4 notice of disallowance referred to in subsection (4).
- 5 (6) In proceedings brought to establish a claim, evidence of an
6 admission or confession by, or other evidence that would be
7 admissible against, the person against whom a defalcation or
8 fraudulent misuse of property is alleged is admissible to prove the
9 defalcation or fraudulent misuse notwithstanding that the person is
10 not the defendant in or a party to those proceedings, and all
11 defences that would have been available to that person are
12 available to the futures organisation.
- 13 (7) The board or, where proceedings are brought to establish a claim,
14 the Court, if satisfied that there was a defalcation or fraudulent
15 misuse of property on which to found the claim, may allow the
16 claim and act accordingly notwithstanding that the person against
17 whom the defalcation or fraudulent misuse of property is alleged
18 has not been convicted or prosecuted or that the evidence on which
19 the board or the Court, as the case may be, acts would not be
20 sufficient to establish the guilt of that person on a criminal trial in
21 respect of the defalcation or fraudulent misuse of property.

22 **1244 Form of order of Court establishing claim**

- 23 (1) Where, in proceedings brought to establish a claim, the Court is
24 satisfied that there was a defalcation or fraudulent misuse of
25 property on which to found the claim and that otherwise the
26 claimant has a valid claim, the Court must, by order:
27 (a) declare the fact and the date of the defalcation or fraudulent
28 misuse of property and the amount of the claim; and
29 (b) direct the board to allow the claim as so declared and deal
30 with it in accordance with the provisions of this Part.
- 31 (2) In any such proceedings all questions of costs are in the discretion
32 of the Court.

1 **1245 Power of Board to require production of documents etc.**

2 The board of a futures organisation may at any time require a
3 person to produce and deliver any documents or statements of
4 evidence necessary to support a claim made or necessary for the
5 purpose either of exercising its rights against a contributing
6 member of the futures organisation or a partner or the partners in a
7 partnership that is a contributing member of the futures
8 organisation or any other person or of enabling criminal
9 proceedings to be taken against a person in respect of a defalcation
10 or fraudulent misuse of property, and in default of delivery of such
11 documents or statements of evidence by the first-mentioned
12 person, the board may disallow any claim by the first-mentioned
13 person under this Part.

14 **1246 Subrogation of futures organisation to rights etc. of claimant**
15 **on payment from fund**

16 On payment out of a fidelity fund of a futures organisation of any
17 money in respect of a claim under this Part, the futures
18 organisation is subrogated to the extent of that payment to all the
19 rights and remedies of the claimant in relation to the loss suffered
20 by the claimant from the defalcation or fraudulent misuse of
21 property.

22 **1247 Payment of claims only from fund**

23 Money or other property belonging to a futures organisation, other
24 than its fidelity fund, is not available for the payment of a claim
25 under this Part, whether the claim is allowed by the board of the
26 futures organisation or is made the subject of an order of the Court.

27 **1248 Provisions where fund insufficient to meet claims or where**
28 **claims exceed total amount payable**

29 (1) Where the amount in a fidelity fund of a futures organisation is
30 insufficient to pay the whole of the amount of all claims against it
31 that have been allowed or in respect of which orders of the Court
32 have been made, the amount in the fund must, subject to

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1 subsection (2), be apportioned among the claimants in such manner
2 as the board of the futures organisation thinks equitable, and such a
3 claim so far as it then remains unpaid is taken to be charged against
4 future receipts of the fund and paid out of the fund when money is
5 available in the fund.

6 (2) Where the aggregate of all claims that have been allowed or in
7 respect of which orders of the Court have been made in relation to
8 defalcations or fraudulent misuses of property by or in connection
9 with a contributing member of a futures organisation exceeds the
10 total amount that may, pursuant to section 1239, be paid under this
11 Part in respect of that contributing member, the total amount must
12 be apportioned among the claimants in such manner as the board
13 thinks equitable, and on payment out of the fund of that total
14 amount in accordance with that apportionment all such claims and
15 any orders relating to those claims and all other claims against the
16 fund that may thereafter arise or be made in respect of defalcations
17 or fraudulent misuses of property by or in connection with that
18 contributing member are discharged.

19 **1249 Power of futures organisation to enter into contracts of**
20 **insurance or indemnity**

21 (1) A futures organisation may enter into a contract with a person
22 carrying on fidelity insurance business whereby the futures
23 organisation will be insured or indemnified, to the extent and in the
24 manner provided by the contract, against liability in respect of
25 claims under this Part.

26 (2) Such a contract may be entered into in relation to contributing
27 members of the futures organisation generally, or in relation to
28 particular contributing members named in the contract, or in
29 relation to contributing members generally with the exclusion of
30 particular contributing members named in the contract.

31 (3) A futures organisation, a member or employee of a futures
32 organisation or of the board of a futures organisation, or a member
33 of the management sub-committee of the board of a futures
34 organisation, has qualified privilege in respect of the publication of

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1 a statement that a contract entered into under this section does, or
2 does not, as the case may be, apply in relation to that member.

3 **1250 Application of insurance money**

4 A claimant against a fidelity fund of a futures organisation does not
5 have a right of action against a person with whom a contract of
6 insurance or indemnity is made under this Part in respect of such a
7 contract or a right or claim with respect to any money paid by the
8 insurer in accordance with such a contract.

1

2 **Part 8.7—Offences**

3 **Division 1—Insider dealing**

4 **1251 Futures contract concerning a body corporate**

5 For the purposes of this Division, a futures contract concerns a
6 body corporate if, and only if:

- 7 (a) the futures contract is a commodity agreement and a
8 commodity to which it relates is securities of the body; or
9 (b) the futures contract is an adjustment agreement and a state of
10 affairs to which it relates concerns the price of securities of
11 the body, or the prices of a class of securities that includes
12 securities of the body, at a particular time.

13 **1252 Person connected with a body corporate**

14 (1) For the purposes of this Division, a person is connected with a
15 body corporate (in this subsection called the *relevant body*
16 *corporate*) if the person is a natural person and:

- 17 (a) is an officer of the relevant body corporate or of a related
18 body corporate; or
19 (b) has a substantial holding in the relevant body corporate or in
20 a related body corporate; or
21 (c) occupies a position that may reasonably be expected to give
22 the person access to information of a kind referred to in
23 subsection 1253(1) or (2) by virtue of:
24 (i) any professional or business relationship existing
25 between the person (or the person's employer or a body
26 corporate of which the person is an officer) and the
27 relevant body corporate or a related body corporate; or
28 (ii) the person being an officer of a body corporate that has
29 a substantial holding in the relevant body corporate or in
30 a related body corporate.

31 (2) For the purposes of subsection (1), *officer*, in relation to a body
32 corporate, includes:

- 1 (a) a director, secretary, executive officer or employee of the
2 body corporate; and
3 (b) a receiver, or a receiver and manager, of property of the body
4 corporate; and
5 (c) an administrator of the body corporate; and
6 (ca) an administrator of a deed of company arrangement executed
7 by the body corporate; and
8 (d) a liquidator of the body corporate; and
9 (e) a trustee or other person administering a compromise or
10 arrangement made between the body corporate and another
11 person or other persons.

12 **1253 Persons precluded from dealing**

- 13 (1) For the purposes of this Part, a person is precluded on a particular
14 day from dealing in a futures contract concerning a body corporate
15 if, by virtue of being, or having been at any time during the 6
16 months ending on that day, connected with the body, the person
17 has inside information in relation to that futures contract.
- 18 (2) For the purposes of this Part, a person is also precluded on a
19 particular day from dealing in a futures contract concerning a body
20 corporate if, by virtue of being, or having been at any time during
21 the 6 months ending on that day, connected with another body
22 corporate, the person has information that:
23 (a) is inside information in relation to that futures contract; and
24 (b) relates to any transaction (actual or expected) involving both
25 those bodies, or involving one of them and securities of the
26 other.
- 27 (3) For the purposes of this Part, a person is also precluded from
28 dealing in a futures contract if the person:
29 (a) has inside information in relation to the futures contract; and
30 (b) obtained the information, directly or indirectly, from another
31 person; and
32 (c) is aware, or ought reasonably to be aware, of facts or
33 circumstances by virtue of which that other person is

1 precluded by subsection (1) or (2) from dealing in the futures
2 contract; and

3 (d) when the information was so obtained:

4 (i) was an associate of the other person; or

5 (ii) had with the other person an arrangement for the
6 communication of information of a kind referred to in
7 subsection (1) or (2) with a view to a dealing, by the
8 first-mentioned person, by the other person, or by both
9 of them together, in that futures contract or a futures
10 contract of the same kind as that futures contract.

11 **1254 Body corporate precluded from dealing when officer precluded**

12 (1) Without prejudice to subsection 1253(3), but subject to this
13 section, while an officer of a body corporate is precluded from
14 dealing in a futures contract, the body is, for the purposes of this
15 Part, also precluded from dealing in the futures contract.

16 (2) A body corporate is not, merely because of information that an
17 officer of the body has, precluded by subsection (1) from dealing at
18 a particular time in a futures contract if:

19 (a) the decision to deal in the futures contract at that time was
20 taken on the body's behalf by a person other than the officer;
21 and

22 (b) the body had in operation at that time arrangements to ensure
23 that the information was not communicated to that person
24 and that no advice with respect to the transaction was given
25 to that person by a person who had the information; and

26 (c) the information was not so communicated and no such advice
27 was so given.

28 (3) A body corporate is not, merely because of information that an
29 officer of the body has, precluded by subsection (1) from dealing in
30 a futures contract concerning another body corporate if the
31 information:

32 (a) was obtained by the officer in the course of performing duties
33 as an officer of the first-mentioned body; and

- 1 (b) relates only to a proposed dealing by the first-mentioned
2 body in securities of, or a futures contract concerning, the
3 other body.

4 **1255 Exceptions: licensed futures brokers**

5 For the purposes of this Part, a person who holds a futures brokers
6 licence is not precluded from dealing in a futures contract
7 concerning a body corporate if:

- 8 (a) the licensee enters into the dealing as agent for another
9 person pursuant to a specific instruction by that other person
10 to enter into that dealing; and
11 (b) the licensee has not given any advice to the other person in
12 relation to dealing in a futures contract concerning the body
13 corporate; and
14 (c) the other person is not, in relation to the dealing, an associate
15 of the licensee.

16 **1256 Prohibitions where dealing precluded**

- 17 (1) A person must not, while precluded from dealing in a futures
18 contract, deal in that futures contract.
19 (2) A person who, because of having particular information, is
20 precluded from dealing in a futures contract, must not, while so
21 precluded, communicate the information to another person if the
22 first-mentioned person knows, or ought reasonably to know, that
23 the other person will make use of the information for the purpose
24 of dealing in that futures contract.

25 **1257 Defence where other party to dealing also had the inside
26 information**

27 Where a prosecution is begun against a person for an offence
28 because the person had particular information and dealt in a futures
29 contract in contravention of section 1256, it is a defence if it is
30 proved that the other party to the dealing knew, or ought
31 reasonably to have known, the information before entering into the
32 dealing.

1

2 **Division 2—General**

3 **1258 Dealings by futures broker on behalf of others**

4 A futures broker must not deal in a futures contract on behalf of
5 another person unless the dealing is effected:

- 6 (a) on a futures market of a futures exchange or recognised
7 futures exchange; or
8 (b) on an exempt futures market; or
9 (c) as permitted by the business rules of a futures organisation of
10 which the broker is a member.

11 **1259 Futures market manipulation**

12 A person must not, in this jurisdiction or elsewhere, take part in, be
13 concerned in, or carry out, whether directly or indirectly:

- 14 (a) a transaction (whether a dealing in a futures contract or not)
15 that has, is intended to have, or is likely to have; or
16 (b) 2 or more transactions (whether any of them is a dealing in a
17 futures contract or not) that have, are intended to have, or are
18 likely to have:
19 the effect of:
20 (c) creating an artificial price for dealings in futures contracts on
21 a futures market in this jurisdiction; or
22 (d) maintaining at a level that is artificial (whether or not it was
23 previously artificial) a price for dealings in futures contracts
24 on a futures market in this jurisdiction.

25 **1260 False trading and market rigging**

- 26 (1) A person must not, in this jurisdiction or elsewhere, create, cause
27 to be created, or do anything that is calculated to create, a false or
28 misleading appearance:
29 (a) of active dealing in futures contracts on a futures market in
30 this jurisdiction; or

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- 1 (b) with respect to the market for, or the price for dealings in,
2 futures contracts on a futures market in this jurisdiction.
- 3 (2) A person must not, in this jurisdiction or elsewhere, by any
4 fictitious or artificial transactions or devices, maintain, inflate,
5 depress, or cause fluctuations in, the price for dealings in futures
6 contracts on a futures market in this jurisdiction.
- 7 (3) In determining whether a transaction is fictitious or artificial for the
8 purposes of subsection (2), the fact that the transaction is, or was at
9 any time, intended by the parties who entered into it to have effect
10 according to its terms is not conclusive.

11 **1261 False or misleading statements etc.**

12 A person contravenes this section if the person:

- 13 (a) in this jurisdiction or elsewhere, makes a statement, or
14 disseminates information, that is false or misleading in a
15 material particular and is likely:
16 (i) to induce other persons to deal in futures contracts on a
17 futures market in this jurisdiction; or
18 (ii) to have the effect of raising, lowering, maintaining or
19 stabilising the price for dealings in futures contracts, or
20 in a class of futures contracts, on a futures market in this
21 jurisdiction; and
22 (b) when making the statement, or disseminating the
23 information:
24 (i) is recklessly indifferent as to whether the statement or
25 information is true or false; or
26 (ii) knows, or ought reasonably to know, that the statement
27 is false or misleading in a material particular.

28 **1262 Fraudulently inducing person to deal in futures contracts**

- 29 (1) A person must not:
30 (a) by making or publishing any statement, promise or forecast
31 that the person knows to be misleading, false or deceptive;
32 (b) by any dishonest concealment of material facts;

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- 1 (c) by the reckless making or publishing (dishonestly or
2 otherwise) of any statement, promise or forecast that is
3 misleading, false or deceptive; or
4 (d) by recording or storing in, or by means of, any mechanical,
5 electronic or other device information that the person knows
6 to be false or misleading in a material particular;
7 induce or attempt to induce another person to deal in a futures
8 contract or a class of futures contracts.
- 9 (7) It is a defence to a prosecution for an offence under this section
10 constituted by recording or storing information as mentioned in
11 paragraph (1)(d) if it is proved that, when the defendant so
12 recorded or stored the information, the defendant had no
13 reasonable grounds for expecting that the information would be
14 available to any person.

15 **1263 Dissemination of information about illegal transactions**

16 Where:

- 17 (a) in this jurisdiction or elsewhere, a person circulates or
18 disseminates, or authorises or is concerned in the circulation
19 or dissemination of, any statement or information to the
20 effect that the price for dealings in futures contracts, or in a
21 class of futures contracts, on a futures market in this
22 jurisdiction will, or is likely to, rise or fall or be maintained
23 because of a transaction, or other act or thing done, in
24 relation to such futures contracts or futures contracts included
25 in that class, being a transaction, or other act or thing, that
26 constitutes a contravention of section 1259, 1260, 1261 or
27 1262; and
28 (b) the person, or an associate of the person:
29 (i) has entered into such a transaction or done such an act
30 or thing; or

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- 1 (ii) has received, or expects to receive, directly or
2 indirectly, a consideration or benefit for circulating or
3 disseminating, or authorising or being concerned in the
4 circulation or dissemination of, the statement or
5 information;
6 the first-mentioned person contravenes this section.

7 **1264 Fraud in connection with dealings in futures contracts**

- 8 Where, in connection with a dealing or proposed dealing in a
9 futures contract by a futures broker on behalf of a client of the
10 broker, a person who:
11 (a) is the broker or an employee or agent of the broker; or
12 (b) has an interest, or is otherwise concerned in, the dealing or
13 proposed dealing;
14 does any of the following:
15 (c) defrauds the client;
16 (d) does an act, or omits to do an act, knowing that the client will
17 be deceived or misled, or with reckless indifference as to
18 whether or not the client will be deceived or misled, as a
19 result of the act or omission;
20 (e) (without limiting the generality of paragraph (d)) makes a
21 statement, promise or forecast to the client, or makes an entry
22 in a record relating to the client or persons including the
23 client:
24 (i) knowing that the statement, promise, forecast or entry is
25 false, misleading or deceptive in a material particular; or
26 (ii) with reckless indifference as to whether or not the
27 statement, promise, forecast or entry is false, misleading
28 or deceptive in a material particular;
29 the person contravenes this section.

30 **1265 Compensation for loss etc.**

- 31 (1) Where:
32 (a) a person who, because of having particular information, is
33 precluded by section 1253 from dealing in a futures contract

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- 1 deals, in contravention of section 1256, in that futures
2 contract; or
- 3 (b) a person, being a body corporate, deals, in contravention of
4 section 1256, in a futures contract at a time when an officer
5 of the body is, because of having particular information,
6 precluded from dealing in that futures contract;
7 the person is liable (whether or not the person has been convicted
8 of an offence in respect of the contravention) to compensate any
9 other party to the dealing who did not have that information for any
10 loss sustained by that party because of any difference between the
11 price at which the dealing took place and the price at which it
12 would be likely to have taken place if that information had been
13 generally available.
- 14 (2) A person who contravenes any of sections 1259 to 1264 (inclusive)
15 (whether or not the person has been convicted of an offence in
16 respect of the contravention) is liable to pay compensation to any
17 other person who, in dealing in futures contracts, suffers loss
18 because of the difference between the price at which the dealing
19 takes place and the price at which it would be likely to have taken
20 place if the contravention had not occurred.
- 21 (3) The amount of compensation for which a person is liable under
22 subsection (1) or (2) is:
- 23 (a) in a case to which paragraph (b) does not apply—the amount
24 of the loss sustained by the person claiming the
25 compensation; or
- 26 (b) if the first-mentioned person has been found by a court to be
27 liable, or has been ordered by a court, to pay an amount or
28 amounts to any other person or persons under this Part or
29 under Part 9.4B because of the same act or transaction—the
30 amount of that loss less the amount or the sum of the
31 amounts that the first-mentioned person has been so found to
32 be liable, or has been so ordered, to pay.
- 33 (4) For the purposes of subsection (3), the onus of proving that the
34 liability of a person to pay an amount to another person arose from
35 the same act or transaction from which another liability arose lies
36 on the person liable to pay the amount.

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- 1 (5) An action under this section for recovery of compensation for a
2 loss is not maintainable after the end of the period of 2 years
3 commencing on the day of completion of the dealing in which the
4 loss occurred.
- 5 (6) ASIC may, if it considers it to be in the public interest to do so,
6 bring an action in the name of, and for the benefit of, a person for
7 recovery of compensation for a loss referred to in subsection (1)
8 and suffered by that person.
- 9 (7) Nothing in subsection (1) affects any liability that a person may
10 incur under any other law.

11 **1266 Sequence of transmission and execution of orders**

- 12 (1) In this section, a reference to the transmission by a futures broker
13 of instructions to deal in a class of futures contracts is a reference:
14 (a) where the broker has direct access to the futures market on
15 which the instructions are to be executed—to the
16 transmission of the instructions to that futures market; or
17 (b) where the broker has access to the futures market on which
18 the instructions are to be executed only through another
19 futures broker—to the transmission of the instructions to that
20 other futures broker.
- 21 (2) Subject to subsection (3), a futures broker must transmit in the
22 sequence in which they are received by the broker all instructions
23 to deal in a class of futures contracts at or near the market price for
24 a futures contract of that class prevailing immediately before
25 execution of the instructions.
- 26 (3) Where a futures broker proposes to deal in a class of futures
27 contracts on the broker's own account and the person by whom or
28 on whose instructions the instructions for the dealing are to be
29 transmitted is aware of instructions of a client of the broker to deal
30 in that class of futures contracts at or near the market price for a
31 futures contract of that class prevailing at that time (being
32 instructions that have not been transmitted), that person must not
33 transmit, and must not give instructions to any other person to
34 transmit, the instructions to give effect to the proposal of the broker

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- 1 to deal in that class of futures contracts before the instructions of
2 the client are transmitted.
- 3 (4) A futures broker, or a director, partner, officer or employee of a
4 futures broker, must not, except:
- 5 (a) to the extent necessary to execute the instructions concerned;
6 or
7 (b) as required by this Act or any other law; or
8 (c) as required by the business rules of a futures organisation of
9 which the broker is a member;
- 10 disclose to any other futures broker, or to a person engaged or
11 employed in the business of the first-mentioned broker or of any
12 other futures broker, instructions of a client to deal in a class of
13 futures contracts.
- 14 (5) A member of a futures exchange who is concerned in the
15 execution, on a trading floor of the futures exchange, of
16 instructions to deal in futures contracts must execute in the order in
17 which they are received by the member all instructions to deal in a
18 class of futures contracts at or near the market price for a futures
19 contract of that class prevailing immediately before execution of
20 the instructions.
- 21 (6) Where:
- 22 (a) during a particular period, a futures broker transmits
23 instructions (whether or not those instructions consist of, or
24 include, instructions giving effect to a proposal of the broker
25 to deal in the class of contracts concerned on the broker's
26 own account) to deal in a class of futures contracts at or near
27 the market price for a futures contract of that class prevailing
28 immediately before execution of the instructions; and
29 (b) dealings in that class of futures contracts are effected
30 pursuant to those instructions;
- 31 the broker must, except so far as the business rules of a futures
32 organisation of which the broker is a member otherwise provide,
33 allocate the dealings to those instructions:
- 34 (c) in the sequence in which the dealings were effected; and

Section 1267

- 1 (d) in the sequence in which the broker transmitted those
2 instructions.
- 3 (7) A futures broker must maintain, in accordance with the regulations,
4 records that set out the prescribed particulars of:
- 5 (a) instructions by a client to deal in futures contracts; and
6 (b) the date and time of receipt, transmission and execution of
7 those instructions; and
8 (c) the person by whom those instructions are received, the
9 person by whom they are transmitted and the person by
10 whom they are executed; and
11 (d) the date and time of receipt, transmission and execution of
12 instructions to deal in futures contracts on the broker's own
13 account; and
14 (e) the person by whom instructions of the kind referred to in
15 paragraph (d) are received, the person by whom they are
16 transmitted and the person by whom they are executed;
17 and must retain those records for the prescribed period.
- 18 (8) Where:
- 19 (a) a futures broker transmits for execution on a futures market
20 outside Australia and the external Territories instructions to
21 deal in futures contracts; and
22 (b) it is not reasonably practicable for the broker to set out in the
23 records maintained by the broker pursuant to subsection (7)
24 the prescribed particulars of the date and time of execution of
25 those instructions;
- 26 the broker must so set out those particulars as precisely as is
27 reasonably practicable.

28 **1267 Dealings by employees of futures brokers and futures advisers**

- 29 (1) A person who is a futures broker or a futures adviser and an
30 employee of that person must not, as principals, jointly deal in, or
31 agree to deal in, futures contracts.
- 32 (2) A person who is a partner in a partnership that carries on a business
33 of dealing in futures contracts and an employee of the partnership

Section 1267

- 1 must not, as principals, jointly deal in, or agree to deal in, futures
2 contracts.
- 3 (3) A person who is a partner in a partnership that carries on a futures
4 advice business and an employee of the partnership must not, as
5 principals, jointly deal in, or agree to deal in, futures contracts.
- 6 (4) A person who is a futures broker or a futures adviser must not give
7 credit to an employee of that person or to a person who, to the
8 knowledge of the first-mentioned person, is associated with such
9 an employee if:
- 10 (a) the credit is given for the purpose of enabling or assisting the
11 person to whom the credit is given to deal in futures
12 contracts; or
- 13 (b) the person giving the credit knows or has reason to believe
14 that the credit will be used for the purpose of dealing in
15 futures contracts.
- 16 (5) A person who is a partner in a partnership that carries on a business
17 of dealing in futures contracts must not give credit to an employee
18 of the partnership or to a person who, to the knowledge of the
19 first-mentioned person, is associated with such an employee if:
- 20 (a) the credit is given for the purpose of enabling or assisting the
21 person to whom the credit is given to deal in futures
22 contracts; or
- 23 (b) the person giving the credit knows or has reason to believe
24 that the credit will be used for the purpose of dealing in
25 futures contracts.
- 26 (6) A person who is a partner in a partnership that carries on a futures
27 advice business must not give credit to an employee of the
28 partnership or to a person who, to the knowledge of the
29 first-mentioned person, is associated with such an employee if:
- 30 (a) the credit is given for the purpose of enabling or assisting the
31 person to whom the credit is given to deal in futures
32 contracts; or
- 33 (b) the person giving the credit knows or has reason to believe
34 that the credit will be used for the purpose of dealing in
35 futures contracts.

Section 1267

- 1 (7) A person who is an employee of a member organisation of a
2 futures exchange in connection with a business of dealing in
3 futures contracts carried on by the member organisation must not,
4 as principal, deal, or agree to deal, in futures contracts unless the
5 member organisation acts as the agent of the person in respect of
6 the transaction.
- 7 (8) A reference in subsection (1) or (4) to an employee of a person
8 who is a futures broker or a futures adviser includes, in the case of
9 a body corporate that is a futures broker or a futures adviser, a
10 reference to an officer of the body corporate.
- 11 (9) The reference in subsection (7) to an employee of a member
12 organisation of a futures exchange includes:
13 (a) in the case of a member organisation that is a body corporate;
14 and
15 (b) in the case of a member organisation that is a partnership in
16 which a partner is a body corporate;
17 a reference to an officer of the body corporate.
- 18 (10) A reference in this section to an employee of a futures broker, a
19 futures adviser, a partnership or a member organisation of a futures
20 exchange includes a reference to a person who, pursuant to a
21 subsisting agreement, performs services for the futures broker,
22 futures adviser, partnership or member organisation in connection
23 with dealings in futures contracts by the futures broker, futures
24 adviser, partnership or member organisation.

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Part 8.8—Miscellaneous

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1268 Power of Court to make certain orders

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(1) Where:

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(a) on the application of ASIC, it appears to the Court that a person:

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(i) has contravened this Chapter, or any other law of a State or Territory in this jurisdiction relating to dealing in futures contracts; or

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(ii) has contravened the conditions of a licence, the business rules of a futures exchange, a clearing house or a futures association; or

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(iii) is about to do an act with respect to dealing in futures contracts that, if done, would be such a contravention; or

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(b) on the application of a futures exchange, clearing house or futures association, it appears to the Court that a person has contravened the business rules of the futures exchange, clearing house or futures association, as the case may be;

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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:

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(c) in the case of persistent or continuing breaches of this Chapter, or of a law of a State or Territory in this jurisdiction relating to dealing in futures contracts, or the conditions or restrictions of a licence, or of the business rules of a futures exchange, clearing house or futures association—an order restraining a person from carrying on a business of dealing in futures contracts, acting as a futures adviser, holding himself, herself or itself out as so carrying on business or so acting, or from doing an act as a representative of a futures broker or of a futures adviser;

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Section 1268

- 1 (d) an order restraining a person from acquiring, disposing of or
2 otherwise dealing in any class of futures contracts that is
3 specified in the order;
- 4 (e) an order appointing a receiver of property of a futures broker
5 or of property that is held by a futures broker for or on behalf
6 of another person, whether as trustee or otherwise;
- 7 (f) an order declaring a futures contract to be void or voidable;
- 8 (g) for the purpose of securing compliance with any other order
9 under this section, an order directing a person to do or refrain
10 from doing a specified act;
- 11 (h) any ancillary order deemed to be desirable in consequence of
12 the making of an order under any of the preceding
13 paragraphs.
- 14 (2) Where an application is made to the Court for an order under
15 subsection (1), the Court may, if in the opinion of the Court it is
16 desirable to do so, before considering the application, grant an
17 interim order, being an order of the kind applied for that is
18 expressed to have effect pending the determination of the
19 application.
- 20 (3) Where ASIC makes an application to the Court for the making of
21 an order under subsection (1), the Court must not require ASIC or
22 any other person, as a condition of granting an interim order under
23 subsection (2), to give any undertaking as to damages.
- 24 (4) The Court must not make an order under subsection (1) if it is
25 satisfied that the order would unfairly prejudice a person.
- 26 (5) The Court may, before making an order under subsection (1),
27 direct that notice of the application be given to such persons as it
28 thinks fit or direct that notice of the application be published in
29 such manner as it thinks fit, or both.
- 30 (6) A person appointed by order of the Court under subsection (1) as a
31 receiver of property of a futures broker:
- 32 (a) may require the broker to deliver to the person any property
33 of which the person has been appointed receiver or to give to
34 the person all information concerning that property that may
35 reasonably be required; and

Section 1269

- 1 (b) may acquire and take possession of any property of which the
2 person has been appointed receiver; and
3 (c) may deal with any property that the person has acquired or of
4 which the person has taken possession in any manner in
5 which the broker might lawfully have dealt with the property;
6 and
7 (d) has such other powers in respect of the property as the Court
8 specifies in the order.
- 9 (7) In paragraph (1)(e) and subsection (6), *property*, in relation to a
10 futures broker, includes money or other property entrusted to or
11 received on behalf of any other person by the broker or another
12 person in the course of or in connection with a business of dealing
13 in futures contracts carried on by the futures broker.
- 14 (8) A person must not, without reasonable excuse, contravene:
15 (a) an order under this section that is applicable to the person; or
16 (b) a requirement of a receiver appointed by order of the Court
17 under subsection (1).
- 18 (9) The Court may rescind, vary or discharge an order made by it
19 under this section or suspend the operation of such an order.

20 **1269 Restrictions on use of titles “futures broker”, “futures**
21 **exchange” etc.**

- 22 (1) A person who is not the holder of a futures brokers licence must
23 not take or use, or by inference adopt, the name or title of futures
24 broker, or take or use, or have attached to, or exhibited at, any
25 place, a name, title or description implying, or tending to create the
26 belief, that the person is a futures broker.
- 27 (2) A person who is not the holder of a futures brokers licence must
28 not:
29 (a) take or use, or by inference adopt; or
30 (b) have attached to, or exhibited at, any place;
31 a name, title or description implying, or tending to create the belief,
32 that the person is the holder of a futures brokers licence.

Section 1270

- 1 (3) A body corporate that is not:
2 (a) a futures exchange; or
3 (b) a recognised futures exchange;
4 must not take or use, or by inference adopt, the name or title of
5 futures exchange, or take or use, or have attached to, or exhibited
6 at, any place, a name, title or description implying, or tending to
7 create the belief, that the body is:
8 (c) a futures exchange; or
9 (d) a recognised futures exchange.
- 10 (4) A body corporate that is not a futures association must not take or
11 use, or by inference adopt, the name or title of futures association,
12 or take or use, or have attached to, or exhibited at, any place, a
13 name, title or description implying, or tending to create the belief,
14 that the body is a futures association.

15 **1270 Preservation and disposal of records etc.**

- 16 (1) A person who is required by a provision of this Act to maintain,
17 make or keep a register or a financial or other record in relation to
18 a business carried on by the person must preserve that register or
19 record for the prescribed period, whether or not the person ceases
20 to carry on that business before the end of that period.
- 21 (2) The prescribed period for the purposes of subsection (1) is:
22 (a) in relation to a register or a record other than a financial
23 record, the period of 5 years next after the day on which the
24 last entry was made in the register or record; or
25 (b) in relation to a financial record, the 7 years after the
26 transactions covered by the record are completed.
- 27 (3) Subsections (1) and (2) do not apply in relation to a contract note
28 or copy of a contract note received or issued by a futures broker
29 who is a member of a futures exchange if the matters required by
30 subsection 1206(4), (5) or (6), as the case requires, to be included
31 in the contract note are recorded:
32 (a) by the futures exchange; or

Section 1271

1 (b) subject to such conditions (if any) as ASIC imposes, by the
2 broker;
3 in a manner approved by ASIC and the record of those matters is
4 retained for not less than 5 years.

5 (4) ASIC may, if of the opinion that it is no longer necessary or
6 desirable to retain it, destroy or otherwise dispose of any document
7 that is given to or lodged with ASIC under or for the purposes of
8 this Act and that has been in the possession of ASIC for such
9 period as is prescribed for the purposes of this subsection, either
10 generally or in relation to a particular document or class of
11 documents.

12 **1271 Concealing etc. books relating to futures contracts**

13 (1) A person who:
14 (a) in any case—conceals, destroys, mutilates or alters a book
15 relating to the business carried on by a futures broker or
16 required under this Act to be kept by the holder of a licence;
17 or
18 (b) sends or takes, or causes the sending or taking of, the book
19 out of this jurisdiction or out of Australia;
20 contravenes this subsection.

21 (2) In a prosecution of a person for an offence under subsection (1), it
22 is a defence if it is established that the person did not act with
23 intent to defraud, to defeat the purposes of this Act or the ASIC
24 Act or to prevent, delay or obstruct the carrying out of an
25 examination, investigation or audit, or the exercise of a power or
26 authority, under this Act or the ASIC Act.

27 **1272 Falsification of records**

28 (1) Where matter that is used or intended to be used in connection with
29 the keeping of a book required to be kept under this Act or a
30 register or any accounting or other record referred to in
31 section 1270 is recorded or stored in an illegible form by means of
32 a mechanical device, an electronic device or any other device, a
33 person who:

Section 1273

- 1 (a) records or stores by means of that device matter that the
2 person knows to be false or misleading in a material
3 particular; or
4 (b) destroys, removes or falsifies matter that is recorded or stored
5 by means of that device, or has been prepared for the purpose
6 of being recorded or stored, or for use in compiling other
7 matter to be recorded or stored, by means of that device; or
8 (c) fails to record or store matter by means of that device with
9 intent to falsify any entry made or intended to be compiled,
10 wholly or in part, from that matter;
11 contravenes this subsection.
- 12 (2) In a prosecution of a person for an offence under subsection (1), it
13 is a defence if it is established that the person acted honestly and
14 that in all the circumstances the act or omission constituting the
15 offence should be excused.

16 **1273 Precautions against falsification of records**

17 A person required by this Chapter to keep a book or record must
18 take reasonable precautions for guarding against falsification of the
19 book or record and for facilitating discovery of any falsification.

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Chapter 9—Miscellaneous

Part 9.1—Registers and registration of documents

1274 Registers

- (1) ASIC must, subject to this Act, keep such registers as it considers necessary in such form as it thinks fit.
- (2) A person may:
 - (a) inspect any document lodged with ASIC, not being:
 - (iaa) a notice lodged under subsection 205D(3); or
 - (i) an application under section 1279; or
 - (ia) a document lodged under a provision of Chapter 7 (other than subsection 776(2B), section 1001B or Part 7.13) or Chapter 8; or
 - (ii) a document lodged under section 1287 or 1288; or
 - (iii) a document lodged under paragraph 1296(2)(b); or
 - (iv) a report made or lodged under section 422, 438D, 452 or 533; or
 - (v) a document that has been destroyed or otherwise disposed of; or
 - (b) require a certificate of the registration of a company or any other certificate authorised by this Act to be given by ASIC; or
 - (c) require a copy of or extract from any document that the person is entitled to inspect pursuant to paragraph (a) or any certificate referred to in paragraph (b) to be given, or given and certified, by ASIC.
- (2A) For the purposes of subsection (2), a document given to ASIC under subsection 776(2B) is taken to be a document lodged with ASIC.
- (3) If a reproduction or transparency of a document or certificate is produced for inspection, a person is not entitled pursuant to

- 1 paragraph (2)(a) to require the production of the original of that
2 document or certificate.
- 3 (4) The reference in paragraph (2)(c) to a document or certificate
4 includes, where a reproduction or transparency of that document or
5 certificate has been incorporated with a register kept by ASIC, a
6 reference to that reproduction or transparency and, where such a
7 reproduction or transparency has been so incorporated, a person is
8 not entitled pursuant to that paragraph to a copy of or extract from
9 the original of that document or certificate.
- 10 (4A) A person is not entitled under paragraph (2)(a) to require the
11 production of the original of a document or certificate if ASIC
12 keeps by means of a mechanical, electronic or other device a
13 record of information set out in the document or certificate and:
14 (a) ASIC produces to the person for inspection a writing that sets
15 out what purports to be the contents of the document or
16 certificate; or
17 (b) ASIC causes to be displayed for the person what purports to
18 be the contents of the document or certificate and, as at the
19 time of the displaying, the person has not asked for the
20 production of a writing of the kind referred to in
21 paragraph (a).
- 22 (4B) Where:
23 (a) a person makes under paragraph (2)(c) a requirement that
24 relates to a document or certificate; and
25 (b) ASIC keeps by means of a mechanical, electronic or other
26 device a record of information set out in the document or
27 certificate; and
28 (c) pursuant to that requirement, ASIC gives a writing or
29 document that sets out what purports to be the contents of:
30 (i) the whole of the document or certificate; or
31 (ii) a part of the document or certificate;
32 then, for the purposes of that paragraph, ASIC is taken to have
33 given, pursuant to that requirement:
34 (d) if subparagraph (c)(i) applies—a copy of the document or
35 certificate; or

- 1 (e) if subparagraph (c)(ii) applies—an extract from the document
2 or certificate setting out that part of it.
- 3 (4C) Where:
- 4 (a) the requirement referred to in paragraph (4B)(a) includes a
5 requirement that the copy or extract be certified; and
6 (b) pursuant to that requirement, ASIC gives a writing or
7 document as mentioned in paragraph (4B)(c);
8 then:
- 9 (c) ASIC may certify that the writing or document sets out the
10 contents of the whole or part of the document or certificate,
11 as the case requires; and
12 (d) the writing or document is, in a proceeding in a court,
13 admissible as prima facie evidence of the information
14 contained in it.
- 15 (5) A copy of or extract from any document lodged with ASIC, and
16 certified by ASIC, is, in any proceeding, admissible in evidence as
17 of equal validity with the original document.
- 18 (6) The reference in subsection (5) to a document includes, where a
19 reproduction or transparency of that document has been
20 incorporated with a register kept by ASIC, a reference to that
21 reproduction or transparency.
- 22 (7) In any proceeding:
- 23 (a) a certificate by ASIC that, at a date or during a period
24 specified in the certificate, no company was registered under
25 this Act by a name specified in the certificate is to be
26 received as prima facie evidence that at that date or during
27 that period, as the case may be, no company was registered
28 by that name under this Act; and
29 (b) a certificate by ASIC that a requirement of this Act specified
30 in the certificate:
31 (i) had or had not been complied with at a date or within a
32 period specified in the certificate; or

- 1 (ii) had been complied with at a date specified in the
2 certificate but not before that date;
3 is to be received as prima facie evidence of matters specified
4 in the certificate; and
5 (c) a certificate by ASIC that, during a period specified in the
6 certificate, a particular company was registered, or taken to
7 be registered, under this Act is to be received as prima facie
8 evidence that, during that period, that company was
9 registered under this Act.
- 10 (7A) A certificate issued by ASIC stating that a company has been
11 registered under this Act is conclusive evidence that:
12 (a) all requirements of this Act for its registration have been
13 complied with; and
14 (b) the company was duly registered as a company under this
15 Act on the date specified in the certificate.
- 16 (8) If ASIC is of opinion that a document submitted for lodgment:
17 (a) contains matter contrary to law; or
18 (b) contains matter that, in a material particular, is false or
19 misleading in the form or context in which it is included; or
20 (c) because of an omission or misdescription has not been duly
21 completed; or
22 (d) contravenes this Act; or
23 (e) contains an error, alteration or erasure;
24 ASIC may refuse to register or receive the document and may
25 request:
26 (f) that the document be appropriately amended or completed
27 and resubmitted; or
28 (g) that a fresh document be submitted in its place; or
29 (h) where the document has not been duly completed, that a
30 supplementary document in the prescribed form be lodged.
- 31 (9) ASIC may require a person who submits a document for lodgment
32 to produce to ASIC such other document, or to give to ASIC such
33 information, as ASIC thinks necessary in order to form an opinion
34 whether it may refuse to receive or register the first-mentioned
35 document.

- 1 (10) ASIC may, if in the opinion of ASIC it is no longer necessary or
2 desirable to retain them, destroy or dispose of:
3 (a) in relation to a body corporate:
4 (i) any return of allotment of shares for cash that has been
5 lodged for not less than 2 years; or
6 (ii) any annual return or balance-sheet that has been lodged
7 for not less than 7 years or any document creating or
8 evidencing a charge, or the complete or partial
9 satisfaction of a charge, where a memorandum of
10 satisfaction of the charge has been registered for not less
11 than 7 years; or
12 (iii) any other document (other than the constitution or any
13 other document affecting it) that has been lodged or
14 registered for not less than 15 years; or
15 (c) any document a transparency of which has been incorporated
16 with a register kept by ASIC.
- 17 (11) If a body corporate or other person, having made default in
18 complying with:
19 (a) any provision of this Act or of any other law that requires the
20 lodging in any manner of any return, account or other
21 document or the giving of notice to ASIC of any matter; or
22 (b) any request of ASIC to amend or complete and resubmit any
23 document or to submit a fresh document;
24 fails to make good the default within 14 days after the service on
25 the body or person of a notice requiring it to be done, a court may,
26 on an application by any member or creditor of the body or by
27 ASIC, make an order directing the body or any officer of the body
28 or the person to make good the default within such time as is
29 specified in the order.
- 30 (12) Any such order may provide that all costs of and incidental to the
31 application are to be borne by the body or by any officers of the
32 body responsible for the default or by the person.
- 33 (13) A person must not contravene an order made under
34 subsection (11).

Section 1274AA

- 1 (14) Nothing in this section prejudices the operation of any law
2 imposing penalties on a body corporate or its officers or on another
3 person in respect of a default mentioned in subsection (11).
- 4 (15) Where information about a person is included on a register kept by
5 ASIC, ASIC may at any time, in writing, require that person to
6 give ASIC specified information about the person, being
7 information of the kind included on that register.
- 8 (16) The person must provide the information within such reasonable
9 period, and in such form, as are specified by ASIC.

10 **1274AA Register of disqualified company directors and other**
11 **officers**

- 12 (1) ASIC must keep a register of persons who have been disqualified
13 from managing corporations under Part 2D.6 or under any previous
14 law of a State or Territory.
- 15 (2) The register must contain a copy of:
16 (b) every notice that was served under section 206F; or
17 (c) every order lodged under section 206G.
- 18 (3) Subsections 1274(2) and (5) apply to a copy of an order or notice
19 as if that copy were a document lodged with ASIC.

20 **1274A Obtaining information from certain registers**

- 21 (1) In this section:
22 *data processor* means a mechanical, electronic or other device for
23 the processing of data.
24 *register* means a register kept by ASIC under this Act.
25 *search* includes inspect.
- 26 (2) ASIC may permit a person to search, otherwise than by using a
27 data processor, a prescribed register.

Section 1274B

- 1 (3) ASIC may permit a person to search a prescribed register by using
2 a data processor in order to obtain prescribed information from the
3 register.
- 4 (4) ASIC may make available to a person prescribed information (in
5 the form of a document or otherwise) that ASIC has obtained from
6 a prescribed register by using a data processor.
- 7 (5) Nothing in this section limits:
8 (a) a power or function that ASIC has apart from this section; or
9 (b) a right that a person has apart from this section.

10 **1274B Use, in court proceedings, of information from ASIC's**
11 **national database**

- 12 (1) In this section:
13 *data processor* means a mechanical, electronic or other device for
14 processing data.
- 15 (2) In a proceeding in a court, a writing that purports to have been
16 prepared by ASIC is admissible as prima facie evidence of the
17 matters stated in so much of the writing as sets out what purports to
18 be information obtained by ASIC, by using a data processor, from
19 the national database. In other words, the writing is proof of such a
20 matter in the absence of evidence to the contrary.
- 21 (3) A writing need not bear a certificate or signature in order to be
22 taken to purport to have been prepared by ASIC.
- 23 (4) Nothing in this section limits, or is limited by, section 1274 or
24 1274A.

25 **1274C ASIC certificate**

26 ASIC may certify that a person was a director or secretary of a
27 company at a particular time or during a particular period. In the
28 absence of evidence to the contrary, a certificate is proof of the
29 matters stated in it.

30 Note: See section 1274B for the evidentiary status of documents prepared by
31 ASIC from the national database.

1 **1275 Relodging of lost registered documents**

- 2 (1) Where a document forming part of the constitution of, or any other
3 document relating to, a body corporate has, since being lodged,
4 been lost or destroyed, a person may apply to ASIC for leave to
5 lodge a copy of the document as originally lodged.
- 6 (2) Where such an application is made, ASIC may direct that notice of
7 the application be given to such persons and in such manner as it
8 thinks fit.
- 9 (3) Whether or not an application has been made to ASIC under
10 subsection (1), ASIC, upon being satisfied:
11 (a) that an original document has been lost or destroyed; and
12 (b) of the date of the lodging of that document; and
13 (c) that a copy of that document produced to ASIC is a correct
14 copy;
15 may certify upon the copy that it is so satisfied and grant leave for
16 the copy to be lodged in the manner required by law in respect of
17 the original.
- 18 (4) Upon the lodgment the copy has, and is taken to have had from
19 such date as is mentioned in the certificate as the date of the
20 lodging of the original, the same force and effect for all purposes
21 as the original.
- 22 (5) A decision of the Tribunal varying or setting aside a decision of
23 ASIC to certify and grant leave under subsection (3) may be
24 lodged with ASIC and is to be registered by it, but no payments,
25 contracts, dealings, acts or things made, had or done in good faith
26 before the registration of the Tribunal's decision and upon the faith
27 of and in reliance upon the certificate are to be invalidated or
28 affected by the Tribunal's decision.
- 29 (6) Where a transparency of a document referred to in subsection (1)
30 has been incorporated with a register kept by ASIC and is lost or
31 destroyed as referred to in that subsection, this section applies as if
32 the document of which it is a transparency had been so lost or
33 destroyed.

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2 **Part 9.2—Registration of auditors and liquidators**

3 **Division 1—Interpretation**

4 **1276 Definitions**

5 In this Part, unless the contrary intention appears:

6 *body corporate* includes a Part 5.7 body.

7 *decision*, in relation to the Board, means, in Division 3, a decision
8 of the Board under that Division and includes a refusal to exercise
9 a power under section 1292.

10 *registered* means registered under Division 2.

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2 **Division 2—Registration**

3 **1279 Application for registration as auditor or liquidator**

- 4 (1) A natural person may make an application to ASIC:
5 (a) for registration as an auditor; or
6 (b) for registration as a liquidator; or
7 (c) for registration as a liquidator of a specified body corporate,
8 being a body corporate that is to be wound up under this Act.
- 9 (2) An application under this section must be made in writing as
10 prescribed and must contain such information as is prescribed.

11 **1280 Registration of auditors**

- 12 (2) Subject to this section, where an application for registration as an
13 auditor is made under section 1279, ASIC must grant the
14 application and register the applicant as an auditor if:
15 (a) the applicant:
16 (i) is a member of the Institute of Chartered Accountants in
17 Australia, the Australian Society of Certified Practising
18 Accountants or any other prescribed body; or
19 (ii) holds a degree, diploma or certificate from a prescribed
20 university or another prescribed institution in Australia
21 and has passed examinations in such subjects, under
22 whatever name, as the appropriate authority of the
23 university or other institution certifies to ASIC to
24 represent a course of study in accountancy (including
25 auditing) of not less than 3 years duration and in
26 commercial law (including company law) of not less
27 than 2 years duration; or
28 (iii) has other qualifications and experience that, in the
29 opinion of ASIC, are equivalent to the qualifications
30 mentioned in subparagraph (i) or (ii); and
31 (b) ASIC is satisfied that the applicant has had such practical
32 experience in auditing as is prescribed; and

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- 1 (c) ASIC is satisfied that the applicant is capable of performing
2 the duties of an auditor and is otherwise a fit and proper
3 person to be registered as an auditor;
4 but otherwise ASIC must refuse the application.
- 5 (3) ASIC must not register as an auditor a person who is disqualified
6 from managing corporations under Part 2D.6.
- 7 (4) Subject to subsection (8), ASIC may refuse to register as an auditor
8 a person who is not resident in Australia.
- 9 (5) Where ASIC grants an application by a person for registration as
10 an auditor, ASIC must cause to be issued to the person a certificate
11 by ASIC stating that the person has been registered as an auditor
12 and specifying the day on which the application was granted.
- 13 (7) A registration under this section is taken to have taken effect at the
14 beginning of the day specified in the certificate as the day on which
15 the application for registration was granted and remains in force
16 until:
17 (a) the registration is cancelled by ASIC or the Board; or
18 (b) the person who is registered dies.
- 19 (8) ASIC must not refuse to register a person as an auditor unless
20 ASIC has given the person an opportunity to appear at a hearing
21 before ASIC and to make submissions and give evidence to ASIC
22 in relation to the matter.
- 23 (9) Where ASIC refuses an application by a person for registration as
24 an auditor, ASIC must, not later than 14 days after the decision,
25 give to the person a notice in writing setting out the decision and
26 the reasons for it.

27 **1281 Auditor-General taken to be registered as auditor**

- 28 A person who holds office as, or is for the time being exercising
29 the powers and performing the duties of:
30 (a) the Auditor-General; or

1 (b) the Auditor-General of a State or Territory in this
2 jurisdiction;
3 is taken, despite any other provision of this Part, to be registered as
4 an auditor.

5 **1282 Registration of liquidators**

- 6 (2) Subject to this section, where an application for registration as a
7 liquidator is made under section 1279, ASIC must grant the
8 application if:
9 (a) the applicant:
10 (i) is a member of The Institute of Chartered Accountants
11 in Australia, the Australian Society of Certified
12 Practising Accountants or any other prescribed body; or
13 (ii) holds a degree, diploma or certificate from a prescribed
14 university or another prescribed institution in Australia
15 and has passed examinations in such subjects, under
16 whatever name, as the appropriate authority of the
17 university or other institution certifies to ASIC to
18 represent a course of study in accountancy of not less
19 than 3 years duration and in commercial law (including
20 company law) of not less than 2 years duration; or
21 (iii) has other qualifications and experience that, in the
22 opinion of ASIC, are equivalent to the qualifications
23 mentioned in subparagraph (i) or (ii); and
24 (b) ASIC is satisfied as to the experience of the applicant in
25 connection with the winding up of bodies corporate; and
26 (c) ASIC is satisfied that the applicant is capable of performing
27 the duties of a liquidator and is otherwise a fit and proper
28 person to be registered as a liquidator;
29 but otherwise ASIC must refuse the application.
- 30 (3) Where an application for registration as a liquidator of a specified
31 body corporate is made under section 1279, ASIC must grant the
32 application and register the applicant as a liquidator of that body if
33 ASIC is satisfied that the applicant has sufficient experience and
34 ability, and is a fit and proper person, to act as liquidator of the
35 body, having regard to the nature of the property or business of the

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- 1 body and the interests of its creditors and contributories, but
2 otherwise ASIC must refuse the application.
- 3 (4) ASIC must not register as a liquidator, or as a liquidator of a
4 specified body corporate, a person who is disqualified from
5 managing corporations under Part 2D.6.
- 6 (5) Subject to subsection (10), ASIC may refuse to register as a
7 liquidator or as a liquidator of a specified body corporate a person
8 who is not resident in Australia.
- 9 (6) Where:
- 10 (a) ASIC grants an application by a person for registration as a
11 liquidator or as a liquidator of a specified body corporate;
12 and
- 13 (b) the person has complied with the requirements of
14 section 1284;
- 15 ASIC must cause to be issued to the person a certificate by ASIC:
- 16 (c) stating that the person has been registered as a liquidator or
17 as a liquidator of a specified body corporate; and
- 18 (d) specifying a day as the day of the beginning of the
19 registration, being:
- 20 (i) the day on which ASIC granted the application; or
21 (ii) the day on which the person complied with the
22 requirements of section 1284;
- 23 whichever was the later; and
- 24 (e) in the case of a person who is registered under subsection (3)
25 as a liquidator of a specified body corporate—setting out the
26 name of that body.
- 27 (8) The registration of a person as a liquidator under subsection (2)
28 comes into force at the beginning of the day specified in the
29 certificate as the day of the beginning of the registration and
30 remains in force until:
- 31 (a) the registration is cancelled by ASIC or by the Board; or
32 (b) the person dies.
- 33 (9) The registration of a person as a liquidator of a specified body
34 corporate under subsection (3) comes into force at the beginning of

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- 1 the day specified in the certificate as the day of the beginning of
2 the registration and remains in force until:
3 (a) the registration is cancelled by ASIC or by the Board; or
4 (b) the person dies; or
5 (c) the body corporate is dissolved or deregistered.
- 6 (10) ASIC must not refuse to register a person as a liquidator, or as a
7 liquidator of a specified body corporate, unless ASIC has given the
8 person an opportunity to appear at a hearing before ASIC and to
9 make submissions and give evidence to ASIC in relation to the
10 matter.
- 11 (11) Where ASIC refuses an application by a person for registration as a
12 liquidator, or as a liquidator of a specified body corporate, ASIC
13 must, not later than 14 days after the decision, give to the person
14 notice in writing setting out the decision and the reasons for it.

15 **1283 Registration of official liquidators**

- 16 (1) ASIC may register as an official liquidator a natural person who is
17 a registered liquidator.
- 18 (2) A person who is registered as an official liquidator is entitled, upon
19 request, to be issued with a certificate of his or her registration.
- 20 (3) ASIC may register under subsection (1) as official liquidators as
21 many registered liquidators as it thinks fit.

22 **1284 Security to be given by liquidators**

- 23 (1) Where ASIC grants an application by a person for registration as a
24 liquidator or as a liquidator of a specified body corporate, the
25 person must lodge and maintain with ASIC a security for the due
26 performance of his or her duties as such a liquidator in such form
27 and for such amount as is, from time to time, determined by ASIC
28 in relation to that liquidator and with such surety or sureties (if
29 any) as ASIC, from time to time, requires.

- 1 (2) Where a security is lodged in accordance with subsection (1), the
2 security may be applied by ASIC in such circumstances, for such
3 purposes and in such manner as is prescribed.
- 4 (3) The regulations may make provision in relation to:
5 (a) the discharge in whole or part by ASIC of securities lodged
6 under this section; and
7 (b) the release by ASIC of sureties referred to in subsection (1)
8 from all or any of their obligations as such sureties.

9 **1285 Register of Auditors**

- 10 (1) ASIC must cause a Register of Auditors to be kept for the purposes
11 of this Act and must cause to be entered in the Register in relation
12 to a person who is registered as an auditor:
13 (a) the name of the person; and
14 (b) the day on which the application by that person for
15 registration as an auditor was granted; and
16 (c) the address of the principal place where the person practises
17 as an auditor and the address of the other places (if any) at
18 which he or she so practises; and
19 (d) if the person practises as an auditor as a member of a firm or
20 under a name or style other than his or her own name—the
21 name of that firm or the name or style under which he or she
22 so practises; and
23 (e) particulars of any suspension of the person's registration,
24 under Division 2, as an auditor and of any action taken in
25 respect of the person under paragraph 1292(9)(a), (b) or (c);
26 and may cause to be entered in the Register in relation to a person
27 who is registered as an auditor such other particulars as ASIC
28 considers appropriate.
- 29 (2) Where a person ceases to be registered as an auditor, ASIC must
30 cause to be removed from the Register of Auditors the name of the
31 person and any other particulars entered in the Register in relation
32 to that person.
- 33 (3) A person may inspect and make copies of, or take extracts from,
34 the Register of Auditors.

1 **1286 Registers of Liquidators and Official Liquidators**

- 2 (1) ASIC must cause a Register of Liquidators to be kept for the
3 purposes of this Act and must cause to be entered in the Register:
4 (a) in relation to a person who is registered as a liquidator:
5 (i) the name of the person; and
6 (ii) the day of the beginning of the registration of that
7 person as a liquidator; and
8 (iii) the address of the principal place where the person
9 practises as a liquidator and the addresses of the other
10 places (if any) at which he or she so practises; and
11 (iv) if the person practises as a liquidator as a member of a
12 firm or under a name or style other than his or her own
13 name—the name of that firm or the name or style under
14 which he or she so practises; and
15 (v) particulars of any suspension of the registration of the
16 person as a liquidator or as a liquidator of a specified
17 body corporate, and of any action taken in respect of the
18 person under paragraph 1292(9)(a), (b) or (c); and
19 (b) in relation to a person who is registered as a liquidator of a
20 specified body corporate:
21 (i) the name of the person; and
22 (ii) the name of the body corporate; and
23 (iii) the day of commencement of the registration of the
24 person as a liquidator of the body corporate; and
25 (iv) the address of the principal place where the person
26 proposes to perform his or her functions as the
27 liquidator of the body corporate; and
28 (v) if the person practises a profession as a member of a
29 firm or under a name or style other than his or her own
30 name, being a profession by virtue of which he or she is
31 qualified to be appointed as a liquidator of the body
32 corporate—the name and address of that firm or the
33 name or style under which he or she so practises; and
34 (vi) particulars of any suspension or deemed suspension of
35 the registration of the person as a liquidator of that body
36 corporate or as a liquidator of a specified body

- 1 corporate, and of any action taken in respect of the
2 person under paragraph 1292(9)(a), (b) or (c);
3 and may cause to be entered in the Register in relation to a person
4 who is registered as a liquidator, or as a liquidator of a specified
5 body corporate, such other particulars as ASIC considers
6 appropriate.
- 7 (2) ASIC must cause a Register of Official Liquidators to be kept for
8 the purposes of this Act and must cause to be entered in the
9 Register the name, and such other particulars as ASIC considers
10 appropriate, of any person registered as an official liquidator.
- 11 (3) Where a person ceases to be registered as a liquidator, as a
12 liquidator of a specified body corporate or as an official liquidator,
13 ASIC must cause to be removed from the Register of Liquidators
14 or from the Register of Official Liquidators, as the case may be, the
15 name of the person and any other particulars entered in that
16 Register in relation to that person.
- 17 (4) A person may inspect and make copies of, or take extracts from,
18 the Register of Liquidators or the Register of Official Liquidators.

19 **1287 Notification of certain matters**

- 20 (1) Where:
21 (a) a person who is a registered company auditor ceases to
22 practise as an auditor; or
23 (b) a change occurs in any matter particulars of which are
24 required by paragraph 1285(1)(a), (c) or (d) to be entered in
25 the Register of Auditors in relation to a person who is a
26 registered company auditor;
27 the person must, not later than 21 days after the occurrence of the
28 event concerned, lodge, in the prescribed form, particulars in
29 writing of that event.
- 30 (2) Where:
31 (a) a person who is a registered liquidator ceases to practise as a
32 liquidator; or

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- 1 (b) a change occurs in any matter particulars of which are
2 required by subparagraph 1286(1)(a)(i), (iii) or (iv) to be
3 entered in the Register of Liquidators in relation to a person
4 who is a registered liquidator;
5 the person must, not later than 21 days after the occurrence of the
6 event concerned, lodge, in the prescribed form, particulars in
7 writing of that event.
- 8 (3) Where:
- 9 (a) a person who is registered as a liquidator of a specified body
10 corporate ceases to act as a liquidator in the winding up of
11 that body; or
12 (b) a change occurs in any matter particulars of which are
13 required by subparagraph 1286(1)(b)(i), (ii), (iv) or (v) to be
14 entered in the Register of Liquidators in relation to a person
15 who is registered as a liquidator of a specified body
16 corporate;
17 the person must, not later than 21 days after the occurrence of the
18 event concerned, lodge, in the prescribed form, particulars in
19 writing of that event.
- 20 (4) If a person who is registered as an auditor, as a liquidator or as a
21 liquidator of a specified corporate body is disqualified from
22 managing corporations under Part 2D.6, then, within a period of 3
23 days after they become disqualified, they must lodge written
24 particulars in the prescribed form of the circumstances because of
25 which they become disqualified.

26 **1288 Triennial statements by registered auditors and liquidators**

- 27 (3) A person who is a registered company auditor or registered
28 liquidator must, within one month after the end of:
29 (a) the period of 3 years beginning on the day on which the
30 person's registration begins; and
31 (b) each subsequent period of 3 years;
32 lodge a statement in respect of that period of 3 years setting out
33 such information as is prescribed.

- 1 (4) ASIC may, on the application of a registered company auditor or a
2 registered liquidator made before the end of the period for lodging
3 a statement under subsection (3), extend, or further extend, that
4 period.
- 5 (5) ASIC may, by notice in writing served on the person, require a
6 person who is registered as a liquidator of a specified body
7 corporate to lodge, within a period specified in the notice, a
8 statement in respect of a period specified in the notice setting out
9 such information as is prescribed.

10 **1289 Auditors and other persons to enjoy qualified privilege in**
11 **certain circumstances**

- 12 (1) An auditor has qualified privilege in respect of:
- 13 (a) any statement that he or she makes, orally or in writing, in
14 the course of his or her duties as auditor; or
- 15 (b) any statement that he or she makes, orally or in writing, on a
16 directors' report under section 298 or 306 or on any
17 statement, report or other document that is taken, for any
18 purpose, to be part of the first-mentioned report; or
- 19 (c) notifying ASIC of a matter under section 311.
- 20 (2) A person has qualified privilege in respect of:
- 21 (a) the publishing of any document prepared by an auditor in the
22 course of his or her duties and required by or under this Act
23 to be lodged, whether or not the document has been lodged;
24 or
- 25 (b) the publishing of any statement made by an auditor as
26 mentioned in subsection (1).

1

2 **Division 3—Cancellation or suspension of registration**

3 **1290 Cancellation at request of registered person**

- 4 (1) Where a person who is registered as an auditor, as a liquidator, as a
5 liquidator of a specified body corporate or as an official liquidator
6 requests ASIC to cancel his or her registration, ASIC may cancel
7 the registration of that person as an auditor, as a liquidator, as a
8 liquidator of that body corporate or as an official liquidator, as the
9 case may be.
- 10 (2) A decision of ASIC under subsection (1) to cancel the registration
11 of a person as an auditor, as a liquidator, as a liquidator of a
12 specified body corporate or as an official liquidator comes into
13 effect as soon as practicable upon the making of the decision.

14 **1291 Official liquidators**

- 15 (1) ASIC may, at any time, cancel, or suspend for a specified period,
16 the registration as an official liquidator of a person who is so
17 registered.
- 18 (2) ASIC may, at any time, require a person registered as an official
19 liquidator to give an undertaking to refrain from engaging in
20 specified conduct except on specified conditions.
- 21 (3) Where ASIC decides to exercise a power under subsection (1) or
22 (2), ASIC must, not later than 14 days after the decision, give to
23 the person a notice in writing setting out the decision and the
24 reasons for it, but the validity of the decision is not affected by
25 failure of ASIC to do so.
- 26 (4) A decision of ASIC under subsection (1) to cancel or suspend the
27 registration of a person as an official liquidator comes into effect at
28 the end of the day on which there is given to the person a notice of
29 the decision, being a notice of the kind referred to in
30 subsection (3).

1 **1292 Powers of Board in relation to auditors and liquidators**

- 2 (1) The Board may, if it is satisfied on an application by ASIC for a
3 person who is registered as an auditor to be dealt with under this
4 section that, before, at or after the commencement of this section:
5 (a) the person has:
6 (i) contravened section 1288; or
7 (ii) ceased to be resident in Australia; or
8 (d) the person has failed, whether in or outside this jurisdiction,
9 to carry out or perform adequately and properly:
10 (i) the duties of an auditor; or
11 (ii) any duties or functions required by an Australian law to
12 be carried out or performed by a registered company
13 auditor;
14 or is otherwise not a fit and proper person to remain
15 registered as an auditor;
16 by order, cancel, or suspend for a specified period, the registration
17 of the person as an auditor.
- 18 (2) The Board may, if it is satisfied on an application by ASIC for a
19 person who is registered as a liquidator to be dealt with under this
20 section that, before, at or after the commencement of this section:
21 (a) the person has:
22 (i) contravened section 1288; or
23 (ii) ceased to be resident in Australia; or
24 (d) that the person has failed, whether in or outside this
25 jurisdiction, to carry out or perform adequately and properly:
26 (i) the duties of a liquidator; or
27 (ii) any duties or functions required by an Australian law to
28 be carried out or performed by a registered liquidator;
29 or is otherwise not a fit and proper person to remain
30 registered as a liquidator;
31 by order, cancel, or suspend for a specified period, the registration
32 of the person as a liquidator.
- 33 (3) The Board may, if it is satisfied on an application by ASIC for a
34 person who is registered as a liquidator of a specified body

1 corporate to be dealt with under this section that, before, at or after
2 the commencement of this section:

- 3 (a) the person has:
- 4 (i) contravened subsection 1288(5); or
 - 5 (ii) ceased to be resident in Australia; or
- 6 (d) that the person has failed, whether in or outside this
7 jurisdiction, to carry out adequately and properly the duties
8 of a liquidator in respect of the winding up of that body
9 corporate or is otherwise not a fit and proper person to
10 remain registered as a liquidator of that body corporate;
- 11 by order, cancel, or suspend for a specified period, the registration
12 of the person as a liquidator of that body corporate.

13 (4) Where:

- 14 (a) ASIC applies to the Board for a person who is registered as
15 an auditor to be dealt with under this section; and
- 16 (b) the person is also registered as a liquidator or as a liquidator
17 of a specified body corporate;

18 the Board may, in addition to making an order under
19 subsection (1), if it is satisfied as to any of the matters specified in
20 paragraph (2)(a) or (d) or (3)(a) or (d), make an order cancelling, or
21 suspending for a specified period, the registration of the person as a
22 liquidator or as a liquidator of that body, as the case may be, and,
23 where the Board makes such an order, the order is, for the purposes
24 of this Division, taken to have been made under subsection (2) or
25 (3), as the case may be.

26 (5) Where:

- 27 (a) ASIC applies to the Board for a person who is registered as a
28 liquidator to be dealt with under this section; and
- 29 (b) the person is also registered as an auditor or as a liquidator of
30 a specified body corporate;

31 the Board may, in addition to making an order under
32 subsection (2), if it is satisfied as to any of the matters specified in
33 paragraph (1)(a) or (d) or (3)(a) or (d), make an order cancelling, or
34 suspending for a specified period, the registration of the person as
35 an auditor or as a liquidator of that body, as the case may be, and,
36 where the Board makes such an order, the order is, for the purposes

1 of this Division, taken to have been made under subsection (1) or
2 (3), as the case may be.

3 (6) Where:

4 (a) ASIC applies to the Board for a person who is registered as a
5 liquidator of a specified body corporate to be dealt with
6 under this section; and

7 (b) the person is also registered as an auditor or as a liquidator;
8 the Board may, in addition to making an order under
9 subsection (3), if it is satisfied as to any of the matters specified in
10 paragraph (1)(a) or (d) or (2)(a) or (d), make an order cancelling, or
11 suspending for a specified period, the registration of the person as
12 an auditor or as a liquidator, as the case may be, and, where the
13 Board makes such an order, the order is, for the purposes of this
14 Division, taken to have been made under subsection (1) or (2), as
15 the case may be.

16 (7) The Board must, if it is satisfied on an application by ASIC for a
17 prescribed person to be dealt with under this section:

18 (a) that the person is disqualified from managing corporations
19 under Part 2D.6; or

20 (b) that the person is incapable, because of mental infirmity, of
21 managing his or her affairs;

22 by order, cancel each prescribed registration of the person.

23 (8) In subsection (7) and in this subsection:

24 **prescribed person** means a person who is registered as an auditor,
25 as a liquidator or as a liquidator of a specified body corporate.

26 **prescribed registration**, in relation to a prescribed person, means a
27 registration of the person as an auditor, as a liquidator or as the
28 liquidator of a specified body corporate.

29 (9) Where, on an application by ASIC for a person who is registered as
30 an auditor, as a liquidator or as a liquidator of a specified body
31 corporate to be dealt with under this section, the Board is satisfied
32 that the person has failed to carry out or perform adequately and
33 properly any of the duties or functions mentioned in
34 paragraph (1)(d), (2)(d) or (3)(d), as the case may be, or is

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1 otherwise not a fit and proper person to remain registered as an
2 auditor, liquidator or liquidator of that body, as the case may be,
3 the Board may deal with the person in one or more of the following
4 ways:

5 (a) by admonishing or reprimanding the person;

6 (b) by requiring the person to give an undertaking to engage in,
7 or to refrain from engaging in, specified conduct;

8 (c) by requiring the person to give an undertaking to refrain from
9 engaging in specified conduct except on specified conditions;

10 and, if a person fails to give an undertaking when required to do so
11 under paragraph (b) or (c), or contravenes an undertaking given
12 pursuant to a requirement under that paragraph, the Board may, by
13 order, cancel, or suspend for a specified period, the registration of
14 the person as an auditor, as a liquidator or as a liquidator of a
15 specified body corporate, as the case may be.

16 (10) Where, on an application by ASIC for a person who is registered as
17 an auditor, as a liquidator or as a liquidator of a specified body
18 corporate to be dealt with under this section, the Board is
19 empowered to deal with the person as mentioned in subsection (9),
20 the Board may so deal with the person:

21 (a) if the Board is required to make an order under subsection (6)
22 on the application—in addition to making such an order; or

23 (b) otherwise—in addition to, or instead of, cancelling or
24 suspending the registration of the person as an auditor, as a
25 liquidator or as a liquidator of that body, as the case may be.

26 (11) The Board may exercise any of its powers under this Division in
27 relation to a person as a result of conduct engaged in by the person
28 whether or not that conduct constituted or might have constituted
29 an offence, and whether or not any proceedings have been brought
30 or are to be brought in relation to that conduct.

31 (12) This section has effect subject to section 1294.

32 **1294 Board to give opportunity for hearing etc.**

33 (1) The Board must not:

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- 1 (a) cancel or suspend the registration of a person as an auditor,
2 as a liquidator or as a liquidator of a specified body
3 corporate; or
4 (b) deal with a person in any of the ways mentioned in
5 subsection 1292(9);
6 unless the Board has given the person an opportunity to appear at a
7 hearing held by the Board and to make submissions to, and adduce
8 evidence before, the Board in relation to the matter.
- 9 (2) Where subsection (1) requires the Board to give a person an
10 opportunity to appear at a hearing and to make submissions to, and
11 bring evidence before, the Board in relation to a matter, the Board
12 must give ASIC an opportunity to appear at the hearing and to
13 make submissions to, and bring evidence before, the Board in
14 relation to the matter.

15 **1295 Board may remove suspension**

- 16 (1) Where a registration of a person is suspended, the Board may, on
17 an application by the person or of its own motion, by order,
18 terminate the suspension.
- 19 (2) An order under subsection (1) has effect accordingly.

20 **1296 Notice of Board's decision**

- 21 (1) Where the Board decides to exercise any of its powers under
22 section 1292 in relation to a person, or decides that it is required to
23 make an order under subsection 1292(7) in relation to a person, the
24 Board must, within 14 days after the decision:
25 (a) give to the person a notice in writing setting out the decision
26 and the reasons for it; and
27 (b) lodge a copy of the notice referred to in paragraph (a); and
28 (c) cause to be published in the *Gazette* a notice in writing
29 setting out the decision.
- 30 (2) Where the Board decides to refuse to exercise its powers under
31 section 1292 in relation to a person, or decides that it is not

1 required to make an order under subsection 1292(7) in relation to a
2 person, the Board must, within 14 days after the decision:

- 3 (a) give to the person a notice in writing setting out the decision
4 and the reasons for it; and
5 (b) lodge a copy of the notice referred to in paragraph (a).
- 6 (3) The validity of a decision of the Board is not affected by failure of
7 the Board to comply with subsection (1) or (2), as the case
8 requires, in relation to the decision.

9 **1297 Time when Board's decision comes into effect**

- 10 (1) Subject to subsection (2) and to sections 41 and 44A of the
11 *Administrative Appeals Tribunal Act 1975*, an order made by the
12 Board cancelling or suspending the registration of a person as an
13 auditor, as a liquidator or as a liquidator of a specified body
14 corporate comes into effect at the end of the day on which there is
15 given to the person a notice of the decision pursuant to which the
16 order is made, being a notice of the kind referred to in paragraph
17 1296(1)(a).
- 18 (2) Where the Board makes an order of a kind referred to in
19 subsection (1), it may, in order to enable an application to be made
20 to the Tribunal for review of the decision to make the order,
21 determine that the order is not to come into effect until a specified
22 time or until the happening of a specified event.
- 23 (3) The Board may at any time vary or revoke a determination made
24 under subsection (2), including such a determination that has been
25 varied at least once before.
- 26 (4) A determination in force under subsection (2) has effect
27 accordingly.

28 **1298 Effect of suspension**

29 A person whose registration as an auditor, as a liquidator, as a
30 liquidator of a specified body corporate or as an official liquidator
31 is suspended is, except for the purposes of subsections 1285(2) and
32 1286(3), section 1287 (other than paragraphs 1287(1)(a), (2)(a) and

Section 1298

1 (3)(a)), section 1288 and this Division, taken not to be registered as
2 an auditor, liquidator, liquidator of that body corporate or official
3 liquidator, as the case may be, so long as the registration is
4 suspended.

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Part 9.3—Books

3

4

1300 Inspection of books

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(1) A book that is by this Act required to be available for inspection must, subject to and in accordance with this Act, be available for inspection at the place where, in accordance with this Act, it is kept and at all times when the registered office in this jurisdiction of the body corporate concerned is required to be open to the public.

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(2) If any register kept by a company or a foreign company for the purposes of this Act is kept at a place other than the registered office of the company or foreign company, that place must be open to permit the register to be inspected during the same hours as those during which the registered office of the company or foreign company is required to be open to the public.

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(2A) If a person asks a proprietary company in writing to inspect a particular book of the company that the person has a right to inspect, the company must make it available within 7 days, for inspection by the person at the place where it is required to be kept.

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(3) A person permitted by this Act to inspect a book may make copies of, or take extracts from, the book and any person who refuses or fails to allow a person so permitted to make a copy of, or take an extract from, the book is guilty of an offence.

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1301 Location of books on computers

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(1) This section applies if:

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(a) a corporation records, otherwise than in writing, matters (*the stored matters*) this Act requires to be contained in a book; and

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(b) the record of the stored matters is kept at a place (*the place of storage*) other than the place (*the place of inspection*) where the book is, apart from this section, required to be kept; and

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Section 1302

- 1 (c) at the place of inspection means are provided by which the
2 stored matters are made available for inspection in written
3 form; and
4 (d) the corporation has lodged a notice:
5 (i) stating that this section is to apply in respect of:
6 (A) except where sub-subparagraph (B) applies—
7 the book; or
8 (B) if the stored matters are only some of the
9 information that is required to be contained in
10 the book—the book and matters that are of the
11 same kind as the stored matters; and
12 (ii) specifying the situation of the place of storage and the
13 place of inspection.
- 14 (2) Subject to subsection (4), the corporation is taken to have complied
15 with the requirements of this Act as to the location of the book, but
16 only in so far as the book is required to contain the stored matters.
- 17 (3) Subject to subsection (4), for the purposes of the application of
18 subsection 1085(3) and section 1300 in relation to the corporation
19 and the book, the book is taken to be kept at the place of
20 inspection, even though the record of the stored matters is kept at
21 the place of storage.
- 22 (4) If:
23 (a) the situation of the place of storage or the place of inspection
24 changes; and
25 (b) the corporation does not lodge notice of the change within 14
26 days after the change;
27 this section, as it applies to the corporation because of the lodging
28 of the notice referred to in paragraph (1)(d), ceases to so apply at
29 the end of that period of 14 days.

30 **1302 Location of registers**

- 31 (1) A register that is required by section 271 to be kept by a company
32 must be kept at the registered office or at an office at the principal
33 place of business in this jurisdiction of the company but:

Section 1303

- 1 (a) if the work of making up the register is done at another office
2 of the company in this jurisdiction, it may be kept at that
3 other office; or
4 (b) if the company arranges with some other person to make up
5 the register on its behalf and the office of that other person at
6 which the work is done is in this jurisdiction, it may be kept
7 at that office; or
8 (c) if ASIC approves, it may be kept at another office in this
9 jurisdiction, being an office of the company or of another
10 person.
- 11 (3) If default is made in complying with subsection (1) in its
12 application to any register of a company, the company, any officer
13 of the company who is in default, and any person who has arranged
14 with the company to make up the register on its behalf and is in
15 default, are each guilty of an offence.
- 16 (4) A company must, within 7 days after any register of the company
17 to which subsection (1) applies is first kept at an office other than
18 the registered office or the principal office, as the case may be,
19 lodge notice of the address of the office where the register is kept
20 and must, within 7 days after any change in the place at which the
21 register is kept, lodge notice of the change.
- 22 (5) If default is made in complying with subsection (4) in its
23 application to any register of a company, the company and any
24 officer of the company who is in default are each guilty of an
25 offence.
- 26 (7) In this section, unless the contrary intention appears, *company*
27 includes a registered body.

28 **1303 Court may compel compliance**

29 If any person in contravention of this Act refuses to permit the
30 inspection of any book or to supply a copy of any book, the Court
31 may by order compel an immediate inspection of the book or order
32 the copy to be supplied.

1 **1304 Translations of instruments**

- 2 (1) Where under this Act a person is required to lodge an instrument or
3 a certified copy of an instrument and the instrument is not written
4 in English, the person must lodge at the same time a certified
5 translation of the instrument into English.
- 6 (2) Where under this Act a body corporate is required to make an
7 instrument available for inspection and the instrument is not
8 written in English, the body corporate must keep at its registered
9 office or, if it does not have a registered office, at its principal
10 office in this jurisdiction, a certified translation of the instrument
11 into English.
- 12 (3) In this section, *instrument* includes any certificate, contract or
13 other document.

14 **1305 Admissibility of books in evidence**

- 15 (1) A book kept by a body corporate under a requirement of this Act is
16 admissible in evidence in any proceeding and is prima facie
17 evidence of any matter stated or recorded in the book.
- 18 (2) A document purporting to be a book kept by a body corporate is,
19 unless the contrary is proved, taken to be a book kept as mentioned
20 in subsection (1).

21 **1306 Form and evidentiary value of books**

- 22 (1) A book that is required by this Act to be kept or prepared may be
23 kept or prepared:
- 24 (a) by making entries in a bound or looseleaf book; or
25 (b) by recording or storing the matters concerned by means of a
26 mechanical, electronic or other device; or
27 (c) in any other manner approved by ASIC.
- 28 (2) Subsection (1) does not authorise a book to be kept or prepared by
29 a mechanical, electronic or other device unless:
- 30 (a) the matters recorded or stored will be capable, at any time, of
31 being reproduced in a written form; or

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- 1 (b) a reproduction of those matters is kept in a written form
2 approved by ASIC.
- 3 (3) A corporation must take all reasonable precautions, including such
4 precautions (if any) as are prescribed, for guarding against damage
5 to, destruction of or falsification of or in, and for discovery of
6 falsification of or in, any book or part of a book required by this
7 Act to be kept or prepared by the corporation.
- 8 (4) Where a corporation records or stores any matters by means of a
9 mechanical, electronic or other device, any duty imposed by this
10 Act to make a book containing those matters available for
11 inspection or to provide copies of the whole or a part of a book
12 containing those matters are to be construed as a duty to make the
13 matters available for inspection in written form or to provide a
14 document containing a clear reproduction in writing of the whole
15 or part of them, as the case may be.
- 16 (4A) The regulations may provide for how up to date the information
17 contained in an instrument prepared for the purposes of
18 subsection (4) must be.
- 19 (5) If:
- 20 (a) because of this Act, a book that this Act requires to be kept or
21 prepared is prima facie evidence of a matter; and
- 22 (b) the book, or a part of the book, is kept or prepared by
23 recording or storing matters (including that matter) by means
24 of a mechanical, electronic or other device;
- 25 a written reproduction of that matter as so recorded or stored is
26 prima facie evidence of that matter.
- 27 (6) A writing that purports to reproduce a matter recorded or stored by
28 means of a mechanical, electronic or other device is, unless the
29 contrary is established, taken to be a reproduction of that matter.

30 **1307 Falsification of books**

- 31 (1) An officer, former officer, member or former member of a
32 company who conceals, destroys, mutilates or falsifies any

Section 1307

- 1 securities of or belonging to the company or any books affecting or
2 relating to affairs of the company is guilty of an offence.
- 3 (2) Where matter that is used or intended to be used in connection with
4 the keeping of any books affecting or relating to affairs of a
5 company is recorded or stored in an illegible form by means of a
6 mechanical device, an electronic device or any other device, a
7 person who:
- 8 (a) records or stores by means of that device matter that the
9 person knows to be false or misleading in a material
10 particular; or
- 11 (b) destroys, removes or falsifies matter that is recorded or stored
12 by means of that device, or has been prepared for the purpose
13 of being recorded or stored, or for use in compiling or
14 recovering other matter to be recorded or stored by means of
15 that device; or
- 16 (c) having a duty to record or store matter by means of that
17 device, fails to record or store the matter by means of that
18 device:
- 19 (i) with intent to falsify any entry made or intended to be
20 compiled, wholly or in part, from matter so recorded or
21 stored; or
- 22 (ii) knowing that the failure so to record or store the matter
23 will render false or misleading in a material particular
24 other matter so recorded or stored;
- 25 contravenes this subsection.
- 26 (3) It is a defence to a charge arising under subsection (1) or (2) if the
27 defendant proves that he, she or it acted honestly and that in all the
28 circumstances the act or omission constituting the offence should
29 be excused.
- 30 (4) In this section, *officer*, in relation to a company, includes a receiver
31 of property of the company who is not also a manager.

1

2 **Part 9.4—Offences**

3 **Division 1—Specific offences**

4 **1308 False or misleading statements**

5 (1) A corporation must not advertise or publish:

- 6 (a) a statement of the amount of its capital that is misleading; or
7 (b) a statement in which the total of all amounts paid and unpaid
8 on shares in the company is stated but the amount of paid up
9 capital or the amount of any charge on uncalled capital is not
10 stated.

11 (2) A person who, in a document required by or for the purposes of
12 this Act or lodged with or submitted to ASIC, makes or authorises
13 the making of a statement that to the person's knowledge is false or
14 misleading in a material particular, or omits or authorises the
15 omission of any matter or thing without which the document is to
16 the person's knowledge misleading in a material respect, is guilty
17 of an offence.

18 (3) A person who makes or authorises the making of a statement that is
19 based on information that to the person's knowledge:

- 20 (a) is false or misleading in a material particular; or
21 (b) has omitted from it a matter or thing the omission of which
22 renders the information misleading in a material respect;

23 is, for the purposes of subsection (2), taken to have made or
24 authorised the making of a statement that to the person's
25 knowledge was false or misleading in a material particular.

26 (3A) A person is not liable to be proceeded against for an offence in
27 consequence of a regulation made under section 1364 as well as for
28 an offence against subsection (2) of this section.

29 (4) A person who, in a document required by or for the purposes of
30 this Act or lodged:

- 1 (a) makes or authorises the making of a statement that is false or
2 misleading in a material particular; or
3 (b) omits or authorises the omission of any matter or thing
4 without which the document is misleading in a material
5 respect;
6 without having taken reasonable steps to ensure that the statement
7 was not false or misleading or to ensure that the statement did not
8 omit any matter or thing without which the document would be
9 misleading, as the case may be, is guilty of an offence.
- 10 (5) A person who makes or authorises the making of a statement
11 without having taken reasonable steps to ensure that the
12 information on which the statement was based:
13 (a) was not false or misleading in a material particular; and
14 (b) did not have omitted from it a matter or thing the omission of
15 which would render the information misleading in a material
16 respect;
17 is, for the purposes of subsection (4), taken to have made or
18 authorised the making of a statement without having taken
19 reasonable steps to ensure that the statement was not false or
20 misleading.
- 21 (6) For the purposes of subsections (2) and (4), where:
22 (a) at a meeting, a person votes in favour of a resolution
23 approving, or otherwise approves, a document required by or
24 for the purposes of this Act or required to be lodged; and
25 (b) the document contains a statement that, to the person's
26 knowledge, is false or misleading in a material particular, or
27 omits any matter or thing without which the document is, to
28 the person's knowledge, misleading in a material respect;
29 the person is taken to have authorised the making of the statement
30 or the omission of the matter or thing.
- 31 (7) For the purposes of this section, a statement, report or other
32 document that:
33 (a) relates to affairs of a company or of a subsidiary of a
34 company; and

- 1 (b) is not itself required by this Act to be laid before the
2 company in general meeting; and
3 (c) is attached to or included with a report of the directors sent
4 under section 314 to members of the company or laid before
5 the company at an annual general meeting of the company;
6 is taken to be part of the report referred to in paragraph (c).
- 7 (8) A person must not, in connection with an application for a
8 securities licence or futures licence:
9 (a) make a statement that is false or misleading in a material
10 particular knowing it to be false or misleading; or
11 (b) omit to state any matter or thing knowing that because of that
12 omission the application is misleading in a material respect.

13 **1309 False information etc.**

- 14 (1) An officer of a corporation who makes available or gives
15 information, or authorises or permits the making available or
16 giving of information, to:
17 (a) a director, auditor, member, debenture holder or trustee for
18 debenture holders of the corporation; or
19 (b) if the corporation is taken for the purposes of Chapter 2M to
20 be controlled by another corporation—an auditor of the other
21 corporation; or
22 (c) a securities exchange in Australia or elsewhere or an officer
23 of such a securities exchange;
24 being information, whether in documentary or any other form, that
25 relates to the affairs of the corporation and that, to the knowledge
26 of the officer:
27 (d) is false or misleading in a material particular; or
28 (e) has omitted from it a matter or thing the omission of which
29 renders the information misleading in a material respect;
30 is guilty of an offence.
- 31 (2) An officer of a corporation who makes available or gives
32 information, or authorises or permits the making available or
33 giving of information, to:

- 1 (a) a director, auditor, member, debenture holder or trustee for
2 debenture holders of the corporation; or
3 (b) if the corporation is taken for the purposes of Chapter 2M to
4 be controlled by another corporation—an auditor of the other
5 corporation; or
6 (c) a securities exchange in Australia or elsewhere or an officer
7 of such a securities exchange;
8 being information, whether in documentary or any other form,
9 relating to the affairs of the corporation that:
10 (d) is false or misleading in a material particular; or
11 (e) has omitted from it a matter or thing the omission of which
12 renders the information misleading in a material respect;
13 without having taken reasonable steps to ensure that the
14 information:
15 (f) was not false or misleading in a material particular; and
16 (g) did not have omitted from it a matter or thing the omission of
17 which rendered the information misleading in a material
18 respect;
19 is guilty of an offence.
- 20 (3) The references in subsections (1) and (2) to a person making
21 available or giving, or authorising or permitting the making
22 available or giving of, information relating to the affairs of a
23 corporation include references to a person making available or
24 giving, or authorising or permitting the making available or giving
25 of, information as to the state of knowledge of that person with
26 respect to the affairs of the corporation.
- 27 (4) Where information is made available or given to a person referred
28 to in paragraph (1)(a), (b) or (c) or (2)(a), (b) or (c) in response to a
29 question asked by that person, the question and the information are
30 to be considered together in determining whether the information
31 was false or misleading.
- 32 (5) A person must not, for the purposes of this Act, lodge with a
33 futures exchange, a clearing house for a futures exchange, or a
34 futures association, a document that contains a statement that, to
35 the person's knowledge, is false or misleading.

1 **1310 Obstructing or hindering ASIC etc.**

2 A person must not, without lawful excuse, obstruct or hinder
3 ASIC, or any other person, in the performance or exercise of a
4 function or power under this Act.

1

2 **Division 2—Offences generally**

3 **1311 General penalty provisions**

4

(1) A person who:

5

(a) does an act or thing that the person is forbidden to do by or
under a provision of this Act; or

6

7

(b) does not do an act or thing that the person is required or
directed to do by or under a provision of this Act; or

8

9

(c) otherwise contravenes a provision of this Act;

10

is guilty of an offence by virtue of this subsection, unless that or
another provision of this Act provides that the person:

11

12

(d) is guilty of an offence; or

13

(e) is not guilty of an offence.

14

(1A) Paragraphs (1)(a), (b) and (c) only apply to a provision in the
following list if a penalty, pecuniary or otherwise, is set out in
Schedule 3 for that provision, or for a provision or provisions in
which that provision is included:

15

16

17

(a) Chapters 2A, 2B and 2C;

18

19

(b) Parts 2F.2 and 2F.3;

20

(c) Chapters 2G, 2H, 2J, 2M (other than Part 2M.4), 2N and 5A;

21

(d) Parts 5B.1 and 5B.3;

22

(e) Chapter 10.

23

(2) Subject to section 1312, a person who is guilty of an offence
against this Act, whether by virtue of subsection (1) or otherwise,
is punishable, on conviction, by a penalty not exceeding the
penalty applicable to the offence.

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(3) Where:

28

(a) subsection (1) operates in relation to a provision of this Act
so as to make a person guilty of an offence; or

29

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- 1 (b) a provision of this Act (other than this section) provides that
2 a person is, in circumstances referred to in the provision,
3 guilty of an offence;
4 and a penalty, pecuniary or otherwise, is set out in Schedule 3 for
5 that provision, or for a provision or provisions in which that
6 provision is included, the penalty applicable to the offence is the
7 penalty so set out.
- 8 (4) Where a provision of this Act (other than this section) provides that
9 the penalty applicable to a contravention of a particular provision
10 of this Act is a specified penalty, pecuniary or otherwise, the
11 penalty applicable to an offence constituted by a contravention of
12 the particular provision is the specified penalty.
- 13 (5) Except as provided in subsection (3) or (4) or in a provision of this
14 Act (other than this section), the penalty applicable to the offence
15 is a fine of 5 penalty units.

16 **1312 Penalties for bodies corporate**

17 Where a body corporate is convicted of an offence against this Act,
18 the penalty that the court may impose is a fine not exceeding 5
19 times the maximum amount that, but for this section, the court
20 could impose as a pecuniary penalty for that offence.

21 **1313 Penalty notices**

- 22 (1) Where ASIC has reason to believe that a person has committed a
23 prescribed offence, ASIC may, subject to subsection (2), give the
24 person a notice in the prescribed form:
- 25 (a) alleging that the person has committed the prescribed offence
26 and giving the prescribed particulars in relation to the
27 prescribed offence; and
- 28 (b) setting out the prescribed penalty in respect of the prescribed
29 offence; and
- 30 (c) stating:
- 31 (i) in the case of a prescribed offence constituted by a
32 failure to do a particular act or thing:

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- 1 (A) that the obligation to do the act or thing
2 continues despite the service of the notice or the
3 payment of the prescribed penalty; and
4 (B) that if, within the period specified in the notice
5 (being a period of at least 21 days), the person
6 pays the prescribed penalty to the authority
7 specified in the notice and does the act or thing,
8 no further action will be taken against the
9 person in relation to the prescribed offence; and
10 (C) that if, at the end of the period specified in the
11 notice, the person has not paid the prescribed
12 penalty to the authority specified in the notice
13 or has not done the act or thing, proceedings
14 may be instituted against the person; or
15 (ii) in the case of a prescribed offence, not being an offence
16 constituted by a failure to do a particular act or thing:
17 (A) that if, within the period specified in the notice
18 (being a period of at least 21 days), the person
19 pays the prescribed penalty to the authority
20 specified in the notice, no further action will be
21 taken against the person in relation to the
22 prescribed offence; and
23 (B) that if, at the end of the period specified in the
24 notice, the person has not paid the prescribed
25 penalty to the authority specified in the notice,
26 proceedings may be instituted against the
27 person.
- 28 (2) Subsection (1) does not empower ASIC:
29 (a) to give a person more than one notice under that subsection
30 in relation to an alleged commission by that person of a
31 particular prescribed offence; or
32 (b) to give a person a notice under that subsection in relation to a
33 prescribed offence unless proceedings could be instituted
34 against that person for that offence in accordance with
35 section 1316.

- 1 (3) A notice under subsection (1) may be given to a natural person
2 either personally or by post.
- 3 (4) Where a notice under subsection (1) is given to a person in relation
4 to a prescribed offence constituted by a failure to do a particular act
5 or thing:
- 6 (a) if, within the period specified in the notice, the person pays
7 the prescribed penalty to the authority specified in the notice,
8 and does the act or thing—no proceedings may be instituted
9 against the person in respect of the prescribed offence; or
- 10 (b) if, at the end of the period specified in the notice, the person
11 has paid the prescribed penalty to the authority specified in
12 the notice but has not done the act or thing—no proceedings
13 may be instituted against the person in respect of the
14 prescribed offence, but the obligation to do that act or thing
15 continues, and section 1314 applies in relation to the
16 continued failure to do that act or thing as if, on the day on
17 which the person so paid the prescribed penalty, the person
18 had been convicted of an offence constituted by a failure to
19 do that act or thing; or
- 20 (c) if, at the end of the period specified in the notice, the person
21 has not paid the prescribed penalty to the authority specified
22 in the notice but had done the act or thing—proceedings may
23 be instituted against the person in respect of the prescribed
24 offence; or
- 25 (d) if, at the end of the period specified in the notice, the person
26 has not paid the prescribed penalty to the authority specified
27 in the notice and has not done the act or thing—the
28 obligation to do that act or thing continues, and proceedings
29 may be instituted against the person in respect of the
30 prescribed offence.
- 31 (5) Where a notice under subsection (1) is given to a person in relation
32 to a prescribed offence, not being an offence constituted by a
33 failure to do a particular act or thing:
- 34 (a) if, within the period specified in the notice, the person pays
35 the prescribed penalty to the authority specified in the
36 notice—no proceedings may be instituted against the person
37 in respect of the prescribed offence; or

- 1 (b) if, at the end of the period specified in the notice, the person
2 has not paid the prescribed penalty to the authority specified
3 in the notice—proceedings may be instituted against the
4 person in respect of the prescribed offence.
- 5 (6) The payment of an amount by a person pursuant to a notice served
6 on the person under this section in relation to a prescribed offence
7 is not taken for any purpose to be an admission by that person of
8 any liability in connection with the alleged commission of the
9 prescribed offence.
- 10 (7) Except as provided by paragraphs (4)(a) and (b) and (5)(a), this
11 section does not affect the operation of any provision of this Act,
12 of the regulations, of the rules or of any other Act in relation to the
13 institution of proceedings in respect of offences that are prescribed
14 offences for the purposes of this section.
- 15 (8) In this section:
- 16 **authority** includes a person.
- 17 **prescribed offence** means:
- 18 (a) a subsection 1311(5) offence; or
19 (b) an offence against this Act that the regulations prescribe for
20 the purposes of this section.
- 21 **prescribed penalty**, in relation to a prescribed offence in relation to
22 which ASIC may give, or has given, to a person a notice under
23 subsection (1), means:
- 24 (a) if the offence is a subsection 1311(5) offence:
- 25 (i) if the regulations prescribe in relation to the offence for
26 the purposes of this paragraph an amount not exceeding
27 one half the amount of the penalty applicable to the
28 offence:
- 29 (A) if the person is a body corporate—a penalty of
30 five times the amount so prescribed; or
31 (B) otherwise—a penalty of the amount so
32 prescribed; or
33 (ii) otherwise:

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- 1 (A) if the person is a body corporate—a penalty of
2 1.25 times the amount of the penalty applicable
3 to the offence; or
4 (B) otherwise—a penalty of 0.25 times the amount
5 of the penalty applicable to the offence; or

6 Note: Section 1311 provides for the penalty applicable to an offence.

- 7 (b) otherwise—a penalty of the amount that the regulations
8 prescribe in relation to the offence.

9 *subsection 1311(5) offence* means an offence the penalty
10 applicable to which is provided for by subsection 1311(5).

11 **1313A Offences committed partly in and partly out of the**
12 **jurisdiction**

13 Where:

- 14 (a) a person does or omits to do an act outside this jurisdiction;
15 and
16 (b) if that person had done or omitted to do that act in this
17 jurisdiction, the person would, by reason of also having done
18 or omitted to do an act in this jurisdiction, have been guilty
19 of an offence against this Act;
20 the person is guilty of that offence.

21 **1314 Continuing offences**

22 (1) Where:

- 23 (a) by or under a provision, an act is or was required to be done
24 within a particular period or before a particular time; and
25 (b) failure to do the act within that period or before that time
26 constitutes an offence; and
27 (c) the act is not done within that period or before that time;
28 then:
29 (d) the obligation to do the act continues, after that period has
30 ended or that time has passed, and whether or not a person is
31 or has been convicted of a primary substantive offence in
32 relation to failure to do the act, until the act is done; and

- 1 (e) subsections (3) and (4) apply.
- 2 (2) Where:
- 3 (a) by or under a provision, an act is or was required to be done
4 but neither a period nor a time for the doing of the Act is or
5 was specified; and
- 6 (b) failure to do the act constitutes an offence; and
- 7 (c) a person is or has been convicted of a primary substantive
8 offence in relation to failure to do the act;
- 9 then:
- 10 (d) the obligation to do the act continues, despite the conviction,
11 until the act is done; and
- 12 (e) subsections (3) and (4) apply.
- 13 (3) Where:
- 14 (a) at a particular time, a person is or was first convicted of a
15 substantive offence, or is or was convicted of a second or
16 subsequent substantive offence, in relation to failure to do the
17 act; and
- 18 (b) the failure to do the act continued after that time;
- 19 then:
- 20 (c) the person is, in relation to failure to do the act, guilty of a
21 further offence in respect of so much of the period
22 throughout which the failure to do the act continued or
23 elapsed after that time and before the relevant day in relation
24 to the further offence; and
- 25 (d) for the purposes of this Act and of the *Crimes Act 1914*, the
26 further offence is taken to be constituted by failure to do the
27 act during so much of that period as so elapsed.
- 28 (4) Where:
- 29 (a) the provision referred to in paragraph (1)(a) or (2)(a), as the
30 case may be, provides or provided that:
- 31 (i) an officer of a body corporate; or
- 32 (ii) a person;
- 33 who is or was in default, or is or was involved in a
34 contravention constituted by the failure to do the act, is or

- 1 was guilty of an offence or contravenes or contravened a
2 provision of this Act; and
- 3 (b) throughout a particular period (in this subsection called the
4 *relevant period*):
- 5 (i) the failure to do the act continued; and
- 6 (ii) a person (in this subsection called the *derivative*
7 *offender*) is or was in any way, by act or omission,
8 directly or indirectly, knowingly concerned in or party
9 to the failure to do the act; and
- 10 (iii) in a case where subparagraph (a)(i) applies—the
11 derivative offender is or was an officer of the body;
- 12 then:
- 13 (c) in a case where either or both of the following events occurs
14 or occur:
- 15 (i) a person is or was convicted, before or during the
16 relevant period, of a primary substantive offence in
17 relation to failure to do the act;
- 18 (ii) the derivative offender is or was convicted, before or
19 during the relevant period, of a primary derivative
20 offence in relation to failure to do the act;
- 21 the derivative offender is, in relation to failure to do the act,
22 guilty of an offence (in this paragraph called the *relevant*
23 *offence*) in respect of so much (if any) of the relevant period
24 as elapsed:
- 25 (iii) after the conviction referred to in subparagraph (i) or(ii),
26 or after the earlier of the convictions referred to in
27 subparagraphs (i) and (ii), as the case may be; and
- 28 (iv) before the relevant day in relation to the relevant
29 offence; and
- 30 (d) in a case where, at a particular time during the relevant
31 period, the derivative offender is or was first convicted of a
32 secondary derivative offence, or is or was convicted of a
33 second or subsequent secondary derivative offence, in
34 relation to failure to do the act—the derivative offender is, in
35 relation to failure to do the act, guilty of a further offence in
36 respect of so much of the relevant period as elapsed after that

1 time and before the relevant day in relation to the further
2 offence.

3 (5) Where a person is guilty, by virtue of subsection (3) or (4), of an
4 offence in respect of the whole or a part of a particular period, the
5 penalty applicable to the offence is a fine of the amount obtained
6 by multiplying half a penalty unit by the number of days in that
7 period, or in that part of that period, as the case may be.

8 (6) In this section:

9 *act* includes thing.

10 *primary derivative offence*, in relation to failure to do an act,
11 means an offence (other than an offence of which a person is guilty
12 by virtue of this section) of which a person is or was guilty by
13 virtue of being an officer of a corporation, or a person, who is or
14 was in any way, by act or omission, directly or indirectly,
15 knowingly concerned in or party to failure to do the act.

16 *primary substantive offence*, in relation to a failure to do an act,
17 means an offence (other than an offence of which a person is or
18 was guilty by virtue of this section) constituted by failure to do the
19 act, or by failure to do the act within a particular period or before a
20 particular time.

21 *provision* means a section, or a subsection of a section, of this Act.

22 *relevant day*, in relation to an offence of which a person is guilty
23 by virtue of this section, means:

- 24 (a) in a case where the information relating to the offence
25 specifies a day in relation to the offence for the purposes of
26 this section, being a day not later than the day on which the
27 information is laid—the day the information so specifies; or
28 (b) in any other case—the day on which the information relating
29 to the offence is laid.

30 *required* includes directed.

31 *secondary derivative offence*, in relation to failure to do an act,
32 means an offence or further offence of which a person is, in

Section 1315

1 relation to failure to do the act, guilty by virtue of paragraph (4)(c)
2 or (d).

3 **substantive offence**, in relation to failure to do an act, means:

4 (a) a primary substantive offence in relation to failure to do the
5 act; or

6 (b) a further offence of which a person is, in relation to failure to
7 do the act, guilty by virtue of subsection (3).

8 (7) For the purposes of subsection (4), a provision of this Act is,
9 whether or not it expressly provides as mentioned in
10 paragraph (4)(a), taken to provide that a person who is or was
11 involved in a contravention constituted by a failure to do an act
12 required by the provision contravenes or contravened that
13 provision.

14 **1315 Proceedings: how taken**

15 (1) Subject to this Act, in any proceedings for an offence against this
16 Act, any information, charge, complaint or application may be laid
17 or made by:

18 (a) ASIC; or

19 (b) a Commission delegate; or

20 (c) another person authorised in writing by the Minister to
21 institute the proceedings.

22 (2) A delegation for the purposes of paragraph (1)(b), or an
23 authorisation for the purposes of paragraph (1)(c), may relate to all
24 offences, or to specified offences, against this Act.

25 (3) Nothing in this section affects the operation of the *Director of*
26 *Public Prosecutions Act 1983*.

27 **1316 Time for instituting criminal proceedings**

28 Despite anything in any other law, proceedings for an offence
29 against this Act may be instituted within the period of 5 years after
30 the act or omission alleged to constitute the offence or, with the
31 Minister's consent, at any later time.

1 **1316A Privilege against self-incrimination not available to bodies**
2 **corporate in Corporations Act criminal proceedings**

3 (1) In a Corporations Act criminal proceeding, a body corporate is not
4 entitled to refuse or fail to comply with a requirement:

- 5 (a) to answer a question or give information; or
6 (b) to produce a book or any other thing; or
7 (c) to do any other act whatever;

8 on the ground that the answer or information, production of the
9 book or other thing, or doing that other act, as the case may be,
10 might tend:

- 11 (d) to incriminate the body (whether in respect of an offence to
12 which the proceeding relates or otherwise); or
13 (e) to make the body liable to a penalty (whether in respect of
14 anything to which the proceeding relates or otherwise).

15 (2) Subsection (1) applies whether or not the body concerned is a
16 defendant in the proceeding or in any other proceeding.

17 (3) In this section:

18 ***Corporations Act criminal proceeding*** means a proceeding in a
19 court when exercising jurisdiction in respect of a criminal matter
20 arising under this Act.

21 **1317 Certain persons to assist in prosecutions**

22 (1) Where a prosecution in respect of an offence against this Act has
23 been instituted, or ASIC is of the opinion that a prosecution in
24 respect of an offence against this Act ought to be instituted, against
25 a person (in this section referred to as the ***defendant***), ASIC may:

- 26 (a) if the defendant is a natural person—require any person who
27 is or was a partner, employee or agent of the defendant; or
28 (b) if the defendant is a body corporate—require any person who
29 is or was an officer, employee or agent of the defendant;

30 to assist in the prosecution, and the person who is so required must
31 give all assistance in connection with the prosecution that that
32 person is reasonably able to give.

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- 1 (2) ASIC must not make such a requirement as is mentioned in
2 subsection (1) of a person who, in the opinion of ASIC, is or is
3 likely to be a defendant in the proceedings or is or has been such a
4 person's lawyer.
- 5 (3) If a person to whom paragraph (1)(a) or (b) relates fails to give
6 assistance as required by subsection (1), the person contravenes
7 this section and, without affecting any penalty to which the person
8 may be liable for the contravention, the Court may, on the
9 application of ASIC, order the person to comply with the
10 requirement within such time, and in such manner, as the Court
11 orders.
- 12 (4) In this section, *agent*, in relation to the defendant, includes a
13 banker of the defendant and a person engaged as an auditor by the
14 defendant, whether that person is an employee or an officer of the
15 defendant or not.

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Part 9.4A—Review by Administrative Appeals Tribunal of certain decisions

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1317A Definitions

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In this Part:

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decision has the same meaning as in the *Administrative Appeals
Tribunal Act 1975*.

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1317B Applications for review

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(1) Subject to this Part, applications may be made to the Tribunal for
review of a decision made under this Act by:

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12

(a) the Minister; or

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(b) ASIC; or

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(c) the Companies Auditors and Liquidators Disciplinary Board.

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(2) For the purposes of this Act and the *Administrative Appeals
Tribunal Act 1975*, ASIC is taken to be a person whose interests
are affected by a decision made under this Act by the Companies
Auditors and Liquidators Disciplinary Board.

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1317C Excluded decisions

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Section 1317B does not apply in relation to:

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(a) a decision in respect of which any provision in the nature of
an appeal or review is expressly provided by this Act; or

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(b) a decision that is declared by this Act to be conclusive or
final or is embodied in a document declared by this Act to be
conclusive evidence of an act, matter or thing; or

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(d) a decision made by ASIC in the performance of a function, or
in the exercise of a power, under section 601CC or 601CL or
Chapter 5A; or

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(e) a decision by ASIC to refuse to exercise a power under
section 601CC or 601CL or Chapter 5A; or

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Section 1317D

- 1 (f) a decision to apply under section 596A or 596B for the Court
2 to summon a person for examination about a corporation's
3 examinable affairs; or
4 (g) a decision to apply under section 597A for the Court to
5 require a person to file an affidavit about a corporation's
6 examinable affairs; or
7 (ga) a decision of ASIC under section 655A; or
8 (gb) a decision of ASIC under section 673 in relation to securities
9 of the target of a takeover bid during the bid period; or
10 (gc) a decision by ASIC whether to make an application under
11 section 657C, 657G, 659B, 1325A, 1325B or 1325C; or
12 (h) a decision to make a determination under subsection
13 1317D(3).

14 **1317D Notice of reviewable decision and review rights**

- 15 (1) This section applies if the Minister, ASIC or the Companies
16 Auditors and Liquidators Disciplinary Board (the *decision maker*)
17 makes a decision to which section 1317B applies.
- 18 (2) Subject to subsection (3), the decision maker must take such steps
19 as are reasonable in the circumstances to give to each person
20 whose interests are affected by the decision notice, in writing or
21 otherwise:
22 (a) of the making of the decision; and
23 (b) of the person's right to have the decision reviewed by the
24 Tribunal.
- 25 (3) Subsection (2) does not require the decision maker to give notice to
26 a person affected by the decision or to the persons in a class of
27 persons affected by the decision, if the decision maker determines
28 that giving notice to the person or persons is not warranted, having
29 regard to:
30 (a) the cost of giving notice to the person or persons; and
31 (b) the way in which the interests of the person or persons are
32 affected by the decision.

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- 1 (4) A failure to comply with this section does not affect the validity of
2 the decision.
- 3 (5) The fact that a person has not been given notice of the decision
4 because of a determination under subsection (3) constitutes special
5 circumstances for the purposes of subsection 29(6) of the
6 *Administrative Appeals Tribunal Act 1975*.

1
2 **Part 9.4B—Civil consequences of contravening**
3 **civil penalty provisions**
4

5 **1317E Declarations of contravention**

- 6 (1) If a Court is satisfied that a person has contravened 1 of the
7 following provisions, it must make a declaration of contravention:
8 (a) subsections 180(1) and 181(1) and (2), 182(1) and (2), 183(1)
9 and (2) (officers' duties);
10 (b) subsection 209(2) (related parties rules);
11 (c) subsections 254L(2), 256D(3), 259F(2) and 260D(2) (share
12 capital transactions);
13 (d) subsection 344(1) (requirements for financial reports);
14 (e) subsection 588G(2) (insolvent trading);
15 (f) subsection 601FC(1);
16 (g) subsection 601FD(1);
17 (h) subsection 601FE(1);
18 (i) section 601FG;
19 (j) subsection 601JD(1);
20 (k) subclause 29(6) of Schedule 4.

21 These provisions are the *civil penalty provisions*.

22 Note: Once a declaration has been made ASIC can then seek a pecuniary
23 penalty order (section 1317G) or a disqualification order
24 (section 206C).

- 25 (2) A declaration of contravention must specify the following:
26 (a) the Court that made the declaration;
27 (b) the civil penalty provision that was contravened;
28 (c) the person who contravened the provision;
29 (d) the conduct that constituted the contravention;
30 (e) the corporation or registered scheme to which the conduct
31 related.

1 **1317F Declaration of contravention is conclusive evidence**

2 A declaration of contravention is conclusive evidence of the
3 matters referred to in subsection 1317E(2).

4 **1317G Pecuniary penalty orders**

5 (1) A Court may order a person to pay the Commonwealth a pecuniary
6 penalty of up to \$200,000 if:

7 (a) a declaration of contravention by the person has been made
8 under section 1317E; and

9 (b) the contravention:

10 (i) materially prejudices the interests of the corporation or
11 scheme, or its members; or

12 (ii) materially prejudices the corporation's ability to pay its
13 creditors; or

14 (iii) is serious.

15 (2) The penalty is a civil debt payable to ASIC on the
16 Commonwealth's behalf. ASIC or the Commonwealth may enforce
17 the order as if it were an order made in civil proceedings against
18 the person to recover a debt due by the person. The debt arising
19 from the order is taken to be a judgment debt.

20 **1317H Compensation orders**

21 *Compensation for damage suffered*

22 (1) A Court may order a person to compensate a corporation or
23 registered scheme for damage suffered by the corporation or
24 scheme if:

25 (a) the person has contravened a civil penalty provision in
26 relation to the corporation or scheme; and

27 (b) the damage resulted from the contravention.

28 The order must specify the amount of the compensation.

1 *Damage includes profits*

- 2 (2) In determining the damage suffered by the corporation or scheme
3 for the purposes of making a compensation order, include profits
4 made by any person resulting from the contravention or the
5 offence.

6 *Damage includes diminution of value of scheme property*

- 7 (3) In determining the damage suffered by the scheme for the purposes
8 of making a compensation order, include any diminution in the
9 value of the property of the scheme.

- 10 (4) If the responsible entity for a registered scheme is ordered to
11 compensate the scheme, the responsible entity must transfer the
12 amount of the compensation to scheme property. If anyone else is
13 ordered to compensate the scheme, the responsible entity may
14 recover the compensation on behalf of the scheme.

15 *Recovery of damage*

- 16 (5) A compensation order may be enforced as if it were a judgment of
17 the Court.

18 **1317J Who may apply for a declaration or order**

19 *Application by ASIC*

- 20 (1) ASIC may apply for a declaration of contravention, a pecuniary
21 penalty order or a compensation order.

22 *Application by corporation*

- 23 (2) The corporation, or the responsible entity for the registered
24 scheme, may apply for a compensation order.
- 25 (3) The corporation, or the responsible entity for the registered
26 scheme, may intervene in an application for a declaration of
27 contravention or a pecuniary penalty order in relation to the
28 corporation or scheme. The corporation or responsible entity is

Section 1317K

1 entitled to be heard on all matters other than whether the
2 declaration or order should be made.

3 *No one else may apply*

4 (4) No person may apply for a declaration of contravention, a
5 pecuniary penalty order or a compensation order unless permitted
6 by this section.

7 (5) Subsection (4) does not exclude the operation of the *Director of*
8 *Public Prosecutions Act 1983*.

9 **1317K Time limit for application for a declaration or order**

10 Proceedings for a declaration of contravention, a pecuniary penalty
11 order, or a compensation order, may be started no later than 6 years
12 after the contravention.

13 **1317L Civil evidence and procedure rules for declarations of**
14 **contravention and civil penalty orders**

15 The Court must apply the rules of evidence and procedure for civil
16 matters when hearing proceedings for:

- 17 (a) a declaration of contravention; or
18 (b) a pecuniary penalty order.

19 **1317M Civil proceedings after criminal proceedings**

20 A court must not make a declaration of contravention or a
21 pecuniary penalty order against a person for a contravention if the
22 person has been convicted of an offence constituted by conduct
23 that is substantially the same as the conduct constituting the
24 contravention.

25 **1317N Criminal proceedings during civil proceedings**

- 26 (1) Proceedings for a declaration of contravention or pecuniary penalty
27 order against a person are stayed if:
28 (a) criminal proceedings are started or have already been started
29 against the person for an offence; and

Section 1317P

1 (b) the offence is constituted by conduct that is substantially the
2 same as the conduct alleged to constitute the contravention.

3 (2) The proceedings for the declaration or order may be resumed if the
4 person is not convicted of the offence. Otherwise, the proceedings
5 for the declaration or order are dismissed.

6 **1317P Criminal proceedings after civil proceedings**

7 Criminal proceedings may be started against a person for conduct
8 that is substantially the same as conduct constituting a
9 contravention of a civil penalty provision regardless of whether:

- 10 (a) a declaration of contravention has been made against the
11 person; or
12 (b) a pecuniary penalty order has been made against the person;
13 or
14 (c) a compensation order has been made against the person; or
15 (d) the person has been disqualified from managing a
16 corporation under Part 2D.6.

17 **1317Q Evidence given in proceedings for penalty not admissible in**
18 **criminal proceedings**

19 Evidence of information given or evidence of production of
20 documents by an individual is not admissible in criminal
21 proceedings against the individual if:

- 22 (a) the individual previously gave the evidence or produced the
23 documents in proceedings for a pecuniary penalty order
24 against the individual for a contravention of a civil penalty
25 provision (whether or not the order was made); and
26 (b) the conduct alleged to constitute the offence is substantially
27 the same as the conduct that was claimed to constitute the
28 contravention.

29 However, this does not apply to a criminal proceeding in respect of
30 the falsity of the evidence given by the individual in the
31 proceedings for the pecuniary penalty order.

1 **1317R ASIC requiring person to assist**

- 2 (1) ASIC may require a person to give all reasonable assistance in
3 connection with:
4 (a) an application for a declaration of contravention or a
5 pecuniary penalty order; or
6 (b) criminal proceedings for an offence against this Act.
- 7 (2) ASIC can require the person to assist in connection with an
8 application for a declaration or order if, and only if:
9 (a) it appears to ASIC that someone other than the person
10 required to assist may have contravened a civil penalty
11 provision; and
12 (b) ASIC suspects or believes that the person required to assist
13 can give information relevant to the application.
- 14 (3) ASIC can require the person to assist in connection with criminal
15 proceedings if, and only if:
16 (a) it appears to ASIC that the person required to assist is
17 unlikely to be a defendant in the proceedings; and
18 (b) the person required to assist is, in relation to a person who is
19 or should be a defendant in the proceedings:
20 (i) an employee or agent (including a banker or auditor) of
21 the other person; or
22 (ii) if the other person is a corporation—an officer of the
23 other person; or
24 (iii) if the other person is an individual—a partner of the
25 other person.
- 26 (4) ASIC can require the person to assist regardless of whether:
27 (a) an application for the declaration or penalty order has
28 actually been made; or
29 (b) criminal proceedings for the offence have actually begun.
- 30 (5) The person cannot be required to assist if they are or have been a
31 lawyer for:
32 (a) in an application for a declaration or penalty order—the
33 person suspected of the contravention; or

Section 1317S

1 (b) in criminal proceedings—a defendant or likely defendant in
2 the proceedings.

3 (6) The requirement to assist must be given in writing.

4 (7) The Court may order the person to comply with the requirement in
5 a specified way. Only ASIC may apply to the Court for an order
6 under this subsection.

7 Note: The person must comply with the requirement and may commit an
8 offence if they do not, even if there is no order under this
9 subsection (see section 104 and subsection 1311(1)).

10 (8) This section does not limit and is not limited by section 49 of the
11 ASIC Act.

12 **1317S Relief from liability for contravention of civil penalty**
13 **provision**

14 (1) In this section:

15 *eligible proceedings:*

16 (a) means proceedings for a contravention of a civil penalty
17 provision (including proceedings under section 588M, 588W
18 or 1317H); and

19 (b) does not include proceedings for an offence (except so far as
20 the proceedings relate to the question whether the court
21 should make an order under section 588K or 1317H).

22 (2) If:

23 (a) eligible proceedings are brought against a person; and

24 (b) in the proceedings it appears to the court that the person has,
25 or may have, contravened a civil penalty provision but that:

26 (i) the person has acted honestly; and

27 (ii) having regard to all the circumstances of the case
28 (including, where applicable, those connected with the
29 person's appointment as an officer of a corporation or of
30 a Part 5.7 body), the person ought fairly to be excused
31 for the contravention;

32 the court may relieve the person either wholly or partly from a
33 liability to which the person would otherwise be subject, or that

Section 1317S

- 1 might otherwise be imposed on the person, because of the
2 contravention.
- 3 (3) In determining under subsection (2) whether a person ought fairly
4 to be excused for a contravention of section 588G, the matters to
5 which regard is to be had include, but are not limited to:
6 (a) any action the person took with a view to appointing an
7 administrator of the company or Part 5.7 body; and
8 (b) when that action was taken; and
9 (c) the results of that action.
- 10 (4) If a person thinks that eligible proceedings will or may be begun
11 against them, they may apply to the Court for relief.
- 12 (5) On an application under subsection (4), the Court may grant relief
13 under subsection (2) as if the eligible proceedings had been begun
14 in the Court.
- 15 (6) For the purposes of subsection (2) as applying for the purposes of a
16 case tried by a judge with a jury:
17 (a) a reference in that subsection to the court is a reference to the
18 judge; and
19 (b) the relief that may be granted includes withdrawing the case
20 in whole or in part from the jury and directing judgment to be
21 entered for the defendant on such terms as to costs as the
22 judge thinks appropriate.
- 23 (7) Nothing in this section limits, or is limited by, section 1318.

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Part 9.5—Powers of Courts

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1318 Power to grant relief

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(1) If, in any civil proceeding against a person to whom this section applies for negligence, default, breach of trust or breach of duty in a capacity as such a person, it appears to the court before which the proceedings are taken that the person is or may be liable in respect of the negligence, default or breach but that the person has acted honestly and that, having regard to all the circumstances of the case, including those connected with the person's appointment, the person ought fairly to be excused for the negligence, default or breach, the court may relieve the person either wholly or partly from liability on such terms as the court thinks fit.

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(2) Where a person to whom this section applies has reason to apprehend that any claim will or might be made against the person in respect of any negligence, default, breach of trust or breach of duty in a capacity as such a person, the person may apply to the Court for relief, and the Court has the same power to relieve the person as it would have had under subsection (1) if it had been a court before which proceedings against the person for negligence, default, breach of trust or breach of duty had been brought.

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(3) Where a case to which subsection (1) applies is being tried by a judge with a jury, the judge after hearing the evidence may, if he or she is satisfied that the defendant ought pursuant to that subsection to be relieved either wholly or partly from the liability sought to be enforced against the person, withdraw the case in whole or in part from the jury and forthwith direct judgment to be entered for the defendant on such terms as to costs or otherwise as the judge thinks proper.

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(4) This section applies to a person who is:
(a) an officer of a corporation; or
(b) an auditor of a corporation, whether or not the person is an officer of the corporation; or

Section 1319

- 1 (c) an expert in relation to a matter:
2 (i) relating to a corporation; and
3 (ii) in relation to which the civil proceeding has been taken
4 or the claim will or might arise; or
5 (d) a receiver, receiver and manager, liquidator or other person
6 appointed or directed by the Court to carry out any duty
7 under this Act in relation to a corporation.
- 8 (5) For the purposes of this section, *officer* in relation to a corporation,
9 means:
10 (a) a director, secretary, executive officer or employee of the
11 corporation; and
12 (b) a receiver, or receiver and manager, of property of the
13 corporation; and
14 (c) an administrator of the corporation; and
15 (ca) an administrator of a deed of company arrangement executed
16 by the corporation; and
17 (d) a liquidator of the corporation; and
18 (e) a trustee or other person administering a compromise or
19 arrangement made between the corporation and another
20 person or other persons.

21 **1319 Power of Court to give directions with respect to meetings**
22 **ordered by the Court**

23 Where, under this Act, the Court orders a meeting to be convened,
24 the Court may, subject to this Act, give such directions with
25 respect to the convening, holding or conduct of the meeting, and
26 such ancillary or consequential directions in relation to the
27 meeting, as it thinks fit.

28 **1321 Appeals from decisions of receivers, liquidators etc.**

29 A person aggrieved by any act, omission or decision of:

- 30 (a) a person administering a compromise, arrangement or
31 scheme referred to in Part 5.1; or
32 (b) a receiver, or a receiver and manager, of property of a
33 corporation; or

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- 1 (c) an administrator of a company; or
2 (ca) an administrator of a deed of company arrangement executed
3 by a company; or
4 (d) a liquidator or provisional liquidator of a company;
5 may appeal to the Court in respect of the act, omission or decision
6 and the Court may confirm, reverse or modify the act or decision,
7 or remedy the omission, as the case may be, and make such orders
8 and give such directions as it thinks fit.

9 **1322 Irregularities**

- 10 (1) In this section, unless the contrary intention appears:
11 (a) a reference to a proceeding under this Act is a reference to
12 any proceeding whether a legal proceeding or not; and
13 (b) a reference to a procedural irregularity includes a reference
14 to:
15 (i) the absence of a quorum at a meeting of a corporation,
16 at a meeting of directors or creditors of a corporation, at
17 a joint meeting of creditors and members of a
18 corporation or at a meeting of members of a registered
19 scheme; and
20 (ii) a defect, irregularity or deficiency of notice or time.
- 21 (2) A proceeding under this Act is not invalidated because of any
22 procedural irregularity unless the Court is of the opinion that the
23 irregularity has caused or may cause substantial injustice that
24 cannot be remedied by any order of the Court and by order declares
25 the proceeding to be invalid.
- 26 (3) A meeting held for the purposes of this Act, or a meeting notice of
27 which is required to be given in accordance with the provisions of
28 this Act, or any proceeding at such a meeting, is not invalidated
29 only because of the accidental omission to give notice of the
30 meeting or the non-receipt by any person of notice of the meeting,
31 unless the Court, on the application of the person concerned, a
32 person entitled to attend the meeting or ASIC, declares proceedings
33 at the meeting to be void.

Section 1322

- 1 (3A) If a member does not have a reasonable opportunity to participate
2 in a meeting of members, or part of a meeting of members, held at
3 2 or more venues, the meeting will only be invalid on that ground
4 if:
5 (a) the Court is of the opinion that:
6 (i) a substantial injustice has been caused or may be
7 caused; and
8 (ii) the injustice cannot be remedied by any order of the
9 Court; and
10 (b) the Court declares the meeting or proceeding (or that part of
11 it) invalid.
- 12 (3B) If voting rights are exercised in contravention of subsection
13 259D(3) (company controlling entity that holds shares in it), the
14 meeting or the resolution on which the voting rights were exercised
15 will only be invalid on that ground if:
16 (a) the court is of the opinion that:
17 (i) a substantial injustice has been caused or may be
18 caused; and
19 (ii) the injustice cannot be remedied by any order of the
20 court; and
21 (b) the court declares the meeting or resolution invalid.
- 22 (4) Subject to the following provisions of this section but without
23 limiting the generality of any other provision of this Act, the Court
24 may, on application by any interested person, make all or any of
25 the following orders, either unconditionally or subject to such
26 conditions as the Court imposes:
27 (a) an order declaring that any act, matter or thing purporting to
28 have been done, or any proceeding purporting to have been
29 instituted or taken, under this Act or in relation to a
30 corporation is not invalid by reason of any contravention of a
31 provision of this Act or a provision of the constitution of a
32 corporation;
33 (b) an order directing the rectification of any register kept by
34 ASIC under this Act;

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- 1 (c) an order relieving a person in whole or in part from any civil
2 liability in respect of a contravention or failure of a kind
3 referred to in paragraph (a);
- 4 (d) an order extending the period for doing any act, matter or
5 thing or instituting or taking any proceeding under this Act or
6 in relation to a corporation (including an order extending a
7 period where the period concerned ended before the
8 application for the order was made) or abridging the period
9 for doing such an act, matter or thing or instituting or taking
10 such a proceeding;
- 11 and may make such consequential or ancillary orders as the Court
12 thinks fit.
- 13 (5) An order may be made under paragraph (4)(a) or (c)
14 notwithstanding that the contravention or failure referred to in the
15 paragraph concerned resulted in the commission of an offence.
- 16 (6) The Court must not make an order under this section unless it is
17 satisfied:
- 18 (a) in the case of an order referred to in paragraph (4)(a):
- 19 (i) that the act, matter or thing, or the proceeding, referred
20 to in that paragraph is essentially of a procedural nature;
- 21 (ii) that the person or persons concerned in or party to the
22 contravention or failure acted honestly; or
- 23 (iii) that it is just and equitable that the order be made; and
- 24 (b) in the case of an order referred to in paragraph (4)(c)—that
25 the person subject to the civil liability concerned acted
26 honestly; and
- 27 (c) in every case—that no substantial injustice has been or is
28 likely to be caused to any person.

29 **1323 Power of Court to prohibit payment or transfer of money,
30 securities, futures contracts or property**

- 31 (1) Where:
- 32 (a) an investigation is being carried out under the ASIC Act or
33 this Act in relation to an act or omission by a person, being

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- 1 an act or omission that constitutes or may constitute a
2 contravention of this Act; or
3 (b) a prosecution has been begun against a person for a
4 contravention of this Act; or
5 (c) a civil proceeding has been begun against a person under this
6 Act;
7 and the Court considers it necessary or desirable to do so for the
8 purpose of protecting the interests of a person (in this section
9 called an *aggrieved person*) to whom the person referred to in
10 paragraph (a), (b) or (c), as the case may be, (in this section called
11 the *relevant person*), is liable, or may be or become liable, to pay
12 money, whether in respect of a debt, by way of damages or
13 compensation or otherwise, or to account for securities, futures
14 contracts or other property, the Court may, on application by ASIC
15 or by an aggrieved person, make one or more of the following
16 orders:
17 (d) an order prohibiting a person who is indebted to the relevant
18 person or to an associate of the relevant person from making
19 a payment in total or partial discharge of the debt to, or to
20 another person at the direction or request of, the person to
21 whom the debt is owed;
22 (e) an order prohibiting a person holding money, securities,
23 futures contracts or other property, on behalf of the relevant
24 person, or on behalf of an associate of the relevant person,
25 from paying all or any of the money, or transferring, or
26 otherwise parting with possession of, the securities, futures
27 contracts or other property, to, or to another person at the
28 direction or request of, the person on whose behalf the
29 money, securities, futures contracts or other property, is or
30 are held;
31 (f) an order prohibiting the taking or sending out of this
32 jurisdiction, or out of Australia, by a person of money of the
33 relevant person or of an associate of the relevant person;
34 (g) an order prohibiting the taking, sending or transfer by a
35 person of securities, futures contracts or other property of the
36 relevant person, or of an associate of the relevant person:
37 (i) from a place in this jurisdiction to a place outside this
38 jurisdiction (including the transfer of securities from a

Section 1323

- 1 register in this jurisdiction to a register outside this
2 jurisdiction); or
3 (ii) from a place in Australia to a place outside Australia
4 (including the transfer of securities from a register in
5 Australia to a register outside Australia);
6 (h) an order appointing:
7 (i) if the relevant person is a natural person—a receiver or
8 trustee, having such powers as the Court orders, of the
9 property or of part of the property of that person; or
10 (ii) if the relevant person is a body corporate—a receiver or
11 receiver and manager, having such powers as the Court
12 orders, of the property or of part of the property of that
13 person;
14 (j) if the relevant person is a natural person—an order requiring
15 that person to deliver up to the Court his or her passport and
16 such other documents as the Court thinks fit;
17 (k) if the relevant person is a natural person—an order
18 prohibiting that person from leaving this jurisdiction, or
19 Australia, without the consent of the Court.
- 20 (2A) A reference in paragraph (1)(g) or (h) to property of a person
21 includes a reference to property that the person holds otherwise
22 than as sole beneficial owner, for example:
23 (a) as trustee for, as nominee for, or otherwise on behalf of or on
24 account of, another person; or
25 (b) in a fiduciary capacity.
- 26 (2B) Subsection (2A) is to avoid doubt, is not to limit the generality of
27 anything in subsection (1) and is not to affect by implication the
28 interpretation of any other provision of this Act.
- 29 (2) An order under subsection (1) prohibiting conduct may prohibit the
30 conduct either absolutely or subject to conditions.
- 31 (3) Where an application is made to the Court for an order under
32 subsection (1), the Court may, if in the opinion of the Court it is
33 desirable to do so, before considering the application, grant an
34 interim order, being an order of the kind applied for that is

Section 1324

- 1 expressed to have effect pending the determination of the
2 application.
- 3 (4) On an application under subsection (1), the Court must not require
4 the applicant or any other person, as a condition of granting an
5 interim order under subsection (3), to give an undertaking as to
6 damages.
- 7 (5) Where the Court has made an order under this section on a
8 person's application, the Court may, on application by that person
9 or by any person affected by the order, make a further order
10 discharging or varying the first-mentioned order.
- 11 (6) An order made under subsection (1) or (2) may be expressed to
12 operate for a specified period or until the order is discharged by a
13 further order under this section.
- 14 (7) Nothing in this section affects the powers that the Court has apart
15 from this section.
- 16 (8) This section has effect subject to the *Bankruptcy Act 1966*.
- 17 (9) A person must not contravene an order by the Court under this
18 section that is applicable to the person.

19 **1324 Injunctions**

- 20 (1) Where a person has engaged, is engaging or is proposing to engage
21 in conduct that constituted, constitutes or would constitute:
22 (a) a contravention of this Act; or
23 (b) attempting to contravene this Act; or
24 (c) aiding, abetting, counselling or procuring a person to
25 contravene this Act; or
26 (d) inducing or attempting to induce, whether by threats,
27 promises or otherwise, a person to contravene this Act; or
28 (e) being in any way, directly or indirectly, knowingly concerned
29 in, or party to, the contravention by a person of this Act; or
30 (f) conspiring with others to contravene this Act;
31 the Court may, on the application of ASIC, or of a person whose
32 interests have been, are or would be affected by the conduct, grant

Section 1324

1 an injunction, on such terms as the Court thinks appropriate,
2 restraining the first-mentioned person from engaging in the
3 conduct and, if in the opinion of the Court it is desirable to do so,
4 requiring that person to do any act or thing.

5 (1A) For the purposes of subsection (1):

6 (a) a contravention of this Act affects the interests of a creditor
7 or member of a company if the insolvency of the company is
8 an element of the contravention; and

9 (b) a company's contravention of:

10 (i) paragraph 257A(1)(a) (share buy-back not to prejudice
11 ability to pay creditors); or

12 (ia) paragraph 256B(1)(b) (share capital reduction not to
13 prejudice ability to pay creditors); or

14 (ii) paragraph 260A(1)(a) (financial assistance for share
15 acquisition not to prejudice company or shareholders or
16 ability to pay creditors);

17 affects the interests of a creditor or member of the company;
18 and

19 (c) a company's contravention of paragraph 256B(1)(a) (fair and
20 reasonable test for share capital reduction) affects the
21 interests of a member of the company.

22 This subsection does not limit subsection (1) in any way.

23 (1B) If the ground relied on in an application for an injunction is
24 conduct or proposed conduct of a company or other person that it is
25 alleged constitutes, or would constitute:

26 (a) a contravention of paragraph 256B(1)(a) or (b), section 257A
27 or paragraph 260A(1)(a); or

28 (b) a contravention of a provision of this Act involving the
29 insolvency of the company because of:

30 (i) the company making a reduction of its share capital to
31 which Division 1 of Part 2J.1 applies; or

32 (ii) the company buying back its shares; or

33 (iii) the company giving financial assistance to which
34 Part 2J.3 applies;

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- 1 the Court must assume that the conduct constitutes, or would
2 constitute, a contravention of that paragraph, section or provision
3 unless the company or person proves otherwise.
- 4 (2) Where a person has refused or failed, is refusing or failing, or is
5 proposing to refuse or fail, to do an act or thing that the person is
6 required by this Act to do, the Court may, on the application of:
- 7 (a) ASIC; or
8 (b) any person whose interests have been, are or would be
9 affected by the refusal or failure to do that act or thing;
10 grant an injunction, on such terms as the Court thinks appropriate,
11 requiring the first-mentioned person to do that act or thing.
- 12 (3) Where an application for an injunction under subsection (1) or (2)
13 has been made, the Court may, if the Court determines it to be
14 appropriate, grant an injunction by consent of all the parties to the
15 proceedings, whether or not the Court is satisfied that that
16 subsection applies.
- 17 (4) Where in the opinion of the Court it is desirable to do so, the Court
18 may grant an interim injunction pending determination of an
19 application under subsection (1).
- 20 (5) The Court may discharge or vary an injunction granted under
21 subsection (1), (2) or (4).
- 22 (6) The power of the Court to grant an injunction restraining a person
23 from engaging in conduct may be exercised:
- 24 (a) whether or not it appears to the Court that the person intends
25 to engage again, or to continue to engage, in conduct of that
26 kind; and
27 (b) whether or not the person has previously engaged in conduct
28 of that kind; and
29 (c) whether or not there is an imminent danger of substantial
30 damage to any person if the first-mentioned person engages
31 in conduct of that kind.
- 32 (7) The power of the Court to grant an injunction requiring a person to
33 do an act or thing may be exercised:

Section 1324A

- 1 (a) whether or not it appears to the Court that the person intends
2 to refuse or fail again, or to continue to refuse or fail, to do
3 that act or thing; and
4 (b) whether or not the person has previously refused or failed to
5 do that act or thing; and
6 (c) whether or not there is an imminent danger of substantial
7 damage to any person if the first-mentioned person refuses or
8 fails to do that act or thing.
- 9 (8) Where ASIC applies to the Court for the grant of an injunction
10 under this section, the Court must not require the applicant or any
11 other person, as a condition of granting an interim injunction, to
12 give an undertaking as to damages.
- 13 (9) In proceedings under this section against a person the Court may
14 make an order under section 1323 in respect of the person.
- 15 (10) Where the Court has power under this section to grant an
16 injunction restraining a person from engaging in particular
17 conduct, or requiring a person to do a particular act or thing, the
18 Court may, either in addition to or in substitution for the grant of
19 the injunction, order that person to pay damages to any other
20 person.

21 **1324A Provisions relating to prosecutions**

- 22 In the prosecution of a person for an offence in respect of a
23 contravention of a provision of Chapter 5C or 6D or Part 7.11, the
24 Court may do either or both of the following:
- 25 (a) grant an injunction under section 1324 against the person in
26 relation to:
27 (i) the conduct that constitutes, or is alleged to constitute,
28 the offence; or
29 (ii) other conduct of that kind
30 (b) make an order under section 1324B in respect of the person.

Section 1324B

1 **1324B Order to disclose information or publish advertisements**

2 Without limiting section 1324, if, on the application of ASIC, the
3 Court is satisfied that a person has engaged in conduct constituting
4 a contravention of a provision of Chapter 5C or 6D or Part 7.11,
5 the Court may make either or both of the following orders against
6 that person or a person involved in the contravention:

7 (a) an order requiring the person to whom it is directed to
8 disclose, in the manner specified in the order, to:

9 (i) the public; or

10 (ii) a particular person; or

11 (iii) a particular class of persons;

12 the information, or information of a kind, that is specified in
13 the order and is in the person's possession or to which the
14 person has access;

15 (b) an order requiring the person to whom it is directed to
16 publish, at the person's own expense, in the manner and at
17 times specified in the order, advertisements whose terms are
18 specified in, or are to be determined in accordance with, the
19 order.

20 **1325 Other orders**

21 (1) Where, in a proceeding instituted under, or for a contravention of,
22 Chapter 5C or 6D or Part 7.11, the Court finds that a person who is
23 a party to the proceeding has suffered, or is likely to suffer, loss or
24 damage because of conduct of another person that was engaged in
25 in contravention of Chapter 5C or 6D or Part 7.11, the Court may,
26 whether or not it grants an injunction, or makes an order, under any
27 other provision of this Act, make such order or orders as it thinks
28 appropriate against the person who engaged in the conduct or a
29 person who was involved in the contravention (including all or any
30 of the orders mentioned in subsection (5)) if the Court considers
31 that the order or orders concerned will compensate the
32 first-mentioned person in whole or in part for the loss or damage or
33 will prevent or reduce the loss or damage.

34 (2) The Court may, on the application of a person who has suffered, or
35 is likely to suffer, loss or damage because of conduct of another

Section 1325

1 person that was engaged in in contravention of Chapter 5C or 6D
2 or Part 7.11, or on the application of ASIC in accordance with
3 subsection (3) on behalf of such a person or 2 or more such
4 persons, make such order or orders as the Court thinks appropriate
5 against the person who engaged in the conduct or a person who
6 was involved in the contravention (including all or any of the
7 orders mentioned in subsection (5)) if the Court considers that the
8 order or orders concerned will compensate the person who made
9 the application, or the person or any of the persons on whose
10 behalf the application was made, in whole or in part for the loss or
11 damage, or will prevent or reduce the loss or damage suffered, or
12 likely to be suffered, by such a person.

13 (3) Where, in a proceeding instituted for a contravention of
14 Chapter 5C or 6D or Part 7.11 or instituted by ASIC under
15 section 1324, a person is found to have engaged in conduct in
16 contravention of Chapter 5C or 6D or Part 7.11, ASIC may make
17 an application under subsection (2) on behalf of one or more
18 persons identified in the application who have suffered, or are
19 likely to suffer, loss or damage by the conduct, but ASIC must not
20 make such an application except with the consent in writing given
21 before the application is made by the person, or by each of the
22 persons, on whose behalf the application is made.

23 (4) An application under subsection (2) may be made within 6 years
24 after the day on which the cause of action arose.

25 (5) The orders referred to in subsections (1) and (2) are:

26 (a) an order declaring the whole or any part of a contract made
27 between the person who suffered, or is likely to suffer, the
28 loss or damage and the person who engaged in the conduct or
29 a person who was involved in the contravention constituted
30 by the conduct, or of a collateral arrangement relating to such
31 a contract, to be void and, if the Court thinks fit, to have been
32 void *ab initio* or at all times on and after a specified day
33 before the order is made; and

34 (b) an order varying such a contract or arrangement in such
35 manner as is specified in the order and, if the Court thinks fit,
36 declaring the contract or arrangement to have had effect as so

Section 1325A

- 1 varied on and after a specified day before the order is made;
2 and
- 3 (c) an order refusing to enforce any or all of the provisions of
4 such a contract; and
- 5 (d) an order directing the person who engaged in the conduct or
6 a person who was involved in the contravention constituted
7 by the conduct to refund money or return property to the
8 person who suffered the loss or damage; and
- 9 (e) an order directing the person who engaged in the conduct or
10 a person who was involved in the contravention constituted
11 by the conduct to pay to the person who suffered the loss or
12 damage the amount of the loss or damage; and
- 13 (f) an order directing the person who engaged in the conduct or
14 a person who was involved in the contravention constituted
15 by the conduct, at the person's own expense, to supply
16 specified services to the person who suffered, or is likely to
17 suffer, the loss or damage.
- 18 (6) Where an application is made for an order under this section
19 against a person, the Court may make an order under section 1323
20 in respect of the person.

21 **1325A Orders if contravention of Chapter 6, 6A, 6B or 6C**

- 22 (1) The Court may make any order or orders (including a remedial
23 order) that it considers appropriate if a person:
- 24 (a) contravenes a provision of Chapter 6, 6A, 6B or 6C; or
25 (b) contravenes a condition on a consent given by ASIC under
26 section 652B; or
27 (c) states in a notice under section 672B about securities that
28 they do not know particular information about:
- 29 (i) the securities; or
30 (ii) someone who has a relevant interest in, or has given
31 instructions in relation to, the securities.
- 32 Note 1: Section 9 defines *remedial order*.
- 33 Note 2: Sections 659B and 659C deal with court proceedings during and after
34 a takeover bid.

Section 1325B

- 1 (2) The Court may make any order or orders (including a remedial
2 order) that it considers appropriate if:
3 (a) the consideration offered under a takeover bid is or includes
4 securities; and
5 (b) the offers under the bid or the bidder's statement states or
6 implies that the securities are to be quoted on a stock market
7 of a securities exchange (whether in Australia or elsewhere)
8 and:
9 (i) an application for admission to quotation is not made
10 within 7 days after the start of the bid period; or
11 (ii) permission for admission to quotation is not granted
12 within 7 days after the end of the bid period.

13 Note: Section 9 defines *remedial order*.

- 14 (3) An order under this section may be made on application by the
15 following:
16 (a) ASIC;
17 (b) the company, or the responsible entity of the registered
18 scheme, whose securities are involved in the contravention;
19 (c) a member or former member of that company or scheme;
20 (d) a person from whom the relevant interest in the securities
21 were acquired;
22 (e) a person whose interests are affected by the contravention.

23 **1325B Court may order bidder to make offers**

- 24 (1) If a bidder making a takeover bid for a class of securities
25 contravenes section 631 by failing to make offers under the bid
26 within time and ASIC applies for an order under this section, the
27 Court may:
28 (a) order the bidder to send, to each holder of securities in that
29 class, an offer to which the bidder's statement relates within
30 a specified time; and
31 (b) make any ancillary orders it thinks appropriate including
32 orders that the bidder:
33 (i) send notices setting out specified information with the
34 offer; and

Section 1325C

- 1 (ii) send copies of the notice within a specified period to the
2 target and, if the target is listed, to the relevant securities
3 exchange; and
4 (iii) lodge a copy of the notice with ASIC within a specified
5 period.
- 6 (2) Offers sent in accordance with an order under this section are taken
7 to be made under a takeover bid.

8 **1325C Unfair or unconscionable agreements, payments or benefits**

- 9 (1) The Court may make orders under subsection (2) if:
- 10 (a) a body corporate gives, or enters into an agreement to give, a
11 director or secretary of the body corporate or a related body
12 corporate a benefit (including a payment or an agreement to
13 employ them, or engage their services, for a fixed period);
14 and
15 (b) the agreement is entered into or the benefit is given:
16 (i) within 12 months after the start of the bid period for a
17 takeover bid for the securities of the body corporate or a
18 related body corporate; or
19 (ii) at a time when the directors of the body corporate have
20 reason to believe that a takeover bid is to be made in
21 respect of securities of the body corporate or a related
22 body corporate; and
23 (c) the Court is satisfied that the agreement or benefit was unfair
24 or unconscionable having regard to the interests of the body
25 corporate.
- 26 (2) The Court may:
- 27 (a) declare the agreement, or any part of it, to be void or to have
28 always been void; or
29 (b) direct a person to whom a benefit is given, or another
30 specified person, to:
31 (i) make a payment or transfer property to the body
32 corporate; or
33 (ii) do any other act for the benefit of the body corporate; or
34 (c) make any other order it considers appropriate.

Section 1325D

- 1 (3) This section does not apply to an agreement or benefit that has
2 been approved by an ordinary resolution of the body corporate
3 (whether before or after the agreement was entered into or the
4 benefit given) with no vote being cast by the person who is to
5 receive the benefit or their associates.
- 6 (4) An order under this section may be made on application by:
7 (a) the body corporate; or
8 (b) ASIC; or
9 (c) members who together hold shares carrying at least 10% of
10 the votes attached to voting shares in the body corporate or a
11 related body corporate;
12 within 12 months, or any longer period that the Court thinks
13 appropriate in the circumstances, after the agreement is entered
14 into or the benefit given.

15 **1325D Contravention due to inadvertence etc.**

- 16 (1) The Court may declare that any act, document or matter:
17 (a) is not invalid merely because a person has contravened a
18 provision of Chapter 6, 6A, 6B or 6C; and
19 (b) has had effect at all times as if there had been no
20 contravention;
21 if the Court is satisfied that the contravention ought to be excused
22 in all the circumstances.
- 23 (2) An application for an order under subsection (1) may be made by
24 any interested person.
- 25 (3) If the Court is satisfied that in all the circumstances a contravention
26 of a provision of Chapter 6, 6A, 6B or 6C ought to be excused, the
27 Court must not make an order under section 1325A, 1325B or
28 1325C other than:
29 (a) an order restraining the exercise of voting or other rights
30 attached to securities; or
31 (b) an order that an exercise of voting or other rights attached to
32 securities be disregarded.

Section 1325E

- 1 (4) In determining whether or not a contravention of a provision by a
2 person ought to be excused, have regard to the contravention being
3 caused by any of the following:
4 (a) the person's inadvertence or mistake;
5 (b) the person not having been aware of a relevant fact or
6 occurrence;
7 (c) circumstances beyond the control of the person.
- 8 (5) This section applies notwithstanding anything contained in any
9 other provision of this Chapter.

10 **1325E Orders to secure compliance**

- 11 In order to secure compliance with an order under section 1325A,
12 1325B or 1325C, the Court may direct a person to:
13 (a) do a specified act; or
14 (b) refrain from doing a specified act.

15 **1326 Effect of sections 1323, 1324 and 1325**

- 16 Nothing in any of sections 1323, 1324, 1324A, 1324B, and 1325
17 limits the generality of anything else in any of those sections.

18 **1327 Power of Court to punish for contempt of Court**

- 19 Nothing in a provision of this Act that provides:
20 (a) that a person must not contravene an order of the Court; or
21 (b) that a person who contravenes an order of the Court
22 contravenes a provision of this Act or is guilty of an offence;
23 affects the powers of the Court in relation to the punishment of
24 contempts of the Court.

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Part 9.6—Proceedings

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4

1330 ASIC's power to intervene in proceedings

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(1) ASIC may intervene in any proceeding relating to a matter arising under this Act.

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(2) Where ASIC intervenes in a proceeding referred to in subsection (1), ASIC is taken to be a party to the proceeding and, subject to this Act, has all the rights, duties and liabilities of such a party.

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(3) Without limiting the generality of subsection (2), ASIC may appear and be represented in any proceeding in which it wishes to intervene pursuant to subsection (1):

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(a) by a staff member of ASIC; or

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(b) by a natural person to whom, or by an officer or employee of a person or body to whom or to which, ASIC has delegated its functions and powers under this Act or such of those functions and powers as relate to a matter to which the proceeding relates; or

(c) by solicitor or counsel.

21

1331 Civil proceedings not to be stayed

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No civil proceedings under this Act are to be stayed merely because the proceeding discloses, or arises out of, the commission of an offence.

23

24

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1332 Standard of proof

26

Where, in proceedings other than proceedings for an offence, it is necessary to establish, or for the Court to be satisfied, for any purpose relating to a matter arising under this Act, that:

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29

(a) a person has contravened a provision of this Act; or

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31

(b) default has been made in complying with a provision of this Act; or

Section 1333

- 1 (c) an act or omission was unlawful by virtue of a provision of
2 this Act; or
3 (d) a person has been in any way, by act or omission, directly or
4 indirectly, knowingly concerned in or party to a
5 contravention, or a default in complying with, a provision of
6 this Act;
7 it is sufficient if the matter referred to in paragraph (a), (b), (c) or
8 (d) is established, or the Court is so satisfied, as the case may be,
9 on the balance of probabilities.

10 **1333 Evidence of contravention**

11 For the purposes of this Act, a certificate that:

- 12 (a) purports to be signed by the Registrar or other proper officer
13 of an Australian court; and
14 (b) states:
15 (i) that a person was convicted by that court on a specified
16 day of a specified offence; or
17 (ii) that a person charged before that court with a specified
18 offence was, on a specified day, found in that court to
19 have committed the offence but that the court did not
20 proceed to convict the person of the offence;
21 is, unless it is proved that the conviction was quashed or set aside,
22 or that the finding was set aside or reversed, as the case may be,
23 conclusive evidence:
24 (c) if subparagraph (b)(i) applies—that the person was convicted
25 of the offence on that day; and
26 (d) if the offence was constituted by a contravention of a
27 provision of a law—that the person contravened that
28 provision.

29 **1335 Costs**

- 30 (1) Where a corporation is plaintiff in any action or other legal
31 proceeding, the court having jurisdiction in the matter may, if it
32 appears by credible testimony that there is reason to believe that
33 the corporation will be unable to pay the costs of the defendant if
34 successful in his, her or its defence, require sufficient security to be

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1 given for those costs and stay all proceedings until the security is
2 given.

3 (2) The costs of any proceeding before a court under this Act is to be
4 borne by such party to the proceeding as the court, in its discretion,
5 directs.

6 **1336 Vesting of property**

7 (1) Where an order is made by a court under this Act vesting property
8 in a person:

9 (a) subject to subsection (2), the property forthwith vests in the
10 person named in the order without any conveyance, transfer
11 or assignment; and

12 (b) the person who applied for the order must, within 7 days after
13 the passing and entering of the order, lodge an office copy of
14 the order with such person (if any) as is specified for the
15 purpose in the order.

16 (2) Where:

17 (a) the property to which an order referred to in subsection (1)
18 relates is property the transfer or transmission of which may
19 be registered under a law of the Commonwealth, of a State or
20 of a Territory; and

21 (b) that law enables the registration of such an order;
22 the property, notwithstanding that it vests in equity in the person
23 named in the order, does not vest in that person at law until the
24 requirements of the law referred to in paragraph (a) have been
25 complied with.

26 (3) Where:

27 (a) property vests in a person by force of this Act; and

28 (b) the property is property the transfer or transmission of which
29 may be registered under a law of the Commonwealth, of a
30 State or of a Territory; and

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1 (c) that law enables the person to be registered as the owner of
2 that property;
3 that property, notwithstanding that it vests in equity in that person
4 by force of this Act, does not vest in that person at law until the
5 requirements of the law referred to in paragraph (b) have been
6 complied with.

1

2 **Part 9.6A—Jurisdiction and procedure of Courts**

3 **Division 1—Civil jurisdiction**

4 **Subdivision A—Preliminary**

5 **1337A Operation of Division**

6 (1) This Division deals with:

- 7 (a) the jurisdiction of courts in respect of civil matters arising
8 under the Corporations legislation; and
9 (b) the jurisdiction of courts in respect of matters arising under
10 the *Administrative Decisions (Judicial Review) Act 1977*
11 involving or related to decisions made under the
12 Corporations legislation by Commonwealth authorities and
13 officers of the Commonwealth; and
14 (c) the jurisdiction of courts in civil matters in respect of
15 decisions made by officers of the Commonwealth to
16 prosecute persons for offences against the Corporations
17 legislation and related criminal justice process decisions.

18 (2) This Division operates to the exclusion of:

- 19 (a) the *Jurisdiction of Courts (Cross-vesting) Act 1987*; and
20 (b) section 39B of the *Judiciary Act 1903*.

21 (3) This Division does not limit the operation of the provisions of the
22 *Judiciary Act 1903* other than section 39B.

23 (4) Without limiting subsection (3), this Division does not limit the
24 operation of subsection 39(2) of the *Judiciary Act 1903* in relation
25 to civil matters arising under the Corporations legislation.

26 (5) Nothing in this Division affects any other jurisdiction of any court.

1 **Subdivision B—Conferral of jurisdiction**

2 **1337B Jurisdiction of Federal Court and State and Territory**
3 **Supreme Courts**

4 (1) Jurisdiction is conferred on the Federal Court of Australia with
5 respect to civil matters arising under the Corporations legislation.

6 (2) Subject to section 9 of the *Administrative Decisions (Judicial*
7 *Review) Act 1977*, jurisdiction is conferred on the Supreme Court
8 of:

9 (a) each State; and

10 (b) the Capital Territory; and

11 (c) the Northern Territory;

12 with respect to civil matters arising under the Corporations
13 legislation.

14 (3) Despite section 9 of the *Administrative Decisions (Judicial Review)*
15 *Act 1977*, jurisdiction is conferred on the Supreme Court of:

16 (a) each State; and

17 (b) the Capital Territory; and

18 (c) the Northern Territory;

19 with respect to matters arising under that Act involving or related
20 to decisions made, or proposed or required to be made, under the
21 Corporations legislation by a Commonwealth authority or an
22 officer of the Commonwealth.

23 Note 1: The Federal Court also has jurisdiction with respect to these matters
24 under that Act.

25 Note 2: A Supreme Court may be required to transfer a proceeding with
26 respect to such a matter to the Federal Court: see subsection
27 1337H(3).

28 (4) Subsection (3) applies to a decision made, or proposed or required
29 to be made:

30 (a) whether or not in the exercise of a discretion; and

31 (b) whether before or after that subsection commences.

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1 (5) The jurisdiction conferred on a Supreme Court by subsection (2) or
2 (3) is not limited by any limits to which any other jurisdiction of
3 that Supreme Court may be subject.

4 (6) This section has effect subject to section 1337D.

5 **1337C Jurisdiction of Family Court and State Family Courts**

6 (1) Jurisdiction is conferred on the Family Court with respect to civil
7 matters arising under the Corporations legislation.

8 (2) Subject to section 9 of the *Administrative Decisions (Judicial*
9 *Review) Act 1977*, jurisdiction is conferred on each State Family
10 Court with respect to civil matters arising under the Corporations
11 legislation.

12 (3) The jurisdiction conferred on a State Family Court by
13 subsection (2) is not limited by any limits to which any other
14 jurisdiction of the State Family Court may be subject.

15 (4) This section has effect subject to section 1337D.

16 **1337D Jurisdiction of courts (decisions to prosecute and related**
17 **criminal justice process decisions made by**
18 **Commonwealth officers)**

19 (1) If a decision to prosecute a person for an offence against the
20 Corporations legislation has been made by an officer or officers of
21 the Commonwealth and the prosecution is proposed to be
22 commenced in a State or Territory court:

23 (a) neither the Federal Court nor the Family Court has
24 jurisdiction with respect to any matter in which a person
25 seeks a writ of mandamus or prohibition or an injunction
26 against the officer or officers in relation to that decision; and

27 (b) jurisdiction with respect to any such matter is conferred on
28 the Supreme Court of the State or Territory in which the
29 prosecution is proposed to be commenced.

30 (2) Subject to subsection (3), at any time when:

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- 1 (a) a prosecution for an offence against the Corporations
2 legislation is before a State or Territory court; or
3 (b) an appeal arising out of such a prosecution is before a State
4 or Territory court;
5 the following apply:
6 (c) neither the Federal Court nor the Family Court has
7 jurisdiction with respect to any matter in which the person
8 who is or was the defendant in the prosecution seeks a writ of
9 mandamus or prohibition or an injunction against an officer
10 or officers of the Commonwealth in relation to a related
11 criminal justice process decision;
12 (d) jurisdiction with respect to any such matter is conferred on
13 the Supreme Court of the State or Territory in which the
14 prosecution or appeal is before a court.
- 15 (3) Subsection (2) does not apply where a person has applied for a writ
16 of mandamus or prohibition, or an injunction, against an officer or
17 officers of the Commonwealth in relation to a related criminal
18 justice process decision before the commencement of a prosecution
19 for an offence against a law of the Commonwealth, or of a State or
20 a Territory.
- 21 (4) Where subsection (3) applies, the prosecutor may apply to the
22 court for a permanent stay of the proceedings referred to in that
23 subsection and the court may grant such a stay if the court
24 determines that:
25 (a) the matters that are the subject of the proceedings are more
26 appropriately dealt with in the criminal justice process; and
27 (b) a stay of proceedings will not substantially prejudice the
28 person.
- 29 (5) Subsections (1), (2), (3) and (4) have effect despite anything in this
30 Act or in any other law. In particular:
31 (a) neither this Act, nor any other law, has the effect of giving
32 the Federal Court or the Family Court jurisdiction contrary to
33 subsection (1) or (2); and
34 (b) neither section 9 of the *Administrative Decisions (Judicial*
35 *Review) Act 1977*, nor any other law, has the effect of

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1 removing from the Supreme Court of a State, the Capital
2 Territory or the Northern Territory the jurisdiction given to
3 that Court by subsection (1) or (2).

4 (6) In this section:

5 *appeal* includes an application for a new trial and a proceeding to
6 review or call in question the proceedings, decision or jurisdiction
7 of a court or judge.

8 *related criminal justice process decision*, in relation to an offence,
9 means a decision (other than a decision to prosecute) made in the
10 criminal justice process in relation to the offence, including:

- 11 (a) a decision in connection with the investigation, committal for
12 trial or prosecution of the defendant; and
13 (b) a decision in connection with the appointment of
14 investigators or inspectors for the purposes of such an
15 investigation; and
16 (c) a decision in connection with the issue of a warrant,
17 including a search warrant or a seizure warrant; and
18 (d) a decision requiring the production of documents, the giving
19 of information or the summoning of persons as witnesses;
20 and
21 (e) a decision in connection with an appeal arising out of the
22 prosecution.

23 **1337E Jurisdiction of lower courts**

24 (1) Subject to section 9 of the *Administrative Decisions (Judicial*
25 *Review) Act 1977*, jurisdiction is conferred on the lower courts of:
26 (a) each State; and
27 (b) the Capital Territory; and
28 (c) the Northern Territory;
29 with respect to civil matters (other than superior court matters)
30 arising under the Corporations legislation.

31 (2) The jurisdiction conferred on a lower court by subsection (1):
32 (a) is subject to the court's general jurisdictional limits, so far as
33 they relate to:

- 1 (i) the amounts; or
2 (ii) the value of property;
3 with which the court may deal; but
4 (b) is not subject to the court's other jurisdictional limits.

5 **1337F Appeals**

- 6 (1) An appeal may not be instituted from a decision of the Federal
7 Court to:
8 (a) a State or Territory court; or
9 (b) the Family Court.
- 10 (2) An appeal may not be instituted from a decision of a court of the
11 Capital Territory to:
12 (a) a court of a State or the Northern Territory; or
13 (b) the Family Court.
- 14 (3) An appeal may not be instituted from a decision of a court (not
15 being a State Family Court) of a State or the Northern Territory to:
16 (a) the Federal Court; or
17 (b) a court of another State or Territory; or
18 (c) the Family Court; or
19 (d) a State Family Court of that State.
- 20 (4) An appeal may not be instituted from a decision of the Family
21 Court to:
22 (a) the Federal Court; or
23 (b) a State or Territory court.
- 24 (5) An appeal may not be instituted from a decision of a State Family
25 Court of a State to:
26 (a) the Federal Court; or
27 (b) a court of another State or Territory; or
28 (c) except in accordance with the law of the State under which
29 the State Family Court is constituted—the Supreme Court of
30 that State.

1 **1337G Courts to act in aid of each other**

2 All courts having jurisdiction in:

- 3 (a) civil matters arising under the Corporations legislation; or
4 (b) matters referred to in subsection 1337B(3);

5 and the officers of, or under the control of, those courts must
6 severally act in aid of, and be auxiliary to, each other in all those
7 matters.

8 **Subdivision C—Transfer of proceedings**

9 **1337H Transfer of proceedings by the Federal Court and State and**
10 **Territory Supreme Courts**

11 (1) This section applies to a proceeding (the *relevant proceeding*) in a
12 court (the *transferor court*) if:

13 (a) the relevant proceeding is:

14 (i) a proceeding with respect to a civil matter arising under
15 the Corporations legislation; or

16 (ii) a subsection 1337B(3) proceeding; and

17 (b) the transferor court is:

18 (i) the Federal court; or

19 (ii) a State or Territory Supreme Court.

20 (2) Subject to subsections (3), (4) and (5), if it appears to the transferor
21 court that, having regard to the interests of justice, it is more
22 appropriate for:

23 (a) the relevant proceeding; or

24 (b) an application in the relevant proceeding;

25 to be determined by another court that has jurisdiction in the
26 matters for determination in the relevant proceeding or application,
27 the transferor court may transfer the relevant proceeding or
28 application to that other court.

29 (3) If:

30 (a) the relevant proceeding is a subsection 1337B(3) proceeding;
31 and

32 (b) the transferor court is a State or Territory Supreme Court;

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- 1 the transferor court must transfer the relevant proceeding to the
2 Federal Court unless the matter for determination in it arises out of,
3 or relates to, another proceeding pending in any court of that State
4 or Territory that:
- 5 (c) arises, or a substantial part of which arises, under the
6 Corporations legislation; and
7 (d) is not a subsection 1337B(3) proceeding;
8 regardless of which proceeding was commenced first.
- 9 (4) Even if subsection (3) does not require a State or Territory
10 Supreme Court to transfer a subsection 1337B(3) proceeding to the
11 Federal Court, it may nevertheless do so if it considers that to be
12 appropriate, having regard to the interests of justice, including the
13 desirability of related proceedings being heard in the same State or
14 Territory.
- 15 (5) If:
- 16 (a) the relevant proceeding is a subsection 1337B(3) proceeding
17 in relation to a matter; and
18 (b) the transferor court is the Federal Court;
19 the transferor court may only transfer the relevant proceeding, or
20 an application in the relevant proceeding, to a State or Territory
21 Supreme Court if:
- 22 (c) the matter arises out of, or relates to, another proceeding
23 pending in any court of that State or Territory that:
- 24 (i) arises, or a substantial part of which arises, under the
25 Corporations legislation; and
26 (ii) is not a subsection 1337B(3) proceeding;
27 regardless of which proceeding was commenced first; and
28 (d) the transferor court considers the transfer to be appropriate,
29 having regard to the interests of justice, including the
30 desirability of related proceedings being heard in the same
31 jurisdiction.
- 32 (6) Nothing in this section confers on a court jurisdiction that the court
33 would not otherwise have.

- 1 (7) The fact that some references in this section to the interests of
2 justice include the desirability of related proceedings being heard
3 in the same jurisdiction does not of itself mean that other
4 references to the interests of justice, in this section or elsewhere in
5 this Act, do not include that matter.

6 **1337J Transfer of proceedings by Family Court and State Family**
7 **Courts**

- 8 (1) This section applies to a proceeding (the *relevant proceeding*) in a
9 court (the *transferor court*) if:
10 (a) the relevant proceeding is with respect to a civil matter
11 arising under the Corporations legislation; and
12 (b) the transferor court is:
13 (i) the Family Court of Australia; or
14 (ii) a State Family Court.
- 15 (2) If it appears to the transferor court:
16 (a) that the relevant proceeding arises out of, or is related to,
17 another proceeding pending in:
18 (i) the Federal Court; or
19 (ii) another State or Territory court;
20 and that the court in which the other proceeding is pending is
21 the most appropriate court to determine the relevant
22 proceeding; or
23 (b) that having regard to:
24 (i) whether, in the transferor court's opinion, apart from
25 this Division, the relevant proceeding, or a substantial
26 part of it, would have been incapable of being instituted
27 in the transferor court; and
28 (ii) the extent to which, in the transferor court's opinion, the
29 matters for determination in the relevant proceeding are
30 matters not within the transferor court's jurisdiction
31 apart from this Division; and

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- 1 (iii) the interests of justice;
2 the Federal Court, or another State or Territory court, is the
3 most appropriate court to determine the relevant proceeding;
4 or
5 (c) that it is otherwise in the interests of justice that the Federal
6 Court, or another State or Territory court, determine the
7 relevant proceeding;
8 the transferor court must transfer the relevant proceeding to the
9 Federal Court or to that other court.
- 10 (3) Subject to subsection (2), if it appears to the transferor court:
11 (a) that the relevant proceeding arises out of, or is related to,
12 another proceeding pending in another court that is:
13 (i) the Family Court of Australia; or
14 (ii) a State Family Court;
15 and that has jurisdiction under section 1337C in the matters
16 for determination in the relevant proceeding and that the
17 other court is the most appropriate court to determine the
18 relevant proceeding; or
19 (b) that it is otherwise in the interests of justice that the relevant
20 proceeding be determined by another court that is:
21 (i) the Family Court of Australia; or
22 (ii) a State Family Court;
23 and that has jurisdiction under section 1337C in the matters
24 for determination in the relevant proceeding;
25 the transferor court must transfer the relevant proceeding to the
26 other court.
- 27 (4) If:
28 (a) the transferor court transfers the relevant proceeding to
29 another court; and
30 (b) it appears to the transferor court that:
31 (i) there is another proceeding pending in the transferor
32 court that arises out of, or is related to, the relevant
33 proceeding; and

- 1 (ii) it is in the interests of justice that the other court also
2 determine the other proceeding;
3 the transferor court must also transfer the other proceeding to the
4 other court.
- 5 (5) Nothing in this section confers on a court jurisdiction that the court
6 would not otherwise have.

7 **1337K Transfer of proceedings in lower courts**

- 8 (1) This section applies to a proceeding (the *relevant proceeding*) in a
9 court (the *transferor court*) if:
10 (a) the relevant proceeding is with respect to a civil matter
11 arising under the Corporations legislation; and
12 (b) the transferor court is a lower court of a State or Territory.
- 13 (2) If it appears to the transferor court that, having regard to the
14 interests of justice, it is more appropriate for:
15 (a) the relevant proceeding; or
16 (b) an application in the relevant proceeding;
17 to be determined by another court that has jurisdiction in the
18 matters for determination in the relevant proceeding or application,
19 the transferor court may take action under whichever of
20 subsections (3) and (4) applies.
- 21 (3) If the other court is also a lower court, the transferor court may
22 transfer the relevant proceeding or application to the other court.
- 23 (4) If the other court is a superior court, the transferor court may:
24 (a) transfer the relevant proceeding or application to the relevant
25 Supreme Court; and
26 (b) recommend that the relevant proceeding or application be
27 transferred by the Supreme Court to the other court.
- 28 (5) The relevant Supreme Court is not bound to comply with a
29 recommendation under subsection (4) and it may instead decide:
30 (a) to deal with the relevant proceeding or application itself; or
31 (b) to transfer the relevant proceeding or application to some
32 other court (which could be the transferor court).

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- 1 (6) Nothing in this section allows the relevant Supreme Court to
2 transfer the relevant proceeding or application to another court
3 otherwise than in accordance with section 1337H and the other
4 requirements of this Division.
- 5 (7) Nothing in this section confers on a court jurisdiction that the court
6 would not otherwise have.
- 7 (8) In this section:
- 8 *relevant Supreme Court* means the Supreme Court of the State or
9 Territory of which the transferor court is a court.

10 **1337L Further matters for a court to consider when deciding**
11 **whether to transfer a proceeding**

- 12 In deciding whether to transfer under section 1337H, 1337J or
13 1337K a proceeding or application, a court must have regard to:
- 14 (a) the principal place of business of any body corporate
15 concerned in the proceeding or application; and
16 (b) the place or places where the events that are the subject of the
17 proceeding or application took place; and
18 (c) the other courts that have jurisdiction to deal with the
19 proceeding or application.

20 **1337M Transfer may be made at any stage**

- 21 A court may transfer under section 1337H, 1337J or 1337K a
22 proceeding or application:
- 23 (a) on the application of a party made at any stage; or
24 (b) of the court's own motion.

25 **1337N Transfer of documents**

- 26 If, under section 1337H, 1337J or 1337K, a court (the *transferor*
27 *court*) transfers a proceeding, or an application in a proceeding, to
28 another court:
- 29 (a) the Registrar or other proper officer of the transferor court
30 must transmit to the Registrar or other proper officer of the

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- 1 other court all documents filed in the transferor court in
2 respect of the proceeding or application, as the case may be;
3 and
4 (b) the other court must proceed as if:
5 (i) the proceeding had been originally instituted in the other
6 court; and
7 (ii) the same proceedings had been taken in the other court
8 as were taken in the transferor court; and
9 (iii) in a case where an application is transferred—the
10 application had been made in the other court.

11 **1337P Conduct of proceedings**

- 12 (1) Subject to sections 1337S, 1337T and 1337U, if it appears to a
13 court that, in determining a matter for determination in a
14 proceeding, the court will, or will be likely to, be exercising
15 relevant jurisdiction, the rules of evidence and procedure to be
16 applied in dealing with that matter are to be the rules that:
17 (a) are applied in a superior court in Australia or in an external
18 Territory; and
19 (b) the court considers appropriate to be applied in the
20 circumstances.
- 21 (2) If a proceeding is transferred or removed to a court (the *transferee*
22 *court*) from another court (the *transferor court*), the transferee
23 court must deal with the proceeding as if, subject to any order of
24 the transferee court, the steps that had been taken for the purposes
25 of the proceeding in the transferor court (including the making of
26 an order), or similar steps, had been taken in the transferee court.
- 27 (3) In this section:
28 *relevant jurisdiction* means:
29 (a) jurisdiction conferred on the Federal Court of Australia or the
30 Family Court with respect to civil matters arising under the
31 Corporations Legislation; or
32 (b) jurisdiction conferred on a court of a State, the Capital
33 Territory or the Northern Territory with respect to matters
34 referred to in subsection 1337B(3).

1 **1337Q Rights of appearance**

2 (1) This section applies if a proceeding (the *transferred proceeding*) in
3 a court (the *transferor court*) is transferred to another court (the
4 *transferee court*) under this Division.

5 (2) A person who is entitled to practise as a barrister or a solicitor, or
6 as both a barrister and a solicitor, in the transferor court has the
7 same entitlements to practise in relation to:

8 (a) the transferred proceeding; and

9 (b) any other proceeding out of which the transferred proceeding
10 arises or to which the transferred proceeding is related, being
11 another proceeding that is to be determined together with the
12 transferred proceeding;

13 in the transferee court that the person would have if the transferee
14 court were a federal court exercising federal jurisdiction.

15 **1337R Limitation on appeals**

16 An appeal does not lie from a decision of a court:

17 (a) in relation to the transfer of a proceeding under this Division;
18 or

19 (b) as to which rules of evidence and procedure are to be applied
20 pursuant to subsection 1337P(1).

21 **Subdivision D—Rules of court**

22 **1337S Rules of the Federal Court**

23 (1) The power to make rules of court conferred by section 59 of the
24 *Federal Court of Australia Act 1976* extends to making rules of
25 court:

26 (a) with respect to proceedings, and the practice and procedure,
27 of the Federal Court of Australia under the Corporations
28 legislation; and

29 (b) with respect to any matter or thing that is:

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- 1 (i) required or permitted by the Corporations legislation to
2 be prescribed by rules within the meaning of the
3 Corporations legislation; or
4 (ii) necessary or convenient to be prescribed by such rules
5 for carrying out or giving effect to the Corporations
6 legislation; and
7 (c) without limitation, with respect to costs, and with respect to
8 rules about meetings ordered by the Federal Court of
9 Australia.

10 (2) In this section:

11 *Corporations legislation* does not include rules of court.

12 **1337T Rules of the Supreme Court**

- 13 (1) The Judges of the Supreme Court of the Capital Territory, or a
14 majority of them, may make rules of court:
15 (a) with respect to proceedings, and the practice and procedure,
16 of that court under the Corporations legislation; and
17 (b) with respect to any matter or thing that is:
18 (i) required or permitted by the Corporations legislation to
19 be prescribed by rules within the meaning of the
20 Corporations legislation; or
21 (ii) necessary or convenient to be prescribed by such rules
22 for carrying out or giving effect to the Corporations
23 legislation; and
24 (c) without limitation, with respect to costs, and with respect to
25 rules as to meetings ordered by that Court.
- 26 (2) When a lower court of the Capital Territory is exercising
27 jurisdiction with respect to matters arising under the Corporations
28 legislation, the court must apply the rules of court made under
29 subsection (1), with such alterations as are necessary.

30 (3) In this section:

31 *Corporations legislation* does not include rules of court.

1 **1337U Rules of the Family Court**

2 (1) The power to make rules of court conferred by section 123 of the
3 *Family Law Act 1975* extends to making rules of court:

4 (a) with respect to proceedings, and the practice and procedure,
5 of the Family Court under the Corporations legislation; and

6 (b) with respect to any matter or thing that is:

7 (i) required or permitted by the Corporations legislation to
8 be prescribed by rules within the meaning of the
9 Corporations legislation; or

10 (ii) necessary or convenient to be prescribed by such rules
11 for carrying out or giving effect to the Corporations
12 legislation; and

13 (c) without limitation, with respect to costs, and with respect to
14 rules about meetings ordered by the Family Court.

15 (2) In this section:

16 *Corporations legislation* does not include rules of court.

1
2 **Division 2—Vesting and cross-vesting of criminal**
3 **jurisdiction**

4 **1338A Operation of Division**

- 5 (1) This Division provides in relation to the jurisdiction of courts in
6 respect of criminal matters arising under the Corporations
7 legislation and so provides to the exclusion of sections 68, 70 and
8 70A of the *Judiciary Act 1903*.
- 9 (2) This Division does not limit the operation of the provisions of the
10 *Judiciary Act 1903* other than sections 68, 70 and 70A.
- 11 (3) Without limiting subsection (2), this Division does not limit the
12 operation of subsection 39(2) of the *Judiciary Act 1903* in relation
13 to criminal matters arising under the Corporations legislation.

14 **1338B Jurisdiction of courts**

- 15 (1) Subject to this section, the several courts of each State, the Capital
16 Territory and the Northern Territory exercising jurisdiction:
17 (a) with respect to:
18 (i) the summary conviction; or
19 (ii) the examination and commitment for trial on
20 indictment; or
21 (iii) the trial and conviction on indictment;
22 of offenders or persons charged with offences against the
23 laws of the State, the Capital Territory or the Northern
24 Territory, and with respect to:
25 (iv) their sentencing, punishment and release; or
26 (v) their liability to make reparation in connection with
27 their offences; or
28 (vi) the forfeiture of property in connection with their
29 offences; or
30 (vii) the proceeds of their crimes; and
31 (b) with respect to the hearing and determination of:
32 (i) proceedings connected with; or

- 1 (ii) appeals arising out of; or
2 (iii) appeals arising out of proceedings connected with;
3 any such trial or conviction or any matter of a kind referred
4 to in subparagraph (a)(iv), (v), (vi) or (vii);
5 have the equivalent jurisdiction with respect to offenders or
6 persons charged with offences against the Corporations legislation.
- 7 (2) The jurisdiction conferred by subsection (1) is not to be exercised
8 with respect to the summary conviction, or examination and
9 commitment for trial, of any person except by a magistrate.
- 10 (3) The jurisdiction conferred by subsection (1) includes jurisdiction in
11 accordance with provisions of a relevant law of a State, the Capital
12 Territory or the Northern Territory, and:
13 (a) the reference in paragraph (1)(b) to “any such trial or
14 conviction” includes a reference to any conviction or
15 sentencing in accordance with the provisions of a relevant
16 law; and
17 (b) unless the contrary intention appears, a reference to
18 jurisdiction conferred by subsection (1) includes a reference
19 to such included jurisdiction.
- 20 (4) A person may be dealt with in accordance with a relevant law even
21 if, apart from this section, the offence concerned:
22 (a) would be required to be prosecuted on indictment; or
23 (b) would be required to be prosecuted either summarily or on
24 indictment.
- 25 (5) For the purposes of the application of a relevant law as provided by
26 subsection (3):
27 (a) a reference in that law to an indictable offence is taken to
28 include a reference to an offence that may be prosecuted on
29 indictment; and
30 (b) in order to determine the sentence that may be imposed on a
31 person by a court pursuant to the relevant law, the person is
32 taken to have been prosecuted and convicted on indictment in
33 that court.

- 1 (6) Subject to subsection (8), the jurisdiction conferred on a State or
2 Territory court by subsection (1) is conferred despite any limits as
3 to locality of the jurisdiction of that court under the law of that
4 State or Territory.
- 5 (7) If:
- 6 (a) jurisdiction is conferred on a State or Territory court in
7 relation to the summary conviction of persons charged with
8 offences against the Corporations legislation by
9 subsection (1); and
- 10 (b) the court is satisfied that it is appropriate to do so, having
11 regard to all the circumstances including the public interest;
12 the court may decline to exercise that jurisdiction in relation to an
13 offence committed in another State or Territory.
- 14 (8) The jurisdiction conferred on a court of a State or the Northern
15 Territory by subsection (1) in relation to:
- 16 (a) the examination and commitment for trial on indictment; and
17 (b) the trial and conviction on indictment;
18 of offenders or persons charged with offences against the
19 Corporations legislation is conferred only in relation to:
- 20 (c) offences committed outside Australia; and
21 (d) offences committed, begun or completed in the State or the
22 Territory concerned.
- 23 (9) In this section:
- 24 **appeal** includes an application for a new trial and a proceeding to
25 review or call in question the proceedings, decision or jurisdiction
26 of a court or judge.
- 27 **Australia** does not include the coastal sea.
- 28 **relevant law** means a law providing that where, in proceedings
29 before a court, a person pleads guilty to a charge for which he or
30 she could be prosecuted on indictment, the person may be
31 committed, to a court having jurisdiction to try offences on
32 indictment, to be sentenced or otherwise dealt with without being
33 tried in that last-mentioned court.

1 **1338C Laws to be applied**

2 (1) Subject to this Division, the laws of a State, the Capital Territory or
3 the Northern Territory respecting:

4 (a) the arrest and custody in the State or Territory of offenders or
5 persons charged with offences; and

6 (b) criminal procedure in the State or Territory in relation to such
7 persons; and

8 (c) the rules of evidence applied in criminal procedure in the
9 State or Territory in relation to such persons;

10 apply in the State or Territory, so far as they are applicable, to
11 persons who are charged with offences against the Corporations
12 legislation.

13 (2) In this section:

14 *criminal procedure* means the procedure for:

15 (a) the summary conviction; and

16 (b) the examination and commitment for trial on indictment; and

17 (c) the trial and conviction on indictment; and

18 (d) the hearing and determination of appeals arising out of any
19 such trial or conviction or out of any related proceedings;

20 of offenders or persons charged with offences, and includes the
21 procedure for holding accused persons to bail.

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Part 9.7—Unclaimed property

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1339 ASIC to deal with unclaimed property

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- (1) ASIC holds unclaimed property on trust in accordance with, and for the purposes of, this Part.

6

7

Note: Division 2 of Part 8 of the ASIC Act contains provisions about property that ASIC receives or holds on trust.

8

9

- (2) If property becomes unclaimed property, ASIC must:

10

(a) in the case of money—pay it into an unclaimed money account; or

11

12

(b) otherwise—sell or dispose of the property as it thinks fit and pay the proceeds into an unclaimed money account.

13

14

This subsection does not apply to unclaimed property so far as the property consists of an investment made as permitted by subsection 142(2) of the ASIC Act.

15

16

17

- (3) The Minister may apply as mentioned in subsection 135(1) of the ASIC Act income derived from investing, as permitted by subsection 142(2) of that Act, money that is unclaimed property.

18

19

20

Note: Subsection 135(1) of the ASIC Act provides for how ASIC may apply its own money.

21

22

- (4) If income is applied under subsection (3), a person is not liable to another person in respect of the income merely because the other person is entitled to money in an unclaimed money account.

23

24

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1340 ASIC not liable to pay calls on shares etc.

26

Where unclaimed property is or includes shares in a body corporate, ASIC is not subject to any obligation:

27

28

(a) to pay any calls; or

29

(b) to make any contribution to the debts and liabilities of the body corporate; or

30

31

(c) to discharge any other liability; or

Section 1341

- 1 (d) to do any other act or thing;
2 in respect of the shares, whether the obligation arises before or
3 after the shares become unclaimed property, but this section does
4 not affect the right of a body corporate to forfeit a share.

5 **1341 Disposition of money in unclaimed money account**

- 6 (1) If money is not paid out of an unclaimed money account in
7 accordance with this section or subsection 1339(3) within 6 years
8 after it was originally paid into such an account under subsection
9 1339(2), it must be paid into the Consolidated Revenue Fund.
- 10 (2) If:
- 11 (a) a person claims to be entitled to money paid into an
12 unclaimed money account under subsection 1339(2); and
13 (b) ASIC is satisfied that the person is entitled to the money;
14 ASIC must:
- 15 (c) unless paragraph (d) applies—pay the money to the person
16 out of the relevant unclaimed money account; or
17 (d) if the money has been paid into the Consolidated Revenue
18 Fund under subsection (1)—pay an equivalent amount to the
19 person out of money appropriated by the Parliament for the
20 purpose.
- 21 (3) A person who is dissatisfied with the decision of ASIC in respect
22 of a claim made by the person in accordance with subsection (2)
23 may appeal to the Court and the Court may confirm, disallow or
24 vary the decision of ASIC.
- 25 (4) Where a person claims to be entitled to money that has been paid
26 to another person in accordance with this section, ASIC is not
27 under any liability to that first-mentioned person in respect of that
28 money, but, if the first-mentioned person is entitled to that money,
29 that person may recover that money from the other person.
- 30 (5) Where a person claims to be entitled to money, being money an
31 amount equivalent to which has been paid to another person in
32 accordance with subsection (2) out of money appropriated by the
33 Parliament for the purpose, ASIC is not under any liability to that

Section 1342

1 first-mentioned person in respect of that money, but, if the
2 first-mentioned person is entitled to that money, that person may
3 recover that equivalent amount from the other person.

4 **1342 Commonwealth or ASIC not liable for loss or damage**

5 Neither the Commonwealth nor ASIC is liable for any loss or
6 damage suffered by a person arising out of the exercise of, or the
7 failure to exercise, any of the powers which are conferred on ASIC
8 under this Part or which ASIC has in relation to unclaimed
9 property.

10 **1343 Disposal of securities if whereabouts of holder unknown**

11 Where a person has been shown in an appropriate register of a
12 company as the holder of securities of the company for a period of
13 at least 6 years and the company has, for a period of at least 6
14 years:

15 (a) had reasonable grounds for believing that the person was not
16 residing at the address shown in the register as the person's
17 address; and

18 (b) on each occasion during that last-mentioned period when,
19 whether or not in accordance with a provision of this Act, it
20 sought to communicate with the person, being unable after
21 the exercise of reasonable diligence to do so;

22 the company may, by executing a transfer for and on behalf of the
23 person, transfer to ASIC:

24 (c) the securities; and

25 (d) any rights in respect of the securities;

26 to be dealt with under this Part.

27 **1343A Disposal of interests in registered scheme if whereabouts of**
28 **member unknown**

29 If, during a period of at least 6 years while a person has been
30 shown in the register of members of a registered scheme as the
31 holder of interests in the scheme:

Section 1343A

- 1 (a) the responsible entity has had reasonable grounds for
2 believing that the person was not residing at the address
3 shown in the register as their address; and
4 (b) the responsible entity's attempts to communicate with the
5 person have been made using reasonable diligence but have
6 all been unsuccessful;
7 the responsible entity may, by executing a transfer for and on
8 behalf of the person, transfer the interests and any rights in respect
9 of them to ASIC to be dealt with under this Part.

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Part 9.9—Miscellaneous

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1345A Minister may delegate prescribed functions and powers under this Act

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(1) The Minister may, by signed instrument, delegate to an officer of the Department such of the Minister's functions and powers under this Act as are prescribed.

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(2) A delegate is, in the performance or exercise of a delegated function or power, subject to the Minister's directions.

10

11

1346 Non-application of rule against perpetuities to certain schemes

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(1) The rules of law relating to perpetuities do not apply, and are taken never to have applied, to the trusts of any fund or scheme for the benefit of any employee of a corporation, whether the fund or scheme was established before, or is established after, the commencement of this section.

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(2) In this section:

18

(a) a reference to a corporation includes a reference to a body corporate or society incorporated or formed, or otherwise duly constituted, whether before, at or after the commencement of this section, by or under:

19

20

21

22

(i) a law of the Commonwealth, of a State or Territory, of an external Territory or of a country outside Australia and the external Territories; or

23

24

25

(ii) letters patent or a royal charter; and

26

27

(b) a reference to a fund or scheme includes a reference to a provident, superannuation, sick, accident, assurance, unemployment, pension or co-operative benefit fund, scheme, arrangement or provision or other like fund, scheme, arrangement or provision; and

28

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31

(c) a reference to an employee of a corporation includes a reference to:

32

33

(i) a director of the corporation; and

- 1 (ii) a spouse, child, grandchild, parent or any dependant of
2 an employee or of a director of the corporation.

3 **1348 Operation of Life Insurance Act**

4 Nothing in this Act is taken to affect any of the provisions of the
5 *Life Insurance Act 1995*.

6 **1350 Compensation for compulsory acquisition**

7 (1) If:

8 (a) apart from this section, the operation of this Act would result
9 in the acquisition of property from a person otherwise than
10 on just terms; and

11 (b) the acquisition would be invalid because of paragraph
12 51(xxxi) of the Constitution;

13 the person who acquires the property is liable to pay compensation
14 of a reasonable amount to the person from whom the property is
15 acquired in respect of the acquisition.

16 (2) If the 2 people do not agree on the amount of the compensation, the
17 person to whom compensation is payable may institute proceedings
18 in the Court for the recovery of such reasonable amount as the
19 court determines from the other person.

20 (3) Any damages or compensation recovered or other remedy given in
21 a proceeding that is commenced otherwise than under this section
22 is to be taken into account in assessing compensation payable in a
23 proceeding that is commenced under this section and that arises out
24 of the same event or transaction.

25 (4) In this section:

26 *acquisition of property* has the same meaning as in paragraph
27 51(xxxi) of the Constitution.

28 *just terms* has the same meaning as in paragraph 51(xxxi) of the
29 Constitution.

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Part 9.10—Fees for chargeable matters

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4

1351 Fees for chargeable matters

5

(1) The *Corporations (Fees) Act 2001* imposes fees in respect of various matters under or connected with this Act.

6

7

(2) The fees so imposed are payable to the Commonwealth.

8

1354 Lodgment of document without payment of fee

9

(1) This section applies where:

10

(a) a fee is payable under section 1351 for the lodgment of a document; and

11

12

(b) the document was submitted for lodgment without payment of the fee.

13

14

(2) The document is not taken not to have been lodged merely because of non-payment of the fee.

15

16

1355 Doing act without payment of fee

17

If a fee is payable under section 1351 for a matter involving the doing of an act by the Minister or ASIC, the Minister or ASIC may refuse to do that act until the fee is paid.

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1356 Effect of sections 1354 and 1355

21

Sections 1354 and 1355 have effect despite anything in another Part of this Act.

22

23

1359 Waiver and refund of fees

24

Nothing in this Part or the *Corporations (Fees) Act 2001* prevents the Commonwealth from:

25

26

(a) waiving or reducing, in a particular case or in particular classes of cases, fees that would otherwise be payable under this Act; or

27

28

Section 1360

- 1 (b) refunding, in whole or in part, in a particular case or in
2 particular classes of cases, fees paid under this Act.

3 **1360 Debts due to the Commonwealth**

- 4 ASIC may, on behalf of the Commonwealth, recover a debt due
5 under this Part.

6 **1362 Payment of fee does not give right to inspect or search**

- 7 To avoid doubt, nothing in this Part, and nothing done under this
8 Part:

9 (a) imposes on ASIC a duty to allow the inspection or search of
10 a register or document, or to make available information; or

11 (b) confers a right to inspect or search a register or document or
12 to have information made available;

13 except so far as such a duty or right would, but for the effect of
14 section 1355, exist under a provision of another Part of this Act or
15 under some other law.

1

2

Part 9.12—Regulations

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1363 Definitions

5

In this Part, unless the contrary intention appears:

6

prescribed means prescribed by the regulations.

7

the regulations means the regulations made under section 1364.

8

1364 Power to make regulations

9

(1) The Governor-General may make regulations prescribing matters:

10

(a) required or permitted by this Act to be prescribed by regulations; or

11

12

(b) necessary or convenient to be prescribed by such regulations for carrying out or giving effect to this Act.

13

14

(2) Without limiting subsection (1), the regulations may make provision:

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16

(c) for or in relation to the keeping of registers by ASIC, the lodging of documents with ASIC, the registration of documents by ASIC, the time and manner of lodging or registration, and the requirements with which documents lodged or to be lodged are to comply; and

17

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(d) prescribing forms for the purposes of this Act and the method of verifying any information required by or in those forms; and

22

23

24

(e) prescribing the manner in which, the persons by whom, and the directions or requirements in accordance with which, the forms prescribed for the purposes of this Act, or any of them, are required or permitted to be signed, prepared, or completed, and generally regulating the signing, preparation and completion of those forms, or any of them; and

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(f) for or in relation to the convening of, conduct of, and procedure and voting at, meetings of creditors, meetings of contributories and meetings of holders of debentures, and

31

32

Section 1364

- 1 joint meetings of creditors and members of companies, the
2 number of persons required to constitute a quorum at any
3 such meeting, the sending of notices of meetings to persons
4 entitled to attend at meetings, the lodging of copies of notices
5 of, and of resolutions passed at, meetings, and generally
6 regulating the conduct of, and procedure at, any such
7 meeting; and
- 8 (g) prescribing the persons by whom, and the circumstances and
9 manner in which, proxies may be appointed and generally
10 regulating the appointment and powers of proxies; and
- 11 (h) for or in relation to the proving of debts in the winding up of
12 a company, the manner of proving debts and the time within
13 which debts are required or permitted to be proved and
14 generally regulating the proving of debts; and
- 15 (j) prescribing the manner in which a liquidator appointed by the
16 Court may:
- 17 (i) exercise powers and perform functions under subsection
18 478(1); and
- 19 (ii) exercise any powers conferred, and perform any duties
20 imposed, on the liquidator by regulations made for the
21 purposes of subsection 488(1); and
- 22 (k) prescribing the manner in which a liquidator in a voluntary
23 winding up may exercise powers and perform functions
24 under section 506; and
- 25 (m) prescribing times for the lodging of any documents; and
- 26 (n) for or in relation to the publication of advertisements offering
27 the services of dealers or investment advisers or offering
28 securities for purchase or sale, and the form and content of
29 those advertisements; and
- 30 (p) for or in relation to the publication of advertisements offering
31 the services of futures brokers or futures advisers or offering
32 to deal in futures contracts, and the form and content of those
33 advertisements; and
- 34 (q) for or in relation to the form of balance-sheets and profit and
35 loss statements required by this Act to be prepared by dealers
36 or futures brokers; and

Section 1365

- 1 (r) for or in relation to prohibiting, or regulating the manner and
2 extent of, the offsetting by a futures broker of dealings in
3 futures contracts (as between dealings on the broker's own
4 account and dealings on behalf of a client or as between
5 dealings on behalf of a client and dealings on behalf of
6 another client) and, without limitation, regulating the manner
7 of, or requiring, the making of margin calls in respect of
8 dealings in futures contracts effected by a futures broker; and
9 (s) for or in relation to the giving to ASIC of information in
10 addition to, or in variation of, the information contained in a
11 prescribed form lodged with it; and
12 (t) for or in relation to the times within which information
13 required to be given to ASIC under this Act must be so
14 given; and
15 (u) for or in relation to the manner in which:
16 (i) orders made under this Act may be served on persons
17 affected by the orders; and
18 (ii) documents that are required or permitted by this Act to
19 be served on a person may be so served; and
20 (w) prescribing penalties not exceeding \$1,000 for contraventions
21 of the regulations.

22 **1365 Scope of particular regulations**

23 Except as otherwise expressly provided in this Act, the regulations
24 may be of general or specially limited application or may differ
25 according to differences in time, locality, place or circumstance.

26 **1366 Verifying or certifying documents**

27 The regulations may:

- 28 (a) where documents required by or under this Act to be lodged
29 in accordance with this Act are required to be verified or
30 certified and no manner of verification or certification is
31 prescribed by or under this Act—require that the documents
32 or any of them be verified or certified by statement in writing
33 made by such persons as are prescribed by the regulations;
34 and

- 1 (b) where no express provision is made in this Act for
2 verification or certification of documents—require that the
3 documents be verified or certified by statement in writing by
4 such persons as are prescribed.

5 **1367 Documents lodged by an agent**

6 The regulations may provide, in such cases as are prescribed, that,
7 if a document that is required by or under this Act to be lodged is
8 signed or lodged on behalf of a person by an agent duly authorised
9 by writing, there must be:

- 10 (a) lodged with; or
11 (b) endorsed on; or
12 (c) annexed to;

13 that document, the original, or a verified copy, of the authority.

14 **1368 Exemptions from Chapter 6D, 7 or 8**

15 The regulations may provide that, subject to any prescribed terms
16 and conditions, Chapter 6D, 7 or 8, or specified provisions of
17 Chapter 6D, 7 or 8:

- 18 (a) do not have effect in relation to a specified person or class of
19 persons; or
20 (b) have effect in relation to a specified person or class of
21 persons to such extent only as is prescribed; or
22 (c) do not have effect in relation to a specified transaction or
23 class of transactions; or
24 (d) do not have effect in relation to a specified transaction or
25 class of transactions entered into by a specified person or
26 class of persons;

27 and may provide that a contravention of a prescribed term or
28 condition is an offence against the regulations.

29 **1369 Penalty notices**

- 30 (1) The regulations:
31 (a) may prescribe offences against this Act (not being offences
32 the penalties applicable to which include a term of

Section 1369A

1 imprisonment or a pecuniary penalty that exceeds \$1,000), or
2 offences against the regulations, for the purposes of
3 section 1313; and

4 (b) must, in relation to each offence that is prescribed under this
5 subsection:

6 (i) prescribe the particulars of that offence that are to be
7 given in a notice served on a person under that section
8 in relation to the offence; and

9 (ii) prescribe the amount of the penalty (being not more
10 than half the amount of the penalty applicable to the
11 offence) that is payable in respect of the offence under a
12 notice served on a person under that section in relation
13 to the offence.

14 (2) In subsection (1), a reference to a penalty applicable to an offence
15 is a reference to the penalty that is applicable to that offence
16 because of any of the provisions of section 1311.

17 (3) The particulars of an offence required to be prescribed by
18 subparagraph (1)(b)(i) may be prescribed by being set out in the
19 form prescribed for the purposes of section 1313 in relation to the
20 offence.

21 **1369A State termination of reference**

22 (1) The regulations may make provision in relation to circumstances
23 that arise because a State ceases to be a referring State.

24 Note: For example, the regulations may prevent companies that have their
25 registered office or financial records in the State from committing
26 offences and give them time to relocate their office or records.

27 (2) Without limiting subsection (1), regulations made under that
28 subsection may modify the operation of this Act in relation to the
29 circumstances dealt with in the regulations.

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Chapter 10—Transitional provisions

Part 10.1—Transition from the old corporations legislation

Division 1—Preliminary

1370 Object of Part

(1) Subject to subsection (3), the object of this Part is to provide for a smooth transition from the regime provided for in the old corporations legislation of the States and Territories in this jurisdiction to the regime provided for in the new corporations legislation, so that individuals, bodies corporate and other bodies are, to the greatest extent possible, put in the same position immediately after the commencement as they would have been if:

- (a) that old corporations legislation had, from time to time when it was in force, been valid Commonwealth legislation applying throughout those States and Territories; and
- (b) the new corporations legislation (to the extent it contains provisions that correspond to provisions of the old corporations legislation as in force immediately before the commencement) were a continuation of that old corporations legislation as so applying.

Note: The new corporations legislation contains provisions that correspond to most of the provisions of the old corporations legislation. Generally, the only exceptions to this are provisions of the old corporations legislation that related to the fact that the Corporations Law operated separately in each of the States and Territories (rather than as a single national law).

(2) In resolving any ambiguity as to the meaning of any of the other provisions of this Part, an interpretation that is consistent with the object of this Part is to be preferred to an interpretation that is not consistent with that object.

- 1 (3) This Part does contain some provisions (for example, subsection
2 1400(4)) which apply or extend to matters under the old
3 corporations legislation of any non-referring State.

4 **1371 Definitions**

- 5 (1) In this Part:

6 *carried over provision* of the old corporations legislation of a State
7 or Territory in this jurisdiction means a provision of the old
8 corporations legislation of that State or Territory that:

- 9 (a) was in force immediately before the commencement; and
10 (b) corresponds to a provision of the new corporations
11 legislation.

12 *commencement* means the commencement of this Act.

13 *corresponds* has a meaning affected by subsections (2), (3) and (4).

14 *instrument* means:

- 15 (a) any instrument of a legislative character (including an Act or
16 regulations) or of an administrative character; or
17 (b) any other document.

18 *liability* includes a duty or obligation.

19 *made* includes issued, given or published.

20 *new corporations legislation* means:

- 21 (a) this Act; and
22 (b) the new Corporations Regulations (as amended and in force
23 from time to time) and any other regulations made under this
24 Act; and
25 (c) the laws of the Commonwealth referred to in paragraph (c) of
26 the definition of *old corporations legislation*, being those
27 laws as they apply after the commencement; and
28 (d) the preserved instruments.

1 ***new Corporations Regulations*** means the regulations that, because
2 of section 1380, have effect as if they were made under
3 section 1364.

4 ***old application Act*** for a State or Territory means:

- 5 (a) in the case of New South Wales—the *Corporations (New*
6 *South Wales) Act 1990* of New South Wales as in force from
7 time to time before the commencement; or
8 (b) in the case of Victoria—the *Corporations (Victoria) Act 1990*
9 of Victoria as in force from time to time before the
10 commencement; or
11 (c) in the case of Queensland—the *Corporations (Queensland)*
12 *Act 1990* of Queensland as in force from time to time before
13 the commencement; or
14 (d) in the case of Western Australia—the *Corporations (Western*
15 *Australia) Act 1990* of Western Australia as in force from
16 time to time before the commencement; or
17 (e) in the case of South Australia—the *Corporations (South*
18 *Australia) Act 1990* of South Australia as in force from time
19 to time before the commencement; or
20 (f) in the case of Tasmania—the *Corporations (Tasmania) Act*
21 *1990* of Tasmania as in force from time to time before the
22 commencement; or
23 (g) in the case of the Australian Capital Territory—the old
24 Corporations Act; or
25 (h) in the case of the Northern Territory—the *Corporations*
26 *(Northern Territory) Act 1990* of the Northern Territory as in
27 force from time to time before the commencement.

28 ***old Corporations Act*** means the *Corporations Act 1989* as in force
29 from time to time before the commencement.

30 ***old Corporations Law*** means:

- 31 (a) when used in relation to a particular State or Territory—the
32 Corporations Law of that State or Territory, within the
33 meaning of the old application Act for that State or Territory,
34 as in force from time to time before the commencement; or

- 1 (b) when used in general terms—the Corporations Law set out in
2 section 82 of the old Corporations Act as in force from time
3 to time before the commencement.

4 ***old corporations legislation*** of a particular State or Territory
5 means:

- 6 (a) the old Corporations Law and old Corporations Regulations
7 of that State or Territory, and any instruments made under
8 that Law or those Regulations; and
9 (b) the old application Act for that State or Territory, and any
10 instruments made under that Act; and
11 (c) either:
12 (i) when used in relation to a State or the Northern
13 Territory—the laws of the Commonwealth as applying
14 in relation to the old Corporations Law and the old
15 Corporations Regulations of the State or Territory from
16 time to time before the commencement as laws of, or
17 for the government of, that State or Territory because of
18 Part 8 of the old Application Act for that State or
19 Territory, and any instruments made under those laws as
20 so applying; or
21 (ii) when used in relation to the Australian Capital
22 Territory—the laws of the Commonwealth referred to in
23 subparagraph (i), but as applying of their own force in
24 relation to the old Corporations Law and old
25 Corporations Regulations of the Territory, and any
26 instruments made under those laws as so applying.

27 ***old Corporations Regulations*** means:

- 28 (a) when used in relation to a particular State or Territory—the
29 Corporations Regulations of that State or Territory, within
30 the meaning of the old application Act for that State or
31 Territory, as in force from time to time before the
32 commencement; or
33 (b) when used in general terms—the regulations made under
34 section 22 of the old Corporations Act as in force from time
35 to time before the commencement.

1 **order**, in relation to a court, includes any judgment, conviction or
2 sentence of the court.

3 **pre-commencement right or liability** has the meaning given by
4 subsection 1400(1) or 1401(1).

5 **preserved instrument** means an instrument that, because of
6 section 1399, has effect after the commencement as if it were made
7 under a provision of the new corporations legislation.

8 **right** includes an interest or status.

9 **substituted right or liability** has the meaning given by subsection
10 1400(2) or 1401(3).

11 **this Part** includes regulations made for the purposes of any of the
12 provisions of this Part.

13 (2) Subject to subsection (4), for the purposes of this Part, a provision
14 or part (the **old provision or part**) of the old corporations
15 legislation of a State or Territory **corresponds** to a provision or part
16 (the **new provision or part**) of the new corporations legislation
17 (and vice versa) if:

18 (a) the old provision or part and the new provision or part are
19 substantially the same, unless the regulations specify that the
20 2 provisions or parts do not correspond; or

21 (b) the regulations specify that the 2 provisions or parts
22 correspond.

23 Note: The range of provisions of the new corporations legislation that may
24 be corresponding provisions for the purposes of this Part is affected by
25 sections 1401 and 1408, which take certain provisions of the old
26 corporations legislation to be included in the new corporations
27 legislation.

28 (3) For the purposes of paragraph (2)(a), differences of all or any of
29 the following kinds are not sufficient to mean that 2 provisions or
30 parts are not substantially the same:

31 (a) differences in the numbering of the provisions or parts;

32 (b) differences of a minor technical nature (for example,
33 differences in punctuation, or differences that are attributable
34 to the correction of incorrect cross references);

- 1 (c) the fact that one of the provisions refers to a corresponding
2 previous law and the other does not;
- 3 (d) that fact that:
- 4 (i) the old provision or part allowed a court to exercise
5 powers on its own motion but the new provision or part
6 does not; or
- 7 (ii) the old provision or part required a court to apply a
8 criterion of public interest but the new provision or part
9 requires a court to apply a criterion of justice and
10 equity; or
- 11 (iii) the new provision or part requires ASIC to take account
12 of public interest but the old provision or part did not;
- 13 (e) other differences that are attributable to the fact that the new
14 corporations legislation applies as a Commonwealth law
15 throughout this jurisdiction;
- 16 (f) other differences of a kind prescribed by the regulations for
17 the purposes of this paragraph.

18 This subsection is not intended to otherwise limit the
19 circumstances in which 2 provisions or parts are, for the purposes
20 of paragraph (2)(a), substantially the same.

- 21 (4) The regulations may provide that a specified provision of the old
22 corporations legislation of a State or Territory does, or does not,
23 correspond to a specified provision of the new corporations
24 legislation.

25 **1372 Relationship of Part with State validation Acts**

- 26 (1) This Part applies to an invalid administrative action of a
27 Commonwealth authority or an officer of the Commonwealth
28 (within the meaning of a State validation Act) as if the
29 circumstances that made the authority's or officer's action an
30 invalid administrative action had not made the action invalid.

31 Note 1: So, for example, in determining whether the purported registration of
32 a company is an action to which this Part (in particular Division 2)
33 applies, the circumstances that made the action an invalid
34 administrative action for the purposes of a State validation Act are to
35 be disregarded.

1 purportedly taken, at the relevant time, by a duly authorised State
2 authority or officer of the State (within the meaning of that Act).

3 **1373 References to things taken or deemed to be the case etc.**

4 If:

5 (a) a law of a State or Territory in this jurisdiction had effect
6 before the commencement:

7 (i) to take or deem something to have happened or to be the
8 case, or to have a particular effect, under or for the
9 purposes of the old corporations legislation of that State
10 or Territory (or a provision of that legislation); or

11 (ii) to give something an effect for the purposes of the old
12 corporations legislation of that State or Territory (or a
13 provision of that legislation) that it would not otherwise
14 have had; and

15 (b) that effect was continuing immediately before the
16 commencement;

17 this Part applies as if that thing had actually happened or were
18 actually the case, or as if that thing actually had that other effect.

19 Note: So, for example, if a provision of the old corporations legislation, or
20 another law, of a State or Territory in this jurisdiction took a company
21 to be registered under Part 2A.2 of the old Corporations Law of the
22 State or Territory, this Part applies as if the company were actually
23 registered under that Part.

24 **1374 Existence of several versions of old corporations legislation**
25 **does not result in this Part operating to take same thing to**
26 **be done several times under new corporations legislation**
27 **etc.**

28 If, apart from this section, a provision of this Part (the *transitional*
29 *provision*) would, because each State or Territory in this
30 jurisdiction had its own old corporations legislation (containing
31 parallel provisions) before the commencement, operate so that:

32 (a) a particular thing done before the commencement would be
33 taken to be done, or have effect, 2 or more times by, under or
34 for the purposes of, a provision of this Act; or

- 1 (b) a right or liability would be created 2 or more times in
2 respect of a particular event, circumstance or thing that
3 happened before the commencement; or
4 (c) a particular result or effect would be produced 2 or more
5 times for the purposes of the new corporations legislation in
6 relation to the same matter;
7 the transitional provision is taken to operate so that:
8 (d) if paragraph (a) applies—the thing is taken to be done or
9 have effect only once by, under, or for the purposes of, the
10 provision of the new corporations legislation; or
11 (e) if paragraph (b) applies—the right or liability is created only
12 once in respect of the event, circumstance or thing; or
13 (f) if paragraph (c) applies—the result or effect is produced only
14 once in relation to the matter.

15 Note: So, for example, if a body (because of the operation of section 102A
16 of the old Corporations Law) was registered under section 601CB of
17 the old Corporations Law of several States and Territories and those
18 registrations were still in force immediately before the
19 commencement, section 1399 does not apply separately to each of
20 those registrations.

21 **1375 Penalty units in respect of pre-commencement conduct remain**
22 **at \$100**

- 23 (1) If, because of this Part, an offence can be prosecuted after the
24 commencement in respect of conduct that occurred solely before
25 the commencement, the amount of a penalty unit in respect of that
26 offence is \$100.
- 27 (2) If, because of this Part, section 1314 of this Act applies to conduct
28 that started before the commencement and that continued after the
29 commencement, then, for the purposes of the application of that
30 section to that conduct (including the post-commencement
31 conduct), the amount of a penalty unit is \$100.
- 32 (3) This section has effect despite section 4AA of the *Crimes Act*
33 *1914*.

1 **1376 Ceasing to be a referring State does not affect previous**
2 **operation of this Part**

3 If, after the commencement, a State ceases to be a referring State,
4 that does not undo or affect:

- 5 (a) the effects that this Part has already had in relation to matters
6 connected with that State; or
7 (b) the ongoing effect of this Act as it operates because of the
8 effects referred to in paragraph (a).

1

2 **Division 2—Carrying over registration of companies**

3 **1377 Division has effect subject to Division 7 regulations**

4 This Division has effect subject to regulations made for the
5 purposes of Division 7.

6 **1378 Existing registered companies continue to be registered**

7 (1) If:

8 (a) before the commencement, a company was registered under
9 Part 2A.2 of the old Corporations Law of a State or Territory
10 in this jurisdiction; and

11 (b) that registration was still in force immediately before the
12 commencement;

13 the registration of the company has effect (and may be dealt with)
14 after the commencement as if it were a registration of the company
15 under Part 2A.2 of this Act as a company of whichever of the
16 company types listed in subsection (2) corresponds to its previous
17 class and type.

18 Note: The carrying over of other matters (for example, the registration of
19 registered managed investment schemes and of registered bodies) is
20 covered by the more general transitional provisions in Division 6.

21 (2) The company types are as follows:

22 (a) a proprietary company limited by shares;

23 (b) an unlimited proprietary company;

24 (c) a proprietary company limited both by shares and by
25 guarantee;

26 (d) a public company limited by shares;

27 (e) an unlimited public company;

28 (f) a company limited by guarantee;

29 (g) a public company limited both by shares and by guarantee;

30 (h) a no liability company.

31 (3) The application of subsection (1) in relation to the registration of a
32 company does not have the effect of creating that company as a

1 new legal entity. Rather, it has the effect of continuing the
2 existence of the legal entity that is that company with the same
3 characteristics and attributes as it had immediately before the
4 commencement. The date of the company's first registration
5 remains the same (see subsection 1402(2)), and a new certificate of
6 registration does not need to be issued.

7 Note: The company will, for example, retain the same name, ACN,
8 constitution and registered office as it had immediately before the
9 commencement. Its certificate of registration will (because of
10 section 1399) have effect as if it were issued under section 118 of this
11 Act.

12 (4) The State or Territory in which the company is taken to be
13 registered is the State or Territory under whose old Corporations
14 Law the company was registered immediately before
15 commencement. This subsection has effect subject to subsection
16 119A(3).

17 Note: For the general provisions about jurisdiction of incorporation and
18 jurisdiction of registration, see section 119A.

1

2 **Division 3—Carrying over the old Corporations**
3 **Regulations**

4 **1379 Division has effect subject to Division 7 regulations**

5 This Division has effect subject to regulations made for the
6 purposes of Division 7.

7 **1380 Old Corporations Regulations continue to have effect**

8 The old Corporations Regulations that were made for the purposes
9 of provisions of the old Corporations Law that correspond to
10 provisions of this Act and that were in force immediately before
11 the commencement continue to have effect (and may be dealt with)
12 after the commencement as if:

- 13 (a) they were regulations in force under section 1364 of this Act;
14 and
15 (b) they were made for the purposes of the corresponding
16 provisions of this Act.

1

2 **Division 4—Court proceedings and orders**

3 **1381 Division has effect subject to Division 7 regulations**

4 This Division has effect subject to regulations made for the
5 purposes of Division 7.

6 **1382 Definitions**

7 (1) In this Division:

8 ***appeal or review proceeding***, in relation to an order of a court,
9 means a proceeding by way of appeal, or otherwise seeking review,
10 of the order.

11 ***enforcement proceeding***, in relation to an order made by a court,
12 means:

- 13 (a) a proceeding to enforce the order; or
14 (b) any other proceeding in respect of a breach of the order.

15 ***federal corporations proceeding*** means a proceeding of any of the
16 following kinds that, immediately before the commencement, was
17 before a court:

- 18 (a) a proceeding in respect of a matter arising under the
19 *Administrative Decisions (Judicial Review) Act 1977*
20 involving or related to a decision made under a provision of
21 the old corporations legislation of a State or Territory in this
22 jurisdiction;
- 23 (b) a proceeding for a writ of mandamus or prohibition, or an
24 injunction, against an officer or officers of the
25 Commonwealth (within the meaning of section 75 of the
26 Constitution) in relation to a matter to which a provision of
27 the old corporations legislation of a State or Territory in this
28 jurisdiction applied;
- 29 (c) a proceeding in the court's accrued federal jurisdiction in
30 relation to a matter to which a provision of the old
31 corporations legislation of a State or Territory in this
32 jurisdiction applied.

1 ***interlocutory application*** means an application that:
2 (a) is made during the course of a proceeding; and
3 (b) is for an order that is incidental to the principal object of that
4 proceeding, including, for example:
5 (i) an order about the conduct of that proceeding; or
6 (ii) an order assisting a party to that proceeding to present
7 their case in that proceeding; or
8 (iii) an order protecting or otherwise dealing with property
9 that is the subject matter of that proceeding;
10 but not including an order making a final determination of
11 existing rights or liabilities.

12 ***interlocutory order*** means:
13 (a) an order made in relation to an interlocutory application; or
14 (b) an order or direction about the conduct of a proceeding.

15 ***interlocutory proceeding*** means a proceeding:
16 (a) dealing only with; or
17 (b) to the extent it deals with;
18 an interlocutory application.

19 ***primary proceeding*** means a proceeding other than an
20 interlocutory proceeding.

21 ***proceeding*** means a proceeding, whether criminal or civil, before a
22 court.

23 (2) For the purposes of this Part, if an interlocutory proceeding relates
24 to a proceeding that is itself an interlocutory proceeding, the
25 first-mentioned proceeding is taken to relate also to the primary
26 proceeding to which the second-mentioned proceeding relates.

27 **1383 Treatment of court proceedings under or related to the old**
28 **corporations legislation—proceedings other than federal**
29 **corporations proceedings**

30 (1) This section applies to a proceeding, other than a federal
31 corporations proceeding, in relation to which the following
32 paragraphs are satisfied:

- 1 (a) the proceeding was started in a court before the
2 commencement; and
3 (b) the proceeding was:
4 (i) under a provision of the old corporations legislation of a
5 State or Territory in this jurisdiction; or
6 (ii) brought as, or connected with, a prosecution for an
7 offence against a provision of the old corporations
8 legislation of a State or Territory in this jurisdiction; and
9 (c) the proceeding was not an enforcement proceeding, or an
10 appeal or review proceeding, in relation to an order of a
11 court; and
12 (d) the proceeding had not been concluded or terminated before
13 the commencement; and
14 (e) either:
15 (i) if the proceeding is a primary proceeding—no final
16 determination of any of the existing rights or liabilities
17 at issue in the proceeding had been made before the
18 commencement; or
19 (ii) if the proceeding is an interlocutory proceeding—this
20 section applies to the primary proceeding to which the
21 interlocutory proceeding relates.
- 22 (2) In this section:
23 (a) the proceeding to which this section applies is called the *old*
24 *proceeding*; and
25 (b) the provision of the old corporations legislation referred to in
26 whichever of subparagraphs (1)(b)(i) and (ii) applies is called
27 the *relevant old provision*.
- 28 (3) A proceeding (the *new proceeding*) equivalent to the old
29 proceeding is, on the commencement, taken to have been brought
30 in the same court, exercising federal jurisdiction:
31 (a) if subparagraph (1)(b)(i) applies—under the provision of the
32 new corporations legislation that corresponds to the relevant
33 old provision; or
34 (b) if subparagraph (1)(b)(ii) applies—as, or connected with, a
35 prosecution for an offence against the provision of the new

1 corporations legislation that corresponds to the relevant old
2 provision.

3 To the extent that the old proceeding, before the commencement,
4 related to pre-commencement rights or liabilities, the new
5 proceeding relates to the substituted rights and liabilities in relation
6 to those pre-commencement rights or liabilities

7 Note 1: See sections 1400 and 1401 for the creation of substituted rights and
8 liabilities.

9 Note 2: In all cases, there will be a provision of the new corporations
10 legislation that corresponds to the relevant old provision, either
11 because:

12 (a) the new corporations legislation actually contains a provision that
13 corresponds to the relevant old provision; or

14 (b) the new corporations legislation, because of section 1401 or
15 1408, is taken to include the relevant old provision (whether with
16 or without modifications), in which case the provision so taken to
17 be included will be the corresponding provision.

18 (4) The following provisions apply in relation to the new proceeding:

19 (a) the parties to the new proceeding are the same as the parties
20 to the old proceeding;

21 (b) subject to subsections (5) and (6), and to any order to the
22 contrary made by the court, the court must deal with the new
23 proceeding as if the steps that had been taken for the
24 purposes of the old proceeding before the commencement
25 had been taken for the purposes of the new proceeding.

26 (5) If:

27 (a) an interlocutory order was made before the commencement
28 for the purpose of, or in relation to, the old proceeding; and

29 (b) that interlocutory order was in force immediately before the
30 commencement;

31 the rights and liabilities of all persons (including rights and
32 liabilities arising wholly or partly because of conduct occurring
33 before the commencement) are declared to be, for all purposes, the
34 same as if the interlocutory order had instead been made by the
35 same court, in the exercise of federal jurisdiction, for the purpose
36 of, or in relation to, the new proceeding.

- 1 (6) The court may make orders doing all or any of the following:
2 (a) cancelling or varying rights or liabilities that a person has
3 because of subsection (5);
4 (b) substituting other rights or liabilities for rights or liabilities a
5 person has because of subsection (5);
6 (c) adding rights or liabilities to the rights or liabilities a person
7 has because of subsection (5);
8 (d) enforcing, or otherwise dealing with conduct contrary to, a
9 right or liability a person has because of subsection (5) in the
10 same way as it could enforce, or deal with, the right, liability
11 or conduct if the right or liability had arisen under or because
12 of an order made by the court in the exercise of federal
13 jurisdiction under the new corporations legislation.

14 **1384 Treatment of court proceedings under or related to the old**
15 **corporations legislation—federal corporations**
16 **proceedings**

- 17 (1) This section applies to a proceeding in relation to which the
18 following paragraphs are satisfied:
19 (a) the proceeding was started in a court before the
20 commencement; and
21 (b) the proceeding was a federal corporations proceeding that
22 related to a matter to which a provision of the old
23 corporations legislation of a State or Territory in this
24 jurisdiction applied; and
25 (c) the proceeding had not been concluded or terminated before
26 the commencement.
- 27 (2) In this section:
28 (a) the proceeding to which this section applies is called the
29 *continued proceeding*; and
30 (b) the provision of the old corporations legislation referred to in
31 paragraph (1)(b) is called the *relevant old provision*.
- 32 (3) Subject to subsection (4):
33 (a) the continued proceeding continues after the commencement
34 in the same court as if it were, and always had been, a

- 1 proceeding in relation to a matter to which the provision of
2 the new corporations legislation that corresponds to the
3 relevant old provision applies; and
- 4 (b) to the extent that the proceeding, before the commencement,
5 related to pre-commencement rights or liabilities, the
6 proceeding, as continued, relates, and as so continuing is
7 taken always to have related, to the substituted rights and
8 liabilities in relation to those pre-commencement rights or
9 liabilities
- 10 Note 1: See sections 1400 and 1401 for the creation of substituted rights and
11 liabilities.
- 12 Note 2: In all cases, there will be a provision of the new corporations
13 legislation that corresponds to the relevant old provision, either
14 because:
- 15 (a) the new corporations legislation actually contains a provision that
16 corresponds to the relevant old provision; or
- 17 (b) the new corporations legislation, because of section 1401 or
18 1408, is taken to include the relevant old provision (whether with
19 or without modifications), in which case the provision so taken to
20 be included will be the corresponding provision.
- 21 (4) Subject to any order to the contrary made by the court, the court
22 must deal with the continued proceeding as if:
- 23 (a) the steps that had been taken for the purposes of the
24 proceeding before the commencement had been taken for the
25 purpose of the proceeding as continued by this section; and
- 26 (b) any orders made in relation to the proceeding before the
27 commencement had been made in relation to the proceeding
28 as continued by this section.

29 **1385 References to proceedings and orders in the new corporations**
30 **legislation**

- 31 (1) Subject to subsection (5), a reference in the new corporations
32 legislation to the taking of a proceeding, or a step in a proceeding,
33 in a court under or in relation to a part or provision of the new
34 corporations legislation includes a reference to the taking of a
35 proceeding, or the equivalent step in a proceeding:

- 1 (a) before the commencement under or in relation to the
2 corresponding part or provision of the old corporations
3 legislation of a State or Territory; or
4 (b) after the commencement under or in relation to the
5 corresponding part or provision of the old corporations
6 legislation of a State or Territory in this jurisdiction, as that
7 legislation continues to have effect after the commencement.
- 8 (2) Subject to subsections (3), (4) and (5), a reference in the new
9 corporations legislation to an order made by a court under or in
10 relation to a part or provision of the new corporations legislation
11 includes a reference to an order made:
12 (a) before the commencement under or in relation to the
13 corresponding part or provision of the old corporations
14 legislation of a State or Territory; or
15 (b) after the commencement under or in relation to the
16 corresponding part or provision of the old corporations
17 legislation of a State or Territory in this jurisdiction, as that
18 legislation continues to have effect after the commencement.
- 19 (3) Nothing in subsection (2) is taken to produce a result that would:
20 (a) make a person liable, under the new corporations legislation,
21 to any penalty (whether civil or criminal) provided for in an
22 order referred to in paragraph (2)(a) or (b); or
23 (b) enable an enforcement proceeding, or an appeal or review
24 proceeding, in relation to such an order to be taken in a court
25 under the new corporations legislation; or
26 (c) enable proceedings by way of appeal, or other review, of
27 such an order to be taken in a court under the new
28 corporations legislation.
- 29 (4) If, after the commencement, an order referred to in
30 paragraph (2)(a) or (b) is varied or set aside on appeal or review,
31 subsection (2) applies, or is taken to have applied, from the time
32 from which the variation or setting aside takes or took effect, as if:
33 (a) if the order is varied—the order had been made as so varied;
34 or
35 (b) if the order is set aside—the order had not been made.

Section 1385

- 1 (5) The regulations may provide that subsection (1) or (2) does not
2 apply in relation to a particular reference or class of references in
3 the new corporations legislation.

1

2 **Division 5—Other specific transitional provisions**

3 **1386 Division has effect subject to Division 7 regulations**

4 This Division has effect subject to regulations made for the
5 purposes of Division 7.

6 **1387 Certain applications lapse on the commencement**

7 (1) An application:

- 8 (a) under section 117 for the registration of a company; or
9 (b) under section 601BC for the registration of a body as a
10 company;

11 that was made by a person before the commencement, but that had
12 not been dealt with by the commencement, lapses on the
13 commencement.

14 (2) Any fee that was paid in respect of the application must be returned
15 to the person, unless it is, with the person's permission, credited
16 against the fee payable in respect of another application the person
17 makes under this Act after the commencement.

18 **1388 Carrying over the Partnerships and Associations Application**
19 **Order**

20 The application order in force immediately before the
21 commencement for paragraph 115(b) of the old Corporations Law
22 of each State and Territory in this jurisdiction continues to have
23 effect (and may be dealt with) after the commencement as if it
24 were a regulation in force under section 1364 of this Act made for
25 the purposes of subsection 115(2) of this Act.

26 **1389 Evidentiary certificates**

27 (1) A certificate by ASIC (whether issued before or after the
28 commencement) stating that a company was registered under the
29 old Corporations Law of a State or Territory in this jurisdiction is
30 conclusive evidence that:

- 1 (a) all requirements of that Law for the company's registration
2 were complied with; and
3 (b) the company was duly registered as a company under that
4 Law on the date (if any) specified in the certificate.
- 5 (2) A certificate issued before the commencement under
6 pre-Corporations Law legislation (see subsection (3)) by the
7 authority responsible for administering that legislation stating that
8 a body was registered as a company under that legislation or other
9 pre-Corporations Law legislation is conclusive evidence that:
10 (a) all requirements of that legislation for the company's
11 registration were complied with; and
12 (b) the company was duly registered as a company under that
13 legislation on the date (if any) specified in the certificate.
- 14 (3) In subsection (2):
- 15 *pre-Corporations Law legislation* means legislation that was, for
16 the purposes of the old Corporations Law of a State or Territory in
17 this jurisdiction, a corresponding previous law in relation to that
18 old Corporations Law.

19 **1390 Preservation of nomination of body corporate as SEGC**

20 The nomination in force immediately before the commencement
21 under section 67 of the old Corporations Act continues to have
22 effect (and may be dealt with) after the commencement as if it
23 were a nomination under section 925A of this Act.

24 **1391 Preservation of identification of satisfactory records**

25 A notice in force immediately before the commencement under
26 section 70 of the old Corporations Act continues to have effect
27 (and may be dealt with) after the commencement as if it were a
28 notice under subsection 147(5) of this Act.

1 **1392 Retention of information obtained under old corporations**
2 **legislation of non-referring State**

3 If a particular State is not a referring State on the commencement,
4 that does not mean that ASIC must then remove from, or cease to
5 retain in, a database or register it maintains information that ASIC
6 obtained before the commencement under or because of (whether
7 in whole or in part) the operation of the old corporations legislation
8 of that State.

9 **1393 Transitional provisions relating to section 1351 fees**

10 (1) If:

11 (a) either:

12 (i) before the commencement, a person paid an amount as
13 required by section 1351 of the old Corporations Law of a
14 State or Territory in respect of a particular matter; or

15 (ii) after the commencement, a person pays an amount as
16 required by subsection 9(2) of the *Corporations (Fees)*
17 *Act 2001* in respect of a particular matter; and

18 (b) a fee is also payable under section 1351 of this Act in respect
19 of the same matter;

20 the payment they made or make as mentioned in
21 subparagraph (a)(i) or (ii) is taken to satisfy their liability to pay
22 the fee referred to in paragraph (b).

23 (2) If:

24 (a) before the commencement, a person paid a deposit as
25 required by section 1357 of the old Corporations Law of a
26 State or Territory in respect of a particular matter; and

27 (b) a fee is payable under section 1351 of this Act in respect of
28 the same matter;

29 the deposit must be applied against the liability to pay the fee.

30 **1394 Transitional provisions relating to securities exchange fidelity**
31 **fund levies**

32 (1) If:

- 1 (a) before the commencement, a person paid an amount as
2 required by subsection 902(1) of the old Corporations Law of
3 a State or Territory in order to be admitted to:
4 (i) membership of a securities exchange; or
5 (ii) membership of a partnership in a member firm
6 recognised by a securities exchange; and
7 (b) that person had not been so admitted by the commencement
8 of this Act;
9 the payment they made before the commencement is taken to
10 satisfy their liability to pay the levy referred to in subsection
11 902(1) of this Act in respect of their admission after the
12 commencement to that securities exchange or firm.
- 13 (2) If:
14 (a) either:
15 (i) before the commencement, a person paid an amount as
16 required by subsection 902(2) of the old Corporations
17 Law of a State or Territory to a securities exchange in
18 respect of a year some or all of which occurs after the
19 commencement of this Act; or
20 (ii) after the commencement, a person pays an amount as
21 required by subsection 8(3) of the *Corporations*
22 *(Securities Exchanges Levies) Act 2001* in respect of a
23 year some or all of which occurs after the
24 commencement of this Act; and
25 (b) a levy is also payable under subsection 902(2) of this Act in
26 respect of the securities exchange and the year;
27 the payment they made or make as mentioned in
28 subparagraph (a)(i) or (ii) is taken to satisfy their liability to pay
29 the levy referred to in paragraph (b).
- 30 (3) If, before the commencement, a person paid an amount to a
31 securities exchange as required by subsection 902(2) of the old
32 Corporations Law of a State or Territory, that payment is to be
33 counted, for the purposes of:
34 (a) the reference in paragraph (a) of the definition of *relevant*
35 *person* in subsection 903(1) of this Act; and
36 (b) subsection 903(5) of this Act;

1 as if it were a payment of a kind referred to in that paragraph or
2 that subsection, as the case requires.

3 **1395 Transitional provisions relating to National Guarantee Fund**
4 **levies**

5 (1) If:

6 (a) either:

7 (i) before the commencement, a person paid an amount as
8 required by section 938 of the old Corporations Law of
9 a State or Territory in respect of a particular transaction;
10 or

11 (ii) after the commencement, a person pays an amount of
12 levy imposed by subsection 6(1) of the *Corporations*
13 *(National Guarantee Fund Levies) Act 2001* in respect
14 of a particular transaction; and

15 (b) a levy is also payable under section 938 of this Act in respect
16 of the same transaction;

17 the payment they made or make as mentioned in
18 subparagraph (a)(i) or (ii) is taken to satisfy their liability to pay
19 the levy referred to in paragraph (b).

20 (2) Subject to subsection (3), a determination of a matter (other than a
21 rate or rates, or an amount) in force immediately before the
22 commencement for the purposes of section 938, 940 or 941 of the
23 old Corporations Law of a State or Territory in this jurisdiction
24 continues to have effect (and may be dealt with) after the
25 commencement of this Act as if it were:

26 (a) in the case of a determination for the purposes of
27 section 938—a determination for the purposes of section 938
28 of this Act; or

29 (b) in the case of a determination for the purposes of
30 section 940—a determination for the purposes of section 940
31 of this Act; or

32 (c) in the case of a determination for the purposes of
33 section 941—a determination for the purposes of section 941
34 of this Act.

- 1 (3) Nothing in subsection (2) is taken to produce a result that a levy is
2 payable by a person in respect of the same matter in respect of
3 which levy is imposed on the person by subsection 6(1), (2) or (3)
4 of the *Corporations (National Guarantee Fund Levies) Act 2001*.

5 **1396 Transitional provisions relating to futures organisation fidelity**
6 **fund levies**

- 7 (1) If:
- 8 (a) before the commencement, a person paid an amount as
9 required by subsection 1234(1) of the old Corporations Law
10 of a State or Territory in order to be admitted to membership
11 of a futures organisation; and
- 12 (b) that person had not been so admitted by the commencement
13 of this Act;
- 14 the payment they made before the commencement is taken to
15 satisfy their liability to pay the levy referred to in subsection
16 1234(1) of this Act in respect of their admission after the
17 commencement to that futures organisation.
- 18 (2) If:
- 19 (a) either:
- 20 (i) before the commencement, a contributing member of a
21 futures organisation paid an amount as required by
22 subsection 1234(2) of the old Corporations Law of a
23 State or Territory to a futures organisation in respect of
24 a year some or all of which occurs after the
25 commencement of this Act; or
- 26 (ii) after the commencement, a person pays an amount as
27 required by subsection 6(1) of the *Corporations*
28 (*Futures Organisations Levies) Act 2001* in respect of a
29 year some or all of which occurs after the
30 commencement of this Act; and
- 31 (b) a levy is also payable under subsection 1234(2) of this Act in
32 respect of the futures organisation and the year;
- 33 the payment they made or make as mentioned in
34 subparagraph (a)(i) or (ii) is taken to satisfy their liability to pay
35 the levy referred to in paragraph (b).

1

2 **Division 6—General transitional provisions relating to**
3 **other things done etc. under the old corporations**
4 **legislation**

5 **1397 Limitations on scope of this Division**

- 6 (1) This Division has effect subject to:
- 7 (a) the provisions of Divisions 2, 3, 4 and 5 (which deal with
- 8 matters in more specific terms); and
- 9 (b) regulations made for the purposes of Division 7.
- 10 (2) Nothing in this Division applies to:
- 11 (a) an order made by a court before the commencement; or
- 12 (b) a right or liability under an order made by a court before the
- 13 commencement; or
- 14 (c) a right to:
- 15 (i) appeal to a court against an order made by a court
- 16 before the commencement;
- 17 (ii) apply to a court for review of such an order; or
- 18 (iii) bring an appeal or review proceeding, or an
- 19 enforcement proceeding, within the meaning of
- 20 section 1382, in respect of such an order; or
- 21 (d) subject to subsection (3)—a proceeding taken (including an
- 22 appeal, review or enforcement proceeding) in a court before
- 23 the commencement, or a step in such a proceeding.
- 24 Note: Division 4 deals with court orders and proceedings made or begun
- 25 before the commencement, and with related matters.
- 26 (3) Despite paragraph (2)(d), sections 1400 and 1401 apply to any
- 27 right or liability to which a proceeding to which section 1383 or
- 28 1384 applies relates.
- 29 (4) Nothing in this Division applies to a liability under section 902,
- 30 904, 938, 940, 941, 1234, 1235 or 1351 of the old Corporations
- 31 Law of a State or Territory in this jurisdiction to pay a
- 32 contribution, levy or fee.

Section 1400

- 1 otherwise ceased to have effect, before the commencement;
2 or
3 (d) if the thing done was the making of an appointment or
4 delegation—the appointment or delegation had not been
5 revoked, and had not otherwise ceased to have effect, before
6 the commencement; or
7 (e) if the thing done was the commencement of a procedure or
8 the taking of a step in a procedure—the procedure was still in
9 progress immediately before the commencement or was
10 otherwise still having an effect; or
11 (f) if the thing done was the establishment of a register or
12 fund—the register or fund was still in existence immediately
13 before the commencement; or
14 (g) if the thing done was requiring a person to do, or not to do
15 something—the requirement was still in force immediately
16 before the commencement; or
17 (h) if the thing done was the giving of a notice or document, or
18 the doing of some other thing—the notice or document (or
19 the giving of the notice or document), or the thing (or the
20 doing of the thing), had an ongoing effect or significance
21 immediately before the commencement for the purposes of
22 the old corporations legislation of the State or Territory.
- 23 (5) The regulations may provide that a specified thing done under, or
24 for the purposes of, a carried over provision of the old corporations
25 legislation of a State or Territory did, or did not, have an ongoing
26 significance immediately before the commencement for the
27 purposes of that legislation.

28 **1400 Creation of equivalent rights and liabilities to those that**
29 **existed before the commencement under carried over**
30 **provisions of the old corporations legislation**

- 31 (1) Subject to subsection (4), this section applies in relation to a right
32 or liability (the *pre-commencement right or liability*), whether
33 civil or criminal, that:

Section 1400

- 1 (a) was acquired, accrued or incurred under a carried over
2 provision of the old corporations legislation of a State or
3 Territory in this jurisdiction; and
4 (b) was in existence immediately before the commencement.
5 However, this section does not apply to a right or liability under an
6 order made by a court before the commencement.

- 7 (2) On the commencement, the person acquires, accrues or incurs a
8 right or liability (the *substituted right or liability*), equivalent to
9 the pre-commencement right or liability, under the corresponding
10 provision of the new corporations legislation (as if that provision
11 applied to the conduct or circumstances that gave rise to the
12 pre-commencement right or liability).

13 Note: If a time limit applied in relation to the pre-commencement right or
14 liability under the old corporations legislation, that same time limit
15 (calculated from the same starting point) will apply under the new
16 corporations legislation to the substituted right or liability—see
17 subsection 1402(3).

- 18 (3) A procedure, proceeding or remedy in respect of the substituted
19 right or liability may be instituted after the commencement under
20 the new corporations legislation (as if that provision applied to the
21 conduct or circumstances that gave rise to the pre-commencement
22 right or liability).

23 Note: For pre-commencement proceedings in respect of substituted rights
24 and liabilities, see sections 1383 and 1384.

- 25 (4) If, immediately before the commencement, a person had an
26 accrued right to make a claim under a provision of Part 7.10 of the
27 old Corporations Law of a State that is not a referring State (and so
28 is not in this jurisdiction), this section applies in relation to that
29 right in the same way as it would have applied if the State had been
30 a referring State.

31 Note: Except to the extent provided in this subsection, this Part does not
32 create rights and liabilities that are equivalent to those that existed
33 under the old corporations legislation of a non-referring State.

1 **1401 Creation of equivalent rights and liabilities to those that**
2 **existed before the commencement under repealed**
3 **provisions of the old corporations legislation**

4 (1) This section applies in relation to a right or liability (the
5 *pre-commencement right or liability*), whether civil or criminal,
6 that:

7 (a) was acquired, accrued or incurred under a provision of the
8 old corporations legislation of a State or Territory in this
9 jurisdiction that was no longer in force immediately before
10 the commencement; and

11 (b) was in existence immediately before the commencement.

12 However, this section does not apply to a right or liability under an
13 order made by a court before the commencement.

14 (2) For the purposes of subsections (3) and (4), the new corporations
15 legislation is taken to include:

16 (a) the provision of the old corporations legislation (with such
17 modifications (if any) as are necessary) under which the
18 pre-commencement right or liability was acquired, accrued or
19 incurred; and

20 (b) the other provisions of the old corporations legislation (with
21 such modifications (if any) as are necessary) that applied in
22 relation to the pre-commencement right or liability.

23 (3) On the commencement, the person acquires, accrues or incurs a
24 right or liability (the *substituted right or liability*), equivalent to
25 the pre-commencement right or liability, under the provision taken
26 to be included in the new corporations legislation by
27 paragraph (2)(a) (as if that provision applied to the conduct or
28 circumstances that gave rise to the pre-commencement right or
29 liability).

30 Note: If a time limit applied in relation to the pre-commencement right or
31 liability under the old corporations legislation, that same time limit
32 (calculated from the same starting point) will apply under the new
33 corporations legislation to the substituted right or liability—see
34 subsection 1402(3).

35 (4) A procedure, proceeding or remedy in respect of the substituted
36 right or liability may be instituted after the commencement under

Section 1402

1 the provisions taken to be included in the new corporations
2 legislation by subsection (2) (as if those provisions applied to the
3 conduct or circumstances that gave rise to the pre-commencement
4 right or liability).

5 Note: For pre-commencement proceedings in respect of substituted rights
6 and liabilities, see sections 1383 and 1384.

7 **1402 Old corporations legislation time limits etc.**

8 (1) An old corporations legislation time limit (see subsection (4)):

9 (a) the starting point of which:

10 (i) was known or had been determined before the
11 commencement (whether that starting point occurred or
12 would occur before, on or after the commencement); or

13 (ii) would have become known, or have been determined,
14 after the commencement if the old corporations
15 legislation of the relevant State or Territory had
16 continued to apply (whether that starting point would
17 have occurred before, on or after the commencement);
18 and

19 (b) that had not ended at or before the commencement;
20 continues to run, or starts or started to run, as if that same time
21 limit (starting from the same starting point) were applicable under
22 the new corporations legislation.

23 (2) If:

24 (a) under the old corporations legislation, a process (for
25 example, the winding up of a company), a status of a person
26 or body (for example, a body's registration as a company or a
27 person's status as a registered liquidator), or an instrument,
28 commenced from a particular time before the
29 commencement; and

30 (b) that process, status or instrument is continued after the
31 commencement for the purposes of the new corporations
32 legislation by a provision of this Part;

33 that process, status or instrument as so continued is still taken to
34 have commenced from the time referred to in paragraph (a).

Section 1403

1 (3) If an old corporations legislation time limit related to a
2 pre-commencement right or liability, the same time limit applies in
3 relation to the substituted right or liability.

4 (4) In this section:

5 *old corporations legislation time limit* includes:

- 6 (a) a period for the doing of a thing specified or determined
7 under a provision of the old corporations legislation of a
8 State or Territory; or
9 (b) a period specified or determined under a provision of the old
10 corporations legislation of a State or Territory as the duration
11 of a particular instrument or status.

12 **1403 Preservation of significance etc. of events or circumstances**

13 (1) An event, circumstance or other thing:

14 (a) that occurred or arose before the commencement under or as
15 mentioned in a provision of the old corporations legislation
16 of a State or Territory in this jurisdiction; and

17 (b) that had a particular significance, status or effect for the
18 purposes of a carried over provision of that legislation
19 (including because of an interpretive provision);

20 has that same significance, status and effect after the
21 commencement for the purposes of the provision of the new
22 corporations legislation that corresponds to that carried over
23 provision.

24 Note: So, for example:

25 (a) if a company took action before the commencement that had the
26 result for the purposes of section 200B of the old Corporations
27 Law of making a superannuation fund a prescribed
28 superannuation fund in relation to the company, that action has
29 that same effect for the purposes of section 200B of this Act; and

30 (b) a delay that could have been taken into account for the purposes
31 of subsection 874(1) of the old Corporations Law also counts for
32 the purposes of subsection 874(1) of this Act.

33 (2) Without limiting subsection (1), an event, circumstance or other
34 thing had a particular significance for the purposes of a carried

Section 1404

- 1 over provision of the old corporations legislation of a State or
2 Territory in this jurisdiction if:
- 3 (a) the carried over provision created an obligation in respect of
4 the event, circumstance or thing (whenever it arose); or
5 (b) the carried over provision provided for the event,
6 circumstance or thing to be dealt with in a particular way; or
7 (c) the carried over provision stated that the event, circumstance
8 or thing (whenever it arose) was to be disregarded for the
9 purposes of that provision or was not covered by that
10 provision.

11 **1404 References in the new corporations legislation generally**
12 **include references to events, circumstances or things that**
13 **happened or arose before the commencement**

- 14 (1) Subject to this section, a reference in the new corporations
15 legislation to an event, circumstance or thing of a particular kind
16 that happens or arises, or that has happened or arisen, is taken to
17 include a reference to an event, circumstance or thing of that kind
18 that happened or arose at a time before the commencement, unless
19 a contrary intention is expressed. The fact that the provision uses
20 only the present tense in referring to an event, circumstance or
21 thing is not, of itself, to be regarded as an expression of a contrary
22 intention.

23 Note: So, for example, if a provision of the new corporations legislation
24 refers to a person who consents to a course of action, that reference (in
25 the absence of an express provision to the contrary) will not be limited
26 to consents given after the commencement and will cover a consent
27 given before the commencement.

- 28 (2) Nothing in subsection (1) is taken to produce a result that a right or
29 liability exists under a provision of the new corporations legislation
30 that relates solely to events, circumstances or things that occurred
31 before the commencement.

32 Note: Instead, an equivalent right or liability will be created by section 1400
33 or 1401.

- 34 (3) The regulations may provide that subsection (1) does not apply in
35 relation to a particular reference or class of references in the new
36 corporations legislation.

1 **1405 References in the new corporations legislation to that**
2 **legislation or the new ASIC legislation generally include**
3 **references to corresponding provisions of the old**
4 **corporations legislation or old ASIC legislation**

5 (1) Subject to subsection (4), a reference in the new corporations
6 legislation to:

7 (a) an Act, or regulations or another instrument that is part of the
8 new corporations legislation; or

9 (b) a provision or group of provisions of such an Act, regulations
10 or other instrument;

11 is taken, in relation to events, circumstances or things that
12 happened or arose at a time before the commencement when the
13 old corporations legislation was in force, to include (in the absence
14 of an express provision to the contrary) a reference to the
15 corresponding part, provision or provisions of the old corporations
16 legislation of the States and Territories in this jurisdiction.

17 (2) Subject to subsection (4), a reference in the new corporations
18 legislation to:

19 (a) an Act, or regulations or some other instrument that is part of
20 the new ASIC legislation; or

21 (b) a provision or group of provisions of such an Act, regulations
22 or other instrument;

23 is taken, in relation to events, circumstances or things that
24 happened or arose at a time before the commencement when the
25 old corporations legislation was in force, to include (in the absence
26 of an express provision to the contrary) a reference to the
27 corresponding part, provision or provisions of the old ASIC
28 legislation of the Commonwealth, of the States in this jurisdiction
29 and of the Northern Territory.

30 (3) In subsection (2):

31 (a) *new ASIC legislation* and *old ASIC legislation* have the
32 same meanings as they have in Part 16 of the *Australian*
33 *Securities and Investments Commission Act 2001*; and

34 (b) the question whether a provision or part of the old ASIC
35 legislation corresponds to a provision of part of the new

Section 1406

1 ASIC legislation is to be determined in the same way as it is
2 determined for the purposes of Part 16 of the *Australian*
3 *Securities and Investments Commission Act 2001*.

4 (4) The regulations may provide that subsection (1) or (2) does not
5 apply in relation to a particular reference or class of references in
6 the new corporations legislation.

7 **1406 Carrying over references to corresponding previous laws**

8 (1) If a carried over provision of the old corporations legislation of a
9 State or Territory in this jurisdiction contained a reference
10 (whether in its own terms or by operation of another provision) to:
11 (a) a corresponding previous law (as defined for the purposes of
12 that provision or provisions including that provision); or
13 (b) a thing done by, under, or for the purposes of, such a law;
14 the corresponding provision of the new corporations legislation is
15 taken to contain an equivalent reference to that previous law, or to
16 such a thing done by, under, or for the purposes of, that previous
17 law.

18 (2) The following references in the old corporations legislation of the
19 States and Territories in this jurisdiction are covered by
20 subsection (1) in the same way as they would be if they used the
21 “corresponding previous law” form of words:
22 (a) the reference in subsection 1274AA(1) to a “previous Law”;
23 (b) the reference in subparagraph 1274AA(2)(b)(ii) to a
24 “previous law of this jurisdiction before the commencement
25 of this Part that corresponds”;
26 (c) any other references prescribed by the regulations for the
27 purposes of this subsection.

28 **1407 References to old corporations legislation in instruments**

29 (1) Subject to subsection (2), a reference in, or taken immediately
30 before the commencement to be in, an instrument, other than:
31 (a) an Act of a State, the Australian Capital Territory, the
32 Northern Territory or Norfolk Island; or

Section 1408

- 1 (b) an instrument made under such an Act;
2 to:
3 (c) an Act, or to regulations or some other instrument, that is part
4 of the old corporations legislation (whether the reference is in
5 general terms or in relation to a particular State or Territory
6 in this jurisdiction); or
7 (d) to a provision or group of provisions of such an Act,
8 regulations or other instrument;
9 is taken, after the commencement, to include a reference to the
10 corresponding part, provision or provisions of the new corporations
11 legislation (unless there is no such corresponding part, provision or
12 provisions).
- 13 Note: This section will, for example, apply to:
- 14 (a) a reference in another Commonwealth Act to the Corporations
15 Law; or
16 (b) a reference in the Corporations Regulations to the Corporations
17 Law; or
18 (c) a reference in a company's constitution to a particular provision
19 of the Corporations Law.
- 20 (2) The regulations may do either or both of the following:
- 21 (a) provide that subsection (1) does not apply in relation to
22 prescribed references in prescribed instruments;
23 (b) provide that subsection (1) has effect in relation to prescribed
24 references in prescribed instruments as if, in that subsection,
25 the words "to be" were substituted for the words "to
26 include".

27 **1408 Old transitional provisions continue to have their effect**

- 28 (1) Subject to subsection (3), this Act has the same effect, after the
29 commencement, as it would have if:
- 30 (a) the transitional provisions (see subsections (6) and (7)) of the
31 old Corporations Laws of the States and Territories in this
32 jurisdiction (as in force from time to time before the
33 commencement) had been part of this Act; and
34 (b) those transitional provisions produced the same results or
35 effects (to the greatest extent possible) for the purposes of

1 this Act as they produced for the purposes of those old
2 Corporations Laws.

3 (2) Without limiting subsection (1) (but subject to subsection (3)), if a
4 transitional provision of the old Corporations Law of a State or
5 Territory in this jurisdiction could, if it had continued in force after
6 the commencement, have operated to give rise to rights and
7 liabilities (including civil or criminal liabilities) in relation to acts
8 or omissions occurring after the commencement, this Act is taken
9 to include that transitional provision (with such modifications (if
10 any) as are necessary.

11 Note: In relation to acts or omissions that occurred before the
12 commencement, equivalent rights and liabilities are created by
13 sections 1400 and 1401.

14 (3) The regulations may determine how a matter dealt with in a
15 transitional provision of the old Corporations Law of a State or
16 Territory in this jurisdiction is to be dealt with under or in relation
17 to the new corporations legislation (including by creating
18 offences). The regulations have effect despite subsections (1) and
19 (2), but subject to subsection (5).

20 Note: In creating offences, the regulations are subject to the limitation
21 imposed by section 1375.

22 (4) For the purpose of determining whether the new corporations
23 legislation includes a provision that corresponds to a provision of
24 the old corporations legislation of a State or Territory, and for the
25 purpose of any reference in this part to a corresponding provision
26 of the new corporations legislation, this Act is taken to include the
27 transitional provisions of the old corporations legislation of the
28 States and Territories, as they have effect because of
29 subsections (1) and (2).

30 (5) Nothing in subsection (1) or (2), or in regulations made for the
31 purposes of subsection (3), is taken to produce a result that a right
32 or liability exists under a transitional provision as it has effect
33 because of subsection (1) or (2), or exists under regulations made
34 for the purposes of subsection (3), that relates solely to events,
35 circumstances or things that occurred before the commencement.

Transitional provisions of old Corporations Law

Item Provisions

- | | |
|----|---|
| 20 | Schedule 4, other than the following provisions: <ul style="list-style-type: none">(a) subclauses 7(3), 8(2) and 9(4);(b) clauses 11 to 16;(c) subclause 17(2);(d) clauses 18 and 19;(e) clauses 20, 25 and 27;(f) Parts 5, 6 and 7. |
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| 1 | (7) The regulations may provide that certain provisions are to be taken to be included in, or omitted from, the table in subsection (6). The table then has effect as if the provisions were so included in it or omitted from it. |
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| 3 | |
| 4 | |

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2 **Division 7—Regulations dealing with transitional matters**

3 **1409 Regulations may deal with transitional matters**

4 (1) The regulations may deal with matters of a transitional nature
5 relating to the transition from the application of provisions of the
6 old corporations legislation of the States and Territories in this
7 jurisdiction to the application of provisions of the new corporations
8 legislation. The regulations have effect despite anything else in this
9 Part, other than section 1375.

10 (2) Without limiting subsection (1), the regulations may provide for a
11 matter to be dealt with, wholly or partly, in any of the following
12 ways:

13 (a) by applying (with or without modifications) to the matter:

14 (i) provisions of the old corporations legislation of the
15 States and Territories in this jurisdiction, as in force
16 immediately before the commencement or at some
17 earlier time; or

18 (ii) provisions of the new corporations legislation; or

19 (iii) a combination of provisions referred to in
20 subparagraphs (i) and (ii);

21 (b) by otherwise specifying rules for dealing with the matter;

22 (c) by specifying a particular consequence of the matter, or of an
23 outcome of the matter, for the purposes of the new
24 corporations legislation.

25 (3) The regulations may provide that certain provisions of this Part are
26 taken to be modified as set out in the regulations. Those provisions
27 then have effect as if they were so modified.

28 (4) Despite subsection 48(2) of the *Acts Interpretation Act 1901*,
29 regulations for the purposes of this section may be expressed to
30 take effect from a date before the regulations are notified in the
31 *Gazette*.

32 (5) In this section:

1 *matters of a transitional nature* also includes matters of an
2 application or saving nature.

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Schedule 2—Forms of Transfer of Marketable Securities and Marketable Rights

Note: See section 1101

FORM 1		Section 1101	
SECURITY TRANSFER FORM		MARKING STAMP	
PART 1			
Full name of company or other eligible body:			
Description of securities:	Class:	If not fully paid, paid to:	Register:
Quantity:	[Words]		[Figures]
Transfer identification number:			
Full name(s) of transferor(s):			

The transferor(s) hereby transfer(s) the above securities to the transferee(s) named in Part 2 hereof or to the several transferees named in Part 2 of the Broker's Transfer Form(s), Split Transfer Form(s) or Consolidated Transfer Form(s) relating to the above securities.

This transfer is executed on the transferor's behalf by the transferor's broker, who certifies:

- (a) as to the validity of documents; and
- (b) that stamp duty, if payable, has been or will be paid.

[Transferor's broker's stamp]

Affixed at.....

on.....

(place and date of affixing stamp)

PART 2

Full name(s) and address(es) of transferee(s):	Transferee's broker hereby certifies: <ul style="list-style-type: none"> (a) that the securities set out in Part 1 above, having been purchased in the ordinary course of business, are to be registered in the name(s) of the transferee(s) named in this Part; and (b) that stamp duty, if payable, has been or will be paid; and hereby requests that such entries be made in the register as are necessary to give effect to this transfer; <hr/> [Transferee's broker's stamp] <hr/> Date of affixing stamp:
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PART 3

Transferee's broker hereby certifies: <ul style="list-style-type: none"> (a) that the securities set out in Part 1 above, having been purchased in the ordinary course of business, are to be registered in the name(s) of the transferee(s) named in the Consolidated Transfer Form relating to the securities; and (b) that stamp duty, if payable, has been or will be paid; and hereby requests that such entries be made in the register as are necessary to give effect to this transfer. <hr/> [Transferee's broker's stamp] <hr/> Date of affixing stamp:	
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FORM 2		Section 1101	
BROKER'S TRANSFER FORM		MARKING STAMP	
PART 1			
Full name of company or other eligible body:			
Description of securities:	Class:	If not fully paid, paid to:	Register:
Quantity:		[Words]	[Figures]
Transfer identification number:	Transferor's broker hereby certifies:		
Full name(s) of transferor(s):	(a) that the Security Transfer Form relating to the securities set out above has been or will be lodged at the company's or eligible body's office; and (b) that stamp duty, if payable, has been or will be paid.		
	[Transferor's broker's stamp]		
	Affixed at.....		
	on.....		
	(place and date of affixing stamp)		
PART 2			
Full name(s) and address(es) of transferee(s):	Transferee's broker hereby certifies:		
	(a) that the securities set out in Part 1 above, having been purchased in the ordinary course of business, are to be registered in the name(s) of the transferee(s) named in this Part; and (b) that stamp duty, if payable, has been or will be paid;		
	and hereby requests that such entries be made in the register as are necessary to give effect to this transfer.		
	[Transferee's broker's stamp]		
	Date of affixing stamp:		
PART 3			
Transferee's broker hereby certifies:			
(a) that the securities set out in Part 1 above, having been purchased in the ordinary course of business, are to be registered in the name(s) of the transferee(s) named in the Consolidated Transfer Form relating to the securities; and (b) that stamp duty, if payable, has been or will be paid;			
and hereby requests that such entries be made in the register as are necessary to give effect to this transfer.			
[Transferee's broker's stamp]			

Date of affixing stamp:

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FORM 3		Section 1101
SPLIT TRANSFER FORM	MARKING STAMP	
PART 1		
Full name of company or other eligible body:		
Description of securities:	Class:	If not fully paid, paid to: Register:
Quantity:	[Words]	[Figures]
Transfer identification number:	The [name of securities exchange] hereby certifies that the Security Transfer Form or the Broker's Transfer Form relating to the securities set out above has been or will be lodged at the company's or eligible body's office.	
Full name(s) of transferor(s):	[Securities Exchange stamp]	
	Affixed at	
	on	
	(place and date of affixing stamp)	
PART 2		
Full name(s) and address(es) of transferee(s)	Transferee's broker hereby certifies:	
	(a) that the securities set out in Part 1 above, having been purchased in the ordinary course of business, are to be registered in the name(s) of the transferee(s) named in this Part; and (b) that stamp duty, if payable, has been or will be paid;	
	and hereby requests that such entries be made in the register as are necessary to give effect to this transfer.	
	[Transferee's broker's stamp]	
	Date of affixing stamp:	

PART 3

Transferee's broker hereby certifies:

- (a) that the securities set out in Part 1 above, having been purchased in the ordinary course of business, are to be registered in the name(s) of the transferee(s) named in the Consolidated Transfer Form relating to the securities; and
- (b) that stamp duty, if payable, has been or will be paid;

and hereby requests that such entries be made in the register as are necessary to give effect to this transfer.

[Transferee's broker's stamp]

Date of affixing stamp:

1

Forms of Transfer of Marketable Securities and Marketable Rights **Schedule 2**

1
2

FORM 4		Section 1101
CONSOLIDATED TRANSFER FORM	MARKING STAMP	
PART 1		
Full name of company or other eligible body:		
Description of securities:	Class:	If not fully paid, paid to:
Quantity:	[Words]	[Figures]
Transfer identification number:		
Transfer Consolidation Number(s):		
PART 2		
Full name(s) and address(es) of transferee(s):	Transferee's broker hereby certifies: (a) that the securities set out in Part 1 of the Form(s) whose Transfer Consolidation Number(s) is (or are) set out in Part 1 above, having been purchased in the ordinary course of business, are to be registered in the name(s) of the transferee(s) named in this Part; and (b) that stamp duty, if payable, has been or will be paid; and hereby requests that such entries be made in the register as are necessary to give effect to the transfer(s). [Transferee's broker's stamp] Date of affixing stamp:	

3

1
2

FORM 5

Section 1101

SECURITY RENUNCIATION AND TRANSFER FORM	MARKING STAMP
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PART 1

Full name of company or other eligible body:

Description of rights:		Register:
Quantity:	[Words]	[Figures]

Transfer identification number:

Full name(s) of transferor(s):

3 The transferor(s) hereby renounce(s) and transfer(s) the above rights in favour of the
4 transferee(s) named in Part 2 hereof or to the several transferees named in Part 2 of the Broker's
5 Renunciation and Transfer Form(s), Renunciation and Split Transfer Form(s) or Renunciation and
6 Consolidated Transfer Form(s) relating to the above rights.

7 This transfer and renunciation is executed on the transferor's behalf by the transferor's broker,
8 who certifies:

- 9 (a) as to the validity of documents; and
10 (b) that stamp duty, if payable, has been or will be paid.

11 [Transferor's broker's stamp]

12 Affixed at.....

13 on.....

14 (place and date of affixing stamp)

PART 2

Full name(s) and address(es) of transferee(s):	Transferee's broker hereby certifies: (a) that, the rights set out in Part 1 above having been purchased in the ordinary course of business, the marketable securities to which the rights relate are to be allotted to the transferee(s) named in this Part; and (b) that stamp duty, if payable, has been or will be paid; and hereby requests that the marketable securities be allotted by the company or eligible body to the transferee(s) and such entries be made in the register as are necessary to give effect to this renunciation and transfer. [Transferee's broker's stamp]
--	--

| Date of affixing stamp:

PART 3

Transferee's broker hereby certifies:

- (a) that, the rights set out in Part 1 above having been purchased in the ordinary course of business, the marketable securities to which the rights relate are to be allotted to the transferee(s) named in the Renunciation and Consolidated Transfer Form relating to the rights; and
- (b) that stamp duty, if payable, has been or will be paid;

and hereby requests that the marketable securities be allotted by the company or eligible body to the transferee(s) and such entries be made in the register as are necessary to give effect to this renunciation and transfer.

[Transferee's broker's stamp]

Date of affixing stamp:

1

Forms of Transfer of Marketable Securities and Marketable Rights **Schedule 2**

1
2

FORM 6		Section 1101
BROKER'S RENUNCIATION AND TRANSFER FORM		MARKING STAMP
PART 1		
Full name of company or other eligible body:		
Description of rights:		Register:
Quantity:	[Words]	[Figures]
Transfer identification number:		Transferor's broker hereby certifies:
Full name(s) of transferor(s):		(a) that the Security Renunciation and Transfer Form relating to the rights set out above has been or will be lodged at the company's or eligible body's office; and
		(b) that stamp duty, if payable, has been or will be paid.
		[Transferor's broker's stamp]
		Affixed at.....
		on.....
		(place and date of affixing stamp)

PART 2

Full name(s) and address(es) of transferee(s):	Transferee's broker hereby certifies: <ul style="list-style-type: none"> (a) that, the rights set out in Part 1 above having been purchased in the ordinary course of business, the marketable securities to which the rights relate are to be allotted to the transferee(s) named in this Part; and (b) that stamp duty, if payable, has been or will be paid; and hereby requests that the marketable securities be allotted by the company or eligible body to the transferee(s) and such entries be made in the register as are necessary to give effect to this renunciation and transfer. <p>[Transferee's broker's stamp]</p> <hr/> Date of affixing stamp:
--	--

PART 3

Transferee's broker hereby certifies:

- (a) that, the rights set out in Part 1 above having been purchased in the ordinary course of business, the marketable securities to which the rights relate are to be allotted to the transferee(s) named in the Renunciation and Consolidated Transfer Form relating to the rights; and
- (b) that stamp duty, if payable, has been or will be paid;

and hereby requests that the marketable securities be allotted by the company or eligible body to the transferee(s) and such entries be made in the register as are necessary to give effect to this renunciation and transfer.

[Transferee's broker's stamp]

Date of affixing stamp:

1

1
2

FORM 7		Section 1101
RENUNCIATION AND SPLIT TRANSFER FORM	MARKING STAMP	
PART 1		
Full name of company or other eligible body:		
Description of rights:	Register:	
Quantity:	[Words]	[Figures]
Transfer identification number:	The [name of securities exchange] hereby certifies that the Security Renunciation and Transfer Form or the Broker's Renunciation and Transfer Form relating to the rights set out above has been or will be lodged at the company's or eligible body's office.	
Full name(s) of transferor(s):	[Securities exchange stamp]	
	Affixed at.....	
	on..... (place and date of affixing stamp)	
PART 2		
Full name(s) and address(es) of transferee(s):	Transferee's broker hereby certifies:	
	(a) that, the rights set out in Part 1 above having been purchased in the ordinary course of business, the marketable securities to which the rights relate are to be allotted to the transferee(s) named in this Part; and (b) that stamp duty, if payable, has been or will be paid;	
	and hereby requests that the marketable securities be allotted by the company or eligible body to the transferee(s) and such entries be made in the register as are necessary to give effect to this renunciation and transfer.	
	[Transferee's broker's stamp]	
	Date of affixing stamp:	

PART 3

Transferee's broker hereby certifies:

- (a) that, the rights set out in Part 1 above having been purchased in the ordinary course of business, the marketable securities to which the rights relate are to be allotted to the transferee(s) named in the Renunciation and Consolidated Transfer Form relating to the rights; and
- (b) that stamp duty, if payable, has been or will be paid;

and hereby requests that the marketable securities be allotted by the company or eligible body to the transferee(s) and such entries be made in the register as are necessary to give effect to this renunciation and transfer.

(Transferee's broker's stamp)

Date of affixing stamp:

1

Forms of Transfer of Marketable Securities and Marketable Rights **Schedule 2**

1
2

FORM 8		Section 1101
RENUNCIATION AND CONSOLIDATED TRANSFER FORM	MARKING STAMP	
PART 1		
Full name of company or other eligible body:		
Description of rights:		
Quantity:	[Words]	[Figures]
Transfer identification number:		
Transfer Consolidation Number(s):		
PART 2		
Full name(s) and address(es) of transferee(s):	Transferee's broker hereby certifies: (a) that, the rights set out in Part 1 of the Form(s) whose Transfer Consolidation Number(s) is (<i>or</i> are) set out in Part 1 above having been purchased in the ordinary course of business, the marketable securities to which the rights relate are to be allotted to the transferee(s) named in this Part; and (b) that stamp duty, if payable, has been or will be paid; and hereby requests that the marketable securities be allotted by the company or eligible body to the transferee(s) and such entries be made in the register as are necessary to give effect to the renunciation(s) and transfer(s). [Transferee's broker's stamp]	
	Date of affixing stamp:	

3

Forms of Transfer of Marketable Securities and Marketable Rights **Schedule 2**

1
2

FORM 9		Section 1101
TRUSTEE TRANSFER FORM	MARKING STAMP	
PART 1		
Full name of company or other eligible body:		
Description of securities:	Class:	If not fully paid, paid to
Quantity:	[Words]	[Figures]
Transfer identification number, where appropriate:		
Full name(s) of transferor(s):		
PART 2		
Full name(s) and address(es) of transferee(s):	Transferor hereby certifies that the securities set out in Part 1 above are to be registered in the name(s) of the transferee(s) named in this Part, being the person(s) for or on whose behalf the transferor held them, either alone or together with another person or other persons, in the ordinary course of business immediately before the execution of this transfer, and hereby requests that such entries be made in the register as are necessary to give effect to this transfer.	
I (<i>or</i> We) hereby transfer the above securities to the transferee(s) named in Part 2 hereof.		
Execution by the transferor(s):		
Date of execution:		

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2

FORM 10

Section 1102

TRUSTEE RENUNCIATION AND TRANSFER FORM

PART 1

Full name of company or other eligible body:

Description of rights:

Register:

Quantity:

[Words]

[Figures]

Transfer identification number, where appropriate:

Full name(s) of transferor(s):

PART 2

Full name(s) and address(es) of transferee(s):

Transferor hereby certifies that, the rights set out in Part 1 above having been transferred to the person(s) for or on whose behalf the transferor held them, either alone or together with another person or other persons, in the ordinary course of business immediately before the transfer, the marketable securities to which the rights relate are to be allotted to the transferee(s) named in this Part, and hereby requests that the marketable securities be allotted by the company or eligible body to the transferee(s) and that such entries be made in the register as are necessary to give effect to this renunciation and transfer.

I (*or* We) hereby renounce and transfer the above rights in favour of the transferee(s) named in Part 2 hereof.

Execution by the transferor(s):

Date of execution:

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4
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6**Schedule 3—Penalties**

Note: See section 1311.

Penalties		
Item	Provision	Penalty
1	Section 111AU	200 penalty units or imprisonment for 5 years, or both.
2	Subsection 113(1)	50 penalty units or imprisonment for 1 year, or both.
3	Subsection 113(3)	5 penalty units.
4	Section 115	5 penalty units.
5	Subsection 117(5)	10 penalty units, or imprisonment for 3 months, or both.
6	Subsection 123(3)	10 penalty units, or imprisonment for 3 months, or both.
7	Subsection 136(5)	5 penalty units.
8	Section 139	5 penalty units.
9	Subsections 142(1) and (2)	5 penalty units.
10	Subsection 143(1)	5 penalty units.
11	Section 144	10 penalty units or imprisonment for 3 months, or both.
12	Subsections 145(1) and (3)	5 penalty units.
13	Section 146	5 penalty units.
14	Subsections 148(2), (3) and (4)	10 penalty units or imprisonment for 3 months, or both.
15	Subsection 150(2)	5 penalty units.
16	Subsection 151(2)	5 penalty units.
17	Subsections 153(1) and (2)	10 penalty units or imprisonment for 3 months, or both.
18	Section 156	10 penalty units or imprisonment for 3 months, or both.
19	Subsection 157(2)	5 penalty units.

Penalties		
Item	Provision	Penalty
20	Subsection 158(2)	50 penalty units or imprisonment for 1 year, or both.
21	Subsection 162(3)	5 penalty units.
22	Subsection 163(5)	10 penalty units or imprisonment for 3 months, or both.
23	Subsection 165(2)	50 penalty units or imprisonment for 1 year, or both.
24	Section 168	10 penalty units or imprisonment for 3 months, or both.
25	Subsection 170(3)	10 penalty units or imprisonment for 3 months, or both.
26	Section 172	10 penalty units or imprisonment for 3 months, or both.
27	Section 173	10 penalty units or imprisonment for 3 months, or both.
28	Section 174	10 penalty units or imprisonment for 3 months, or both.
29	Section 177	10 penalty units or imprisonment for 3 months, or both.
30	Section 184	200 penalty units or imprisonment for 5 years, or both.
31	Subsections 188(1) and (2)	5 penalty units.
32	Subsection 191(1)	10 penalty units or imprisonment for 3 months, or both.
33	Subsection 195(1)	5 penalty units.
34	Section 199B	5 penalty units.
35	Subsection 200B(1)	25 penalty units or imprisonment for 6 months, or both.
36	Section 200C	25 penalty units or imprisonment for 6 months, or both.
37	Section 200D	25 penalty units or imprisonment for 6 months, or both.
38	Subsection 201D(1)	10 penalty units or imprisonment for 3 months, or both.

Penalties		
Item	Provision	Penalty
39	Subsection 201D(2)	5 penalty units.
40	Subsection 202B(1)	5 penalty units.
41	Subsections 203D(3) and (5)	5 penalty units.
42	Section 204A	5 penalty units.
43	Subsections 204C(1) and (2)	5 penalty units.
44	Subsections 205B(1), (2), (4) and (5)	10 penalty units or imprisonment for 3 months, or both.
45	Subsections 205C(1) and (2)	10 penalty units or imprisonment for 3 months, or both.
46	Subsection 205E(2)	10 penalty units or imprisonment for 3 months, or both.
47	Section 205F	10 penalty units or imprisonment for 3 months, or both.
48	Subsections 205G(1), (3) and (4)	10 penalty units or imprisonment for 3 months, or both.
49	Subsection 206A(1)	50 penalty units or imprisonment for 1 year, or both.
50	Subsection 209(3)	2000 penalty units, or imprisonment for 5 years, or both.
51	Section 224	200 penalty units or imprisonment for 5 years, or both.
52	Section 225	5 penalty units.
53	Section 235	50 penalty units or imprisonment for 1 year, or both.
54	Section 237	25 penalty units or imprisonment for 6 months, or both.
55	Section 242	10 penalty units or imprisonment for 3 months, or both.
56	Subsection 242AA(3)	5 penalty units.
58	Subsection 246B(3)	5 penalty units.
59	Subsection 246D(6)	5 penalty units.
60	Subsections 246F(1) and (3)	5 penalty units.

Penalties		
Item	Provision	Penalty
61	Subsection 246G(1)	5 penalty units.
62	Section 247C	5 penalty units.
63	Subsections 249E(3) and (4)	5 penalty units.
64	Section 249K	5 penalty units.
65	Section 249Z	5 penalty units.
66	Subsection 250A(5)	5 penalty units.
67	Subsections 250N(1) and (2)	10 penalty units or imprisonment for 3 months, or both.
68	Subsections 250P(3) and (4)	10 penalty units or imprisonment for 3 months, or both.
69	Section 250S	5 penalty units.
70	Section 250T	5 penalty units.
71	Subsections 251A(1) to (5)	10 penalty units or imprisonment for 3 months, or both.
72	Subsections 251B(1), (3) and (4)	5 penalty units.
73	Subsections 252C(3) and (4)	5 penalty units.
74	Section 252H	5 penalty units.
75	Section 252X	5 penalty units.
76	Subsection 252Y(5)	5 penalty units.
77	Subsections 253M(1), (2) and (3)	10 penalty units or imprisonment for 3 months, or both.
78	Subsections 253N(1), (3) and (4)	5 penalty units.
79	Subsection 254H(4)	5 penalty units.
80	Subsection 254L(3)	2,000 penalty units, or imprisonment for 5 years, or both.
81	Subsection 254N(2)	5 penalty units.
82	Subsection 254Q(13)	5 penalty units.
83	Section 254T	100 penalty units or imprisonment for 2 years, or both.

Penalties		
Item	Provision	Penalty
84	Subsections 254X(1) and (2)	5 penalty units.
85	Section 254Y	5 penalty units.
86	Subsection 256D(4)	2,000 penalty units, or imprisonment for 5 years, or both.
87	Subsection 259B(6)	5 penalty units.
88	Subsection 259D(4)	5 penalty units.
89	Subsection 259F(3)	2,000 penalty units, or imprisonment for 5 years, or both.
90	Subsection 260D(3)	2,000 penalty units, or imprisonment for 5 years, or both.
91	Subsection 283AA(1)	25 penalty units or imprisonment for 6 months, or both.
92	Subsection 283AA(3)	25 penalty units or imprisonment for 6 months, or both.
93	Section 283AB	25 penalty units or imprisonment for 6 months, or both.
94	Subsection 283AC(1)	25 penalty units or imprisonment for 6 months, or both.
95	Subsection 283AC(2)	25 penalty units or imprisonment for 6 months, or both.
96	Subsection 283BH(1)	200 penalty units or imprisonment for 5 years, or both.
97	Section 283BI	25 penalty units or imprisonment for 6 months, or both.
98	Section 283CE	25 penalty units or imprisonment for 6 months, or both.
99	Section 286	25 penalty units or imprisonment for 6 months, or both.
100	Section 287	25 penalty units or imprisonment for 6 months, or both.
101	Section 288	25 penalty units or imprisonment for 6 months, or both.
102	Subsection 289(2)	25 penalty units or imprisonment for 6 months, or both.

Penalties		
Item	Provision	Penalty
103	Section 294	10 penalty units or imprisonment for 3 months, or both.
104	Subsection 308(1)	50 penalty units or imprisonment for 1 year, or both.
105	Section 311	10 penalty units or imprisonment for 3 months, or both.
106	Section 312	25 penalty units or imprisonment for 6 months, or both.
107	Section 313	10 penalty units or imprisonment for 3 months, or both.
108	Subsection 314(1)	10 penalty units or imprisonment for 3 months, or both.
109	Section 316	10 penalty units or imprisonment for 3 months, or both.
110	Section 317	10 penalty units or imprisonment for 3 months, or both.
111	Subsections 318(1), (3) and (4)	25 penalty units or imprisonment for 6 months, or both.
112	Subsections 318(1) and (5)	25 penalty units or imprisonment for 6 months, or both.
113	Section 322	10 penalty units or imprisonment for 3 months, or both.
114	Section 323	25 penalty units or imprisonment for 6 months, or both.
115	Section 323B	25 penalty units or imprisonment for 6 months, or both.
116	Subsection 323D(3)	10 penalty units or imprisonment for 3 months, or both.
117	Subsection 344(2)	2,000 penalty units, or imprisonment for 5 years, or both.
118	Subsections 345(1), (2) and (3)	5 penalty units.
119	Subsection 346(1)	5 penalty units.
120	Section 428	10 penalty units or imprisonment for 3 months, or both.

Penalties		
Item	Provision	Penalty
121	Subsection 437C(1)	25 penalty units or imprisonment for 6 months, or both.
122	Subsection 437D(5)	25 penalty units or imprisonment for 6 months, or both.
123	Subsection 438B(4)	50 penalty units or imprisonment for 1 year, or both.
124	Subsection 438C(5)	50 penalty units or imprisonment for 1 year, or both.
125	Section 448B	25 penalty units or imprisonment for 6 months, or both.
126	Section 448C	25 penalty units or imprisonment for 6 months, or both.
127	Section 448D	25 penalty units or imprisonment for 6 months, or both.
128	Section 450E	10 penalty units.
129	Section 471A	25 penalty units or imprisonment for 6 months, or both.
130	Section 475	25 penalty units or imprisonment for 6 months, or both.
131	Subsection 486A(8)	100 penalty units or imprisonment for 2 years, or both.
132	Section 494	50 penalty units or imprisonment for 1 year, or both.
133	Section 497	10 penalty units or imprisonment for 3 months, or both.
134	Subsection 530A(6)	50 penalty units or imprisonment for 1 year, or both.
135	Subsections 530B(3) and (6)	50 penalty units or imprisonment for 1 year, or both.
136	Section 532	10 penalty units or imprisonment for 3 months, or both.
137	Section 541	10 penalty units or imprisonment for 3 months, or both.
138	Subsection 588G(3)	2,000 penalty units, or imprisonment for 5 years, or both.

Penalties		
Item	Provision	Penalty
139	Subsection 590(1)	100 penalty units or imprisonment for 2 years, or both.
140	Subsection 590(5)	50 penalty units or imprisonment for 1 year, or both.
141	Subsection 592(1)	50 penalty units or imprisonment for 1 year, or both.
142	Subsection 592(6)	100 penalty units or imprisonment for 2 years, or both.
143	Section 595	10 penalty units or imprisonment for 3 months, or both.
144	Section 596	100 penalty units or imprisonment for 2 years, or both.
145	Subsection 596AB(1)	1,000 penalty units or imprisonment for 10 years, or both.
146	Subsection 596F(3)	100 penalty units or imprisonment for 2 years, or both.
147	Section 597	100 penalty units or imprisonment for 2 years, or both.
148	Subsections 597(6), (7), (10A) and (13)	100 penalty units or imprisonment for 2 years, or both.
149	Subsection 597A(3)	100 penalty units or imprisonment for 2 years, or both.
150	Subsection 601AD(5)	5 penalty units.
151	Subsection 601BC(5)	10 penalty units or imprisonment for 3 months, or both.
152	Subsections 601BH(1) and (2)	5 penalty units.
153	Subsection 601BJ(3)	5 penalty units.
154	Subsection 601BK(1)	5 penalty units.
155	Subsection 601BP(1)	5 penalty units.
156	Section 601BR	5 penalty units.
157	Section 601CW	10 penalty units or imprisonment for 3 months, or both.
158	Subsection 601CZB(1)	10 penalty units or imprisonment for 3 months, or both.

Penalties		
Item	Provision	Penalty
159	Section 601CZC	10 penalty units or imprisonment for 3 months, or both.
160	Section 601DD	5 penalty units.
161	Section 601DE	10 penalty units or imprisonment for 3 months, or both.
162	Subsection 601DH(1)	5 penalty units.
163	Subsection 601ED(5)	200 penalty units or imprisonment for 5 years, or both.
164	Subsection 601FF(2)	200 penalty units or imprisonment for 5 years, or both.
165	Subsection 601FL(4)	100 penalty units or imprisonment for 2 years, or both.
166	Subsection 601FM(3)	100 penalty units or imprisonment for 2 years, or both.
167	Subsection 601FQ(6)	100 penalty units or imprisonment for 2 years, or both.
168	Section 601HD	25 penalty units or imprisonment for 6 months, or both.
169	Subsection 601HG(6)	25 penalty units or imprisonment for 6 months, or both.
170	Subsection 601JA(1)	100 penalty units or imprisonment for 2 years, or both.
171	Section 601JA	25 penalty units or imprisonment for 6 months, or both.
172	Subsection 601JB(5)	25 penalty units or imprisonment for 6 months, or both.
173	Subsection 601KA(3)	25 penalty units or imprisonment for 6 months, or both.
174	Subsection 606(1)	25 penalty units or imprisonment for 6 months, or both.
175	Subsection 606(2)	25 penalty units or imprisonment for 6 months, or both.
176	Subsection 606(4)	25 penalty units or imprisonment for 6 months, or both.

Penalties		
Item	Provision	Penalty
177	Paragraphs 614(1)(a), (b), (c) and (d)	100 penalty units or imprisonment for 2 years, or both.
178	Subsection 622(1)	25 penalty units or imprisonment for 6 months, or both.
179	Subsection 623(1)	25 penalty units or imprisonment for 6 months, or both.
180	Subsection 624(2)	25 penalty units or imprisonment for 6 months, or both.
181	Subsections 630(2), (3) and (4)	25 penalty units or imprisonment for 6 months, or both.
182	Subsection 631(1)	100 penalty units or imprisonment for 2 years, or both.
183	Subsection 631(2)	200 penalty units or imprisonment for 5 years, or both.
184	Subsection 633(1) (items 4, 5, 7, 8, 9, 11, 12, 13, 14)	25 penalty units or imprisonment for 6 months, or both.
185	Section 635 (items 5, 7, 8, 10, 11, 12, 13, 14)	25 penalty units or imprisonment for 6 months, or both.
186	Subsection 636(3)	25 penalty units or imprisonment for 6 months, or both.
187	Subsection 636(4)	10 penalty units.
188	Subsection 637(1)	25 penalty units or imprisonment for 6 months, or both.
189	Subsection 638(1)	25 penalty units or imprisonment for 6 months, or both.
190	Subsection 638(3)	25 penalty units or imprisonment for 6 months, or both.
191	Subsection 638(5)	25 penalty units or imprisonment for 6 months, or both.
192	Subsection 638(6)	10 penalty units.
193	Subsection 639(1)	25 penalty units or imprisonment for 6 months, or both.
194	Subsection 640(1)	25 penalty units or imprisonment for 6 months, or both.

Penalties		
Item	Provision	Penalty
195	Subsection 641(1)	25 penalty units or imprisonment for 6 months, or both.
196	Section 643	25 penalty units or imprisonment for 6 months, or both.
197	Section 644	25 penalty units or imprisonment for 6 months, or both.
198	Subsections 647(1), (2) and (3)	25 penalty units or imprisonment for 6 months, or both.
199	Subsection 648A(1)	25 penalty units or imprisonment for 6 months, or both.
200	Subsections 648E(1) and (2)	25 penalty units or imprisonment for 6 months, or both.
201	Section 648G	50 penalty units or imprisonment for 1 year, or both.
202	Subsection 649C(2)	25 penalty units or imprisonment for 6 months, or both.
203	Subsection 650B(3)	25 penalty units or imprisonment for 6 months, or both.
204	Subsections 650E(5) and (6)	25 penalty units or imprisonment for 6 months, or both.
205	Subsection 650F(3)	25 penalty units or imprisonment for 6 months, or both.
206	Subsection 651A(4)	25 penalty units or imprisonment for 6 months, or both.
207	Section 651C	25 penalty units or imprisonment for 6 months, or both.
208	Subsection 652C(3)	25 penalty units or imprisonment for 6 months, or both.
209	Subsection 654A(1)	25 penalty units or imprisonment for 6 months, or both.
210	Subsection 654C(1)	25 penalty units or imprisonment for 6 months, or both.
211	Subsection 654C(3)	25 penalty units or imprisonment for 6 months, or both.
212	Section 657F	25 penalty units or imprisonment for 6 months, or both.

Penalties		
Item	Provision	Penalty
213	Section 661D	25 penalty units or imprisonment for 6 months, or both.
214	Subsection 662A(1)	25 penalty units or imprisonment for 6 months, or both.
215	Section 663A	25 penalty units or imprisonment for 6 months, or both.
216	Subsections 664D(1), (2) and (3)	25 penalty units or imprisonment for 6 months, or both.
217	Subsections 664E(2), (3) and (4)	25 penalty units or imprisonment for 6 months, or both.
218	Subsection 665A(2)	25 penalty units or imprisonment for 6 months, or both.
219	Subsections 665D(3) and (4)	25 penalty units or imprisonment for 6 months, or both.
220	Section 665E	25 penalty units or imprisonment for 6 months, or both.
221	Subsection 666A(1)	25 penalty units or imprisonment for 6 months, or both.
222	Subsections 666B(2) and (3)	25 penalty units or imprisonment for 6 months, or both.
223	Subsection 667A(3)	25 penalty units or imprisonment for 6 months, or both.
224	Subsections 668A(1), (3) and (4)	25 penalty units or imprisonment for 6 months, or both.
225	Subsection 668B(1)	25 penalty units or imprisonment for 6 months, or both.
226	Subsection 670A(3)	50 penalty units or imprisonment for 1 year, or both.
227	Subsections 670C(1), (2) and (3)	25 penalty units or imprisonment for 6 months, or both.
228	Subsection 671B(1)	25 penalty units or imprisonment for 6 months, or both.
229	Subsection 672B(1)	25 penalty units or imprisonment for 6 months, or both.
230	Subsection 721(1)	200 penalty units or imprisonment for 5 years, or both.

Penalties		
Item	Provision	Penalty
231	Subsection 721(4)	200 penalty units or imprisonment for 5 years, or both.
232	Subsection 722(1)	25 penalty units or imprisonment for 6 months, or both.
233	Subsection 724(1)	25 penalty units or imprisonment for 6 months, or both.
234	Subsection 725(1)	25 penalty units or imprisonment for 6 months, or both.
235	Section 726	200 penalty units or imprisonment for 5 years, or both.
236	Subsection 727(1)	200 penalty units or imprisonment for 5 years, or both.
237	Subsection 727(2)	200 penalty units or imprisonment for 5 years, or both.
238	Subsection 727(3)	200 penalty units or imprisonment for 5 years, or both.
239	Subsection 727(4)	200 penalty units or imprisonment for 5 years, or both.
240	Subsection 728(3)	200 penalty units or imprisonment for 5 years, or both.
241	Section 730	50 penalty units or imprisonment for 1 year, or both.
242	Subsection 734(1)	25 penalty units or imprisonment for 6 months, or both.
243	Subsection 734(2)	25 penalty units or imprisonment for 6 months, or both.
244	Section 735	10 penalty units or imprisonment for 3 months, or both.
245	Subsection 736(1)	25 penalty units or imprisonment for 6 months, or both.
246	Section 766F	400 penalty units.
247	Section 766G	500 penalty units.
248	Section 767	50 penalty units or imprisonment for 1 year, or both.

Penalties		
Item	Provision	Penalty
249	Subsection 775(6)	10 penalty units for each day during all or part of which the contravention continues.
250	Section 776	25 penalty units or imprisonment for 6 months, or both.
251	Section 780	50 penalty units or imprisonment for 1 year, or both.
252	Section 781	50 penalty units or imprisonment for 1 year, or both.
253	Section 787	50 penalty units or imprisonment for 1 year, or both.
254	Section 788	10 penalty units.
255	Section 806	25 penalty units or imprisonment for 6 months, or both.
256	Section 807	25 penalty units or imprisonment for 6 months, or both.
257	Section 809	50 penalty units or imprisonment for 1 year, or both.
258	Section 813	25 penalty units or imprisonment for 6 months, or both.
259	Section 814	25 penalty units or imprisonment for 6 months, or both.
260	Section 815	50 penalty units or imprisonment for 1 year, or both.
261	Section 835	25 penalty units or imprisonment for 6 months, or both.
262	Section 839	25 penalty units or imprisonment for 6 months, or both.
263	Section 843	25 penalty units or imprisonment for 6 months, or both.
264	Section 844	25 penalty units or imprisonment for 6 months, or both.
265	Section 845	25 penalty units or imprisonment for 6 months, or both.

Penalties		
Item	Provision	Penalty
266	Section 846	(a) for a first offence—25 penalty units or imprisonment for 6 months, or both; (b) for a later offence—100 penalty units or imprisonment for 2 years, or both.
267	Subsection 847(5)	10 penalty units for each day during all or part of which the contravention continues.
268	Section 849	25 penalty units or imprisonment for 6 months, or both.
269	Subsection 866(3)	50 penalty units or imprisonment for 1 year, or both.
270	Subsection 866(4)	100 penalty units or imprisonment for 2 years, or both.
271	Subsection 867(3)	50 penalty units or imprisonment for 1 year, or both.
272	Subsection 867(4)	100 penalty units or imprisonment for 2 years, or both.
273	Subsection 868(2)	50 penalty units or imprisonment for 1 year, or both.
274	Subsection 868(3)	100 penalty units or imprisonment for 2 years, or both.
275	Subsection 869(3)	50 penalty units or imprisonment for 1 year, or both.
276	Subsection 869(4)	100 penalty units or imprisonment for 2 years, or both.
277	Subsection 870(3)	25 penalty units or imprisonment for 6 months, or both.
278	Section 872	25 penalty units or imprisonment for 6 months, or both.
279	Subsection 873(6)	100 penalty units or imprisonment for 2 years, or both.
280	Section 881	25 penalty units or imprisonment for 6 months, or both.
281	Subsection 889(3)	50 penalty units or imprisonment for 1 year, or both.
282	Section 891	50 penalty units or imprisonment for 1 year, or both.

Penalties		
Item	Provision	Penalty
283	Section 997	200 penalty units or imprisonment for 5 years, or both.
284	Section 998	200 penalty units or imprisonment for 5 years, or both.
285	Section 999	200 penalty units or imprisonment for 5 years, or both.
286	Section 1000	200 penalty units or imprisonment for 5 years, or both.
287	Section 1001	200 penalty units or imprisonment for 5 years, or both.
288	Subsection 1001A(2)	200 penalty units or imprisonment for 5 years, or both.
289	Subsection 1001B(1)	200 penalty units or imprisonment for 5 years, or both.
290	Section 1002G	2,000 penalty units or imprisonment for 5 years, or both.
291	Subsections 1096A(1), (3), (4), (5) and (6)	10 penalty units or imprisonment for 3 months, or both.
292	Section 1112	25 penalty units or imprisonment for 6 months, or both.
293	Section 1112A	25 penalty units or imprisonment for 6 months, or both.
294	Section 1112B	25 penalty units or imprisonment for 6 months, or both.
295	Subsection 1114(8)	100 penalty units or imprisonment for 2 years, or both.
296	Section 1117	50 penalty units or imprisonment for 12 months, or both.
297	Section 1118	50 penalty units or imprisonment for 12 months, or both.
298	Section 1123	200 penalty units or imprisonment for 5 years, or both.
299	Section 1123A	200 penalty units or imprisonment for 5 years, or both.
300	Section 1125	200 penalty units or imprisonment for 5 years, or both.

Penalties		
Item	Provision	Penalty
301	Section 1128	200 penalty units or imprisonment for 5 years, or both.
302	Section 1129	200 penalty units or imprisonment for 5 years, or both.
303	Section 1130	200 penalty units or imprisonment for 5 years, or both.
304	Subsections 1138(10) and (11)	10 penalty units for each day on which a contravention occurs.
305	Subsection 1139(5)	25 penalty units or imprisonment for 6 months, or both.
306	Section 1142	200 penalty units or imprisonment for 5 years, or both.
307	Section 1143	200 penalty units or imprisonment for 5 years, or both.
308	Section 1153	50 penalty units or imprisonment for 1 year, or both.
309	Section 1154	10 penalty units.
310	Section 1192	25 penalty units or imprisonment for 6 months, or both.
311	Section 1205	100 penalty units or imprisonment for 2 years, or both.
312	Section 1208	25 penalty units or imprisonment for 6 months, or both.
313	Section 1209	50 penalty units or imprisonment for 1 year, or both.
314	Section 1210	25 penalty units or imprisonment for 6 months, or both.
315	Section 1213	25 penalty units or imprisonment for 6 months, or both.
316	Section 1214	100 penalty units or imprisonment for 2 years, or both.
317	Section 1219	100 penalty units or imprisonment for 2 years, or both.
318	Section 1256	200 penalty units or imprisonment for 5 years, or both.

Penalties		
Item	Provision	Penalty
319	Section 1258	100 penalty units or imprisonment for 2 years, or both.
320	Section 1259	200 penalty units or imprisonment for 5 years, or both.
321	Section 1260	200 penalty units or imprisonment for 5 years, or both.
322	Section 1261	25 penalty units or imprisonment for 6 months, or both.
323	Section 1262	200 penalty units or imprisonment for 5 years, or both.
324	Section 1263	200 penalty units or imprisonment for 5 years, or both.
325	Section 1264	200 penalty units or imprisonment for 5 years, or both.
326	Section 1266	25 penalty units or imprisonment for 6 months, or both.
327	Section 1267	25 penalty units or imprisonment for 6 months, or both.
328	Section 1268	100 penalty units or imprisonment for 2 years, or both.
329	Section 1269	25 penalty units or imprisonment for 6 months, or both.
330	Section 1271	50 penalty units or imprisonment for 1 year, or both.
331	Section 1272	50 penalty units or imprisonment for 1 year, or both.
332	Section 1274	50 penalty units or imprisonment for 1 year, or both.
333	Subsection 1300(2A)	10 penalty units or imprisonment for 3 months, or both.
334	Section 1307	100 penalty units or imprisonment for 2 years, or both.
335	Subsection 1308(2)	100 penalty units or imprisonment for 2 years, or both.
336	Subsection 1309(1)	100 penalty units or imprisonment for 2 years, or both.

Penalties		
Item	Provision	Penalty
337	Subsection 1309(2)	50 penalty units or imprisonment for 1 year, or both.
338	Subsection 1317FA(1)	2,000 penalty units or imprisonment for 5 years, or both.
339	Section 1323	25 penalty units or imprisonment for 6 months, or both.
340	Subsections 1423(1) and (2)	5 penalty units.
341	Subsection 1431(6)	5 penalty units.
342	Section 1432	5 penalty units.
343	Subsection 1436(2)	5 penalty units.

Schedule 4—Transfer of financial institutions and friendly societies

Note: See section 1465A.

Part 1—Preliminary

1 Definitions

In this Schedule, except so far as the contrary intention appears:

AFIC Code of a State or Territory means the Australian Financial Institutions Commission Code as set out in the *Australian Financial Institutions Commission Act 1992* of Queensland as in force immediately before the transfer date and as applied as a law of the State or Territory.

building society of a State or Territory means a transferring financial institution authorised under the Financial Institutions Code of the State or Territory to operate as a building society immediately before the transfer date.

Financial Institutions Code of a State or Territory means the Financial Institutions Code set out in the *Financial Institutions (Queensland) Act 1992* as in force immediately before the transfer date and as applied as a law of the State or Territory.

Friendly Societies Code means the Friendly Societies Code set out in Schedule 1 to the **Friendly Societies (Victoria) Act 1996** as in force immediately before the transfer date.

Friendly Societies Code of a State or Territory means:

- (a) the Friendly Societies Code as applied as a law of the State or Territory; or
- (b) if the State is Western Australia—the Friendly Societies (Western Australia) Code set out in the *Friendly Societies (Western Australia) Act 1999*.

member of a transferring financial institution means a person who, immediately before the transfer date, is a member of the institution under:

- (a) the previous governing Code; or
- (b) the rules of the institution.

membership share means a share in a company that was a transferring financial institution:

- (a) that was taken to have been issued under clause 12 of the transfer provisions; and
- (b) that carries the rights and obligations that were conferred or imposed on the person in a capacity other than that of shareholder, by:
 - (i) the institution's rules (as in force immediately before the transfer date); and
 - (ii) the previous governing Code; and
- (c) on which no amount is paid; and
- (d) on which no amount is unpaid; and

- (e) that is not:
 - (i) transferable or transmissible; or
 - (ii) capable of devolution by will or by operation of law; and
- (f) that can be cancelled as set out in subclause 12(3).

previous governing Code for a transferring financial institution means the Code or law under which the institution is registered immediately before the transfer date.

State Supervisory Authority (SSA) for a transferring financial institution means:

- (a) the SSA for the institution within the meaning of the previous governing Code; or
- (b) in the case of The Cairns Cooperative Weekly Penny Savings Bank Limited—the Queensland Office of Financial Supervision.

transfer date means the date that is the transfer date for the purposes of the *Financial Sector Reform (Amendments and Transitional Provisions) Act (No. 1) 1999*.

transfer provisions of a State or Territory means Schedule 4 to the Corporations Law of the State or Territory.

transferring financial institution of a State or Territory means:

- (a) a building society of the State or Territory (that is, a society that was registered under the Financial Institutions Code of the State or Territory, and authorised to operate as a building society, immediately before the transfer date); or
- (b) a credit union of the State or Territory (that is, a society that was registered under the Financial Institutions Code of the State or Territory, and authorised to operate as a credit union, immediately before the transfer date); or
- (c) a friendly society of the State or Territory (that is, a body that was registered as a friendly society under the Friendly Societies Code of the State or Territory immediately before the transfer date); or
- (d) a body registered as an association under Part 12 of the Financial Institutions Code of the State or Territory immediately before the transfer date; or
- (e) a body registered as a Special Services Provider under the AFIC Code of the State or Territory immediately before the transfer date; or
- (f) a body registered as an association under Part 12 of the Friendly Societies Code of the State or Territory immediately before the transfer date; or
- (g) The Cairns Cooperative Weekly Penny Savings Bank Limited referred to in section 263 of the *Financial Intermediaries Act 1996* of Queensland if:
 - (i) the State is Queensland; and
 - (ii) a determination by APRA under subitem 7(2) of the *Financial Sector Reform (Amendments and Transitional Provisions) Act (No. 1) 1999* is in force immediately before the transfer date.

Note: If a determination is made, the Bank will be covered by the *Banking Act 1959* from the transfer date. APRA may only make a determination if the Treasurer and the Queensland Minister responsible for the administration of the *Financial Intermediaries Act 1996* of Queensland have agreed that the Bank should be covered by the *Banking Act 1959*.

transition period means the period of 18 months starting on the transfer date.

withdrawable share of a transferring financial institution of a State or Territory means a withdrawable share within the meaning of the Financial Institutions Code of the State or Territory as in force immediately before the transfer date.

Part 2—Financial institutions that became companies

Division 1—Registration and its consequences

3 Background (registration of transferring financial institution as company)

- (1) On the transfer date, each transferring financial institution of a State or Territory was taken to be registered as a company under the Corporations Law of the State or Territory under the name under which the institution was registered under the previous governing Code immediately before the transfer date.
- (2) Subclause 3(2) of the transfer provisions governed the kind of company the transferring financial institution was registered as.
- (3) Under clause 7 of the transfer provisions, ASIC:
 - (a) gave the company an ACN; and
 - (b) kept a record of the company's registration; and
 - (c) issued a certificate to the company that stated:
 - (i) the company's name; and
 - (ii) the company's ACN; and
 - (iii) the company's type; and
 - (iv) that the company is registered as a company under the Corporations Law of the State or Territory.

4 Rules applied to transferring institution that was registered as a company under the transfer provisions

Application of section 1274 to registration documents

- (1) Subsections 1274(2) and (5) apply to the record of the company's registration referred to in paragraph 3(3)(b) of this Schedule as if it were a document lodged with ASIC.

ASIC may keep documents relating to company lodged while it was a registered body

- (2) ASIC may keep any of the documents relating to the company that were lodged because the company used to be a registered body.

Application of replaceable rules

- (3) The replaceable rules (as described in section 135) do not apply to the company, despite section 135, unless the company:
 - (a) repealed its constitution after the transfer date and before the commencement of this Act; or
 - (b) repeals its constitution on or after the commencement of this Act.

11 Transferring financial institution under external administration

Background

- (1) Clause 11 of the transfer provisions provided that if, immediately before the transfer date, provisions of Chapter 5 of the Corporations Law of a State or Territory applied to:
 - (a) a compromise or arrangement between a transferring financial institution of the State or Territory and its creditors; or
 - (b) a reconstruction of a transferring financial institution of the State or Territory; or
 - (c) a receiver or other controller of property of a transferring financial institution of the State or Territory; or
 - (d) the winding-up or dissolution of a transferring financial institution of the State or Territory;

because of Part 9 of the Financial Institutions Code, or Part 9 of the Friendly Societies Code, of the State or Territory, those provisions of Chapter 5 continued to apply to that matter after the transfer date.

Note: Clause 11 of the transfer provisions also provided that:

- (a) a matter referred to in paragraph (1)(a), (b) or (d) included an application or other step preliminary to the matter; and
 - (b) any act done before the transfer date under or for the purposes of the provisions of Chapter 5 as applied by the Code were to have effect as if it had been done under or for the purposes of Chapter 5 as it applied after the transfer date.
- (2) Clause 11 of the transfer provisions also provided that if, before the transfer date, a liquidator of a transferring financial institution of a State or Territory had been appointed under:
 - (a) section 341 of the Financial Institutions Code of the State or Territory; or
 - (b) section 402 of the Friendly Societies Code of the State or Territory;the institution could be wound up in accordance with the provisions of Chapter 5 of the Corporations Law of the State or Territory.

Continuing external administration under Chapter 5 of the Corporations Act 2001

- (3) If, immediately before the commencement of this Act, provisions of Chapter 5 of the Corporations Law of a State or Territory applied to:
 - (a) a compromise or arrangement between a transferring financial institution of the State or Territory and its creditors; or
 - (b) a reconstruction of a transferring financial institution of the State or Territory; or
 - (c) a receiver or other controller of property of a transferring financial institution of the State or Territory; or
 - (d) the winding-up or dissolution of a transferring financial institution of the State or Territory;

because of clause 11 of the transfer provisions, the corresponding provisions of Chapter 5 of this Act apply (as a law of the Commonwealth) to that matter after the commencement of this Act.

- (4) Subclause (3) does not limit the regulations that may be made under clause 28.
- (5) Any act done:

- (a) before the transfer date under or for the purposes of the provisions of Chapter 5 of the Corporations Law of the State or Territory as applied by the Code; or
 - (b) on or after the transfer date and before the commencement of this Act for the purposes of the provisions of Chapter 5 of the Corporations Law of the State or Territory as applied by clause 11 of the transfer provisions;
- has effect as if it had been done under or for the purposes of Chapter 5 of this Act as it applies after the commencement of this Act.

Division 2—Membership

12 Institution that became a company limited by shares

Background

- (1) Clause 12 of the transfer provisions applied to a transferring financial institution of a State or Territory if the institution was taken to be registered as a company limited by shares under clause 3 of the transfer provisions.
- (2) Clause 12 of the transfer provisions provided that:
 - (a) any shares in the institution on issue immediately before the transfer date (other than withdrawable shares) became shares of the company; and
 - (b) any withdrawable shares of the institution on issue immediately before the transfer date became redeemable preference shares of the company; and
 - (c) in the case of a building society—each person who was a member of the society immediately before the transfer date, other than by virtue of only holding shares in the society, was taken to have been issued with a membership share on the transfer date; and
 - (d) in any case other than that of a building society—any person:
 - (i) who was a member of the institution immediately before the transfer date; and
 - (ii) who did not hold any shares in the institution; andwas taken to have been issued with a membership share on the transfer date.

Joint members of institution that became a company limited by shares

- (3) If a person who was taken to have been issued with a membership share was a joint member, they hold the membership share jointly with the other member or members of the joint membership. This is so, even if the other member, or another member, held shares in the institution immediately before the transfer date. However, the joint membership does not have any more votes because of the membership share or shares than it had immediately before the transfer date.

Cancellation shares

- (4) A membership share can be cancelled at the option of the holder or the company in the circumstances (if any):
 - (a) set out in the company's constitution; or
 - (b) in which the member who holds the share could have had their membership of the institution cancelled immediately before the transfer date.Part 2J.1 does not apply to the cancellation of a membership share.

13 Institution that became a company limited by guarantee

Background

- (1) Clause 13 of the transfer provisions applied to a transferring financial institution of a State or Territory if the institution was taken to be registered as a company limited by guarantee under clause 3 of the transfer provisions.

- (2) Clause 13 of the transfer provisions provided that each person who was a member of the institution immediately before the transfer date was taken to have given a guarantee (but only for the purpose of determining whether the person is a member of the company).

Guarantees

- (3) Each person who becomes a member of the company after the commencement of this Act and before the amount of the relevant guarantee is determined is taken to have given a guarantee (but only for the purpose of determining whether the person is a member of the company).

Note: Someone who became a member after the transfer date and this Act commences was taken to have given a guarantee by clause 13 of the transfer provisions. This guarantee is preserved by sections 1373 and 1399.

- (4) If a person who is taken to have given a guarantee by subclause (2) is a joint member, they are taken to have given the guarantee jointly with the other member or members of the joint membership. However, the joint membership does not have any more votes because of giving the guarantee or guarantees than it had immediately before the transfer date.

14 Institution becoming a company limited by shares and guarantee

Background

- (1) Clause 14 of the transfer provisions applied to a transferring financial institution of a State or Territory if the institution was taken to be registered as a company limited by shares and guarantee under clause 3 of the transfer provisions.
- (2) Clause 14 of the transfer provisions provided that each person who was a member of the institution immediately before the transfer date was taken to have given a guarantee (but only for the purpose of determining whether the person is a member of the company).

Guarantees

- (3) Each person who becomes a member of the company after this Act commences and before the amount of the relevant guarantee is determined is taken to have given a guarantee (but only for the purpose of determining whether the person is a member of the company).

Note: Someone who became a member after the transfer date and this Act commences was taken to have given a guarantee by clause 13 of the transfer provisions. This guarantee is preserved by sections 1373 and 1399.

- (4) If a person who is taken to have given a guarantee by subclause (2) is a joint member, they are taken to have given the guarantee jointly with the other member or members of the joint membership. However, the joint membership does not have any more votes because of giving the guarantee or guarantees than it had immediately before the transfer date.

15 Redeemable preference shares that were withdrawable shares

- (1) This Act applies to a redeemable preference share that was a withdrawable share of a transferring financial institution of a State or Territory immediately before the transfer date, except that:

- (a) the share is redeemable on the same terms that the withdrawable share was withdrawable under the Financial Institutions Code of the State or Territory and the institution's rules or constitution; and
 - (b) the holder of the share continues to have the same rights and obligations that they had by holding the withdrawable share.
- (2) The provisions of this Act that apply to redeemable preference shares apply:
- (a) subject to subclause (1), to redeemable preference shares of a company registered under clause 3 of the transfer provisions; and
 - (b) to redeemable preference shares of a company (other than a company referred to in paragraph (a)) that is permitted to use the expression ***building society, credit union or credit society*** under section 66 of the *Banking Act 1959*;
- even if the shares are the only class of shares issued by the company.

16 Liability of members on winding up

- (1) If a transferring financial institution of a State or Territory that was registered under clause 3 of the transfer provisions is wound up, each person:
- (a) who was a past member of the institution at the time it became registered; and
 - (b) who did not again become a member; and
 - (c) who had not held shares in the institution;
- is not liable under Division 2 of Part 5.6 on the winding up.
- Note: A person who was a past member at the time of registration and who held shares in the institution may be liable as a past member under Division 2 of Part 5.6.
- (2) If a company that is registered under clause 3 of the transfer provisions is wound up, a person who is taken to have given a guarantee by subclause 13(1) or 14(1) of the transfer provisions, or clause 13 or 14 of this Schedule, is not liable under:
- (a) section 515 merely because the person is or was a member who is taken to have given a guarantee; or
 - (b) section 517 or paragraph 518(b) merely because the person is taken to have given a guarantee.

Division 3—Share capital

17 Share capital

Background (transfer of certain amounts to share capital)

- (1) On registration of a transferring financial institution of a State or Territory as a company under clause 3 of the transfer provisions:
 - (a) any amount of withdrawable share capital (within the meaning of the Financial Institutions Code of the State or Territory); and
 - (b) any amount standing to the credit of its share premium account; and
 - (c) any amount standing to the credit of its capital redemption reserve;immediately before the transfer date became part of the company's share capital under clause 17 of the transfer provisions.

Use of amount standing to credit of share premium account

- (2) The company may use the amount standing to the credit of its share premium account immediately before the transfer date (if any) to:
 - (a) provide for the premium payable on redemption of debentures or redeemable preference shares issued before the transfer date; or
 - (b) write off:
 - (i) the preliminary expenses of the institution incurred before the transfer date; or
 - (ii) expenses incurred, payments made, or discounts allowed before the transfer date, in respect of any issue of shares in, or debentures of, the institution.

18 Application of no par value rule

- (1) Section 254C applies to shares issued by a transferring financial institution of a State or Territory before the transfer date as well as shares issued on and after that.
- (2) In relation to a share issued by the institution before the transfer date:
 - (a) the amount paid on the share is the sum of all amounts paid to the institution at any time for the share (but not including any premium); and
 - (b) the amount unpaid on the share is the difference between the issue price of the share (but not including any premium) and the amount paid on the share (see paragraph (a)).

19 Calls on partly-paid shares

The liability of a shareholder for calls in respect of money unpaid on shares issued before the transfer date by a transferring financial institution of a State or Territory (whether on account of the par value of the shares or by way of premium) is not affected by the share ceasing to have a par value.

20 References in contracts and other documents to par value

- (1) This clause applies for the purpose of interpreting and applying the following after the commencement of this Act:

- (a) a contract entered into by a transferring financial institution of a State or Territory before the transfer date (including the institution's constitution);
- (b) a trust deed or other document executed by or in relation to the institution before the transfer date.

Note: The interpretation and application of contracts and deeds before this Act commences was governed by clause 20 of the transfer provisions.

- (2) A reference to the par value of a share issued by a transferring financial institution of a State or Territory is taken to be a reference to:
 - (a) if the share is issued before the transfer date—the par value of the share immediately before then; or
 - (b) if the share is issued on or after the transfer date but shares of the same class were on issue immediately before then—the par value that the share would have had if it had been issued then; or
 - (c) if the share is issued on or after the transfer date and shares of the same class were not on issue immediately before then—the par value determined by the directors.

A reference to share premium is taken to be a reference to any residual share capital in relation to the share.

- (3) A reference to a right to a return of capital on a share issued by the institution is taken to be a reference to a right to a return of capital of a value equal to the amount paid in respect of the share's par value.
- (4) A reference to the aggregate par value of the institution's issued share capital is taken to be a reference to that aggregate as it existed immediately before the transfer date and:
 - (a) increased to take account of the par value of any shares issued after then; and
 - (b) reduced to take account of the par value of any shares cancelled after then.

Part 4—The transition period

25 ASIC may direct directors of a company to modify its constitution

- (1) If a company registered under clause 3 of the transition provisions has not modified its constitution so that it complies with subclause 24(1) of the transition provisions by the end of the transition period, ASIC may direct, in writing, the directors of the company to:
 - (a) take the necessary or specified steps to:
 - (i) ensure that the company modifies its constitution so that it does comply; or
 - (ii) ensure that the company makes the modifications to its constitution that ASIC specifies; and
 - (b) take those steps within a specified time (which must be more than 28 days).
A direction may require the directors to take steps that are inconsistent with the company's constitution.
- (2) ASIC may issue a direction under subclause (1) before the end of the transition period if requested by a majority of directors of the company.
- (3) No civil or criminal liability arises from action taken by a director in good faith and in accordance with a direction issued under subclause (1).
- (4) A person contravenes this subclause if, without reasonable excuse, they contravene a direction under subclause (1).
- (5) A person who intentionally or recklessly contravenes a direction under subclause (1) is guilty of an offence.

Penalty: 100 penalty units or imprisonment for 2 years, or both.

27 When certain modifications of a company's constitution under an exemption or declaration take effect

- (1) If the constitution of a company registered under clause 3 of the transition provisions was modified under an exemption or declaration made under clause 26 of the transition provisions, and that modification varies or cancels, or allows the variation or cancellation of:
 - (a) rights attached to shares in a class of shares; or
 - (b) rights of members in a class of members;the following provisions apply, and to the exclusion of section 246D if it would otherwise apply.
- (2) If the company is not required to lodge a copy of the modification with ASIC by or under any other provision of this Act, the company must lodge a copy of the modification with ASIC within 14 days of the modification being made.
- (3) If:
 - (a) members in the class do not all agree (whether by resolution or written consent) to the modification of the company's constitution; or

(b) the members in the class did not have an opportunity to vote on or consent to the modification;

10% or more of the members in the class may apply to the Court to have the modification set aside.

Note: If a company has only 1 class of shares, all members are members of the class.

- (4) An application may only be made within 1 month after the modification is lodged.
- (5) The modification takes effect:
 - (a) if no application is made to the Court to have it set aside—1 month after the modification is lodged; or
 - (b) if an application is made to the Court to have it set aside—when the application is withdrawn or finally determined.
- (6) The members of the class who want to have the modification set aside may appoint 1 or more of themselves to make the application on their behalf. The appointment must be in writing.
- (7) The Court may set aside the modification if it is satisfied that it would unfairly prejudice the applicants. However, the Court must confirm the modification if the Court is not satisfied of unfair prejudice.
- (8) Within 14 days after the Court makes an order, the company must lodge a copy of it with ASIC.

Part 5—Demutualisations

29 Disclosure for proposed demutualisation

- (1) If a modification of the constitution of an unlisted company registered under clause 3 of the transition provisions is proposed and the modification would have the effect of:
 - (a) varying or cancelling the rights of members, or a class of members, to the reserves of the company; or
 - (b) varying or cancelling the rights of members, or a class of members, to the assets of the company on a winding up; or
 - (c) varying or cancelling the voting rights of members or a class of members; or
 - (d) otherwise varying or cancelling rights so that Part 2F.2 (Class rights) applies; or
 - (e) allowing 1 of those variations or cancellations of rights;the following rules apply:
 - (f) notice of the meeting of the company's members at which the proposed modification is to be considered must be accompanied by the documents listed in subclause (4);
 - (g) notice of the meeting may not be shortened under subsection 249H(2);
 - (h) the company must lodge with ASIC the notice and the documents referred to in paragraphs (4)(a) and (c) within 7 days after notice of the meeting is given.
- (2) If:
 - (a) an issue of shares by an unlisted company registered under clause 3 of the transition provisions would have the effect of varying or cancelling rights so that Part 2F.2 (Class rights) applies; and
 - (b) at least 1 of the following is required to approve the share issue, or variation or cancellation of rights:
 - (i) a meeting of the company's members;
 - (ii) a resolution passed at a meeting of the class of members concerned;
 - (iii) written consent of a specified proportion of members in the class concerned;the following rules apply (in addition to those that apply under Part 2F.2):
 - (c) notice of the meeting or consent process must be accompanied by the documents listed in subclause (4);
 - (d) the company must lodge with ASIC the notice of the meeting or consent process and the documents referred to in paragraphs (4)(a) and (c) within 7 days after the notice is given;
 - (e) notice of the meeting may not be shortened under subsection 249H(2).Paragraph (c) need not be complied with to the extent that a person has already been given the documents.
- (3) ASIC may exempt a company from this Part under clause 30.
- (4) The documents that must accompany the notice are:
 - (a) a disclosure statement that:

- (i) satisfies clause 31; and
- (ii) ASIC has registered under clause 32; and
- (b) in the case of a proposed modification of the constitution of a company—
an estimate of the financial benefits (if any) the member will be offered if
the proposed modification occurs; and
- (c) a report by an expert that:
 - (i) states whether, in the expert’s opinion, the proposed modification or
share issue is in the best interests of the members of the company as a
whole; and
 - (ii) gives the expert’s reasons for forming that opinion; and
 - (iii) complies with subclauses 33(2) and (3).
- (5) If the company contravenes subclause (1) or (2) it is not guilty of an offence.
- (6) A person contravenes this subclause if they are involved in a contravention of
subclause (1) or (2).

Note 1: This subclause is a civil penalty provision.

Note 2: Section 79 defines *involved*.

- (7) A person commits an offence if they are involved in a contravention of
subclause (1) or (2) and the involvement is dishonest.

Penalty: 2,000 penalty units or imprisonment for 5 years, or both.

- (8) In this clause:

reserves includes general reserves and retained earnings of the company.

unlisted company means a company (registered under clause 3) that does not
have voting shares quoted on a stock market of a securities exchange.

30 ASIC’s exemption power

- (1) If ASIC is satisfied that a company does not have a mutual structure, it may
exempt the company from this Part.
- (2) If ASIC is satisfied that:
 - (a) a proposed modification of the constitution of a company will not result in
or allow a modification of the mutual structure of the company; or
 - (b) an issue of shares would not result in or allow a modification of the mutual
structure of the company;it may exempt the company from this Part in relation to the proposed
modification or share issue.
- (3) In determining whether the company has a mutual structure, ASIC may take into
account:
 - (a) the particular structure, circumstances and history of the company; and
 - (b) whether:
 - (i) each customer of the company (for example an account holder,
mortgagor or policy holder) is required to be a member of the
company; or
 - (ii) each member (or joint membership) has only 1 vote; and
 - (c) any other relevant matter in relation to the company or its members.

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- (4) In determining whether the proposed modification or share issue will result in or allow a modification of the mutual structure of the company, ASIC must take into account whether the proposed modification or share issue would have the effect of converting the company into a company run for the purpose of yielding a return to shareholders.
 - (5) An exemption under subclause (2) 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.
 - (6) The exemption must be in writing and ASIC must publish notice of it in the *Gazette*.
 - (7) For the purposes of this clause, the *provisions of this Part* include regulations made for the purposes of this Part.

31 Coverage of disclosure statement

The disclosure statement must give all the information that members would reasonably require and expect to be given to make an informed decision about the proposed modification or share issue.

32 Registration of disclosure statement

- (1) ASIC must register the disclosure statement if satisfied that the statement adequately sets out or explains the following (if relevant):
 - (a) the variation or cancellation of members' rights
 - (b) that the proposed modification will allow the variation or cancellation of members' rights
 - (c) in relation to a share issue:
 - (i) who will and will not receive shares under the issue; and
 - (ii) the rights and obligations attached to the shares; and
 - (iii) the implications of the share issue for the management and structure of the company
 - (d) what financial benefits (if any) members will be offered if the proposed modification occurs and why the benefits are considered to be appropriate
 - (e) the basis upon which members' entitlement to the financial benefits will be determined, including:
 - (i) any minimum period of membership that a member must satisfy to receive benefits; or
 - (ii) whether members must pay an amount or provide other value to receive benefits
 - (f) any preferential allocation of benefits to members, or a class of members, and how that allocation is to be determined
 - (g) any benefits officers of the company (including retiring officers) may receive (whether directly or indirectly) in connection with the proposed modification or share issue
 - (h) any other proposed changes to the company that are related to the proposed modification or share issue (for example, whether the company proposes to

list its securities for quotation on a securities market of a stock exchange or merge with another company)

- (i) the new name of the company, if the company's name is to be changed in connection with the proposed modification or share issue, or that it is not proposed to change the company's name
 - (j) the procedural steps required to vary or cancel the members' rights
 - (k) the procedural steps required to issue the shares
 - (l) how voting on the proposed modification or share issue will take place.
- (2) In deciding whether the disclosure statement adequately sets out or explains the matters in subclause (1), ASIC may also have regard to:
- (a) the readability of the statement; and
 - (b) whether the statement would be readily comprehensible by the members of the company concerned.
- (3) The disclosure statement must include a statement to the effect that registration of the disclosure statement:
- (a) is on the basis that the statement adequately sets out or explains the matters in subclause (1); and
 - (b) does not mean that ASIC has considered whether the proposed modification or share issue is in the best interests of the members of the company as a whole.
- (4) Subclause (1) does not limit clause 31.

33 Expert's report

- (1) If the company obtains 2 or more reports each of which could be used for the purposes of paragraph 29(4)(c), a copy of each report must:
- (a) be lodged with ASIC; and
 - (b) be given to each member entitled to receive a disclosure statement.

Penalty: 25 penalty units or imprisonment for 6 months, or both.

- (2) The report must be by an expert who is not an associate of the company.
- (3) The report must set out details of:
- (a) any relationship between the expert and the company, including any circumstances in which the expert gives it advice, or acts on its behalf, in the proper performance of the functions attaching to the expert's professional capacity or business relationship with the company; 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; 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.

34 Unconscionable conduct in relation to demutualisations

- (1) A person must not engage in:
- (a) conduct that is, in all the circumstances, unconscionable; or
 - (b) conduct that is misleading or deceptive or is likely to mislead or deceive;

in relation to:

- (c) a modification of the constitution of an unlisted company that is a modification to which this Part applies; or
- (d) anything done in reliance on, in conjunction with or in connection with the modification; or
- (e) a share issue to which this Part applies.

(2) In determining whether a person has engaged in conduct that contravenes paragraph (1)(a), have regard to:

- (a) whether the person, or someone acting for the person, exerted undue influence or pressure on, or used unfair tactics against, members of the company; and
- (b) whether the person, or someone acting for the person, engaged in conduct that resulted in a member or someone else gaining, or being in a position to gain, a benefit that the members generally did not, or would not be in a position to, gain.

This subclause does not limit subclause (1).

(3) A person who contravenes subclause (1) is not guilty of an offence.

35 Orders the Court may make

(1) Without limiting the Court's powers under Part 9.5, if the Court is satisfied that a person has engaged in conduct constituting a contravention of subclause 34(1), the Court may make 1 or more of the following orders:

- (a) an order requiring the person or a person involved in the contravention to disclose to the public, to a particular person or to a particular class of persons, in the manner specified in the order, specified information, or information of a specified kind, (being information that is in the possession of the person to whom the order is directed or to which that person has access)
- (b) an order requiring the person or a person involved in the contravention to publish, at their own expense, in a manner and at times specified in the order, advertisements the terms of which are specified in, or are to be determined in accordance with, the order
- (c) any order that it thinks necessary or desirable:
 - (i) to protect the rights or interests of any person affected by the conduct; or
 - (ii) to ensure, as far as possible, that a proposed modification or share issue proceeds in the manner in which it would have proceeded if the conduct had not been engaged in
- (d) without limiting the generality of paragraph (c):
 - (i) an order prohibiting the exercise of voting or other rights attached to specified shares; or
 - (ii) an order directing a company not to make payment, or to defer making payment, of any amount or amounts due from the company in respect of specified shares; or
 - (iii) an order prohibiting the acquisition or disposal of, or of an interest in, specified shares; or
 - (iv) an order directing the disposal of, or of an interest in, specified shares; or

- (v) an order directing a company not to register a transfer or transmission of specified shares; or
 - (vi) an order that an exercise of the voting or other rights attached to specified shares be disregarded; or
 - (vii) an order directing a company not to issue shares to a person who holds shares in the company, being shares that were proposed to be issued to the person because the person holds shares in the company or pursuant to an offer or invitation made or issued to the person because the person holds shares in the company.
- (2) Without limiting the Court's powers under Part 9.5, if, in a proceeding, the Court is satisfied that:
- (a) a person has engaged in conduct constituting a contravention of subclause 34(1); and
 - (b) a member of the company has suffered, or is likely to suffer, loss or damage because of that conduct;
- the Court may make the orders that it thinks are appropriate to compensate the member (in whole or in part) or to prevent or reduce the loss or damage, including:
- (c) an order directing the person or a person who was involved in the contravention to refund money or return property to the member
 - (d) an order directing the person or a person who was involved in the contravention to pay to the member the amount of the loss or damage
 - (e) an order listed in paragraph (1)(d).
- (3) An application for an order under this clause may be made by ASIC or a member of the company.

Part 6—Continued application of fundraising provisions of the Friendly Societies Code

36 Friendly Societies Code to apply to offers of interests in benefit funds

- (1) The following apply as a law of the Commonwealth as from the transfer date:
 - (a) Divisions 2 and 3 of Part 4B of the Friendly Societies Code
 - (b) Division 2 of Part 1, and Division 1 of Part 4B, of that Code to the extent to which they provide for the interpretation of terms used in the Divisions referred to in paragraph (a)
 - (c) sections 28, 29 and 128 of that Code to the extent to which they apply for the purposes of the Divisions referred to in paragraph (a)
 - (d) the regulations in force immediately before the transfer date under Part 4B of that Code to the extent to which they were made for the purposes of the provisions referred to in paragraphs (a), (b) and (c)
 - (e) standards adopted by that Code for the purposes of the provisions referred to in paragraphs (a), (b) and (c).
- (2) The provisions referred to in subclause (1) apply as if:
 - (a) references in the provisions to a society were references to a friendly society within the meaning of the *Life Insurance Act 1996*; and
 - (b) references to a benefit fund were references to an approved benefit fund within the meaning of the *Life Insurance Act 1996*; and
 - (c) references in the provisions to an SSA were references to ASIC; and
 - (d) references in the provisions to lodging a document were references to lodging the document with ASIC; and
 - (e) references in the provisions to the Code were references to this Act; and
 - (f) references in the provisions to Part 4B of the Code were references to the provisions applied by this clause; and
 - (g) references to a penalty of \$20,000 were references to a penalty of 200 penalty units; and
 - (h) references to a penalty of \$5,000 were references to a penalty of 50 penalty units; and
 - (i) references to a penalty of \$2,500 were references to a penalty of 25 penalty units; and
 - (j) references to a penalty of \$1,000 were references to a penalty of 10 penalty units; and
 - (k) subsection 135(2) of the Friendly Societies Code were omitted; and
 - (l) paragraph 137(1)(e) of the Friendly Societies Code were omitted and replaced with a provision that requires a disclosure document to contain any other information that ASIC requires to be included in the document; and
 - (m) subsection 137(3) of the Friendly Societies Code were omitted and replaced with a provision that requires each copy of a disclosure document to:
 - (i) state that the document has been lodged with ASIC; and
 - (ii) specify the date of lodgment; and

(iii) state that ASIC takes no responsibility as to the contents of the document.

(3) If there is an inconsistency between:

(a) the provisions of Division 2 of Part 1, or Division 1 of Part 4B, of the Friendly Societies Code; and

(b) the provisions of Chapter 1 of this Act;

the provisions of the Code prevail for the purposes of interpreting the provisions applied by subclause (1).

Part 7—Transitional provisions

37 Unclaimed money

- (1) On and from the transfer date, section 414 applies to a sum or other property that, immediately before the transfer date, is covered by section 414 as applied by:
 - (a) section 337 of the Financial Institutions Code of a State or Territory; or
 - (b) section 399 of the Friendly Societies Code of a State or Territory.
- (2) On and from the transfer date, section 544 applies to an amount of money that, immediately before the transfer date, is covered by section 544 as applied by:
 - (a) section 342 of the Financial Institutions Code of a State or Territory; or
 - (b) section 403 of the Friendly Societies Code of a State or Territory.
- (3) Sections 414 and 544, as applied by this clause, apply as if:
 - (a) references to Part 9.7 were references to the unclaimed money law of the State or Territory; and
 - (b) references to the Commission or ASIC were references to the Minister administering the unclaimed money law of the State or Territory.
- (4) In this clause:

unclaimed money law means:

- (a) the *Unclaimed Money Act 1995* of New South Wales; or
- (b) the **Unclaimed Moneys Act 1962** of Victoria; or
- (c) Part 8 of the *Public Trustee Act 1978* of Queensland; or
- (d) the *Unclaimed Money Act 1990* of Western Australia; or
- (e) the *Unclaimed Moneys Act 1891* of South Australia; or
- (f) the *Unclaimed Moneys Act 1918* of Tasmania; or
- (g) the *Unclaimed Moneys Act 1950* of the Australian Capital Territory; or
- (h) the *Companies (Unclaimed Assets and Moneys) Act* of the Northern Territory.

38 Modification by regulations

- (1) The regulations may modify the operation of this Act (including the provisions applied by clause 36) in relation to:
 - (a) a company registered under clause 3; or
 - (b) a company that is permitted to use the expression ***building society***, ***credit union*** or ***credit society*** under section 66 of the *Banking Act 1959*; or
 - (c) a company that is a friendly society for the purposes of the *Life Insurance Act 1995*; or
 - (d) a specified class of any of those companies.
- (2) Regulations made for the purposes of this clause may only modify this Act in relation to the following matters:
 - (a) issuing, cancelling or redeeming membership shares or redeemable preference shares
 - (b) inspection of the register of members required by section 169

- (c) giving notice of a meeting of a company's members
 - (d) members' rights to request the directors to hold a general meeting or to move a resolution at a general meeting
 - (e) issuing share certificates for membership shares or redeemable preference shares, or numbering those shares
 - (f) the publication of the names and addresses of members in the annual return
 - (g) the report to members required by section 314
 - (h) disposing of securities in a company if the whereabouts of the holder of the securities is unknown as described in section 1343
 - (i) the treatment of members who hold shares jointly or who have jointly given a guarantee
 - (j) selective buy-backs.
- (3) Regulations made for the purposes of this clause may not:
- (a) create an offence with a penalty greater than 10 penalty units; or
 - (b) increase the penalty for an existing offence; or
 - (c) substitute for an existing offence an offence with a penalty greater than the penalty for the existing offence; or
 - (d) modify an obligation, contravention of which will result in committing an offence, so as to make it more difficult to comply with.

39 Regulations may deal with transitional, saving or application matters

- (1) The regulations may deal with matters of a transitional, saving or application nature relating to:
- (a) the transfer of the registration of transferring financial institutions to this Act; or
 - (b) the amendments made by Schedule 3 to the *Financial Sector Reform (Amendments and Transitional Provisions) Act (No. 1) 1999*.
- (2) Without limiting subclause (1), the regulations may provide for a matter to be dealt with, wholly or partly, in any of the following ways:
- (a) by applying (with or without modifications) to the matter:
 - (i) provisions of a law of the Commonwealth, or of a State or Territory; or
 - (ii) provisions of a repealed or amended law of the Commonwealth, or of a State or Territory, in the form that those provisions took before the repeal or amendment; or
 - (iii) a combination of provisions referred to in subparagraphs (i) and (ii)
 - (b) by otherwise specifying rules for dealing with the matter
 - (c) by specifying a particular consequence of the matter, or of an outcome of the matter, for the purposes of this Act.
- (3) Without limiting subclause (1) or (2), the regulations may provide for the continued effect, for the purposes of this Act, of a thing done or instrument made, or a class of things done or instruments made, before the transfer date under or for the purposes of a provision of a previous governing Code of a transferring financial institution of a State or Territory. In the case of an instrument, or class of instruments, the regulations may provide for the instrument or instruments to continue to have effect subject to modifications.

- (4) Without limiting subclause (3), regulations providing for the continued effect of things done or instruments made may permit all or any of the following matters to be determined in writing by a specified person, or by a person in a specified class of persons:
- (a) the identification of a thing done or instrument made, or a class of them, that is to continue to have effect
 - (b) the purpose for which a thing done or instrument made, or a class of them, is to continue to have effect
 - (c) any modifications subject to which an instrument made, or a class of instruments made, is to continue to have effect.
- (5) Without limiting subclause (1) or (2), the regulations may provide for the application of Chapter 5 of this Act or a similar law about external administration (in whole or in part and with or without modification) to a transferring financial institution of a State or Territory if, immediately before the transfer date:
- (a) the institution is under external administration (however described); and
 - (b) the provisions of Chapter 5 are not already applied to it, or in relation to it, by a law of the State or Territory.
- (6) In this clause, a reference to a *law*, whether of the Commonwealth or of a State or Territory, includes a reference to an instrument made under such a law.