

EXPOSURE DRAFT

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Inserts for
**Treasury Laws Amendment (Measures
for Consultation) Bill 2023: FMI new
and enhanced regulatory powers**

Commencement information

Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details

- | | | |
|---------------|---|--|
| 1. | | |
| 2. Schedule 2 | The day after this Act receives the Royal Assent. | |
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Schedule 2—Financial markets infrastructure: new and enhanced regulatory powers

Part 1—Who may be granted an Australian CS facility licence?

Corporations Act 2001

1 After paragraph 821A(1)(e)

Insert:

(ea) if the licence was granted under subsection 824B(1)
(domestic clearing and settlement facilities)—be registered
under Chapter 2A; and

2 Subsection 821A(2)

After “(e),” insert “(ea),”.

3 Subsection 824B(1)

Omit “The Minister may grant an applicant an Australian CS facility
licence if the Minister”, substitute “ASIC may grant an applicant an
Australian CS facility licence if ASIC”.

4 Subsection 824B(1)

Omit “subject to subsections (3) and (4)”, substitute “subject to
subsection (3)”.

5 Subsection 824B(1) (note)

Omit “The Minister”, substitute “ASIC”.

6 Subsection 824B(2)

Omit “the Minister”, substitute “ASIC”.

7 Subsection 824B(2) (including the note)

Omit “The Minister” (wherever occurring), substitute “ASIC”.

8 Subsection 824B(2)

Omit “subject to subsections (3) and (4)”, substitute “subject to
subsection (3)”.

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9 Subsections 824B(3) and (4)

Repeal the subsections, substitute:

Disqualified individuals

(3) ASIC must not grant an applicant an Australian CS facility licence unless:

- (a) 42 days have passed since the application was made for the licence; and
- (b) ASIC has not given under subsection 853D(2) a notice to the applicant within those 42 days.

Consultation with Reserve Bank

(4) ASIC must consult the Reserve Bank before granting an applicant an Australian CS facility licence under this section. However, a failure to consult does not invalidate the grant of the licence.

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1 **Part 2—Dealing with licences that are not being used**
2 **etc.**

3 *Corporations Act 2001*

4 **10 Paragraph 797B(a)**

5 Repeal the paragraph, substitute:

- 6 (a) the licensee ceases to carry on the business of operating the
7 financial market to which the licence relates; or
8 (aa) there has been no acceptance, for a period of at least 12
9 months, of any offers made through the market to acquire or
10 dispose of financial products to which the licence relates; or
11 (ab) if the licence is subject to a condition specifying that the
12 licensee is authorised to engage in specified conduct or
13 activity that constitutes operating that market—the licensee
14 has, for a period of at least 12 months, ceased engaging in all
15 such specified conduct or activity; or

16 **11 After paragraph 797B(c)**

17 Insert:

- 18 (ca) an application has been made under section 601AA to
19 deregister the licensee as a company; or
20 (cb) ASIC has decided under section 601AB to deregister the
21 licensee as a company; or

22 **12 Subparagraph 797B(d)(ii)**

23 Repeal the subparagraph, substitute:

- 24 (ii) there is a change to the regulatory regime applying in
25 relation to the financial market to which the licence
26 relates in that country and, because of that change,
27 ASIC is no longer satisfied of the matters in
28 paragraph 795B(2)(c); or
29 (iii) the cooperation (including information sharing) between
30 ASIC and the authority or authorities responsible for
31 supervising the operation of that market in that country
32 has materially deteriorated or is otherwise inadequate;
33 or

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13 Paragraph 826B(a)

Repeal the paragraph, substitute:

- (a) the licensee ceases to carry on the business of operating the facility to which the licence relates; or
- (aa) the licensee has not, for a period of at least 12 months, provided the facility's services to which the licence relates; or
- (ab) if the licence is subject to a condition specifying that the licensee is authorised to engage in specified conduct or activity that constitutes operating that facility—the licensee has, for a period of at least 12 months, ceased engaging in all such specified conduct or activity; or

14 After paragraph 826B(c)

Insert:

- (ca) the licensee ceases to be registered under:
 - (i) if the licence was granted under subsection 824B(1) (domestic licensees)—Chapter 2A; or
 - (ii) if the licence was granted under subsection 824B(2) (overseas licensees)—Division 2 of Part 5B.2; or
- (cb) an application has been made under section 601AA to deregister the licensee as a company; or
- (cc) ASIC has decided under section 601AB to deregister the licensee as a company; or

15 Subparagraph 826B(d)(ii)

Repeal the subparagraph, substitute:

- (ii) there is a change to the regulatory regime applying in relation to the facility to which the licence relates in that country and, because of that change, ASIC is no longer satisfied of the matters in paragraph 824B(2)(c); or
- (iii) the cooperation (including information sharing) between ASIC or the Reserve Bank and the authority or authorities responsible for supervising the operation of that facility in that country has materially deteriorated or is otherwise inadequate; or

16 Paragraph 905H(a)

Repeal the paragraph, substitute:

- (a) the licensee ceases to carry on the business of operating the repository to which the licence relates; or

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- 1 (aa) the licensee has not, for a period of at least 12 months,
2 provided the repository's services to which the licence
3 relates; or
4 (ab) if the licence is subject to a condition specifying that the
5 licensee is authorised to engage in specified conduct or
6 activity that constitutes operating that repository—the
7 licensee has, for a period of at least 12 months, ceased
8 engaging in all such specified conduct or activity; or

17 After paragraph 905H(c)

9 Insert:

- 10 (ca) an application has been made under section 601AA to
11 deregister the licensee as a company; or
12 (cb) ASIC has decided under section 601AB to deregister the
13 licensee as a company; or
14

18 Paragraph 908BI(1)(a)

15 Repeal the paragraph, substitute:

- 16 (a) the licensee ceases to carry on the business of administering
17 the financial benchmark specified in the licence; or
18 (aa) the licensee has not, for a period of at least 12 months,
19 administered the financial benchmark specified in the
20 licence; or
21 (ab) if the licence is subject to a condition specifying that the
22 licensee is authorised to engage in specified conduct or
23 activity that constitutes administering that financial
24 benchmark—the licensee has, for a period of at least 12
25 months, ceased engaging in all such specified conduct or
26 activity; or
27

19 After paragraph 908BI(1)(c)

28 Insert:

- 29 (ca) an application has been made under section 601AA to
30 deregister the licensee as a company; or
31 (cb) ASIC has decided under section 601AB to deregister the
32 licensee as a company; or
33

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1 **Part 3—Declared financial markets and widely held**
2 **market bodies**

3 **Division 1—Declared financial markets**

4 *Corporations Act 2001*

5 **20 Section 9**

6 Insert:

7 *declared financial market* has the meaning given by
8 subsection 9D(1).

9 **21 Section 9 (definition of *prescribed financial market*)**

10 Repeal the definition.

11 **22 At the end of Division 1 of Part 1.2**

12 Add:

13 **9D Meaning of *declared financial market***

14 (1) A *declared financial market* is a financial market specified in a
15 declaration in force under subsection (2).

16 (2) ASIC may, by legislative instrument, declare a specified financial
17 market for the purposes of subsection (1).

18 (3) ASIC must not make a declaration under subsection (2) unless the
19 Minister has approved it in writing.

20 **23 After paragraph 1317C(b)**

21 Insert:

22 (ba) a decision by ASIC under subsection 9D(2) to declare a
23 financial market; or

24 **24 Amendments of listed provisions**
25

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Further amendments			
Item	Provision	Omit (wherever occurring)	Substitute
1	Section 9 (definition of <i>listed</i>)	prescribed financial market	declared financial market
2	Section 9 (definition of <i>listed corporation</i>)	prescribed financial market	declared financial market
3	Section 9 (definition of <i>market traded option</i>)	prescribed financial market	declared financial market
4	Section 9 (definition of <i>on-market</i>)	prescribed financial market	declared financial market
5	Section 9 (definition of <i>on-market buy-back</i>)	prescribed financial market	declared financial market
6	Section 9 (definition of <i>public company</i>)	prescribed financial market	declared financial market
7	Section 9 (definition of <i>quoted security</i>)	prescribed financial market	declared financial market
8	Section 9 (paragraph (a) of the definition of <i>relevant financial market</i>)	prescribed financial market	declared financial market
9	Section 9 (paragraph (b) of the definition of <i>relevant financial market</i>)	prescribed financial markets	declared financial markets
10	Section 111AE	prescribed financial market	declared financial market
11	Paragraph 167AC(b)	prescribed financial market	declared financial market
12	Paragraph 167AH(2)(b)	prescribed financial market	declared financial market
13	Subsection 170(3B)	prescribed financial market	declared financial market
14	Subparagraph 250V(1)(b)(ii)	prescribed financial market	declared financial market
15	Section 253F	prescribed financial market	declared financial market
16	Section 257B	prescribed financial market	declared financial market
17	Subsection 300(12)	prescribed financial market	declared financial market

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Further amendments			
Item	Provision	Omit (wherever occurring)	Substitute
18	Section 611 (table item 14)	prescribed financial market	declared financial market
19	Subsection 621(2)	prescribed financial market	declared financial market
20	Subsection 633(1)	prescribed financial market	declared financial market
21	Paragraph 647(3)(b)	prescribed financial market	declared financial market
22	Subsection 671B(5)	prescribed financial market	declared financial market
23	Paragraph 708AA(2)(c)	prescribed financial market	declared financial market
24	Paragraph 708A(5)(b)	prescribed financial market	declared financial market
25	Paragraph 713(5)(a)	prescribed financial market	declared financial market
26	Section 713A	prescribed financial market	declared financial market
27	Subsection 727(3A)	prescribed financial market	declared financial market
28	Paragraph 1012DAA(2)(c)	prescribed financial market	declared financial market
29	Paragraph 1012DA(5)(b)	prescribed financial market	declared financial market
30	Section 1222N	prescribed financial market	declared financial market
31	Subsection 1228H(3)	prescribed financial market	declared financial market
32	Subparagraph 1317DAE(7)(a) (i)	prescribed financial market	declared financial market
33	Subclause 29(8) of Part 5 of Schedule 4 (definition of <i>unlisted company</i>)	prescribed financial market	declared financial market
34	Paragraph 32(1)(h) of Part 5 of Schedule 4	prescribed financial market	declared financial market

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1 Division 2—Other amendments about declared financial 2 markets

3 *Bankruptcy Act 1966*

4 **25 Subsection 5(1) (paragraph (a) of the definition of *private* 5 *company*)**

6 Omit “prescribed financial market”, substitute “declared financial
7 market”.

8 *Personal Property Securities Act 2009*

9 **26 Section 49**

10 Omit “prescribed financial market”, substitute “declared financial
11 market”.

12 Division 3—Widely held market bodies

13 *Corporations Act 2001*

14 **27 Section 9**

15 Insert:

16 *widely held market body* has the meaning given by
17 subsection 850A(2).

18 **28 Paragraph 792A(1)(h)**

19 Omit “(within the meaning of Division 1 of Part 7.4)”.

20 **29 Paragraph 792A(1)(h)**

21 Omit “within the meaning of that Division”, substitute “see
22 section 850B”.

23 **30 Paragraph 821A(1)(g)**

24 Omit “(within the meaning of Division 1 of Part 7.4)”.

25 **31 Paragraph 821A(1)(g)**

26 Omit “within the meaning of that Division”, substitute “see
27 section 850B”.

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32 Section 850A

Repeal the section, substitute:

850A Scope of Division

(1) This Division applies in relation to widely held market bodies.

Meaning of widely held market body

(2) A body corporate is a **widely held market body** if the body:

(a) is:

(i) a market licensee or the holding company of such a licensee; or

(ii) a CS facility licensee or the holding company of such a licensee; and

(b) is specified in a declaration in force under subsection (3).

(3) ASIC may, by legislative instrument, declare a specified body corporate for the purposes of paragraph (2)(b) if, having regard to the matters in subsection (4), ASIC is satisfied that:

(a) if the body is a market licensee or the holding company of such a licensee—the financial market to which the licence relates is of national significance; or

(b) if the body is a CS facility licensee or the holding company of such a licensee—the clearing and settlement facility to which the licence relates is of national significance.

(4) The matters are:

(a) the significance to the national economy of the operation of the market or the facility; and

(b) the size and importance of the market or the facility:

(i) in the context of the Australian financial products and services industry; and

(ii) relative to other financial markets on which similar financial products are dealt, or other clearing and settlement facilities providing similar services, in Australia; and

(c) the degree of, or potential for, competition within the market or the facility; and

(d) any other matters that ASIC considers relevant.

(5) ASIC must not make a declaration under subsection (3) unless:

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- 1 (a) the Minister has approved it in writing; and
2 (b) if the proposed declaration relates to a body corporate
3 mentioned in subparagraph (2)(a)(ii)—ASIC has consulted
4 the Reserve Bank about it.
- 5 (6) However, a failure to consult as required by paragraph (5)(b) does
6 not invalidate the declaration.

33 Section 851I (heading)

7 Omit “in relation to bodies specified in regulations made for
8 section 850A”.

34 Subsection 851I(1)

10 Repeal the subsection (not including the note), substitute:

- 11 (1) If:
- 12 (a) a person holds, at a particular time, a particular percentage of
13 voting power in a body corporate that would (apart from this
14 section) constitute an unacceptable control situation in
15 relation to the body and in relation to the person; and
16 (b) at that time, the body becomes specified in a declaration in
17 force under subsection 850A(3);
18 then, the person is taken to be granted at that time an approval
19 under section 851B to hold that percentage of voting power in the
20 body.
21

35 Subsection 851I(3)

22 Repeal the subsection.
23

36 Before paragraph 1317C(gd)

24 Insert:
25 (gcm) a decision by ASIC under subsection 850A(3) to declare a
26 body corporate; or
27

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1 **Part 4—Ministerial power to approve increases in**
2 **voting power in ASX Limited**

3 *Corporations Act 2001*

4 **37 Subsection 850B(1)**

5 Omit “(1)”.

6 **38 Paragraphs 850B(1)(b) and (c)**

7 Repeal the paragraphs, substitute:

8 (b) if an approval of a higher percentage is in force under
9 Subdivision B in relation to the body and in relation to the
10 person—that higher percentage.

11 **39 Subsection 850B(2)**

12 Repeal the subsection.

13 **40 Subsection 851A(1)**

14 Omit “(other than the Australian Stock Exchange Limited)”.

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1 **Part 5—Approval for control of certain Australian**
2 **licensees**

3 *Corporations Act 2001*

4 **41 Section 9**

5 Insert:

6 *controlled Australian financial body* has the meaning given by
7 subsection 852DA(2).

8 *passes the legitimate control test* has the meaning given by section
9 852DC.

10 **42 After Division 1 of Part 7.4**

11 Insert:

12 **Division 1A—Limit on control of certain Australian**
13 **licensees that are not widely held market bodies**

14 **Subdivision A—Scope and interpretation**

15 **852DA Scope of Division**

- 16 (1) This Division applies in relation to controlled Australian financial
17 bodies.

18 *Meaning of controlled Australian financial body*

- 19 (2) A body corporate is a *controlled Australian financial body* if the
20 body is:
21 (a) registered under Chapter 2A; and
22 (b) any of the following:
23 (i) a market licensee;
24 (ii) a CS facility licensee;
25 (iii) a derivative trade repository licensee;
26 (iv) a benchmark administrator licensee;
27 (v) the holding company of a licensee mentioned in any of
28 subparagraphs (i) to (iv); and
29 (c) not a widely held market body.

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1 852DB Meaning of *unacceptable control situation*

2 For the purposes of this Division, an *unacceptable control*
3 *situation* exists in relation to a controlled Australian financial body
4 and a particular person if the person's voting power in the body is
5 more than:

- 6 (a) unless paragraph (b) applies—15%; or
7 (b) if an approval of a higher percentage is in force under
8 Subdivision C for the body and the person—that higher
9 percentage.

10 852DC Meaning of *passes the legitimate control test*

11 A person *passes the legitimate control test* for having a particular
12 percentage of voting power in a controlled Australian financial
13 body if the person's having of that percentage of voting power in
14 the body is unlikely to adversely affect:

- 15 (a) if the body is a licensee mentioned in any of subparagraphs
16 852DA(2)(b)(i) to (iv)—the body's ability to meet one or
17 more of its obligations as such a licensee under this Act; or
18 (b) if the body is the holding company of a licensee mentioned in
19 any of subparagraphs 852DA(2)(b)(i) to (iv)—the licensee's
20 ability to meet one or more of its obligations as such a
21 licensee under this Act.

22 Subdivision B—15% voting power limit

23 852DD Acquisition of shares

24 A person contravenes this section if:

- 25 (a) the person acquires, or the person with one or more other
26 persons under an arrangement acquire, shares in a body
27 corporate; and
28 (b) the acquisition has the result that:
29 (i) an unacceptable control situation comes into existence
30 in relation to a controlled Australian financial body and
31 a person; or
32 (ii) if an unacceptable control situation already exists in
33 relation to a controlled Australian financial body and a
34 person (the *controller*)—there is an increase in the
35 voting power of the controller in the controlled
36 Australian financial body.

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1 Note 1: The person mentioned in subparagraph (b)(i) or (b)(ii) need not be the
2 person who contravenes this section.

3 Note 2: A contravention of this section is an offence (see subsection 1311(1)).

4 **852DE Remedial orders**

- 5 (1) If an unacceptable control situation exists in relation to a controlled
6 Australian financial body and a person, the Court may make such
7 orders as the Court considers appropriate for the purpose of
8 ensuring that the unacceptable control situation ceases to exist.
- 9 (2) However, the Court may only make orders under this section on
10 application by:
11 (a) ASIC; or
12 (b) the body; or
13 (c) a person who has any voting power in the body.
- 14 (3) Without limiting subsection (1), the Court's orders may include:
15 (a) an order directing the disposal of shares; or
16 (b) an order restraining the exercise of any rights attached to
17 shares; or
18 (c) an order prohibiting or deferring the payment of any sums
19 due to a person in respect of shares held by the person; or
20 (d) an order that any exercise of rights attached to shares be
21 disregarded; or
22 (e) an order directing any person to do or refrain from doing a
23 specified act, for the purpose of securing compliance with
24 any other order made under this section; or
25 (f) an order containing such ancillary or consequential
26 provisions as the Court thinks just.
- 27 (4) Before making an order under this section, the Court may direct
28 that notice of the application be given to such persons as the Court
29 thinks fit or be published in such manner as the Court thinks fit, or
30 both.
- 31 (5) The Court may, by order:
32 (a) rescind, vary or discharge an order made by the Court under
33 this section; or
34 (b) suspend the operation of such an order.

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852DF Injunctions

- (1) If any conduct (including a refusal or failure to act) amounts or would amount to a contravention of this Division in relation to a particular controlled Australian financial body, the body is taken, for the purposes of section 1324, to be a person whose interests are affected by the conduct.
- (2) Subsection (1) does not limit the class of persons whose interests are affected by the conduct.
- (3) Sections 852DE and 1324 do not limit each other.

Subdivision C—Approvals to exceed 15% voting power limit

852DG Application for approval to exceed 15% voting power limit

A person may apply for approval to have voting power of more than 15% in a particular controlled Australian financial body by lodging with ASIC an application that sets out:

- (a) the percentage of voting power (if any) the person currently has in the body; and
- (b) the percentage of voting power the person is seeking approval to have in the body; and
- (c) the period (whether indefinite or not) the person is seeking the approval for; and
- (d) the person's reasons for making the application.

Note 1: For fees in respect of lodging applications, see Part 9.10.

Note 2: For applications to vary an approved percentage, see section 852DL.

852DH Decision on the application

- (1) ASIC must, by written notice given to the applicant, approve the applicant having a specified percentage of voting power in the body if:
 - (a) ASIC is satisfied the specified percentage is the highest percentage (up to that sought by the applicant) of voting power in the body for which the applicant:
 - (i) passes the legitimate control test; and
 - (ii) is likely to continue to do so either for a specified period (the *approved period*) or indefinitely from a specified day (the *approval start day*); and

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- 1 (b) ASIC believes relevant information in the application, or
2 later provided by the applicant, to be correct;
3 otherwise ASIC must, by written notice given to the applicant,
4 refuse such an approval.
- 5 (2) A notice of approval under subsection (1) must specify that the
6 approval to have the specified percentage of voting power in the
7 body is in force either:
8 (a) for the approved period, which may be extended under
9 section 852DJA; or
10 (b) indefinitely from the approval start day;
11 but may be varied under section 852DL or revoked under section
12 852DM.
- 13 Note: The notice may also specify that the approval is subject to conditions
14 (see subsection 852DK(1)).
- 15 (3) ASIC must give a copy of a notice under subsection (1) to the
16 body.

17 **852DJ Duration of approval**

18 An approval under subsection 852DH(1) is in force as specified
19 under subsection 852DH(2) in the notice of the approval.

20 **852DJA Extension of approval**

- 21 (1) If a person's approval under subsection 852DH(1) to have a
22 specified percentage of voting power in a controlled Australian
23 financial body is in force for a specified period (including an
24 extended period from a previous operation of this section), the
25 person may apply to extend that period by lodging with ASIC an
26 application that sets out:
27 (a) the extended period the person is seeking; and
28 (b) the person's reasons for making the application.
- 29 Note 1: For fees in respect of lodging applications, see Part 9.10.
- 30 Note 2: ASIC can vary the period of an approval on its own initiative (see
31 subsection 852DL(4)).
- 32 (2) ASIC must, by written notice given to the applicant, extend the
33 period of the applicant's approval to have the specified percentage
34 of voting power in the body if:
35 (a) ASIC is satisfied the extended period is the longest period
36 (up to that sought by the applicant) for which the applicant is

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- 1 likely to continue to pass the legitimate control test for
2 having the specified percentage of voting power in the body;
3 and
4 (b) ASIC believes relevant information in the application, or
5 later provided by the applicant, to be correct;
6 otherwise ASIC must, by written notice given to the applicant,
7 refuse such an extension.
- 8 (3) A notice of extension under subsection (2) must specify that the
9 approval:
10 (a) is in force for the extended period, which may be further
11 extended under this section; and
12 (b) may be varied under section 852DL or revoked under section
13 852DM.
- 14 (4) ASIC must give a copy of a notice under subsection (2) to the
15 body.

16 **852DK Conditions of approval**

17 *Conditions of approval*

- 18 (1) An approval under subsection 852DH(1) is subject to such
19 conditions (if any) specified in the notice of approval given under
20 that subsection.

21 *Imposing, varying or revoking conditions after approval*

- 22 (2) ASIC may, by written notice given to a person who holds an
23 approval under subsection 852DH(1) to have a specified
24 percentage of voting power in a controlled Australian financial
25 body:
26 (a) impose one or more conditions on the approval; or
27 (b) vary or revoke any condition:
28 (i) imposed under paragraph (a); or
29 (ii) specified in the notice of approval.
- 30 (3) ASIC must give a copy of a notice under subsection (2) to the
31 body.

32 *Power exercisable on own initiative or by application*

- 33 (4) ASIC's power under subsection (2) may be exercised:
34 (a) on ASIC's own initiative; or
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1 (b) on application by the person who holds the approval under
2 subsection 852DH(1).

3 Note: For fees in respect of lodging applications, see Part 9.10.

4 *Notice of refusal of application*

5 (5) If ASIC refuses to exercise its power under subsection (2) on an
6 application made under paragraph (4)(b), ASIC must give written
7 notice of the refusal to the applicant.

8 *Breach of condition*

9 (6) A person who holds an approval under subsection 852DH(1) must
10 give written notice to ASIC if they become aware that they have
11 breached a condition to which the approval is subject.

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

14 **852DL Varying an approval**

15 (1) This section applies to a person holding an approval under
16 subsection 852DH(1) to have a specified percentage (the **current**
17 **approved percentage**) of voting power:

- 18 (a) in a controlled Australian financial body; and
19 (b) for a specified period or indefinitely (the **current approved**
20 **duration**);

21 including as affected by any variation from a previous operation of
22 this section.

23 *Application by holder of approval to vary percentage*

24 (2) The person may apply to vary the current approved percentage by
25 lodging with ASIC an application that sets out:

- 26 (a) the percentage of voting power the person currently has in
27 the body; and
28 (b) the percentage of voting power the person is seeking
29 approval to have in the body; and
30 (c) the person's reasons for making the application.

31 Note: For fees in respect of lodging applications, see Part 9.10.

32 (3) ASIC must, by written notice given to the applicant, approve the
33 applicant having a new specified percentage of voting power in the
34 body for the current approved duration if:

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- 1 (a) ASIC is satisfied the new specified percentage is the highest
2 percentage (up to that sought by the applicant and greater
3 than the current approved percentage) of voting power in the
4 body for which the applicant:
5 (i) passes the legitimate control test; and
6 (ii) is likely to continue to do so for the current approved
7 duration; and
8 (b) ASIC believes relevant information in the application, or
9 later provided by the applicant, to be correct;
10 otherwise ASIC must, by written notice given to the applicant,
11 refuse such a variation.

12 *ASIC varying percentage or period on own initiative*

- 13 (4) ASIC may, on its own initiative, by written notice given to the
14 person, vary the person's approval as follows:
15 (a) vary the current approved percentage to a new specified
16 percentage of voting power in the body for the current
17 approved duration; or
18 (b) vary the current approved duration to a new specified period
19 or an indefinite period (the *new specified duration*) for the
20 current approved percentage of voting power in the body; or
21 (c) vary both the current approved percentage and the current
22 approved duration to a new specified percentage of voting
23 power in the body for a new specified period or an indefinite
24 period (also the *new specified duration*);
25 if ASIC is satisfied of the matters in subsection (5).

26 Note: ASIC could, for example, vary the approval after becoming aware that
27 information contained in the person's application for approval has
28 ceased to be correct (see section 852DQ).

- 29 (5) The matters are that the specified percentage that is to result from
30 the variation is the highest percentage of voting power in the body
31 for which the person:
32 (a) passes the legitimate control test; and
33 (b) is likely to continue to do so for the approved duration that is
34 to result from the variation.

35 Note: The specified percentage that is to result from the variation could be
36 the current approved percentage or a new specified percentage.
37 Similarly, the approved duration that is to result from the variation
38 could be the current approved duration or a new specified duration.

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Downwards variations

- 1
- 2 (6) If ASIC varies under subsection (4) either or both of the following:
- 3 (a) the current approved percentage to a lower new specified
- 4 percentage;
- 5 (b) the current approved duration to a shorter new specified
- 6 duration;
- 7 then:
- 8 (c) the variation takes effect on the day specified in the notice of
- 9 variation; and
- 10 (d) the specified day must be at least 90 days after the day on
- 11 which the notice is given under subsection (4).

Upwards variations

- 12
- 13 (7) If ASIC:
- 14 (a) varies under subsection (3) the current approved percentage;
- 15 or
- 16 (b) varies under subsection (4) the current approved percentage
- 17 or the current approved duration otherwise than as described
- 18 in subsection (6);
- 19 the variation takes effect on the day the notice of variation is given
- 20 under subsection (3) or (4) (as applicable).

Notice to the body

- 21
- 22 (8) ASIC must give a copy of a notice of approval under subsection (3)
- 23 or a notice under subsection (4) to the body.

852DM Revoking an approval

- 24
- 25 (1) ASIC may, on its own initiative, by written notice given to a
- 26 person holding an approval under subsection 852DH(1) to have a
- 27 specified percentage of voting power in a controlled Australian
- 28 financial body, revoke the approval if ASIC is satisfied that:
- 29 (a) the person no longer passes the legitimate control test for the
- 30 specified percentage of voting power in the body; or
- 31 (b) an unacceptable control situation exists in relation to the
- 32 body and the person; or
- 33 (c) there has been a contravention of a condition to which the
- 34 approval is subject; or
- 35 (d) information contained in an application given by the person
- 36 under this Subdivision was incorrect and the person did not

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1 give ASIC the correct information before the application was
2 decided.

3 Note: The specified percentage is the percentage currently applying after
4 any variations under this Subdivision.

5 (2) A revocation under subsection (1) takes effect on the day specified
6 in the notice of revocation. The specified day must be at least 90
7 days after the day on which the notice is given.

8 (3) ASIC must, by written notice given to the person, revoke the
9 approval if the person requests ASIC to do so. A revocation under
10 this subsection takes effect on the day specified in the notice of
11 revocation.

12 (4) ASIC must give a copy of a notice of revocation under
13 subsection (1) or (3) to the body.

14 **852DP Further information about applications**

15 If an application is lodged with ASIC under this Subdivision, ASIC
16 may:

17 (a) by written notice given to the applicant, request the applicant
18 to give ASIC, within a period specified in the notice, further
19 information about the application; and

20 (b) refuse to consider the application until the applicant gives
21 ASIC the information.

22 **852DQ Applicant must update ASIC with correct information**

23 If information contained in an application lodged under this
24 Subdivision:

25 (a) is incorrect; or

26 (b) ceases to be correct after the application is made;

27 the applicant must, as soon as practicable after the applicant
28 becomes aware of that fact, give ASIC the correct information in
29 writing.

30 **852DR Time limit for ASIC's decision**

31 *Time limit*

32 (1) ASIC must decide an application lodged under this Subdivision
33 within the 90-day period starting on the day the application was

EXPOSURE DRAFT

1 lodged. This subsection has effect subject to subsections (2), (3)
2 and (5).

3 *Extending the time limit*

- 4 (2) Before the end of the period mentioned in subsection (1):
5 (a) ASIC may, by written notice given to the applicant, extend
6 the period by up to 30 days; and
7 (b) if ASIC does so, this section has effect as if references to the
8 period mentioned in subsection (1) were references to the
9 period as so extended.

10 *Stopping the clock*

- 11 (3) In working out the period mentioned in subsection (1), disregard:
12 (a) the period:
13 (i) starting on the day ASIC gives the applicant a notice
14 under section 852DP requesting information about the
15 application; and
16 (ii) ending on the day the applicant gives ASIC all of the
17 information requested under, or ASIC otherwise
18 disposes of, the notice; and
19 (b) any day on which ASIC believes relevant information
20 currently before ASIC, that was provided by the applicant in
21 relation to the application, is incorrect.

22 *Deemed approval*

- 23 (4) If ASIC has not decided the application by the end of the period
24 mentioned in subsection (1):
25 (a) ASIC is taken to have granted whatever was applied for on
26 the day after the end of that period; and
27 (b) as soon as practicable afterwards, ASIC must give a notice to
28 that effect to:
29 (i) the applicant; and
30 (ii) the controlled Australian financial body concerned.

31 *Application of this section*

- 32 (5) This section does not apply in relation to an application lodged
33 under section 852DG or 852DL if an unacceptable control situation
34 exists in relation to the applicant and the controlled Australian

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1 financial body concerned at any time before ASIC decides the
2 application.

3 Subdivision D—Other matters

4 852DS Acquisition of property

- 5 (1) The Court must not make an order under section 852DE if:
6 (a) the order would result in the acquisition of property from a
7 person otherwise than on just terms; and
8 (b) the order would be invalid because of paragraph 51(xxxi) of
9 the Constitution.
- 10 (2) Section 1350 does not apply in relation to the making of an order
11 under section 852DE.
- 12 (3) In this section:

13 *acquisition of property* has the same meaning as in
14 paragraph 51(xxxi) of the Constitution.

15 *just terms* has the same meaning as in paragraph 51(xxxi) of the
16 Constitution.

17 852DT Anti-avoidance

- 18 (1) If:
19 (a) one or more persons enter into, begin to carry out or carry out
20 a scheme; and
21 (b) it would be concluded that the person, or any of the persons,
22 who:
23 (i) entered into; or
24 (ii) began to carry out; or
25 (iii) carried out;
26 the scheme or any part of the scheme did so for the sole or
27 dominant purpose of avoiding the application of any
28 provision of Subdivision B in relation to any person or
29 persons (whether or not mentioned in paragraph (a)); and
30 (c) as a result of the scheme or a part of the scheme, a person
31 (the *controller*) increases (including from a starting point of
32 nil) the controller's voting power in a controlled Australian
33 financial body;

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1 ASIC may give the controller a written direction to cease having
2 that voting power within a time specified in the direction.

3 (2) A person who is subject to a written direction under subsection (1)
4 must comply with the direction.

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

7 **43 In the appropriate position in Schedule 3**

8 Insert:

9

Section 852DD	400 penalty units
Subsection 852DK(6)	200 penalty units
Subsection 852DT(2)	400 penalty units

EXPOSURE DRAFT

1 **Part 6—Limits on certain market licences and CS**
2 **facility licences**

3 *Corporations Act 2001*

4 **44 After paragraph 791A(1)(b)**

5 Insert:

6 ; or (c) the person is exempt from the operation of this Part.

7 **45 After paragraph 791B(c)**

8 Insert:

9 (ca) that the person or any other person is exempt from the
10 operation of this Part; or

11 **46 Section 791B (note)**

12 Omit “subsection”, substitute “section”.

13 **47 Subsection 791C(1)**

14 Repeal the subsection, substitute:

15 (1) ASIC may exempt:

16 (a) a financial market or class of financial markets; or

17 (b) a person or class of persons;

18 from all or specified provisions of this Part.

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

21 (1A) An exemption may apply:

22 (a) unconditionally or subject to specified conditions; and

23 (b) for a specified period or indefinitely (the *exemption*
24 *duration*).

25 **48 After subparagraph 791C(2)(a)(ii)**

26 Insert:

27 (iii) extend or shorten the exemption duration (including as
28 affected by any variation from a previous operation of this
29 subparagraph); or

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1 **49 Paragraph 791C(3)(a)**

2 After “the operator of each financial market”, insert “or each person (as
3 applicable)”.

4 **50 Paragraph 791C(3)(b)**

5 Omit “class of financial markets”, substitute “class of financial markets
6 or class of persons”.

7 **51 Paragraph 791C(3)(b)**

8 After “the operator of each financial market”, insert “or each person (as
9 applicable)”.

10 **52 Subsection 791C(4)**

11 After “class of financial markets”, insert “or class of persons”.

12 **53 Subsection 791C(4)**

13 After “one or more financial markets”, insert “, or one or more
14 persons,”.

15 **54 Section 795C**

16 Omit “stating”, substitute “that includes”.

17 **55 After paragraph 820A(1)(b)**

18 Insert:

19 ; or (c) the person is exempt from the operation of this Part.

20 **56 After paragraph 820B(c)**

21 Insert:

22 or (d) that the person or any other person is exempt from the
23 operation of this Part;

24 **57 Section 820B (note)**

25 Omit “subsection”, substitute “section”.

26 **58 Subsection 820C(1)**

27 Repeal the subsection, substitute:

28 (1) ASIC may exempt:

29 (a) a clearing and settlement facility or class of clearing and
30 settlement facilities; or

EXPOSURE DRAFT

1 (b) a person or class of persons;
2 from all or specified provisions of this Part.

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

5 (1A) An exemption may apply:

6 (a) unconditionally or subject to specified conditions; and

7 (b) for a specified period or indefinitely (the *exemption*
8 *duration*).

9 **59 After subparagraph 820C(2)(a)(ii)**

10 Insert:

11 (iii) extend or shorten the exemption duration (including as
12 affected by any variation from a previous operation of this
13 subparagraph); or

14 **60 Paragraph 820C(3)(a)**

15 After “the operator of each clearing and settlement facility”, insert “or
16 each person (as applicable)”.

17 **61 Paragraph 820C(3)(b)**

18 Omit “class of clearing and settlement facilities”, substitute “class of
19 clearing and settlement facilities or class of persons”.

20 **62 Paragraph 820C(3)(b)**

21 After “the operator of each clearing and settlement facility”, insert “or
22 each person (as applicable)”.

23 **63 Subsection 820C(4)**

24 After “class of clearing and settlement facilities”, insert “or class of
25 persons”.

26 **64 Subsection 820C(4)**

27 After “one or more clearing and settlement facilities”, insert “, or one or
28 more persons,”.

29 **65 Section 824C**

30 Omit “stating”, substitute “that includes”.

31 **66 Paragraph 824C(b)**

32 Omit “date”, insert “day”.

EXPOSURE DRAFT

67 Subsection 825A(5)

Repeal the subsection, substitute:

Reserve Bank's consent needed for imposing, varying or revoking certain conditions

(5) Before taking action under subsection (1) that relates to financial or systemic risk in the provision of the services of the facility to which the licence relates, ASIC must obtain the Reserve Bank's written consent to the proposed action.

(6) However, a failure to obtain consent as required by subsection (5) does not invalidate the action.

68 At the end of subsection 827A(3)

Add:

; and (e) the arrangements the licensee or applicant has in place relating to its governance and operations, including the adequacy of those arrangements for ensuring:

- (i) the facility's services are provided in a fair and effective way in this jurisdiction; and
- (ii) the integrity of, and public confidence in, the operation of the facility in this jurisdiction; and
- (iii) the overall stability in the Australian financial system.

EXPOSURE DRAFT

1 **Part 7—Rulemaking power for CS facility licensees**

2 *Corporations Act 2001*

3 **69 Section 9**

4 Insert:

5 *CS facility rules* means rules made under section 826H.

6 **70 After paragraph 793B(2)(a)**

7 Insert:

8 (aa) the CS facility rules;

9 **71 Before paragraph 822B(2)(a)**

10 Insert:

11 (aa) the CS facility rules;

12 **72 After Division 3 of Part 7.3**

13 Insert:

14 **Division 3A—CS facility rules**

15 **Subdivision A—Power to make CS facility rules**

16 **826H CS facility rules**

17 ASIC may, by legislative instrument, make rules (the *CS facility*
18 *rules*) for the purposes of promoting the provision of fair and
19 effective services by licensed CS facilities.

20 **Subdivision B—Compliance with CS facility rules**

21 **826J Complying with CS facility rules**

22 (1) The following entities must comply with the CS facility rules:

- 23 (a) operators of licensed CS facilities;
- 24 (b) participants in licensed CS facilities;
- 25 (c) entities prescribed by the regulations for the purposes of this
26 paragraph.

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1 Note: This subsection is a civil penalty provision (see section 1317E). For
2 relief from liability to a civil penalty relating to this subsection, see
3 section 1317S.

- 4 (2) Subsection (1) does not apply in relation to a clearing and
5 settlement facility the operator of which is licensed under
6 subsection 824B(2) (overseas clearing and settlement facilities).

7 **826K Inconsistency with other instruments**

8 *Inconsistency with other rules*

- 9 (1) If there is an inconsistency between the CS facility rules and any of
10 the following rules:
11 (a) the CS services rules;
12 (b) the derivative transaction rules;
13 (c) the derivative trade repository rules;
14 the CS facility rules prevail to the extent of the inconsistency.

15 *Inconsistency with the financial stability standards*

- 16 (2) If the Reserve Bank considers there is an inconsistency between a
17 CS facility rule and one or more standards determined under
18 section 827D, the Reserve Bank must refer the matter to the
19 Minister.
20 (3) The Minister may, if the Minister considers it appropriate after
21 being referred the matter, direct ASIC to vary or revoke the CS
22 facility rule.
23 (4) ASIC must comply with the direction.
24 (5) A direction under subsection (3) is not a legislative instrument.

25 **826L Alternatives to civil proceedings**

- 26 (1) The regulations may provide for a person who is alleged to have
27 contravened subsection 826J(1) (complying with CS facility rules)
28 to do one or more of the following as an alternative to civil
29 proceedings:
30 (a) pay a penalty to the Commonwealth;
31 (b) undertake or institute remedial measures (including education
32 programs);
33 (c) accept sanctions other than the payment of a penalty to the
34 Commonwealth;

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-
- 1 (d) enter into a legally enforceable undertaking.
- 2 (2) The penalty payable under regulations made under paragraph (1)(a)
3 in relation to an alleged contravention of a CS facility rule must not
4 exceed:
- 5 (a) for an individual—3,000 penalty units; and
6 (b) for a body corporate—15,000 penalty units.
- 7 (3) Without limiting regulations that may be made under
8 paragraph (1)(d), those regulations may provide for one or more of
9 the following kinds of undertakings:
- 10 (a) an undertaking to take specified action within a specified
11 period;
12 (b) an undertaking to refrain from taking specified action;
13 (c) an undertaking to pay a specified amount within a specified
14 period to the Commonwealth or to some other specified
15 person.

16 Subdivision C—The process of making CS facility rules

17 826M ASIC to consult before making rules

- 18 (1) ASIC must not make a CS facility rule unless ASIC:
19 (a) has consulted the public about the proposed rule; and
20 (b) has also consulted the following about the proposed rule:
21 (i) the Reserve Bank;
22 (ii) any other person or body prescribed by the regulations
23 for the purposes of this subparagraph.
- 24 Note: In some situations, consultation is not required (see section 826P).
- 25 (2) Without limiting the ways in which ASIC may comply with the
26 obligation in paragraph (1)(a) to consult the public about a
27 proposed rule, ASIC is taken to comply with that obligation if
28 ASIC, on its website:
29 (a) makes the proposed rule, or a description of the content of
30 the proposed rule, available; and
31 (b) invites the public to comment on the proposed rule.
- 32 (3) A failure to consult as required by subsection (1) does not
33 invalidate a CS facility rule.

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1 826N Ministerial consent to rules required

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

4 Note: In some situations, consent is not required (see section 826P).

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

6 826P Emergency rules: consultation and consent not required

7 (1) ASIC may, under section 826H, make a CS facility rule without
8 consulting as required by section 826M, and without the consent of
9 the Minister as required by subsection 826N(1), if ASIC is of the
10 opinion that it is necessary, or in the public interest, to do so in
11 order to protect:

12 (a) the Australian economy; or

13 (b) the efficiency, integrity and stability of the Australian
14 financial system; or

15 (c) the provision of fair and effective services by licensed CS
16 facilities.

17 (2) However, if ASIC does so, ASIC must, on the following day,
18 provide the Minister and the Reserve Bank with a written
19 explanation of the need for the rule.

20 (3) The Minister may, if the Minister considers it appropriate after
21 being provided with the explanation, direct ASIC to vary or revoke
22 the rule.

23 (4) ASIC must comply with the direction.

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

25 826Q Variation and revocation of rules

26 (1) ASIC may vary or revoke a CS facility rule in like manner and
27 subject to like conditions (see subsection 33(3) of the *Acts*
28 *Interpretation Act 1901*).

29 (2) However, the requirements of sections 826M and 826N do not
30 apply in relation to a variation or revocation pursuant to a direction
31 by the Minister under subsection 826K(3) or 826P(3).

EXPOSURE DRAFT

1 Subdivision D—Limitations

2 826R Regulations may limit how rules may deal with certain matters

3 The regulations may prescribe limits on:

- 4 (a) the extent to which, or the way in which, the CS facility rules
5 may deal with matters permitted by Subdivision A; or
- 6 (b) the classes of persons on whom those rules may impose
7 requirements; or
- 8 (c) the extent to which those rules may impose requirements (or
9 certain kinds of requirements) on certain classes of persons.

10 Subdivision E—Exemptions

11 826S Provisions covered this Subdivision

12 In this Subdivision, the *provisions covered by this Subdivision* are:

- 13 (a) the following provisions:
 - 14 (i) the provisions of this Division;
 - 15 (ii) the provisions of regulations made for the purposes of
16 the provisions of this Division;
 - 17 (iii) the provisions of the CS facility rules; and
- 18 (b) definitions in this Act, or in the regulations, as they apply to
19 references in provisions referred to in paragraph (a).

20 826T Exemptions and modifications by regulations

21 (1) The regulations may:

- 22 (a) exempt a person or class of persons from all or specified
23 provisions covered by this Subdivision; or
- 24 (b) exempt a clearing and settlement facility or class of clearing
25 and settlement facilities from all or specified provisions
26 covered by this Subdivision; or
- 27 (c) declare that provisions covered by this Subdivision apply in
28 relation to:
 - 29 (i) a person or a clearing and settlement facility; or
 - 30 (ii) a class of persons or clearing and settlement facilities;
31 as if specified provisions were omitted, modified or varied as
32 specified in the regulations.

33 (2) If there is an inconsistency between:

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-
- 1 (a) an exemption prescribed by regulations made for the
2 purposes of subsection (1); and
3 (b) an exemption by ASIC under section 826U or 826V;
4 (including in relation to any conditions specified by ASIC), the
5 regulations prevail to the extent of the inconsistency.

6 **826U Exemptions by ASIC—for a class of persons or facilities**

- 7 (1) ASIC may, by legislative instrument, exempt:
8 (a) a class of persons; or
9 (b) a class of clearing and settlement facilities;
10 from all or specified provisions covered by this Subdivision. An
11 exemption may be unconditional, or subject to specified
12 conditions.
- 13 (2) ASIC may, by legislative instrument:
14 (a) vary such an exemption to:
15 (i) impose conditions, or additional conditions, on the
16 exemption; or
17 (ii) vary or revoke any of the conditions on the exemption;
18 or
19 (b) revoke such an exemption.
- 20 (3) However, ASIC may only take action under subsection (2) if:
21 (a) a notice is published on ASIC's website allowing a
22 reasonable period for the operator of each clearing and
23 settlement facility covered by the exemption to make
24 submissions on the proposed action; and
25 (b) that period has ended.

26 **826V Exemptions by ASIC—for a particular person or facility**

- 27 (1) ASIC may, by written notice given to a person or an operator of a
28 clearing and settlement facility, exempt the person or facility from
29 all or specified provisions covered by this Subdivision. An
30 exemption may be unconditional, or subject to specified
31 conditions.
- 32 (2) ASIC may, by written notice given to the person or operator to
33 whom notice of such an exemption was given:
34 (a) vary the exemption to:
35 (i) impose conditions, or additional conditions, on the
36 exemption; or
-

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-
- 1 (ii) vary or revoke any of the conditions on the exemption;
2 or
3 (b) revoke the exemption.
- 4 (3) However, ASIC may only take action under subsection (2) after
5 giving:
6 (a) notice of the proposed action; and
7 (b) an opportunity to make submissions on the proposed action;
8 to the person or to the operator to whom notice of the exemption
9 was given.
- 10 (4) ASIC must publish notice of each exemption, variation or
11 revocation under this section on ASIC's website.

73 Subsection 827D(2A)

- 12 Repeal the subsection, substitute:
- 13
- 14 (2A) If there is an inconsistency between the standards and any of the
15 following:
16 (a) the CS facility rules;
17 (b) the CS services rules;
18 (c) the derivative transaction rules;
19 (d) the derivative trade repository rules;
20 the standards prevail to the extent of the inconsistency.

74 Before paragraph 1317C(gcd)

- 21 Insert:
- 22
- 23 (gccc) a decision by ASIC:
24 (i) under section 826H to make CS facility rules; or
25 (ii) under subsection 826Q(1) to vary or revoke CS facility
26 rules; or
- 27 (gccd) a decision by ASIC to do or not do anything under
28 regulations made for the purposes of section 826L
29 (alternatives to civil proceedings); or
- 30 (gcce) a decision by the Minister:
31 (i) under subsection 826N(1) to consent to the making of a
32 CS facility rule; or
33 (ii) under subsection 826K(3) or 826P(3) to direct ASIC to
34 vary or revoke a CS facility rule; or
- 35 (gccf) a decision by ASIC to grant an exemption under subsection
36 826U(1); or

EXPOSURE DRAFT

1 **75 In the appropriate position in subsection 1317E(3) (table)**

2 Insert:

subsection 826J(1) complying with CS facility rules uncategorised

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1 **Part 8—Streamlining some of ASIC’s existing**
2 **directions powers**

3 *Corporations Act 2001*

4 **76 Section 794D**

5 Repeal the section, substitute:

6 **794D ASIC’s directions power—protecting dealings in financial**
7 **products**

8 (1) ASIC may, by written notice given to a market licensee, direct the
9 licensee:

10 (a) to suspend dealings in a specified financial product or class
11 of financial products; or

12 (b) to take, or refrain from taking:

13 (i) any actions; or

14 (ii) one or more specified actions;

15 relating to dealings in a specified financial product or class of
16 financial products;

17 if ASIC considers the direction is necessary, or in the public
18 interest, to protect people dealing in the financial product or class
19 of financial products.

20 Example: Under paragraph (b), a direction could require the licensee to take
21 actions to:

22 (a) limit the kinds of dealings that are allowed in the financial
23 product or class of financial products; or

24 (b) require participants in the market to act in a specified manner in
25 relation to dealings in the financial product or class of financial
26 products.

27 (2) The direction:

28 (a) must specify a reasonable time by which, or a reasonable
29 period during which, it is to be complied with; and

30 (b) must include the reasons for the direction; and

31 (c) may deal with either or both of the matters in the paragraphs
32 of subsection (1).

33 (3) The licensee must comply with the direction (even if under
34 subsection 794DA(1) the licensee has requested ASIC to refer the
35 direction to the Minister).

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

- (4) If the licensee fails to comply with the direction, ASIC may apply to the Court for, and the Court may make, an order that the licensee comply with the direction.

794DA Matters relating to ASIC directions to protect dealings in financial products

Referrals to the Minister

- (1) If, at any time after a market licensee receives a direction under subsection 794D(1), the licensee requests in writing that ASIC refer the direction to the Minister, ASIC must do so immediately.
- (2) The Minister may, if the Minister considers it appropriate after being referred the direction, request ASIC to vary or revoke the direction.
- (3) ASIC must comply with the request.
- (4) A request under subsection (2) is not a legislative instrument.

Variations and revocations

- (5) ASIC may vary or revoke a direction given under subsection 794D(1):
- (a) in like manner; and
 - (b) subject to like conditions, except if a condition is contrary to a request under subsection (2) of this section;
- (see subsection 33(3) of the *Acts Interpretation Act 1901*).

Notifying other affected persons

- (6) As soon as practicable after:
- (a) giving a direction under subsection 794D(1) to a market licensee; or
 - (b) varying or revoking such a direction;
- ASIC must give written notice of the direction, variation or revocation to the operator of each clearing and settlement facility with which the market licensee has clearing and settlement arrangements for transactions effected through the market.

EXPOSURE DRAFT

77 Section 823D

Repeal the section, substitute:

823D ASIC's directions power—protecting dealings in financial products and ensuring fair and effective provision of services by CS facilities

(1) ASIC may, by written notice given to a CS facility licensee, direct the licensee:

(a) not to provide the licensee's services in relation to any transactions that:

(i) the licensee receives notice of after the direction is given; and

(ii) relate to a specified financial product or class of financial products; or

(b) to take, or refrain from taking:

(i) any actions; or

(ii) one or more specified actions;

relating to dealings with transactions relating to a specified financial product or class of financial products;

if subsection (2) applies for the licensee.

(2) This subsection applies for the licensee if ASIC considers that:

(a) the direction is necessary, or in the public interest, to protect people dealing in a financial product or class of financial products; or

(b) the licensee has not done all things reasonably practicable to ensure the facility's services are provided in a fair and effective way.

(3) The direction:

(a) must specify a reasonable time by which, or a reasonable period during which, it is to be complied with; and

(b) must include the reasons for the direction; and

(c) may deal with either or both of the matters in the paragraphs of subsection (1).

(4) The licensee must comply with the direction (even if under subsection 823DA(1) the licensee has requested ASIC to refer the direction to the Minister).

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

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-
- 1 (5) If the licensee fails to comply with the direction, ASIC may apply
2 to the Court for, and the Court may make, an order that the licensee
3 comply with the direction.

4 **823DA Matters relating to these ASIC directions**

5 *Referrals to the Minister*

- 6 (1) If, at any time after a CS facility licensee receives a direction under
7 subsection 823D(1), the licensee requests in writing that ASIC
8 refer the direction to the Minister, ASIC must do so immediately.
- 9 (2) The Minister may, if the Minister considers it appropriate after
10 being referred the direction, request ASIC to vary or revoke the
11 direction.
- 12 (3) ASIC must comply with the request.
- 13 (4) A request under subsection (2) is not a legislative instrument.

14 *Variations and revocations*

- 15 (5) ASIC may vary or revoke a direction given under
16 subsection 823D(1):
17 (a) in like manner; and
18 (b) subject to like conditions, except if a condition is contrary to
19 a request under subsection (2) of this section;
20 (see subsection 33(3) of the *Acts Interpretation Act 1901*).

21 *Notifying other affected persons*

- 22 (6) As soon as practicable after:
23 (a) giving a direction under subsection 823D(1) to a CS facility
24 licensee; or
25 (b) varying or revoking such a direction;
26 ASIC must give written notice of the direction, variation or
27 revocation to:
28 (c) the operator of each financial market with which the facility
29 has arrangements to provide services for transactions effected
30 through the market; and
31 (d) if the direction relates to one or more specified financial
32 products—each issuer of those products; and
33 (e) the Reserve Bank.

EXPOSURE DRAFT

78 Section 904G

Repeal the section, substitute:

904G ASIC's directions power—licensees not complying with their obligations

(1) ASIC may, by written notice given to a derivative trade repository licensee, direct the licensee to:

(a) take one or more specified actions to promote compliance by the licensee with its obligations as a derivative trade repository licensee; or

(b) refrain from taking one or more specified actions to promote compliance by the licensee with those obligations;

if ASIC considers that the licensee is not complying with those obligations.

(2) The direction:

(a) must specify a reasonable time by which, or a reasonable period during which, it is to be complied with; and

(b) must include the reasons for the direction; and

(c) may deal with either or both of the matters in the paragraphs of subsection (1).

(3) The licensee must comply with the direction (even if under subsection 904GA(1) the licensee has requested ASIC to refer the direction to the Minister).

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

(4) If the licensee fails to comply with the direction, ASIC may apply to the Court for, and the Court may make, an order that the licensee comply with the direction.

904GA Matters relating to ASIC directions to licensees not complying with their obligations

Referrals to the Minister

(1) If, at any time after a derivative trade repository licensee receives a direction under subsection 904G(1), the licensee requests in writing that ASIC refer the direction to the Minister, ASIC must do so immediately.

EXPOSURE DRAFT

1 (2) The Minister may, if the Minister considers it appropriate after
2 being referred the direction, request ASIC to vary or revoke the
3 direction.

4 (3) ASIC must comply with the request.

5 (4) A request under subsection (2) is not a legislative instrument.

6 *Variations and revocations*

7 (5) ASIC may vary or revoke a direction given under
8 subsection 904G(1):

9 (a) in like manner; and

10 (b) subject to like conditions, except if a condition is contrary to
11 a request under subsection (2) of this section;

12 (see subsection 33(3) of the *Acts Interpretation Act 1901*).

13 *Notifying other affected persons*

14 (6) As soon as practicable after:

15 (a) giving a direction under subsection 904G(1) to a derivative
16 trade repository licensee; or

17 (b) varying or revoking such a direction;

18 ASIC must give written notice of the direction, variation or
19 revocation to:

20 (c) the operator of each financial market with which the licensed
21 derivative trade repository has arrangements to provide
22 services relating to derivative trade data; and

23 (d) the operator of each clearing and settlement facility with
24 which that repository has arrangements to provide services
25 relating to derivative trade data.

26 **79 Section 1042E**

27 Omit “794D(2)”, substitute “794D(1)”.

28 **80 Before paragraph 1317C(gca)**

29 Insert:

30 (gcaaa) a decision by the Minister under subsection 794DA(2) to
31 request ASIC to vary or revoke a direction given under
32 subsection 794D(1); or

33 **81 In the appropriate position in section 1317C**

34 Insert:

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1 (gccb) a decision by the Minister under subsection 823DA(2) to
2 request ASIC to vary or revoke a direction given under
3 subsection 823D(1); or

4 **82 After paragraph 1317C(gdc)**

5 Insert:

6 (gdca) a decision by the Minister under subsection 904GA(2) to
7 request ASIC to vary or revoke a direction given under
8 subsection 904G(1); or

9 **83 Schedule 3 (table item dealing with subsection 823D(5))**

10 Omit “823D(5)”, substitute “823D(4)”.

11 **84 Schedule 3 (table item dealing with subsection 904G(5))**

12 Omit “904G(5)”, substitute “904G(3)”.

EXPOSURE DRAFT

1 **Part 9—Enhancing regulator powers for CS facility**
2 **licensees**

3 **Division 1—Main amendments**

4 *Corporations Act 2001*

5 **85 Paragraph 821A(1)(aa)**

6 Repeal the paragraph, substitute:

7 (aa) comply with standards in force under section 827D; and

8 (ab) do all other things necessary to reduce systemic risk to the
9 extent that it is reasonably practicable to do so; and

10 **86 Section 821D (heading)**

11 Omit “ASIC”.

12 **87 Section 821D**

13 Before “A CS facility licensee”, insert “(1)”.

14 **88 At the end of section 821D**

15 Add:

16 (2) A CS facility licensee must give a person authorised by the
17 Reserve Bank such reasonable access to the facility as the person
18 requests for any of the purposes of this Part.

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

21 **89 Subsection 822C(1)**

22 After “made by”, insert “one or more of the following”.

23 **90 Paragraph 822C(1)(a)**

24 Omit “; or”, substitute “or the Reserve Bank;”.

25 **91 Paragraphs 822C(1)(b) and (c)**

26 Omit “; or”, substitute “;”.

27 **92 Subsection 823B(2)**

28 Repeal the subsection.

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93 Subsection 823B(3)

Omit “, and audit report (if any),”.

94 After section 823B

Insert:

823BAA Reserve Bank’s power to require special report

- (1) The Reserve Bank may give a CS facility licensee a written notice requiring the licensee to give the Reserve Bank a special report on specified matters.
- (2) The licensee must give the special report to the Reserve Bank within the time required by the notice.

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

823BA ASIC’s power to require expert report

Method for appointment

- (1) ASIC may, by written notice given to a CS facility licensee and a person (the *expert*):
 - (a) appoint the expert to provide ASIC with an expert report on specified matters:
 - (i) relating to the licensee’s compliance with its obligations as a CS facility licensee under this Chapter; but
 - (ii) not relating to the licensee’s compliance with its obligations under paragraph 821A(1)(aa) or (ab); and
 - (b) determine a fee equal to ASIC’s expenses in appointing and paying the expert to provide the report.The fee must not be such as to amount to taxation, and may be determined after the appointment.
- (2) ASIC may, by written notice given to a CS facility licensee, direct the licensee to appoint a person to provide ASIC with an expert report on specified matters:
 - (a) relating to the licensee’s compliance with its obligations as a CS facility licensee under this Chapter; but
 - (b) not relating to the licensee’s compliance with its obligations under paragraph 821A(1)(aa) or (ab).

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Qualifications for appointment

1
2 (3) However, a person cannot be appointed under subsection (1) or (2),
3 unless ASIC:

4 (a) is satisfied that the person has the necessary skills or
5 experience to provide the expert report; and

6 (b) if subsection (2) applies—has approved the proposed
7 appointment of the person.

Licensee's obligations

8
9 (4) The licensee must comply with any direction given under
10 subsection (2) to the licensee.

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

13 (5) The licensee must give all information, explanation and assistance
14 reasonably necessary for the preparation and provision of the
15 expert report.

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

18 (6) If subsection (1) applies and notice of a fee is given to the licensee
19 under paragraph (1)(b), the fee:

20 (a) is a debt due and payable to ASIC; and

21 (b) is recoverable by ASIC in:

22 (i) the Federal Court; or

23 (ii) the Federal Circuit and Family Court of Australia
24 (Division 1); or

25 (iii) a court of a State or Territory that has jurisdiction in
26 relation to the matter.

823BB Reserve Bank's power to require expert report

Method for appointment

27
28
29 (1) The Reserve Bank may, by written notice given to a CS facility
30 licensee and a person (the *expert*):

31 (a) appoint the expert to provide the Reserve Bank with an
32 expert report on specified matters relating to the licensee's
33 compliance with its obligations as a CS facility licensee
34 under paragraphs 821A(1)(aa) and (ab); and

EXPOSURE DRAFT

1 (b) determine a fee equal to the Reserve Bank's expenses in
2 appointing and paying the expert to provide the report.
3 The fee must not be such as to amount to taxation, and may be
4 determined after the appointment.

5 (2) The Reserve Bank may, by written notice given to a CS facility
6 licensee, direct the licensee to appoint a person to provide the
7 Reserve Bank with an expert report on specified matters relating to
8 the licensee's compliance with its obligations as a CS facility
9 licensee under paragraphs 821A(1)(aa) and (ab).

10 *Qualifications for appointment*

11 (3) However, a person cannot be appointed under subsection (1) or (2),
12 unless the Reserve Bank:
13 (a) is satisfied that the person has the necessary skills or
14 experience to provide the expert report; and
15 (b) if subsection (2) applies—has approved the proposed
16 appointment of the person.

17 *Licensee's obligations*

18 (4) The licensee must comply with any direction given under
19 subsection (2) to the licensee.

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

22 (5) The licensee must give all information, explanation and assistance
23 reasonably necessary for the preparation and provision of the
24 expert report.

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

27 (6) If subsection (1) applies and notice of a fee is given to the licensee
28 under paragraph (1)(b), the fee:

- 29 (a) is a debt due and payable to the Reserve Bank; and
30 (b) is recoverable by the Reserve Bank in:
31 (i) the Federal Court; or
32 (ii) the Federal Circuit and Family Court of Australia
33 (Division 1); or
34 (iii) a court of a State or Territory that has jurisdiction in
35 relation to the matter.

EXPOSURE DRAFT

95 Section 823E

Repeal the section, substitute:

Subdivision D—Reserve Bank’s directions powers

823DB Directions to comply with obligations as a CS facility licensee

(1) If the Reserve Bank considers that a CS facility licensee is not complying or is not likely to comply with its obligations as a CS facility licensee under:

- (a) paragraph 821A(1)(aa) or (ab); or
- (b) section 821BA; or
- (c) subsection 821C(3);

the Reserve Bank may give the licensee a written direction to do specified things that the Reserve Bank reasonably believes will promote compliance by the licensee with those obligations.

(2) The direction must specify a reasonable time by which, or a reasonable period during which, it is to be complied with.

(3) The licensee must comply with the direction.

Referrals to the Minister

(4) If, at any time after the licensee receives the direction, the licensee requests in writing that the Reserve Bank refer the direction to the Minister, the Reserve Bank must do so immediately.

(5) The Minister may, if the Minister considers it appropriate after being referred the direction, require the Reserve Bank to vary or revoke the direction.

Note: The Reserve Bank will need to do so immediately (see paragraph 823J(1)(b)).

823E Directions to increase compliance or reduce systemic risk

(1) The Reserve Bank may, by written notice given to a CS facility licensee, direct the licensee to take:

- (a) specified measures to comply with all or part of one or more standards in force under section 827D, if the Reserve Bank considers that the licensee is not complying with those standards or parts; or

EXPOSURE DRAFT

-
- 1 (b) specified action to reduce systemic risk in the provision of
2 the facility's services, if the Reserve Bank reasonably
3 believes that the licensee:
4 (i) has not done; or
5 (ii) is unlikely to do;
6 all things reasonably practicable to reduce systemic risk in
7 the provision of the facility's services.
- 8 (2) The direction must specify a reasonable time by which, or a
9 reasonable period during which, it is to be complied with.
- 10 (3) The licensee must comply with the direction.
- 11 Note: Failure to comply with this subsection is an offence (see
12 subsection 1311(1)).

13 **823F Directions to preserve stability in the Australian financial** 14 **system**

- 15 (1) The Reserve Bank may, by written notice given to a CS facility
16 licensee holding a licence granted under subsection 824B(1)
17 (domestic clearing and settlement facilities), direct the licensee to:
18 (a) do, or refrain from doing, anything under either or both of the
19 following instruments (the *operating instruments*):
20 (i) the licensee's operating rules;
21 (ii) the written procedures the licensee must have under
22 regulations made for the purposes of
23 subsection 822A(2); or
24 (b) amend one or more of those operating instruments; or
25 (c) subject to sections 823M and 823P:
26 (i) increase the licensee's level of share capital to a
27 specified level; or
28 (ii) issue one or more specified classes of shares, or one or
29 more specified classes of rights to acquire shares, in the
30 licensee; or
31 (iii) issue one or more specified classes of capital
32 instruments that are prescribed by the regulations; or
33 (d) refrain from paying a dividend on any shares; or
34 (e) refrain from repaying any amount paid on shares; or
35 (f) exercise rights under an agreement (including termination
36 rights);
37 if subsection (2) applies for the licensee.

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-
- 1 Note 1: The direction is a *recapitalisation direction* to the extent that it deals
2 with a matter in paragraph (c).
- 3 Note 2: The procedures referred to in subparagraph (a)(ii) could relate to
4 matters such as:
5 (a) the licensee's operations; or
6 (b) the conduct of participants in the facility; or
7 (c) the structure and operation of electronic communications with
8 those participants; or
9 (d) default management or recovery.
- 10 (2) This subsection applies for the licensee if:
11 (a) the licensee informs the Reserve Bank that the licensee
12 considers that the licensee is likely to become unable to meet
13 one or more of its obligations under paragraphs 821A(1)(aa),
14 (ab) and (d) (its *critical obligations*); or
15 (b) the Reserve Bank reasonably believes that, in the absence of
16 external support:
17 (i) the licensee may become unable to meet one or more of
18 its critical obligations; or
19 (ii) it is likely that the licensee will be unable to operate the
20 facility in Australia consistently with the stability of the
21 Australian financial system; or
22 (c) the licensee becomes unable to meet one or more of its
23 critical obligations; or
24 (d) the Reserve Bank reasonably believes that the licensee is
25 conducting, or is likely to conduct its affairs in a way that
26 may cause or promote instability in the Australian financial
27 system.
- 28 (3) For the purposes of paragraph (2)(b), the regulations may specify
29 that a particular form of support:
30 (a) is external support; or
31 (b) is not external support.
- 32 (4) The direction:
33 (a) must specify a reasonable time by which, or a reasonable
34 period during which, it is to be complied with; and
35 (b) may deal with one or more of the matters in the paragraphs or
36 subparagraphs of subsection (1).
- 37 (5) The licensee must comply with the direction.
- 38 Note: Failure to comply with this subsection is an offence (see
39 subsection 1311(1)).
-

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823FA Directions to ensure effective crisis resolution

- 1
- 2 (1) The Reserve Bank may, by written notice given to body corporate
- 3 that is a CS facility licensee, or a related body corporate of a CS
- 4 facility licensee that is incorporated in Australia, direct the body
- 5 corporate to take:
- 6 (a) specified measures to comply with all or part of one or more
- 7 standards in force under section 827DA that applies to the
- 8 body corporate, if the Reserve Bank reasonably believes that
- 9 the body corporate is not complying with those standards or
- 10 parts; or
- 11 (b) specified action to manage or resolve an impediment to the
- 12 effective management of or response to a condition in
- 13 section 831A being satisfied in relation to the CS facility
- 14 licensee, if the Reserve Bank reasonably believes that the
- 15 body corporate:
- 16 (i) has not done; or
- 17 (ii) is unlikely to do;
- 18 all things reasonably practicable to manage or resolve the
- 19 impediment.
- 20 (2) The direction must specify a reasonable time by which, or a
- 21 reasonable period during which, it is to be complied with.
- 22 (3) The body corporate must comply with the direction.

23 Note: Failure to comply with this subsection is an offence (see

24 subsection 1311(1)).

823G Directions to give information to assist the Reserve Bank perform its functions

Direction to give information or documents

- 25
- 26
- 27
- 28 (1) The Reserve Bank may, by written notice given to a CS facility
- 29 licensee, direct the licensee to give:
- 30 (a) specified information; or
- 31 (b) specified documents containing specified information;
- 32 to the Reserve Bank or a Reserve Bank staff member if
- 33 subsection (2) applies for the licensee.
- 34 (2) This subsection applies for the licensee if the Reserve Bank
- 35 reasonably believes that:
- 36 (a) the licensee can give the information or documents; and

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1 (b) the information or documents could assist the Reserve Bank
2 perform its functions, or exercise its powers, under this Part.

3 (3) The direction:

4 (a) must specify a reasonable time by which, or a reasonable
5 period during which, it is to be complied with; and

6 (b) may specify the form and manner in which the information or
7 documents must be given.

8 (4) The licensee must comply with the direction.

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

11 (5) Subsection (4) does not apply to the extent that the person has a
12 reasonable excuse.

13 Note: A defendant bears an evidential burden in relation to the matter in this
14 subsection, see subsection 13.3(3) of the *Criminal Code*.

15 **823H All Reserve Bank directions—order for body corporate to** 16 **comply with direction**

17 If a body corporate fails to comply with a direction given under
18 this Subdivision to the body corporate, the Reserve Bank may
19 apply to the Court for, and the Court may make, an order that the
20 body corporate comply with the direction.

21 **823J All Reserve Bank directions—variation or revocation**

22 (1) The Reserve Bank:

23 (a) may, by written notice given to a body corporate:

24 (i) vary a direction given under this Subdivision to the
25 body corporate if, at the time of variation, the Reserve
26 Bank reasonably believes the variation is necessary or
27 appropriate; or

28 (ii) revoke such a direction if, at the time of revocation, the
29 Reserve Bank reasonably believes the direction is no
30 longer necessary or appropriate; and

31 (b) for a direction given under subsection 823DB(1)—must
32 immediately do so if required under subsection 823DB(5).

33 (2) A direction given under this Subdivision has effect until the
34 Reserve Bank revokes it under subsection (1).

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823K Certain Reserve Bank directions—consulting ASIC

Before:

(a) giving a direction under:

(i) subsection 823E(1); or

(ii) subsection 823F(1) that deals with a matter in paragraph 823F(1)(c); or

(b) varying or revoking, under subsection 823J(1), such a direction;

the Reserve Bank must consult ASIC. However, a failure to consult ASIC does not invalidate the direction, variation or revocation.

Subdivision E—Matters relating to Reserve Bank recapitalisation directions

823L Recapitalisation directions—matters relating to compliance

Giving members of the licensee notice of share issue etc.

(1) As soon as practicable after a CS facility licensee issues shares, rights to acquire shares, or other capital instruments in compliance with a recapitalisation direction, the licensee must give a written notice:

(a) to the persons who were members of the licensee just before the issue; and

(b) that:

(i) identifies the issue; and

(ii) explains the effect of the issue of the shares, rights to acquire shares, or other capital instruments on the members' interests.

(2) The licensee must comply with subsection (1).

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

(3) If the licensee fails to comply with subsection (1), the Reserve Bank may apply to the Court for, and the Court may make, an order that the licensee comply with that subsection.

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Issue of shares etc. despite other laws etc.

- 1
- 2 (4) A CS facility licensee may issue shares, rights to acquire shares, or
3 other capital instruments in compliance with a recapitalisation
4 direction despite all of the following:
- 5 (a) this Act;
6 (b) the licensee's constitution;
7 (c) the licensee's operating instruments referred to in paragraph
8 823F(1)(a);
9 (d) any arrangement to which the licensee is a party;
10 (e) any listing rules of a financial market in whose official list
11 the licensee is included.

12 **823M Recapitalisation directions—Reserve Bank must obtain**
13 **expert's report on the fair value of shares etc.**

- 14 (1) Before giving a recapitalisation direction directing a CS facility
15 licensee to issue one or more specified classes of:
- 16 (a) shares in the licensee; or
17 (b) rights to acquire shares in the licensee;
18 the Reserve Bank must:
- 19 (c) obtain a report on the fair value of those shares, or those
20 rights, from an expert who is not an associate of the licensee;
21 and
22 (d) consider the report.

23 Note: The report may not always be required (see subsection (4)).

- 24 (2) The report must set out:
- 25 (a) the amount that is, in the expert's opinion, the fair value for
26 each of those shares or rights; and
27 (b) the reasons for forming the opinion; and
28 (c) any relationship between the expert and:
29 (i) the licensee; or
30 (ii) a person who is an associate of the licensee;
31 including any circumstances in which the expert gives the
32 licensee or person advice, or acts on behalf of the licensee or
33 person, in the proper performance of the functions attaching
34 to the expert's professional capacity or business relationship
35 with the licensee or person; and
36 (d) any financial or other interest of the expert that could
37 reasonably be regarded as being capable of affecting the

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1 expert's ability to give an unbiased opinion in relation to the
2 matter being reported on.

- 3 (3) The Reserve Bank may publish details of, or relating to the report.
- 4 (4) Despite subsection (1), the Reserve Bank need not obtain the report
5 if satisfied that doing so would detrimentally affect:
- 6 (a) participants, or proposed participants, in the CS facility; or
 - 7 (b) continuity in the provision of critical services by the CS
8 facility; or
 - 9 (c) stability in the Australian financial system.

10 **823N Recapitalisation directions—determination of the fair value of** 11 **shares or rights by an expert**

12 *Determining the fair value of shares*

- 13 (1) In determining the fair value for each share in a CS facility licensee
14 for the purposes of paragraph 823M(2)(a), the expert must:
- 15 (a) first, assess the value of the licensee as a whole, in
16 accordance with the assumptions (if any) notified to the
17 expert by the Minister for the valuation of the licensee; and
 - 18 (b) then, allocate that value among the classes of shares in the
19 licensee that:
 - 20 (i) have been issued; or
 - 21 (ii) the Reserve Bank proposes to direct be issued (taking
22 into account the relative financial risk, and voting and
23 distribution rights, of the classes); and
 - 24 (c) then, allocate the value of each class pro rata among the
25 shares in that class that:
 - 26 (i) have been issued; or
 - 27 (ii) the Reserve Bank proposes to direct be issued (without
28 allowing a premium or applying a discount for
29 particular shares in that class).

30 *Determining the fair value of rights*

- 31 (2) In determining the fair value for each right to acquire shares in a
32 CS facility licensee for the purposes of paragraph 823M(2)(a), the
33 expert must act in accordance with the assumptions (if any)
34 notified to the expert by the Minister for the valuation of that right.

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Ministerial assumptions

- 1
- 2 (3) The Minister may give the expert written notice of the following:
- 3 (a) assumptions for the valuation of the CS facility licensee;
- 4 (b) assumptions for the valuation of rights to acquire shares in
- 5 the CS facility licensee.
- 6 (4) The Minister may, by further written notice given to the expert,
- 7 revoke, but not vary, those assumptions.
- 8 (5) A notice given under subsection (3) or (4) is not a legislative
- 9 instrument.

10 **823P Recapitalisation directions—working out the fair value of**

11 **other capital instruments**

- 12 (1) Before giving a recapitalisation direction directing a CS facility
- 13 licensee to issue one or more specified classes of capital
- 14 instruments (see subparagraph 823F(1)(c)(iii)), the Reserve Bank
- 15 must comply with any requirements prescribed by the regulations
- 16 for ascertaining the fair value of the capital instruments.
- 17 (2) Regulations made for the purposes of this section may specify
- 18 different requirements for different classes of capital instruments.

19 **823Q Recapitalisation directions—contravening certain provisions**

20 **does not affect the validity of the direction etc.**

21 A contravention of section 823M, 823N or 823P does not affect the

22 validity of a recapitalisation direction or anything done in

23 compliance with the direction.

24 **823R Recapitalisation directions—exceptions to Part IV of the**

25 ***Competition and Consumer Act 2010***

26 For the purposes of subsection 51(1) of the *Competition and*

27 *Consumer Act 2010*, the following things are specified and

28 specifically authorised:

- 29 (a) the acquisition of shares in a CS facility licensee as a direct
- 30 result of:
- 31 (i) the issue of the shares in compliance with a
- 32 recapitalisation direction given to the licensee; or

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-
- 1 (ii) the exercise of a right to acquire the shares that was
2 issued in compliance with such a recapitalisation
3 direction;
4 (b) the acquisition of other capital instruments as a direct result
5 of the issue of those capital instruments in compliance with a
6 recapitalisation direction given to a CS facility licensee.

7 **Subdivision F—Other matters relating to Reserve Bank**
8 **directions**

9 **823S Directions to preserve stability in the Australian financial**
10 **system—relationship with other provisions**

11 If a direction under subsection 823F(1) directs a CS facility
12 licensee to amend any of the licensee’s operating rules or
13 procedures (see subparagraph 823F(1)(a)(ii)), neither of the
14 following provisions apply in relation to the amendment:

- 15 (a) subsection 822D(2) (about amendment ceasing to have effect
16 if ASIC not notified);
17 (b) section 822E (about disallowance).

18 Note: The licensee would still need to notify ASIC of the amendment (see
19 subsection 822D(1)).

20 **823T All Reserve Bank directions—publishing details about**
21 **directions**

22 The Reserve Bank may publish details of, or relating to:

- 23 (a) a direction given under Subdivision D; or
24 (b) a variation or revocation of such a direction.

25 **823U All Reserve Bank directions—injunctions**

- 26 (1) The Reserve Bank has the same powers as ASIC to apply for an
27 injunction under section 1324 in relation to a provision of this Part.
28 (2) The Reserve Bank may so apply itself or jointly with ASIC.

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1 Subdivision G—Other matters relating to ASIC or Reserve 2 Bank powers

3 823V All Reserve Bank powers under this Part—not grounds for 4 denial of obligations

- 5 (1) This section applies if a body corporate is party to an agreement,
6 whether the proper law of the agreement is:
- 7 (a) Australian law; or
 - 8 (b) foreign law, including the law of part of a foreign country.
- 9 (2) None of the matters mentioned in subsection (3) allows the
10 agreement, or a party to the agreement (other than the body
11 corporate), to do any of the following:
- 12 (a) deny any obligation under the agreement;
 - 13 (b) accelerate any debt under the agreement;
 - 14 (c) terminate or close out the agreement, or any transaction
15 relating to the agreement;
 - 16 (d) enforce any security under the agreement.
- 17 (3) The matters are as follows:
- 18 (a) the body corporate being subject to the exercise of a power
19 under this Part by the Reserve Bank;
 - 20 (b) if the body corporate is a member of a group of bodies
21 corporate—another member of the group being subject to the
22 exercise of such a power.

23 823W All ASIC and Reserve Bank directions etc. under this Part— 24 failure by officers to take reasonable steps to ensure 25 compliance

- 26 (1) An officer of a CS facility licensee contravenes this subsection if:
- 27 (a) the officer fails to take reasonable steps to ensure that the
28 licensee complies with:
 - 29 (i) a direction given under this Part by ASIC, or the
30 Reserve Bank, to the licensee; or
 - 31 (ii) subsection 823BA(2) or (4), or 823BB(2) or (4), to the
32 extent to which that subsection is about making a
33 payment relating to an expert report; or
 - 34 (iii) subsection 823BA(5) or 823BB(5) (about giving
35 assistance etc. relating to an expert report); and

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1 (b) it would be reasonable to expect that the officer's duties
2 include ensuring that the licensee complies with that
3 direction or subsection.

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

6 (2) If an officer of a CS facility licensee contravenes subsection (1),
7 the officer contravenes that subsection in respect of:

8 (a) the first day the contravention happens; and

9 (b) each later day (if any) the circumstances that gave rise to the
10 contravention continue (including the day of conviction for
11 any such offence or any later day).

12 Note: This subsection is not intended to imply that section 4K of the *Crimes*
13 *Act 1914* does not apply to offences against this Act or the regulations.

14 **823X All ASIC and Reserve Bank directions under this Part—** 15 **protection from liability for compliance in good faith**

16 (1) An action or other proceeding (whether criminal or civil) does not
17 lie against a person in relation to anything done, or omitted to be
18 done, in good faith by the person if:

19 (a) the person does the thing, or omits to do the thing, for the
20 purpose of any of the following:

21 (i) complying with a direction given under this Part by
22 ASIC, or the Reserve Bank, to a body corporate;

23 (ii) taking a measure, or an action, specified in such a
24 direction;

25 (iii) doing, or refraining from doing, anything in accordance
26 with such a direction; and

27 (b) it is reasonable for the person to do the thing, or to omit to do
28 the thing, in order to achieve that purpose; and

29 (c) the person is any of the following:

30 (i) an officer or senior manager of the body corporate, or of
31 a related body corporate;

32 (ii) an employee or agent of the body corporate, or of a
33 related body corporate;

34 (iii) the body corporate or a related body corporate;

35 (iv) a person engaged to provide services (including advice)
36 to the body corporate or a related body corporate.

37 (2) For the purposes of paragraph (1)(b), treat it as reasonable for a
38 person to do a thing, or to omit to do a thing, in order to achieve a

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1 purpose unless no reasonable person in that person's position
2 would do the thing, or omit to do the thing, in order to achieve that
3 purpose.

4 **96 Subparagraph 1101B(1)(a)(iii)**

5 Omit "or of the operating rules of a licensed CS facility".

6 **97 After paragraph 1101B(1)(a)**

7 Insert:

8 (aa) on the application of ASIC or the Reserve Bank or both, it
9 appears to the Court that a person has contravened a
10 provision of the operating rules of a licensed CS facility; or

11 **98 Schedule 3 (table item dealing with section 821D)**

12 Repeal the item, substitute:

Subsection 821D(1)	2 years imprisonment
Subsection 821D(2)	2 years imprisonment

13 **99 In the appropriate position in Schedule 3 (table)**

14 Insert:

Subsection 823BAA(2)	2 years imprisonment
Subsection 823BA(4)	2 years imprisonment
Subsection 823BA(5)	2 years imprisonment
Subsection 823BB(4)	2 years imprisonment
Subsection 823BB(5)	2 years imprisonment

15 **100 In the appropriate position in Schedule 3 (table)**

16 Insert:

Subsection 823F(5)	(a) for an individual—100 penalty units for each day, or part of a day, in respect of which the offence is committed; and (b) for a body corporate—1,000 penalty units for each day, or part of a day, in respect of which the offence is committed
Subsection 823FA	1,000 penalty units for each day, or part of a day, in respect of which the offence is committed
Subsection 823G(4)	(a) for an individual—100 penalty units for each day, or part of a day, in respect of which the offence is committed; and

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	(b) for a body corporate—1,000 penalty units for each day, or part of a day, in respect of which the offence is committed
Subsection 823L(2)	(a) for an individual—100 penalty units for each day, or part of a day, in respect of which the offence is committed; and (b) for a body corporate—1,000 penalty units for each day, or part of a day, in respect of which the offence is committed
Subsection 823W(1)	100 penalty units for each day, or part of a day, in respect of which the offence is committed

1 **Division 2—Other amendments**

2 ***Australian Securities and Investments Commission Act 2001***

3 **101 After paragraph 246(1)(m)**

4 Insert:

5 (n) an expert appointed under subsection 823BA(1), or as
6 directed under subsection 823BA(2), of the *Corporations Act*
7 *2001*;

8 ***Corporations Act 2001***

9 **102 Section 9**

10 Insert:

11 ***recapitalisation direction*** means a direction given under
12 subsection 823F(1), to the extent that the direction deals with a
13 matter in paragraph 823F(1)(c).

14 ***Reserve Bank*** means the Reserve Bank of Australia.

15 ***Reserve Bank staff member*** means *staff member of the Reserve*
16 *Bank Service* (within the meaning of the *Reserve Bank Act 1959*).

17 **103 Subsection 821C(3)**

18 Omit “of Australia (the *Reserve Bank*)”.

19 **104 Subsection 823C(3)**

20 Omit “of Australia”.

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-
- 1 **105 Subsection 823CA(1)**
2 Omit “of Australia (the *Reserve Bank*)”.
- 3 **106 Paragraph 824B(2)(d)**
4 Omit “of Australia”.
- 5 **107 Paragraphs 827A(2)(h) and (3)(d)**
6 Omit “of Australia”.
- 7 **108 Section 827C**
8 Omit “of Australia”.
- 9 **109 Subsection 827D(1)**
10 Omit “of Australia (the *Reserve Bank*)”.
- 11 **110 Subsections 901B(4) and (6)**
12 Omit “of Australia”.
- 13 **111 Subparagraph 901J(1)(b)(ii)**
14 Omit “of Australia”.
- 15 **112 Paragraph 904B(2)(c)**
16 Omit “of Australia”.
- 17 **113 Paragraph 904D(1)(c)**
18 Omit “of Australia”.
- 19 **114 Subsection 908BR(1)**
20 Omit “of Australia”.
- 21 ***Reserve Bank Act 1959***
- 22 **115 After section 84**
23 Insert:

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84A Protection from liability—crisis powers etc.

Protection from criminal actions or proceedings

- (1) A criminal action or proceeding does not lie against a person in relation to anything done, or omitted to be done, in good faith by the person if:
- (a) the person does the thing, or omits to do the thing, for the purpose of:
 - (i) performing or purportedly performing any function; or
 - (ii) exercising or purportedly exercising any power; conferred or expressed to be conferred by or under:
 - (iii) section 823F (directions to preserve stability in the Australian financial system) or 823L (recapitalisation directions) of the *Corporations Act 2001*; or
 - (iv) Part 7.3B (crisis resolution) of that Act; and
 - (b) it is reasonable for the person to do the thing, or to omit to do the thing, in order to achieve that purpose; and
 - (c) the person is covered by subsection (3).

Protection from civil actions or proceedings

- (2) A civil action or proceeding does not lie against a person in relation to anything done, or omitted to be done, in good faith by the person if:
- (a) the person does the thing, or omits to do the thing, for the purpose of:
 - (i) performing or purportedly performing any function; or
 - (ii) exercising or purportedly exercising any power; conferred or expressed to be conferred by or under Part 7.3 (clearing and settlement facilities) or 7.3B (crisis resolution) of the *Corporations Act 2001*; and
 - (b) it is reasonable for the person to do the thing, or to omit to do the thing, in order to achieve that purpose; and
 - (c) the person is covered by subsection (3).

Persons protected

- (3) This subsection covers the following persons:
- (a) the Bank;
 - (b) the Governor;
 - (c) the Deputy Governor;

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-
- 1 (d) a member of the Reserve Bank Board;
2 (e) a member of the Payments System Board;
3 (f) a staff member of the Reserve Bank Service;
4 (g) an officer or employee of:
5 (i) an Agency (within the meaning of the *Public Service*
6 *Act 1999*); or
7 (ii) an authority of the Commonwealth;
8 whose services are made available to the Bank in connection
9 with the performance or exercise of any of the Bank's
10 functions or powers.

11 *Reasonableness*

- 12 (4) For the purposes of paragraph (1)(b) or (2)(b), treat it as reasonable
13 for a person to do a thing, or to omit to do a thing, in order to
14 achieve a purpose unless no reasonable person in that person's
15 position would do the thing, or omit to do the thing, in order to
16 achieve that purpose.

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Part 10—Enhancing ASIC powers for other licensees

Corporations Act 2001

116 After section 794B

Insert:

794BA ASIC’s power to require expert report

Method for appointment

- (1) ASIC may, by written notice given to a market licensee and a person (the *expert*):
 - (a) appoint the expert to provide ASIC with an expert report on specified matters relating to the licensee’s compliance with its obligations as a market licensee under this Chapter; and
 - (b) determine a fee equal to ASIC’s expenses in appointing and paying the expert to provide the report.The fee must not be such as to amount to taxation, and may be determined after the appointment.
- (2) ASIC may, by written notice given to a market licensee, direct the licensee to appoint a person to provide ASIC with an expert report on specified matters relating to the licensee’s compliance with its obligations as a market licensee under this Chapter.

Qualifications for appointment

- (3) However, a person cannot be appointed under subsection (1) or (2), unless ASIC:
 - (a) is satisfied that the person has the necessary skills or experience to provide the expert report; and
 - (b) if subsection (2) applies—has approved the proposed appointment of the person.

Licensee’s obligations

- (4) The licensee must comply with any direction given under subsection (2) to the licensee.

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

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-
- 1 (5) The licensee must give all information, explanation and assistance
2 reasonably necessary for the preparation and provision of the
3 expert report.

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

- 6 (6) If subsection (1) applies and notice of a fee is given to the licensee
7 under paragraph (1)(b), the fee:
8 (a) is a debt due and payable to ASIC; and
9 (b) is recoverable by ASIC in:
10 (i) the Federal Court; or
11 (ii) the Federal Circuit and Family Court of Australia
12 (Division 1); or
13 (iii) a court of a State or Territory that has jurisdiction in
14 relation to the matter.

15 **117 At the end of Division 5 of Part 7.5A**

16 Add:

17 **Subdivision C—Power of ASIC to require expert report**

18 **904L ASIC’s power to require expert report**

19 *Method for appointment*

- 20 (1) ASIC may, by written notice given to a derivative trade repository
21 licensee and a person (the *expert*):
22 (a) appoint the expert to provide ASIC with an expert report on
23 specified matters relating to the licensee’s compliance with
24 its obligations as a derivative trade repository licensee under
25 this Chapter; and
26 (b) determine a fee equal to ASIC’s expenses in appointing and
27 paying the expert to provide the report.

28 The fee must not be such as to amount to taxation, and may be
29 determined after the appointment.

- 30 (2) ASIC may, by written notice given to a derivative trade repository
31 licensee, direct the licensee to appoint a person to provide ASIC
32 with an expert report on specified matters relating to the licensee’s
33 compliance with its obligations as a derivative trade repository
34 licensee under this Chapter.

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Qualifications for appointment

1
2 (3) However, a person cannot be appointed under subsection (1) or (2),
3 unless ASIC:

4 (a) is satisfied that the person has the necessary skills or
5 experience to provide the expert report; and

6 (b) if subsection (2) applies—has approved the proposed
7 appointment of the person.

Licensee's obligations

8
9 (4) The licensee must comply with any direction given under
10 subsection (2) to the licensee.

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

13 (5) The licensee must give all information, explanation and assistance
14 reasonably necessary for the preparation and provision of the
15 expert report.

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

18 (6) If subsection (1) applies and notice of a fee is given to the licensee
19 under paragraph (1)(b), the fee:

20 (a) is a debt due and payable to ASIC; and

21 (b) is recoverable by ASIC in:

22 (i) the Federal Court; or

23 (ii) the Federal Circuit and Family Court of Australia
24 (Division 1); or

25 (iii) a court of a State or Territory that has jurisdiction in
26 relation to the matter.

118 After section 908BW

27
28 Insert:

908BWA ASIC's power to require expert report

Method for appointment

29
30
31 (1) ASIC may, by written notice given to a benchmark administrator
32 licensee and a person (the *expert*):

33 (a) appoint the expert to provide ASIC with an expert report on
34 specified matters relating to the licensee's compliance with

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1 its obligations as a benchmark administrator licensee under
2 this Chapter; and

3 (b) determine a fee equal to ASIC's expenses in appointing and
4 paying the expert to provide the report.

5 The fee must not be such as to amount to taxation, and may be
6 determined after the appointment.

7 (2) ASIC may, by written notice given to a benchmark administrator
8 licensee, direct the licensee to appoint a person to provide ASIC
9 with an expert report on specified matters relating to the licensee's
10 compliance with its obligations as a benchmark administrator
11 licensee under this Chapter.

12 *Qualifications for appointment*

13 (3) However, a person cannot be appointed under subsection (1) or (2),
14 unless ASIC:

15 (a) is satisfied that the person has the necessary skills or
16 experience to provide the expert report; and

17 (b) if subsection (2) applies—has approved the proposed
18 appointment of the person.

19 *Licensee's obligations*

20 (4) The licensee must comply with any direction given under
21 subsection (2) to the licensee.

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

24 (5) The licensee must give all information, explanation and assistance
25 reasonably necessary for the preparation and provision of the
26 expert report.

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

29 (6) If subsection (1) applies and notice of a fee is given to the licensee
30 under paragraph (1)(b), the fee:

31 (a) is a debt due and payable to ASIC; and

32 (b) is recoverable by ASIC in:

33 (i) the Federal Court; or

34 (ii) the Federal Circuit and Family Court of Australia
35 (Division 1); or

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1

(iii) a court of a State or Territory that has jurisdiction in relation to the matter.

2

3

119 In the appropriate position in Schedule 3

4

Insert:

Subsection 794BA(4) 2 years imprisonment

Subsection 794BA(5) 2 years imprisonment

5

120 In the appropriate position in Schedule 3

6

Insert:

Subsection 904L(4) 2 years imprisonment

Subsection 904L(5) 2 years imprisonment

7

121 In the appropriate position in Schedule 3

8

Insert:

Subsection 908BWA(4) 2 years imprisonment

Subsection 908BWA(5) 2 years imprisonment

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1 **Part 11—Fit, proper and competent person standards**

2 **Division 1—Additional obligation for certain licensees**

3 *Corporations Act 2001*

4 **122 Section 9**

5 Insert:

6 *core officer*, of a corporation (other than a CCIV), means a person
7 covered by paragraph 9AD(1)(a) or (b).

8 **123 After paragraph 792A(1)(h)**

9 Insert:

10 (ha) take:

11 (i) all reasonable steps; and

12 (ii) if the licence was granted under subsection 795B(1)
13 (domestic licensees)—all additional steps (if any)
14 prescribed by the regulations for the purposes of this
15 subparagraph;

16 to ensure that each individual performing the role of core
17 officer of the licensee is fit, proper, capable and competent
18 for that role; and

19 **124 Paragraph 792A(1)(i)**

20 Repeal the paragraph, substitute:

21 (i) take all reasonable steps to ensure that no:

22 (i) disqualified individual; or

23 (ii) individual against whom an FMI banning order is made;
24 becomes, or remains, involved in the licensee (see
25 Divisions 2 and 2A of Part 7.4).

26 **125 Subsection 792A(2)**

27 After “(h)”, insert “, (ha)”.

28 **126 After paragraph 821A(1)(g)**

29 Insert:

30 (ga) take:

31 (i) all reasonable steps; and

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1 (ii) if the licence was granted under subsection 824B(1)
2 (domestic licensees)—all additional steps (if any)
3 prescribed by the regulations for the purposes of this
4 subparagraph;
5 to ensure that each individual performing the role of core
6 officer of the licensee is fit, proper, capable and competent
7 for that role; and

8 **127 Paragraph 821A(1)(h)**

9 Repeal the paragraph, substitute:

10 (h) take all reasonable steps to ensure that no:

11 (i) disqualified individual; or

12 (ii) individual against whom an FMI banning order is made;
13 becomes, or remains, involved in the licensee (see
14 Divisions 2 and 2A of Part 7.4).

15 **128 Subsection 821A(2)**

16 After “(g)”, insert “, (ga)”.

17 **129 Subsections 853C(2) and (3)**

18 Repeal the subsections, substitute:

19 (2) ASIC may make such a declaration only if ASIC is satisfied that
20 the individual is unfit to be involved in the licensee or applicant.

21 (3) In deciding whether an individual is unfit as mentioned in
22 subsection (2), ASIC must take into account such matters as the
23 individual’s fame, character and integrity.

24 **130 After paragraph 904A(1)(b)**

25 Insert:

26 (ba) take:

27 (i) all reasonable steps; and

28 (ii) if the licensee is not a foreign body corporate—all
29 additional steps (if any) prescribed by the regulations
30 for the purposes of this subparagraph;

31 to ensure that each individual performing the role of core
32 officer of the licensee is fit, proper, capable and competent
33 for that role; and

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131 Paragraph 904A(1)(c)

Repeal the paragraph, substitute:

(c) take all reasonable steps to ensure that no:

(i) disqualified individual; or

(ii) individual against whom an FMI banning order is made; becomes, or remains, involved in the operator (see Divisions 2 and 2A of Part 7.4).

132 Subsection 904A(2)

After “(b)”, insert “, (ba)”.

133 After paragraph 908BP(b)

Insert:

(ba) take:

(i) all reasonable steps; and

(ii) if the licensee is not a foreign body corporate—all additional steps (if any) prescribed by the regulations for the purposes of this subparagraph;

to ensure that each individual performing the role of core officer of the licensee is fit, proper, capable and competent for that role; and

134 Paragraph 908BP(c)

Repeal the paragraph, substitute:

(c) take all reasonable steps to ensure that no:

(i) disqualified individual; or

(ii) individual against whom an FMI banning order is made; becomes, or remains, involved in the administration of the financial benchmark specified in the licence (see Divisions 2 and 2A of Part 7.4).

Division 2—Financial market infrastructure banning orders

Corporations Act 2001

135 Section 9

Insert:

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1 ***FMI banning order*** (short for financial market infrastructure
2 banning order) means an order made under subsection 853H(1).

3 ***FMI licensee*** means:

- 4 (a) a market licensee; or
- 5 (b) a CS facility licensee; or
- 6 (c) a derivative trade repository licensee; or
- 7 (d) a benchmark administrator licensee.

8 **136 After Division 2 of Part 7.4**

9 Insert:

10 **Division 2A—Financial market infrastructure banning** 11 **orders**

12 **Subdivision A—Making financial market infrastructure** 13 **banning orders**

14 **853H ASIC’s power to make financial market infrastructure** 15 **banning orders**

- 16 (1) ASIC may, in writing, make one or more orders (***FMI banning***
17 ***orders***) against an individual if:
 - 18 (a) the individual becomes an insolvent under administration; or
 - 19 (b) the individual is convicted of fraud; or
 - 20 (c) ASIC has reason to believe that the individual is not a fit and
21 proper person to:
 - 22 (i) perform one or more functions as a core officer of an
23 FMI licensee; or
 - 24 (ii) control an FMI licensee; or
 - 25 (d) ASIC has reason to believe that the individual is not
26 adequately trained, or is not competent, to:
 - 27 (i) perform one or more functions as a core officer of an
28 FMI licensee; or
 - 29 (ii) control an FMI licensee; or
 - 30 (e) the individual has not complied with a financial services law;
31 or
 - 32 (f) ASIC has reason to believe that the individual is likely to
33 contravene a financial services law; or

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-
- 1 (g) the individual has been involved in the contravention of a
2 financial services law by another person; or
3 (h) ASIC has reason to believe that the individual is likely to
4 become involved in the contravention of a financial services
5 law by another person; or
6 (i) section 853M applies to the individual in relation to one or
7 more corporations.

8 *Copy of banning order to be given to the individual*

- 9 (2) ASIC must give a copy of a banning order to the individual against
10 whom it was made.

11 **853J Individual to be given an opportunity to be heard before** 12 **making financial market infrastructure banning orders**

- 13 (1) Despite subsection 853H(1), ASIC may make an FMI banning
14 order against an individual only after giving the individual an
15 opportunity:
16 (a) to appear, or be represented, at a hearing before ASIC that
17 takes place in private; and
18 (b) to make submissions to ASIC on the matter.
- 19 (2) However, ASIC may make an FMI banning order against an
20 individual without giving the individual the opportunities
21 mentioned in subsection (1) if ASIC's grounds for making the
22 order are or include both of the following:
23 (a) that the individual is not a fit and proper person under
24 paragraph 853H(1)(c) because the individual is or has been a
25 core officer of an entity that has had a licence suspended or
26 cancelled (see paragraph 853K(2)(a));
27 (b) that the individual has been convicted of serious fraud.

28 **853K When an individual is not a fit and proper person**

- 29 (1) ASIC must have regard to the matters set out in subsection (2)
30 (subject to Part VIIC of the *Crimes Act 1914*) for the purposes of
31 applying paragraph 853H(1)(c) of this Act to an individual.

32 Note: Part VIIC of the *Crimes Act 1914* includes provisions that, in certain
33 circumstances, relieve individuals from the requirement to disclose
34 spent convictions and require persons aware of such convictions to
35 disregard them.

- 36 (2) The matters are as follows:
-

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-
- 1 (a) whether the individual has ever been a core officer of an
2 entity that has held:
3 (i) an Australian market licence; or
4 (ii) an Australian CS facility licence; or
5 (iii) an Australian derivative trade repository licence; or
6 (iv) a benchmark administrator licence;
7 that has been suspended or cancelled;
8 (b) whether any of the following has ever been made against the
9 individual:
10 (i) an FMI banning order;
11 (ii) a banning order, or a disqualification order under
12 Subdivision B of Division 8 of Part 7.6;
13 (iii) a banning order, or a disqualification order, under
14 Part 2-4 of the *National Consumer Credit Protection*
15 *Act 2009*;
16 (c) whether the individual has ever been disqualified under this
17 Act, or any other law of the Commonwealth or of a State or
18 Territory, from managing corporations;
19 (d) whether the individual has ever been banned from engaging
20 in a credit activity (within the meaning of the *National*
21 *Consumer Credit Protection Act 2009*) under a law of a State
22 or Territory;
23 (e) whether the individual has ever been linked to a refusal or
24 failure to give effect to a determination made by AFCA;
25 (f) whether the individual has ever been an insolvent under
26 administration;
27 (g) whether, in the last 10 years, the individual has been
28 convicted of an offence;
29 (h) any relevant information given to ASIC by a State or
30 Territory, or an authority of a State or Territory, in relation to
31 the individual;
32 (i) any other matter prescribed by the regulations;
33 (j) any other matter ASIC considers relevant.
34 Note: To work out whether an individual has been linked as described in
35 paragraph (e), see section 910C.

36 **853L When an individual contravenes a financial services law**

37 For the purposes of subsection 853H(1), an individual contravenes
38 a financial services law if the individual fails to comply with a duty

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1 imposed under that law, even if the provision imposing the duty is
2 not an offence provision or a civil penalty provision.

3 **853M When an individual has been a core officer of a corporation**
4 **unable to pay its debts**

5 This section applies to an individual in relation to a corporation if,
6 within the last 7 years:

- 7 (a) the individual was a core officer of the corporation when the
8 corporation was an FMI licensee; and
9 (b) the corporation was wound up either:
10 (i) while the individual was a core officer of the
11 corporation; or
12 (ii) within the 12 months after the individual ceased to be a
13 core officer of the corporation; and
14 (c) a liquidator lodged a report under subsection 533(1)
15 (including that subsection as applied by section 526-35 of the
16 *Corporations (Aboriginal and Torres Strait Islander) Act*
17 *2006*) about the corporation's inability to pay its debts.

18 **Subdivision B—Matters relating to financial market**
19 **infrastructure banning orders**

20 **853N What a financial market infrastructure banning order**
21 **prohibits**

- 22 (1) An FMI banning order made against an individual may specify that
23 the individual is prohibited from doing one or more of the
24 following:
25 (a) controlling, whether alone or in concert with one or more
26 other entities, an FMI licensee;
27 (b) performing any function of an FMI licensee, including as a
28 core officer, manager, employee, contractor or in some other
29 capacity;
30 (c) performing specified functions of an FMI licensee, including
31 as a core officer, manager, employee, contractor or in some
32 other capacity.
- 33 (2) The FMI banning order may specify that a particular prohibition
34 specified in the order applies against the individual:
35 (a) for a specified period; or
36 (b) permanently.

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1 Note: This subsection applies separately to each prohibition specified in the
2 order.

- 3 (3) A FMI banning order may include a provision allowing the
4 individual against whom it was made, subject to any specified
5 conditions:
6 (a) to do specified acts; or
7 (b) to do specified acts in specified circumstances;
8 that the order would otherwise prohibit them from doing.

9 **853P Effect of financial market infrastructure banning orders**

- 10 (1) An individual against whom an FMI banning order is made must
11 not engage in conduct in breach of the banning order.

12 *Fault-based offence*

- 13 (2) An individual commits an offence if the individual contravenes
14 subsection (1).

15 *Civil liability*

- 16 (3) An individual contravenes this subsection if the individual
17 contravenes subsection (1).

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

19 **853Q Variation or cancellation of financial market infrastructure** 20 **banning orders**

- 21 (1) ASIC may vary or cancel an FMI banning order, by giving written
22 notice to the individual against whom the order was made, if ASIC
23 is satisfied that it is appropriate to do so because of a change in any
24 of the circumstances based on which ASIC made the order.

- 25 (2) ASIC may do so:

- 26 (a) on its own initiative; or
27 (b) if the individual against whom the order was made lodges
28 with ASIC an application for ASIC to do so, which is
29 accompanied by the documents, if any, required by
30 regulations made for the purposes of this paragraph.

31 Note: For fees in respect of lodging applications, see Part 9.10.

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- 1 (3) If ASIC proposes not to vary or cancel an FMI banning order in
2 accordance with an application lodged by an individual under
3 paragraph (2)(b), ASIC must give the individual an opportunity:
4 (a) to appear, or be represented, at a hearing before ASIC that
5 takes place in private; and
6 (b) to make submissions to ASIC on the matter.

7 **853R Date of effect and publication of financial market**
8 **infrastructure banning orders, variation or cancellation**

- 9 (1) An FMI banning order, or variation or cancellation of an FMI
10 banning order, takes effect when it is given to the individual
11 against whom the order is or was made.
- 12 (2) ASIC must publish a notice on ASIC's website as soon as
13 practicable after making, varying or cancelling an FMI banning
14 order. The notice must state when the action took effect and:
15 (a) in the case of the making of an FMI banning order—set out a
16 copy of the FMI banning order; or
17 (b) in the case of the variation of an FMI banning order—set out
18 a copy of the FMI banning order as varied.
- 19 (3) However, if:
20 (a) the FMI banning order contains a provision of the kind
21 referred to in subsection 853N(3); and
22 (b) ASIC considers that the notice on ASIC's website would be
23 unreasonably long if that provision were included;
24 the notice may instead set out a summary of the provision's effect.

25 **853S Statements of reasons**

- 26 (1) An FMI banning order given to an individual must be accompanied
27 by a statement of reasons for the order.
- 28 (2) If ASIC varies an FMI banning order made against an individual,
29 ASIC must, on request by the individual, give the individual a
30 statement of reasons for the variation.

31 **137 In the appropriate position in subsection 1317E(3)**

32 Insert:

subsection 853P(3)	need to comply with an FMI banning order	uncategorised
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1 **138 In the appropriate position in Schedule 3**

2 Insert:

Subsection 853P(2)

5 years imprisonment

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1 **Part 12—Arrangements under which certain foreign**
2 **operators need to be licensed or exempt**

3 *Corporations Act 2001*

4 **139 Section 791D**

5 Repeal the section, substitute:

6 **791D When a financial market is *operated in this jurisdiction***

- 7 (1) A financial market is taken to be *operated in this jurisdiction* if it:
8 (a) is operated by a body corporate that is registered under
9 Chapter 2A; or
10 (b) is covered by a declaration in force under subsection (2).
11 (2) ASIC may, by written notice given to a body corporate, declare
12 that a financial market operated by the body corporate has a
13 material connection with this jurisdiction.

14 **791E Criteria for declarations that financial markets have a**
15 **material connection with this jurisdiction**

- 16 (1) When ASIC is deciding under subsection 791D(2) whether to
17 declare that a financial market has a material connection with this
18 jurisdiction:
19 (a) the market must have a connection with this jurisdiction (see
20 subsection (2) of this section); and
21 (b) ASIC must consider, under subsection (3) of this section,
22 whether the connection is material.

23 *Does the market have a connection with this jurisdiction?*

- 24 (2) The financial market has a connection with this jurisdiction if one
25 or more of the following paragraphs apply for the market:
26 (a) the market has operations located in this jurisdiction;
27 (b) the market provides a market for financial products:
28 (i) denominated in Australian currency; or
29 (ii) issued by a domestic corporation or by the
30 Commonwealth, a State or a Territory;
31 (c) the market provides a market for financial products based on
32 something else (of any nature whatsoever and whether or not

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-
- 1 deliverable) located or issued in this jurisdiction, including,
2 for example, one or more of the following:
- 3 (i) an asset;
 - 4 (ii) a rate (including an interest rate or exchange rate);
 - 5 (iii) an index;
 - 6 (iv) a commodity;
 - 7 (d) one or more current or expected participants in the market, or
 - 8 users of the market, are resident or based in this jurisdiction;
 - 9 (e) the market targets investors resident or based in this
 - 10 jurisdiction;
 - 11 (f) a connection in a determination in force under
 - 12 paragraph (4)(a).

13 *If such a connection exists, is it material?*

14 (3) The financial market's connection with this jurisdiction is material
15 if ASIC considers that, after applying any principles in force under
16 paragraph (4)(c), either or both of the following paragraphs apply
17 for the market:

- 18 (a) the size and extent of current or expected aggregate activity
19 in the market of participants in the market, and users of the
20 market, is material to:
 - 21 (i) the risk management activities of those participants and
22 users; or
 - 23 (ii) the efficient allocation of capital or liquidity to the
24 Australian economy; or
 - 25 (iii) the provision of fair, orderly and transparent financial
26 markets to those participants, and users, who are
27 resident or based in this jurisdiction; or
 - 28 (iv) confident and informed decision making by consumers
29 of financial products or financial services who are
30 resident or based in this jurisdiction;
- 31 (b) a matter in a determination in force under paragraph (4)(b).

32 *Relevant ASIC determinations*

- 33 (4) ASIC may by legislative instrument:
- 34 (a) determine, for the purposes of paragraph (2)(f), additional
35 connections that financial markets may have with this
36 jurisdiction; or

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1 (b) determine, for the purposes of paragraph (3)(b), additional
2 matters that show when connections with this jurisdiction are
3 material; or

4 (c) determine, for each paragraph of subsection (3), principles
5 for working out if that paragraph applies for financial
6 markets.

7 Note: A single document could cover any or all of the things mentioned in
8 paragraphs (a) to (c).

9 *ASIC may request related information*

10 (5) ASIC may, by written notice given to a body corporate, request the
11 body to give ASIC, within a period specified in the notice,
12 information about a financial market operated by the body.

13 **791F Revoking declarations that financial markets have a material** 14 **connection with this jurisdiction**

15 ASIC may, by written notice given to a body corporate, revoke a
16 declaration made under subsection 791D(2) about a financial
17 market operated by the body corporate if:

18 (a) after having regard to subsection 791E(2), ASIC considers
19 that the market does not have a connection with this
20 jurisdiction; or

21 (b) after having regard to subsection 791E(3), ASIC no longer
22 considers that the market's connection with this jurisdiction
23 is material.

24 **140 Section 820D**

25 Repeal the section, substitute:

26 **820D When a clearing and settlement facility is operated in this** 27 ***jurisdiction***

28 (1) A clearing and settlement facility is taken to be ***operated in this***
29 ***jurisdiction*** if it:

30 (a) is operated by a body corporate that is registered under
31 Chapter 2A; or

32 (b) is covered by a declaration in force under subsection (2).

33 (2) ASIC may, by written notice given to a body corporate, declare
34 that a clearing and settlement facility operated by the body
35 corporate has a material connection with this jurisdiction.

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1 820E Criteria for declarations that clearing and settlement facilities 2 have a material connection with this jurisdiction

- 3 (1) When ASIC is deciding under subsection 820D(2) whether to
4 declare that a clearing and settlement facility has a material
5 connection with this jurisdiction:
6 (a) the facility must have a connection with this jurisdiction (see
7 subsection (2) of this section); and
8 (b) ASIC must consider, under subsection (3) of this section,
9 whether the connection is material.

10 *Does the facility have a connection with this jurisdiction?*

- 11 (2) The clearing and settlement facility has a connection with this
12 jurisdiction if one or more of the following paragraphs apply for
13 the facility:
14 (a) the facility has operations located in this jurisdiction;
15 (b) the facility provides services for financial products:
16 (i) denominated in Australian currency; or
17 (ii) issued by a domestic corporation or by the
18 Commonwealth, a State or a Territory;
19 (c) the facility provides services for financial products based on
20 something else (of any nature whatsoever and whether or not
21 deliverable) located or issued in this jurisdiction, including,
22 for example, one or more of the following:
23 (i) an asset;
24 (ii) a rate (including an interest rate or exchange rate);
25 (iii) an index;
26 (iv) a commodity;
27 (d) one or more current or expected participants in the facility, or
28 users of the facility, are resident or based in this jurisdiction;
29 (e) the operator of the facility has entered into an arrangement
30 (either directly or indirectly through one or more interposed
31 entities) with:
32 (i) the holder of an Australian market licence granted under
33 subsection 795B(1); or
34 (ii) the holder of an Australian CS facility licence granted
35 under subsection 824B(1); or
36 (iii) the operator of a payments system that is a system
37 having a connection with Australia;

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1 (f) a connection in a determination in force under
2 paragraph (4)(a).

3 *If such a connection exists, is it material?*

- 4 (3) The clearing and settlement facility's connection with this
5 jurisdiction is material if ASIC considers that, after applying any
6 principles in force under paragraph (4)(c), one or more of the
7 following paragraphs apply for the facility:
- 8 (a) the current or expected number of participants in the facility,
9 or users of the facility, who are resident or based in this
10 jurisdiction is material;
 - 11 (b) the size and extent of current or expected aggregate activity
12 with the facility of those participants and users is material to:
 - 13 (i) the risk management activities of those participants and
14 users; or
 - 15 (ii) the efficient allocation of capital or liquidity to the
16 Australian economy;
 - 17 (c) the size and extent of current or expected activity in a
18 relevant financial product class offered by the facility is
19 material to:
 - 20 (i) risk management activities in the Australian financial
21 system; or
 - 22 (ii) the efficient allocation of capital or liquidity to the
23 Australian economy;
 - 24 (d) the operator of the facility has an arrangement covered by
25 paragraph (2)(e) that is material;
 - 26 (e) a matter in a determination in force under paragraph (4)(b).

27 *Relevant ASIC determinations*

- 28 (4) ASIC may by legislative instrument:
- 29 (a) determine, for the purposes of paragraph (2)(f), additional
30 connections that clearing and settlement facilities may have
31 with this jurisdiction; or
 - 32 (b) determine, for the purposes of paragraph (3)(e), additional
33 matters that show when connections with this jurisdiction are
34 material; or
 - 35 (c) determine, for each paragraph of subsection (3), principles
36 for working out if that paragraph applies for clearing and
37 settlement facilities.

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1 Note: A single document could cover any or all of the things mentioned in
2 paragraphs (a) to (c).

3 (5) In making a determination under subsection (4), ASIC must have
4 regard to any relevant advice received from the Reserve Bank.

5 *ASIC may request related information*

6 (6) ASIC may, by written notice given to a body corporate, request the
7 body to give ASIC, within a period specified in the notice,
8 information about a clearing and settlement facility operated by the
9 body.

10 **820F Revoking declarations that clearing and settlement facilities** 11 **have a material connection with this jurisdiction**

12 ASIC may, by written notice given to a body corporate, revoke a
13 declaration made under subsection 820D(2) about a clearing and
14 settlement facility operated by the body corporate if:

- 15 (a) after having regard to subsection 820E(2), ASIC considers
16 that the facility does not have a connection with this
17 jurisdiction; or
18 (b) after having regard to subsection 820E(3), ASIC no longer
19 considers that the facility's connection with this jurisdiction
20 is material.

21 **141 After paragraph 1317C(gc)**

22 Insert:

23 (gcaa) a decision by ASIC under subsection 791E(4) to determine
24 connections, matters or principles; or

25 **142 After paragraph 1317C(gcc)**

26 Insert:

27 (gcca) a decision by ASIC under subsection 820E(4) to determine
28 connections, matters or principles; or

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1 **Part 13—Transitional provisions**

2 *Corporations Act 2001*

3 **143 In the appropriate position in Chapter 10**

4 Insert:

5 **Part 10.76—Transitional provisions relating to**
6 **Schedule 2 to the [insert name of Bill later]**

7 **Division 1—Definitions**

8 **1706A Definitions**

9 In this Part:

10 *amending Act* means the [insert name of Bill later].

11 *commencement time* means the time Schedule 2 to the amending
12 Act commences.

13 **Division 2—Granting of Australian CS facility licences**

14 **1706AA Application of amendments—applications for Australian**
15 **CS facility licence**

16 Section 824B, as amended by Schedule 2 to the amending Act,
17 applies in relation to applications made under section 824A at or
18 after the commencement time.

19 **1706AB Transitional—Australian CS facility licences in force before**
20 **the commencement time**

21 (1) This section applies to an Australian CS facility licence:

22 (a) granted under subsection 824B(1) as in force before the
23 commencement time; and

24 (b) in force immediately before the commencement time.

25 (2) The licence continues in force (and may be dealt with) at and after
26 the commencement time as if the licence had been granted under

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1 subsection 824B(1), as amended by Schedule 2 to the amending
2 Act.

3 **1706AC Transitional—Australian CS facility licences in force before**
4 **the commencement time for operating overseas clearing**
5 **and settlement facilities**

- 6 (1) This section applies to an Australian CS facility licence:
7 (a) granted under subsection 824B(2) as in force before the
8 commencement time; and
9 (b) in force immediately before the commencement time.
- 10 (2) The licence continues in force (and may be dealt with) at and after
11 the commencement time as if the licence had been granted under
12 subsection 824B(2), as amended by Schedule 2 to the amending
13 Act.

14 **1706AD Transitional—applications for an Australian CS facility**
15 **licence undecided before the commencement time**

- 16 (1) This section applies to an application for an Australian CS facility
17 licence if:
18 (a) the application is lodged under section 824A as in force
19 before the commencement time; and
20 (b) before the commencement time, the Minister had not made a
21 decision under section 824B in relation to the application.
- 22 (2) This Act as in force immediately before the commencement time
23 (the *old Act*) continues to apply, at and after the commencement
24 time, in relation to the application despite the amendments made
25 by the amending Act.
- 26 (3) However, if at or after the commencement time, the Minister
27 decides the application by granting a licence under section 824B of
28 the old Act, the licence is taken to be (and may be dealt with as if it
29 were) granted as follows:
30 (a) if the licence is granted under subsection 824B(1) of the old
31 Act—as if the licence had been granted under
32 subsection 824B(1), as amended by that Schedule;
33 (b) if the licence is granted under subsection 824B(2) of the old
34 Act—as if the licence had been granted under
35 subsection 824B(2), as amended by that Schedule.

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1 Division 3—Dealing with licences that are not being used 2 etc.

3 1706AE Application of amendments—suspension or cancellation of 4 licences

- 5 (1) The provisions mentioned in subsection (2) apply to an action
6 taken or decision made by ASIC at or after the commencement
7 time (whether a related licence is granted, change happens or
8 period starts before, at or after the commencement time).
- 9 (2) The provisions, as amended by Schedule 2 to the amending Act,
10 are as follows:
- 11 (a) section 797B;
 - 12 (b) section 826B;
 - 13 (c) section 905H;
 - 14 (d) section 908BI.

15 Division 4—Declared financial markets and widely held 16 market bodies

17 1706AF Transitional—prescribed financial markets to be declared 18 financial markets

- 19 (1) This section applies to a financial market that was prescribed by
20 regulations:
- 21 (a) in force immediately before the commencement time; and
 - 22 (b) made for the purposes of the definition of *prescribed*
23 *financial market* in section 9 as in force immediately before
24 the commencement time.
- 25 (2) The financial market is, at and after the commencement time, taken
26 to be (and may be dealt with as if it were) specified in a declaration
27 in force under subsection 9D(2) as added by Schedule 2 to the
28 amending Act.

29 1706AG Translation of references to prescribed financial markets in 30 instruments

- 31 (1) This section applies to an instrument (the *affected instrument*),
32 other than regulations, that:
- 33 (a) was made under:

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-
- 1 (i) this Act; or
2 (ii) an instrument made under this Act; and
3 (b) was in force immediately before the commencement time.
- 4 (2) If:
- 5 (a) immediately before the commencement time, the affected
6 instrument contained a reference to the expression in column
7 1 of an item of the following table; and
8 (b) the expression had the same meaning in the affected
9 instrument as it had in this Act as in force immediately
10 before the commencement time; and
11 (c) the reference to the expression remains in the affected
12 instrument on the commencement time;
- 13 then, at and after the commencement time, the affected instrument
14 applies as if the reference to the expression were instead a
15 reference to the expression in column 2 of that item.
16

Translating references in instruments made under this Act

Item	Column 1	Column 2
1	prescribed financial market	declared financial market
2	prescribed financial markets	declared financial markets

1706AH Transitional—widely held market bodies

- 18 (1) This section applies to a body corporate that was specified in
19 regulations:
- 20 (a) in force immediately before the commencement time; and
21 (b) made for the purposes of section 850A as in force
22 immediately before the commencement time.
- 23 (2) The body corporate is, at and after the commencement time, taken
24 to be (and may be dealt with as if it were) specified in a declaration
25 in force under subsection 850A(3) as substituted by Schedule 2 to
26 the amending Act.

1706AI Application of amendments—preservation of voting power

28 Section 851I, as amended by Schedule 2 to the amending Act,
29 applies to a person who holds a particular percentage of voting
30 power in a body corporate at a particular time at or after the
31 commencement of that Schedule if, at that time, the body:

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- 1 (a) becomes specified in a declaration in force under subsection
2 850A(3); but
3 (b) not because of subsection 1706AH(2).

4 **1706AJ Transitional—pre-commencement approvals granted for**
5 **preservation of voting power**

- 6 (1) This section applies to an approval to hold a particular percentage
7 of voting power in a body corporate if the approval:
8 (a) was in force immediately before the commencement time;
9 and
10 (b) was taken to be granted under section 851B because of the
11 operation of section 851I as in force at that time.
- 12 (2) The approval continues in force (and may be dealt with) at and
13 after the commencement time as if the approval were granted under
14 section 851B because of the operation of section 851I as amended
15 by Schedule 2 to the amending Act.

16 **Division 5—Approval for control of certain Australian**
17 **licensees**

18 **1706AK Transitional—preservation of voting power in controlled**
19 **Australian financial bodies**

- 20 (1) This section applies to a person if:
21 (a) at the commencement time, the person holds a particular
22 percentage of voting power in a controlled Australian
23 financial body; and
24 (b) that percentage is more than 15%.
- 25 (2) The person is taken to be granted, at the commencement time, an
26 approval under subsection 852DH(1) to have that percentage of
27 voting power in the body.
- 28 Note: ASIC can impose conditions on the approval (see section 852DK).
- 29 (3) The approval:
30 (a) comes into force at the commencement time; and
31 (b) remains in force indefinitely (unless varied under section
32 852DL or revoked under section 852DM).
- 33 (4) ASIC is taken to have complied with its obligations under
34 Division 1A of Part 7.4 for the granting of the approval.

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Note: For example, ASIC is taken to have given the notice required by section 852DH.

Division 6—Enhancing regulator powers for CS facility licensees

1706AL Transitional—directions power to reduce systemic risk

- (1) This section applies to a direction given by ASIC to a CS facility licensee if the direction:
 - (a) was given under section 823E as in force before the commencement time; and
 - (a) was in force immediately before the commencement time.
- (2) The direction continues in force (and may be dealt with) at and after the commencement time as if the direction were given by the Reserve Bank to the licensee under section 823E as substituted by Schedule 2 to the amending Act.