



# **Corporations Act 2001**

**No. 50, 2001**

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This compilation is in 7 volumes

- Volume 1: sections 1–260E
- Volume 2: sections 283AA–600K
- Volume 3: sections 601–742
- Volume 4: sections 760A–994Q
- Volume 5: sections 1010A–1243A**
- Volume 6: sections 1272–1710
- Volume 7: Schedules  
Endnotes

Each volume has its own contents

Prepared by the Office of Parliamentary Counsel, Canberra

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## About this compilation

### This compilation

This is a compilation of the *Corporations Act 2001* that shows the text of the law as amended and in force on 17 March 2025 (the *compilation date*).

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

### Uncommenced amendments

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

### Application, saving and transitional provisions for provisions and amendments

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

### Editorial changes

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

### Modifications

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

### Self-repealing provisions

If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

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Section 1010A

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## Chapter 7—Financial services and markets

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

### Part 7.9—Financial product disclosure and other provisions relating to issue, sale and purchase of financial products

#### Division 1—Preliminary

##### 1010A Part generally does not apply to securities

- (1) Apart from section 1017F and Divisions 5A, 5B, 5C and 6 (and provisions of Division 7 that apply in relation to that section or provisions of those Divisions), nothing in this Part applies in relation to securities.

Note 1: Chapters 6CA and 6D provide for disclosure in relation to securities.

Note 2: Division 1A of Part 7.12 (Employee share schemes) contains a separate regime for the making of offers in connection with employee share schemes. The provisions of this Part do not apply in relation to offers that are eligible to be made under that Division: see subsection 1100ZC(3) and section 1100ZD.

- (2) Apart from section 1017F and Divisions 5A, 5B and 6, nothing in this Part applies in relation to debentures, stocks or bonds issued or proposed to be issued by a government.

Note: These financial products are not *securities* as defined in subsection 92(5).

##### 1010B Part does not apply to financial products not issued in the course of a business

- (1) Apart from Division 5A, nothing in this Part applies in relation to a financial product that is not or was not issued, or that will not be issued, in the course of a business of issuing financial products.

- (2) For this purpose, the issue of:
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- (a) any managed investment product; or
  - (aa) any foreign passport fund product; or
  - (b) any superannuation product;
- is taken to occur in the course of a business of issuing financial products.

**1010BA Part does not apply to contribution plans and ESS contribution plans**

Apart from section 1017F and Divisions 5A and 6 (and provisions of Division 7 that apply in relation to that section or provisions of those Divisions), nothing in this Part applies in relation to contribution plans or ESS contribution plans for offers of ESS interests that are eligible to be made under Division 1A of Part 7.12.

**1010C Meaning of *offer*, *purchase* and *sale*—Part 7.9**

- (1) For the purposes of this Part, a reference to a *sale* or *purchase* of a financial product is a reference to a sale of the product by, or a purchase of the product from, a person who has (whether by issue or otherwise) acquired the product. The issue of a financial product is not a sale of the financial product.
- (2) For the purposes of this Part:
  - (a) a reference to *offer* to issue a financial product includes a reference to *invite* an application for the issue of the financial product; and
  - (b) a reference to *offer* to sell a financial product includes a reference to *invite* an offer to purchase the financial product.

**1010D General approach to offence provisions**

Division 7 contains provisions creating offences by reference to various rules contained in Divisions of this Part. However, it does not create all the offences relating to those rules, as some offences are created by subsection 1311(1). Where offences are created by

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subsection 1311(1) in relation to a rule, this is indicated by a note  
at the end of the provision containing the rule.

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**Division 2—Product Disclosure Statements**

**Subdivision A—Preliminary**

**1011A Jurisdictional scope of Division**

- (1) Subject to subsection (2), sections 1012A, 1012B and 1012C only apply in relation to offers and recommendations referred to in those sections that are received in this jurisdiction.
- (2) Section 1012B also applies in relation to issues referred to in subparagraph 1012B(3)(a)(iii) that are made in this jurisdiction.
- (3) The regulations may make provision dealing with the jurisdictional scope of some or all of the other provisions of this Division. The other provisions of this Division have effect subject to any such regulations.

**1011B Meaning of *regulated person***

In this Division, a ***regulated person***, in relation to a financial product, is:

- (a) an issuer of the financial product; or
- (b) a seller of the financial product if the sale takes place in circumstances described in subsection 1012C(5), (6) or (8) (secondary sales that require a Product Disclosure Statement); or
- (c) any financial services licensee; or
- (d) any authorised representative of a financial services licensee; or
- (e) any person who is not required to hold an Australian financial services licence because the person is covered by:
  - (i) paragraph 911A(2)(j); or
  - (ii) an exemption in regulations made for the purposes of paragraph 911A(2)(k); or

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- (iii) an exemption specified by ASIC for the purposes of paragraph 911A(2)(l); or
- (f) any person who is required to hold an Australian financial services licence but who does not hold such a licence.

**1011C Treatment of offers of options over financial products**

For the purposes of this Division:

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

**Subdivision B—Requirement for a Product Disclosure Statement to be given**

**1012A Obligation to give Product Disclosure Statement—personal advice recommending particular financial product**

*Section sets out recommendation situation in which Product Disclosure Statement required*

- (1) This section sets out the situations in which giving financial product advice that consists of, or includes, a recommendation to acquire a financial product gives rise to an obligation on a regulated person to give another person a Product Disclosure Statement for the product.

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- (2) For the purposes of this Act:
- (a) each of the situations is a ***recommendation situation***; and
  - (b) the ***relevant conduct*** for that situation is the making of the recommendation; and
  - (c) the ***client*** for that situation is the person to whom the advice is provided.

*Personal advice recommending a particular financial product*

- (3) A regulated person must give a person a Product Disclosure Statement for a financial product if:
- (a) the regulated person provides financial product advice to the person that consists of, or includes, a recommendation that the person acquire the financial product; and
  - (b) the person would acquire the financial product by way of:
    - (i) the issue of the product to the person (rather than the transfer of the product to the person); or
    - (ii) the transfer of the product to the person in circumstances described in subsection 1012C(5), (6) or (8) (secondary sales that require a Product Disclosure Statement); and
  - (c) the financial product advice is provided to the client as a retail client; and
  - (d) the financial product advice is personal advice to the client.

The Product Disclosure Statement must be given at or before the time when the regulated person provides the advice and must be given in accordance with this Division.

*This section has effect subject to other provisions*

- (4) This section does not apply to a regulated person for a recommendation situation if:
- (a) one or more of sections 1012D, 1012DA, 1012E, 1012F, 1012G or 1014E apply to a regulated person for that recommendation situation; and

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- (b) for each of those sections that so applies—the regulated person complies with the requirements (if any) in that section for that recommendation situation.

*Civil liability*

- (5) A person contravenes this subsection if the person contravenes this section.

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

**1012B Obligation to give Product Disclosure Statement—situations related to issue of financial products**

*Section sets out issue situations in which Product Disclosure Statement required*

- (1) This section sets out situations in which:
  - (a) an offer relating to the issue of a financial product; or
  - (b) the issue of a financial product; gives rise to an obligation on a regulated person to give another person a Product Disclosure Statement for the product.
- (2) For the purposes of this Act:
  - (a) each of the situations is an *issue situation*; and
  - (b) the *relevant conduct* for that situation is the conduct by the regulated person that gives rise to the obligation to give the Product Disclosure Statement; and
  - (c) the *client* for that situation is the person to whom the financial product is to be or is issued.

*The main issue situations*

- (3) A regulated person must give a person a Product Disclosure Statement for a financial product if:
  - (a) the regulated person:
    - (i) offers to issue the financial product to the person; or

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- (ii) offers to arrange for the issue of the financial product to the person; or
  - (iii) issues the financial product to the person in circumstances in which there are reasonable grounds to believe that the person has not been given a Product Disclosure Statement for the product; and
- (b) the financial product is, or is to be, issued to the person as a retail client.

The Product Disclosure Statement must be given at or before the time when the regulated person makes the offer, or issues the financial product, to the person and must be given in accordance with this Division.

Note: If a Product Disclosure Statement is given when the offer is made, it will not need to be given again when the product is issued to the person (see subsection 1012D(1)) unless the Product Disclosure Statement that was given is no longer up to date.

*Receiving offer to acquire financial product*

- (4) A regulated person must give a person a Product Disclosure Statement for a financial product if:
- (a) the person makes an offer to the regulated person to acquire the financial product; and
  - (b) the person would acquire the financial product by way of the issue of the product to the person (rather than the transfer of the product to the person); and
  - (c) the financial product is to be issued to the person as a retail client.

The Product Disclosure Statement must be given to the person before the person becomes bound by a legal obligation to acquire the financial product pursuant to the offer and must be given in accordance with this Division.

*This section has effect subject to other provisions*

- (5) This section does not apply to a regulated person for an issue situation if:
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- (a) one or more of sections 1012D, 1012DAA, 1012E, 1012F, 1012G, 1012GA or 1014E apply to a regulated person for that issue situation; and
- (b) for each of those sections that so applies—the regulated person complies with the requirements (if any) in that section for that issue situation.

*Civil liability*

- (6) A person contravenes this subsection if the person contravenes this section.

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

**1012C Obligation to give Product Disclosure Statement—offers related to sale of financial products**

*Section sets out sale situations in which Product Disclosure Statement required*

- (1) This section sets out situations in which an offer relating to the sale of a financial product gives rise to an obligation on a regulated person to give another person a Product Disclosure Statement for the product.
- (2) For the purposes of this Act:
  - (a) each of the situations is a **sale situation**; and
  - (b) the **relevant conduct** for that situation is the offer; and
  - (c) the **client** for that situation is the person to whom the product is to be sold.

*Sale offers that require a Product Disclosure Statement*

- (3) A regulated person must give a person a Product Disclosure Statement for a financial product if:
  - (a) the regulated person offers to sell the financial product to the person; and

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- (b) a sale of the product to the person pursuant to the offer would take place in circumstances covered by subsection (5), (6) or (8); and
- (c) the financial product is to be sold to the person as a retail client.

The Product Disclosure Statement must be given at or before the time when the regulated person makes the offer and must be given in accordance with this Division.

- (4) A regulated person must give a person a Product Disclosure Statement for a financial product if:
  - (a) the person makes an offer to the regulated person to acquire the financial product; and
  - (b) the person would acquire the financial product by way of the transfer of the product to the person; and
  - (c) a sale of the product to the person pursuant to the offer would take place in the circumstances described in subsection (5), (6) or (8); and
  - (d) the financial product is to be sold to the person as a retail client.

The Product Disclosure Statement must be given to the person before the person becomes bound by a legal obligation to acquire the financial product pursuant to the offer and must be given in accordance with this Division.

*Off-market sale by controller*

- (5) This subsection covers the circumstances in which:
  - (a) the seller controls the issuer of the financial product; and
  - (b) either:
    - (i) the product is not able to be traded on any licensed market; or
    - (ii) although the product is able to be traded on a licensed market, the offer is not made in the ordinary course of trading on a licensed market.

Note: See section 50AA for when a person controls a body.

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*Sale amounting to indirect issue*

- (6) This subsection covers the circumstances in which:
- (a) the offer is made within 12 months after the issue of the financial product; and
  - (b) the product was issued without a Product Disclosure Statement for the product being prepared; and
  - (c) either:
    - (i) the issuer issued the product with the purpose of the person to whom it was issued selling or transferring the product, or granting, issuing or transferring interests in, or options or warrants over, the product; or
    - (ii) the person to whom the product was issued acquired it with the purpose of selling or transferring the product, or granting, issuing or transferring interests in, or options or warrants over, the product.

*The purpose test in subsection (6)*

- (7) For the purposes of subsection (6):
- (a) a financial product is taken to be:
    - (i) issued with the purpose referred to in subparagraph (6)(c)(i); or
    - (ii) acquired with the purpose referred to in subparagraph (6)(c)(ii);  
if there are reasonable grounds for concluding that the product was issued or acquired with that purpose (whether or not there were or may have been other purposes for the issue or acquisition); and
  - (b) without limiting paragraph (a), a financial product is taken to be:
    - (i) issued with the purpose referred to in subparagraph (6)(c)(i); or
    - (ii) acquired with the purpose referred to in subparagraph (6)(c)(ii);

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if the financial product, or any financial product of the same kind that was issued at the same time, is subsequently sold, or offered for sale, within 12 months after issue, unless it is proved that the circumstances of the issue and the subsequent sale or offer are not such as to give rise to reasonable grounds for concluding that the product was issued or acquired with that purpose.

*Sale amounting to indirect off-market sale by controller*

- (8) This subsection covers the circumstances in which:
- (a) the offer is made within 12 months after the sale of the financial product by a person (the **controller**) who controlled the issuer of the product at the time of the sale; and
  - (b) either:
    - (i) at the time of the sale by the controller, the product was not able to be traded on any licensed market; or
    - (ii) although the product was able to be traded on a licensed market at that time, the sale by the controller did not occur in the ordinary course of trading on a licensed market; and
  - (c) a Product Disclosure Statement was not prepared by, or on behalf of, the controller before the sale of the product by the controller; and
  - (d) either:
    - (i) the controller sold the product with the purpose of the person to whom it was sold selling or transferring the product, or granting, issuing or transferring interests in, or options or warrants over, the product; or
    - (ii) the person to whom the controller sold the product acquired it with the purpose of selling or transferring the product, or granting, issuing or transferring interests in, or options or warrants over, the product.

Note: See section 50AA for when a person controls a body.

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*The purpose test in subsection (8)*

- (9) For the purposes of subsection (8):
- (a) a financial product is taken to be:
    - (i) sold with the purpose referred to in subparagraph (8)(d)(i); or
    - (ii) acquired with the purpose referred to in subparagraph (8)(d)(ii);  
if there are reasonable grounds for concluding that the product was sold or acquired with that purpose (whether or not there were or may have been other purposes for the sale or acquisition); and
  - (b) without limiting paragraph (a), a financial product is taken to be:
    - (i) sold with the purpose referred to in subparagraph (8)(d)(i); or
    - (ii) acquired with the purpose referred to in subparagraph (8)(d)(ii);  
if the financial product, or any financial product of the same kind that was sold by the controller at the same time, is subsequently sold, or offered for sale, within 12 months after issue, unless it is proved that the circumstances of the initial sale and the subsequent sale or offer are not such as to give rise to reasonable grounds for concluding that the product was sold or acquired (in the initial sale) with that purpose.

*This section has effect subject to other provisions*

- (10) This section does not apply to a regulated person for a sale situation if:
- (a) one or more of sections 1012D, 1012DA, 1012E or 1014E apply to a regulated person for that sale situation; and
  - (b) for each of those sections that so applies—the regulated person complies with the requirements (if any) in that section for that sale situation.

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*Civil liability*

- (11) A person contravenes this subsection if the person contravenes this section.

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

**1012D Situations in which Product Disclosure Statement is not required**

*Recommendation, issue or sale situation—client has already received an up to date Product Disclosure Statement*

- (1) In a recommendation situation, issue situation or sale situation, the regulated person does not have to give the client a Product Disclosure Statement if:
- (a) the client has already received a Product Disclosure Statement that contains all of the information that the first-mentioned Product Disclosure Statement would be required to contain; or
  - (b) the regulated person believes on reasonable grounds that paragraph (a) applies.

*Recommendation, issue or sale situation—client has or has access to up to date information*

- (2) In a recommendation situation, issue situation or sale situation, the regulated person does not have to give the client a Product Disclosure Statement for the financial product if:
- (a) the client already holds a financial product of the same kind; and
  - (b) the regulated person believes on reasonable grounds that the client has received, or has, and knows that they have, access to, all of the information that the first-mentioned Product Disclosure Statement would be required to contain through:
    - (i) a Product Disclosure Statement; and

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- (ii) information provided to the client under section 1017B, 1017C or 1017D or through continuous disclosure under Chapter 6CA.

Note: Paragraph (a)—see subsection (10).

*Recommendation or issue situation—interests in self managed superannuation funds*

- (2A) In a recommendation situation or issue situation, the regulated person does not have to give the client a Product Disclosure Statement for the financial product if:
  - (a) the financial product is an interest in a self managed superannuation fund; and
  - (b) the regulated person believes on reasonable grounds that the client has received, or has, and knows that they have, access to, all of the information that the Product Disclosure Statement would be required to contain.

*Recommendation, issue or sale situation—no information required to be in Product Disclosure Statement*

- (2B) In a recommendation situation, issue situation or sale situation, the regulated person does not have to give the client a Product Disclosure Statement for the financial product if, because of section 1013F, no information would be required to be included in the Statement.

*Recommendation or issue situation—certain offers to present holders*

- (3) In a recommendation situation or issue situation, the regulated person does not have to give the client a Product Disclosure Statement for the financial product if:
  - (a) the client already holds a financial product of the same kind; and
  - (b) either:
    - (i) in a recommendation situation—the advice that constitutes the relevant conduct relates to an offer made

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under a distribution reinvestment plan or switching facility; or

- (ii) in an issue situation—the offer or issue that constitutes the relevant conduct is made under a distribution reinvestment plan or switching facility.

Note: Paragraph (a)—see subsection (10).

*Recommendation, issue or sale situation—no consideration to be provided*

- (5) In a recommendation situation, an issue situation or a sale situation, the regulated person does not have to give the client a Product Disclosure Statement if:
- (a) no consideration is to be provided for the issue or sale of the financial product; and
  - (b) the financial product is not an option and is:
    - (i) a managed investment product; or
    - (ia) a foreign passport fund product; or
    - (ii) a financial product of a kind prescribed by regulations made for the purposes of this subparagraph.
- (6) In a recommendation situation, an issue situation or a sale situation, the regulated person does not have to give the client a Product Disclosure Statement if:
- (a) the financial product is an option; and
  - (b) no consideration is to be provided for the issue or sale of the financial product; and
  - (c) no consideration is to be provided for the underlying financial product on the exercise of the option.

*Issue or sale situation—takeovers*

- (7) In an issue situation or a sale situation, the regulated person does not have to give the client a Product Disclosure Statement if:
- (a) the financial product is:
    - (i) a managed investment product; or

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- (ia) a foreign passport fund product; or
- (ii) an option to acquire, by way of transfer, a share in a body, a debenture of a body or a legal or equitable right or interest in a share in a body or a debenture of a body; and
- (b) the offer that constitutes the relevant conduct is made as consideration for an offer made under a takeover bid under Chapter 6; and
- (c) the offer is accompanied by a bidder's statement.

Note: Although a Product Disclosure Statement is not needed, disclosures must be made in the bidder's document under section 636.

*Recommendation, issue or sale situation—responsible entity an exempt body corporate*

- (8) In a recommendation situation, an issue situation or a sale situation, the regulated person does not have to give the client a Product Disclosure Statement if:
  - (a) the financial product is a financial product described in paragraph 764A(1)(ba) (which relates to certain managed investment schemes that are not registered schemes); and
  - (b) the holder of the office (by whatever name it is known), in relation to the managed investment scheme, that corresponds most closely to the office of responsible entity of a registered scheme is an exempt body corporate of a State or Territory; and
  - (c) in the case of a recommendation situation or an issue situation—either:
    - (i) the recommendation that constitutes the relevant conduct relates to an offer made by the office holder referred to in paragraph (b); or
    - (ii) the offer that constitutes the relevant conduct is made by or to the office holder referred to in paragraph (b).

Note 1: Section 66A defines *exempt body corporate* of a State or Territory.

Note 2: In the case of a sale situation, there is no additional requirement equivalent to paragraph (c).

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*Recommendation or issue situation—interim contracts of insurance*

- (9) In a recommendation situation or an issue situation, the regulated person does not have to give the client a Product Disclosure Statement if the financial product is an interim contract of insurance (as defined in subsection 11(2) of the *Insurance Contracts Act 1984*).

Note: This does not detract from the obligation to give a Product Disclosure Statement relating to any contract of insurance that replaces or supersedes the interim contract.

*Recommendation, issue or sale situation—client is associated with registered scheme*

- (9A) In a recommendation situation, an issue situation or a sale situation, the regulated person does not have to give the client a Product Disclosure Statement if:
- the financial product is a managed investment product; and
  - the client is associated (within the meaning of subsection (9B)) with the scheme's responsible entity.

- (9B) For the purposes of subsection (9A), the client is associated with the scheme's responsible entity if the client is:
- a senior manager of the responsible entity or of a related body corporate; or
  - a spouse, parent, child, brother or sister of a person who is a senior manager of the responsible entity or a related body corporate; or
  - a body corporate controlled by a person referred to in paragraph (a) or (b).

*Recommendation, issue or sale situation—client is associated with a notified foreign passport fund*

- (9C) In a recommendation situation, an issue situation or a sale situation, the regulated person does not have to give the client a Product Disclosure Statement if:
- the financial product is a foreign passport fund product; and
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- (b) the client is associated (within the meaning of subsection (9D)) with the fund's operator.
- (9D) For the purposes of subsection (9C), the client is associated with the fund's operator if the client is:
- (a) a senior manager of the operator or of a related body corporate; or
  - (b) a spouse, parent, child, brother or sister of a person who is a senior manager of the operator or a related body corporate; or
  - (c) a body corporate controlled by a person referred to in paragraph (a) or (b).

*Interpretation*

- (10) For the purposes of this section:
- (a) a financial product (other than a managed investment product, a foreign passport fund product or a superannuation product) is of the same kind as another financial product only if they are both issued:
    - (i) by the same issuer; and
    - (ii) on the same terms and conditions (other than price); and
  - (b) a managed investment product, a foreign passport fund product or a superannuation product is of the same kind as another product only if the other product is an interest in the same scheme or fund; and
  - (c) a reference to information that a Product Disclosure Statement would be required to contain includes a reference to information that would be required to be in any statement that the Product Disclosure Statement would be required to contain.

**1012DAA Rights issues for which Product Disclosure Statement is not required**

- (1) In a recommendation situation or issue situation, the regulated person does not have to give the client a Product Disclosure Statement if:
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- (a) but for subsection (2), the regulated person would be required by section 1012B to give a Product Disclosure Statement for the transfer or issue of a financial product (*the relevant product*); and
- (b) a determination under subsection (3) was not in force in relation to the issuer of the relevant product at the time when the relevant product was issued.

*Conditions required for rights issue*

- (2) The regulated person does not have to give the client a Product Disclosure Statement if:
  - (a) the relevant product is being offered under a rights issue; and
  - (b) the class of the relevant product are quoted securities at the time at which the offer is made; and
  - (c) trading in that class of the relevant product on a declared financial market on which they are quoted was not suspended for more than a total of 5 days during the shorter of the following periods:
    - (i) the period during which the class of the relevant product is quoted;
    - (ii) the period of 12 months before the day on which the offer is made; and
  - (d) no exemption under section 111AS or 111AT covered the issuer of the relevant product, or any person as director or auditor of the issuer, at any time during the relevant period referred to in paragraph (c); and
  - (e) no order under section 340, 340A, 341 or 341A covered the issuer of the relevant product, or any person as director or auditor of the issuer, at any time during the relevant period referred to in paragraph (c); and
  - (f) the issuer of the relevant product gives the relevant market operator for the issuer a written notice that complies with subsection (7) within the 24 hour period before the relevant conduct occurs.

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*Determination by ASIC*

- (3) ASIC may make a determination under this subsection if ASIC is satisfied that in the previous 12 months the issuer of the relevant product contravened any of the following provisions:
  - (a) the provisions of Chapter 2M as they apply to the registered scheme in which the relevant product is an interest;
  - (aa) the provisions of Chapter 2M as they apply to the notified foreign passport fund in which the relevant product is an interest;
  - (b) section 674, 674A, 675 or 675A as it applies to the registered scheme in which the relevant product is an interest;
  - (ba) section 674, 674A, 675 or 675A as it applies to the notified foreign passport fund in which the relevant product is an interest;
  - (c) section 1016E, 1021D, 1021E or 1021J;
  - (d) subsection (10) of this section;
  - (e) section 1308 as it applies to a notice under subsection (2) of this section.
- (4) The determination must be made in writing and a copy must be published in the *Gazette* as soon as practicable after the determination is made.
- (5) The determination made under subsection (3) is not a legislative instrument.
- (6) A failure to publish a copy of the determination does not affect the validity of the determination.

*Requirements for notice*

- (7) A notice complies with this subsection if the notice:
  - (a) states that the relevant product was issued without a Product Disclosure Statement for the relevant product being prepared; and
  - (b) states that the notice is being given under paragraph (2)(f); and

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- (c) states that, as a disclosing entity, the issuer of the relevant product is subject to regular reporting and disclosure obligations; and
- (d) if the relevant product is a managed investment product—states that, as at the date of the notice, the issuer of the relevant product has complied with:
  - (i) the provisions of Chapter 2M as they apply to the registered scheme in which the relevant product is an interest; and
  - (ii) sections 674 and 674A as they applies to that registered scheme; and
- (da) if the relevant product is a foreign passport fund product—states that, as at the date of the notice, the issuer of the relevant product has complied with:
  - (i) the provisions of Chapter 2M as they apply to the fund in which the relevant product is an interest; and
  - (ii) sections 674 and 674A as they apply to that fund; and
- (e) sets out any information that is excluded information as at the date of the notice (see subsections (8) and (9)); and
- (f) states:
  - (i) the potential effect the issue of the relevant product will have on the control of the body; and
  - (ii) the consequences of that effect.

Note 1: A person is taken not to contravene section 1021C if a notice purports to comply with this subsection but does not actually comply with this subsection: see subsection 1021C(5).

Note 2: A notice must not be false or misleading in a material particular, or omit anything that would render it misleading in a material respect: see sections 1308 and 1309. The issuer has an obligation to correct a defective notice: see subsection (10) of this section.

- (8) For the purposes of subsection (7), excluded information is information:
  - (a) that has been excluded from a continuous disclosure notice in accordance with the listing rules of the relevant market operator to whom that notice is required to be given; and

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- (b) that a person would reasonably require for the purpose of making a decision, as a retail client, whether to acquire the relevant product.
- (9) The notice given under subsection (2) must contain any excluded information only to the extent to which it is reasonable for a person considering, as a retail client, whether to acquire the relevant product to expect to find the information in a Product Disclosure Statement.

*Obligation to correct defective notice*

- (10) The issuer of the relevant product contravenes this subsection if:
  - (a) the notice given under subsection (2) is defective; and
  - (b) the issuer becomes aware of the defect in the notice within 12 months after the relevant product is issued; and
  - (c) the issuer does not, within a reasonable time after becoming aware of the defect, give the relevant market operator a notice that sets out the information necessary to correct the defect.
- (11) For the purposes of subsection (10), the notice under subsection (2) is **defective** if the notice:
  - (a) does not comply with paragraph (2)(f); or
  - (b) is false or misleading in a material particular; or
  - (c) has omitted from it a matter or thing, the omission of which renders the notice misleading in a material respect.

**1012DA Product Disclosure Statement not required for sale amounting to indirect issue**

*Product Disclosure Statement not required*

- (1) In a recommendation situation or sale situation, the regulated person does not have to give the client a Product Disclosure Statement if:

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- (a) but for subsection (5), (11) or (12), the regulated person would be required by section 1012A or 1012C to give a Product Disclosure Statement for the relevant product; and
  - (b) the transfer or sale of the financial product (the *relevant product*) to the client would take place in circumstances covered by subsection 1012C(6); and
  - (c) the relevant product was not issued by the issuer with the purpose referred to in subparagraph 1012C(6)(c)(i); and
  - (d) a determination under subsection (2) was not in force in relation to the issuer of the relevant product at the time when the relevant product was issued.
- (1A) In a recommendation situation or sale situation, the regulated person does not have to give the client a Product Disclosure Statement if:
- (a) but for subsection (5), the regulated person would be required by section 1012C to give a Product Disclosure Statement for the transfer or sale of the financial product (the *relevant product*); and
  - (b) the transfer or sale of the relevant product to the client would take place in circumstances covered by subsection 1012C(8); and
  - (c) the relevant product was not sold by the controller with the purpose referred to in subparagraph 1012C(8)(d)(i); and
  - (d) a determination under subsection (2) was not in force in relation to the issuer of the relevant product at the time when the relevant product was issued.

*Determination by ASIC*

- (2) ASIC may make a determination under this subsection if ASIC is satisfied that in the previous 12 months the issuer of the relevant product contravened any of the following provisions:
- (a) the provisions of Chapter 2M as they apply to:
    - (i) the issuer; or
    - (ii) if the relevant product is an interest in a registered scheme—the scheme; or

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- (iii) if the relevant product is an interest in a notified foreign passport fund—the fund;
  - (b) section 674, 674A, 675 or 675A as it applies to:
    - (i) the issuer; or
    - (ii) if the relevant product is an interest in a registered scheme—the scheme; or
    - (iii) if the relevant product is an interest in a notified foreign passport fund—the fund;
  - (c) section 1016E, 1021D, 1021E or 1021J;
  - (d) subsection (9) of this section;
  - (e) section 1308 as it applies to a notice under subsection (5) of this section.
- (3) The determination must be made in writing and a copy must be published in the *Gazette* as soon as practicable after the determination is made.
- (4) A failure to publish a copy of the determination does not affect the validity of the determination.

*Transfer or sale of quoted securities—case 1*

- (5) The regulated person does not have to give the client a Product Disclosure Statement if:
  - (a) the relevant product is in a class of financial products that were quoted securities at all times in the 3 months before the day on which the relevant product was issued; and
  - (b) trading in that class of financial products on a declared financial market on which they were quoted was not suspended for more than a total of 5 days during the shorter of the period during which the class of financial product was quoted, and the period of 12 months before the day on which the relevant product was issued; and
  - (c) no exemption under section 111AS or 111AT covered the issue of the relevant product, or any person as director or auditor of the issuer, at any time during the relevant period referred to in paragraph (b); and

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- (d) no order under section 340, 340A, 341 or 341A covered the issuer of the relevant product, or any person as director or auditor of the issuer, at any time during the relevant period referred to in paragraph (b); and
  - (e) either:
    - (i) if the regulated person is not required under subsection (1) to give a Product Disclosure Statement—the issuer of the relevant product gives the relevant market operator for the issuer a written notice that complies with subsection (6) before the relevant conduct occurs; or
    - (ii) if the regulated person is not required under subsection (1A) to give a Product Disclosure Statement—both the issuer of the relevant product, and the controller, give the relevant market operator for the issuer a written notice that complies with subsection (6) before the relevant conduct occurs.
- (6) A notice complies with this subsection if the notice:
- (a) is given within 5 business days after the day on which the relevant product was issued; and
  - (b) states that the relevant product was issued without a Product Disclosure Statement for the relevant product being prepared; and
  - (c) states that the notice is being given under paragraph (5)(e); and
  - (d) states that, as a disclosing entity, the issuer of the relevant product is subject to regular reporting and disclosure obligations; and
  - (e) states that, as at the date of the notice, the issuer of the relevant product has complied with the provisions of Chapter 2M, and of sections 674 and 674A, as those provisions apply to:
    - (i) the issuer; or
    - (ii) if the relevant product is an interest in a registered scheme—the scheme; or

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- (iii) if the relevant product is an interest in a notified foreign passport fund—the fund; and
  - (f) sets out any information that is excluded information as at the date of the notice (see subsections (7) and (8)).

Note 1: A person is taken not to contravene section 1021C if a notice purports to comply with this subsection but does not actually comply with this subsection: see subsection 1021C(5).

Note 2: A notice must not be false or misleading in a material particular, or omit anything that would render it misleading in a material respect: see sections 1308 and 1309. The issuer has an obligation to correct a defective notice: see subsection (9) of this section.

- (7) For the purposes of subsection (6), excluded information is information:
  - (a) that has been excluded from a continuous disclosure notice in accordance with the listing rules of the relevant market operator to whom that notice is required to be given; and
  - (b) that a person would reasonably require for the purpose of making a decision, as a retail client, whether to acquire the relevant product.
- (8) The notice given under subsection (5) must contain any excluded information only to the extent to which it is reasonable for a person considering, as a retail client, whether to acquire the relevant product to expect to find the information in a Product Disclosure Statement.

*Obligation to correct defective notice*

- (9) The issuer of the relevant product contravenes this subsection if:
  - (a) the notice given under subsection (5) is defective; and
  - (b) the issuer becomes aware of the defect in the notice within 12 months after the relevant product is issued; and
  - (c) the issuer does not, within a reasonable time after becoming aware of the defect, give the relevant market operator a notice that sets out the information necessary to correct the defect.

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- (10) For the purposes of subsection (9), the notice under subsection (5) is **defective** if the notice:
- (a) does not comply with paragraph (6)(f); or
  - (b) is false or misleading in a material particular; or
  - (c) has omitted from it a matter or thing the omission of which renders the notice misleading in a material respect.

*Transfer or sale of quoted securities—case 2*

- (11) The regulated person does not have to give the client a Product Disclosure Statement if:
- (a) the relevant product is in a class of financial products that are quoted securities of the issuer; and
  - (b) either:
    - (i) a Product Disclosure Statement required to be given by section 1012B is lodged with ASIC on or after the day on which the relevant product is issued but before the day on which the relevant conduct occurs; or
    - (ii) a Product Disclosure Statement required to be given by section 1012B is lodged with ASIC before the day on which the relevant product is issued and, on the day on which the relevant product is issued, the Product Disclosure Statement is still being used by the issuer of the relevant product for offers of financial products in the same class of financial products as the relevant product; and
  - (c) the Product Disclosure Statement is for a financial product of the issuer of the relevant product that is in the same class of financial products as the relevant product.

*Transfer or sale of quoted securities—case 3*

- (12) The regulated person does not have to give the client a Product Disclosure Statement if:
- (a) a Product Disclosure Statement for a financial product was given under section 1012B; and
  - (b) the relevant product was issued to:
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- (i) a person (the **underwriter**) named in that Product Disclosure Statement as an underwriter of the issue of the financial product; or
  - (ii) a person nominated by the underwriter; and
  - (c) the relevant product was issued to the underwriter, or the person nominated by the underwriter, at or about the time that persons who applied for the financial product under that Product Disclosure Statement were issued with that product; and
  - (d) the relevant product is in a class of financial products that were quoted securities of the issuer.

**1012E Small scale offerings of managed investment and other prescribed financial products (20 issues or sales in 12 months)**

- (1) This section applies only to financial products that are:
  - (a) managed investment products; or
  - (b) financial products of a kind prescribed by regulations made for the purposes of this paragraph.
- (2) Personal offers of financial products do not need a Product Disclosure Statement under this Part if:
  - (a) all of the financial products are issued by the same person (the **issuer**); and
  - (b) none of the offers results in a breach of the 20 purchasers ceiling (see subsections (6) and (7)); and
  - (c) none of the offers results in a breach of the \$2 million ceiling (see subsections (6) and (7)).
- (3) Subsection (2) does not apply to an offer to which subsection 1012C(6) (sale amounting to indirect issue) or (8) (sale amounting to indirect sale by controller) applies.

Note: Under section 1012K, ASIC may make a determination aggregating the transactions of bodies that ASIC considers to be closely related.

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- (4) If subsection (2) applies to an offer of a financial product, a recommendation to a person to acquire a financial product in response to a personal offer of that kind does not need a Product Disclosure Statement under this Part.
  - (5) For the purposes of subsections (2) and (4), a ***personal offer*** is one that:
    - (a) may only be accepted by the person to whom it is made; and
    - (b) is made to a person who is likely to be interested in the offer, having regard to:
      - (i) previous contact between the person making the offer and that person; or
      - (ii) some professional or other connection between the person making the offer and that person; or
      - (iii) statements or actions by that person that indicate that they are interested in offers of that kind.
  - (6) An offer to issue, or arrange for the issue of, a financial product:
    - (a) results in a breach of the 20 purchasers ceiling if it results in the number of people to whom the issuer has issued financial products exceeding 20 in any 12 month period; and
    - (b) results in a breach of the \$2 million ceiling if it results in the amount raised by the issuer from issuing financial products exceeding \$2 million in any 12 month period.
  - (7) An offer by a person to sell a financial product:
    - (a) results in a breach of the 20 purchasers ceiling if it results in the number of people to whom the person sells financial products issued by the issuer of that financial product exceeding 20 in any 12 month period; and
    - (b) results in a breach of the \$2 million ceiling if it results in the amount raised by the person from selling financial products issued by the issuer of that financial product exceeding \$2 million in any 12 month period.
  - (8) In counting issues and sales of the financial products issued by the issuer, and the amount raised from issues and sales, for the
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purposes of subsection (2), disregard issues and sales that result from offers that:

- (a) do not need a Product Disclosure Statement (otherwise than because of this section); or
- (b) are made under a Product Disclosure Statement.

Note 1: Also see provisions on restrictions on advertising (section 1018A) and the anti-hawking provisions in section 992A.

Note 2: Issues and sales that result from offers that are eligible to be made under Division 1A of Part 7.12 (Employee share schemes) are also disregarded for the purposes of subsection (2); see subsection 1100ZC(4).

- (9) In counting issues and sales of the financial products issued by the issuer, and the amount raised from issues and sales, for the purposes of subsection (2), disregard any issues and sales made by a body if:
  - (a) the body was a managed investment scheme (but not a registered scheme) at the time that the offer of interests in the scheme that resulted in the issues or sales was made; and
  - (b) the body became a registered scheme within 12 months after that offer was made; and
  - (c) the offer would not have required a Product Disclosure Statement (otherwise than because of this section) if the managed investment scheme had been a registered scheme at the time that the offer was made.
- (10) In working out the amount of money raised by the issuer from issuing financial products, include the following:
  - (a) the amount payable for the financial products at the time when they are issued;
  - (b) if the financial product is an option—any amount payable on the exercise of the option;
  - (c) if the financial products carry a right to convert the financial product into other financial products—any amount payable on the exercise of that right.

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- (11) If a person relies on subsection (2) to make offers of financial products without a Product Disclosure Statement under this Part, the person must not issue, arrange for the issue of, or transfer, financial products without a Product Disclosure Statement under this Part if the issue or transfer would result in a breach of the 20 purchasers ceiling or the \$2 million ceiling (see subsections (6), (7), (8), (9) and (10)).
- (12) For the purposes of this section, an *offer of a financial product* is an offer to:
  - (a) issue the financial product; or
  - (b) arrange for the issue of the financial product; or
  - (c) sell the financial product.

**1012F Product Disclosure Statement for certain superannuation products may be provided later**

In a recommendation situation or an issue situation in which the financial product is a superannuation product of a kind specified in regulations made for the purposes of this section, the regulated person:

- (a) need not give the client the Product Disclosure Statement at or before the time when it would otherwise be required to be given; and
- (b) must give the client the Product Disclosure Statement as soon as is reasonably practicable and in any event within 3 months after the product is issued to the client; and
- (c) need not give the client the Product Disclosure Statement at all if the client ceases to be a member of the superannuation fund concerned before the regulated person is required to give the Product Disclosure Statement under paragraph (b).

**1012G Product Disclosure Statement may sometimes be provided later**

- (1) The regulated person may deal with a financial product under this section only if:
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- (a) the financial product is one for which an application form is not required under section 1016A and section 1019B (cooling off period) will apply if the client enters into a legal obligation to acquire the product pursuant to the recommendation or offer that constitutes the relevant conduct; or
  - (b) the financial product is:
    - (i) a basic deposit product; or
    - (ii) a facility for making non-cash payments that is related to a basic deposit product; or
    - (iii) a financial product of a kind prescribed by regulations made for the purposes of this subparagraph.
- (2) In a recommendation situation or an issue situation, the regulated person need not give the client a Product Disclosure Statement for the financial product at or before the time when it would otherwise be required to be given if:
- (a) the client expressly instructs the regulated person that they require:
    - (i) in a recommendation situation—the advice constituting the recommendation; or
    - (ii) in an issue situation—the financial product; to be provided or issued immediately, or by a specified time; and
  - (b) it is not reasonably practicable, while complying with the client's instructions, to give the client the Product Disclosure Statement at or before the time when it would otherwise be required to be given.

The regulated person must comply with subsection (3) instead.

- (3) The regulated person must:
- (a) at or before the time referred to in paragraph (2)(b), orally communicate the following information to the client:
    - (i) the name and contact details of the issuer of the financial product; and

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- (ii) information about the essential features of the financial product; and
  - (iii) the information that would be required to be in a Product Disclosure Statement for the financial product by paragraphs 1013D(1)(c), (d), (g) and (i); and
- (b) give the client the Product Disclosure Statement as soon as practicable after that time, and in any event not later than:
- (i) the time when the confirmation requirement (if applicable) is complied with; or
  - (ii) the end of the fifth day after the day on which the financial product was issued or sold to the client.
- (3A) The information referred to in paragraph (3)(a) must be communicated in a clear, concise and effective manner.
- (4) For the purposes of paragraph (3)(b), the confirmation requirement is complied with when:
- (a) the client receives confirmation, as mentioned in paragraph 1017F(5)(a), of the transaction by which they acquired the financial product; or
  - (b) confirmation of that transaction is available to the client by a facility as mentioned in paragraph 1017F(5)(b).

**1012GA Product Disclosure Statement for certain general insurance product quotes may be provided later, or is not required**

- (1) A regulated person, in making an offer to issue, or an offer to arrange for the issue of, a general insurance product to a client, may deal with the product under this section only if:
- (a) the offer is made by or at the same time as giving a quote to the client in the course of, or because of, a telephone call with the client that is not unsolicited contact; and
  - (b) in the course of the phone call, but before the offer is made, the regulated person orally communicates the following information to the client in a clear, concise and effective manner:

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- (i) if the insurance cover under the product is subject to exclusions or limitations—that fact, and the fact that information about those exclusions and limitations is contained in the Product Disclosure Statement for the product;
  - (ii) that the level of insurance cover under the product may be different from the level of insurance cover under other general insurance products; and
  - (c) the regulated person asks the client whether the client wants to be given a Product Disclosure Statement for the product, but does not influence the client's decision to elect to be given the Product Disclosure Statement.
- (2) In the course of the telephone call:
- (a) if the client informs the regulated person that the client wants to be given the Product Disclosure Statement—the regulated person must give the Product Disclosure Statement to the client as soon as practicable after the time the offer is made; or
  - (b) if the client informs the regulated person that the client does not want to be given the Product Disclosure Statement—the regulated person does not have to give the client the Product Disclosure Statement in relation to the making of the offer.

Note: The regulated person may need to give a Product Disclosure Statement to the client at or before the time specified in section 1012B if, in the course of the telephone call or later, the client applies for, or otherwise offers to acquire, the product, or the product is issued to the client.

- (3) In this section:

***quote*** means, in relation to a general insurance product, a statement of the cost (and not merely an estimate of the likely cost) of the product if the cost is calculated by a regulated person having regard to information given to them by a client.

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**1012H Obligation to take reasonable steps to ensure that Product Disclosure Statement is given to person electing to be covered by group financial product**

- (1) This section covers the situation in which a financial product:
  - (a) is issued to a person; and
  - (b) covers, or is designed to cover, a group of people; and
  - (c) may cover a particular person (the ***new group member***) if the person elects to be covered by the financial product.
- (2) The issuer must take reasonable steps to ensure that the new group member is given a Product Disclosure Statement for the financial product in accordance with this Division before the new group member makes an election to be covered by the financial product.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (3) For the purposes of this section, a person is covered by a financial product if benefits are, or may be, provided under the financial product directly to:
  - (a) the person; or
  - (b) a relative of the person; or
  - (c) a person nominated by the person.

**1012I Obligation to give employer a Product Disclosure Statement in relation to certain superannuation products and RSAs**

- (1) At or before the time when a person (the ***applicant***) becomes a standard employer-sponsor of a superannuation entity, the person (the ***issuer***) who is to provide the superannuation products to the applicant's employees must give the applicant a Product Disclosure Statement in accordance with this Division for each of those superannuation products.
- (2) If:
  - (a) a person (the ***applicant***) applies for the issue of an RSA to the employee; and

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- (b) the applicant has not previously applied to the RSA provider for the issue to any employee of an RSA of the same kind; the person (the *issuer*) who is to issue the RSA to the employee must, at or before the time when the RSA is issued to the employee, give the applicant a Product Disclosure Statement in accordance with this Division for the RSA.
- (2A) If:
- a trustee (the *applicant*), under Part 24 of the *Superannuation Industry (Supervision) Act 1993*, applies on behalf of a person for the issue of an interest in a relevant superannuation entity; and
  - the applicant has not previously applied under that Part for the issue of an interest in that entity on behalf of any person; the person (the *issuer*) who is to issue the interest to the person must, at or before the time when the interest is issued to the person, give the applicant a Product Disclosure Statement in accordance with this Division for the interest.
- (2B) If:
- a trustee (the *applicant*), under Part 9 of the *Retirement Savings Accounts Act 1997*, applies on behalf of a person for the issue of an interest in a relevant superannuation entity; and
  - the applicant has not previously applied under that Part for the issue of an interest in that entity on behalf of any person; the person (the *issuer*) who is to issue the interest to the person must, at or before the time when the interest is issued to the person, give the applicant a Product Disclosure Statement in accordance with this Division for the interest.
- (3) The issuer does not have to give the applicant a Product Disclosure Statement under subsection (1), (2), (2A) or (2B) for a financial product if:
- the applicant has already received a Product Disclosure Statement for that financial product that contains all of the

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information that the first-mentioned Product Disclosure Statement would be required to contain; or

- (b) the issuer believes on reasonable grounds that paragraph (a) applies.

Note: Information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

- (4) The issuer need not give the applicant a Product Disclosure Statement under subsection (1), (2), (2A) or (2B) in the circumstances specified in the regulations.

- (5) In this section:

- (a) terms used in subsection (1) that are defined for the purposes of the *Superannuation Industry (Supervision) Act 1993* have the same meanings as in that Act; and
- (b) terms used in subsection (2) that are defined for the purposes of the *Retirement Savings Accounts Act 1997* have the same meanings as in that Act; and
- (c) **relevant superannuation entity** has the same meaning as in section 1016A of this Act.

**1012IA Treatment of arrangements under which a person can instruct another person to acquire a financial product**

*Definitions*

- (1) In this section:

**acquirer**, in relation to a custodial arrangement, has the meaning given by the definition of **custodial arrangement**.

**client**, in relation to a custodial arrangement, has the meaning given by the definition of **custodial arrangement**.

**custodial arrangement** means an arrangement between a person (the **provider**) and another person (the **client**) (whether or not there are also other parties to the arrangement) under which:

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- (a) the client is, or is entitled, to give an instruction that a particular financial product, or a financial product of a particular kind, is to be acquired; and
  - (b) if the client gives such an instruction, a person (the *acquirer*), being the provider or a person with whom the provider has or will have an arrangement, must (subject to any discretion they have to refuse) acquire the financial product, or a financial product of that kind; and
  - (c) if the acquirer acquires the financial product, or a financial product of that kind, pursuant to an instruction given by the client, either:
    - (i) the product is to be held on trust for the client or another person nominated by the client; or
    - (ii) the client, or another person nominated by the client, is to have rights or benefits in relation to the product or a beneficial interest in the product, or in relation to, or calculated by reference to, dividends or other benefits derived from the product.

*instruction* includes a direction or request.

*provider*, in relation to a custodial arrangement, has the meaning given by the definition of *custodial arrangement*.

*regulated acquisition* means an acquisition of a financial product pursuant to an instruction by the client under a custodial arrangement, being an acquisition:

- (a) by way of issue by the issuer (the *regulated person*); or
- (b) pursuant to a sale by a person (the *regulated person*) in circumstances described in subsection 1012C(5), (6) or (8).

*regulated person*, in relation to a regulated acquisition of a financial product, has the meaning given by paragraph (a) or (b) (as the case requires) of the definition of *regulated acquisition*.

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*Obligation on provider to give client a PDS*

- (2) Before a regulated acquisition of a financial product occurs pursuant to an instruction given by the client under a custodial arrangement, the provider must give the client a Product Disclosure Statement for the product if a Product Disclosure Statement for the product would, if there were an equivalent direct acquisition by the client, be required by subsection 1012B(3) or 1012C(3) (see subsection (3) of this section) to be given to the client by the regulated person before that acquisition occurred. For this purpose, an ***equivalent direct acquisition*** is an acquisition that would occur if:
  - (a) the product were instead being offered for issue or sale direct to the client by the regulated person for the same price (or for the appropriate proportion of that price, if the transaction for the regulated acquisition also covers other products); and
  - (b) the circumstances of that issue or sale to the client were otherwise the same as those in which the regulated acquisition will occur.

*Determining whether a PDS would have to be given for an equivalent direct acquisition*

- (3) The following provisions apply for the purpose of determining whether the regulated person would be required by subsection 1012B(3) or 1012C(3) to give the client a Product Disclosure Statement for the financial product:
  - (a) the effect of the provisions referred to in subsection 1012B(5) or 1012C(10), as the case requires, as they have effect subject to the following paragraphs, must be taken into account;
  - (b) subsections 1012D(1), (2) and (2A) apply as if references in those subsections to the regulated person's belief in relation to a matter were instead references to the provider's belief in relation to that matter;
  - (c) subsections 1012D(2) and (3) apply as if references to the client already holding a financial product of the same kind also included a reference to a person already holding a

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- financial product of the same kind as a result of an instruction given by the client under a custodial arrangement;
- (d) sections 1012E and 1012F are to be disregarded;
  - (e) section 1012G has effect in accordance with subsection (4).

*Modification of section 1012G*

- (4) The following provisions apply in relation to section 1012G:
  - (a) in determining for the purposes of subsection (2) whether the regulated person would be required by subsection 1012B(3) or 1012C(3) to give the client a Product Disclosure Statement for the financial product, subsection 1012G(2) applies as if the reference to the client instructing the regulated person (in an issue situation) that they require the financial product to be provided or issued immediately, or by a specified time, were instead a reference to the client instructing the provider that they require the financial product to be acquired immediately, or by a specified time;
  - (b) if, because of subsection 1012G(2) as it applies because of paragraph (a) of this subsection, the provider does not have to give the client a Product Disclosure Statement for a financial product before a regulated acquisition of the financial product occurs pursuant to an instruction given by the client under a custodial arrangement:
    - (i) subsection 1012G(2) applies in relation to the provider, the client and the regulated acquisition as if the obligation it imposes to comply with subsection 1012G(3) were imposed on the provider; and
    - (ii) subsection 1012G(3) applies in relation to the provider, the client and the regulated acquisition as if the reference to the regulated person were instead a reference to the provider, as if subparagraph 1012G(3)(b)(i) were omitted and as if the reference in subparagraph 1012G(3)(b)(ii) to the day on which the financial product was issued or sold to the client were instead a reference to the day on which the regulated acquisition occurs.

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*Modification of section 1013A*

- (5) Section 1013A applies in relation to a regulated acquisition as if:
  - (a) paragraph 1013A(1)(b) also covered a Product Disclosure Statement that is required to be given by subsection (2) of this section in relation to an acquisition covered by paragraph (a) of the definition of **regulated acquisition** in subsection (1) of this section; and
  - (b) paragraph 1013A(2)(b) also covered a Product Disclosure Statement that is required to be given by subsection (2) of this section in relation to an acquisition covered by paragraph (b) of the definition of **regulated acquisition** in subsection (1) of this section.

*Provider is not an agent for the purposes of section 1015C*

- (6) For the purposes of the application of section 1015C in relation to a regulated acquisition, the provider in relation to the relevant custodial arrangement is taken not to be an agent of the client.

*Provider is covered by sections 1015E, 1021F and 1021I*

- (7) Sections 1015E, 1021F and 1021I apply in relation to a regulated acquisition as if the references to a regulated person were instead references to the provider in relation to the relevant custodial arrangement.

*Regulations may provide for other modifications*

- (8) The regulations may provide for other modifications of provisions of this Part that are to have effect in relation to regulated acquisitions.

**1012J Information must be up to date**

The information in a Product Disclosure Statement must be up to date as at the time when it is given.

Note: A Supplementary Product Disclosure Statement containing updated information may be given with a Product Disclosure Statement that

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has become out of date. The updated information is taken to be included in the Product Disclosure Statement (see section 1014D).

**1012K Anti-avoidance determinations**

(1) ASIC may determine in writing that a number of different bodies are closely related and that their transactions should be aggregated for the purposes of this Subdivision. If ASIC does so:

- (a) an issue, sale or transfer of financial products of any other bodies is taken to also be an issue, sale or transfer of the financial products of each of the other bodies by those bodies; and
- (b) any money received from an issue, sale or transfer of financial products of any of the bodies is taken to also be received by each of the other bodies from an issue, sale or transfer of its own financial products.

ASIC must give written notice of the determination to each of the bodies.

(2) ASIC may determine in writing that the transactions of a body and of a person who controls the body should be aggregated for the purposes of this Subdivision. If ASIC does so:

- (a) an issue of financial products of the body is taken to also be the transfer of the financial products by the controller; and
- (b) any money received from an issue of financial products of the body is taken to also be received by the controller from a transfer of the financial products; and
- (c) a sale or transfer of financial products of the body by the controller is taken to also be the issue of the financial products by the body; and
- (d) any money received from a sale or transfer of financial products of the body by the controller is taken to also be received by the body from an issue of the financial products.

ASIC must give written notice of the determination to the body and the controller.

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**Subdivision C—Preparation and content of Product Disclosure Statements**

**1013A Who must prepare Product Disclosure Statement**

- (1) A Product Disclosure Statement that:
- (a) is required to be given by section 1012A (otherwise than in a situation in which the recommendation concerned relates to an offer described in subsection 1012C(3) or (4)); or
  - (b) is required to be given by section 1012B; or
  - (c) section 1012H requires an issuer to take reasonable steps to ensure is given to a new group member; or
  - (d) is required to be given by section 1012I;  
must be a document that has been prepared by the issuer of the financial product. A Product Disclosure Statement of this kind is an *issue Statement*.
- (2) A Product Disclosure Statement that:
- (a) is required to be given by section 1012A in a situation in which the recommendation concerned relates to an offer described in subsection 1012C(3) or (4)); or
  - (b) is required to be given by section 1012C;  
must be a document that has been prepared by the person making the offer to sell the financial product. A Product Disclosure Statement of this kind is a *sale Statement*.
- (3) The person by whom, or on whose behalf, a Product Disclosure Statement for a financial product is required to be prepared is the *responsible person* for the financial product.
- (4) For the purposes of this Part, a Product Disclosure Statement prepared on behalf of a person is taken to be prepared by the person.

Section 1013B

### **1013B Title of Product Disclosure Statement**

- (1) The title “Product Disclosure Statement” must be used on the cover of, or at or near the front of, a Product Disclosure Statement.
- (2) In any other part of a Product Disclosure Statement, “Product Disclosure Statement” may be abbreviated to “PDS”.

### **1013C Product Disclosure Statement content requirements**

- (1) A Product Disclosure Statement:
  - (a) must include the following statements and information required by this Subdivision:
    - (i) the statements and information required by section 1013D; and
    - (ii) the information required by section 1013E; and
    - (iii) the information required by the other provisions of this Subdivision; and
  - (b) may also:
    - (i) include other information; or
    - (ii) refer to other information that is set out in another document.

Note: A Supplementary Product Disclosure Statement containing additional information may be given with a Product Disclosure Statement that does not contain all the required information. The additional information is taken to be included in the Product Disclosure Statement (see section 1014D).

- (2) The information required by sections 1013D and 1013E need only be included in the Product Disclosure Statement to the extent to which it is actually known to:
  - (a) the responsible person; and
  - (b) in the case of a sale Statement—the issuer of the financial product; and
  - (c) any person named in the Statement as an underwriter of the issue or sale of the financial product; and
  - (d) any person:

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- (i) named in the Statement as a financial services licensee providing services in relation to the issue or sale of the financial product; and
  - (ii) who participated in any way in the preparation of the Statement; and
  - (e) any person who has given a consent referred to in section 1013K in relation to a statement included in the Statement; and
  - (f) any person named in the Statement with their consent as having performed a particular professional or advisory function; and
  - (g) if any of the above persons is a body corporate—any director of that body corporate.
- (3) The information included in the Product Disclosure Statement must be worded and presented in a clear, concise and effective manner.
- (4) The responsible person may include in the Product Disclosure Statement a statement about the association between the financial product and another person.
- (5) The responsible person must not include a statement about the association between the financial product and a person if:
- (a) the statement creates the impression that the financial product is issued or sold by that other person; and
  - (b) the person has not issued or sold the product.
- (6) The responsible person must not include a statement about the association between the financial product and a person if:
- (a) the statement creates the impression that the financial product is guaranteed or underwritten by that other person; and
  - (b) the person has not guaranteed or underwritten the product.
- (7) If the Product Disclosure Statement states that a person provides, or is to provide, services in relation to the financial product, the Product Disclosure Statement must clearly distinguish between the respective roles of that person and the issuer or seller of the financial product.
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**1013D Product Disclosure Statement content—main requirements**

- (1) Subject to this section, subsection 1013C(2) and sections 1013F and 1013FA, a Product Disclosure Statement must include the following statements, and such of the following information as a person would reasonably require for the purpose of making a decision, as a retail client, whether to acquire the financial product:
  - (a) a statement setting out the name and contact details of:
    - (i) the issuer of the financial product; and
    - (ii) if the Statement is a sale Statement—the seller; and
  - (b) information about any significant benefits to which a holder of the product will or may become entitled, the circumstances in which and times at which those benefits will or may be provided, and the way in which those benefits will or may be provided; and
  - (c) information about any significant risks associated with holding the product; and
  - (d) information about:
    - (i) the cost of the product; and
    - (ii) any amounts that will or may be payable by a holder of the product in respect of the product after its acquisition, and the times at which those amounts will or may be payable; and
    - (iii) if the amounts paid in respect of the financial product and the amounts paid in respect of other financial products are paid into a common fund—any amounts that will or may be deducted from the fund by way of fees, expenses or charges; and
  - (e) if the product will or may generate a return to a holder of the product—information about any commission, or other similar payments, that will or may impact on the amount of such a return; and
  - (f) information about any other significant characteristics or features of the product or of the rights, terms, conditions and obligations attaching to the product; and

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- (g) information about the dispute resolution system that covers complaints by holders of the product and about how that system may be accessed; and
  - (h) general information about any significant taxation implications of financial products of that kind; and
  - (i) information about any cooling-off regime that applies in respect of acquisitions of the product (whether the regime is provided for by a law or otherwise); and
  - (j) if the product issuer (in the case of an issue Statement) or the seller (in the case of a sale Statement) makes other information relating to the product available to holders or prospective holders of the product, or to people more generally—a statement of how that information may be accessed; and
  - (k) any other statements or information required by the regulations; and
  - (l) if the product has an investment component—the extent to which labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of the investment; and
  - (m) unless in accordance with the regulations, for information to be disclosed in accordance with paragraphs (b), (d) and (e), any amounts are to be stated in dollars.
- (2) For the purposes of paragraph (1)(d), an amount will or may be payable in respect of a financial product by the holder of the financial product if:
- (a) the holder will or may have to pay an amount in respect of the product; or
  - (b) an amount will or may be deducted from:
    - (i) a payment to be made by the holder; or
    - (ii) a payment to be made to the holder; or
    - (iii) an amount held on the holder's behalf under the financial product; or
  - (c) an account representing the holder's interest in the financial product will or may be debited with an amount.

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It includes an amount that the holder will or may have to pay, or that will or may be deducted or debited, as a fee, expense or charge in relation to a particular transaction in relation to the financial product.

- (2A) For the purposes of paragraph (1)(l), products which have an investment component include superannuation products, managed investment products, foreign passport fund products and investment life insurance products.
- (3) Subsection (1) requires information to be included in the Product Disclosure Statement only to the extent to which the requirement is applicable to the financial product. The Product Disclosure Statement does not need to indicate that a particular requirement is not applicable to the financial product.
- (4) The regulations may:
  - (a) provide that a provision of subsection (1) does not apply in a particular situation; or
  - (b) provide that particular information is not required by a provision of subsection (1), either in a particular situation or generally; or
  - (c) provide a more detailed statement of the information that is required by a provision of subsection (1), either in a particular situation or generally.

**1013DA Information about ethical considerations etc.**

ASIC may develop guidelines that must be complied with where a Product Disclosure Statement makes any claim that labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of the investment.

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**1013E General obligation to include other information that might influence a decision to acquire**

Subject to subsection 1013C(2) and sections 1013F and 1013FA, a Product Disclosure Statement must also contain any other information that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client, whether to acquire the product.

**1013F General limitations on extent to which information is required to be included**

- (1) Despite anything in section 1013D or 1013E, information, or a statement containing information, is not required to be included in a Product Disclosure Statement if it would not be reasonable for a person considering, as a retail client, whether to acquire the product to expect to find the information in the Statement.
- (2) In considering whether it would not be reasonable for a person considering, as a retail client, whether to acquire the product to expect to find particular information in the Statement, the matters that may be taken into account include, but are not limited to:
  - (a) the nature of the product (including its risk profile); and
  - (b) the extent to which the product is well understood by the kinds of person who commonly acquire products of that kind as retail clients; and
  - (c) the kinds of things such persons may reasonably be expected to know; and
  - (d) if the product is an ED security that is not a continuously quoted security—the effect of the following provisions:
    - (i) Chapter 2M as it applies to disclosing entities;
    - (ii) sections 674, 674A, 675 and 675A; and
  - (e) the way in which the product is promoted, sold or distributed; and
  - (f) any other matters specified in the regulations.

Section 1013FA

**1013FA Information not required to be included in PDS for continuously quoted securities**

- (1) This section applies to a Product Disclosure Statement that relates to a continuously quoted security.
- (2) Despite anything in section 1013D, 1013E or 1013F, information is not required to be included in the Product Disclosure Statement if:
  - (a) for a continuously quoted security that is not a security of a notified foreign passport fund—the information is included in any of the following documents:
    - (i) the annual financial report most recently lodged with ASIC by the issuer of the product;
    - (ia) if the issuer of the product has lodged with ASIC a sustainability report—the most recently lodged sustainability report;
    - (ii) any half-year financial report lodged with ASIC by the issuer of the product after the lodgment of that annual financial report and before the date of the Product Disclosure Statement;
    - (iii) any continuous disclosure notices given by the issuer of the product after the lodgment of that annual financial report and before the date of the Product Disclosure Statement; and
  - (aa) for a continuously quoted security of a notified foreign passport fund—the information is included in any of the following documents:
    - (i) a copy of a report for the fund for the most recent financial year for the fund, prepared in accordance with the financial reporting requirements applying to the fund under the Passport Rules for the home economy for the fund;
    - (ii) a copy of an auditor's report that relates to the report mentioned in subparagraph (i);
    - (iii) any continuous disclosure notices given by the issuer of the product after the lodgment of the report mentioned

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in subparagraph (i) and before the date of the Product Disclosure Statement; and

- (b) the Product Disclosure Statement:

- (i) states that as a disclosing entity, the issuer of the product is subject to regular reporting and disclosure obligations; and
- (ii) informs people of their right to obtain a copy of any of the documents referred to in paragraph (a) or (aa) (as the case requires).

If the Product Disclosure Statement informs people of their right to obtain a copy of the document, the issuer of the product must give a copy of the document free of charge to anyone who asks for it.

- (3) ASIC may determine that this section does not apply to Product Disclosure Statements for continuously quoted securities if ASIC is satisfied that in the previous 12 months:
  - (a) the issuer of the continuously quoted securities contravened:
    - (i) the provisions of Chapter 2M; or
    - (ii) subsection 674(2), 674A(2), 675(2) or 675A(2); or
    - (iii) subsection 1012DAA(10) or 1012DA(9); or
    - (iv) section 1308 as it applies to a notice under subsection 1012DAA(2) or 1012DA(5); or
  - (b) the responsible person for the Product Disclosure Statement contravened section 1016E, 1021D, 1021E or 1021J.
- (4) The determination must be made in writing and ASIC must publish a copy of the determination in the *Gazette*.

**1013G Product Disclosure Statement must be dated**

A Product Disclosure Statement must be dated. The date must be:

- (a) if a copy of the Product Disclosure Statement has been lodged with ASIC (see section 1015B)—the date on which it was so lodged; or
- (b) in any other case—the date on which the Product Disclosure Statement was prepared or its preparation was completed.

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**1013GA Extra requirements if Product Disclosure Statement relates to foreign passport fund products**

- (1) This section applies to a Product Disclosure Statement that relates to foreign passport fund products.
- (2) The Product Disclosure Statement must:
  - (a) identify the home economy for the notified foreign passport fund to which the foreign passport fund products relate; and
  - (b) include a statement that:
    - (i) the operation of the fund is regulated by the law of the home economy for the fund; and
    - (ii) the operator of the fund and the custodian of the assets of the fund are regulated under the law of the home economy for the fund; and
    - (iii) the rights and remedies available to a person who acquires the foreign passport fund product may differ from the rights and remedies available in relation to a registered scheme; and
    - (iv) information made available to members of the fund in the home economy will from time to time be made available to Australian members of the fund by posting the information on the fund's website; and
  - (c) include an outline of the main rights and remedies available under the law of the home economy for the fund to persons who acquire the foreign passport fund product in this jurisdiction; and
  - (d) include an outline of how information mentioned in subparagraph (b)(iv) may be accessed by Australian members of the fund; and
  - (e) include a statement that the rights of a member of the fund on the fund being wound up are mainly determined under the constitution for the fund and the law of the home economy for the fund.

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**1013H Requirements if Product Disclosure Statement states or implies that financial product will be able to be traded**

If a Product Disclosure Statement states or implies that the financial product will be able to be traded on a financial market (whether in Australia or elsewhere), the Statement must state that:

- (a) the product is able to be traded on that market; or
- (b) an application has been made to the operator of that market for the taking of such action as is necessary to enable the product to be traded on that market; or
- (c) an application of a kind referred to in paragraph (b) will be made to the operator of that market within 7 days after the date of the Statement.

**1013I Extra requirements if Product Disclosure Statement relates to managed investment products that are ED securities**

- (1) This section applies to a Product Disclosure Statement that relates to managed investment products that are ED securities.
- (2) The Product Disclosure Statement must include a statement that:
  - (a) as a disclosing entity, the scheme is subject to regular reporting and disclosure obligations; and
  - (b) copies of documents lodged with ASIC in relation to the scheme may be obtained from, or inspected at, an ASIC office.
- (3) The Product Disclosure Statement must either:
  - (a) inform people of their right to obtain a copy of the following documents:
    - (i) the annual financial report most recently lodged with ASIC by the scheme;
    - (ia) if the scheme has lodged with ASIC a sustainability report—the most recently lodged sustainability report;
    - (ii) any half-year financial report lodged with ASIC by the scheme after the lodgment of that annual financial

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- report and before the date of the Product Disclosure Statement;
- (iii) any continuous disclosure notices given by the scheme after the lodgment of that annual report and before the date of the Product Disclosure Statement; or
- (b) include, or be accompanied by, a copy of the relevant document or documents.
- (4) If:
- (a) the Product Disclosure Statement informs people of their right to obtain a copy of a document referred to in subsection (3); and
- (b) a person asks the issuer (in the case of an issue Statement) or the seller (in the case of a sale Statement) for a copy of the document;
- the issuer or seller must give (see subsection (5)) the person a copy of the document free of charge as soon as practicable, and in any event within 5 days, after receiving the person's request.
- Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (5) In subsection (4), *give* means give in a way that would satisfy the requirements of section 1015C if the copy of the document were a Statement to which that section applied.
- 1013IA Extra requirements if Product Disclosure Statement relates to foreign passport fund products that are ED securities**
- (1) This section applies to a Product Disclosure Statement that relates to foreign passport fund products that are ED securities.
- (2) The Product Disclosure Statement must include a statement that:
- (a) as a disclosing entity, the fund is subject to regular reporting and disclosure obligations; and
- (b) copies of documents lodged with ASIC in relation to the fund may be obtained from, or inspected at, an ASIC office.
- (3) The Product Disclosure Statement must either:
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- (a) inform people of their right to obtain a copy of the following documents:
    - (i) a copy of a report for the most recent financial year for the fund, prepared in accordance with the financial reporting requirements applying to the fund under the Passport Rules for the home economy for the fund;
    - (ii) a copy of each auditor's report that relates to the report mentioned in subparagraph (i); or
  - (b) include, or be accompanied by, a copy of that document or those documents.
- (4) Subsections (5) and (6) apply if:
- (a) the Product Disclosure Statement informs people of their right to obtain a copy of a document referred to in subsection (3); and
  - (b) a person asks the issuer (in the case of an issue Statement) or the seller (in the case of a sale Statement) for a copy of the document.
- (5) The issuer or seller must give (see subsection (6)) the person a copy of the document:
- (a) free of charge; and
  - (b) as soon as practicable, and in any event within 5 days, after receiving the person's request; and
  - (c) if the person asks the issuer or seller for a copy of the document in English—in English.

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

- (6) In subsection (5), *give* means give in a way that would satisfy requirements of section 1015C if the copy of the document were a Statement to which that section applied.

**1013J Requirements if Statement has been lodged with ASIC**

A Product Disclosure Statement, a copy of which has been lodged with ASIC (see section 1015B), must include a statement that:

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- (a) a copy of the document has been lodged with ASIC; and
  - (b) ASIC takes no responsibility for the content of the document.

**1013K Requirements relating to consents to certain statements**

- (1) A Product Disclosure Statement must only include a statement made by a person, or a statement said in the Product Disclosure Statement to be based on a statement made by a person, if:
  - (a) the person has consented to the statement being included in the Product Disclosure Statement in the form and context in which it is included; and
  - (b) the Product Disclosure Statement states that the person has given this consent; and
  - (c) the person has not withdrawn this consent before the date of the Product Disclosure Statement.

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

- (2) The person who prepared the Product Disclosure Statement must not, without reasonable excuse, fail to keep the consent, or a copy of it, for the period, and in the manner, required by the regulations.

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

**1013L Product Disclosure Statement may consist of 2 or more separate documents given at same time**

- (1) Subject to this section, a Product Disclosure Statement may be made up of 2 or more separate documents that are given at the same time.
- (2) Each of the documents must have on the cover of the document, or at or near the front of the document, a statement:
  - (a) to the effect that the document is part of a Product Disclosure Statement; and
  - (b) that (subject to subsection (3)) identifies the other documents that make up the Product Disclosure Statement.

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- (3) If there are or may be different versions of a document referred to in paragraph (2)(b), the statement required by subsection (2) does not have to identify any particular one of those versions and may instead identify the document generically.

Note: For example, if a Product Disclosure Statement is made up of a core document that is not updated very frequently, and a separate document providing information about remuneration that is updated more frequently:

- (a) the statement in the core document need only refer to the fact that it, and a separate document about remuneration, make up the Product Disclosure Statement; and
- (b) the statement in the document about remuneration need only refer to the fact that it, and a separate document about all other required matters, make up the Product Disclosure Statement.

- (4) The requirement of section 1013B (title of Product Disclosure Statement) is taken to be satisfied if the title ‘Product Disclosure Statement’ is used on the cover of, or at or near the front of, at least one of the documents that make up the Product Disclosure Statement.
- (5) The requirement of section 1013G (dating of Product Disclosure Statement) must be separately complied with in relation to each of the documents. If, for any purpose, a single date needs to be determined as the date of the Product Disclosure Statement as a whole, that date is the most recent of the dates of those documents.
- (6) Section 1015E applies to an alteration to one of the documents as though the reference in that section to the date specified in the Product Disclosure Statement were a reference to the date specified in the document.
- (7) The regulations may impose additional requirements to be complied with if a Product Disclosure Statement is made up of 2 or more documents.

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### **1013M Combining a Product Disclosure Statement and a Financial Services Guide in a single document**

For provisions about combining a Product Disclosure Statement and a Financial Services Guide in a single document, see section 942DA and regulations made for the purposes of that section.

### **Subdivision D—Supplementary Product Disclosure Statements**

#### **1014A Meaning of *Supplementary Product Disclosure Statement***

A ***Supplementary Product Disclosure Statement*** is a document by which a person who has prepared a Product Disclosure Statement (the **PDS**) can:

- (a) correct a misleading or deceptive statement in the PDS; or
- (b) correct an omission from the PDS of information it is required to contain; or
- (c) update, or add to, the information contained in the PDS; or
- (d) change a statement of a kind referred to in paragraph 1016E(1)(a) or (b).

Note: In certain circumstances a Replacement Product Disclosure Statement may be prepared instead of a Supplementary Product Disclosure Statement (see Subdivision DA).

#### **1014B Title of Supplementary Product Disclosure Statement**

- (1) The title “Supplementary Product Disclosure Statement” must be used on the cover of, or at or near the front of, a Supplementary Product Disclosure Statement.
- (2) In any other part of a Supplementary Product Disclosure Statement, “Supplementary Product Disclosure Statement” may be abbreviated to “SPDS”.

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**1014C Form of Supplementary Product Disclosure Statement**

At the beginning of a Supplementary Product Disclosure Statement there must be:

- (a) a statement that it is a Supplementary Product Disclosure Statement; and
- (b) an identification of the Product Disclosure Statement that it supplements; and
- (c) a statement that it is to be read together with that Product Disclosure Statement and any other specified Supplementary Disclosure Statements.

**1014D Effect of giving person a Supplementary Product Disclosure Statement**

If:

- (a) a person is given a Product Disclosure Statement (the **PDS**); and
- (b) at the same time, or later, they are given a Supplementary Product Disclosure Statement (the **SPDS**) that supplements the PDS;

the PDS is taken, from when the SPDS is given to the person, to include the information and statements contained in the SPDS.

**1014E Situation in which only a Supplementary Product Disclosure Statement need be given**

If:

- (a) apart from this section, a person would be required to give another person (the **client**) a Product Disclosure Statement (the **new PDS**) relating to a financial product; and
- (b) the client has, because of some previous conduct, already received a Product Disclosure Statement (the **earlier PDS**) relating to the financial product; and
- (c) the earlier PDS contains some, but not all, of the information that the new PDS is required to contain;

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the person may, instead of giving the client the new PDS, give the client a Supplementary Product Disclosure Statement that contains the additional information.

**1014F Application of other provisions in relation to Supplementary Product Disclosure Statements**

Sections 1013A, 1013G, 1013H, 1013J and 1013K, and subsections 1013C(3) to (7), apply in relation to a Supplementary Product Disclosure Statement in the same way as they apply to a Product Disclosure Statement.

**Subdivision DA—Replacement Product Disclosure Statements**

**1014G Application of this Subdivision—stapled securities**

This Subdivision applies if:

- (a) a Product Disclosure Statement has been lodged in relation to an offer for the issue or sale of an interest in a managed investment scheme; and
- (b) the interest can only be transferred together with one or more securities; and
- (c) a disclosure document has been lodged in relation to an offer for the issue or sale of the security (or securities).

**1014H Meaning of *Replacement Product Disclosure Statement***

A *Replacement Product Disclosure Statement* is a document that replaces the Product Disclosure Statement (the *earlier PDS*) mentioned in paragraph 1014G(a) in order to:

- (a) correct a misleading or deceptive statement in the earlier PDS; or
- (b) correct an omission from the earlier PDS of information it is required to contain; or
- (c) update, or add to, the information contained in the earlier PDS; or

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- (d) change a statement of a kind referred to in paragraph 1016E(1)(a) or (b).

**1014J Consequences of lodging a Replacement Product Disclosure Statement**

If a Replacement Product Disclosure Statement is prepared in accordance with section 1014K and lodged with ASIC as provided by Subdivision E (in its application under section 1014L), a reference to a Product Disclosure Statement is taken to be a reference to the Replacement Product Disclosure Statement for the purposes of the application of this Act to events that occur after the lodgment.

Note: This section means, for example, that offers made after lodgment of the Replacement Product Disclosure Statement must be accompanied by copies of the Replacement Product Disclosure Statement and not the earlier PDS.

**1014K Form, content and preparation of Replacement Product Disclosure Statements**

- (1) At the beginning of a Replacement Product Disclosure Statement, there must be:
    - (a) a statement that it is a Replacement Product Disclosure Statement; and
    - (b) an identification of the Product Disclosure Statement it replaces.
  - (2) The title “Replacement Product Disclosure Statement” must be used on the cover of, or at or near the front of, a Replacement Product Disclosure Statement.
  - (3) In any other part of a Replacement Product Disclosure Statement, “Replacement Product Disclosure Statement” may be abbreviated to “RPDS”.
  - (4) Otherwise, section 1012J and Subdivision C (apart from section 1013B) apply in relation to a Replacement Product
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Disclosure Statement in the same way as they apply to a Product Disclosure Statement.

Note: Section 1012J provides that the information in a Product Disclosure Statement must be up to date at the time it is given. Subdivision C deals with the preparation and content of Product Disclosure Statements.

**1014L Giving, lodgment and notice of Replacement Product Disclosure Statements**

Subdivision E applies in relation to a Replacement Product Disclosure Statement in the same way as it applies to a Product Disclosure Statement that is required to be lodged with ASIC under section 1015B.

**Subdivision E—Other requirements relating to Product Disclosure Statements and Supplementary Product Disclosure Statements**

**1015A Subdivision applies to Product Disclosure Statements and Supplementary Product Disclosure Statements**

This Subdivision applies to Product Disclosure Statements and to Supplementary Product Disclosure Statements. Both kinds of document are referred to in this Subdivision as a ***Statement***.

**1015B Some Statements must be lodged with ASIC**

- (1) A copy of a Statement must have been lodged with ASIC in a prescribed form (in accordance with the requirements of subsection (2) for consents) before the Statement is given to a person for the purposes of a provision of this Part if:
  - (a) the following subparagraphs apply:
    - (i) the financial product is a managed investment product; and
    - (ii) the Statement states or implies that the product will be able to be traded on a financial market; and

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- (iii) the Statement meets the requirements set out in section 1013H; or
- (b) the financial product is a managed investment product that can be traded on a financial market; or
- (ba) the financial product is:
  - (i) a managed investment product of an Australian passport fund; or
  - (ii) a foreign passport fund product; or
- (c) the financial product is a financial product of a kind specified in regulations made for the purposes of this paragraph.

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

- (2) The lodgment of a Statement in relation to a managed investment product with ASIC requires the consent of:
  - (a) whether it is an issue Statement or a sale Statement:
    - (i) if the responsible person is a body corporate—every director of the responsible person; or
    - (ii) otherwise—the responsible person; and
  - (b) if it is a sale Statement:
    - (i) if the issuer of the financial product concerned is a body corporate—every director of the issuer; or
    - (ii) otherwise—the issuer of the financial product concerned.
- (3) The lodgment of a Statement in relation to a foreign passport fund product with ASIC requires the consent of:
  - (a) if the operator of the fund is a body corporate—every director of the operator; or
  - (b) otherwise—the responsible person.

**1015C How a Statement is to be given**

- (1) A Statement:
  - (a) must be:
    - (i) given to a person, or the person's agent, personally; or

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- (ii) sent to the person, or the person's agent, at an address (including an electronic address) or fax number nominated by the person or the agent; and
  - (b) may be printed or be in electronic form.
- (2) For the purposes of this section, the Statement is sent to a person at an address if, and only if:
- (a) the Statement is sent to the address; and
  - (b) either:
    - (i) the envelope or other container in which the Statement is sent; or
    - (ii) the message that accompanies the Statement; is addressed to the person.
- (3) The Statement may be given or sent to the person's agent only if the agent is not acting as the person's agent in one of the following capacities:
- (a) a financial services licensee;
  - (b) an authorised representative of a financial services licensee;
  - (d) a person who is not required to hold an Australian financial services licence because the person is covered by:
    - (i) paragraph 911A(2)(j); or
    - (ii) an exemption in regulations made for the purposes of paragraph 911A(2)(k); or
    - (iii) an exemption specified by ASIC for the purposes of paragraph 911A(2)(l);
  - (e) a person who is required to hold an Australian financial services licence but who does not hold such a licence;
  - (f) an employee, director or other representative of a person referred to in paragraph (a), (b), (d) or (e).
- (4) The regulations may provide for alternative ways of giving a Statement to a person.
- (5) The regulations may specify requirements as to:

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- (a) the manner in which a Statement may be given to a person; and
- (b) the presentation, structure and format for a Statement that is to be given in electronic form.

The giving of the Statement is not effective unless those requirements are satisfied.

**1015D Notice, retention and access requirements for Statement that does not need to be lodged**

- (1) This section applies to a Statement if section 1015B does not require a copy of the Statement to be lodged with ASIC.
- (2) The responsible person for the Statement (other than the trustee of a self managed superannuation fund) must lodge a notice with ASIC, in electronic form, advising of the occurrence of any of the following events as soon as practicable, and in any event within 5 business days, after the occurrence of the event:
  - (a) except in the case of a Supplementary Product Disclosure Statement—a copy of the Statement is first given to someone in a recommendation, issue or sale situation;
  - (b) a change is made to fees and charges set out in the Statement;
  - (c) the financial product to which the Statement relates ceases to be available to be recommended or offered to new clients in a recommendation, issue or sale situation.

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

Note 2: The fees and charges set out in a Product Disclosure Statement may be changed by a Supplementary Product Disclosure Statement (see section 1014A).

- (3) The responsible person for the Statement must keep a copy of the Statement for the period of 7 years after the date of the Statement.

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

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- (4) During that period the responsible person:
- (a) must make a copy of the Statement available to ASIC if asked to do so by ASIC; and
  - (b) must comply with any reasonable request from any other person for a copy of the Statement.

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

**1015E Altering a Statement after its preparation and before giving it to a person**

- (1) A regulated person must not, in purported compliance with a provision of this Part, give a person a Statement that has been altered (otherwise than pursuant to paragraph (b)) after the date of the Statement if either or both of the following paragraphs applies:
- (a) the alteration was not made by, or with the authority of, the issuer or seller, as the case requires, of the financial products;
  - (b) the alteration is a material alteration and the date of the Statement has not been changed to:
    - (i) if a copy of the altered Statement has been lodged with ASIC (see subsection (2))—the date on which it was so lodged; or
    - (ii) in any other case—the date on which the alteration was made.

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

- (2) If the alteration is a material alteration to a Statement that has been lodged with ASIC under section 1015B, that section applies to the altered Statement as if it were a new Statement.

**Subdivision F—Other rights and obligations related to Product Disclosure Statements**

**1016A Provisions relating to use of application forms**

- (1) In this section:
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***defective***, in relation to a Product Disclosure Statement as at a particular time, means that the Product Disclosure Statement, if it had been given to a person at that time, would have been ***defective*** as defined in Subdivision A of Division 7.

Note: Information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

***eligible application***, in relation to a restricted issue or restricted sale of a relevant financial product, means an application that satisfies the following requirements:

- (a) the application is made using an application form; and
- (b) the application form used to apply for the product:
  - (i) was included in, or accompanied, a Product Disclosure Statement (relating to the product) that was given to the applicant and that was not defective as at the time when the application was made; or
  - (ii) was copied, or directly derived, by the applicant from a form referred to in subparagraph (i); and
- (c) all other applicable requirements (if any) in regulations made for the purposes of this paragraph are satisfied in relation to the application.

Note: Information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

***relevant financial product*** means:

- (a) a managed investment product; or
- (aa) a foreign passport fund product; or
- (b) a superannuation product; or
- (c) an investment life insurance product; or
- (d) an RSA; or
- (db) a margin lending facility; or
- (e) a financial product of a kind specified in regulations made for the purposes of this paragraph.

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***relevant superannuation entity*** means a superannuation entity of a kind specified in regulations made for the purposes of this definition.

***restricted issue*** means an issue of a relevant financial product to a person as a retail client, other than an issue covered by either of the following paragraphs:

- (a) an issue in a situation, or pursuant to an offer made in a situation, to which a subsection, other than subsection (1), of section 1012D applies; or
- (b) an issue in a situation, or pursuant to an offer made in a situation, to which section 1012E or 1012F applies.

***restricted sale*** means a sale of a relevant financial product pursuant to an offer that:

- (a) is of a kind described in subsection 1012C(3) or (4); and
- (b) is not made in a situation to which a subsection, other than subsection (1), of section 1012D applies.

(2) A person (the ***issuer*** or ***seller***) must only make a restricted issue or a restricted sale of a relevant financial product to a person (the ***recipient***) if:

- (a) the issue or sale is made pursuant to an eligible application made to the issuer or seller by the recipient; or
- (b) it is a restricted issue in relation to which the following conditions are satisfied:
  - (i) the financial product is an interest in a relevant superannuation entity;
  - (ii) the interest is issued pursuant to an application made to the issuer by a standard employer-sponsor of the entity on the recipient's behalf;
  - (iii) if the application is the first application for the issue of a superannuation interest made to the issuer by the standard employer-sponsor on behalf of any person—the application is an eligible application; or
- (c) it is a restricted issue in relation to which the following conditions are satisfied:

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- (i) the financial product is an interest in a relevant superannuation entity;
- (ii) the interest is issued pursuant to an application made to the issuer by another trustee under Part 24 of the *Superannuation Industry (Supervision) Act 1993* on the recipient's behalf;
- (iii) if the application is the first application under Part 24 of that Act made to the issuer by the other trustee on behalf of any person—the application is an eligible application; or
- (d) it is a restricted issue in relation to which the following conditions are satisfied:
  - (i) the financial product is an interest in a relevant superannuation entity;
  - (ii) the interest is issued pursuant to an application made to the issuer by an RSA provider under Part 9 of the *Retirement Savings Accounts Act 1997* on the recipient's behalf;
  - (iii) if the application is the first application under Part 9 of that Act made to the issuer by the RSA provider on behalf of any person—the application is an eligible application; or
- (e) it is a restricted issue in relation to which the following conditions are satisfied:
  - (i) the financial product is an RSA;
  - (ii) the interest is issued pursuant to an application made to the issuer by an employer (within the meaning of the *Retirement Savings Accounts Act 1997*) of the recipient;
  - (iii) if the application is the first application for the issue of an RSA of that kind made to the issuer by the employer on behalf of any person—the application is an eligible application;
  - (iv) all other applicable requirements (if any) in regulations made for the purposes of this subparagraph are satisfied in relation to the application; or

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- (f) the issue or sale occurs in a situation covered by regulations made for the purposes of this paragraph.

Note 1: This subsection does not apply to an issue or sale pursuant to paragraph 1016E(2)(c) (see subsection 1016E(2C)).

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (3) The trustee of a relevant superannuation entity must only permit a person to become a standard employer-sponsor of the entity if:
- (a) the person applied to become a standard employer-sponsor of the entity using an application form; and
  - (b) the application form used to apply to become a standard employer-sponsor:
    - (i) was included in, or accompanied, a Product Disclosure Statement (relating to an interest in the entity) that was given to the person and that was not defective as at the time when the application was made; or
    - (ii) was copied, or directly derived, by the person from a form referred to in subparagraph (i).

Note 1: Information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (4) The regulations may:
- (a) provide for defences to offences based on subsection (2) or (3); and
  - (b) provide for additional offences relating to the receipt or non-receipt of applications or application forms.

Note 1: A defendant bears an evidential burden in relation to a defence. See subsection 13.3(3) of the *Criminal Code*.

Note 2: For the limit on penalties for offences against the regulations, see paragraph 1364(2)(w).

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**1016B If Statement lodged with ASIC, financial product is not to be issued or sold before specified period**

(1) If:

- (a) a copy of a Product Disclosure Statement has been lodged with ASIC; and
- (b) the financial product to which the Statement relates is not able to be traded on any financial market (whether in Australia or elsewhere);

the responsible person must not issue or sell a financial product, pursuant to an application made in response to the Statement, until the period of 7 days (or that period as extended under subsection (2)) after lodgment of the Statement has ended.

Note 1: This subsection does not apply to an issue or sale pursuant to paragraph 1016E(2)(c) (see subsection 1016E(2C)).

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) ASIC may extend the period by notice in writing to the responsible person. The period as extended must end no more than 14 days after lodgment.
- (3) This section does not apply if the financial product to which the Product Disclosure Statement relates is:
  - (a) a managed investment product of an Australian passport fund; or
  - (b) a foreign passport fund product.

**1016C Minimum subscription condition must be fulfilled before issue or sale**

If a Product Disclosure Statement for a financial product states that a financial product to which the Statement relates will not be issued or sold unless:

- (a) applications for a minimum number of financial products of that kind are received; or
- (b) a minimum amount is raised;

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the responsible person must not issue or sell a financial product of that kind, pursuant to an application made in response to the Statement, if that condition has not been satisfied. For the purpose of working out whether the condition has been satisfied, a person who has agreed to take a financial product as underwriter is taken to have applied for that product.

Note 1: Statements in a Supplementary Product Disclosure Statement are taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

Note 1A: This subsection does not apply to an issue or sale pursuant to paragraph 1016E(2)(c) (see subsection 1016E(2C)).

Note 2: Failure to comply with this section is an offence (see subsection 1311(1)).

**1016D Condition about ability to trade on a market must be fulfilled before issue or sale**

- (1) If a Product Disclosure Statement for a financial product states or implies that a financial product to which the Statement relates will be able to be traded on a financial market (whether in Australia or elsewhere), the responsible person must only issue or sell a financial product of that kind, pursuant to an application made in response to the Statement, if:
  - (a) the product is able to be traded on that market; or
  - (b) an application has, within 7 days after the relevant date (see subsection (3)), been made to the operator of that market for the taking of such action as is necessary to enable financial products of that kind to be traded on that market.

Paragraph (b) ceases to apply to the financial product at the end of the period of 3 months starting on the relevant date.

Note 1: Statements in a Supplementary Product Disclosure Statement are taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

Note 1A: This subsection does not apply to an issue or sale pursuant to paragraph 1016E(2)(c) (see subsection 1016E(2C)).

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

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*Issue or transfer void if quotation condition not fulfilled*

- (2) If a Product Disclosure Statement for a financial product states or implies that the financial product is to be quoted on a financial market (whether in Australia or elsewhere) and:
- (a) an application has not, within 7 days after the relevant date (see subsection (3)), been made to the operator of that market for the taking of such action as is necessary to enable financial products of that kind to be traded on that market; or
  - (b) the product is not able to be traded on that market at the end of 3 months after the relevant date;
- then:
- (c) an issue or transfer to a person of a financial product of that kind is void if:
    - (i) the issue or transfer is pursuant to an application made in response to the Statement; or
    - (ii) the person should have been given the Statement; and  - (d) if:
    - (i) an issue or transfer of a financial product to a person is void because of paragraph (c); and
    - (ii) the responsible person received money from that person on account of the issue or transfer—the responsible person must, as soon as practicable, return the money to that person.

Note 1: Paragraphs (c) and (d) do not apply to an issue or sale pursuant to paragraph 1016E(2)(c) (see subsection 1016E(2C)).

Note 2: Failure to comply with paragraph (d) is an offence (see subsection 1311(1)).

*The relevant date*

- (3) For the purposes of this section, the ***relevant date*** in relation to an express or implied statement is:
- (a) if the statement is express or implied in a Product Disclosure Statement, disregarding the effect of section 1014D—the date of the Product Disclosure Statement; or
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- (b) if the statement is express or implied in a Supplementary Product Disclosure Statement—the date of the Supplementary Product Disclosure Statement; or
- (c) if the statement is express or implied in a Replacement Product Disclosure Statement (whether or not it is express or implied in the earlier Product Disclosure Statement it replaces)—the date of the Replacement Product Disclosure Statement.

**1016E Choices open to person making the offer if disclosure condition not met or Product Disclosure Statement defective**

- (1) This section applies if:
  - (a) a Product Disclosure Statement for a financial product states that a financial product to which the Statement relates will not be issued or sold unless:
    - (i) applications for a minimum number of financial products of that kind are received; or
    - (ii) a minimum amount is raised;and that condition is not satisfied within 4 months after the relevant date (see subsections (3) and (4)); or
  - (b) a Product Disclosure Statement for a financial product states or implies that a financial product to which the Statement relates will be able to be traded on a financial market (whether in Australia or elsewhere) and:
    - (i) an application has not, within 7 days after the relevant date (see subsection (4)), been made to the operator of that market for the taking of such action as is necessary to enable financial products of that kind to be traded on that market; or
    - (ii) at the end of the period of 3 months starting on the relevant date, financial products of that kind are not able to be traded on that market; or
  - (c) in relation to a Product Disclosure Statement for a financial product, the responsible person becomes aware that the

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Product Disclosure Statement was defective as at the time when it was prepared, or that it became or has become defective as at some later time.

Note: Information and statements in a Supplementary Product Disclosure Statement are taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

- (2) If this section applies, the responsible person must, in relation to any application for financial products of the relevant kind that is made in response to the Product Disclosure Statement (the *first Product Disclosure Statement*) and that has not resulted in an issue or sale of financial products of that kind, comply with one of the following paragraphs:
- (a) the responsible person must repay the money they received from the applicant; or
  - (aa) the responsible person must give the applicant:
    - (i) a new Product Disclosure Statement for the financial products, and an additional statement that identifies the respects in which the new Product Disclosure Statement is materially different from the first Product Disclosure Statement; and
    - (ii) 1 month to withdraw their application and be repaid; or
  - (b) the responsible person must give the applicant:
    - (i) a Supplementary Product Disclosure Statement that changes the statement referred to in paragraph (1)(a) or (b), or that corrects the deficiency referred to in paragraph (1)(c); and
    - (ii) 1 month to withdraw their applications and be repaid; or
  - (ba) the responsible person must issue or sell the financial products to the applicant and give them:
    - (i) a new Product Disclosure Statement for the financial products, and an additional statement that identifies the respects in which the new Product Disclosure Statement is materially different from the first Product Disclosure Statement; and

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- (ii) 1 month to return the financial products and be repaid;  
or
- (c) the responsible person must issue or sell the financial products to the applicant and give them:
  - (i) a Supplementary Product Disclosure Statement that changes the statement referred to in paragraph (1)(a) or (b), or that corrects the deficiency referred to in paragraph (1)(c); and
  - (ii) 1 month to return the financial products and be repaid.

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

Note 2: If the responsible person chooses the option given by paragraph (aa) or (b), that option does not require the responsible person to wait until the end of the month referred to in subparagraph (aa)(ii) or (b)(ii) before going ahead and issuing or selling the financial products to the applicant if the applicant indicates before then that they still wish to proceed with the application.

Note 3: However, if the responsible person chooses the option given by paragraph (aa) or (b), whether the responsible person may go ahead and issue or sell the financial products to the applicant at the end of the month referred to in subparagraph (aa)(ii) or (b)(ii) (or earlier, as mentioned in note 2) is affected by this subsection and sections 1016A to 1016E (including as those provisions are affected by subsections (2A) and (2B) of this section).

Note 4: If the responsible person chooses the option given by paragraph (c), sections 1016A to 1016D do not prohibit the issue or sale of the financial products under that paragraph (see subsection (2C) of this section).

(2A) If, in accordance with paragraph (2)(aa), the responsible person gives the applicant a new Product Disclosure Statement for the financial products and the additional statement referred to in subparagraph (2)(aa)(i):

- (a) subsection (2), and sections 1016B, 1016C, 1016D and 1016E, apply in relation to the application, from the time when the applicant is given the new Product Disclosure Statement (**the *correction time***), as if the application had been made in response to the new Product Disclosure Statement; and

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(b) if:

- (i) the reason for giving the new Product Disclosure Statement was that the responsible person became aware that the first Product Disclosure Statement was defective as at the time when it was prepared, or had become defective by the time the application was made; and
  - (ii) the financial products are *relevant financial products* as defined in section 1016A;
- section 1016A applies in relation to the application, from the correction time, as if the first Product Disclosure Statement had instead contained the content of the new Product Disclosure Statement.

Note 1: Because of paragraph (a):

- (a) if this section applies to the new Product Disclosure Statement, the responsible person's ability to proceed to issue or sell the financial products pursuant to the application will be affected by subsection (2), and by sections 1016B, 1016C and 1016D, as those provisions apply in relation to the new Product Disclosure Statement (even though the application was actually made in response to the first Product Disclosure Statement); and
- (b) sections 1016B, 1016C and 1016D, as they relate to the first Product Disclosure Statement, cease to apply in relation to the application.

Note 2: Because of paragraph (b), the application may be an *eligible application* as defined in section 1016A, even though the first Product Disclosure Statement was actually defective as at the time when the application was made.

(2B) If:

- (a) in accordance with paragraph (2)(b), the responsible person gives the applicant a Supplementary Product Disclosure Statement that relates to the financial products; and
- (b) the reason for giving the Supplementary Product Disclosure Statement was that the responsible person became aware that the first Product Disclosure Statement was defective as at the time when it was prepared, or had become defective by the time the application was made; and

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- (c) the financial products are *relevant financial products* as defined in section 1016A;

section 1016A applies in relation to the application, from the time when the applicant is given the Supplementary Product Disclosure Statement, as if the Supplementary Product Disclosure Statement had been given to the applicant before the application was made.

Note 1: Because of this subsection and section 1014D (information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements), the application may be an *eligible application* as defined in section 1016A, even though the Supplementary Product Disclosure Statement was not actually given until after the time when the application was made.

Note 2: The responsible person's ability to proceed to issue or sell the financial products pursuant to the application will be affected by subsection (2), and by sections 1016B, 1016C and 1016D, as those provisions apply in relation to the first Product Disclosure Statement as affected by the Supplementary Product Disclosure Statement and any other Supplementary Product Disclosure Statements.

(2BA) If Subdivision DA applies:

- (a) for the purposes of subsection (2), instead of giving the applicant a Supplementary Product Disclosure Statement, the responsible person may give the applicant a Replacement Product Disclosure Statement; and
- (b) if the responsible person gives the applicant a Replacement Product Disclosure Statement, subsection (2B) applies as if references in that subsection to a Supplementary Product Disclosure Statement were references to the Replacement Product Disclosure Statement.

(2C) If the responsible person chooses to comply with paragraph (2)(c), nothing in sections 1016A to 1016D applies to the issue or sale of the financial products under that paragraph.

Note: This subsection affects the elements of the offences under sections 1016A to 1016D, and so it is not an exception in relation to which a defendant bears an evidential burden under subsection 13.3(3) of the *Criminal Code*.

(3) For the purpose of working out whether the condition referred to in paragraph (1)(a) has been satisfied, a person who has agreed to

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take a financial product as an underwriter is taken to have applied for that financial product.

- (4) For the purposes of paragraphs (1)(a) and (b), the ***relevant date*** in relation to an express or implied statement is:
  - (a) if the statement is express or implied in a Product Disclosure Statement, disregarding the effect of section 1014D—the date of the Product Disclosure Statement; or
  - (b) if the statement is express or implied in a Supplementary Product Disclosure Statement—the date of the Supplementary Product Disclosure Statement; or
  - (c) if the statement is express or implied in a Replacement Product Disclosure Statement (whether or not it is express or implied in the earlier Product Disclosure Statement it replaces)—the date of the Replacement Product Disclosure Statement.
- (5) For the purposes of this section, ***defective***, when used in relation to a Product Disclosure Statement at a particular time, means that the Product Disclosure Statement, if it had been given to a person at that time, would have been ***defective*** as defined in Subdivision A of Division 7.

Note: Information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

**1016F Remedies for person acquiring financial product under defective Product Disclosure Document**

- (1) Subject to this section, if a financial product is issued or sold to a person (the ***client***) in contravention of section 1016E, the client has the right to return the product and to have the money they paid to acquire the product repaid. This is so even if the responsible person is being wound up.
  - (2) If the responsible person:
    - (a) is a body corporate; and
    - (b) does not repay the money as required by subsection (1);
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the directors of the responsible person are personally liable to repay the money.

- (3) The right to return the product must be exercised by notifying the responsible person in one of the following ways:

- (a) in writing; or
- (b) electronically; or
- (c) in any other way specified in the regulations.

Also, if the regulations require the client to comply with other requirements in order to exercise the right to return the product, those other requirements must be complied with.

- (4) The right to return the product can only be exercised during the period of 1 month starting on the date of the issue or sale of the product to the client.

- (5) On the exercise of the right to return the product:

- (a) if the product is constituted by a legal relationship between the client and the issuer of the product—that relationship is, by force of this section, terminated with effect from that time without penalty to the client; and
- (b) any contract for the acquisition of the product by the client is, by force of this section, terminated with effect from that time without penalty to the client.

- (6) The regulations may provide for consequences and obligations (in addition to those provided for by subsection (5)) to apply if the right to return a financial product is exercised.

- (7) The regulations may do any or all of the following:

- (a) provide that a specified subclass of financial products that would otherwise be covered by this section is excluded from this section;
- (b) provide additional requirements to be satisfied before this section applies in relation to a class or subclass of financial products;
- (c) provide that this section does not apply in relation to the provision of a financial product in specified circumstances.

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**Division 3—Other disclosure obligations of the issuer of a financial product**

**1017A Obligation to give additional information on request**

*Obligation to give information*

- (1) The following people may request the person who is the responsible person for a Product Disclosure Statement for a financial product under Division 2 to provide further information about the product:
  - (a) a person who:
    - (i) has been or should have been given, or who has obtained, the Product Disclosure Statement for the financial product; and
    - (ii) is not a holder of the financial product;
  - (b) a financial services licensee;
  - (c) an authorised representative of a financial services licensee;
  - (e) a person who is not required to hold an Australian financial services licence because the person is covered by:
    - (i) paragraph 911A(2)(j); or
    - (ii) an exemption in regulations made for the purposes of paragraph 911A(2)(k); or
    - (iii) an exemption specified by ASIC for the purposes of paragraph 911A(2)(l).
- (2) The responsible person must give the person the information if:
  - (a) the financial product is offered in this jurisdiction or the Product Disclosure Statement is given or obtained in this jurisdiction; and
  - (b) the responsible person has previously made the information generally available to the public; and
  - (c) the information might reasonably influence a person's decision, as a retail client, whether to acquire a financial product to which the Statement relates; and

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- (d) it is reasonably practicable for the responsible person to give the person the information; and

- (e) the person pays any charge payable under subsection (5).

The responsible person does not need to give information that is contained in the Product Disclosure Statement.

Note 1: Paragraph (b)—This requirement means that the responsible person does not have to disclose material that is confidential because it is:

- (a) an internal working document; or
- (b) personal information about another person; or
- (c) a trade secret or other information that has a commercial value that would be reduced or destroyed by the disclosure; or
- (d) material that the responsible person owes another a person a duty not to disclose.

Note 2: Information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements (see section 1014D).

- (3) The responsible person must take reasonable steps to ensure that, as soon as practicable after receiving the request, and in any event within one month, subsection (2) is complied with.

*Manner of giving information*

- (4) The responsible person may give the person making the request the information:
  - (a) by making a document containing the information available for inspection by the person:
    - (i) at a suitable place in this jurisdiction (having adequate facilities for the person to inspect and photocopy the document); and
    - (ii) during normal business hours; or
  - (b) in some other way that is agreed between the responsible person and the person making the request.

*Issuer or seller may charge for giving information*

- (5) The responsible person may require the person making the request to pay a charge for obtaining the information.

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- (6) The amount of the charge must not exceed the reasonable costs that the responsible person incurs that are reasonably related to giving the information (including any costs incurred in photocopying the document containing the information).

Note: This would include the costs of searching for, obtaining and collating the information.

**1017B Ongoing disclosure of material changes and significant events**

*Issuer to notify holders of changes and events*

- (1) If:
- (a) a person (the **holder**) acquired a financial product as a retail client (whether or not it was acquired from the issuer); and
  - (b) either:
    - (i) the financial product was offered in this jurisdiction; or
    - (ii) the holder applied for the financial product in this jurisdiction; and
  - (c) the product is not specified in regulations made for the purposes of this paragraph; and
  - (d) the circumstances in which the product was acquired are not specified in regulations made for the purposes of this paragraph;

the issuer must, in accordance with subsections (3) to (8), notify the holder of changes and events referred to in subsection (1A).

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

*The changes and events that must be notified*

- (1A) The changes and events that must be notified are:

- (a) any material change to a matter, or significant event that affects a matter, being a matter that would have been required to be specified in a Product Disclosure Statement for the financial product prepared on the day before the change or event occurs; and

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- (b) any other change, event or other matter of a kind specified in regulations made for the purposes of this paragraph; and
- (c) without limiting paragraph (a) or (b)—any replacement of a kind specified in regulations made for the purposes of this paragraph of a beneficial interest of a class that is a MySuper product with a beneficial interest of another class in a superannuation entity.

Note: Paragraph (a) applies whether or not a Product Disclosure Statement for the financial product was in fact prepared (or required to be prepared) on the day before the change or event occurs.

- (2) The issuer does not need to give the notice if the financial product is a managed investment product or foreign passport fund product that is an ED security.

Note 1: The continuous disclosure provisions in Chapter 6CA apply to managed investment products and foreign passport fund products that are ED securities.

Note 2: A defendant bears an evidential burden in relation to the matters in this subsection.

- (3) The issuer must notify the holder in one of the following ways:
- (a) in writing; or
  - (b) electronically; or
  - (c) in a way specified in the regulations.

- (4) The notice must give the holder the information that is reasonably necessary for the holder to understand the nature and effect of the change or event.

*Time for notifying holders*

- (5) The time within which the issuer must give the notice is set out in the following table:

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| <b>Time for giving notice of change or event</b> |   |  |
|--|---|--|
|  | <b>Nature of change or event</b>                      | <b>Time for giving notice</b>  |
| 1  | Change or event is not an increase in fees or charges | Subject to subsection (6), before the change or event occurs or as soon as practicable after, but not more than 3 months after, the change or event occurs |
| 2  | Change is an increase in fees or charges              | 30 days before the change takes effect   |

- (6) If the change or event is not an increase in fees or charges, the notice may be given more than 3 months after the change or event occurs if:
- the issuer reasonably believes that the event is not adverse to the holder's interests and accordingly the holder would not be expected to be concerned about the delay in receiving the information; and
  - the notice is given no later than 12 months after the change or event occurs.
- (7) If the change or event might result in an increase in fees or charges, this section applies to the change or event as if it would result in an increase in fees or charges.
- (8) In any proceedings against the issuer for an offence based on subsection (1), it is a defence if the issuer took reasonable steps to ensure that the other person would be notified of the matters required by subsection (1) in accordance with subsections (3) to (8).

Note: A defendant bears an evidential burden in relation to the matters in subsection (8). See subsection 13.3(3) of the *Criminal Code*.

- (9) In this section:

**fees or charges** does not include fees or charges payable under a law of the Commonwealth or of a State or Territory.

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**1017BA Trustees of regulated superannuation funds—obligation to make product dashboard publicly available**

- (1) The trustee, or the trustees, of a regulated superannuation fund that has 7 or more members must ensure:
  - (a) that a product dashboard for each of the fund's MySuper products and choice products is publicly available at all times on the fund's website; and
  - (b) that each product dashboard sets out the information required by subsection (2) or (3); and
  - (c) that the information set out in each product dashboard about fees and other costs is updated within 14 days after the end of a period prescribed by the regulations; and
  - (d) that the other information set out in each product dashboard is updated within 14 days after any change to the information; and
  - (e) if the regulations prescribe the way in which information is to be set out in a product dashboard—that each product dashboard sets out the information in accordance with the regulations.
- (2) The product dashboard for a MySuper product must set out:
  - (a) the following, worked out in accordance with the regulations in relation to the period or periods prescribed by the regulations:
    - (i) a return target or return targets for the product;
    - (ii) a return or returns for the product;
    - (iii) a comparison or comparisons between return targets and returns for the product;
    - (iv) the level of investment risk that applies to the product;
    - (v) a statement of fees and other costs in relation to the product; and
  - (b) any other information prescribed by the regulations.
- (3) Subject to subsection (4), the product dashboard for a choice product must set out:

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- (a) the following for each investment option offered within the choice product, worked out in accordance with the regulations in relation to the period or periods prescribed by the regulations:
  - (i) a return target or return targets for the investment option;
  - (ii) a return or returns for the investment option;
  - (iii) a comparison or comparisons between return targets and returns for the investment option;
  - (iv) the level of investment risk that applies to the investment option;
  - (v) a statement of fees and other costs in relation to the investment option; and
- (b) any other information prescribed by the regulations.

(4) Subsection (3) does not apply to an investment option within a choice product if:

- (a) the assets of the fund that are invested under the option are invested only in one or more of the following:
  - (i) a life policy under which contributions and accumulated earnings may not be reduced by negative investment returns or any reduction in the value of assets in which the policy is invested;
  - (ii) a life policy under which the benefit to a member (or a relative or dependant of a member) is based only on the realisation of a risk, not the performance of an investment;
  - (iii) an investment account contract the only beneficiaries of which are a member, and relatives and dependants of a member; or
- (b) the sole purpose of the investment option is the payment of a pension to members who have satisfied a condition of release of benefits specified in a standard made under paragraph 31(2)(h) of the *Superannuation Industry (Supervision) Act 1993*; or

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- (c) the assets of the fund that are invested under the option are invested only in another single asset.
  - (4A) The regulations may prescribe circumstances in which assets of a regulated superannuation fund are, or are not, to be treated as invested in a single asset for the purposes of paragraph (4)(c).

*Civil liability*

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

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

- (5) In this section:

**fee**, in relation to a MySuper product or a choice product offered by a regulated superannuation fund, means a fee (other than an activity fee, an advice fee or an insurance fee within the meaning of the *Superannuation Industry (Supervision) Act 1993*) that may be charged by the trustee, or the trustees, of the regulated superannuation fund in relation to the product under that Act.

**investment account contract** has the same meaning as in the *Life Insurance Act 1995*.

**member**, in relation to a regulated superannuation fund, has the same meaning as in the *Superannuation Industry (Supervision) Act 1993*.

**1017BB Trustees of registrable superannuation entities—obligation to make information relating to investment of assets publicly available**

*Obligation to publicise investment information*

- (1) The trustee, or the trustees, of a registrable superannuation entity (the **reporting entity**) must make the following information about each of the entity's investment options publicly available on the entity's website no later than 90 days after each reporting day:
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- (a) sufficient information to identify each investment item (*a disclosable item*) allocated to the investment option at the end of the reporting day that:
    - (i) is held by the reporting entity, an associated entity of the reporting entity or a pooled superannuation trust; and
    - (ii) is neither an investment in an associated entity of the reporting entity, nor an investment in a pooled superannuation trust;
  - (b) sufficient information to identify the value, and the weighting or exposure, at the end of the reporting day of each disclosable item;
  - (c) the total value, and the total weighting or exposure, at the end of the reporting day of all disclosable items.
- (1A) However, the regulations may provide that subsection (1) applies for a prescribed kind of disclosable item so that:
- (a) paragraphs (1)(a) and (b) need not be complied with for each item of that kind; and
  - (b) instead, only the following need be disclosed:
    - (i) the name of that kind of item;
    - (ii) the total value, and the total weighting or exposure, at the end of the reporting day of all items of that kind.
- (2) Information made publicly available under subsection (1) in respect of a reporting day must continue to be made publicly available on the registrable superannuation entity's website until information relating to the next reporting day is made publicly available under subsection (1).
- (3) If the regulations prescribe the way in which information made publicly available under subsection (1) must be organised, the information must be organised in accordance with the regulations.

*Full exemption*

- (4) Subsection (1) does not apply to the trustee, or the trustees, of a registrable superannuation entity if the entity is:
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- (a) a pooled superannuation trust; or
  - (b) a single member fund; or
  - (c) a small APRA fund.

*Partial exemptions*

- (5) Subsection (1) does not apply to the trustee, or the trustees, of a registrable superannuation entity for:
  - (a) an investment option of the entity that has been closed to new members for at least 5 years; or
  - (b) an investment item that is not a material investment in accordance with regulations prescribed for the purposes of this paragraph; or
  - (c) an investment item invested solely to support a defined benefit interest (within the meaning of the *Income Tax Assessment Act 1997*); or
  - (d) an investment item invested in a life policy, or investment account contract, of a kind described in subparagraph 1017BA(4)(a)(i), (ii) or (iii); or
  - (e) an investment item of a kind prescribed by the regulations for the purposes of this paragraph.

Note: An investment item covered by any of paragraphs (b) to (e) will not be a disclosable item.

- (5AA) A person contravenes this subsection if the person contravenes subsection (1) or (2), or regulations made for the purposes of subsection (3).

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

*Definitions*

- (6) In this section:

***investment item*** means an asset or a derivative.

***investment option***, for a registrable superannuation entity, means:

- (a) an investment pool maintained within the entity; or

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- (b) a financial product made available to a member of the entity:
  - (i) that is a managed investment scheme or other pooled investment; and
  - (ii) in respect of which section 1012IA applies if there is, or will be, a regulated acquisition of the product (within the meaning of that section).

**member**, in relation to a superannuation fund (within the meaning of the *Superannuation Industry (Supervision) Act 1993*), has the same meaning as in that Act.

**reporting day** means 30 June and 31 December each year.

**small APRA fund** means a regulated superannuation fund with no more than 6 members.

**1017C Information for existing holders of superannuation products and RSAs**

*Application*

- (1) This section applies to the issuer of a financial product if the product is:
  - (a) a superannuation product; or
  - (b) an RSA.

*Information for concerned person related to a superannuation product*

- (2) If the financial product is a superannuation product, then, subject to subsection (4), the issuer must, on request by a concerned person, give the concerned person information that the concerned person reasonably requires for the purposes of:
  - (a) understanding any benefit entitlements that the concerned person may have, has or used to have under the superannuation product; or
  - (b) understanding the main features of:
    - (i) the relevant sub-plan; or

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- (ii) if there is no relevant sub-plan—the superannuation entity; or
- (c) making an informed judgment about the management and financial condition of:
  - (i) the superannuation entity; and
  - (ii) the relevant sub-plan (if any); or
- (d) making an informed judgment about the investment performance of:
  - (i) the relevant sub-plan; or
  - (ii) if there is no relevant sub-plan—the superannuation entity; or
- (e) understanding the particular investments of:
  - (i) the superannuation entity; and
  - (ii) the relevant sub-plan (if any).

The information must be given in accordance with the other requirements of this section.

Note 1: Subsection (9) defines **concerned person** and **relevant sub-plan**.

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

*Information for concerned person related to an RSA*

- (2A) If the financial product is an RSA, then, subject to subsection (4), the issuer must, on request by a concerned person, give the concerned person information that the concerned person reasonably requires for the purposes of:
  - (a) understanding any benefit entitlements that the concerned person may have, has or used to have under the RSA; or
  - (b) understanding the main features of the RSA.

The information must be given in accordance with the other requirements of this section.

Note 1: Subsection (9) defines **concerned person**.

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

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- (3) If the financial product is a superannuation product, then, subject to subsection (4), the issuer must, on request by an employer-sponsor, give the employer-sponsor information that the employer-sponsor reasonably requires for the purposes of:
- (a) understanding the kinds of benefits to which the employer-sponsor's employees are entitled or will or may become entitled; or
  - (b) understanding the main features of:
    - (i) the relevant sub-plan; or
    - (ii) if there is no relevant sub-plan—the superannuation entity; or
  - (c) making an informed judgment about the management and financial condition of:
    - (i) the superannuation entity; and
    - (ii) the relevant sub-plan (if any); or
  - (d) making an informed judgment about the investment performance of:
    - (i) the relevant sub-plan; or
    - (ii) if there is no relevant sub-plan—the superannuation entity; or
  - (e) a matter related to the *Superannuation Guarantee (Administration) Act 1992*.

The information must be given in accordance with the other requirements of this section.

Note 1: Subsection (9) defines **relevant sub-plan**.

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

*Reports prepared by a registrable superannuation entity etc.*

- (3AA) If the financial product is a superannuation product that relates to a registrable superannuation entity (within the meaning of

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Chapter 2M), the issuer must, on request in writing by a person who is a concerned person, give the person:

- (a) a copy of the financial report of the entity for a specified financial year; and
- (aa) if the entity prepared a sustainability report for a specified financial year—a copy of the sustainability report; and
- (b) a copy of the directors' report of the entity for a specified financial year; and
- (c) a copy of the auditor's report on the financial report; and
- (d) a copy of the auditor's report on the sustainability report.

Each copy must be given in accordance with the other requirements of this section.

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

*Information for employer related to an RSA*

- (3A) If the financial product is an RSA, then, subject to subsection (4), the issuer must, on request by an employer who made an application to acquire the RSA on behalf of an employee, give the employer information that the employer reasonably requires for the purposes of:
- (a) understanding the kinds of benefits to which the employer's employees are entitled or will or may become entitled; or
  - (b) understanding the main features of the RSA; or
  - (c) a matter related to the *Superannuation Guarantee (Administration) Act 1992*.

The information must be given in accordance with the other requirements of this section.

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

*Exceptions*

- (4) This section does not require (and does not, by implication, authorise) the disclosure of:

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- (a) internal working documents of the issuer; or
- (b) information or documents that would disclose, or tend to disclose:
  - (i) personal information of another person if, in the circumstances, the disclosure would be unreasonable; or
  - (ii) trade secrets or other information having a commercial value that would be reduced or destroyed by the disclosure; or
- (c) information or documents in relation to which the issuer owes to another person a duty of non-disclosure.

Note: A defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code*.

*Specific requirements*

- (5) The issuer must, on request in writing by a person who is a concerned person, an employer-sponsor (if the financial product is a superannuation product) or an employer referred to in subsection (3A) (if the financial product is an RSA), give the person:
  - (a) a copy of a prescribed document (to the extent the issuer has access to the document) specified in the request; or
  - (b) prescribed information (to the extent to which the issuer has or has access to the information) specified in the request.

The document or information must be given in accordance with the other requirements of this section.

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

- (6) Subsection (5) does not apply if the issuer is the trustee of a self managed superannuation fund.

*Documents may be made available for inspection*

- (7) It is sufficient compliance with a requirement imposed by this section on the issuer to give information, or to give a copy of a document, to a person (the *client*) if:

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- (a) a document containing the information; or  
(b) a copy of the document;  
is made available for inspection by the issuer:  
(c) at a suitable place (having adequate facilities for the person to inspect and photocopy the document); and  
(d) during normal business hours;  
or as otherwise agreed between the issuer for the financial product and the client.

*Time for compliance*

- (8) The issuer must comply with a request to give information, or a copy of a document, as soon as practicable. The issuer must, in any event, make reasonable efforts to comply with the request within 1 month of receiving the request.

*Definitions*

- (9) In this section:

*concerned person:*

- (a) in relation to a superannuation product—means a person who:  
(i) is, or was within the preceding 12 months, a member of the superannuation entity; or  
(ii) is a beneficiary of the superannuation entity; or  
(b) in relation to an RSA—means a person who:  
(i) is, or was within the preceding 12 months, a holder of the RSA; or  
(ii) has a right or a claim under the RSA.

*relevant sub-plan*, in relation to a superannuation product, has the meaning given by the regulations.

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**1017D Periodic statements for retail clients for financial products that have an investment component**

(1) If:

- (a) a person (the **holder**) of a financial product acquired the financial product as a retail client (whether or not it was acquired from the issuer); and
- (b) the product is:
  - (i) a managed investment product; or
  - (ia) a foreign passport fund product; or
  - (ii) a superannuation product; or
  - (iii) an RSA; or
  - (iv) an investment life insurance product; or
  - (v) a deposit product; or
  - (va) a margin lending facility; or
  - (vi) specified in regulations made for the purposes of this paragraph; and
- (c) either:
  - (i) the financial product was offered in this jurisdiction; or
  - (ii) the holder applied for the financial product in this jurisdiction;

the issuer of the product must, in accordance with subsections (2) to (6), give the holder a periodic statement for each reporting period during which the holder holds the product.

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

(2) The following provisions apply in relation to reporting periods:

- (a) each reporting period lasts for a period, not exceeding 1 year, determined by the issuer;
- (b) the first reporting period starts when the holder acquired the product;
- (c) each subsequent reporting period starts at the end of the preceding reporting period;

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- (d) if the holder ceases to hold the product, the period starting at the end of the preceding reporting period and ending when the holder ceases to hold the product is a reporting period.
  - (3) The periodic statement must be given as soon as practicable after, and in any event within 6 months after, the end of the reporting period to which it relates.
  - (4) The periodic statement must give the holder the information that the issuer reasonably believes the holder needs to understand his or her investment in the financial product.
  - (5) The periodic statement must include the following if they are relevant to the financial product:
    - (a) opening and closing balances for the reporting period;
    - (b) the termination value of the investment at the end of the reporting period (to the extent to which it is reasonably practicable to calculate that value for the investment or a component of the investment);
    - (c) details of transactions in relation to the product during the reporting period as required by regulations made for the purposes of this paragraph;
    - (d) any increases in contributions in relation to the financial product by the holder or another person during the reporting period;
    - (e) return on investment during the reporting period (on an individual basis if reasonably practicable to do so and otherwise on a fund basis);
    - (f) details of any change in circumstances affecting the investment that has not been notified since the previous periodic statement;
    - (g) details prescribed by regulations made for the purposes of this paragraph.
  - (5A) Unless in accordance with the regulations:
    - (a) for information to be disclosed in accordance with paragraphs (5)(a), (b), (c), (d) and (e), any amounts are to be stated in dollars; and

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- (b) for any other information in relation to amounts paid by the holder of the financial product during the period, any amounts are to be stated in dollars.
- (6) The periodic statement must be given in one of the following ways:
  - (a) in writing; or
  - (b) electronically; or
  - (c) in a way specified in the regulations.
- (7) The periodic statement need not be given if the issuer has already given the holder all the information that would be included in the periodic statement if it were to be given.

Note: A defendant bears an evidential burden in relation to the matters in this subsection.

**1017DA Trustees of superannuation entities—regulations may specify additional obligations to provide information**

- (1) The regulations may:
  - (a) require the trustee of a superannuation entity to do all or any of the following:
    - (i) provide the holder of a superannuation product (being an interest in that entity) with information relating to the management, financial condition and investment performance of the entity and/or of any relevant sub-plan (within the meaning of section 1017C);
    - (ii) provide the holder or former holder of a superannuation product (being an interest in that entity), or any other person to whom benefits under the product are payable, with information relating to his or her benefit entitlements;
    - (iii) provide the holder of a superannuation product (being an interest in the entity) with information about arrangements for dealing with inquiries and/or complaints relating to the product; or
  - (b) require an RSA provider to do either or both of the following:

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- (i) provide the holder or former holder of an RSA provided by the RSA provider, or any other person to whom benefits under the product are payable, with information relating to his or her benefit entitlements;
  - (ii) provide the holder of an RSA provided by the RSA provider with information about arrangements for dealing with inquiries and/or complaints relating to the product.
- (2) Without limiting subsection (1), regulations made for the purposes of that subsection may deal with all or any of the following:
- (a) what information is to be provided;
  - (b) when information is to be provided;
  - (c) how information is to be provided.
- (3) The trustee of a superannuation entity, or an RSA provider, must provide information in accordance with any applicable requirements of regulations made for the purposes of subsection (1).

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

**1017E Dealing with money received for financial product before the product is issued**

- (1) This section applies to money paid to:
    - (a) an issuer (the **product provider**) of financial products; or
    - (b) a seller (the **product provider**) of financial products in relation to which the seller has prepared a Product Disclosure Statement;
- if:
- (c) the money is paid to acquire, or acquire an increased interest in, one or more of those financial products from the product provider (whether or not the acquisition would be by a person as a retail client); and

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- (d) the product provider does not, for whatever reason, issue or transfer the product or products, or the increased interest, immediately after receiving the money; and
  - (e) either:
    - (i) the financial product or increased interest was offered in this jurisdiction; or
    - (ii) the application for the financial product or increased interest was made in this jurisdiction; or
    - (iii) the money was received in this jurisdiction.
- (1A) However, this section does not apply in relation to money paid to an issuer (the **product provider**) of foreign passport fund products if the money is paid to acquire, or acquire an increased interest in, one or more of those foreign passport fund products from the product provider (whether or not the acquisition would be by a person as a retail client).
- (2) The product provider must ensure that the money is paid into an account that satisfies these requirements:
- (a) the account is:
    - (i) with an Australian ADI; or
    - (ii) of a kind prescribed by regulations made for the purposes of this paragraph;and is designated as an account for the purposes of this section of this Act; and
  - (b) the only money paid into the account is:
    - (i) money to which this section applies; or
    - (ii) interest on the amount from time to time standing to the credit of the account; and
  - (c) if regulations made for the purposes of this paragraph impose additional requirements—the requirements so imposed by the regulations.

The money must be paid into the account on the day it is received by the product provider, or on the next business day.

Note: See section 1021O for related offences.

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- (2A) Subject to subsection (2C), the money is taken to be held in trust by the product provider for the benefit of the person who paid the money.
- (2C) The regulations may:
- (a) provide that subsection (2A) does not apply in relation to money in specified circumstances; and
  - (b) provide for matters relating to the taking of money to be held in trust (including, for example, terms on which the money is taken to be held in trust and circumstances in which it is no longer taken to be held in trust).
- (3) The money must only be taken out of the account if:
- (a) it is taken out for the purpose of return to the person by whom it was paid; or
  - (b) the product is issued or transferred to, or in accordance with the instructions of, that person; or
  - (c) it is taken out for a purpose specified by regulations made for the purposes of this paragraph; or
  - (d) it is taken out in a situation specified by regulations made for the purposes of this paragraph.

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

- (4) The product provider must:
- (a) return the money; or
  - (b) issue or transfer the product to, or in accordance with the instructions of, the person who paid the money; or
  - (c) if the money is taken out:
    - (i) for a purpose specified by regulations made for the purposes of paragraph (3)(c); or
    - (ii) in a situation specified by regulations made for the purposes of paragraph (3)(d);do any action required, by regulations made for the purposes of this paragraph, after taking out that money;

either:

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- (d) before the end of one month starting on the day on which the money was received; or
- (e) if it is not reasonably practicable to do so before the end of that month—by the end of such longer period as is reasonable in the circumstances.

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

- (5) The product provider may, for the purposes of this section, maintain a single account or 2 or more accounts.
- (6) Nothing in this section, or in regulations made for the purposes of this section, makes the body (not being the product provider) that the account is with under paragraph (2)(a) subject to any liability merely because of a failure by the product provider to comply with any of the provisions of this section or those regulations.

**1017F Confirming transactions***Transactions to which this section applies*

- (1) This section applies in relation to a transaction involving a financial product if:
  - (a) a person (the *holder*) acquired the product as a retail client; and
  - (b) the transaction is:
    - (i) the transaction by which the holder acquired the product; or
    - (ii) a transaction that occurs while the holder holds the product, including a transaction by which the holder disposes of all or part of the product (and see also subsection (3)); and
  - (c) the transaction is not one that does not require confirmation because of subsection (4); and
  - (d) the holder has not, in accordance with regulations made for the purposes of paragraph (9)(d), waived their right to be provided with confirmation of the transaction; and

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(e) either:

- (i) the financial product was offered to, or acquired by, the holder in this jurisdiction; or
- (ii) the transaction takes place in this jurisdiction.

Note: This section extends to financial products that are securities (see section 1010A).

*Obligation to confirm transactions*

(2) The person (the **responsible person**) specified in column 3 of an item in the following table must provide the holder with confirmation of the transaction specified in column 2 of the same item. The confirmation must be provided in accordance with subsections (5) to (8).

| <b>Who bears the obligation to confirm a transaction</b> |  |  |
|--|--|--|
| <b>Item</b>  | <b>Transaction</b>   | <b>Whose obligation?</b>   |
| 1  | transaction by which the holder acquired the financial product, unless that transaction was a sale pursuant to an offer to which section 1012C applies         | the issuer of the product  |
| 2  | transaction by which the holder acquired the financial product, where that transaction was a sale pursuant to an offer to which section 1012C applies          | the seller of the product  |
| 3  | any other transaction in relation to the financial product that occurs while the holder holds the product, other than a disposal of all or part of the product | the issuer of the product  |
| 4  | transaction by which the holder disposes of all or part of the financial product   | the person specified in the regulations made for the purposes of this item |

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

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*Examples of transactions that are covered by subparagraph (1)(b)(ii)*

- (3) Without limiting the generality of subparagraph (1)(b)(ii), the transactions that are covered by that subparagraph include:
- (a) varying the terms of the financial product while the holder holds the product (unless subsection (4) provides that the variation does not require confirmation); and
  - (b) the redemption or surrender of the financial product from or by the holder.

*Transactions that do not require confirmation*

- (4) The following transactions do not require confirmation:
- (a) a transaction consisting solely of an additional contribution towards the financial product in either of the following circumstances:
    - (i) the timing and amount, or method of calculating the amount, of the additional contribution was agreed on when the product was acquired by the holder;
    - (ii) the additional contribution is an amount that is payable under the terms of the product because of an increase in an external factor, such as a person's salary, an inflation index or a rate of a tax or levy;
  - (b) if the financial product is a security—a transaction consisting solely of a variation of the rights attaching to the security;
  - (c) if the financial product is a deposit product—any of the following transactions:
    - (i) a withdrawal from the deposit product pursuant to a cheque drawn on the account;
    - (ii) a deposit to, or withdrawal from, the deposit product under a direct credit arrangement or a direct debit arrangement;
    - (iii) crediting interest to the deposit product;
    - (iv) debiting the deposit product for fees or charges in respect of the product or transactions involving the product;

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- (v) debiting the deposit product for charges or duties on deposits into, or withdrawals from, the product that are payable under a law of the Commonwealth or of a State or Territory;
- (vi) a transaction of a kind specified in regulations made for the purposes of this subparagraph;
- (d) a variation of the terms of all financial products in the class to which the financial product belongs;
- (e) a transaction of a kind specified in regulations made for the purposes of this paragraph.

Note 1: Because of subparagraph (a)(i), confirmation is not required, e.g., for regular monthly contributions to a superannuation fund.

Note 2: A defendant bears an evidential burden in relation to the matters in this subsection.

*Confirmation may be provided on a transaction-by-transaction basis or by means of a standing facility*

- (5) Confirmation of a transaction must be provided:
- (a) by confirming the transaction in accordance with subsections (6) to (8), to the holder as soon as is reasonably practicable after the transaction occurs; or
  - (b) subject to subsection (5A), by providing the holder with access to a facility through which they can, for themselves, get a confirmation of the transaction in accordance with subsections (6) to (8) as soon as is reasonably practicable after the transaction occurs.

An arrangement under which the holder may request or require another person to provide a confirmation does not count as a facility that satisfies paragraph (b).

*When confirmation may be provided by means of a standing facility*

- (5A) Confirmation may only be provided by means of a facility as mentioned in paragraph (5)(b) if:

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- (a) the holder concerned has agreed that confirmation of transactions involving the product may be provided by means of the facility; or
- (b) the holder concerned:
  - (i) has, in accordance with the applicable requirements (if any) in regulations made for the purposes of this subparagraph, been informed, by or on behalf of the responsible person, about the facility and its availability to the holder as a means of obtaining confirmation of transactions involving the product; and
  - (ii) has not advised the responsible person that the holder does not agree to use the facility as a means of obtaining such confirmations.

*Means of confirmation*

(6) The confirmation of the transaction:

- (a) must be:
  - (i) in writing; or
  - (ii) electronic; or
  - (iii) in some other form applicable under regulations made for the purposes of this paragraph; and
- (b) may be provided:
  - (i) in a case to which paragraph (5)(a) applies—directly by the responsible person or through another person (such as a financial services licensee); or
  - (ii) in a case to which paragraph (5)(b) applies—through a facility provided directly by the responsible person, or provided on behalf of the responsible person by someone else.

*Content of confirmation*

(7) The confirmation of the transaction must give the holder the information that the responsible person reasonably believes the holder needs (having regard to the information the holder has

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received before the transaction) to understand the nature of the transaction.

- (8) Without limiting subsection (7), the confirmation of the transaction must:
- (a) identify the issuer and the holder; and
  - (b) if required to be given by a person other than the issuer—  
identify that person; and
  - (c) give details of the transaction, including:
    - (i) the date of the transaction; and
    - (ii) a description of the transaction; and
    - (iii) subject to regulations made for the purposes of this subparagraph—any amount paid or payable by the holder in relation to the transaction; and
    - (iv) subject to any regulations made for the purposes of this subparagraph—any taxes and stamp duties payable in relation to the transaction; and
  - (d) give any other details prescribed by regulations made for the purposes of this paragraph.

*Regulations may provide for modification or waiver of confirmation obligation*

- (9) The regulations may do all or any of the following:
- (a) modify subsection (2) to change the person required to provide confirmation of a transaction;
  - (b) modify subsections (5) and (6) to expand on or change the way in which confirmation of a transaction must be provided in particular circumstances;
  - (c) modify subsections (7) and (8) to expand on or change the information that must be included in the confirmation of a transaction in particular circumstances;
  - (d) specify the circumstances in which a person may waive the right to be provided with confirmation of a transaction, and specify how such a waiver may be made.

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**1017G Certain product issuers and regulated persons must meet appropriate dispute resolution requirements**

(1) If:

- (a) particular financial products are, or have been, available for acquisition (whether by issue or sale) by a person or persons as retail clients; and
  - (b) the issue or sale of those products is not covered by an Australian financial services licence;
- both the issuer, and any regulated person obliged under subsection 1012C(5), (6) or (8) to give a retail client a Product Disclosure Statement for one or more of those financial products, must each:
- (c) have a dispute resolution system complying with subsection (2); and
  - (d) give to ASIC the same information as the issuer or regulated person would be required to give under subparagraph 912A(1)(g)(ii) of that Act if the issuer or regulated person were a financial services licensee.

Note 1: If the issue of particular financial products is covered by an Australian financial services licence, the requirement to have a dispute resolution system relating to the issue of the products is imposed by paragraph 912A(1)(g).

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

(2) To comply with this subsection, a dispute resolution system must consist of:

- (a) an internal dispute resolution procedure that:
  - (i) complies with standards, and requirements, made or approved by ASIC in accordance with regulations made for the purposes of this subparagraph; and
  - (ii) covers complaints, against the person required to have the system, made by retail clients in relation to financial services provided in relation to any of those products or, if any of those products are foreign passport fund

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- products, the operation of the relevant notified foreign passport fund; and
- (c) membership of the AFCA scheme.
- (3) Regulations made for the purposes of subparagraph (2)(a)(i) may also deal with the variation or revocation of:
- (a) standards or requirements made by ASIC; or
- (b) approvals given by ASIC.

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**Division 4—Advertising for financial products**

**1018A Advertising or other promotional material for financial product must refer to Product Disclosure Statement**

*Advertisements and promotional material must identify issuer (or issuer and seller) and refer to Product Disclosure Statement*

- (1) Subject to this section, if a particular financial product is available for acquisition by persons as retail clients (whether or not it is also available for acquisition by persons as wholesale clients) by way of issue, or pursuant to sale offers to which section 1012C applies or will apply, a person must only:
- (a) advertise the product; or
  - (b) publish a statement that is reasonably likely to induce people to acquire the product;
- if the advertisement or statement:
- (c) identifies:
    - (i) if the product is available by way of issue—the issuer of the product; or
    - (ii) if the product is available pursuant to sale offers to which section 1012C applies or will apply—the issuer of the product and the seller of the product; and
  - (ca) in a case where Part 7.8A requires a target market determination be made for the product—describes the target market for the product or specifies where the determination is available; and
  - (d) indicates that a Product Disclosure Statement for the product is available and where it can be obtained; and
  - (e) indicates that a person should consider the Product Disclosure Statement in deciding whether to acquire, or to continue to hold, the product.

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

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- (2) Subject to this section, if a particular financial product, or proposed financial product, is not available for acquisition by persons as retail clients but it is reasonably likely that the product will become so available (whether or not it is, or will also become, available for acquisition by persons as wholesale clients) by way of issue, or pursuant to sale offers to which section 1012C will apply, a person must only:
- (a) advertise the product; or
  - (b) publish a statement that is reasonably likely to induce people to acquire the product;
- if the advertisement or statement:
- (c) identifies:
    - (i) if the product is likely to be so available by way of issue—the issuer of the product; or
    - (ii) if the product is likely to be so available pursuant to sale offers to which section 1012C will apply—the issuer of the product and the seller of the product; and
  - (ca) in a case where Part 7.8A requires a target market determination be made in relation to the product—describes the target market or specifies where the description is available; and
  - (d) indicates that a Product Disclosure Statement for the product will be made available when the product is released or otherwise becomes available; and
  - (e) indicates when and where the Product Disclosure Statement is expected to be made available; and
  - (f) indicates that a person should consider the Product Disclosure Statement in deciding whether to acquire, or continue to hold, the product.

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

Note 2: Subsection (2) has an extended operation in relation to recognised offers under Chapter 8 (see subsection 1200L(4)).

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*Distribution of disclosure document*

- (3) A person may distribute a Product Disclosure Statement without contravening subsection (1) or (2). This does not apply if an order under section 1020E is in force in relation to the product.

Note 1: A defendant bears an evidential burden in relation to the matters in this section. See subsection 13.3(3) of the *Criminal Code*.

Note 2: Subsection (3) has an extended operation in relation to recognised offers under Chapter 8 (see subsection 1200L(5)).

*General exceptions*

- (4) An advertisement or publication does not contravene subsection (1) or (2) if it:
- (a) relates to a financial product that is able to be traded on a financial market and consists of a notice or report by the issuer of the product, or one of its officers, about its affairs to the market operator; or
  - (b) consists solely of a notice or report of a general meeting of the issuer; or
  - (c) consists solely of a report about the issuer that is published by the issuer and:
    - (i) does not contain information that materially affects affairs of the issuer, other than information previously made available in a Product Disclosure Statement that has been distributed, a disclosure document that has been lodged with ASIC, a CSF offer document that has been published on a platform of a CSF intermediary, an annual report or a notice or report referred to in paragraph (a) or (b); and
    - (ii) does not refer (whether directly or indirectly) to the offer of the financial product; or
  - (d) is a news report, or is genuine comment, in the media relating to:
    - (i) a Product Disclosure Statement that has been distributed, a disclosure document that has been lodged

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- with ASIC or a CSF offer document that has been published on a platform of a CSF intermediary; or
- (ii) information contained in such a Statement or document; or
- (iii) a notice or report covered by paragraph (a), (b) or (c); or
- (e) is a report about the financial products of the issuer published by someone who is not:
- (i) the issuer; or
- (ii) acting at the instigation of, or by arrangement with, the issuer; or
- (iii) a director of the issuer; or
- (iv) a person who has an interest in the success of the issue or sale of the financial product.

Paragraphs (d) and (e) do not apply if anyone gives consideration or another benefit for publishing the report.

Note: A defendant bears an evidential burden in relation to the matters in this section. See subsection 13.3(3) of the *Criminal Code*.

*Liability of publishers*

- (5) A person does not contravene subsection (1) or (2) by publishing an advertisement or statement if the person:
- (a) publishes it in the ordinary course of a media business; and
- (b) did not know, and had no reason to suspect, that its publication would amount to a contravention of a provision of this section.

Note: A defendant bears an evidential burden in relation to the matters in this section. See subsection 13.3(3) of the *Criminal Code*.

*Meaning of media*

- (6) For the purposes of this section, the **media** consists of:
- (a) newspapers and magazines; and
- (b) radio and television broadcasting services; and
- (c) electronic services (including services provided through the internet) that:

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- (i) are operated on a commercial basis; and
- (ii) are similar to newspapers, magazines or radio or television broadcasts.

**1018B Prohibition on advertising personal offers covered by section 1012E**

- (1) A person must not advertise an offer, or intended offer, of financial products that would not need a Product Disclosure Statement because of section 1012E.

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

- (2) A person does not contravene subsection (1) by publishing an advertisement or statement if the person:

- (a) publishes it in the ordinary course of a media business; and
- (b) did not know, and had no reason to suspect, that a Product Disclosure Statement was needed.

For this purpose, **media** has the same meaning as it has in section 1018A.

Note: A defendant bears an evidential burden in relation to the matters in this section. See subsection 13.3(3) of the *Criminal Code*.

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## Division 5—Cooling-off periods

### 1019A Situations in which this Division applies

- (1) Subject to subsection (2), this Division applies if:
  - (a) a financial product of one of the following classes is provided in this jurisdiction to a person as a retail client after the commencement of this Chapter:
    - (i) risk insurance products;
    - (ii) investment life insurance products;
    - (iii) managed investment products;
    - (iv) superannuation products;
    - (v) RSAs; and
  - (b) the product is provided to the person:
    - (i) by way of issue; or
    - (ii) by way of sale pursuant to an offer to which section 1012C applies.
- (2) The regulations may do any or all of the following:
  - (a) provide that a specified subclass of financial products that would otherwise be covered by a subparagraph of paragraph (1)(a) are excluded from that subparagraph;
  - (b) provide additional requirements to be satisfied before this Division applies in relation to a class or subclass of financial products;
  - (c) provide that this Division does not apply in relation to the provision of a financial product in specified circumstances.
- (3) In this Division:
  - (a) the person referred to in paragraph (1)(a) is the *client*; and
  - (b) the person who issues or sells the product to the client is the *responsible person*.

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**1019B Cooling-off period for return of financial product**

- (1) Subject to this section, the client has the right to return the financial product to the responsible person and to have the money they paid to acquire the product repaid. This is so even if the responsible person is being wound up.
- (2) The right to return the product must be exercised by notifying the responsible person in one of the following ways:
  - (a) in writing; or
  - (b) electronically; or
  - (c) in any other way specified in the regulations.Also, if the regulations require the client to comply with other requirements in order to exercise the right to return the product, those other requirements must be complied with.
- (3) The right to return the product can only be exercised during the period of 14 days starting on the earlier of:
  - (a) the time when the confirmation requirement (if applicable) is complied with; or
  - (b) the end of the fifth business day after the day on which the product was issued or sold to the client.
- (4) For the purposes of subsection (3), the confirmation requirement is complied with when:
  - (a) the client receives confirmation, as mentioned in paragraph 1017F(5)(a), of the transaction by which they acquired the product; or
  - (b) confirmation of that transaction is available to the client by a facility as mentioned in paragraph 1017F(5)(b).
- (5) The right to return the product (and have money paid to acquire it repaid) cannot be exercised at any time after:
  - (a) the client has (whether before or after the start of the period referred to in subsection (3)) exercised a right or power that they have under the terms applicable to the product; or

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- (b) the time (whether before or after the start of the period referred to in subsection (3)) at which, under the terms applicable to the product, the client's rights or powers in respect of the product end.

Note: So, e.g.:

- (a) if the product is a contract of insurance, the right to return cannot be exercised after the client has made a claim under the contract of insurance; and
- (b) if the product is a contract of insurance covering a period of only one week, the right to return cannot be exercised after the end of that week.

- (5A) The regulations may specify other circumstances in which the right to return the product (and have money paid to acquire it repaid) cannot be exercised.
- (6) On the exercise of the right to return the product:
- (a) if the product is constituted by a legal relationship between the client and the issuer of the product—that relationship is, by force of this section, terminated with effect from that time without penalty to the client; and
  - (b) any contract for the acquisition of the product by the client is, by force of this section, terminated with effect from that time without penalty to the client.
- (7) The regulations may provide for consequences and obligations (in addition to those provided for by subsection (6)) to apply if the right to return a financial product is exercised.
- (8) The regulations may provide that, in specified circumstances, the amount to be repaid on exercise of the right to return a financial product is to be increased or reduced in accordance with the regulations.

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**Part 7.9** Financial product disclosure and other provisions relating to issue, sale and purchase of financial products

**Division 5A** Unsolicited offers to purchase financial products off-market

**Section 1019D**

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**Division 5A—Unsolicited offers to purchase financial products off-market**

**1019D Offers to which this Division applies**

- (1) This Division applies to an offer in relation to which the following paragraphs are satisfied:
  - (a) the offer is an unsolicited offer to purchase a financial product made by a person (the *offeror*) to another person (the *offeree*);
  - (b) the offer is made otherwise than on a licensed market;
  - (c) one or more of the following apply:
    - (i) the offer is made in the course of a business of purchasing financial products;
    - (ii) the offeror was not in a personal or business relationship with the offeree before the making of the offer;
    - (iii) the offer is made in circumstances specified in regulations made for the purposes of this subparagraph;
  - (d) the offer is not:
    - (i) made to the issuer of the financial products; or
    - (ii) to buy back shares under a buy-back authorised by section 257A; or
    - (iii) made under a compromise or arrangement approved at a meeting held as a result of an order under subsection 411(1) or (1A); or
    - (iv) to acquire securities under an off-market bid; or
    - (v) to compulsorily acquire or buy out securities under Chapter 6A; or
    - (vi) to acquire shares from a dissenting shareholder under section 414; or
    - (vii) made in relation to particular financial products that are specified in regulations made for the purposes of this subparagraph; or

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- (viii) made in circumstances that are specified in regulations made for the purposes of this subparagraph;
  - (e) the offer is made or received in this jurisdiction.
- (2) The regulations may clarify:
- (a) when an offer is, or is not, made in the course of a business of purchasing financial products; or
  - (b) when an offeror was, or was not, in a previous personal or business relationship with an offeree.
- Regulations made for the purposes of this subsection have effect despite anything else in this section.

**1019E How offers are to be made**

- (1) An offer to which this Division applies must not be made otherwise than by sending an offer document in printed or electronic form to the offeree in accordance with the following requirements:
  - (a) the document must be sent to an address of the offeree (which may be an electronic address);
  - (b) either the envelope or the container in which it is sent, or the message that accompanies it, must be addressed to the offeree.
- (2) The offer document must be sent to the offeree as soon as practicable after the date of offer.

**1019F Prohibition on inviting offers to sell**

A person must not invite another person to make an offer to sell a financial product in circumstances in which, if the invitation were instead an offer to purchase the financial product, that offer would be an offer to which this Division applies.

**1019G Duration and withdrawal of offers**

- (1) An offer to which this Division applies:
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- (a) must remain open for at least 1 month after the date of offer; and
  - (b) cannot remain open for more than 12 months after the date of offer.
- (2) The offer may be withdrawn by the offeror at any time, but not within 1 month of the date of offer.
- (3) The offer may only be withdrawn by the offeror by sending a withdrawal document in printed or electronic form to the offeree in accordance with paragraphs 1019E(1)(a) and (b). The withdrawal document must identify the offeror and be dated.
- (4) A purported withdrawal of the offer contrary to subsection (2) or (3) is ineffective.

**1019H Terms of offer cannot be varied**

- (1) The terms of an offer to which this Division applies, as set out in the offer document, cannot be varied.
- (2) A purported variation of the terms of the offer is ineffective.
- (3) This section does not:
  - (a) affect the offeror's obligation under section 1019J to update the market value of the financial product to which the offer relates; or
  - (b) prevent the offeror from withdrawing the offer in accordance with section 1019G or paragraph 1019J(2)(a) and making another offer on different terms; or
  - (c) prevent the offeree from making a counter-offer on different terms.

**1019I Contents of offer document**

- (1) The offer document by which an offer to which this Division applies is made must identify the offeror and be dated.
-

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- (2) The offer document must also contain the following:
  - (a) the price at which the offeror wishes to purchase the financial products;
  - (b) if the financial product is able to be traded on a licensed market and there is a market value for the product as traded on that market—the market value of the product as at the date of offer;
  - (c) if paragraph (b) does not apply—a fair estimate of the value of the product as at the date of offer, and an explanation of the basis on which that estimate was made;
  - (d) the period during which the offer remains open (which must be consistent with subsection 1019G(1));
  - (e) a statement to the effect that the offer may be withdrawn by sending a withdrawal document to the offeree, but generally not within 1 month of the date of offer;
  - (f) any other information specified in regulations made for the purposes of this paragraph.
- (3) The regulations may clarify:
  - (a) the manner in which a fair estimate of the value of a financial product (see paragraph (2)(c)) is to be worked out; and
  - (b) the level of detail required in the explanation of the basis on which the estimate was made.Regulations made for the purposes of this subsection have effect despite anything else in this section.
- (4) The offer document must be worded and presented in a clear, concise and effective manner.

**1019J Obligation to update market value**

- (1) This section applies if:
  - (a) the offer document by which an offer to which this Division applies is made states the market value of the financial product to which the offer relates as at the date of the offer; and

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- (b) while the offer remains open, there is an increase or decrease in the market value of the product when compared to:
    - (i) unless subparagraph (ii) applies—the market value (the *currently stated value*) stated as mentioned in paragraph (a); or
    - (ii) if this section has previously applied in relation to the offer and one or more supplementary offer documents have been sent to the offeree—the market value (the *currently stated value*) stated as mentioned in paragraph (3)(c) in the supplementary offer document most recently sent to the offeree; and
  - (c) the increase or decrease, expressed as a percentage of the currently stated value, exceeds the percentage specified in the regulations for the purposes of this paragraph.
- (2) The offeror must, within 10 business days of this section applying because of a particular increase or decrease in value:
- (a) withdraw the offer by sending a withdrawal document, in printed or electronic form, to the offeree in accordance with paragraphs 1019E(1)(a) and (b):
    - (i) that identifies the offeror and that is dated; and
    - (ii) that contains a statement to the effect that the offer is withdrawn because of a change in the market value of the product, and that withdrawal for this reason is permitted even within 1 month of the date of offer; or
  - (b) send a supplementary offer document (see subsection (3)) in printed or electronic form to the offeree in accordance with paragraphs 1019E(1)(a) and (b).
- Nothing in section 1019G affects the effectiveness of a withdrawal of the offer under paragraph (a) of this subsection.
- (3) A supplementary offer document must:
- (a) identify the offer to which it relates; and
  - (b) be dated; and
  - (c) state the market value of the financial product to which the offer relates as at that date; and

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- (d) state the price that was stated in the offer document as required by paragraph 1019I(2)(a), and contain a statement to the effect that this is still the price at which the offeror wishes to purchase the product and that the terms of the offer remain unchanged; and
  - (e) contain a statement to the effect that the document has been prepared because the market value of the product has changed.
- (4) A supplementary offer document must be worded and presented in a clear, concise and effective manner.
- (5) In this section, a reference to stating a market value of a financial product includes a reference to purporting to state the market value of the product.

**1019K Rights if requirements of Division not complied with**

*First situation covered by this section—offers to which this Division applies*

- (1) This section applies if, in relation to an offer to which this Division applies, the offeree (the **seller**) accepts the offer and enters into a contract for the sale of the financial product to the offeror (the **buyer**), and one or more of the following paragraphs applies:
  - (a) section 1019E was not complied with in relation to the offer;
  - (b) the offer was accepted after the period referred to in paragraph 1019G(1)(b);
  - (c) the offeror gave the offeree an offer document and either:
    - (i) the offer document did not comply with section 1019I;  
or
    - (ii) there was a misleading or deceptive statement in the offer document;
  - (d) in a situation to which section 1019J applies, either:
    - (i) subsection 1019J(2) was not complied with; or
    - (ii) subsection 1019J(2) was complied with, but the offeree did not receive the withdrawal document, or the

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supplementary offer document, as the case requires,  
until after the offeree had accepted the offer;

- (e) in a situation to which section 1019J applies, the offeror gave the offeree a supplementary offer document and either:
  - (i) the supplementary offer document did not comply with subsection 1019J(3); or
  - (ii) there was a misleading or deceptive statement in the supplementary offer document.

*Second situation covered by this section—invitations prohibited by section 1019F*

- (2) This section applies if, in response to an invitation prohibited by section 1019F, a person (the *seller*) makes an offer to sell a financial product to the person who made the invitation (the *buyer*), and that person accepts the offer and enters into a contract for the purchase of that financial product from the seller.

*Seller's right to refuse to transfer, or to seek the return of, the financial product*

- (3) The seller has:
  - (a) the right to refuse to transfer the financial product to the buyer; or
  - (b) if the seller has already transferred the financial product to the buyer—the right to have the financial product returned to the seller, if the buyer still holds the product.

The seller's right under paragraph (a) or (b) is conditional on the seller repaying any money that has been paid to the seller for the purchase of the financial product.

*How the seller's right is to be exercised*

- (4) The seller's right under subsection (3) must be exercised by notifying the buyer in one of the following ways:
  - (a) in writing;
  - (b) electronically;

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- (c) in any other way specified in regulations made for the purposes of this paragraph.

Also, if the regulations require the seller to comply with other requirements in order to exercise that right, those other requirements must be complied with.

- (5) The seller's right under subsection (3) can only be exercised during the period of 30 days starting on the day the contract was entered into.

*Effect of exercise of seller's right*

- (6) On the exercise of the seller's right under subsection (3), the contract referred to in subsection (1) or (2) is, by force of this section, terminated from that time without penalty to the seller.

*Regulations may provide for certain matters*

- (7) The regulations may provide for consequences and obligations (in addition to those provided for by subsection (6)) to apply if the seller's right under subsection (3) is exercised.
- (8) The regulations may provide that, in specified circumstances, the amount to be repaid as mentioned in subsection (3) is to be increased or reduced in accordance with the regulations.

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**Division 5B** Disclosure etc. in relation to short sales covered by securities lending arrangement of listed section 1020B products

**Section 1020AAA**

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**Division 5B—Disclosure etc. in relation to short sales  
covered by securities lending arrangement of  
listed section 1020B products**

Note: Section 1020B prohibits certain short sales of section 1020B products.

**1020AAA Treatment of transactions relating to section 1020B  
products**

- (1) For the purposes of this Division, treat the following as being made on a licensed market:
  - (a) a sale of section 1020B products made by a financial services licensee on behalf of both the buyer and the seller of the products;
  - (b) a sale of section 1020B products made by a financial services licensee on behalf of the buyer of the products and on its own behalf as seller of the products;
  - (c) a sale of section 1020B products made by a financial services licensee on behalf of the seller of the products and on its own behalf as buyer of the products.
- (2) To avoid doubt, for the purposes of this Division, treat the entering into of an agreement to sell section 1020B products as the sale of the products.
- (3) To avoid doubt, for the purposes of this Division, treat a financial services licensee as making a sale on behalf of a person if the sale is, in economic substance, made by the licensee for the person.

Example: A request that the sale be made is passed from the person to the financial services licensee through a chain of intermediaries.

**1020AA Meaning of *securities lending arrangement***

A *securities lending arrangement* is an arrangement under which:

- (a) one entity (the *lender*) agrees that it will:

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- (i) deliver particular securities, managed investment products, foreign passport fund products or other financial products to another entity (the **borrower**) or to an entity nominated by the borrower; and
- (ii) vest title in those products in the entity to which they are delivered; and
- (b) the borrower agrees that it will, after the lender does the things mentioned in paragraph (a):
  - (i) deliver the products (or equivalent products) to the lender or to an entity nominated by the lender; and
  - (ii) vest title in those products (or those equivalent products) in the entity to which they are delivered.

**1020AB Seller disclosure**

- (1) Subsection (3) applies if:
  - (a) either:
    - (i) a financial services licensee, on behalf of a person (the **seller**), makes a sale in this jurisdiction of section 1020B products on a licensed market to a buyer; or
    - (ii) a financial services licensee (the **seller**), on its own behalf, makes a sale in this jurisdiction of section 1020B products on a licensed market to a buyer; and
  - (b) before the time of the sale, the seller had entered into or gained the benefit of a securities lending arrangement; and
  - (c) at the time of the sale, the seller intends that the securities lending arrangement will ensure that some or all the section 1020B products can be vested in the buyer; and
  - (d) the following requirements are satisfied (if applicable):
    - (i) if regulations made for the purposes of this subparagraph specify a kind of section 1020B product—the section 1020B products are of that kind;

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- (ii) if regulations made for the purposes of this subparagraph specify a kind of section 1020B product—the section 1020B products are not of that kind;
  - (iii) if regulations made for the purposes of this subparagraph specify circumstances in which the sale is made—the sale is made in those circumstances.
- (2) Subsection (3) applies regardless of whether the seller is inside or outside Australia.

*Offence*

- (3) The seller must:

- (a) give the entity mentioned in subsection (4) particulars specified in the regulations in relation to the circumstances mentioned in paragraphs (1)(a), (b) and (c); and
- (b) do so:
  - (i) on or before the time specified in the regulations; and
  - (ii) in the manner specified in the regulations.

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

- (4) The entity is:

- (a) if subparagraph (1)(a)(i) applies:
  - (i) the financial services licensee mentioned in that subparagraph; or
  - (ii) if the regulations specify another entity—that entity; or
- (b) if subparagraph (1)(a)(ii) applies:
  - (i) the operator of the licensed market mentioned in that subparagraph; or
  - (ii) if the regulations specify another entity—that entity.

**1020AC Licensee disclosure**

- (1) Subsection (2) applies if:

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- (a) the seller mentioned in subparagraph 1020AB(1)(a)(i) gives a financial services licensee information in accordance with section 1020AB in relation to a sale of section 1020B products on a licensed market; and
- (b) the following requirements are satisfied (if applicable):
  - (i) if regulations made for the purposes of this subparagraph specify a kind of section 1020B product—the section 1020B products are of that kind;
  - (ii) if regulations made for the purposes of this subparagraph specify a kind of section 1020B product—the section 1020B products are not of that kind;
  - (iii) if regulations made for the purposes of this subparagraph specify circumstances in which the sale is made—the sale is made in those circumstances.

*Offence*

- (2) The financial services licensee must:
  - (a) give the entity mentioned in subsection (3) particulars specified in the regulations in relation to the circumstances mentioned in paragraph (1)(a); and
  - (b) do so:
    - (i) on or before the time specified in the regulations; and
    - (ii) in the manner specified in the regulations.

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

- (3) The entity is:
  - (a) the operator of the licensed market mentioned in paragraph (1)(a); or
  - (b) if the regulations specify another entity—that entity.

### **1020AD Public disclosure of information**

- (1) Subsection (2) applies if:
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- (a) any of the following apply, in relation to a sale of section 1020B products on a licensed market:
  - (i) the seller mentioned in subparagraph 1020AB(1)(a)(ii) gives information to the operator of a licensed market (or to another entity) in accordance with section 1020AB;
  - (ii) the financial services licensee mentioned in paragraph 1020AC(1)(a) gives information to the operator of a licensed market (or to another entity) in accordance with section 1020AC;
  - (iii) if regulations for the purposes of subparagraph 1020AB(4)(a)(ii) provide that the entity to which information is to be given in accordance with section 1020AB is the operator of a licensed market (or another entity)—the seller mentioned in subparagraph 1020AB(1)(a)(i) gives information to the operator (or other entity) in accordance with that section; and
- (b) the following requirements are satisfied (if applicable):
  - (i) if regulations made for the purposes of this subparagraph specify a kind of section 1020B product—the section 1020B products are of that kind;
  - (ii) if regulations made for the purposes of this subparagraph specify a kind of section 1020B product—the section 1020B products are not of that kind;
  - (iii) if regulations made for the purposes of this subparagraph specify circumstances in which the sale is made—the sale is made in those circumstances.

*Offence*

(2) The operator (or the other entity) must:

- (a) make a public disclosure of particulars specified in the regulations in relation to the information mentioned in paragraph (1)(a); and
  - (b) do so:
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- (i) on or before the time specified in the regulations; and
- (ii) in the manner specified in the regulations.

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

**1020AE Licensee's obligation to ask seller about short sale**

The financial services licensee must not make a sale in this jurisdiction of section 1020B products on a licensed market if:

- (a) the sale is on behalf of a person (the *seller*); and
- (b) the seller will be obliged under section 1020AB to give the financial services licensee information in relation to the sale; and
- (c) either or both of the following apply:
  - (i) before making the sale, the financial services licensee failed to ask the seller, orally or in writing, whether the seller will be obliged under section 1020AB to give the financial services licensee information in relation to the sale;
  - (ii) before making the sale, the financial services licensee failed to record, in writing, the seller's answer.

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

Note 2: For the definition of *writing*, see section 2B of the *Acts Interpretation Act 1901*.

**1020AF Regulations**

- (1) Regulations made for the purposes of this Division may specify a matter or thing differently for different kinds of persons, things or circumstances. For example, the regulations may:
  - (a) specify a matter or thing differently for different kinds of sellers mentioned in subsection 1020AB(1) or 1020AC(1); and

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- (b) specify a time differently for different kinds of circumstances.

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

- (2) Subsection (1) does not limit the regulations that may be made for the purposes of this Division.

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## **Division 5C—Information about CGS depository interests**

### **1020AG Jurisdictional scope of Division**

- (1) Section 1020AI applies only in relation to recommendations received in this jurisdiction.
- (2) The regulations may make provision dealing with the jurisdictional scope of some or all of the other provisions of this Division. The other provisions of this Division have effect subject to any such regulations.

### **1020AH Meaning of *CGS depository interest information website, information statement and regulated person***

- (1) In this Act:

***CGS depository interest information website*** means a website that is prescribed by the regulations for the purposes of this definition.

***information statement*** for a class of CGS depository interests means a document that:

- (a) contains a statement that the document is an information statement for that class; and
- (b) contains information about all CGS depository interests of that class (whether or not it also contains information about CGS depository interests of another class); and
- (c) is prepared by the Commonwealth; and
- (d) is published on the CGS depository interest information website.

- (2) In this Division and Division 7:

***regulated person***, in relation to a CGS depository interest, means:

- (a) an issuer of the CGS depository interest; or
- (b) any financial services licensee; or

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- (c) any authorised representative of a financial services licensee; or
- (d) any person who is not required to hold an Australian financial services licence because the person is covered by:
  - (i) paragraph 911A(2)(j); or
  - (ii) an exemption in regulations made for the purposes of paragraph 911A(2)(k); or
  - (iii) an exemption specified by ASIC for the purposes of paragraph 911A(2)(l); or
- (e) any person who is required to hold an Australian financial services licence but who does not hold such a licence.

**1020AI Requirement to give information statements for CGS depository interest if recommending acquisition of interest**

- (1) A regulated person must give a person (the *client*) each information statement for a class of CGS depository interests if:
  - (a) the regulated person provides financial product advice to the client that consists of, or includes, a recommendation that the client acquire a CGS depository interest of that class; and
  - (b) the financial product advice is provided to the client as a retail client; and
  - (c) the financial product advice is personal advice to the client.

Each information statement must be given at or before the time when the regulated person provides the advice and must be given in accordance with this Division.

Note: If the recommendation is to acquire CGS depository interests of a class for which there is an information statement and that is a subset of a wider class of CGS depository interests for which there is another information statement, the regulated person must give the client both information statements.

- (2) However, the regulated person does not have to give the client an information statement for a class of CGS depository interests if:
  - (a) the client has already received that statement; or

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- (b) the regulated person reasonably believes that the client has received that statement.

*Strict liability offence of failing to give statement*

- (3) A regulated person commits an offence if:
- (a) the regulated person is required by this section to give another person an information statement for a class of CGS depository interests; and
  - (b) the regulated person does not give the other person, in accordance with section 1020AK, that statement by the time the regulated person is required to do so.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2). See subsection 13.3(3) of the *Criminal Code*.

- (4) An offence based on subsection (3) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

*Ordinary offence of failing to give statement*

- (5) A regulated person commits an offence if:
- (a) the regulated person is required by this section to give another person an information statement for a class of CGS depository interests; and
  - (b) the regulated person does not give the other person, in accordance with section 1020AK, that statement by the time the regulated person is required to do so.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2).

*Defence for authorised representative*

- (6) In any proceedings against an authorised representative of a financial services licensee for an offence based on subsection (3) or (5), it is a defence if:
- (a) the licensee had provided the representative with information or instructions about the giving of information statements for a class of CGS depository interests; and

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- (b) the representative's failure to give an information statement for that class occurred because the representative was acting in reliance on that information or those instructions; and
- (c) the representative's reliance on that information or those instructions was reasonable.

Note: A defendant bears an evidential burden in relation to the matters in subsection (6). See subsection 13.3(3) of the *Criminal Code*.

*Offence of failing to ensure authorised representative gives statement*

- (7) A financial services licensee commits an offence if the licensee does not take reasonable steps to ensure that an authorised representative of the licensee complies with the representative's obligations under this section to give each information statement for a class of CGS depository interests as and when required by this section.

**1020AJ Information statement given must be up to date**

A regulated person must not, in purported compliance with this Division, give a person at a time a document that:

- (a) purports to be an information statement for a class of CGS depository interests; and
- (b) is not an information statement for that class published at that time on the CGS depository interest information website.

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

**1020AK How an information statement is to be given**

- (1) An information statement for a class of CGS depository interests:
  - (a) must be:
    - (i) given to a person, or the person's agent, personally; or
    - (ii) sent to the person, or the person's agent, at an address (including an electronic address) or fax number nominated by the person or the agent; and

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- (b) may be printed or be in electronic form.
- (2) For the purposes of this section, the information statement is sent to a person at an address if, and only if:
- (a) the information statement is sent to the address; and
  - (b) either:
    - (i) the envelope or other container in which the information statement is sent; or
    - (ii) the message that accompanies the information statement;
- is addressed to the person.
- (3) The information statement may be given or sent to the person's agent only if the agent is not acting as the person's agent in one of the following capacities:
- (a) a financial services licensee;
  - (b) an authorised representative of a financial services licensee;
  - (c) a person who is not required to hold an Australian financial services licence because the person is covered by:
    - (i) paragraph 911A(2)(j); or
    - (ii) an exemption in regulations made for the purposes of paragraph 911A(2)(k); or
    - (iii) an exemption specified by ASIC for the purposes of paragraph 911A(2)(l);
  - (d) a person who is required to hold an Australian financial services licence but who does not hold such a licence;
  - (e) an employee, director or other representative of a person referred to in paragraph (a), (b), (c) or (d).
- (4) The regulations may provide for other ways of giving an information statement for a class of CGS depository interests.
- (5) The regulations may specify requirements as to the manner in which an information statement for a class of CGS depository interests may be given to a person. The giving of the information statement is not effective unless those requirements are satisfied.

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## Section 1020AL

**1020AL Civil action for loss or damage**

- (1) A person (the *client*) who suffers loss or damage for a reason described in column 1 of an item of the table may recover the amount of the loss or damage by action begun against a person indicated in column 2 of that item within 6 years after the loss or damage was suffered.

| <b>Recovery of amount of loss or damage</b>   |  |
|---|--|
| <b>Column 1</b><br><b>Reason for loss or damage</b>   | <b>Column 2</b><br><b>Person amount may be recovered from</b>  |
| 1 The client was not given an information statement for a class of CGS depository interests as and when required by this Division   | The person required to give the statement or, if that person was an authorised representative of a financial services licensee, each such licensee responsible for the person's conduct (see subsection (2))   |
| 2 The client was given at a time, in purported compliance with this Division, a document that:<br>(a) purported to be an information statement for a class of CGS depository interests; and<br>(b) was not an information statement for that class that was published at that time on the CGS depository interest information website | Each person who:<br>(a) directly or indirectly caused or contributed to the giving of the document; and<br>(b) did not take reasonable steps to ensure that the document given would be an information statement published at that time on the CGS depository interest information website |

- (2) A financial services licensee is responsible for the conduct of an authorised representative of the licensee for the purposes of item 1 of the table in subsection (1), and the authorised representative is not liable under that item, if:
- (a) the authorised representative is not an authorised representative of any other financial services licensee; or  
(b) the licensee is responsible (alone or jointly and severally with other financial services licensees) for the authorised

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representative's conduct under section 917C, disregarding sections 917D and 917F.

- (3) This section does not affect any liability that a person has under any other law.

*Other orders*

- (4) The court dealing with an action under subsection (1) may, in addition to awarding loss or damage under that subsection and if it thinks it necessary in order to do justice between the parties:
- (a) make an order declaring void a contract entered into by the client referred to in that subsection for or relating to a financial product or a financial service; and
  - (b) if it makes an order under paragraph (a)—make such other order or orders as it thinks are necessary or desirable because of that order.
- (5) Without limiting paragraph (4)(b), the orders that may be made under that paragraph include (but are not limited to) an order for the return of money paid by a person, and/or an order for payment of an amount of interest specified in, or calculated in accordance with, the order.

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**Division 6** Miscellaneous

**Section 1020A**

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**Division 6—Miscellaneous**

**1020A Offers etc. relating to certain managed investment schemes not to be made in certain circumstances**

*Obligation*

- (1) A person must not engage in conduct of a kind referred to in subsection (2) in relation to a financial product described in paragraph 764A(1)(ba) (which relates to certain managed investment schemes that are not registered schemes) if the managed investment scheme concerned needs to be, or will need to be, registered and has not been registered. This is so even if it is proposed to register the scheme.
- (2) Subject to subsection (3), the kinds of conduct that must not be engaged in in relation to such a managed investment product are as follows:
  - (a) making a recommendation, as described in subsection 1012A(3), that is received in this jurisdiction;
  - (b) making an offer, as described in subsection 1012B(3) or 1012C(3), that is received in this jurisdiction;
  - (c) accepting an offer, made as described in subsection 1012B(3) or (4), that was received in this jurisdiction.

*Exceptions*

- (3) Subsection (2) does not apply to a recommendation or offer made in a situation to which a subsection of section 1012D, other than subsection 1012D(1), applies.

Note: In criminal proceedings, a defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code*.

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*Fault-based offence*

- (4) A person commits an offence if the person contravenes subsection (1).

*Civil liability*

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

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

**1020BAA Offers etc. relating to foreign passport funds not to be made in certain circumstances**

- (1) A person must not engage in conduct of a kind referred to in subsection (2) in relation to an interest in a foreign passport fund if the fund is not:
- (a) a notified foreign passport fund; or
  - (b) a registered scheme.

This is so even if it is proposed that the fund will become a notified foreign passport fund or a registered scheme.

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

- (2) Subject to subsection (3), the kinds of conduct that must not be engaged in in relation to an interest in such a foreign passport fund are as follows:
- (a) making a recommendation, as described in subsection 1012A(3), that is received in this jurisdiction;
  - (b) making an offer, as described in subsection 1012B(3) or 1012C(3), that is received in this jurisdiction;
  - (c) accepting an offer, made as described in subsection 1012B(3) or (4), that was received in this jurisdiction.

- (3) Subsection (2) does not apply to:

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- (a) a recommendation or offer made in a situation to which a subsection of section 1012D, other than subsection 1012D(1), applies; or
- (b) a recognised offer.

**1020B Prohibition of certain short sales of securities, managed investment products, foreign passport fund products and certain other financial products**

(1) In this Act:

*section 1020B products* means:

- (a) securities; or
- (b) managed investment products; or
- (ba) foreign passport fund products; or
- (c) financial products referred to in paragraph 764A(1)(j); or
- (d) financial products of any other kind prescribed by regulations made for the purposes of this definition.

(2) Subject to this section and the regulations, a person must only, in this jurisdiction, sell section 1020B products to a buyer if, at the time of the sale:

- (a) the person has or, if the person is selling on behalf of another person, that other person has; or
- (b) the person believes on reasonable grounds that the person has, or if the person is selling on behalf of another person, that other person has;

a presently exercisable and unconditional right to vest the products in the buyer.

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

(3) For the purposes of subsection (2):

- (a) a person who, at a particular time, has a presently exercisable and unconditional right to have section 1020B products vested in the person, or in accordance with the directions of the person, has at that time a presently exercisable and

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- unconditional right to vest the products in another person;  
and
- (b) a right of a person to vest section 1020B products in another person is not conditional merely because the products are subject to a security interest in favour of another person to secure the repayment of money.
- (4) Subsection (2) does not apply in relation to a sale of section 1020B products by a person who, before the time of sale, has entered into a contract to buy those products and who has a right to have those products vested in the person that is conditional only upon all or any of the following:
- (a) payment of the consideration in respect of the purchase;
- (b) the receipt by the person of a proper instrument of transfer in respect of the products;
- (c) the receipt by the person of the documents that are, or are documents of title to, the products.
- (7) For the purposes of this section, a person who:
- (a) purports to sell section 1020B products; or
- (b) offers to sell section 1020B products; or
- (c) holds himself, herself or itself out as entitled to sell section 1020B products; or
- (d) instructs a financial services licensee to sell section 1020B products;
- is taken to sell the products.

**1020D Part cannot be contracted out of**

A condition of a contract for the acquisition of a financial product is void if it provides that a party to the contract is:

- (a) required or bound to waive compliance with any requirement of this Part (or of regulations made for the purposes of this Part); or
- (b) if the acquisition occurs in circumstances in which the party is required by a provision of this Part to have been given a Product Disclosure Statement for the product—taken to have

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notice of any contract, document or matter not specifically referred to in a Product Disclosure Statement or Supplementary Product Disclosure Statement given to the party.

**1020E Stop orders by ASIC**

- (1) This section applies if:
  - (a) either:
    - (i) a disclosure document or statement is defective (see subsection (11)); or
    - (ia) a disclosure document or statement does not comply with a requirement of this Part that it be worded and presented in a clear, concise and effective manner; or
    - (ii) an advertisement or statement of a kind referred to in subsection 1018A(1) or (2) that relates to financial products is defective (see subsection (11)); or
  - (b) an issuer of financial products is in breach of section 1017G; or
  - (c) information made publicly available under section 1017BA or 1017BB is defective (see subsection (11)).
- (2) ASIC may order that:
  - (a) if paragraph (1)(a) applies—specified conduct in respect of the financial products to which the document, advertisement or statement relates; or
  - (b) if paragraph (1)(b) applies—specified conduct in respect of financial products issued by that issuer; or
  - (c) if paragraph (1)(c) applies—specified conduct in respect of the financial products or other property to which the information relates;must not be engaged in while the order is in force.
- (3) The order may include a statement that specified conduct engaged in contrary to the order will be regarded as not complying with the requirements of a specified provision of this Part.

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- (4) Before making an order under subsection (2), ASIC must:
  - (a) hold a hearing; and
  - (b) give a reasonable opportunity to any interested people to make oral or written submissions to ASIC on whether an order should be made.
- (5) If ASIC considers that any delay in making an order under subsection (2) pending the holding of a hearing would be prejudicial to the public interest, ASIC may make an interim order under that subsection. The interim order may be made without holding a hearing and lasts for 21 days after the day on which it is made unless revoked before then.
- (6) At any time during the hearing, ASIC may make an interim order under subsection (2). The interim order lasts until:
  - (a) ASIC makes an order under subsection (2) after the conclusion of the hearing; or
  - (b) the interim order is revoked;whichever happens first.
- (7) The order under subsection (2) must be in writing and must be served on:
  - (a) unless paragraph (b), (c) or (d) applies—the issuer of the financial products concerned; or
  - (b) if paragraph (1)(a) applies and the document, advertisement or statement relates to a sale or proposed sale of the financial products—the seller of the financial products; or
  - (c) if subparagraph (1)(a)(i) applies and the disclosure document or statement is an offer document of a kind referred to in section 1019E or a supplementary offer document of a kind referred to in section 1019J—the offeror referred to in subsection 1019D(1); or
  - (d) if paragraph (1)(c) applies—the person who made the information publicly available or who provided the information.

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- (8) The person on whom the order is served must take reasonable steps to ensure that other people who engage in conduct to which the order applies are aware of the order.

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

- (9) The person on whom the order is served, or a person who is aware of the order, must not engage in conduct contrary to the order.

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

- (10) If the person on whom the order is served, or a person who is aware of the order, engages in conduct contrary to the order, any relevant statement included in the order under subsection (3) has effect accordingly. This applies in addition to any other consequence that is provided for by this Act.

- (11) In this section:

***defective:***

- (a) in relation to a disclosure document or statement—has the same meaning as in Subdivision B of Division 7; and
- (b) in relation to an advertisement or statement of a kind referred to in subsection 1018A(1) or (2) that relates to financial products—means:
- (i) there is a misleading or deceptive statement in the advertisement or statement; or
  - (ii) there is an omission from the advertisement or statement of material required by paragraph 1018A(1)(c), (d) or (e), or paragraph 1018A(2)(c), (d), (e) or (f), to be included in the advertisement or statement; and
- (c) in relation to information made publicly available under section 1017BA—means:
- (i) the information has not been updated as required by that section; or
  - (ii) the information is otherwise misleading or deceptive; or
  - (iii) there is an omission from the information; and

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- (d) in relation to information made publicly available under section 1017BB—means:
- (i) the information is misleading or deceptive; or
  - (ii) there is an omission from the information.

***disclosure document or statement*** has the same meaning as it has in Subdivision B of Division 7.

**1020F Exemptions and modifications by ASIC**

- (1) ASIC may:
- (a) exempt a person or class of persons from all or specified provisions of this Part; or
  - (b) exempt a financial product or a class of financial products from all or specified provisions of this Part; or
  - (c) declare that this Part applies in relation to a person or a financial product, or a class of persons or financial products, as if specified provisions were omitted, modified or varied as specified in the declaration.
- (4) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.
- (5) An exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.
- (6) If conduct (including an omission) of a person would not have constituted an offence if a particular declaration under paragraph (1)(c) had not been made, that conduct does not constitute an offence unless, before the conduct occurred (in addition to complying with the gazettal requirement of subsection (5)):
- (a) the text of the declaration was made available by ASIC on the internet; or

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- (b) ASIC gave written notice setting out the text of the declaration to the person.

In a prosecution for an offence to which this subsection applies, the prosecution must prove that paragraph (a) or (b) was complied with before the conduct occurred.

- (7) For the purpose of this section, the ***provisions of this Part*** include:

- (a) definitions in this Act, or in the regulations, as they apply to references in this Part; and
- (b) any provisions of Part 10.2 (transitional provisions) that relate to provisions of this Part.

Note: Because of section 761H, a reference to this Part or Part 10.2 also includes a reference to regulations or other instruments made for the purposes of this Part or Part 10.2 (as the case requires).

- (8) To avoid doubt, a declaration under paragraph (1)(c) may specify omissions, modifications or variations that have any or all of the following effects:

- (a) suspending, prohibiting or limiting:
- (i) any form of short selling of financial products; or
- (ii) any transaction that has the same or substantially similar market effect as a short sale of financial products;
- (b) varying requirements under this Part that apply to:
- (i) any form of short selling of financial products; or
- (ii) any transaction that has the same or substantially similar market effect as a short sale of financial products;
- (c) removing some or all requirements under this Part that apply to:
- (i) any form of short selling of financial products; or
- (ii) any transaction that has the same or substantially similar market effect as a short sale of financial products;
- (d) imposing requirements that apply to:
- (i) any form of short selling of financial products; or
- (ii) any transaction that has the same or substantially similar market effect as a short sale of financial products.

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**1020G Exemptions and modifications by regulations**

- (1) The regulations may:
  - (a) exempt a person or class of persons from all or specified provisions of this Part; or
  - (b) exempt a financial product or a class of financial products from all or specified provisions of this Part; or
  - (c) provide that this Part applies as if specified provisions were omitted, modified or varied as specified in the regulations.
- (3) For the purpose of this section, the *provisions of this Part* include:
  - (a) definitions in this Act, or in the regulations, as they apply to references in this Part; and
  - (b) any provisions of Part 10.2 (transitional provisions) that relates to provisions of this Part.

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**Division 7—Enforcement**

**Subdivision A—Offences**

**1021A Overview**

This Subdivision contains provisions creating offences by reference to various rules contained in preceding Divisions of this Part. However, it does not create all the offences relating to those rules, as some offences are created by subsection 1311(1). Where offences are created by subsection 1311(1) in relation to a rule, this is indicated by a note at the end of the provision containing the rule.

**1021B Meaning of *defective* and *disclosure document or statement***

(1) In this Subdivision:

***defective***, in relation to a disclosure document or statement, means:

- (a) there is a misleading or deceptive statement in the disclosure document or statement; or
- (b) if it is a Product Disclosure Statement—there is an omission from the Product Disclosure Statement of material required by section 1013C, other than material required by section 1013B or 1013G; or
- (c) if it is a Supplementary Product Disclosure Statement that is given for the purposes of section 1014E—there is an omission from the Supplementary Product Disclosure Statement of material required by that section; or
- (d) if it is information required by paragraph 1012G(3)(a)—there is an omission from the information of material required by that paragraph;

being a statement, or an omission, that is or would be materially adverse from the point of view of a reasonable person considering whether to proceed to acquire the financial product concerned.

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Note: In determining whether a Product Disclosure Statement is defective, the effect of section 1014D must be taken into account (section 1014D takes information and statements in a Supplementary Product Disclosure Statement to be included in the Product Disclosure Statement it supplements).

***disclosure document or statement*** means:

- (a) a Product Disclosure Statement; or
- (b) a Supplementary Product Disclosure Statement; or
- (c) information required by paragraph 1012G(3)(a).

(1A) For the avoidance of doubt, if section 1012J (information must be up to date) is not complied with in relation to a Product Disclosure Statement, then, for the purposes of the definition of **defective** in subsection (1):

- (a) if the circumstance constituting the non-compliance is that particular information included in the Product Disclosure Statement is not as up to date as section 1012J requires it to be—the information so included constitutes a misleading statement in the Product Disclosure Statement; and
- (b) if the circumstance constituting the non-compliance is a failure to include particular information that was not previously required to be included in the Product Disclosure Statement—the failure to include the information constitutes an omission from the Statement of material required by section 1013C.

Note 1: The effect of section 1014D (information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements) must be taken into account in determining whether section 1012J is complied with in relation to a Product Disclosure Statement.

Note 2: Whether the inclusion of out of date information, or the failure to include information, results in the Product Disclosure Statement being **defective** as defined in subsection (1) depends on whether the materiality test set out in that definition is satisfied.

(2) In this Subdivision, a reference (including in the definitions in subsection (1)) to a document or statement, or to information, of a kind referred to in a paragraph of the definition of **disclosure**

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**document or statement** in subsection (1) includes a reference to something purporting to be a document or statement, or to be information, of that kind.

**1021C Offence of failing to give etc. a disclosure document or statement**

*Strict liability offence*

- (1) A person (the **providing entity**) commits an offence if:
  - (a) the providing entity:
    - (i) is required by a provision of this Part to give another person a Product Disclosure Statement or a Supplementary Product Disclosure Statement (the **required disclosure document or statement**); or
    - (ii) is required by paragraph 1012G(3)(a) to orally communicate information (the **required disclosure document or statement**) to another person; and
  - (b) the providing entity does not:
    - (i) if subparagraph (a)(i) applies—give (in accordance with section 1015C) the other person anything purporting to be the required disclosure document or statement by the time they are required to do so; or
    - (ii) if subparagraph (a)(ii) applies—orally communicate to the other person anything purporting to be the information required by paragraph 1012G(3)(a) by the time they are required to do so.

Note: A defendant bears an evidential burden in relation to the matters in sections 1012D, 1012DAA and 1012E.

- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For **strict liability**, see section 6.1 of the *Criminal Code*.

*Ordinary offence*

- (3) A person (the **providing entity**) commits an offence if:
  - (a) the providing entity:

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- (i) is required by a provision of this Part to give another person a Product Disclosure Statement or a Supplementary Product Disclosure Statement (the ***required disclosure document or statement***); or
  - (ii) is required by paragraph 1012G(3)(a) to orally communicate information (the ***required disclosure document or statement***) to another person; and
- (b) the providing entity does not:
- (i) if subparagraph (a)(i) applies—give (in accordance with section 1015C) the other person anything purporting to be the required disclosure document or statement by the time they are required to do so; or
  - (ii) if subparagraph (a)(ii) applies—orally communicate to the other person anything purporting to be the information required by paragraph 1012G(3)(a) by the time they are required to do so.

Note: A defendant bears an evidential burden in relation to the matters in sections 1012D, 1012DAA, 1012DA and 1012E.

*Defence for authorised representative*

- (4) In any proceedings against an authorised representative of a financial services licensee for an offence based on subsection (1) or (3), it is a defence if:
- (a) the licensee had provided the representative with information or instructions about the giving or communication of disclosure documents or statements; and
  - (b) the representative's failure to give or communicate the required disclosure document or statement occurred because the representative was acting in reliance on that information or those instructions; and
  - (c) the representative's reliance on that information or those instructions was reasonable.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4). See subsection 13.3(3) of the *Criminal Code*.

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*Circumstances in which a person is taken not to contravene this section*

- (5) If:
- (a) a person does not give another person a Product Disclosure Statement for a financial product because of section 1012DAA or 1012DA; and
  - (b) a notice was given under subsection 1012DAA(2) or 1012DA(5); and
  - (c) the notice purported to comply with subsection 1012DAA(7) or 1012DA(6) but did not actually comply with that subsection;
- the person is taken not to contravene this section.

**1021D Offence of preparer of defective disclosure document or statement giving the document or statement knowing it to be defective**

- (1) A person commits an offence if:
- (a) the person prepares (or has someone else prepare for them) a disclosure document or statement (not being information required by paragraph 1012G(3)(a)); and
  - (b) the person knows that the disclosure document or statement is defective; and
  - (c) the person:
    - (i) gives (see subsection (3)) another person the disclosure document or statement in circumstances in which it is required by a provision of this Part to be given to the other person; or
    - (ii) gives (see subsection (3)), or makes available to, another person the disclosure document or statement reckless as to whether the other person will or may rely on the information in it.

Note: A defendant bears an evidential burden in relation to the matters in sections 1012D, 1012DAA, 1012DA and 1012E.

- (2) A person commits an offence if:
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- (a) the person prepares (or has someone else prepare for them) a disclosure document or statement (not being information required by paragraph 1012G(3)(a)); and
  - (b) the person knows that the disclosure document or statement is defective; and
  - (c) the person gives (see subsection (3)), or makes available to, another person the disclosure document or statement, reckless as to whether the other person, or someone else, will or may give it, or make it available, to another person as mentioned in subparagraph (1)(c)(i) or (ii).
- (3) In this section, *give* means give by any means (including orally), and is not limited to giving in accordance with section 1015C.

**1021E Preparer of defective disclosure document or statement giving the document or statement (whether or not known to be defective)**

*Obligations*

- (1) A person contravenes this subsection if:
  - (a) the person prepares (or has someone else prepare for them) a disclosure document or statement (not being information required by paragraph 1012G(3)(a)); and
  - (b) the disclosure document or statement is defective; and
  - (c) the person:
    - (i) gives (see subsection (4)) another person the disclosure document or statement in circumstances in which it is required by a provision of this Part to be given to the other person; or
    - (ii) gives (see subsection (4)), or makes available to, another person the disclosure document or statement, reckless as to whether the other person will or may rely on the information in it.

Note: In criminal proceedings, a defendant bears an evidential burden in relation to the matters in sections 1012D, 1012DAA, 1012DA and 1012E.

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(2) A person contravenes this subsection if:

- (a) the person prepares (or has someone else prepare for them) a disclosure document or statement (not being information required by paragraph 1012G(3)(a)); and
- (b) the disclosure document or statement is defective; and
- (c) the person gives (see subsection (4)), or makes available to, another person the disclosure document or statement, reckless as to whether the other person, or someone else, will or may give it, or make it available, to another person as mentioned in subparagraph (1)(c)(i) or (ii).

*Exception*

(3) A person does not contravene subsection (1) or (2) if the person took reasonable steps to ensure that the disclosure document or statement would not be defective.

Note: In criminal proceedings, a defendant bears an evidential burden in relation to the matters in subsection (3). See subsection 13.3(3) of the *Criminal Code*.

*Meaning of give*

(4) In this section, **give** means give by any means (including orally), and is not limited to giving in accordance with section 1015C.

*Fault-based offence*

- (5) A person commits an offence if the person contravenes subsection (1) or (2).
  - (6) For the purposes of an offence based on subsection (1), strict liability applies to the physical element of the offence specified in paragraph (1)(b).
  - (7) For the purposes of an offence based on subsection (2), strict liability applies to the physical element of the offence specified in paragraph (2)(b).
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*Civil liability*

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

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

**1021F Offence of regulated person (other than preparer) giving disclosure document or statement knowing it to be defective**

- (1) A regulated person commits an offence if:
- (a) another person prepares (or has someone else prepare for them) a disclosure document or statement (not being information required by paragraph 1012G(3)(a)); and
  - (b) the regulated person knows that the disclosure document or statement is defective; and
  - (c) the regulated person:
    - (i) gives (see subsection (2)) another person the disclosure document or statement in circumstances in which it is required by a provision of this Part to be given to the other person; or
    - (ii) gives (see subsection (2)), or makes available to, another person the disclosure document or statement, reckless as to whether the other person will or may rely on the information in it.

Note: A defendant bears an evidential burden in relation to the matters in sections 1012D, 1012DAA, 1012DA and 1012E.

- (2) In this section, **give** means give by any means (including orally), and is not limited to giving in accordance with section 1015C.

**1021FA Paragraph 1012G(3)(a) obligation—offences relating to communication of information**

*Offence where information known to be defective*

- (1) A person (the **providing entity**) commits an offence if:

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- (a) the providing entity communicates information required by paragraph 1012G(3)(a) to another person in circumstances in which the providing entity is required to do so; and
- (b) the providing entity knows that the information is defective.

Note: A defendant bears an evidential burden in relation to the matters in sections 1012D and 1012E.

*Offence whether or not information known to be defective*

- (2) A person (the **providing entity**) commits an offence if:
- (a) the providing entity communicates information required by paragraph 1012G(3)(a) to another person in circumstances in which the providing entity is required to do so; and
  - (b) the information is defective.

Note: A defendant bears an evidential burden in relation to the matters in sections 1012D and 1012E.

- (3) For the purposes of an offence based on subsection (2), strict liability applies to the physical element of the offence specified in paragraph (2)(b).

Note: For **strict liability**, see section 6.1 of the *Criminal Code*.

*Defences*

- (4) In any proceedings against a person for an offence based on subsection (1) or (2), it is a defence if the person took reasonable steps to ensure that the information communicated would not be defective.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4). See subsection 13.3(3) of the *Criminal Code*.

- (5) In any proceedings against a person for an offence based on subsection (2), it is a defence if the information communicated was defective because of information, or an omission from information, provided to the person (whether in a document or otherwise) by the issuer of the financial product concerned.

Note: A defendant bears an evidential burden in relation to the matters in subsection (5). See subsection 13.3(3) of the *Criminal Code*.

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**1021FB Paragraph 1012G(3)(a) obligation—offences relating to information provided by product issuer for communication by another person**

*Product issuer knows information is defective*

- (1) The issuer of a financial product commits an offence if:
  - (a) the issuer provides information (whether in a document or otherwise) relating to the product to a person:
    - (i) for the purpose of the information being communicated under paragraph 1012G(3)(a); or
    - (ii) knowing that it is likely that the information will be so communicated; and
  - (b) the issuer knows that, if the person communicates the provided information for the purpose of paragraph 1012G(3)(a), the information communicated will be defective.

*Product issuer knows information is not all the required information*

- (2) The issuer of a financial product commits an offence if:
  - (a) the issuer provides information (whether in a document or otherwise) relating to the product to a person:
    - (i) for the purpose of it being communicated under paragraph 1012G(3)(a); or
    - (ii) knowing that it is likely that it will be so communicated; and
  - (b) the provided information relates to a matter or matters, but the issuer knows that it is not all of the information relating to the matter or matters that is required to be so communicated; and
  - (c) the issuer is reckless as to whether the person will or may communicate information for the purposes of paragraph 1012G(3)(a) on the basis that the provided information is all the information relating to the matter or matters that is required to be so communicated.

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*Product issuer provides information that results in information required by paragraph 1012G(3)(a) being defective*

- (3) The issuer of a financial product commits an offence if:
  - (a) the issuer provides information (whether in a document or otherwise) relating to the product to a person:
    - (i) for the purpose of it being communicated under paragraph 1012G(3)(a); or
    - (ii) knowing that it is likely that it will be so communicated; and
  - (b) the person communicates the information for the purpose of paragraph 1012G(3)(a); and
  - (c) the information communicated is defective because it includes the provided information (whether or not it is defective for other reasons).
- (4) For the purposes of an offence based on subsection (3), strict liability applies to the physical element of the offence specified in paragraph (3)(c).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

*Defence to subsection (3) offence*

- (5) In any proceedings against the issuer of a financial product for an offence based on subsection (3), it is a defence if the issuer took reasonable steps to ensure that the information they provided would not be such as to make the information communicated for the purpose of paragraph 1012G(3)(a) defective.

Note: A defendant bears an evidential burden in relation to the matters in subsection (5). See subsection 13.3(3) of the *Criminal Code*.

*Product issuer does not provide all the required information*

- (6) The issuer of a financial product commits an offence if:
  - (a) the issuer provides information (whether in a document or otherwise) relating to the product to a person:

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- (i) for the purpose of it being communicated under paragraph 1012G(3)(a); or
  - (ii) knowing that it is likely that it will be so communicated; and
  - (b) the provided information relates to a matter or matters, but it is not all of the information relating to the matter or matters that is required to be so communicated; and
  - (c) the person communicates information for the purpose of paragraph 1012G(3)(a) on the basis that the provided information is all the information relating to the matter or matters that is required to be so communicated; and
  - (d) the information communicated is defective because it includes only that information about the matter or matters (whether or not it is also defective for other reasons).
- (7) For the purposes of an offence based on subsection (6), strict liability applies to the physical elements of the offence specified in paragraphs (6)(b) and (d).

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

*Defence to subsection (6) offence*

- (8) In any proceedings against the issuer of a financial product for an offence based on subsection (6), it is a defence if the issuer took reasonable steps to ensure that the information they provided about the matter or matters would be all the information about the matter or matters that would be required by paragraph 1012G(3)(a) to be communicated.

Note: A defendant bears an evidential burden in relation to the matters in subsection (8). See subsection 13.3(3) of the *Criminal Code*.

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**1021G Financial services licensee failing to ensure authorised representative gives etc. disclosure documents or statements as required**

*Financial services licensee must ensure authorised representative gives etc. disclosure documents or statements as required*

- (1) A financial services licensee contravenes this subsection if the licensee does not take reasonable steps to ensure that an authorised representative of the licensee complies with their obligations under this Part to give or communicate disclosure documents or statements as and when required by this Part.

*Fault-based offence*

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

*Civil liability*

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

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

**1021H Offences if a Product Disclosure Statement (or Supplementary PDS) does not comply with certain requirements**

- (1) A person commits an offence if:
  - (a) the person prepares (or has someone else prepare for them) a Product Disclosure Statement, a Supplementary Product Disclosure Statement or a Replacement Product Disclosure Statement (the *disclosure document*); and
  - (b) the disclosure document does not comply with:
    - (i) if it is a Product Disclosure Statement—section 1013B or 1013G or subsection 942DA(3); or

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- (ii) if it is a Supplementary Product Disclosure Statement—  
section 1013G, 1014B or 1014C; or
  - (iii) if it is a Replacement Product Disclosure Statement—  
subsection 942DA(3), section 1013G or  
subsection 1014K(1), (2) or (3); and
- (c) the person:
- (i) gives (see subsection (3)) another person the disclosure  
document in circumstances in which it is required by a  
provision of this Part to be given to the other person; or
  - (ii) gives (see subsection (3)), or makes available to,  
another person the disclosure document, reckless as to  
whether the other person will or may rely on the  
information in it; or
  - (iii) gives (see subsection (3)), or makes available to,  
another person the disclosure document, reckless as to  
whether the other person, or someone else, will or may  
give it, or make it available, to another person as  
mentioned in subparagraph (i) or (ii).

Note: A defendant bears an evidential burden in relation to the matters in sections 1012D, 1012DAA, 1012DA and 1012E.

- (2) For the purposes of an offence based on subsection (1), strict liability applies to paragraph (b) of that subsection.

Note: For **strict liability**, see section 6.1 of the *Criminal Code*.

- (3) In this section, **give** means give by any means (including orally), and is not limited to giving in accordance with section 1015C.

**1021I Offence of giving disclosure document or statement that has not been prepared by the appropriate person**

- (1) A regulated person commits an offence if:
- (a) the regulated person:
- (i) gives (see subsection (2)) another person a disclosure  
document or statement (not being information required  
by paragraph 1012G(3)(a)) in circumstances in which it

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is required by a provision of this Part to be given to the other person; or

- (ii) gives (see subsection (2)), or makes available to, another person a disclosure document or statement (not being information required by paragraph 1012G(3)(a)), reckless as to whether the other person will or may rely on the information in it; and

- (b) the disclosure document or statement has not been prepared by, or on behalf of, the person required by section 1013A to prepare it.

Note: A defendant bears an evidential burden in relation to the matters in sections 1012D, 1012DAA, 1012DA and 1012E.

- (2) In this section, *give* means give by any means (including orally), and is not limited to giving in accordance with section 1015C.

**1021J Offences if preparer etc. of disclosure document or statement becomes aware that it is defective**

- (1) A person commits an offence if:

- (a) the person prepares (or has someone else prepare for them) a disclosure document or statement (not being information required by paragraph 1012G(3)(a)); and
- (b) the person becomes aware that the disclosure document or statement is defective; and
- (c) the person does not, as soon as practicable, take reasonable steps to ensure that any regulated person to whom the disclosure document or statement has been provided for further distribution is given a direction that satisfies one of more of the following subparagraphs:
  - (i) a direction not to distribute the disclosure document or statement;
  - (ii) if it is a Product Disclosure Statement—a direction not to distribute the Product Disclosure Statement unless it is accompanied by a Supplementary Product Disclosure Statement that corrects the deficiency;

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- (iii) if it is a Product Disclosure Statement or a Supplementary Product Disclosure Statement—a direction not to distribute the Product Disclosure Statement or Supplementary Product Disclosure Statement without first altering it in a way that is specified in the direction, being a way that corrects the deficiency and that complies with section 1015E.
- (2) A regulated person commits an offence if:
  - (a) the person is given a direction referred to in paragraph (1)(c); and
  - (b) the person does not comply with the direction.
- (3) A regulated person commits an offence if:
  - (a) a disclosure document or statement (not being information required by paragraph 1012G(3)(a)) has been provided to the person for distribution; and
  - (b) the person becomes aware that the disclosure document or statement is defective; and
  - (c) the person does not take reasonable steps to notify the person by whom, or on whose behalf, the disclosure document or statement was prepared of the particulars of the deficiency.
- (4) In this section, a reference to **distributing** a disclosure document or statement includes (but is not limited to) giving the document or statement to another person in purported compliance with a requirement of this Part.

**1021K Offence of unauthorised alteration of Product Disclosure Statement (or Supplementary PDS)**

- (1) A person commits an offence if:
  - (a) the person engages in conduct that results in an alteration of a Product Disclosure Statement or a Supplementary Product Disclosure Statement that has been prepared by or on behalf of another person (the **responsible person**); and

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- (b) the alteration results in the Product Disclosure Statement or Supplementary Product Disclosure Statement becoming defective, or more defective than it previously was; and
  - (c) the alteration is not made with the authority of the responsible person; and
  - (d) either:
    - (i) the person, in purported compliance with a provision of this Part, gives (see subsection (2)) the altered Product Disclosure Statement or Supplementary Product Disclosure Statement to another person; or
    - (ii) the person gives (see subsection (2)), or makes available to, another person the altered Product Disclosure Statement or Supplementary Product Disclosure Statement, reckless as to whether the other person will or may rely on the information in it; or
    - (iii) the person gives (see subsection (2)), or makes available to, another person the altered Product Disclosure Statement or Supplementary Product Disclosure Statement, reckless as to whether the other person, or someone else, will or may give it, or make it available, to another person as mentioned in subparagraph (i) or (ii).
- (2) In this section, **give** means give by any means (including orally), and is not limited to giving in accordance with section 1015C.

**1021L Offences of giving, or failing to withdraw, consent to inclusion of defective statement**

- (1) A person commits an offence if:
  - (a) they consent to the inclusion of a statement (the **consented material**) in a Product Disclosure Statement or a Supplementary Product Disclosure Statement as mentioned in paragraph 1013K(1)(a); and
  - (b) either:
    - (i) there is a misleading or deceptive statement in the consented material; or

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- (ii) there is an omission of information from the consented material; and
  - (c) the statement or omission is or would be materially adverse from the point of view of a reasonable person considering whether to proceed to acquire the financial product concerned.
- (2) A person commits an offence if:
- (a) they consent to the inclusion of a statement (the **consented material**) in a Product Disclosure Statement or a Supplementary Product Disclosure Statement as mentioned in paragraph 1013K(1)(a); and
  - (b) they become aware that either:
    - (i) there is a misleading or deceptive statement in the consented material; or
    - (ii) there is an omission of information from the consented material;being a statement, or an omission, that:
    - (iii) is or would be materially adverse from the point of view of a reasonable person considering whether to proceed to acquire the financial product concerned; or
    - (iv) results in the Product Disclosure Statement or the Supplementary Product Disclosure Statement being defective, or more defective than it would otherwise be; and
  - (c) they do not withdraw their consent after becoming aware of the matter mentioned in paragraph (b).

**1021M Offences relating to keeping and providing copies of Product Disclosure Statements (or Supplementary PDSs)**

*Strict liability offence*

- (1) A person commits an offence if:
- (a) the person is required by section 1015D:

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- (i) to notify ASIC that a Product Disclosure Statement or a Supplementary Product Disclosure Statement is in use; or
  - (ii) to keep a copy of a Product Disclosure Statement or a Supplementary Product Disclosure Statement for a particular period; or
  - (iii) to make a copy of a Product Disclosure Statement or a Supplementary Product Disclosure Statement available to ASIC; or
  - (iv) to comply with a request from a person for a copy of a Product Disclosure Statement or a Supplementary Product Disclosure Statement; and
- (b) the person does not comply with that requirement.
- (2) An offence based on subsection (1) is an offence of strict liability.
- Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- Ordinary offence*
- (3) A person commits an offence if:
- (a) the person is required by section 1015D:
    - (i) to notify ASIC that a Product Disclosure Statement or a Supplementary Product Disclosure Statement is in use; or
    - (ii) to keep a copy of a Product Disclosure Statement or a Supplementary Product Disclosure Statement for a particular period; or
    - (iii) to make a copy of a Product Disclosure Statement or a Supplementary Product Disclosure Statement available to ASIC; or
    - (iv) to comply with a request from a person for a copy of a Product Disclosure Statement or a Supplementary Product Disclosure Statement; and
- (b) the person does not comply with that requirement.
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**1021N Offence of failing to provide additional information  
requested under section 1017A**

A person (the *responsible person*) commits an offence if:

- (a) a request is made to them by another person, in accordance with subsection 1017A(1), to provide further information about a financial product; and
- (b) the responsible person is required by subsection 1017A(2) to give the other person the information; and
- (c) the other person has paid any charge in respect of the request, being a charge that is in accordance with subsections 1017A(5) and (6); and
- (d) the responsible person does not take reasonable steps to ensure that, as soon as practicable after receiving the request, and in any event within one month, the information is provided to the other person in accordance with subsection 1017A(4).

**1021NA Offences relating to obligation to make product dashboard  
publicly available**

*Failure to comply with obligation to make product dashboard  
publicly available*

- (1) A person commits an offence if:
  - (a) the person is a trustee of a regulated superannuation fund; and
  - (b) as trustee, the person is required, under section 1017BA, to ensure that a product dashboard for each of the fund's MySuper products and choice products is made publicly available on the fund's website; and
  - (c) a product dashboard for each of the fund's MySuper products and choice products is not made publicly available as required by that section.

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*Offence where information known to be defective*

- (2) A person commits an offence if:
- (a) the person is a trustee of a regulated superannuation fund; and
  - (b) a product dashboard is made publicly available on the fund's website in purported compliance with section 1017BA; and
  - (c) the person knows that:
    - (i) the information set out in the product dashboard has not been updated as required by that section; or
    - (ii) the information set out in the product dashboard is otherwise misleading or deceptive; or
    - (iii) there is an omission from the information set out in the product dashboard.

*Offence whether or not information known to be defective*

- (3) A person commits an offence if:
- (a) the person is a trustee of a regulated superannuation fund; and
  - (b) a product dashboard is made publicly available on the fund's website in purported compliance with section 1017BA; and
  - (c) either:
    - (i) the information set out in the product dashboard has not been updated as required by that section; or
    - (ii) the information set out in the product dashboard is otherwise misleading or deceptive; or
    - (iii) there is an omission from the information set out in the product dashboard.
- (4) For the purposes of an offence based on subsection (3), strict liability applies to the physical element of the offence specified in any of subparagraphs (3)(c)(i) to (iii).

Note: For strict liability, see section 6.1 of the *Criminal Code*.

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*Defences*

- (5) In any proceedings against a trustee of a regulated superannuation fund for an offence based on subparagraph (2)(c)(iii) or (3)(c)(iii), it is a defence if:
- (a) the trustee or another trustee of the fund took reasonable steps to ensure that there would not be an omission from the information set out in the product dashboard; or
  - (b) both of the following apply:
    - (i) the information was omitted because it was not up to date;
    - (ii) the trustee or another trustee of the fund took reasonable steps to obtain up-to-date information; or
  - (c) both of the following apply:
    - (i) the information was omitted because it would have been misleading or deceptive;
    - (ii) the trustee or another trustee of the fund took reasonable steps to obtain information that would not have been misleading or deceptive.

Note: A defendant bears an evidential burden in relation to the matters in subsection (5). See subsection 13.3(3) of the *Criminal Code*.

- (6) In any proceedings against a trustee of a regulated superannuation fund for an offence based on subparagraph (3)(c)(i), it is a defence if the trustee or another trustee of the fund took reasonable steps to ensure that the information set out in the product dashboard was updated as required by section 1017BA.

Note: A defendant bears an evidential burden in relation to the matters in subsection (6). See subsection 13.3(3) of the *Criminal Code*.

- (7) In any proceedings against a trustee of a regulated superannuation fund for an offence based on subparagraph (3)(c)(ii), it is a defence if the trustee or another trustee of the fund took reasonable steps to ensure that the information set out in the product dashboard would not be misleading or deceptive.

Note: A defendant bears an evidential burden in relation to the matters in subsection (7). See subsection 13.3(3) of the *Criminal Code*.

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**1021NB Offences relating to obligation to make superannuation investment information publicly available**

*Failure to comply with obligation to make information publicly available*

- (1) A person commits an offence if:
  - (a) the person is a trustee of a registrable superannuation entity; and
  - (b) as trustee, the person is required, under section 1017BB, to make information publicly available on the entity's website; and
  - (c) the information is not made publicly available as required by that section.

*Offence where information known to be defective*

- (2) A person commits an offence if:
  - (a) the person is a trustee of a registrable superannuation entity; and
  - (b) as trustee, the person is required, under section 1017BB, to make information publicly available; and
  - (c) information is made publicly available in purported compliance with that requirement; and
  - (d) the trustee knows that:
    - (i) the information is misleading or deceptive; or
    - (ii) there is an omission from the information.

*Offence whether or not information known to be defective*

- (3) A person commits an offence if:
  - (a) the person is a trustee of a registrable superannuation entity; and
  - (b) as trustee, the person is required, under section 1017BB, to make information publicly available; and
  - (c) information is made publicly available in purported compliance with that requirement; and

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- (d) either:
- (i) the information is misleading or deceptive; or
  - (ii) there is an omission from the information.
- (4) For the purposes of an offence based on subsection (3), strict liability applies to the physical element of the offence specified in subparagraph (3)(d)(i) or (ii).

Note: For strict liability, see section 6.1 of the *Criminal Code*.

*Defences*

- (5) In any proceedings against a trustee of a registrable superannuation entity for an offence based on subsection (1), it is a defence if the information would have been made publicly available but for the fact that the trustee or another trustee of the entity was unable to obtain the information after taking reasonable steps to do so.

Note: A defendant bears an evidential burden in relation to the matters in subsection (5). See subsection 13.3(3) of the *Criminal Code*.

- (6) In any proceedings against a trustee of a registrable superannuation entity for an offence based on subparagraph (2)(d)(ii) or (3)(d)(ii), it is a defence if:
- (a) there was an omission from the information made publicly available because the trustee or another trustee of the entity was unable to obtain the information after taking reasonable steps to do so; or
  - (b) both of the following apply:
    - (i) the information was omitted because it would have been misleading or deceptive;
    - (ii) the trustee or another trustee of the entity took reasonable steps to obtain information that would not have been misleading or deceptive.

Note: A defendant bears an evidential burden in relation to the matters in subsection (6). See subsection 13.3(3) of the *Criminal Code*.

- (7) In any proceedings against a trustee of a registrable superannuation entity for an offence based on subparagraph (3)(d)(i), it is a

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defence if the trustee or another trustee of the entity took reasonable steps to ensure that the information made publicly available would not be misleading or deceptive.

Note: A defendant bears an evidential burden in relation to the matters in subsection (7). See subsection 13.3(3) of the *Criminal Code*.

**1021O Offences of issuer or seller of financial product failing to pay money into an account as required**

*Strict liability offence*

- (1) An issuer or seller of financial products commits an offence if:
  - (a) the issuer or seller is required by subsection 1017E(2) to pay particular money into an account in accordance with that subsection; and
  - (b) the issuer or seller does not pay the money into an account in accordance with that subsection.
- (2) An offence based on subsection (1) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

*Ordinary offence*

- (3) An issuer or seller of financial products commits an offence if:
  - (a) the issuer or seller is required by subsection 1017E(2) to pay particular money into an account in accordance with that subsection; and
  - (b) the issuer or seller does not pay the money into an account in accordance with that subsection.

**1021P Offences relating to offers to which Division 5A applies**

*Failure to comply with requirements of section 1019E relating to how offers are made*

- (1) A person commits an offence if:
  - (a) the person makes an offer; and

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- (b) the offer is an offer to which Division 5A applies (see section 1019D); and
- (c) in making the offer, the person fails to comply with a requirement of section 1019E.

*Contravening section 1019F by inviting offers to sell*

- (2) A person commits an offence if:
  - (a) the person invites another person to make an offer to sell a financial product; and
  - (b) in making the invitation, the person contravenes section 1019F.

*Failure to comply with requirements of section 1019G relating to duration and withdrawal of offers*

- (3) A person commits an offence if:
  - (a) the person makes an offer; and
  - (b) the offer is an offer to which Division 5A applies (see section 1019D); and
  - (c) any of the following apply:
    - (i) the offer does not remain open for the period required by paragraph 1019G(1)(a);
    - (ii) the offer remains open for longer than is permitted by paragraph 1019G(1)(b);
    - (iii) in purporting to withdraw the offer, the person fails to comply with a requirement of subsection 1019G(2) or (3).

*Failure to comply with requirements of section 1019I relating to price or value*

- (4) A person commits an offence if:
  - (a) the person makes an offer; and
  - (b) the offer is an offer to which Division 5A applies (see section 1019D); and
  - (c) the person gives the offeree an offer document; and

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- (d) either:
  - (i) the offer document does not comply with paragraph 1019I(2)(a), (b) or (c); or
  - (ii) material of a kind referred to in paragraph 1019I(2)(a), (b) or (c) that is included in the offer document is misleading or deceptive.

*Failure to comply with other requirements of section 1019I*

- (5) A person commits an offence if:
  - (a) the person makes an offer; and
  - (b) the offer is an offer to which Division 5A applies (see section 1019D); and
  - (c) the person gives the offeree an offer document; and
  - (d) either:
    - (i) the offer document does not comply with subsection 1019I(1), or paragraph 1019I(2)(d), (e) or (f); or
    - (ii) material of a kind referred to in subsection 1019I(1), or paragraph 1019I(2)(d), (e) or (f), that is included in the offer document is misleading or deceptive.

*Failure to comply with requirements of section 1019J*

- (6) A person commits an offence if:
  - (a) the person makes an offer; and
  - (b) the offer is an offer to which Division 5A applies (see section 1019D); and
  - (c) section 1019J applies because of an increase or decrease in the market value of the financial product to which the offer relates; and
  - (d) one of the following subparagraphs applies:
    - (i) the person fails to comply with subsection 1019J(2) in relation to that increase or decrease; or
    - (ii) the person gives the offeree a supplementary offer document in relation to that increase or decrease, but

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- that document does not comply with subsection 1019J(3); or
- (iii) the person gives the offeree a supplementary offer document in relation to that increase or decrease, but material of a kind referred to in subsection 1019J(3) that is included in that document is misleading or deceptive.

**Subdivision B—Civil liability**

**1022A Meaning of *defective* and *disclosure document or statement***

(1) In this Subdivision:

- defective*, in relation to a disclosure document or statement, means:
- (a) there is a misleading or deceptive statement in the disclosure document or statement; or
  - (b) if it is a Product Disclosure Statement—there is an omission from the Product Disclosure Statement of material required by section 1013C, other than material required by section 1013B or 1013G; or
  - (c) if it is a Supplementary Product Disclosure Statement that is given for the purposes of section 1014E—there is an omission from the Supplementary Product Disclosure Statement of material required by that section; or
  - (d) if it is information required by paragraph 1012G(3)(a)—there is an omission from the information of material required by that paragraph; or
  - (e) if it is an offer document of a kind referred to in section 1019E—there is an omission from the document of material required by section 1019I; or
  - (f) if it is a supplementary offer document of a kind referred to in section 1019J—there is an omission from the document of material required by subsection 1019J(3).

Note: In determining whether a Product Disclosure Statement is defective, the effect of section 1014D must be taken into account (section 1014D takes information and statements in a Supplementary Product

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Disclosure Statement to be included in the Product Disclosure Statement it supplements).

***disclosure document or statement*** means:

- (a) a Product Disclosure Statement; or
- (b) a Supplementary Product Disclosure Statement; or
- (c) information required by paragraph 1012G(3)(a); or
- (d) an offer document of a kind referred to in section 1019E; or
- (e) a supplementary offer document of a kind referred to in section 1019J.

(1A) For the avoidance of doubt, if section 1012J (information must be up to date) is not complied with in relation to a Product Disclosure Statement, then, for the purposes of the definition of ***defective*** in subsection (1):

- (a) if the circumstance constituting the non-compliance is that particular information included in the Product Disclosure Statement is not as up to date as section 1012J requires it to be—the information so included constitutes a misleading statement in the Product Disclosure Statement; and
- (b) if the circumstance constituting the non-compliance is a failure to include particular information that was not previously required to be included in the Product Disclosure Statement—the failure to include the information constitutes an omission from the Statement of material required by section 1013C.

Note: The effect of section 1014D (information in a Supplementary Product Disclosure Statement is taken to be contained in the Product Disclosure Statement it supplements) must be taken into account in determining whether section 1012J is complied with in relation to a Product Disclosure Statement.

(2) In this Subdivision, a reference (including in the definitions in subsection (1)) to a document or statement, or to information, of a kind referred to in a paragraph of the definition of ***disclosure document or statement*** in subsection (1) includes a reference to something purporting to be a document or statement, or to be information, of that kind.

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**1022B Civil action for loss or damage**

- (1) This section applies in the following situations:
- (a) a person:
    - (i) is required by a provision of this Part to give another person (the *client*) a Product Disclosure Statement or a Supplementary Product Disclosure Statement (the *required disclosure document or statement*); and
    - (ii) does not give (in accordance with section 1015C) the client anything purporting to be the required disclosure document or statement by the time they are required to do so; or
  - (aa) a person makes an offer to which Division 5A applies (see section 1019D) to another person (the *client*) otherwise than by sending the client an offer document in accordance with section 1019E; or
  - (ab) a person makes an invitation prohibited by section 1019F to another person (the *client*); or
  - (ac) a person:
    - (i) is required by subsection 1019J(2), in relation to an offer made to another person (the *client*), to send the client a withdrawal document or a supplementary offer document; and
    - (ii) does not send (in accordance with paragraphs 1019E(1)(a) and (b)) the client anything purporting to be either of those things by the time they are required to do so; or
  - (b) a person:
    - (i) is required by paragraph 1012G(3)(a) to orally communicate information (the *required disclosure document or statement*) to another person (the *client*); and
    - (ii) does not orally communicate to the other person anything purporting to be the information required by that paragraph by the time they are required to do so; or

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- (c) a person:
  - (i) gives another person (the *client*) a disclosure document or statement (other than an offer document of a kind referred to in section 1019E or a supplementary offer document of a kind referred to in section 1019J) that is defective in circumstances in which a disclosure document or statement is required by a provision of this Part to be given to the client; or
    - (ia) makes an offer to which Division 5A applies (see section 1019D) by sending another person (the *client*) an offer document in accordance with section 1019E, but that offer document is defective; or
      - (ib) in a situation to which section 1019J applies, sends a person (the *client*) a supplementary offer document in accordance with that section but that supplementary offer document is defective; or
    - (ii) is a regulated person and gives, or makes available to, another person (the *client*) a disclosure document or statement, being a Product Disclosure Statement or a Supplementary Product Disclosure Statement, that is defective, reckless as to whether the client will or may rely on the information in it; or
- (d) a person:
  - (i) gives consent to the inclusion of a statement in a Product Disclosure Statement or a Supplementary Product Disclosure Statement as mentioned in subsection 1021L(1), disregarding paragraph 1021L(1)(c); or
    - (ii) does not take reasonable steps to withdraw such a statement as mentioned in subsection 1021L(2), disregarding subparagraphs 1021L(2)(b)(iii) and (iv); or
- (e) a person contravenes section 1017B or 1017D; or
- (f) a person is required by section 1017BA to make information publicly available on a regulated superannuation fund's website and any of the following circumstances apply:

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- (i) the information is not made publicly available as required by that section;
  - (ii) the information made publicly available is not updated as required by that section;
  - (iii) the information made publicly available is misleading or deceptive;
  - (iv) there is an omission from the information made publicly available; or
- (g) a person is required by section 1017BB to make information publicly available on a registrable superannuation entity's website and any of the following circumstances apply:
- (i) the information is not made publicly available as required by that section;
  - (ii) the information made publicly available is misleading or deceptive;
  - (iii) there is an omission from the information made publicly available.

In paragraph (c), *give* means give by any means (including orally), and is not limited to giving in accordance with section 1015C or paragraph 1012G(3)(a).

- (2) In a situation to which this section applies, if a person suffers loss or damage:
- (a) if paragraph (1)(a) applies—because the client was not given the disclosure document or statement that they should have been given; or
  - (aa) if paragraph (1)(aa) applies—because the client was not sent an offer document in accordance with section 1019E; or
  - (ab) if paragraph (1)(ab) applies—because the client received an invitation prohibited by section 1019F rather than being sent an offer document in accordance with section 1019E; or
  - (ac) if paragraph (1)(ac) applies—because the client was not sent a withdrawal document or a supplementary offer document as required by subsection 1019J(2); or

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- (b) if paragraph (1)(b) applies—because the information required by paragraph 1012G(3)(a) was not communicated to the client; or
- (c) if paragraph (1)(c) applies—because the disclosure document or statement the client was given or sent was defective; or
- (d) if paragraph (1)(d) applies—because the consent referred to in that paragraph was given, or was not withdrawn, as the case requires; or
- (e) if paragraph (1)(e) applies—because of the contravention referred to in that paragraph; or
- (f) if paragraph (1)(f) or (g) apply—because of any of the circumstances mentioned in those paragraphs;

the person may recover the amount of the loss or damage by action against the, or a, liable person (see subsections (3) to (5)), whether or not that person (or anyone else) has been convicted of an offence in respect of the matter referred to in paragraph (a), (aa), (ab), (ac), (b), (c), (d), (e) or (f).

- (3) For the purposes of subsection (2), the, or a, **liable person** is:
  - (a) if paragraph (1)(a), (aa), (ab), (ac) or (b) applies—subject to subsection (4), the person first-referred to in that paragraph; or
  - (aa) if paragraph (1)(c) applies and the disclosure document or statement is information required by paragraph 1012G(3)(a)—subject to subsection (5A), the person first-referred to in paragraph (1)(c) of this section; or
  - (b) if paragraph (1)(c) (other than subparagraph (1)(c)(ia) or (ib)) applies and the disclosure document or statement is not information required by paragraph 1012G(3)(a)—subject to subsection (5):
    - (i) the person by whom, or on whose behalf, the disclosure document or statement was prepared; and
    - (ii) each other person involved in the preparation of the disclosure document or statement who, directly or indirectly, caused the disclosure document or statement to be defective or contributed to it being defective; or

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- (ba) if subparagraph (1)(c)(ia) or (ib) applies—the person who made the offer; or
  - (c) if paragraph (1)(d) applies—the person who gave the consent; or
  - (d) if paragraph (1)(e) applies—the person who contravened the provision concerned; or
  - (e) if paragraph (1)(f) applies—the trustee, or the trustees, of the regulated superannuation fund on whose website the information was required to be made publicly available; or
  - (f) if paragraph (1)(g) applies—the trustee, or the trustees, of the registrable superannuation entity on whose website the information was required to be made publicly available.
- (4) If paragraph (1)(a) or (b) applies, or paragraph (1)(c) applies so far as it relates to information required by paragraph 1012G(3)(a), and the person who would, but for this subsection, be the liable person is an authorised representative, the authorised representative is not the liable person and the following paragraphs apply:
- (a) if the authorised representative is an authorised representative of only one financial services licensee—that financial services licensee is the liable person;
  - (b) if the authorised representative is an authorised representative of more than one financial services licensee:
    - (i) if, under the rules in section 917C, one of those licensees is responsible for the person's conduct—that licensee is the (or a) liable person; or
    - (ii) if, under the rules in section 917C, 2 or more of those licensees are jointly and severally responsible for the person's conduct—each of those licensees is a liable person.
- (4A) For the purposes of paragraph (4)(b):
- (a) section 917C is taken to apply, despite section 917F; and
  - (b) section 917D is taken not to apply.

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(5) If:

- (a) paragraph (1)(c) (other than subparagraph (1)(c)(ia) or (ib)) applies; and
- (b) an alteration was made to the disclosure document or statement (not being information required by paragraph 1012G(3)(a)) before it was given to the client; and
- (c) the alteration made the disclosure document or statement defective, or more defective than it would otherwise have been; and
- (d) the alteration was not made by, or with the authority of, the person who would, but for this subsection, be a liable person because of subparagraph (3)(b)(i);

then, so far as a person has suffered loss or damage because the disclosure document or statement was defective because of the alteration, the person who made the alteration is a liable person, rather than the person referred to in paragraph (d).

(5A) If:

- (a) paragraph (3)(aa) applies; and
- (b) the person referred to in that paragraph is not the issuer, or an authorised representative of the issuer, of the financial product to which the required disclosure document or statement relates; and
- (c) the required disclosure document or statement was defective because of information, or an omission from information, provided to that person (whether in a document or otherwise) by the issuer of the product;

the issuer of the product is the liable person, rather than the person who would otherwise be the liable person because of paragraph (3)(aa) or subsection (4).

(6) An action under subsection (2) may be begun at any time within 6 years after the day on which the cause of action arose.

(7) A person is not liable under subsection (2) in a situation described in paragraph (1)(c) if the person took reasonable steps to ensure that the disclosure document or statement would not be defective.

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- (7A) If subsection (5A) applies, the issuer of the financial product is not liable under subsection (2) if the issuer took reasonable steps to ensure that the information provided as mentioned in paragraph (5A)(c) would not be such as to make the required disclosure document or statement defective.
- (7B) A person is not liable under subsection (2) in a situation described in subparagraph (1)(f)(iii) or (g)(ii) if the person took reasonable steps to ensure that the information would not be misleading or deceptive.
- (7C) A person is not liable under subsection (2) in a situation described in subparagraph (1)(f)(iv) or (g)(iii) if the person took reasonable steps to ensure that there would not be an omission from the information.
- (8) This section does not affect any liability that a person has under any other law.

**1022C Additional powers of court to make orders**

- (1) The court dealing with an action under subsection 1022B(2) may, in addition to awarding loss or damage under that subsection and if it thinks it necessary in order to do justice between the parties:
  - (a) make an order declaring void a contract entered into by the client referred to in that subsection for or relating to a financial product or a financial service; and
  - (b) if it makes an order under paragraph (a)—make such other order or orders as it thinks are necessary or desirable because of that order.
- (2) Without limiting paragraph (1)(b), the orders that may be made under that paragraph include (but are not limited to) an order for the return of money paid by a person, and/or an order for payment of an amount of interest specified in, or calculated in accordance with, the order.

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## **Part 7.9A—Product intervention orders**

### **1023A Object**

The object of this Part is to provide ASIC with powers that it can use proactively to reduce the risk of significant detriment to retail clients resulting from financial products.

### **1023B Meaning of *financial product*—Part 7.9A**

In this Part, *financial product*:

- (a) includes a financial product within the meaning of Division 2 of Part 2 of the ASIC Act; but
- (b) does not include:
  - (i) a financial product issued, or offered for regulated sale, by an exempt body corporate of a State or Territory or by an exempt public authority; or
  - (ii) a financial product specified in regulations made for the purposes of this subparagraph.

### **1023C Application of product intervention orders**

- (1) A product intervention order does not apply to a financial product held by a person if the person acquired, or entered into a contract for the acquisition of, the product before the order comes into force.
- (2) A product intervention order does not apply to a person:
  - (a) in the person's capacity as a retail client; or
  - (b) who is in a class of persons specified in regulations made for the purposes of this paragraph.
- (3) The regulations may provide that this Part does not apply to a financial product specified in the regulations.

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Note: In a prosecution for an offence, the defendant bears an evidential burden in relation to the matters in this section (see subsection 13.3(3) of the *Criminal Code*).

### 1023D ASIC may make product intervention orders

#### *Making product intervention orders*

- (1) Subject to subsection (5), if ASIC is satisfied that a financial product:
  - (a) is, or is likely to be, available for acquisition by issue, or for regulated sale, to persons as retail clients (whether or not it also is, or is likely to be, available for acquisition by persons as wholesale clients); and
  - (b) has resulted in, or will or is likely to result in, significant detriment to retail clients;

ASIC may, in accordance with this Part, order that a specified person must not engage in specified conduct in relation to the product, either entirely or except in accordance with conditions specified in the order.

Note 1: An example of conditions that may be specified in a product intervention order include that the product not be issued to a retail client unless the retail client has received personal advice.

Note 2: Section 1023E specifies matters to be taken into account in considering whether a financial product has resulted in, or will or is likely to result in, significant detriment to retail clients.

Note 3: Section 1023N also provides that product intervention orders may include requirements for notifying retail clients.

- (2) An order under subsection (1) is not a legislative instrument.
- (3) Subject to subsection (5), if ASIC is satisfied that a class of financial products:
  - (a) is, or is likely to be, available for acquisition by issue, or for regulated sale, to persons as retail clients (whether or not it also is, or is likely to be, available for acquisition by persons as wholesale clients); and
  - (b) has resulted in, or will or is likely to result in, significant detriment to retail clients;

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ASIC may, in accordance with this Part and by legislative instrument, order that a person must not engage in specified conduct in relation to the class of products, either entirely or except in accordance with conditions specified in the order.

- Note 1: An example of conditions that may be specified in a product intervention order include that a product in a class of products not be issued to a retail client unless the retail client has received personal advice.
- Note 2: Section 1023E specifies matters to be taken into account in considering whether a financial product has resulted in, or will or is likely to result in, significant detriment to retail clients.
- Note 3: Section 1023N also provides that product intervention orders may include requirements for notifying retail clients.

*Restrictions on product intervention orders*

- (4) A product intervention order must not specify any of the following for subsection (1) or (3):
- (a) a condition that a person satisfy a standard of training, or meet a professional standard, other than a standard otherwise prescribed for the person by or under this Act;
  - (b) a condition that a person who is not required to hold an Australian financial services licence become a member of an external dispute resolution scheme;
  - (c) a condition related to a person's remuneration, other than a condition related to:
    - (i) so much of the person's remuneration as is conditional on the achievement of objectives directly related to the financial product; or
    - (ii) a fee, charge or other consideration paid or payable to the person by a retail client.
- (5) Conduct covered by a product intervention order must be limited to conduct in relation to a retail client.
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**1023E Significant detriment to retail clients**

- (1) In considering whether a financial product has resulted in, or will or is likely to result in, significant detriment to retail clients for the purposes of this Part, the following must be taken into account:
  - (a) the nature and extent of the detriment;
  - (b) without limiting paragraph (a), the actual or potential financial loss to retail clients resulting from the product;
  - (c) the impact that the detriment has had, or will or is likely to have, on retail clients;
  - (d) any other matter prescribed by regulations made for the purposes of this paragraph.
- (2) Subsection (1) does not limit the matters to be taken into account in considering whether a financial product has resulted in, or will or is likely to result in, significant detriment to retail clients for the purposes of this Part.
- (3) A financial product may result in significant detriment to retail clients even if a person has complied with the disclosure requirements in Chapter 6D or this Chapter, and with the person's obligations under Part 7.8A, in relation to the product.

**1023F ASIC to consult before making product intervention orders**

- (1) ASIC must not make a product intervention order unless ASIC has:
  - (a) consulted persons who are reasonably likely to be affected by the proposed order; and
  - (b) if the proposed order will apply to a body that is regulated by APRA—consulted APRA; and
  - (c) complied with any other requirements as to consultation prescribed by regulations made for the purposes of this paragraph.
- (2) Without limiting paragraph (1)(a), ASIC is taken to comply with that paragraph if ASIC, on its website:
  - (a) makes the proposed order, or a description of the content of the proposed order, available; and

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- (b) invites the public to comment on the proposed order.
- (3) A failure to comply with subsection (1) does not invalidate a product intervention order.
- (4) Section 17 of the *Legislation Act 2003* (rule-makers should consult before making legislative instruments) does not apply to the making of a product intervention order.

## **1023G Commencement and duration of product intervention orders**

### *Commencement of product intervention orders*

- (1) A product intervention order comes into force:
  - (a) for an order that is a legislative instrument—on the day after the instrument is registered under the *Legislation Act 2003*; or
  - (b) otherwise—on the day after the notice under subsection 1023L(3) in relation to the order is published; or a later day specified in the order.

### *Duration of product intervention orders*

- (2) A product intervention order remains in force for:
    - (a) 18 months, or any shorter period specified by the regulations; or
    - (b) any shorter period specified in the order.However, if the Court makes an order staying or otherwise affecting the operation or enforcement of a product intervention order, then, in determining when the period referred to in paragraph (a) or (b) ends, disregard the period during which the Court's order has that effect.
  - (3) Subsection (2) does not apply to a product intervention order if a declaration under section 1023H (which relates to extensions of product intervention orders) is in force in relation to the order.
  - (4) Subsection (2) does not prevent the revocation of a product intervention order.
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*Repeal of product intervention orders*

- (5) A product intervention order that is a legislative instrument that ceases to be in force is repealed by force of this subsection.

**1023H Extension of product intervention orders**

- (1) ASIC may, in accordance with an approval under subsection (4), by legislative instrument, declare that a product intervention order that is in force:
  - (a) remains in force until it is revoked; or
  - (b) remains in force for a specified period, unless it is revoked earlier.

Note: A declaration under this subsection has the effect of overriding any provisions in a product intervention order about the duration of the order: see subsection 1023G(3).

- (2) ASIC may make more than one declaration under subsection (1) in relation to a product intervention order that is in force.

*Approval of Minister*

- (3) ASIC may, at any time before the order ceases to be in force, give the Minister a report on whether the declaration should be made.
- (4) After considering the report, the Minister may give an approval in writing for the purposes of subsection (1).

**1023J Amendment of product intervention orders**

- (1) Subject to this section, ASIC may, in writing, amend a product intervention order that is in force.

*Requirements before amending product intervention orders*

- (2) If a declaration under section 1023H is in force in relation to a product intervention order, ASIC must not amend the order without the Minister's approval, given after considering a report from ASIC on whether the amendment should be made.

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- (3) ASIC may, at any time before the order ceases to be in force, give the Minister a report on whether the amendment should be made.

*Amendments of product intervention orders*

- (4) An amendment of a product intervention order must not be such that the order remains in force for a period longer than the maximum period determined for the order in accordance with subsection 1023G(2) or 1023H(1).
- (5) An amendment of a product intervention order comes into force:
  - (a) for an amendment of an order that is a legislative instrument—on the day after the amendment is registered under the *Legislation Act 2003*; or
  - (b) otherwise—on the day after the day on which the notice under subsection 1023L(6) in relation to the amendment is published;or a later day specified in the amendment.

*Amendments of orders that are legislative instruments*

- (6) An amendment of a product intervention order that is a legislative instrument must be by legislative instrument.

## 1023K Revocation of product intervention orders

- (1) Subject to this section, ASIC may, in writing, revoke a product intervention order.

*Requirements for revocation of product intervention orders*

- (2) If a declaration under section 1023H is in force in relation to a product intervention order, ASIC must not revoke the order without the Minister's approval, given after considering a report from ASIC on whether the order should be revoked.
- (3) ASIC may, at any time before the order ceases to be in force, give the Minister a report on whether the order should be revoked.

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*Revocation of orders that are legislative instruments*

- (4) A revocation of a product intervention order that is a legislative instrument must be by legislative instrument.

**1023L ASIC to issue public notice of product intervention orders**

*Product intervention orders*

- (1) ASIC must serve a copy of a product intervention order that is not a legislative instrument on any person to whom ASIC considers the order applies. Failure to comply with this subsection does not invalidate the order.

- (2) ASIC must publish each product intervention order, as in force for the time being, on its website.

Note: The *Legislation Act 2003* requires legislative instruments to be registered on the Federal Register of Legislation and provides for compilations of legislative instruments.

- (3) ASIC must also publish on its website, with the product intervention order, a notice that:

- (a) describes the significant detriment to retail clients that has resulted from, or will or is likely to result from, the financial product or class of financial products to which the order relates, and sets out why the order is an appropriate way of reducing the detriment; and
  - (b) describes the consultation that ASIC undertook in relation to the order; and
  - (c) if the order comes into force after it is published—specifies the day it comes into force.

- (4) ASIC must publish on its website, with the product intervention order, each declaration under section 1023H (which relates to extensions of product intervention orders) that relates to the order.

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### *Amendments of product intervention orders*

- (5) ASIC must serve a copy of the instrument amending a product intervention order that is not a legislative instrument on any person to whom ASIC considers the order applies. Failure to comply with this subsection does not invalidate the order.
- (6) ASIC must publish on its website, with the product intervention order, each amendment of the product intervention order.
- (7) ASIC must also publish on its website, with the amendment, a notice that:
  - (a) sets out why the amendment is appropriate; and
  - (b) describes the consultation that ASIC undertook in relation to the amendment; and
  - (c) if the day the amendment is to take effect is later than the day after the day of publication of the amendment—specifies the day the amendment is to take effect.

### *Revocation of product intervention orders*

- (8) If a product intervention order is revoked, ASIC must publish notice of the revocation on its website.

## **1023M Remaking product intervention orders**

If a product intervention order ceases to be in force or is revoked, ASIC must not remake the order, or make an order in substantially the same terms, unless:

- (a) ASIC is satisfied the circumstances have materially changed since the order was made; or
- (b) the Minister approves, in writing, the remaking or making of the order.

## **1023N Product intervention orders may require notification**

- (1) A product intervention order in relation to a financial product may:
  - (a) require that a specified person who has:

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- (i) dealt in, or dealt in a specified way in, a financial product in relation to a retail client; or
  - (ii) provided financial product advice, or a specified kind of financial product advice, to a retail client in relation to a financial product;
    - take reasonable steps to notify the retail client:
    - (iii) of the terms of the order; and
    - (iv) of any other matter specified in regulations made for the purposes of this subparagraph; and
  - (b) specify requirements in relation to giving those notifications (including requirements as to the periods within which to give those notifications).
- (2) In this section, ***dealing*** in a financial product has the meaning given by subsection 994A(1).

**1023P Enforcement of product intervention orders**

- (1) A person must not engage in conduct contrary to a product intervention order that is in force in relation to the person.

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

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

- (2) A person who is required by a product intervention order to take reasonable steps to notify a retail client must comply with the requirement.

Note 1: For this requirement, see subsection 1023N(1).

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

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

- (3) Subsections (1) and (2) do not apply if:

## Section 1023Q

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- (a) the product intervention order is not a legislative instrument; and
- (b) the person was not aware, and could not reasonably have been aware, of the order.

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

- (4) If a product intervention order has been served on a person, the person must take all reasonable steps as soon as practicable to ensure that other persons who engage in conduct to which the order applies are aware of the order.

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

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

## 1023Q Civil liability

- (1) If:

- (a) a person (the *first person*) contravenes a product intervention order; and
  - (b) a retail client suffers loss or damage because of the contravention;
- the retail client may recover the amount of the loss or damage by action against the first person, whether or not:
- (c) the first person (or anyone else) has been convicted of an offence in relation to the contravention; or
  - (d) a Court has made a declaration of contravention under subsection 1317E(1) in relation to the contravention; or
  - (e) a Court has ordered the first person (or anyone else) to pay the Commonwealth a pecuniary penalty under section 1317G in relation to the contravention.

- (2) An action under subsection (1) may be begun at any time within 6 years after the day on which the cause of action arose.
-

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- (3) This section does not affect any liability that a person has under any other law.

**1023R Additional powers of court to make orders**

- (1) The Court dealing with an action under subsection 1023Q(1) may, in addition to awarding loss or damage under that subsection and if it thinks it necessary in order to do justice between the parties:
  - (a) make an order declaring void a contract relating to the financial product that was entered into by the retail client who suffered the loss or damage; and
  - (b) if it makes an order under paragraph (a)—make such other order or orders as it thinks are necessary or desirable because of that order.
- (2) Without limiting paragraph (1)(b), an order under that paragraph may include either or both of the following:
  - (a) an order for the return of money paid by a person;
  - (b) an order for payment of an amount of interest specified in, or calculated in accordance with, the order.

**1023S Avoidance schemes—prohibition**

*General prohibition*

- (1) A person must not, either alone or with others, engage in any of the following conduct:
  - (a) enter into a scheme;
  - (b) begin to carry out a scheme;
  - (c) carry out a scheme;if, having regard to any matters as required under subsection (8), it would be reasonable to conclude that the purpose, or one of the purposes, of the person engaging in that conduct was to avoid the application of a credit product intervention order.

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

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*Constitutional corporations*

- (2) A constitutional corporation must not, either alone or with others, engage in any of the following conduct:

- (a) enter into a scheme;
- (b) begin to carry out a scheme;
- (c) carry out a scheme;

if, having regard to any matters as required under subsection (8), it would be reasonable to conclude that the purpose, or one of the purposes, of the constitutional corporation engaging in that conduct was to avoid the application of a credit product intervention order.

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

*Constitutional trade and commerce*

- (3) A person must not in the course of constitutional trade and commerce, either alone or with others, engage in any of the following conduct:

- (a) enter into a scheme;
- (b) begin to carry out a scheme;
- (c) carry out a scheme;

if, having regard to any matters as required under subsection (8), it would be reasonable to conclude that the purpose, or one of the purposes, of the person engaging in that conduct was to avoid the application of a credit product intervention order.

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

*Use of communications service*

- (4) A person must not use postal, telegraphic, telephonic or other like services (within the meaning of paragraph 51(v) of the Constitution), either alone or with others, in order to engage in any of the following conduct:

- (a) enter into a scheme;

**Section 1023S**

- (b) begin to carry out a scheme;
- (c) carry out a scheme;

if, having regard to any matters as required under subsection (8), it would be reasonable to conclude that the purpose, or one of the purposes, of the person engaging in that conduct was to avoid the application of a credit product intervention order.

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

*Prohibitions independent of each other*

- (5) To avoid doubt, subsections (1), (2), (3) and (4) are independent from and do not limit each other.
- (6) If conduct constitutes a contravention of 2 or more subsections of this section, proceedings may be started against a person in relation to the contravention of any one or more of those subsections.
- (7) However, the person is not liable to more than one pecuniary penalty in relation to the same conduct.

*Matters to which regard must be had*

- (8) In determining, for the purposes of subsection (1), (2), (3) or (4), whether it would be reasonable to conclude that a purpose of a person entering into or carrying out (to any extent) a scheme was to avoid the application of a credit product intervention order, regard must be had to any matters prescribed by the regulations.
- (9) Subsection (8) does not limit the matters to which regard may be had in making a determination described in that subsection.

*Offence*

- (10) A person commits an offence if:
  - (a) the person is subject to a requirement under subsection (1), (2), (3) or (4); and
  - (b) the person engages in conduct; and

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- (c) the conduct contravenes the requirement.

*Definitions*

- (11) In this section:

**constitutional corporation** means a corporation to which paragraph 51(xx) of the Constitution applies.

**constitutional trade and commerce** means trade and commerce:

- (a) between Australia and places outside Australia; or
- (b) between the States; or
- (c) between a State and a Territory; or
- (d) between 2 Territories; or
- (e) within a Territory.

**credit product intervention order** means a product intervention order made in relation to a financial product of the kind covered by paragraph 12BAA(7)(k) of the *Australian Securities and Investments Commission Act 2001* (which is about credit facilities).

**scheme** means:

- (a) any agreement, arrangement, understanding, promise or undertaking, whether express or implied; or
- (b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise; or
- (c) any combination of 2 or more things that are schemes because of paragraph (a) or (b).

**1023T Avoidance schemes—presumption of avoidance for certain schemes in civil cases**

- (1) For the purposes of subsection 1023S(1), (2), (3) or (4), it is reasonable to conclude, unless the contrary is proved, that a person entered into or carried out a scheme for the purpose of avoiding a credit product intervention order (within the meaning of subsection 1023S(11)) if:
- (a) the scheme is of a kind prescribed by the regulations; or
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- (b) the scheme is of a kind determined by ASIC under subsection (3).
- (2) In proving the contrary for the purposes of subsection (1), regard must be had to any matters as required under subsection 1023S(8).
- (3) ASIC may, by legislative instrument, determine a scheme, or a class of schemes, for the purposes of paragraph (1)(b).
- (4) This section does not have effect for the purposes of determining whether a person has committed an offence against subsection 1023S(10).

**1023U Avoidance schemes—exemption by ASIC**

- (1) ASIC may, by legislative instrument, exempt a scheme, or class of schemes, from all or specified provisions of section 1023S.
- (2) The exemption may apply subject to any specific conditions imposed by ASIC.

**Chapter 7** Financial services and markets

**Part 7.10** Market misconduct and other prohibited conduct relating to financial products and financial services

**Division 1** Preliminary

**Section 1040A**

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**Part 7.10—Market misconduct and other prohibited conduct relating to financial products and financial services**

**Division 1—Preliminary**

**1040A Content of Part**

This Part deals in Division 2 with various kinds of prohibited conduct, other than insider trading. The insider trading prohibitions are contained in Division 3.

**1040B Treat certain instruments as if they were financial products and Division 3 financial products**

- (1) This Part applies to bank accepted bills, and to negotiable certificates of deposit, as if they were:
  - (a) financial products; and
  - (b) Division 3 financial products.
- (2) If a term used in this Part is defined outside of this Part by reference to financial products, treat that term when used in this Part as if that reference to financial products included a reference to each of the following:
  - (a) bank accepted bills;
  - (b) negotiable certificates of deposit.
- (3) Subsections (1) and (2) do not, by implication, affect the interpretation of any other provision:
  - (a) of this Act; or
  - (b) of an instrument made under this Act.

Section 1041A

## **Division 2—The prohibited conduct (other than insider trading prohibitions)**

### **1041A Market manipulation**

A person must not take part in, or carry out (whether directly or indirectly and whether in this jurisdiction or elsewhere):

- (a) a transaction that has or is likely to have; or
- (b) 2 or more transactions that have or are likely to have; the effect of:
- (c) creating an artificial price for trading in financial products on a financial market operated in this jurisdiction; or
- (d) maintaining at a level that is artificial (whether or not it was previously artificial) a price for trading in financial products on a financial market operated in this jurisdiction.

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

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

### **1041B False trading and market rigging—creating a false or misleading appearance of active trading etc.**

- (1) A person must not do, or omit to do, an act (whether in this jurisdiction or elsewhere) if that act or omission has or is likely to have the effect of creating, or causing the creation of, a false or misleading appearance:
  - (a) of active trading in financial products on a financial market operated in this jurisdiction; or
  - (b) with respect to the market for, or the price for trading in, financial products on a financial market operated in this jurisdiction.

**Chapter 7** Financial services and markets

**Part 7.10** Market misconduct and other prohibited conduct relating to financial products and financial services

**Division 2** The prohibited conduct (other than insider trading prohibitions)

**Section 1041B**

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Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see Division 4.

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see Division 4 and section 1317S.

(1A) For the purposes of the application of the *Criminal Code* in relation to an offence based on subsection (1):

- (a) intention is the fault element for the physical element consisting of doing or omitting to do an act as mentioned in that subsection; and
- (b) recklessness is the fault element for the physical element consisting of having, or being likely to have, the effect of creating, or causing the creation of, a false or misleading appearance as mentioned in that subsection.

Note 1: For *intention*, see section 5.2 of the *Criminal Code*.

Note 2: For *recklessness*, see section 5.4 of the *Criminal Code*.

(2) For the purposes of subsection (1), a person is taken to have created a false or misleading appearance of active trading in particular financial products on a financial market if the person:

- (a) enters into, or carries out, either directly or indirectly, any transaction of acquisition or disposal of any of those financial products that does not involve any change in the beneficial ownership of the products; or
- (b) makes an offer (the *regulated offer*) to acquire or to dispose of any of those financial products in the following circumstances:
  - (i) the offer is to acquire or to dispose of at a specified price; and
  - (ii) the person has made or proposes to make, or knows that an associate of the person has made or proposes to make:
    - (A) if the regulated offer is an offer to acquire—an offer to dispose of; or

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(B) if the regulated offer is an offer to dispose of—  
an offer to acquire;

the same number, or substantially the same number, of  
those financial products at a price that is substantially  
the same as the price referred to in subparagraph (i).

Note: The circumstances in which a person creates a false or misleading appearance of active trading in particular financial products on a financial market are not limited to the circumstances set out in this subsection.

- (3) For the purposes of paragraph (2)(a), an acquisition or disposal of financial products does not involve a change in the beneficial ownership if:
  - (a) a person who had an interest in the financial products before the acquisition or disposal; or
  - (b) an associate of such a person;  
has an interest in the financial products after the acquisition or disposal.
- (4) The reference in paragraph (2)(a) to a transaction of acquisition or disposal of financial products includes:
  - (a) a reference to the making of an offer to acquire or dispose of financial products; and
  - (b) a reference to the making of an invitation, however expressed, that expressly or impliedly invites a person to offer to acquire or dispose of financial products.

**1041C False trading and market rigging—artificially maintaining etc. trading price**

- (1) A person must not (whether in this jurisdiction or elsewhere) enter into, or engage in, a fictitious or artificial transaction or device if that transaction or device results in:
  - (a) the price for trading in financial products on a financial market operated in this jurisdiction being maintained, inflated or depressed; or

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**Section 1041D**

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- (b) fluctuations in the price for trading in financial products on a financial market operated in this jurisdiction.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see Division 4.

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see Division 4 and section 1317S.

- (2) In determining whether a transaction is fictitious or artificial for the purposes of subsection (1), the fact that the transaction is, or was at any time, intended by the parties who entered into it to have effect according to its terms is not conclusive.

**1041D Dissemination of information about illegal transactions**

A person must not (whether in this jurisdiction or elsewhere) circulate or disseminate, or be involved in the circulation or dissemination of, any statement or information to the effect that the price for trading in financial products on a financial market operated in this jurisdiction will, or is likely to, rise or fall, or be maintained, because of a transaction, or other act or thing done, in relation to those financial products, if:

- (a) the transaction, or thing done, constitutes or would constitute a contravention of section 1041A, 1041B, 1041C, 1041E or 1041F; and
- (b) the person, or an associate of the person:
- (i) has entered into such a transaction or done such an act or thing; or
  - (ii) has received, or may receive, directly or indirectly, a consideration or benefit for circulating or disseminating, or authorising the circulation or dissemination of, the statement or information.

Note 1: Failure to comply with this section is an offence (see subsection 1311(1)). For defences to a prosecution based on this section, see Division 4.

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**Section 1041E**

Note 2: This section is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this section, see Division 4 and section 1317S.

**1041E False or misleading statements**

- (1) A person must not (whether in this jurisdiction or elsewhere) make a statement, or disseminate information, if:
  - (a) the statement or information is false in a material particular or is materially misleading; and
  - (b) the statement or information is likely:
    - (i) to induce persons in this jurisdiction to apply for financial products; or
    - (ii) to induce persons in this jurisdiction to dispose of or acquire financial products; or
    - (iii) to have the effect of increasing, reducing, maintaining or stabilising the price for trading in financial products on a financial market operated in this jurisdiction; and
  - (c) when the person makes the statement, or disseminates the information:
    - (i) the person does not care whether the statement or information is true or false; or
    - (ii) the person knows, or ought reasonably to have known, that the statement or information is false in a material particular or is materially misleading.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see Division 4.

Note 2: Failure to comply with this subsection may also lead to civil liability under section 1041I. For relief from liability under that section, see Division 4.

- (2) For the purposes of the application of the *Criminal Code* in relation to an offence based on subsection (1), paragraph (1)(a) is a physical element, the fault element for which is as specified in paragraph (1)(c).

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- (3) For the purposes of an offence based on subsection (1), strict liability applies to subparagraphs (1)(b)(i), (ii) and (iii).

Note: For **strict liability**, see section 6.1 of the *Criminal Code*.

**1041F Inducing persons to deal**

- (1) A person must not, in this jurisdiction, induce another person to deal in financial products:
- (a) by making or publishing a statement, promise or forecast if the person knows, or is reckless as to whether, the statement is misleading, false or deceptive; or
  - (b) by a dishonest concealment of material facts; or
  - (c) by recording or storing information that the person knows to be false or misleading in a material particular or materially misleading if:
    - (i) the information is recorded or stored in, or by means of, a mechanical, electronic or other device; and
    - (ii) when the information was so recorded or stored, the person had reasonable grounds for expecting that it would be available to the other person, or a class of persons that includes the other person.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see Division 4.

Note 2: Failure to comply with this subsection may also lead to civil liability under section 1041I. For relief from liability under that section, see Division 4.

- (3) This section applies in relation to the following conduct as if that conduct were dealing in financial products:
- (a) applying to become a standard employer-sponsor of a superannuation entity;
  - (b) permitting a person to become a standard employer-sponsor of a superannuation entity;
  - (c) applying, on behalf of an employee (within the meaning of the *Retirement Savings Accounts Act 1997*), for the employee to become the holder of an RSA.
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Section 1041G

**1041G Dishonest conduct**

A person must not, in the course of carrying on a financial services business in this jurisdiction, engage in dishonest conduct in relation to a financial product or financial service.

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

Note 2: Failure to comply with this subsection may also lead to civil liability under section 1041I.

**1041H Misleading or deceptive conduct (civil liability only)**

- (1) A person must not, in this jurisdiction, engage in conduct, in relation to a financial product or a financial service, that is misleading or deceptive or is likely to mislead or deceive.

Note 1: Failure to comply with this subsection is not an offence.

Note 2: Failure to comply with this subsection may lead to civil liability under section 1041I. For limits on, and relief from, liability under that section, see Division 4.

- (2) The reference in subsection (1) to engaging in conduct in relation to a financial product includes (but is not limited to) any of the following:

- (a) dealing in a financial product;
- (b) without limiting paragraph (a):
  - (i) issuing a financial product;
  - (ii) publishing a notice in relation to a financial product;
  - (iii) making, or making an evaluation of, an offer under a takeover bid or a recommendation relating to such an offer;
  - (iv) applying to become a standard employer-sponsor of a superannuation entity;
  - (v) permitting a person to become a standard employer-sponsor of a superannuation entity;
  - (vi) a trustee of a superannuation entity dealing with a beneficiary of that entity as such a beneficiary;

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- (vii) a trustee of a superannuation entity dealing with an employer-sponsor or an associate (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of an employer-sponsor, of that entity as such an employer-sponsor or associate;
- (viii) applying, on behalf of an employee (within the meaning of the *Retirement Savings Accounts Act 1997*), for the employee to become the holder of an RSA;
- (ix) an RSA provider dealing with an employer (within the meaning of the *Retirement Savings Accounts Act 1997*), or an associate (within the meaning of that Act) of an employer, who makes an application, on behalf of an employee (within the meaning of that Act) of the employer, for the employee to become the holder of an RSA, as such an employer;
- (x) carrying on negotiations, or making arrangements, or doing any other act, preparatory to, or in any way related to, an activity covered by any of subparagraphs (i) to (ix).

(3) If a person engages in conduct:

- (a) that contravenes:
  - (i) section 670A (misleading or deceptive takeover document); or
  - (ii) section 728 (misleading or deceptive fundraising document); or
  - (iia) section 738Y (other liabilities relating to defective CSF offer documents); or
  - (iii) section 1021NA or 1021NB; or
- (b) in relation to a disclosure document or statement within the meaning of section 953A; or
- (c) in relation to a disclosure document or statement within the meaning of section 1022A;

the person's engaging in that conduct does not contravene subsection (1) of this section.

(4) If a disclosing entity engages in conduct that:

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- (a) does not contravene subsection 674A(2), but would contravene that subsection if paragraph 674A(2)(d) contained the same text as paragraph 674(2)(d); or
  - (b) does not contravene subsection 675A(2), but would contravene that subsection if paragraph 675A(2)(b) contained the same text as paragraph 675(2)(b); or
- the disclosing entity's engaging in that conduct does not contravene subsection (1) of this section.

Note: The subsections mentioned in paragraphs (a) and (b) deal with continuous disclosure of information by disclosing entities.

- (5) For the purposes of subsections (3) and (4), a person or disclosing entity engages in conduct that contravenes a provision even if engaging in the conduct does not constitute an offence, or lead to a liability, because of the availability of a defence.

**1041I Civil action for loss or damage for contravention of sections 1041E to 1041H**

- (1) A person who suffers loss or damage by conduct of another person that was engaged in contravention of section 1041E, 1041F, 1041G or 1041H may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention, whether or not that other person or any person involved in the contravention has been convicted of an offence in respect of the contravention.

- (1A) Subsection (1) has effect subject to section 1044B.

Note: Section 1044B may limit the amount that the person may recover for a contravention of section 1041H (Misleading or deceptive conduct) from the other person or from another person involved in the contravention.

- (1B) Despite subsection (1), if:

- (a) a person (the *claimant*) makes a claim under subsection (1) in relation to:
  - (i) economic loss; or
  - (ii) damage to property;

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caused by conduct of another person (the *defendant*) that was done in contravention of section 1041H; and

- (b) the claimant suffered the loss or damage:
  - (i) as a result partly of the claimant's failure to take reasonable care; and
  - (ii) as a result partly of the conduct referred to in paragraph (a); and
- (c) the defendant:
  - (i) did not intend to cause the loss or damage; and
  - (ii) did not fraudulently cause the loss or damage;

the damages that the claimant may recover in relation to the loss or damage are to be reduced to the extent to which the court thinks just and equitable having regard to the claimant's share in the responsibility for the loss or damage.

Note: Division 2A also applies proportionate liability to a claim for damages under this section for a contravention of section 1041H.

- (2) An action under subsection (1) may be begun at any time within 6 years after the day on which the cause of action arose.
- (3) This section does not affect any liability that a person has under any other law.
- (4) Section 1317S (which provides for relief from liability) applies in relation to liability under subsection (1) as if:
  - (a) the sections referred to in subsection (1) were civil penalty provisions; and
  - (b) proceedings under subsection (1) were eligible proceedings.

Note: Relief from liability under this section may also be available (depending on the circumstances) under Division 4.

**1041J Sections of this Division have effect independently of each other**

Subject to any express provision to the contrary, the various sections in this Division have effect independently of each other,

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**Section 1041K**

and nothing in any of the sections limits the scope or application of any of the other sections.

**1041K Division applies to certain conduct to the exclusion of State Fair Trading Acts provisions**

- (1) This section applies to conduct:
  - (a) that contravenes:
    - (i) section 670A (misleading or deceptive takeover document); or
    - (ii) section 728 (misleading or deceptive fundraising document); or
    - (iia) section 738Y (other liabilities relating to defective CSF offer documents); or
    - (iii) section 1021NA or 1021NB; or
  - (b) that relates to a disclosure document or statement within the meaning of section 953A; or
  - (c) that relates to a disclosure document or statement within the meaning of section 1022A.

For this purpose, conduct contravenes the provision even if the conduct does not constitute an offence, or does not lead to any liability, because of the availability of a defence.

- (2) This Division operates in relation to conduct to which this section applies to the exclusion of the provisions of the State Fair Trading Act of any State or Territory.

**Section 1041L**

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**Division 2A—Proportionate liability for misleading and deceptive conduct**

**1041L Application of Division**

- (1) This Division applies to a claim (an *apportionable claim*) if the claim is a claim for damages made under section 1041I for:
  - (a) economic loss; or
  - (b) damage to property;caused by conduct that was done in a contravention of section 1041H.
- (2) For the purposes of this Division, there is a single apportionable claim in proceedings in respect of the same loss or damage even if the claim for the loss or damage is based on more than one cause of action (whether or not of the same or a different kind).
- (3) In this Division, a *concurrent wrongdoer*, in relation to a claim, is a person who is one of 2 or more persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the claim.
- (4) For the purposes of this Division, apportionable claims are limited to those claims specified in subsection (1).
- (5) For the purposes of this Division, it does not matter that a concurrent wrongdoer is insolvent, is being wound up or has ceased to exist or died.

**1041M Certain concurrent wrongdoers not to have benefit of apportionment**

- (1) Nothing in this Division operates to exclude the liability of a concurrent wrongdoer (an *excluded concurrent wrongdoer*) in proceedings involving an apportionable claim if:
  - (a) the concurrent wrongdoer intended to cause the economic loss or damage to property that is the subject of the claim; or

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- (b) the concurrent wrongdoer fraudulently caused the economic loss or damage to property that is the subject of the claim.
- (2) The liability of an excluded concurrent wrongdoer is to be determined in accordance with the legal rules (if any) that (apart from this Division) are relevant.
- (3) The liability of any other concurrent wrongdoer who is not an excluded concurrent wrongdoer is to be determined in accordance with the provisions of this Division.

**1041N Proportionate liability for apportionable claims**

- (1) In any proceedings involving an apportionable claim:
  - (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss; and
  - (b) the court may give judgment against the defendant for not more than that amount.
- (2) If the proceedings involve both an apportionable claim and a claim that is not an apportionable claim:
  - (a) liability for the apportionable claim is to be determined in accordance with the provisions of this Division; and
  - (b) liability for the other claim is to be determined in accordance with the legal rules, if any, that (apart from this Division) are relevant.
- (3) In apportioning responsibility between defendants in the proceedings:
  - (a) the court is to exclude that proportion of the damage or loss in relation to which the plaintiff is contributorily negligent under any relevant law; and
  - (b) the court may have regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceedings.

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- (4) This section applies in proceedings involving an apportionable claim whether or not all concurrent wrongdoers are parties to the proceedings.
- (5) A reference in this Division to a defendant in proceedings includes any person joined as a defendant or other party in the proceedings (except as a plaintiff) whether joined under this Division, under rules of court or otherwise.

**1041O Defendant to notify plaintiff of concurrent wrongdoer of whom defendant aware**

- (1) If:
  - (a) a defendant in proceedings involving an apportionable claim has reasonable grounds to believe that a particular person (**the other person**) may be a concurrent wrongdoer in relation to the claim; and
  - (b) the defendant fails to give the plaintiff, as soon as practicable, written notice of the information that the defendant has about:
    - (i) the identity of the other person; and
    - (ii) the circumstances that may make the other person a concurrent wrongdoer in relation to the claim; and
  - (c) the plaintiff unnecessarily incurs costs in the proceedings because the plaintiff was not aware that the other person may be a concurrent wrongdoer in relation to the claim;

the court hearing the proceedings may order that the defendant pay all or any of those costs of the plaintiff.
- (2) The court may order that the costs to be paid by the defendant be assessed on an indemnity basis or otherwise.

**1041P Contribution not recoverable from defendant**

A defendant against whom judgment is given under this Division as a concurrent wrongdoer in relation to an apportionable claim:

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- (a) cannot be required to contribute to any damages or contribution recovered from another concurrent wrongdoer in respect of the apportionable claim (whether or not the damages or contribution are recovered in the same proceedings in which judgment is given against the defendant); and
- (b) cannot be required to indemnify any such wrongdoer.

**1041Q Subsequent actions**

- (1) In relation to an apportionable claim, nothing in this Division or any other law prevents a plaintiff who has previously recovered judgment against a concurrent wrongdoer for an apportionable part of any damage or loss from bringing another action against any other concurrent wrongdoer for that damage or loss.
- (2) However, in any proceedings in respect of any such action, the plaintiff cannot recover an amount of damages that, having regard to any damages previously recovered by the plaintiff in respect of the damage or loss, would result in the plaintiff receiving compensation for damage or loss that is greater than the damage or loss actually sustained by the plaintiff.

**1041R Joining non-party concurrent wrongdoer in the action**

- (1) The court may give leave for any one or more persons to be joined as defendants in proceedings involving an apportionable claim.
- (2) The court is not to give leave for the joinder of any person who was a party to any previously concluded proceedings in respect of the apportionable claim.

**1041S Application of Division**

Nothing in this Division:

- (a) prevents a person being held vicariously liable for a proportion of an apportionable claim for which another person is liable; or

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- (b) prevents a partner from being held severally liable with another partner for that proportion of an apportionable claim for which the other partner is liable; or
- (c) affects the operation of any other Act to the extent that it imposes several liability on any person in respect of what would otherwise be an apportionable claim.

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## Division 3—The insider trading prohibitions

### Subdivision A—Preliminary

#### 1042A Meaning of some terms relating to the insider trading prohibitions

(1) In this Act:

*Division 3 financial products* means:

- (a) securities; or
- (b) derivatives; or
- (c) interests in a managed investment scheme; or
- (d) debentures, stocks or bonds issued or proposed to be issued by a government; or
- (e) superannuation products, other than those prescribed by regulations made for the purposes of this paragraph; or
- (f) any other financial products that are able to be traded on a financial market.

*inside information* means information in relation to which the following paragraphs are satisfied:

- (a) the information is not generally available;
- (b) if the information were generally available—a reasonable person would expect it to have a material effect on the price or value of particular Division 3 financial products.

*relevant Division 3 financial products*, in relation to particular inside information, means the Division 3 financial products referred to in paragraph (b) of the definition of *inside information* in this subsection.

(2) In this Division:

*information* includes:

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- (a) matters of supposition and other matters that are insufficiently definite to warrant being made known to the public; and
- (b) matters relating to the intentions, or likely intentions, of a person.

**1042B Application of Division**

This Division applies to:

- (a) acts and omissions within this jurisdiction in relation to Division 3 financial products (regardless of where the issuer of the products is formed, resides or located and of where the issuer carries on business); and
- (b) acts and omissions outside this jurisdiction (and whether in Australia or not) in relation to Division 3 financial products issued by:
  - (i) a person who carries on business in this jurisdiction; or
  - (ii) a body corporate that is formed in this jurisdiction.

**1042C Meaning of *generally available***

- (1) For the purposes of this Division, information is *generally available* if:
  - (a) it consists of readily observable matter; or
  - (b) both of the following subparagraphs apply:
    - (i) it has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in Division 3 financial products of a kind whose price might be affected by the information; and
    - (ii) since it was made known, a reasonable period for it to be disseminated among such persons has elapsed; or
  - (c) it consists of deductions, conclusions or inferences made or drawn from either or both of the following:
    - (i) information referred to in paragraph (a);

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- (ii) information made known as mentioned in subparagraph (b)(i).
- (2) None of the paragraphs of subsection (1) limits the generality of any of the other paragraphs of that subsection.

**1042D Meaning of *material effect***

For the purposes of this Division, a reasonable person would be taken to expect information to have a ***material effect*** on the price or value of particular Division 3 financial products if (and only if) the information would, or would be likely to, influence persons who commonly acquire Division 3 financial products in deciding whether or not to acquire or dispose of the first-mentioned financial products.

**1042E Meaning of *able to be traded***

Particular Division 3 financial products that are ordinarily able to be traded on a licensed market are taken, for the purposes of this Division, to be ***able to be traded*** on that market even though trading in those products on that market is suspended by action taken by the market licensee, or is contrary to a direction given to the market licensee by ASIC under subsection 794AA(1), 794D(1), 798J(1) or 798JB(1).

**1042F Meaning of *procure***

- (1) For the purposes of this Division, but without limiting the meaning that the expression ***procure*** has apart from this section, if a person incites, induces, or encourages an act or omission by another person, the first-mentioned person is taken to ***procure*** the act or omission by the other person.
- (2) Subsection (1) does not limit the application in relation to provisions in this Division of:
  - (a) section 6 of the *Crimes Act 1914*; or
  - (b) section 11.1, 11.2, 11.2A, 11.4 or 11.5 of the *Criminal Code*.

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**1042G Information in possession of officer of body corporate**

- (1) For the purposes of this Division:
  - (a) a body corporate is taken to possess any information which an officer of the body corporate possesses and which came into his or her possession in the course of the performance of duties as such an officer; and
  - (b) if an officer of a body corporate knows any matter or thing because he or she is an officer of the body corporate, it is to be presumed that the body corporate knows that matter or thing; and
  - (c) if an officer of a body corporate, in that capacity, is reckless as to a circumstance or result, it is to be presumed that the body corporate is reckless as to that circumstance or result; and
  - (d) for the purposes of paragraph 1043M(2)(b), if an officer of a body corporate ought reasonably to know any matter or thing because he or she is an officer of the body corporate, it is to be presumed that the body corporate ought reasonably to know that matter or thing.
- (2) This section does not limit the application of section 769B in relation to this Division.

**1042H Information in possession of partner or employee of partnership**

- (1) For the purposes of this Division:
  - (a) a member of a partnership is taken to possess any information:
    - (i) which another member of the partnership possesses and which came into the other member's possession in the other member's capacity as a member of the partnership; or
    - (ii) which an employee of the partnership possesses and which came into his or her possession in the course of the performance of duties as such an employee; and

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- (b) if a member or employee of a partnership knows any matter or thing because the member or employee is such a member or employee, it is to be presumed that every member of the partnership knows that matter or thing; and
  - (c) if a member or employee of a partnership, in that capacity, is reckless as to a circumstance or result, it is to be presumed that every member of the partnership is reckless as to that circumstance or result; and
  - (d) for the purposes of paragraph 1043M(2)(b), if a member or employee of a partnership ought reasonably to know any matter or thing because he or she is such a member or employee, it is to be presumed that every member of the partnership ought reasonably to know that matter or thing.
- (2) This section does not limit the application of section 769B in relation to this Division.

### **Subdivision B—The prohibited conduct**

#### **1043A Prohibited conduct by person in possession of inside information**

- (1) Subject to this Subdivision, if:
  - (a) a person (the *insider*) possesses inside information; and
  - (b) the insider knows, or ought reasonably to know, that the matters specified in paragraphs (a) and (b) of the definition of *inside information* in subsection 1042A(1) are satisfied in relation to the information;the insider must not (whether as principal or agent):
  - (c) apply for, acquire, or dispose of, relevant Division 3 financial products, or enter into an agreement to apply for, acquire, or dispose of, relevant Division 3 financial products; or
  - (d) procure another person to apply for, acquire, or dispose of, relevant Division 3 financial products, or enter into an agreement to apply for, acquire, or dispose of, relevant Division 3 financial products.

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Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see section 1043M.

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see sections 1043N and 1317S.

(2) Subject to this Subdivision, if:

- (a) a person (the *insider*) possesses inside information; and
  - (b) the insider knows, or ought reasonably to know, that the matters specified in paragraphs (a) and (b) of the definition of *inside information* in subsection 1042A(1) are satisfied in relation to the information; and
  - (c) relevant Division 3 financial products are able to be traded on a financial market operated in this jurisdiction;
- the insider must not, directly or indirectly, communicate the information, or cause the information to be communicated, to another person if the insider knows, or ought reasonably to know, that the other person would or would be likely to:
- (d) apply for, acquire, or dispose of, relevant Division 3 financial products, or enter into an agreement to apply for, acquire, or dispose of, relevant Division 3 financial products; or
  - (e) procure another person to apply for, acquire, or dispose of, relevant Division 3 financial products, or enter into an agreement to apply for, acquire, or dispose of, relevant Division 3 financial products.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)). For defences to a prosecution based on this subsection, see section 1043M.

Note 2: This subsection is also a civil penalty provision (see section 1317E). For relief from liability to a civil penalty relating to this subsection, see sections 1043N and 1317S.

(3) For the purposes of the application of the *Criminal Code* in relation to an offence based on subsection (1) or (2):

- (a) paragraph (1)(a) is a physical element, the fault element for which is as specified in paragraph (1)(b); and

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- (b) paragraph (2)(a) is a physical element, the fault element for which is as specified in paragraph (2)(b).

**1043B Exception for withdrawal from registered scheme or notified foreign passport fund**

Subsection 1043A(1) does not apply in respect of a member's withdrawal from a registered scheme or a notified foreign passport fund if the amount paid to the member on withdrawal is calculated (so far as is reasonably practicable) by reference to the underlying value of the assets of the financial or business undertaking or scheme, common enterprise, investment contract or time-sharing scheme to which the member's interest relates, less any reasonable charge for acquiring the member's interest.

**1043C Exception for underwriters**

- (1) Subsection 1043A(1) does not apply in respect of:
- (a) applying for or acquiring securities, managed investment products or foreign passport fund products under an underwriting agreement or a sub-underwriting agreement; or
  - (b) entering into an agreement referred to in paragraph (a); or
  - (c) disposing of securities, managed investment products or foreign passport fund products acquired under an agreement referred to in paragraph (a).
- (2) Subsection 1043A(2) does not apply in respect of:
- (a) the communication of information in relation to securities, managed investment products or foreign passport fund products to a person solely for the purpose of procuring the person to enter into an underwriting agreement in relation to any such securities, managed investment products or foreign passport fund products; or
  - (b) the communication of information in relation to securities, managed investment products or foreign passport fund products by a person who may be required under an underwriting agreement to apply for or acquire any such

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securities, managed investment products or foreign passport fund products if the communication is made to another person solely for the purpose of procuring the other person to do either or both of the following:

- (i) enter into a sub-underwriting agreement in relation to any such securities, managed investment products or foreign passport fund products;
- (ii) apply for any such securities, managed investment products or foreign passport fund products.

**1043D Exception for acquisition pursuant to legal requirement**

Subsection 1043A(1) does not apply in respect of the acquisition of financial products pursuant to a requirement imposed by this Act.

**1043E Exception for information communicated pursuant to a legal requirement**

Subsection 1043A(2) does not apply in respect of the communication of information pursuant to a requirement imposed by the Commonwealth, a State, a Territory or any regulatory authority.

**1043F Chinese wall arrangements by bodies corporate**

A body corporate does not contravene subsection 1043A(1) by entering into a transaction or agreement at any time merely because of information in the possession of an officer or employee of the body corporate if:

- (a) the decision to enter into the transaction or agreement was taken on its behalf by a person or persons other than that officer or employee; and
- (b) it had in operation at that time arrangements that could reasonably be expected to ensure that the information was not communicated to the person or persons who made the decision and that no advice with respect to the transaction or

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- agreement was given to that person or any of those persons by a person in possession of the information; and
- (c) the information was not so communicated and no such advice was so given.

**1043G Chinese wall arrangements by partnerships etc.**

- (1) The members of a partnership do not contravene subsection 1043A(1) by entering into a transaction or agreement at any time merely because one or more (but not all) of the members, or an employee or employees of the partnership, are in actual possession of information if:
- (a) the decision to enter into the transaction or agreement was taken on behalf of the partnership by any one or more of the following persons:
- (i) a member or members who are taken to have possessed the information merely because another member or other members, or an employee or employees of the partnership, were in possession of the information;
- (ii) an employee or employees of the partnership who was not or were not in possession of the information; and
- (b) the partnership had in operation at that time arrangements that could reasonably be expected to ensure that the information was not communicated to the person or persons who made the decision and that no advice with respect to the transaction or agreement was given to that person or any of those persons by a person in possession of the information; and
- (c) the information was not so communicated and no such advice was so given.
- (2) A member of a partnership does not contravene subsection 1043A(1) by entering into a transaction or agreement otherwise than on behalf of the partnership merely because the member is taken to possess information that is in the possession of another member or an employee of the partnership.

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**1043H Exception for knowledge of person's own intentions or activities**

A natural person does not contravene subsection 1043A(1) by entering into a transaction or agreement in relation to financial products issued by another person merely because the person is aware that he or she proposes to enter into, or has previously entered into or proposed to enter into, one or more transactions or agreements in relation to financial products issued by the other person or by a third person.

**1043I Exception for bodies corporate**

- (1) A body corporate does not contravene subsection 1043A(1) by entering into a transaction or agreement in relation to financial products issued by another person merely because the body corporate is aware that it proposes to enter into, or has previously entered into or proposed to enter into, one or more transactions or agreements in relation to financial products issued by the other person or by a third person.
- (2) Subject to subsection (3), a body corporate does not contravene subsection 1043A(1) by entering into a transaction or agreement in relation to financial products issued by another person merely because an officer or employee of the body corporate is aware that the body corporate proposes to enter into, or has previously entered into or proposed to enter into, one or more transactions or agreements in relation to financial products issued by the other person or by a third person.
- (3) Subsection (2) does not apply unless the officer or employee of the body corporate became aware of the matters referred to in that subsection in the course of the performance of duties as such an officer or employee.

**1043J Exception for officers or agents of body corporate**

- (1) Subject to subsection (2), a person (the *first person*) does not contravene subsection 1043A(1) by entering into a transaction or
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agreement on behalf of a person (the *second person*) in relation to financial products issued by another person (the *third person*) merely because the first person is aware that the second person proposes to enter into, or has previously entered into or proposed to enter into, one or more transactions or agreements in relation to financial products issued by the third person or by a fourth person.

- (2) Subsection (1) does not apply unless the first person became aware of the matters referred to in that subsection in the course of the performance of duties as an officer or employee of the second person or in the course of acting as an agent of the second person.

**1043K Transactions by holder of financial services licence or a representative of the holder of such a licence**

A person (the *agent*) does not contravene subsection 1043A(1) by applying for, acquiring, or disposing of, or entering into an agreement to apply for, acquire, or dispose of, financial products that are able to be traded on a licensed market if:

- (a) the agent is a financial services licensee or a representative of a financial services licensee; and
- (b) the agent entered into the transaction or agreement concerned on behalf of another person (the *principal*) under a specific instruction by the principal to enter into that transaction or agreement; and
- (c) the licensee had in operation, at the time when that transaction or agreement was entered into, arrangements that could reasonably be expected to ensure that any information in the possession of the licensee, or of any representative of the licensee, as a result of which the person in possession of the information would be prohibited by subsection 1043A(1) from entering into that transaction or agreement was not communicated to the agent and that no advice with respect to the transaction or agreement was given to the principal or to the agent by a person in possession of the information; and
- (d) the information was not so communicated and no such advice was so given; and

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- (e) the principal is not an associate of the licensee or of any representative of the licensee;

but nothing in this section affects the application of subsection 1043A(1) in relation to the principal.

**1043L A specific situation in which a compensation order under section 1317HA may be made**

*Situation to which this section applies*

(1) If:

- (a) a person (the *insider*) possesses information that is not generally available but, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value of Division 3 financial products (other than derivatives); and

- (b) the insider knows that, or is reckless as to whether:
- (i) the information is not generally available; and
  - (ii) if the information were generally available, it might have a material effect on the price or value of those Division 3 financial products; and

- (c) the insider (whether as principal or agent) in contravention of subsection 1043A(1):

- (i) applies for, acquires, or disposes of, or enters into an agreement to apply for, acquire, or dispose of, any such Division 3 financial products; or

- (ii) procures another person to apply for, acquire, or dispose of, or to enter into an agreement to apply for, acquire, or dispose of, any such Division 3 financial products;

the following subsections apply.

*Compensation for damage suffered by person applying for the Division 3 financial products*

- (2) If the insider applied for or agreed to apply for, or procured another person to apply for or to agree to apply for, the Division 3 financial products, the issuer of the products may, by action under
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section 1317HA, recover as compensation for damage suffered by the issuer, the amount (if any) by which the price described in the first of the following paragraphs was less than the price described in the second of those paragraphs:

- (a) the price at which the products were applied for, or agreed to be applied for, by the insider or the other person;
- (b) the price at which they would have been likely to have been disposed of in a disposal made at the time of the application or the time of the agreement, as the case may be, if the information had been generally available.

The action may be taken against the insider, the other person or any other person involved in the contravention.

*Compensation for damage suffered by person disposing of the Division 3 financial products*

- (3) If the insider acquired or agreed to acquire, or procured another person to acquire or to agree to acquire, the Division 3 financial products from a person (in this subsection and subsection (5) called the *disposer*) who did not possess the information, the disposer may, by action under section 1317HA, recover, as compensation for damage suffered by the disposer, the amount (if any) by which the price described in the first of the following paragraphs was less than the price described in the second of those paragraphs:
  - (a) the price at which the financial products were acquired, or agreed to be acquired, by the insider or the other person from the disposer;
  - (b) the price at which they would have been likely to have been acquired in an acquisition made at the time of the first-mentioned acquisition or the time of the agreement, as the case may be, if the information had been generally available.

The action may be taken against the insider, the other person or any other person involved in the contravention.

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*Compensation for damage suffered by person acquiring the Division 3 financial products*

- (4) If the insider disposed of or agreed to dispose of, or procured another person to dispose of or to agree to dispose of, the Division 3 financial products to a person (in this subsection and subsection (5) called the *acquirer*) who did not possess the information, the acquirer may, by action under section 1317HA, recover, as compensation for damage suffered by the acquirer, the amount (if any) by which the price described in the first of the following paragraphs was greater than the price described in the second of those paragraphs:
- (a) the price at which the financial products were disposed of, or agreed to be disposed of, by the insider or the other person to the acquirer;
  - (b) the price at which they would have been likely to have been disposed of in a disposal made at the time of the first-mentioned disposal or the time of the agreement, as the case may be, if the information had been generally available.

The action may be taken against the insider, the other person or any other person involved in the contravention.

*Additional situations in which issuer may recover*

- (5) In addition to any action that may be brought as provided by subsection (3) or (4), the issuer of the financial products may, in the case of an acquisition or disposal of, or an agreement to acquire or dispose of, the financial products by the insider or another person in the circumstances mentioned in that subsection, by action under section 1317HA, recover, as compensation for damage suffered by the issuer:
- (a) in the case of an acquisition or agreement to acquire the financial products—the amount (if any) by which the price described in the first of the following subparagraphs was less than the price described in the second of those subparagraphs:

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- (i) the price at which the financial products were acquired, or agreed to be acquired, by the insider or other person from the disposer;
- (ii) the price at which they were likely to have been acquired in an acquisition made at the time of the first-mentioned acquisition or the time of the agreement, as the case may be, if the information had been generally available; or
- (b) in the case of a disposal or an agreement to dispose of financial products—the amount (if any) by which the price described in the first of the following subparagraphs was greater than the price described in the second of those subparagraphs:
  - (i) the price at which the financial products were disposed of, or agreed to be disposed of, by the insider or other person to the acquirer;
  - (ii) the price at which they would have been likely to have been disposed of at the time of the first-mentioned disposal or the time of the agreement, as the case may be, if the information had been generally available.

The action may be taken against the insider, the other person or any other person involved in the contravention.

*ASIC may take action for benefit of issuer*

- (6) ASIC may, if it considers that it is in the public interest to do so, bring an action in accordance with subsection (2) or (5) in the name of, and for the benefit of, an issuer of Division 3 financial products for the recovery of an amount that the issuer is entitled to recover by virtue of that subsection.

*Relief from liability*

- (7) In an action brought against a person in accordance with this section because the person entered into, or procured another person to enter into, a transaction or agreement at a time when certain information was in the first-mentioned person's possession, the court may relieve the person wholly or partly from liability if it

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appears to the court that the information came into the first-mentioned person's possession solely as a result of the information having been made known as mentioned in subparagraph 1042C(1)(b)(i).

*Special provision for registered schemes and notified foreign passport funds—treatment of amount recovered in respect of subsection (2) loss*

(8) If:

- (a) the responsible entity for a registered scheme or the operator of a notified foreign passport fund; or
- (b) ASIC in the name of, and for the benefit of, the responsible entity for a registered scheme or the operator of a notified foreign passport fund;

brings an action in accordance with subsection (2) in respect of a subscription for, or any agreement to subscribe for, any interests in the scheme or fund, any amount recovered in the action:

- (c) is to be held:

- (i) in the case of a registered scheme other than an Australian passport fund—by the responsible entity; and
- (ii) in the case of an Australian passport fund or a notified foreign passport fund—by the responsible holding party for the fund;

on behalf of the persons who, at the time of the subscription or agreement, had rights or interests in the relevant financial or business undertaking or scheme, common enterprise, investment contract or time-sharing scheme; and

- (d) is to be held on their behalf in the respective proportions that, at that time, their individual rights or interests bore to the total of all those rights or interests.

*Special provision for registered schemes and notified foreign passport funds—treatment of amount recovered in respect of subsection (5) loss*

(9) If:

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- (a) the responsible entity for a registered scheme or the operator of a notified foreign passport fund; or
- (b) ASIC in the name of, and for the benefit of, the responsible entity for a registered scheme or the operator of a notified foreign passport fund;
- brings an action in accordance with subsection (5) in respect of an acquisition or disposal of, or an agreement to acquire or dispose of, interests in the scheme or fund, any amount recovered in the action:
- (c) is to be held:
- (i) in the case of a registered scheme other than an Australian passport fund—by the responsible entity; and
  - (ii) in the case of an Australian passport fund or a notified foreign passport fund—by the responsible holding party for the fund;
- on behalf of the persons who, at the time of the disposal, acquisition or agreement, had rights or interests in the relevant financial or business undertaking or scheme, common enterprise, investment contract or time-sharing scheme; and
- (d) is to be held on their behalf in the respective proportions that, at that time, their individual rights or interests bore to the total of all those rights or interests.
- (10) Any right of action that a person has by virtue of this section is in addition to any right that any other person has under section 1317HA.

**1043M Defences to prosecution for an offence**

- (1) In a prosecution of a person for an offence based on subsection 1043A(1) or (2), it is not necessary for the prosecution to prove the non-existence of facts or circumstances which, if they existed, would, by virtue of section 1043B, 1043C, 1043D, 1043E, 1043F, 1043G, 1043H, 1043I, 1043J or 1043K, preclude the act or omission from constituting a contravention of subsection 1043A(1)

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or (2), as the case may be, but it is a defence if the facts or circumstances existed.

Note: A defendant bears an evidential burden in relation to the facts or circumstances. See subsection 13.3(3) of the *Criminal Code*.

- (2) In a prosecution brought against a person for an offence based on subsection 1043A(1) because the person entered into, or procured another person to enter into, a transaction or agreement at a time when certain information was in the first-mentioned person's possession:
- (a) it is a defence if the information came into the first-mentioned person's possession solely as a result of the information having been made known as mentioned in subparagraph 1042C(1)(b)(i); and
  - (b) it is a defence if the other party to the transaction or agreement knew, or ought reasonably to have known, of the information before entering into the transaction or agreement.

Note: A defendant bears an evidential burden in relation to the matters referred to in paragraphs (a) and (b). See subsection 13.3(3) of the *Criminal Code*.

- (3) In a prosecution against a person for an offence based on subsection 1043A(2) because the person communicated information, or caused information to be communicated, to another person:
- (a) it is a defence if the information came into the first-mentioned person's possession solely as a result of the information having been made known as mentioned in subparagraph 1042C(1)(b)(i); and
  - (b) it is a defence if the other person knew, or ought reasonably to have known, of the information before the information was communicated.

Note: A defendant bears an evidential burden in relation to the matters referred to in paragraphs (a) and (b). See subsection 13.3(3) of the *Criminal Code*.

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Section 1043N

**1043N Relief from civil liability**

In proceedings against a person under Part 9.4B (including under section 1317HA) relating to a contravention of subsection 1043A(1) or (2), the court may relieve the person wholly or partly from liability if it appears to the court that:

- (a) in any case—the circumstances in any of the sections referred to in subsection 1043M(1) applied; or
- (b) in the case of subsection 1043A(1)—the circumstance referred to in paragraph 1043M(2)(a) or (b) applied; or
- (c) in the case of subsection 1043A(2)—the circumstance referred to in paragraph 1043M(3)(a) or (b) applied.

**1043O Powers of Court**

If, in a proceeding instituted under this Act, the Court finds that a contravention of section 1043A has occurred, the Court may, in addition to any other orders that it may make under any other provision of this Act, make such order or orders as it thinks just, including, but without limiting the generality of the above, any one or more of the following orders:

- (a) an order restraining the exercise of rights attached to Division 3 financial products;
- (b) an order restraining the issue of Division 3 financial products;
- (c) an order restraining the acquisition or disposal of Division 3 financial products;
- (d) an order directing the disposal of Division 3 financial products;
- (e) an order vesting Division 3 financial products in ASIC;
- (f) an order cancelling an agreement for the acquisition or disposal of Division 3 financial products;
- (g) an order cancelling an Australian financial services licence;
- (h) for the purpose of securing compliance with any other order made under this section, an order directing a person to do or refrain from doing a specified act.

Section 1044A

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**Division 4—Defences, relief and limits on liability**

**1044A General defence or relief for publishers**

- (1) It is a defence to a prosecution for an offence based on a provision of this Part committed by the publication of an advertisement if:
  - (a) the defendant was, at that time, a person whose business it was to publish or arrange for the publication of advertisements; and
  - (b) they received the advertisement for publication in the ordinary course of that business and did not know, and had no reason to believe, that its publication would amount to an offence against that provision.

Note: A defendant bears an evidential burden in relation to the matters in subsection (1). See subsection 13.3(3) of the *Criminal Code*.

- (2) In proceedings against a person under:
  - (a) Part 9.4B (including under section 1317H or 1317HA) relating to a contravention of a civil penalty provision that is in this Part; or
  - (b) section 1041I relating to a contravention of a provision to which that section applies;the court may relieve the person wholly or partly from liability if it appears to the court that the circumstances mentioned in paragraphs (1)(a) and (b) applied.

**1044B Limit on liability for misleading or deceptive conduct**

*State or Territory professional standards law limits liability*

- (1) A professional standards law of a State or Territory applies to limit occupational liability relating to an action for contravention of section 1041H in the same way as it limits occupational liability arising under a law of the State or Territory.

Note: Section 1041H prohibits misleading or deceptive conduct by a person in relation to a financial product or financial service.

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Section 1044B

- (2) However, the professional standards law applies for that purpose:
- (a) only in relation to a scheme that was prescribed by the regulations at the time (the *contravention time*) of the contravention; and
  - (b) as if the scheme were in force under that law at the contravention time in the form the scheme would have been in if:
    - (i) the scheme had not been amended or revoked under that law since the scheme was first prescribed; and
    - (ii) the modifications (if any) prescribed by the regulations at the contravention time had been made to the scheme.

*Which State's or Territory's professional standards law applies?*

- (3) For the purposes of working out whether a professional standards law of a particular State or Territory applies under subsection (1) in relation to a particular contravention of section 1041H, choice of law rules operate in relation to the contravention in the same way as they operate in relation to a tort.

*Definitions*

- (4) In this section:

***occupation*** includes profession and trade.

***occupational association*** means a body:

- (a) that represents the interests of persons who have the same occupation; and
- (b) whose membership is limited principally to such persons.

***occupational liability*** means civil liability arising directly or vicariously from anything done or omitted by a member of an occupational association in the course of his or her occupation.

***professional standards law*** means a law providing for the limitation of occupational liability by reference to schemes for limiting that liability that were formulated and published in accordance with that law.

**Chapter 7** Financial services and markets

**Part 7.10** Market misconduct and other prohibited conduct relating to financial products and financial services

**Division 5** Miscellaneous

**Section 1045A**

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**Division 5—Miscellaneous**

**1045A Exemptions and modifications by regulations**

- (1) The regulations may:
  - (a) exempt a person or class of persons from all or specified provisions of this Part; or
  - (b) exempt a financial product or a class of financial products from all or specified provisions of this Part; or
  - (c) provide that this Part applies as if specified provisions were omitted, modified or varied as specified in the regulations.
- (2) For the purpose of this section, the *provisions of this Part* include:
  - (a) definitions in this Act, or in the regulations, as they apply to references in this Part; and
  - (b) any provisions of Part 10.2 (transitional provisions) that relate to provisions of this Part.

## **Part 7.10A—External dispute resolution**

### **Division 1—Authorisation of an external dispute resolution scheme**

#### **Subdivision A—Minister may authorise an external dispute resolution scheme**

##### **1050 Minister may authorise an external dispute resolution scheme**

- (1) The Minister may, by notifiable instrument, authorise an external dispute resolution scheme if the Minister is satisfied that the mandatory requirements under section 1051 will be met.
- (2) In considering whether to authorise an external dispute resolution scheme, the Minister:
  - (a) must take into account the general considerations for an external dispute resolution scheme under section 1051A; and
  - (b) may take into account any other matter the Minister considers relevant (whether or not those other matters are consistent with those general considerations).
- (3) An authorisation of an external dispute resolution scheme must not come into force while an authorisation of another external dispute resolution scheme is in force.
- (4) The Minister may, by notifiable instrument, vary or revoke an authorisation of an external dispute resolution scheme.
- (5) In an instrument under subsection (1) or (4), the Minister:
  - (a) must specify the day the authorisation, variation or revocation comes into force; and
  - (b) may specify, vary or revoke conditions relating to the authorisation.

Note: Once the authorisation of an external dispute resolution scheme comes into force, the scheme is known as the AFCA scheme and the operator

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is known as AFCA (AFCA is short for Australian Financial Complaints Authority): see the definitions of **AFCA** and **AFCA scheme** in section 761A.

### **Subdivision B—Mandatory requirements and general considerations**

#### **1051 Mandatory requirements**

- (1) The mandatory requirements for an external dispute resolution scheme are:
  - (a) the organisational requirements under subsection (2); and
  - (b) the operator requirements under subsection (3); and
  - (c) the operational requirements under subsection (4); and
  - (d) the compliance requirements under subsection (5).

##### *Organisational requirements*

- (2) The organisational requirements are that:
  - (a) the membership of the scheme is open to every entity that is required, under:
    - (i) a law of the Commonwealth; or
    - (ii) an instrument made under such a law; or
    - (iii) the conditions of a licence or permission issued under such a law;to be a member of an external dispute resolution scheme authorised under this Part; and
  - (b) the operations of the scheme are financed through contributions made by members of the scheme; and
  - (c) the scheme has an independent assessor; and
  - (d) complainants are exempt from payment of any fee or charge, to the operator of the scheme or to any other entity, in relation to a complaint.

Note: A law, instrument or condition referred to in paragraph (a) that requires entities to be members of the scheme need not be a law, instrument or condition regulating providers of financial products or

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services. The constitutional basis for that law, instrument or condition would need to support the scheme's application to such entities.

*Operator requirements*

- (3) The operator requirements are that:
- (a) the operator of the scheme commissions the conducting of independent reviews of the scheme's operations and procedures; and
  - (b) the operator of the scheme is a company limited by guarantee; and
  - (c) the operator's constitution provides that the operator must not be operated for profit; and
  - (d) the operator's constitution provides that the number of directors of the operator who have experience in carrying on the kinds of businesses operated by members of the scheme must equal the number of directors who have experience in representing consumers; and
  - (da) the operator's constitution provides that the Chair of the board of the operator must be an independent person; and
  - (e) the operator's constitution provides that, within 6 months after the scheme is authorised under section 1050, the Minister:
    - (i) may appoint an independent person as the Chair of the board of the operator; and
    - (ii) may appoint any director, if the total number of directors (including that director) whom the Minister has appointed, as mentioned in subparagraph (i) and this subparagraph, is less than half the total number of directors.

*Operational requirements*

- (4) The operational requirements are that:
- (a) the complaints mechanism under the scheme is appropriately accessible to persons dissatisfied with members of the scheme; and
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- (b) complaints against members of the scheme are resolved (including by making determinations relating to such complaints) in a way that is fair, efficient, timely and independent; and
- (c) appropriate expertise is available to deal with complaints; and
- (d) reasonable steps are taken to ensure compliance by members of the scheme with those determinations; and
- (e) under the scheme, determinations made by the operator of the scheme are:
  - (i) binding on members of the scheme; but
  - (ii) not binding on complainants under the scheme; and
- (f) for superannuation complaints, there are no limits on:
  - (i) the value of claims that may be made under the scheme; or
  - (ii) the value of remedies that may be determined under the scheme.

Note: Division 3 includes additional provisions relating to superannuation complaints.

*Compliance requirements*

- (5) The compliance requirements are that:
  - (a) the operator of the scheme is to ensure that the following are complied with:
    - (i) conditions of the authorisation of the scheme specified under paragraph 1050(5)(b);
    - (ii) regulatory requirements issued under section 1052A;
    - (iii) directions given under section 1052B, 1052BA or 1052C;
    - (iv) the requirements of section 1052E; and
  - (b) material changes to the scheme are not to be made without the approval of ASIC under section 1052D.

Section 1051A

### **1051A General considerations**

The general considerations for an external dispute resolution scheme are the following:

- (a) the accessibility of the scheme;
- (b) the independence of the scheme;
- (c) the fairness of the scheme;
- (d) the accountability of the scheme;
- (e) the efficiency of the scheme;
- (f) the effectiveness of the scheme.

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**Division 2—Regulating the AFCA scheme**

**1052 Obligation to comply with mandatory requirements**

AFCA must ensure that the mandatory requirements for the AFCA scheme under section 1051 are complied with.

**1052A ASIC may issue regulatory requirements**

ASIC may, by legislative instrument, issue to AFCA regulatory requirements relating to:

- (a) compliance with the mandatory requirements for the AFCA scheme under section 1051; or
- (b) any of the general considerations for the AFCA scheme under section 1051A.

Note: This power to issue regulatory requirements extends to any application of the AFCA scheme in relation to members of the scheme that are not providers of financial products or services.

**1052B Directions to increase limits on the value of claims**

- (1) If, under the AFCA scheme, there are one or more limits on:
  - (a) the value of claims that may be made under the scheme; or
  - (b) the value of remedies that AFCA may determine under the scheme;

ASIC may give AFCA a written direction requiring the limit, or some or all of the limits, to be increased.

Note 1: One of the operational requirements for the scheme is that there are no such limits for superannuation complaints (see paragraph 1051(4)(f)).

Note 2: This power to give directions extends to any application of the AFCA scheme in relation to members of the scheme that are not providers of financial products or services.

- (2) However:

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- (a) ASIC must not give a direction under this section unless ASIC has given AFCA written notice of at least 1 month of ASIC's intention to issue the direction; and
  - (b) a direction under this section must not apply in relation to complaints AFCA received before ASIC gives the direction.
- (3) AFCA must comply with a direction made under this section.
- Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (4) If AFCA fails to comply with the direction, ASIC may apply to the Court for, and the Court may make, an order that AFCA comply with the direction.
  - (5) A direction made under this section is not a legislative instrument.

**1052BA Directions to ensure sufficient financing**

- (1) ASIC may give AFCA a written direction under this section if ASIC considers that AFCA has not done all things reasonably practicable to ensure that the operations of the AFCA scheme are sufficiently financed.
- Note: This power to give directions extends to any application of the AFCA scheme in relation to members of the scheme that are not providers of financial products or services.
- (2) The direction must set out the specific measures that AFCA must take to ensure that the operations of the AFCA scheme are sufficiently financed.
  - (3) ASIC must not give a direction under this section unless ASIC has given AFCA written notice of at least 1 month of ASIC's intention to issue the direction.
  - (4) AFCA must comply with a direction made under this section.
- Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

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- (5) If AFCA fails to comply with the direction, ASIC may apply to the Court for, and the Court may make, an order that AFCA comply with the direction.
- (6) A direction made under this section is not a legislative instrument.

## 1052C General directions to AFCA

### *Notice of intention to issue a direction*

- (1) If ASIC considers that AFCA has not done all things reasonably practicable to ensure compliance with:
  - (a) the mandatory requirements for the AFCA scheme under section 1051; or
  - (b) a condition of the authorisation of the AFCA scheme imposed by the Minister under paragraph 1050(5)(b); or
  - (c) regulatory requirements issued under section 1052A;ASIC may give AFCA written notice that it intends to give AFCA a specified direction under this section.

Note: This power to give directions extends to any application of the AFCA scheme in relation to members of the scheme that are not providers of financial products or services.

- (2) The notice must set out:
  - (a) the specific measures that the direction will require AFCA to take to comply with the requirements or condition; and
  - (b) the reasons for ASIC's intention to give the direction.

### *Issuing a direction*

- (3) If, after receiving the notice:
  - (a) AFCA does not take those specific measures; and
  - (b) ASIC still considers that it is appropriate to give the direction to AFCA;ASIC may give AFCA the direction, in writing, with a statement setting out the reasons for giving the direction.

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**Section 1052D**

- (4) The direction must deal with the time by which, or the period during which, it is to be complied with. The time or period must be reasonable.
- (5) A direction made under this section is not a legislative instrument.

*Compliance*

- (6) AFCA must comply with a direction made under this section.

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

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

*Varying or revoking a direction*

- (8) ASIC may vary a direction made under this section by giving written notice to AFCA.
- (9) The direction has effect until ASIC revokes it by giving written notice to AFCA.
- (10) ASIC may revoke the direction, by giving written notice to AFCA, if, at the time of revocation, ASIC considers that the direction is no longer necessary or appropriate.

**1052D Approval of material changes to the AFCA scheme**

- (1) AFCA may request ASIC to approve a material change to the AFCA scheme.

Note 1: A material change must not be made to the scheme without ASIC's approval (see paragraph 1051(5)(b)).

Note 2: This right to make requests extends to any application of the AFCA scheme in relation to members of the scheme that are not providers of financial products or services.

- (2) ASIC may, by written notice given to AFCA, approve the change.

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- (3) In considering whether to approve the change, ASIC must take into account the following in relation to the scheme as it is proposed to be changed:
- (a) the mandatory requirements for the scheme under section 1051;
  - (b) the general considerations for the scheme under section 1051A;
  - (c) any conditions imposed by the Minister on the authorisation of the scheme under paragraph 1050(5)(b);
  - (d) any regulatory requirements issued under section 1052A.

## **1052E Referring matters to appropriate authorities**

*Referring contraventions and breaches etc. to appropriate authorities*

- (1) If AFCA becomes aware, in connection with a complaint under the AFCA scheme, that:
- (a) a serious contravention of any law may have occurred; or
  - (b) a contravention of the governing rules of any of the following may have occurred:
    - (i) a regulated superannuation fund;
    - (ii) an AFCA regulated superannuation scheme;
    - (iii) an approved deposit fund; or
  - (c) a breach of the terms and conditions relating to an annuity policy, a life policy or an RSA may have occurred; or
  - (d) a party to the complaint may have refused or failed to give effect to a determination made by AFCA;

AFCA must give particulars of the contravention, breach, refusal or failure to one or more of APRA, ASIC or the Commissioner of Taxation.

Note: This subsection extends to any application of the AFCA scheme in relation to members of the scheme that are not providers of financial products or services.

- (2) However, if:
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- (a) the complaint relates to the scheme provided for by the *Australian Defence Force Cover Act 2015*; and
- (b) subsection (1) applies because AFCA becomes aware that:
  - (i) a serious contravention of any law may have occurred; or
  - (ii) a party to the complaint may have refused or failed to give effect to a determination made by AFCA;

AFCA must instead give particulars of the contravention, refusal or failure to the Minister administering that Act and the Minister administering the *Public Governance, Performance and Accountability Act 2013*.

*Referring settled complaints*

- (3) If:
    - (a) the parties to a complaint made under the AFCA scheme agree to a settlement of the complaint; and
    - (b) AFCA thinks the settlement may require investigation;
- AFCA may give particulars of the settlement to one or more of APRA, ASIC or the Commissioner of Taxation.

*Referring systemic issues*

- (4) If AFCA considers that there is a systemic issue arising from the consideration of complaints under the AFCA scheme, AFCA must give particulars of the issue to one or more of APRA, ASIC or the Commissioner of Taxation.

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**Division 3—Additional provisions relating to superannuation complaints**

**Subdivision A—Preliminary**

**1053 Meaning of *superannuation complaint***

- (1) Subject to subsection (4), a complaint made under the AFCA scheme is a ***superannuation complaint*** if the complaint is:
  - (a) that the trustee of a regulated superannuation fund, an AFCA regulated superannuation scheme or an approved deposit fund has made a decision (whether before or after the commencement of this section) relating to:
    - (i) a particular member, or a particular former member, of a regulated superannuation fund or an AFCA regulated superannuation scheme; or
    - (ii) a particular beneficiary or a particular former beneficiary of an approved deposit fund;that is or was unfair or unreasonable; or
  - (b) that a decision, by a trustee maintaining a life policy that covers a member of a life policy fund, to admit the member to the fund was unfair or unreasonable; or
  - (c) that the conduct (including any act, omission or representation) of an insurer, or of a representative of an insurer, relating to the sale of an annuity policy was unfair or unreasonable; or
  - (d) that a decision of an insurer under an annuity policy is or was unfair or unreasonable; or
  - (e) that a decision of a superannuation provider to set out, in a statement to which subsection (2) applies, an amount or amounts in respect of a person was unfair or unreasonable; or
  - (f) that the conduct (including any act, omission or representation) of an RSA provider, or of a representative of an RSA provider, relating to the opening of an RSA was unfair or unreasonable; or

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- (g) that a decision of an RSA provider relating to a particular RSA holder or former RSA holder is or was unfair or unreasonable; or
- (h) that the conduct (including any act, omission or representation) of an insurer, or of a representative of an insurer, relating to the sale of insurance benefits in relation to a contract of insurance where the premiums are paid from an RSA, was unfair or unreasonable; or
- (i) that a decision of an insurer relating to a contract of insurance where the premiums are paid from an RSA is or was unfair or unreasonable; or
- (j) that a decision by a death benefit decision-maker relating to the payment of a death benefit is or was unfair or unreasonable.

Note: Certain persons are taken to be members of regulated superannuation funds, AFCA regulated superannuation schemes or approved deposit funds, or holders of RSAs (see section 1053A).

- (2) This subsection applies to a statement given to the Commissioner of Taxation under:
  - (a) section 13 of the *Superannuation Contributions Tax (Assessment and Collection) Act 1997*; or
  - (b) section 12 of the *Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997*; or
  - (c) subsection 133-120(2) or 133-140(1) in Schedule 1 to the *Taxation Administration Act 1953*; or
  - (d) section 390-5 or 390-20 in that Schedule.
- (4) However, a complaint is not a ***superannuation complaint*** to the extent that it is a complaint that:
  - (a) a decision made by a trustee of a self managed superannuation fund; or
  - (b) conduct engaged in by an insurer, or by a representative of an insurer, relating to the sale of an annuity policy maintained, or to be maintained, by a trustee of a self managed superannuation fund on behalf of its members; or

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- (c) a decision made by an insurer, or by a representative of an insurer, under an annuity policy maintained by a trustee of a self managed superannuation fund on behalf of its members; is unfair or unreasonable.
- (5) For the purposes of this section, a trustee, an insurer, an RSA provider or another decision-maker, makes a decision if:
- the trustee, insurer, RSA provider or other decision-maker, or a person acting for the trustee, insurer, RSA provider or other decision-maker, makes, or fails to make, a decision; or
  - the trustee, insurer, RSA provider or other decision-maker, or a person acting for the trustee, insurer, RSA provider or other decision-maker, engages in any conduct, or fails to engage in any conduct, in relation to making a decision;
- whether or not the decision or conduct involved the exercise of a discretion.

**1053A Persons taken to be members of regulated superannuation funds, AFCA regulated superannuation schemes and approved deposit funds and holders of RSAs**

For the purposes of this Division, each of the following persons is taken to be a member of a regulated superannuation fund, an AFCA regulated superannuation scheme or an approved deposit fund, or a holder of an RSA, (as the case requires):

- a non-member spouse in relation to whom a splitting order under the *Family Law Act 1975* has been made, from the day on which a copy of the order is served on the trustee of the fund;
- a non-member spouse who is a party to a superannuation agreement under the *Family Law Act 1975*, from the day on which a copy of the agreement is served on the trustee of the fund;
- a party to a marriage in relation to which an order of a kind referred to in Part VIIIAA of the *Family Law Act 1975* has been made, if the order relates to an interest in the fund;

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- (d) an eligible person, within the meaning of section 90XZB or 90YZR of the *Family Law Act 1975*, in relation to an interest of the member or holder in the fund;
- (e) a covered ADF member within the meaning of the *Australian Defence Force Cover Act 2015*.

**1053B This Division does not restrict ability to make other complaints**

To avoid doubt, this Division does not limit the ability of a person to make a complaint under the AFCA scheme (including a complaint relating to superannuation) that is not a superannuation complaint.

Note: Schedule 8 to the *Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Act 2024*, which added this section, was enacted as a response to the decision of the Federal Court of Australia in *MetLife Insurance Limited v Australian Financial Complaints Authority Limited* [2022] FCAFC 173.

**Subdivision B—Powers of AFCA**

**1054 Power to join other parties to superannuation complaint**

- (1) AFCA may (subject to subsection 1056A(3)) at any time join, as a party to a superannuation complaint made under the AFCA scheme, any of the following persons whom AFCA decides should be a party to the complaint:
  - (a) a person who has applied to become a party to the complaint;
  - (b) a trustee of:
    - (i) a regulated superannuation fund; or
    - (ii) an AFCA regulated superannuation scheme; or
    - (iii) an approved deposit fund;
  - (c) an insurer;
  - (d) an RSA provider;
  - (e) a superannuation provider;
  - (f) a person whom AFCA decides is responsible for determining either or both of the existence and the extent of a disability

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(whether total and permanent or otherwise), if the subject matter of the complaint relates to a benefit in respect of the disability, whether under a contract of insurance or otherwise.

Note: Section 1056A requires certain procedures to be followed before a person can be joined as a party to a superannuation complaint about a decision relating to the payment of a death benefit.

- (2) If AFCA decides under subsection (1) that a person should be a party to the complaint, AFCA must give the new party, and all of the existing parties to the complaint, written notice of the decision and of the reasons for the decision.
- (3) If AFCA decides that a person who has applied to become a party to the complaint should not be a party to the complaint, AFCA must give the person written notice of the decision and of the reasons for the decision.

## 1054A Power to obtain information and documents

- (1) If AFCA has reason to believe that a person is capable of giving information or producing documents relevant to a superannuation complaint, AFCA may, by written notice to the person, require the person:
  - (a) to give to AFCA, by writing, any such information; or
  - (b) to produce to AFCA such documents or copies of such documents as are stated in the notice;at such place, and within such period or on such date and at such time, as are stated in the notice.

Note: A strict liability offence may apply under section 1058 (secrecy) in relation to information acquired under this section.

- (2) If documents (whether originals or copies) are so produced, AFCA:
  - (a) may take possession of, and may make copies of, or take extracts from, the documents; and
  - (b) may keep the documents for as long as is necessary for the purpose of dealing with the complaint; and

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- (c) must, while keeping the documents, permit a person who would be entitled to inspect any one or more of them (if the documents were not in the possession of AFCA) to inspect at all reasonable times such of the documents as that person would be so entitled to inspect.
- (3) A person must not fail to comply with a requirement made by AFCA under subsection (1).

Penalty: 30 penalty units.

- (4) Subsection (3) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

- (5) Subsection (3) does not apply to the extent that the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (5), see subsection 13.3(3) of the *Criminal Code*.

**1054B Power to require attendance at conciliation conferences**

- (1) AFCA may, if AFCA thinks it desirable to do so, by notice in writing given to:
    - (a) each party to a superannuation complaint; and
    - (b) any other person:
      - (i) who, in AFCA's opinion, is likely to be able to provide information relevant to the settlement of the complaint; or
      - (ii) whose presence at a conciliation conference would, in AFCA's opinion, be likely to be conducive to settling the complaint;
- require the party or other person to attend the conference.

Note: A strict liability offence may apply under section 1058 (secrecy) in relation to information acquired during a conference held under this section.

- (2) The notice must also fix the date, time and place for the conference.

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- (3) If the complainant fails to attend the conference, AFCA may deal with the complaint as if it had been withdrawn by the complainant.
- (4) A person (other than the complainant) commits an offence if he or she does not attend a conference when required to do so under this section.

Penalty: 30 penalty units.

## 1054BA Power to give directions

- (1) AFCA may, in connection with, or as part of the process of, determining a superannuation complaint:
  - (a) give directions prohibiting or restricting the disclosure of documents or information relating to the complaint; and
  - (b) give directions as to who may be present at any meeting held by AFCA relating to the complaint.
- (2) In giving directions, AFCA must have regard to the wishes of the parties in relation to the complaint and the need to protect their privacy.
- (3) Directions may be made in writing or orally.
- (4) A person must not refuse or fail to comply with a direction under this section.

Penalty: 30 penalty units.

## 1054C Reference of questions of law to Federal Court

- (1) AFCA may, on its own initiative or on the request of a party to a superannuation complaint, refer a question of law arising in relation to the making of a determination relating to the complaint to the Federal Court for decision.
- (2) The Federal Court has jurisdiction to hear and determine a question of law referred to it under this section.

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- (3) If a question of law has been so referred to the Federal Court, AFCA must not:
- (a) make the determination to which the question is relevant while the reference is pending; or
  - (b) do anything that is inconsistent with the opinion of the Federal Court on the question.

**Subdivision C—Determinations of superannuation complaints**

**1055 Making a determination**

- (1) In making a determination of a superannuation complaint, AFCA has, subject to this section, all the powers, obligations and discretions that are conferred on the trustee, insurer, RSA provider or other person who:
- (a) made a decision to which the complaint relates; or
  - (b) engaged in conduct (including any act, omission or representation) to which the complaint relates.

*Affirming decisions or conduct*

- (2) AFCA must affirm a decision or conduct (except a decision relating to the payment of a death benefit) if AFCA is satisfied that:
- (a) the decision, in its operation in relation to the complainant; or
  - (b) the conduct;
- was fair and reasonable in all the circumstances.
- (3) AFCA must affirm a decision relating to the payment of a death benefit if AFCA is satisfied that the decision, in its operation in relation to:
- (a) the complainant; and
  - (b) any other person joined under subsection 1056A(3) as a party to the complaint;
- was fair and reasonable in all the circumstances.

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*Varying etc. decisions or conduct*

- (4) If AFCA is satisfied that:
- (a) a decision (except a decision relating to the payment of a death benefit), in its operation in relation to the complainant; or
  - (b) conduct; is unfair or unreasonable, or both, AFCA may take any one or more of the actions mentioned in subsection (6), but only for the purpose of placing the complainant, as nearly as practicable, in such a position that the unfairness, unreasonableness, or both, no longer exists.
- (5) If AFCA is satisfied that a decision relating to the payment of a death benefit, in its operation in relation to:
- (a) the complainant; and
  - (b) any other person joined under subsection 1056A(3) as a party to the complaint; is unfair or unreasonable, or both, AFCA may take any one or more of the actions mentioned in subsection (6), but only for the purpose of placing the complainant (and any other person so joined as a party), as nearly as practicable, in such a position that the unfairness, unreasonableness, or both, no longer exists.
- (6) AFCA may, under subsection (4) or (5), do any of the following:
- (a) vary the decision;
  - (b) set aside the decision and:
    - (i) substitute a decision for the decision so set aside; or
    - (ii) remit the decision to the person who made it for reconsideration in accordance with any directions or recommendations of AFCA;
  - (c) if the complainant was unfairly or unreasonably admitted into a life policy fund:
    - (i) require a party to the complaint to repay all money, or particular money, received under the life policy to which the complaint relates; or

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- (ii) set aside the whole or part of the terms or conditions of the life policy in their application to the complainant; or
  - (iii) vary the governing rules of the life policy fund in their application to the complainant; or
  - (iv) cancel the complainant's membership of the life policy fund or of any sub-plan of the fund;
- (d) if the complainant was unfairly or unreasonably sold an annuity policy, contract of insurance or RSA:
- (i) require a party to the complaint to repay all money, or particular money, received under the annuity policy, contract or RSA; or
  - (ii) set aside the whole or part of the terms or conditions of the annuity policy, contract or RSA in their application to the complainant; or
  - (iii) vary the terms or conditions of the annuity policy, contract or RSA in their application to the complainant.

*Limitations on determinations*

- (7) AFCA must not make a determination of a superannuation complaint that would be contrary to:
- (a) law; or
  - (b) subject to paragraph (6)(c), the governing rules of a regulated superannuation fund, an AFCA regulated superannuation scheme or an approved deposit fund to which the complaint relates; or
  - (c) subject to paragraph (6)(d), the terms and conditions of an annuity policy, contract of insurance or RSA to which the complaint relates.

**1055A AFCA to give reasons**

AFCA must give written reasons for its determination of a superannuation complaint.

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**1055B Operation of determination of superannuation complaint**

- (1) Subject to subsection (2), a determination of a superannuation complaint by AFCA comes into operation immediately upon the making of the determination.
- (2) AFCA may specify in the determination that the determination is not to come into operation until a later date specified in the determination and, if a later date is so specified, the determination comes into operation on that date.
- (3) If, under subsection 1055(4) or (5), the determination varies a decision of another person, or substitutes a decision for a decision of another person, that decision as varied or substituted:
  - (a) is, for all purposes (other than the making of a complaint about the decision) taken to be a decision of the other person; and
  - (b) on the coming into operation of the determination by AFCA, unless AFCA otherwise orders, has effect, and is taken to have had effect, on and from the day on which the original decision has or had effect.

**1055C Evidence of determination of superannuation complaint**

- (1) A document purporting to be a copy of AFCA's determination of a superannuation complaint, and purporting to be certified, by an AFCA staff member who is authorised to do so, to be a true copy of the determination, is, in any proceeding, *prima facie* evidence of the determination.
- (2) This section does not affect any other method available by law for the proof of determinations of AFCA.

**1055D Compliance with determinations under the AFCA scheme**

If:

- (a) a superannuation complaint has been made concerning a disability benefit (whether under a contract of insurance or otherwise); and

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- (b) a determination is made by AFCA that a person other than a member of the AFCA scheme is responsible for determining either or both of the existence and the extent of the disability; and
- (c) AFCA joins the person under subsection 1054(1) as a party to the complaint;
- the person must comply with any determination made in respect of the person by AFCA.

**Subdivision D—Superannuation complaints relating to payment of death benefits**

**1056 When superannuation complaint cannot be made in relation to decision about the payment of death benefit**

- (1) A person cannot make a superannuation complaint under the AFCA scheme relating to a decision by a death benefit decision-maker relating to the payment of a death benefit unless the person has an interest in the death benefit.
- (2) A person cannot make a superannuation complaint under the AFCA scheme relating to a decision by a death benefit decision-maker relating to the payment of a death benefit if:
  - (a) the decision-maker gave the person notice:
    - (i) that the decision-maker proposed to make the decision; and
    - (ii) that the person may object to the proposed decision within 28 days after being given notice;and the person did not, by notifying the decision-maker, object to the proposed decision within 28 days after being given notice; and
  - (b) the decision-maker gave the person notice:
    - (i) that the decision-maker had made the decision; and
    - (ii) that the person may make a complaint under the AFCA scheme relating to the decision within 28 days after being given notice;

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and the person does not make the complaint to AFCA within 28 days after being given notice.

- (3) If a person has not been given either of the notices referred to in subsection (2) relating to a decision by a death benefit decision-maker relating to the payment of a death benefit, the person cannot make a superannuation complaint under the AFCA scheme relating to the decision unless AFCA is satisfied that:
  - (a) the person has an interest in the death benefit; and
  - (b) it was unreasonable for the person not to be given those notices from the decision-maker.

## **1056A Joining persons to complaints relating to death benefit decisions**

- (1) If a death benefit decision-maker:
  - (a) makes a decision relating to the payment of a death benefit; and
  - (b) is notified by AFCA of a superannuation complaint made in accordance with section 1056 relating to the decision;the decision-maker must, within 28 days after being so notified, give notice to each person (other than the complainant) whom the decision-maker believes, after reasonable enquiry, may have an interest in the death benefit.
- (2) A notice given to a person under subsection (1) must:
  - (a) state that a complaint has been made to AFCA about the decision; and
  - (b) set out the details of the complaint; and
  - (c) state that the person may apply to be joined as a party to the complaint by giving notice to AFCA within 28 days after the person is given notice, or such longer period as AFCA allows.
- (3) A person (other than a person referred to in any of paragraphs 1054(1)(b) to (f)) may be joined as a party to the complaint under section 1054 only if:

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- (a) the person applies in accordance with paragraph (2)(c) of this section; or
- (b) AFCA is satisfied that, in all the circumstances, the person should be joined as a party despite not so applying.

**Subdivision E—Appeals to the Federal Court**

**1057 Appeals to the Federal Court from determination of superannuation complaint**

- (1) A party to a superannuation complaint may appeal to the Federal Court, on a question of law, from AFCA's determination of the complaint.
- (2) An appeal by a person under subsection (1) is to be instituted:
  - (a) not later than the 28th day after the day on which a copy of the determination of AFCA is given to the person, or within such further period as the Federal Court (whether before or after the end of that day) allows; and
  - (b) in accordance with rules of court made under the *Federal Court of Australia Act 1976*.
- (3) The Federal Court is to hear and determine the appeal and may make such order as it thinks appropriate.
- (4) Without limiting subsection (3), the orders that may be made by the Federal Court on an appeal include:
  - (a) an order affirming or setting aside the determination of AFCA; and
  - (b) an order remitting the matter to be determined again by AFCA in accordance with the directions of the Court.
- (5) The Federal Court must not make an order awarding costs against a complainant if the complainant does not defend an appeal instituted by another party to the complaint.

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**1057A Operation and implementation of determination that is subject to appeal**

- (1) Subject to this section, the institution of an appeal to the Federal Court from AFCA's determination of a superannuation complaint does not affect the operation of the determination or prevent the taking of action to implement the determination.
- (2) If an appeal is brought to the Federal Court from the determination, the Court or a judge of the Court may make such order or orders staying or otherwise affecting the operation or implementation of either or both of the following:
  - (a) the determination or a part of the determination;
  - (b) if the complaint relates to a decision of another person—the whole or part of the decision that is complained of, or of a decision of an insurer or other person who is a party to the complaint;as the Court thinks appropriate to secure the effectiveness of the hearing and determination of the appeal.
- (3) If an order is in force under subsection (2) (including an order that has previously been varied on one or more occasions under this subsection), the Court or a judge of the Court may make an order varying or revoking the first-mentioned order.
- (4) An order in force under subsection (2) (including an order that has previously been varied on one or more occasions under subsection (3)):
  - (a) is subject to such conditions as are specified in the order; and
  - (b) has effect until:
    - (i) if a period for the operation of the order is specified in the order—the end of that period or, if a decision is given on the appeal before the end of that period, the giving of the decision; or
    - (ii) if no period is so specified—the giving of a decision on the appeal.

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**1057B Sending of documents to, and disclosure of documents by, the Federal Court**

If an appeal is instituted in the Federal Court from AFCA's determination of a superannuation complaint:

- (a) AFCA must send to the Court all documents that were before AFCA in connection with the consideration of the matter to which the appeal relates; and
- (b) at the conclusion of the proceeding before the Court in relation to the appeal, the Court must return the documents to AFCA.

**Subdivision F—Secrecy**

**1058 Secrecy**

- (1) An AFCA staff member must not directly or indirectly:
  - (a) make a record of, or disclose to any person, court or investigating authority, any information acquired by the staff member under section 1054A or during a conference held under section 1054B in connection with a superannuation complaint; or
  - (b) produce to any person, court or investigating authority a document so acquired; or
  - (c) permit any person, court or investigating authority to have access to a document so acquired.

Penalty: 30 penalty units.

- (2) Subsection (1) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

- (2A) For the purposes of subsection (1), **investigating authority** means a tribunal, authority or person having power to require the production of documents or the answering of questions.
- (3) Subsection (1) does not apply to the extent that the AFCA staff member makes the record of the information, discloses the

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information, produces the document or permits access to the document for the purposes of this Part.

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

- (4) Subsection (1) does not apply to the AFCA staff member disclosing information, producing a document or permitting access to a document:
- (a) to ASIC; or
  - (b) to APRA; or
  - (c) to the Information Commissioner; or
  - (d) to the Commissioner of Taxation; or
  - (e) to a particular party to the complaint if the person who provided the information or document to the staff member consents in writing to the disclosure, production or access.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4), see subsection 13.3(3) of the *Criminal Code*.

- (5) Subsection (1) does not apply to the AFCA staff member disclosing information if:
- (a) the disclosure is made in a way that does not enable the identification of the parties to a complaint; or
  - (b) the disclosure is made to a police officer (within the meaning of the *Evidence Act 1995*) because:
    - (i) a threat has been made against an AFCA staff member or another person; or
    - (ii) the AFCA staff member believes that a party to a complaint may commit an act of self-harm.

Note: A defendant bears an evidential burden in relation to the matters in subsection (5), see subsection 13.3(3) of the *Criminal Code*.

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Section 1058A

## Division 4—Information sharing and reporting

### 1058A Authorised use or disclosure of information

- (1) An AFCA staff member may use or disclose information or documents obtained by an AFCA staff member under or for the purposes of this Part if:
  - (a) the use or disclosure is for the purposes of:
    - (i) this Part; or
    - (ii) Part 7.10B; or
    - (iii) the *Financial Services Compensation Scheme of Last Resort Levy Act 2023*; or
    - (iv) the *Financial Services Compensation Scheme of Last Resort Levy (Collection) Act 2023*; or
  - (b) the use or disclosure is to the CSLR operator for the purposes of assisting the CSLR operator to perform its functions or exercise its powers.
- (2) In this section:

**use or disclosure**, for information or documents, includes making a record of the information, disclosing the information, producing the document or permitting access to the document.

### 1058B AFCA reporting to CSLR operator

#### *Notification of unpaid fees to CSLR operator*

- (1) AFCA must notify the CSLR operator, in writing, of AFCA's unpaid fees, for a month ending on or after the accumulation recovery day, as soon as practicable after the end of the month.

Note: The notification could include information about AFCA's unpaid fees, including whether those fees relate to pre-CSLR complaints.

- (2) **AFCA's unpaid fees**, for a month, is the sum of each fee (however described) that:
  - (a) relates to one or more complaints, each of which:

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- (i) at the time the complaint is made, is a complaint against a person (the *AFCA member*) who (at that time) is a member of the AFCA scheme; and
  - (ii) is a complaint about a product, or service, of a kind mentioned in subsection 1065(2); and
  - (iii) is a complaint that has been finalised by AFCA (including by making a determination); and
- (b) AFCA has charged to the AFCA member (or would have so charged were the AFCA member still in existence); and
  - (c) the AFCA member has not paid to AFCA; and
  - (d) AFCA finished taking steps to recover on or after the accumulation recovery day and during the month, which may have included taking one or more of the following steps if AFCA considered them appropriate (or possible):
    - (i) seeking an explanation from the AFCA member for the AFCA member not paying the fee;
    - (ii) explaining to the AFCA member the consequences of not paying the fee;
    - (iii) discussing with the AFCA member a reasonable payment plan or other alternatives to paying the fee;
    - (iv) if the AFCA member is (or has become) a Chapter 5 body corporate—engaging with an officer of the Chapter 5 body corporate to assess whether the body can pay the fee to AFCA.

Note: In addition to the steps in subparagraphs (d)(i) to (iv), AFCA may take any other steps it considers appropriate and cost effective.

*AFCA's accumulated unpaid fees*

- (3) AFCA must notify the CSLR operator, in writing, of AFCA's accumulated unpaid fees as soon as practicable after the accumulation recovery day.
- (4) ***AFCA's accumulated unpaid fees*** is the sum of each fee (however described) that:
  - (a) relates to one or more complaints, each of which:

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- (i) at the time the complaint is made, is a complaint against a person (the *AFCA member*) who (at that time) is a member of the AFCA scheme; and
  - (ii) is a complaint about a product, or service, of a kind mentioned in subsection 1065(2); and
  - (iii) is a complaint that has been finalised by AFCA (including by making a determination); and
- (b) AFCA has charged to the AFCA member (or would have so charged were the AFCA member still in existence); and
- (c) the AFCA member has not paid to AFCA; and
- (d) AFCA finished taking steps to recover during the period:
- (i) starting on 1 November 2018; and
  - (ii) ending on the day before the accumulation recovery day;
- which may have included taking one or more of the steps mentioned in subparagraphs (2)(d)(i) to (iv) of this section if AFCA considered them appropriate (or possible).

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## **Part 7.10B—Financial services compensation scheme of last resort**

### **Division 1—Establishment of the scheme**

#### **1059 Establishment of the scheme**

The financial services compensation scheme of last resort is established by this Part.

#### **1060 Minister may authorise an operator of the scheme**

- (1) The Minister may, by notifiable instrument, authorise a person to operate the financial services compensation scheme of last resort if the Minister is satisfied the person will meet the mandatory requirements under section 1062.

Note: The person who is authorised by the Minister to operate the scheme is the CSLR operator (short for financial services compensation scheme of last resort operator).

- (2) An authorisation of a person to operate the financial services compensation scheme of last resort must not come into force while an authorisation of another person to operate that scheme is in force.
- (3) The Minister may, by notifiable instrument, vary or revoke an authorisation.
- (4) In an instrument made under subsection (1) or (3), the Minister:
  - (a) must specify the day the authorisation, variation or revocation comes into force; and
  - (b) may impose, vary or revoke conditions relating to the authorisation.

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### **1061 Minister may appoint independent member**

The Minister may, by written instrument, appoint an independent person to be a member of the board of the CSLR operator.

Note: The independent person appointed by the Minister is the Chair of the board (see the mandatory requirement in paragraph 1062(3)(d)).

### **1062 Mandatory requirements**

- (1) The mandatory requirements for a person (the *operator*) to operate the financial services compensation scheme of last resort are:
  - (a) the organisational requirement under subsection (2); and
  - (b) the operator requirements under subsection (3); and
  - (c) the operational requirements under subsection (4); and
  - (d) the compliance requirements under subsection (5).

#### *Organisational requirement*

- (2) The organisational requirement is that the operator does not require a person applying for compensation to pay any fee or charge to the operator, or to any other entity, in relation to the application.

#### *Operator requirements*

- (3) The operator requirements are that:
  - (a) the operator is a company limited by guarantee; and
  - (b) the operator's constitution provides that the operator must not be operated for profit; and
  - (c) the operator's constitution provides that amounts paid to the operator by the Commonwealth must be maintained for the purposes of the financial services compensation scheme of last resort; and
  - (d) the operator's constitution provides that the Chair of the board of the operator must be an independent person appointed by the Minister as a member of the board; and

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- (e) the operator's constitution provides that, within 6 months after the operator is authorised under section 1060, the following must be appointed as members of the board:
  - (i) a person who is a director of AFCA, or who is the Chair of the board of AFCA;
  - (ii) a person who is a Fellow of the Institute of Actuaries of Australia and has at least 5 years' experience in actuarial analysis.

*Operational requirements*

- (4) The operational requirements are that:
  - (a) the operator operates in accordance with the operator's constitution; and
  - (b) the operator administers the financial services compensation scheme of last resort in accordance with this Part and regulations made for the purposes of this Part; and
  - (c) the operator manages money of the operator in a manner that is efficient, effective and economical; and
  - (d) the operator has appropriate expertise available to deal with applications for compensation; and
  - (e) the operator has appropriate expertise available to undertake actuarial analysis and modelling to estimate the value of claims to be made against the financial services compensation scheme of last resort.

*Compliance requirements*

- (5) The compliance requirements are that:
  - (a) the operator is to ensure that any conditions of the authorisation of the operator (see paragraph 1060(4)(b)) are complied with; and
  - (b) the operator is to ensure that regulatory requirements issued under section 1069K are complied with.

## **Division 2—Compensation payments under the scheme**

### **1063 Compensation payments**

- (1) The CSLR operator must pay to a person an amount of compensation for a relevant AFCA determination made in respect of the person if:
  - (a) the person is eligible under section 1064 for compensation for the determination; and
  - (b) the amount of compensation for the determination is the amount referred to in section 1067; and
  - (c) the CSLR operator has offered under section 1068 that amount of compensation; and
  - (d) the person has accepted under section 1069 that offer of that amount of compensation.
- (2) The CSLR operator must pay the amount of compensation to the person:
  - (a) in a single lump sum; or
  - (b) if a determination under subsection 1069H(2) specifies, under subsection 1069H(3), a class of persons that includes the person—in the instalments specified in the determination for that class of persons over the period specified in the determination.
- (3) The CSLR operator must not pay an amount under this section before:
  - (a) the start of the first levy period; or
  - (b) any later day prescribed by regulations made for the purposes of this paragraph.

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**1064 Eligibility for compensation payments**

*Eligibility for compensation*

- (1) A person is eligible for compensation for a relevant AFCA determination made in respect of the person if:
  - (a) the determination requires an amount to be paid to the person by an entity or body (the *relevant entity*), whether or not the relevant entity still exists; and
  - (b) the person has notified AFCA:
    - (i) within 12 months after the day the determination was made; or
    - (ii) within such longer period as AFCA agrees with the person;that the person has not been paid the amount; and
  - (c) in the case where the relevant entity still exists:
    - (i) AFCA has finished taking steps to require the amount to be paid to the person by the relevant entity, which may have included taking one or more of the steps mentioned in subsection (2) if AFCA considered them appropriate; and
    - (ii) AFCA has notified the person, in writing, that AFCA has finished taking such steps; and
  - (d) the amount has not been fully paid to the person; and
  - (e) the person is not eligible to receive, under any other statutory compensation scheme, compensation:
    - (i) for the matters covered by the determination; and
    - (ii) for an amount equal to or greater than the amount required to be paid in accordance with the determination; and
  - (f) the person applies in accordance with section 1066 to the CSLR operator for compensation for the determination; and
  - (g) the person has not withdrawn that application for compensation; and
  - (h) the CSLR operator reasonably believes, having regard to:

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- (i) the relevant entity's financial position (if the relevant entity still exists); or  
(ii) any other reason;  
that the person is unlikely to be fully paid the amount in accordance with the determination.

Note: A person's application for compensation may be withdrawn at any time before an offer of compensation is accepted by the person (see subsection 1066(4)).

*Appropriate steps by AFCA*

- (2) For the purposes of paragraph (1)(c), the steps are the following:
- seeking an explanation from the relevant entity for the relevant entity not paying the amount to the person in accordance with the relevant AFCA determination;
  - explaining to the relevant entity the consequences of not paying the amount to the person;
  - discussing with the relevant entity a reasonable payment plan or other alternatives to paying the amount to the person;
  - if the relevant entity is (or has become) a Chapter 5 body corporate—engaging with an officer of the Chapter 5 body corporate to assess whether the body will pay the amount to the person.

Note: In addition to these steps, AFCA may take any other steps it considers appropriate and cost effective.

**1065 Meaning of *relevant AFCA determination***

- (1) A determination made by AFCA in respect of a person is a *relevant AFCA determination* if:
- the determination relates to a complaint by the person that:
    - at the time the complaint is made, is a complaint against another person (the *relevant entity*) who (at that time) is a member of the AFCA scheme; and
    - is a complaint about a product, or service, of a kind mentioned in subsection (2); and
  - the determination:

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- (i) requires the relevant entity to pay an amount to the person, whether or not the relevant entity still exists; and
  - (ii) is accepted by the person.
- (2) For the purposes of subparagraph (1)(a)(ii), the kinds of products and services are as follows:
- (a) engaging in a credit activity (within the meaning of the *National Consumer Credit Protection Act 2009*):
    - (i) as a credit provider; or
    - (ii) other than as a credit provider;
  - (b) providing financial product advice that is personal advice provided to a person as a retail client about one or more products that include at least one relevant financial product (within the meaning of Part 7.6 of this Act);
  - (c) dealing in securities for a person as a retail client, other than issuing securities.
- (3) In this section:

***credit provider*** has the same meaning as in any Part of the *National Consumer Credit Protection Act 2009* other than Part 3-2CA.

## 1066 Applications for compensation payments

- (1) A person may apply, in the approved form, to the CSLR operator for compensation for a relevant AFCA determination made in respect of the person.
- (2) An application is in the approved form if and only if:
  - (a) it is in the form approved by the CSLR operator; and
  - (b) it includes any information (including any declarations) required by the form; and
  - (c) it is given in the manner required by the CSLR operator.
- (3) The CSLR operator may approve a form for the purposes of paragraph (2)(a).

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- (4) If a person makes an application for compensation for a relevant AFCA determination made in respect of the person, the person may:
- (a) amend the application at any time before the CSLR operator offers under section 1068 to the person an amount of compensation for the determination; or
  - (b) withdraw the application any time before the person accepts under 1069 such an offer.

### 1067 Amount of compensation payments

The amount of compensation for a person for a relevant AFCA determination made in respect of the person must be an amount equal to the lower of the following amounts:

- (a) \$150,000;
- (b) the amount payable to the person in accordance with the relevant AFCA determination, less:
  - (i) any amount paid to the person in accordance with the relevant AFCA determination, including any partial payments or any payments made to the person as an unsecured creditor of a Chapter 5 body corporate for the matters covered by the determination; and
  - (ii) any compensation to which the person is eligible under any other statutory compensation scheme for the matters covered by the determination; and
  - (iii) any other payments made to the person of a kind prescribed by regulations made for the purposes of this subparagraph.

Note: This means, subject to the cap in paragraph (a), the amount payable to the person must be the amount required to be paid in accordance with the relevant AFCA determination. The amount payable cannot include, for example, an additional interest component not mentioned in that determination.

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**1068 Offer of compensation payments**

*Offer of compensation*

- (1) If a person is eligible under section 1064 for compensation for a relevant AFCA determination made in respect of the person, the CSLR operator must offer to the person, in writing, the amount of compensation referred to in section 1067 for the determination.
- (2) The offer must explain the effect of section 1069A (subrogation of rights).
- (3) Before the offer is accepted by the person, the CSLR operator may vary or revoke the offer if the CSLR operator reasonably believes:
  - (a) there is an error relating to the offer; or
  - (b) there is fraud relating to the offer; or
  - (c) there is a change in circumstances affecting:
    - (i) the person's eligibility under section 1064 for the amount of compensation in the offer; or
    - (ii) the amount of compensation in the offer; or
  - (d) other exceptional circumstances exist that justify the variation or revocation.

*Notification that person is not eligible for compensation*

- (4) If a person:
    - (a) is not eligible under section 1064 for compensation for a relevant AFCA determination made in respect of the person; and
    - (b) has made an application under section 1066 for compensation for the relevant AFCA determination;the CSLR operator must, as soon as reasonably practicable, notify the person, in writing, that the person is not eligible for compensation.
  - (5) A notice to a person under subsection (4) must include reasons why the person is not eligible for compensation.
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### **1069 Acceptance of offer of compensation payments**

- (1) A person accepts an offer made under section 1068 of an amount of compensation if the person notifies the CSLR operator, in writing, that the person accepts the offer.
- (2) If the person does not accept the offer within 90 days after the day the offer is made, the person is taken to have withdrawn their application for compensation for the relevant AFCA determination to which the offer relates.

### **1069A CSLR operator's right of subrogation if compensation is paid**

If:

- (a) the CSLR operator pays an amount of compensation:
  - (i) to a person under section 1063; and
  - (ii) for a relevant AFCA determination that required payment of an amount by another person (the *AFCA member*) who is, or was, a member of the AFCA scheme; and
- (b) the AFCA member is (or has become) a Chapter 5 body corporate;

the CSLR operator is subrogated, to the extent of that amount of compensation, to any rights and remedies that the person may have, in relation to the relevant AFCA determination, that are recognised by an officer of the Chapter 5 body corporate.

**Section 1069B**

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**Division 3—Reimbursement of unpaid AFCA fees**

**1069B Payment of AFCA's unpaid fees**

- (1) The CSLR operator must pay to AFCA an amount equal to AFCA's unpaid fees for a month starting on or after the accumulation recovery day if AFCA has notified the CSLR operator of those fees in accordance with subsection 1058B(1).
- (2) The CSLR operator must pay the amount to AFCA as soon as reasonably practicable after AFCA's notification to the CSLR operator of those fees.
- (3) However, the CSLR operator must not pay an amount under this section before:
  - (a) the start of the first levy period; or
  - (b) any later day prescribed by regulations made for the purposes of this paragraph.

**1069C Payment of AFCA's accumulated unpaid fees**

- (1) The CSLR operator must pay to AFCA an amount equal to AFCA's accumulated unpaid fees if AFCA has notified the CSLR operator of those fees in accordance with subsection 1058B(3).
- (2) The CSLR operator must pay the amount to AFCA as soon as reasonably practicable after AFCA's notification to the CSLR operator of those fees.
- (3) However, the CSLR operator must not pay an amount under this section before:
  - (a) the start of the first levy period; or
  - (b) any later day prescribed by regulations made for the purposes of this paragraph.

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## Division 4—Powers, reporting and information sharing

### Subdivision A—Powers of CSLR operator

#### 1069D Power to obtain information and documents

- (1) If the CSLR operator has reason to believe that a person is capable of giving information or producing documents relevant to an application for compensation under this Part, the CSLR operator may, by written notice to the person, require the person:
  - (a) to give to the CSLR operator, by writing, any such information; or
  - (b) to produce to the CSLR operator such documents or copies of such documents as are stated in the notice; in the manner and within the period specified in the notice.
- (2) The period specified in a notice given under subsection (1) must be at least 14 days after the day the notice is given.
- (3) If documents (whether originals or copies) are so produced, the CSLR operator:
  - (a) may take possession of, and may make copies of, or take extracts from, the documents; and
  - (b) may keep the documents for as long as is necessary for the purpose of dealing with the application; and
  - (c) must, while keeping the documents, permit a person who would be entitled to inspect any one or more of them (if the documents were not in the possession of the CSLR operator) to inspect at all reasonable times such of the documents as that person would be so entitled to inspect.
- (4) A person must not fail to comply with a requirement made by the CSLR operator under subsection (1).  
Penalty: 30 penalty units.
- (5) Subsection (4) is an offence of strict liability.

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- (6) Subsection (4) does not apply to the extent that the person has a reasonable excuse.

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

- (7) If a person who is, or was, a member of the AFCA scheme fails, without a reasonable excuse, to comply with a requirement made by the CSLR operator under subsection (1), the CSLR operator must notify AFCA and ASIC of the person's failure to comply with the notice.
- (8) The CSLR operator must not require ASIC to give information or produce documents under this section.

Note: For information sharing between ASIC and the CSLR operator, see subparagraph 127(4)(aa)(ia) of the *Australian Securities and Investments Commission Act 2001*.

## Subdivision B—Information sharing and reporting

### 1069E Authorised use or disclosure of information

A CSLR staff member may use or disclose information or documents obtained by a CSLR staff member under or for the purposes of this Part if:

- (a) the use or disclosure is for the purposes of:
- (i) this Part; or
  - (ii) Part 7.10A; or
  - (iii) the *Financial Services Compensation Scheme of Last Resort Levy Act 2023*; or
  - (iv) the *Financial Services Compensation Scheme of Last Resort Levy (Collection) Act 2023*; or
- (b) the use or disclosure is to:
- (i) ASIC; or
  - (ii) AFCA; or
  - (iii) the Information Commissioner; or
  - (iv) the Commissioner of Taxation;

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for the purposes of assisting the entity or person to perform its functions or exercise its powers.

## 1069F Reporting by CSLR operator

### *Reporting compensation payments*

- (1) If the CSLR operator pays an amount of compensation:
  - (a) to a person under section 1063; and
  - (b) for a relevant AFCA determination that required payment of an amount by an entity or body (the *AFCA member*) who is, or was, a member of the AFCA scheme;the CSLR operator must, as soon as reasonably practicable, notify ASIC, in writing, of details about the AFCA member and the AFCA member's failure to pay the amount required by the relevant AFCA determination.
- (2) If the CSLR operator:
  - (a) pays an amount of compensation:
    - (i) to a person under section 1063; and
    - (ii) for a relevant AFCA determination that required payment of an amount by another person (the *AFCA member*) who is, or was, a member of the AFCA scheme; and
  - (b) becomes aware that the AFCA member is a Chapter 5 body corporate while the determination is in force;the CSLR operator must, as soon as reasonably practicable, notify an officer of the Chapter 5 body corporate, in writing, of the amount of compensation paid.

### *Reporting revised claims, fees and costs estimates that exceed cap*

- (3) If a revised claims, fees and costs estimate for a levy period and a sub-sector comes into force that could cause the sub-sector levy cap for the levy period and the sub-sector to be exceeded (or further exceeded), the CSLR operator must notify the Minister of this as soon as practicable.

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- (4) A notice to the Minister under subsection (3) must include the information (if any) prescribed by regulations made for the purposes of this subsection.

### **1069G Publishing reports**

- (1) The CSLR operator must, as soon as reasonably practicable after the end of a levy period, prepare a report for the levy period that contains information about the matters prescribed by regulations made for the purposes of this subsection.
- (2) The CSLR operator must publish the report on its website.

## **Subdivision C—Powers of the Minister**

### **1069H Ministerial determination**

#### *Ministerial determination*

- (1) Subsection (2) applies if the Minister is notified under subsection 1069F(3) that a revised claims, fees and costs estimate for:
  - (a) a levy period; and
  - (b) a sub-sector (the *primary sub-sector*);could cause the sub-sector levy cap for the levy period and the primary sub-sector to be exceeded (or further exceeded).
- (2) The Minister may, by legislative instrument, make a determination for the levy period and the primary sub-sector dealing with one or more of the matters mentioned in subsections (3) to (5).

Note: The matter in subsection (5) involves the determination specifying further sub-sectors on which special levy will be imposed.

#### *Manner of payment*

- (3) A determination made under subsection (2) may provide that an amount of compensation payable by the CSLR operator to a person in a specified class of persons must be paid in specified instalments over a specified period of time.
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*Special levy for just the primary sub-sector*

- (4) For the purposes of paragraph 8(3)(b) of the *Financial Services Compensation Scheme of Last Resort Levy Act 2023*, a determination made under subsection (2) of this section may:
- (a) specify that levy needs to be imposed by subsection 8(3) of that Act for the levy period and the primary sub-sector; and
  - (b) specify the total amount of levy that needs to be imposed by subsection 8(3) of that Act across all persons for the levy period and the primary sub-sector, which must not exceed the difference between:
    - (i) the revised claims, fees and costs estimate (referred to in subsection (1) of this section) for the levy period and the primary sub-sector; and
    - (ii) the total amount of levy already paid as worked out under subsection (6) of this section.

*Special levy for several sub-sectors not just the primary sub-sector*

- (5) For the purposes of paragraph 9(b) of the *Financial Services Compensation Scheme of Last Resort Levy Act 2023*, a determination made under subsection (2) of this section may:
- (a) specify that levy needs to be imposed by section 9 of that Act (**special levy**) for the levy period if the Minister is satisfied that imposing special levy:
    - (i) is necessary due to the number of persons accepting amounts of compensation under section 1069 of this Act for the levy period and the primary sub-sector, and due to the size of the sum of those amounts; and
    - (ii) is the most effective way of enabling payment of those amounts to those persons in a timely manner; and
  - (b) for each of one or more specified sub-sectors—specify a total amount of special levy that needs to be imposed for the levy period across all members of the specified sub-sector if the Minister has had regard to:

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- (i) the impact that imposing that total amount of special levy may have on the financial sustainability and viability of the specified sub-sector; and
- (ii) the impact that imposing that total amount of special levy across all members of the specified sub-sector may have on the financial system more broadly; and
- (c) specify the sum of the total amounts of special levy specified under paragraph (b) of this subsection, which must not exceed the difference between:
  - (i) the revised claims, fees and costs estimate (referred to in subsection (1) of this section) for the levy period and the primary sub-sector; and
  - (ii) the total amount of levy already paid as worked out under subsection (6) of this section.

*Working out the total amount of levy already paid*

- (6) For the purposes of subparagraph (4)(b)(ii) or (5)(c)(ii), work out the sum of:
  - (a) the total amount of levy paid that was earlier imposed by section 8 of the *Financial Services Compensation Scheme of Last Resort Levy Act 2023* across all persons for the levy period and the primary sub-sector; and
  - (b) the total amount of levy paid that was earlier imposed by section 9 of that Act across all persons for all sub-sectors in relation to any earlier revised claims, fees and costs estimate for the levy period and the primary sub-sector.

## Division 5—Regulating the CSLR operator

### 1069J Obligation to comply with mandatory requirements

The CSLR operator must ensure that the mandatory requirements for the CSLR operator under section 1062 are complied with.

### 1069K ASIC may issue regulatory requirements

ASIC may, by legislative instrument, issue to the CSLR operator regulatory requirements relating to compliance with the mandatory requirements for the CSLR operator under section 1062.

### 1069L General directions to CSLR operator

*Notice of intention to issue a direction*

- (1) If ASIC considers that the CSLR operator has not done all things reasonably practicable to ensure compliance with:
  - (a) the mandatory requirements for the CSLR operator under section 1062; or
  - (b) a condition of the authorisation of the CSLR operator imposed by the Minister (see paragraph 1060(4)(b)); or
  - (c) regulatory requirements issued under section 1069K;ASIC may give the CSLR operator written notice that it intends to give the CSLR operator a specified direction under this section.
- (2) The notice must set out:
  - (a) the specific measures that the direction will require the CSLR operator to take to comply with the requirements or condition; and
  - (b) the reasons for ASIC's intention to give the direction.

*Issuing a direction*

- (3) If, after receiving the notice:

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- (a) the CSLR operator does not take those specific measures;  
and
  - (b) ASIC still considers that it is appropriate to give the direction to the CSLR operator;
- ASIC may give the CSLR operator the direction, in writing, with a statement setting out the reasons for giving the direction.
- (4) The direction must deal with the time by which, or the period during which, it is to be complied with. The time or period must be reasonable.
  - (5) A direction made under this section is not a legislative instrument.

*Compliance*

- (6) The CSLR operator must comply with a direction made under this section.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (7) If the CSLR operator fails to comply with the direction, ASIC may apply to the Court for, and the Court may make, an order that the CSLR operator comply with the direction.

*Varying or revoking a direction*

- (8) ASIC may vary a direction made under this section by giving written notice to the CSLR operator.
- (9) The direction has effect until ASIC revokes it by giving written notice to the CSLR operator.
- (10) ASIC may revoke the direction, by giving written notice to the CSLR operator, if, at the time of revocation, ASIC considers that the direction is no longer necessary or appropriate.

## Division 6—Financial matters

### 1069M Costs for first levy period

*Estimate of costs for first levy period*

- (1) The CSLR operator may, by notifiable instrument made at any time before the start of the first levy period, determine for the first levy period and a sub-sector an estimate that is the sum of:
  - (a) the specified amount equal to what the CSLR operator reasonably believes (having regard to actuarial principles) will be the total amount of compensation payable under section 1063:
    - (i) during the first levy period; and
    - (ii) for the sub-sector;other than any such compensation relating to pre-CSLR complaints; and
  - (b) the specified amount equal to what the CSLR operator reasonably believes (having regard to actuarial principles) will be the portion of the sum of the following that is attributable to the sub-sector:
    - (i) the sum of AFCA's unpaid fees expected for each of the months ending on or after the accumulation recovery day but before the second levy period, other than any such fees relating to pre-CSLR complaints;
    - (ii) the capital reserve establishment contribution;
    - (iii) the CSLR operator's expected administrative costs for the first levy period.

Note: A single instrument may determine estimates for several sub-sectors.

- (2) The notifiable instrument must include each of the amounts referred to in subparagraphs (1)(b)(i) to (iii).

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### *Reconciliation of costs for first levy period*

- (3) The CSLR operator may, by notifiable instrument and as soon as reasonably practicable after the first levy period, determine the revised costs for the first levy period and a sub-sector by calculating the sum of the following amounts:
- (a) the total amount of compensation paid under section 1063 during the first levy period for the sub-sector, other than any such compensation relating to pre-CSLR complaints;
  - (b) the amount equal to the portion of the sum of the following amounts that the CSLR operator reasonably believes (having regard to actuarial principles) are attributable to the sub-sector:
    - (i) the sum of AFCA's unpaid fees for each of the months ending on or after the accumulation recovery day but before the second levy period, other than any such fees relating to pre-CSLR complaints;
    - (ii) the capital reserve establishment contribution;
    - (iii) the CSLR operator's administrative costs for the first levy period.

Note: A single instrument may determine revised costs for several sub-sectors.

## **1069N Payment to the CSLR operator of amount for the first levy period for the scheme**

- (1) The Commonwealth must pay to the CSLR operator the amount mentioned in subsection (2) for the first levy period for the following purposes:
- (a) the CSLR operator paying compensation under section 1063 during the first levy period, other than any such compensation relating to pre-CSLR complaints;
  - (b) the CSLR operator paying AFCA's unpaid fees for each month ending on or after the accumulation recovery day but before the second levy period, other than any such fees relating to pre-CSLR complaints;

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- (c) the CSLR operator establishing approximately one third of the capital reserve (within the meaning of the *Financial Services Compensation Scheme of Last Resort Levy (Collection) Act 2023*);
  - (d) the CSLR operator paying the CSLR operator's administrative costs for the first levy period.
- (2) For the purposes of subsection (1), the amount is equal to the sum of each estimate determined under subsection 1069M(1) for the first levy period and a sub-sector.

**1069P Payment to the CSLR operator of amounts equal to levy**

- (1) The Commonwealth must pay to the CSLR operator an amount equal to each amount received by ASIC, on behalf of the Commonwealth, by way of:
  - (a) an instalment of levy (within the meaning of the *Financial Services Compensation Scheme of Last Resort Levy (Collection) Act 2023*); or
  - (b) late payment penalty (within the meaning of that Act); or
  - (c) shortfall penalty (within the meaning of that Act).
- (2) The Consolidated Revenue Fund is appropriated for the purposes of subsection (1).

**1069Q Application of money by CSLR operator**

- (1) The money of the CSLR operator is to be applied only:
  - (a) to pay compensation under section 1063; and
  - (b) to pay AFCA's unpaid fees under section 1069B; and
  - (c) to pay AFCA's accumulated unpaid fees under section 1069C; and
  - (d) to pay the CSLR operator's administrative costs; and
  - (e) to reimburse to ASIC the costs that ASIC has notified to the CSLR operator under subsection 9(4) of the *Financial Services Compensation Scheme of Last Resort Levy (Collection) Act 2023*; and

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- (f) to establish and restore the capital reserve (within the meaning of the *Financial Services Compensation Scheme of Last Resort Levy (Collection) Act 2023*).
- (2) Subsection (1) does not prevent investment of money.

### **1069R Investment by CSLR operator**

The CSLR operator must not invest money of the CSLR operator unless:

- (a) the money is not immediately required for the purposes mentioned in paragraphs 1069Q(1)(a) to (e); and
- (b) the money is invested:
  - (i) on deposit with an ADI (within the meaning of the *Banking Act 1959*), including a deposit evidenced by a certificate of deposit; or
  - (ii) in securities of, or securities guaranteed by, the Commonwealth, a State or a Territory.

### **1069S Recovery of overpayments**

- (1) If:
  - (a) the CSLR operator pays an amount of compensation to a person under, or purportedly under, this Part; and
  - (b) the amount paid exceeds the amount (if any) properly payable to the person under this Part;the amount of the excess is recoverable by the CSLR operator as a debt due to the CSLR operator by action against the person in the Federal Court or the Federal Circuit and Family Court of Australia (Division 2).
- (2) An amount equal to the excess may alternatively be deducted from any other amount of compensation payable under this Part to, or for the benefit of, the person.

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Section 1070A**Part 7.11—Title and transfer****Division 1—Title to certain securities****1070A Nature of shares and certain other interests in a company or registered scheme**

- (1) A share, other interest of a member in a company or interest of a person in a registered scheme:
  - (a) is personal property; and
  - (b) is transferable or transmissible as provided by:
    - (i) the company's, or scheme's, constitution; or
    - (ii) the operating rules of a prescribed CS facility if they are applicable; and
  - (c) is capable of devolution by will or by operation of law.
- (2) Paragraph (1)(c) has effect subject to:
  - (a) in the case of a company:
    - (i) the company's constitution (if any); and
    - (ii) any replaceable rules that apply to the company; and
    - (iii) the operating rules of a prescribed CS facility if they apply to the share or interest; and
  - (b) in the case of a scheme:
    - (i) the scheme's constitution; and
    - (ii) the operating rules of a prescribed CS facility if they apply to the interest.
- (3) Subject to subsection (1):
  - (a) the laws applicable to ownership of, and dealing with, personal property apply to a share, other interest of a member in a company or interest of a person in a registered scheme as they apply to other property; and
  - (b) equitable interests in respect of a share, interest of a member in a company or other interest of a person in a registered

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scheme may be created, dealt with and enforced as in the case of other personal property.

- (4) For the purposes of any law, a share, other interest of a member in a company or interest of a person in a registered scheme is taken to be situated:
- (a) if the share, interest in a company, or interest in a registered scheme is entered on the register kept under section 169—in the State or Territory where that register is kept; or
  - (b) if the share or interest in the company is entered on an overseas branch register kept under section 178—in the foreign country where that register is kept.

**1070B Numbering of shares**

- (1) Except as provided in subsection (2), a company must ensure that each share in the company is distinguished by an appropriate number.

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

- (2) Despite subsection (1):

- (a) if at any time all the issued shares in a company, or all the issued shares in a company of a particular class:
  - (i) are fully paid up; and
  - (ii) rank equally for all purposes;none of those shares is required to have a distinguishing number so long as each of those shares remains fully paid up, and ranks equally for all purposes with all shares of the same class for the time being issued and fully paid up; and
- (b) if:
  - (i) all the issued shares in a company are evidenced by certificates in accordance with section 1070C; and
  - (ii) each certificate is distinguished by an appropriate number; and
  - (iii) that number is recorded in the register of members;

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none of those shares is required to have a distinguishing number; and

- (c) a share need not have a distinguishing number if the operating rules of a prescribed CS facility through which it is able to be transferred provide that the share need not have a distinguishing number.

Note: A defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code*.

### **1070C Matters to be specified in share certificate**

- (1) A company must ensure that a certificate it issues specifying the shares held by a member of the company states:
  - (a) the name of the company and the fact that it is registered under this Act; and
  - (b) the class of the shares; and
  - (c) the amount (if any) unpaid on the shares.

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

- (2) A certificate issued in accordance with subsection (1) specifying shares held by a member of a company is *prima facie* evidence of the title of the member to the shares.
- (3) A failure to comply with subsection (1) does not affect the rights of a holder of shares.

### **1070D Loss or destruction of title documents for certain securities**

- (1) This section applies to the following securities:
  - (a) shares in a company;
  - (b) debentures of a company;
  - (c) interests in a registered scheme.
- (2) This section applies to an interest in a registered scheme as if:
  - (a) references to a company were instead references to the responsible entity of the registered scheme; and

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- (b) references to the directors of a company were instead references to the directors of the responsible entity of the registered scheme.
- (3) A company must, in accordance with subsection (4), issue a duplicate certificate or other title document for securities if:
  - (a) the certificate or document is lost or destroyed; and
  - (b) the owner of the securities applies to the company for the duplicate in accordance with subsection (5); and
  - (c) the owner complies with any requirements made in accordance with subsection (6).

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

- (4) The company must issue the duplicate:
  - (a) if the company requires the payment of an amount not exceeding the amount prescribed by regulations made for the purposes of this paragraph—within 21 days after the payment is received by the company or within such longer period as ASIC approves; or
  - (b) in a case to which paragraph (a) does not apply—within 21 days after the application is made or within such longer period as ASIC approves.
- (5) The application must be accompanied by:
  - (a) a statement in writing that the certificate or other document:
    - (i) has been lost or destroyed; and
    - (ii) has not been pledged, sold or otherwise disposed of; and
  - (b) if the certificate or other document has been lost—a statement in writing that proper searches have been made; and
  - (c) an undertaking in writing that if the certificate or other document is found or received by the owner it will be returned to the company.

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- (6) The directors of the company may, before accepting an application for the issue of a duplicate certificate, require the applicant to do either or both of the following:
- (a) publish a notice in a manner specified by the directors stating that:
    - (i) the certificate or other document has been lost or destroyed; and
    - (ii) the owner intends, after the end of 14 days after the publication of the advertisement, to apply to the company for a duplicate certificate;
  - (b) give a bond for an amount equal to at least the current market value of the securities indemnifying the company against loss following the production of the original certificate or other document.
- (7) If:
- (a) a certificate or other title document for securities is cancelled in reliance on the operating rules of a prescribed CS facility; and
  - (b) having regard to those provisions, the certificate or other document should not have been cancelled;
- this section applies to the certificate or other document as though it were destroyed on its cancellation.

**Section 1071A**

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**Division 2—Transfer of certain securities**

**Subdivision A—General provisions**

**1071A Application of the Subdivision to certain securities**

- (1) This Subdivision applies to the following securities:
  - (a) shares in a company;
  - (b) debentures of a company;
  - (c) interests in a registered scheme.
- (2) This Subdivision applies to an interest in a registered scheme as if:
  - (a) references to a company were instead references to the responsible entity of the registered scheme; and
  - (b) references to the constitution of a company were instead references to the constitution of the registered scheme; and
  - (c) references to members of a company were instead references to members of the registered scheme.

**1071B Instrument of transfer**

- (1) This section does not apply to a transfer of a security through a prescribed CS facility.
  - (2) Subject to subsection (5), a company must only register a transfer of securities if a proper instrument of transfer (see subsections (3) and (4)) has been delivered to the company. This is so despite:
    - (a) anything in its constitution; or
    - (b) anything in a deed relating to debentures.
- Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (3) An instrument of transfer is not a proper instrument of transfer for the purposes of subsection (2) if it does not show the details, specified in the regulations, in relation to the company concerned.

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- (4) If the transfer of the securities is covered by Division 3 of this Part, then (in addition to subsection (3)), the instrument is not a proper instrument of transfer for the purposes of subsection (2) unless it is a sufficient transfer of the securities under regulations made for the purposes of that Division.
- (5) Subsection (2) does not prejudice the power of the company to register, as the holder of securities, a person to whom the right to the securities has devolved by will or by operation of law.
- (6) Subsections (7) to (13) deal with a transfer of a security of a dead holder by the dead holder's personal representative. They deal with the transfer differently depending on whether the personal representative is a local representative or not.
- (7) The personal representative is a ***local representative*** if the representative is duly constituted as a personal representative under the law of the State or Territory in which the security is situated.

Note: Subsection 1070A(4) provides that the security is situated where the relevant register is kept.

- (8) If the personal representative is a local representative, a transfer of the security by the representative is as valid as if the representative had been registered as the holder of the security at the time when the instrument of transfer was executed.
- (9) If:
  - (a) the personal representative is not a local representative; and
  - (b) the representative:
    - (i) executes an instrument of transfer of the security to the representative or to another person; and
    - (ii) delivers the instrument to the company; and
    - (iii) delivers to the company with the instrument a statement in writing made by the representative to the effect that, to the best of the representative's knowledge, information and belief, no grant of representation of the estate of the deceased holder has been applied for or made in the State or Territory in which the security is

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located and no application for such a grant will be made; and

- (c) the statement is made within 3 months immediately before the date on which the statement is delivered to the company; the company must (subject to subsection (10)) register the transfer and pay to the representative any dividends or other money accrued in respect of the security up to the time when the instrument was executed.
- (10) Subsection (9) does not operate so as to require the company to do anything that it would not have been required to do if the personal representative were a local representative.
- (11) A transfer or payment made under subsection (9) and a receipt or acknowledgment of such a payment is, for all purposes, as valid and effectual as if the personal representative were a local representative.
- (12) For the purposes of this section, an application by a personal representative of a dead person for registration as the holder of a security in place of the dead person is taken to be an instrument of transfer effecting a transfer of the security to the personal representative.
- (13) The production to a company of a document that is, under the law of a State or Territory, sufficient evidence of probate of the will, or letters of administration of the estate, of a dead person having been granted to a person, is sufficient evidence of the grant (for the company's purposes). This is so despite:
  - (a) anything in its constitution; or
  - (b) in a deed relating to debentures.

**1071C Occupation need not appear in transfer document, register etc.**

- (1) A document transferring securities need not state the occupation of the transferor or transferee and, if it is signed by a person, the signature need not be witnessed.

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- (2) Subsection (1) applies despite anything in:
- (a) the constitution of:
    - (i) a company; or
    - (ii) a body referred to in paragraph 1073C(a) or (b); or
  - (b) the terms and conditions on which securities are created or issued.
- (3) The omission from a register, certificate, document transferring securities or other document relating to a security, of a statement of the occupation of a person who is, or is entitled to be, registered as the holder of the security does not breach any law, constitution, trust deed or other document relating to the securities.

**1071D Registration of transfer at request of transferor**

- (1) A written application by the transferor of a security of a company for the transferee's name to be entered in the appropriate register is as effective (for the company's purposes) as if it were an application by the transferee. The application is subject to the same conditions as it would be if it had been made by the transferee.
- (2) If the transferor of a security of a company requests the company in writing to do so, the company must, by written notice, require a person who has possession, custody or control of either or both of the following:
  - (a) any title documents for the security;
  - (b) the instrument of transfer of the security;to bring it or them into the office of the company within a specified period, to have the document cancelled or rectified and the transfer registered or otherwise dealt with.
- (3) The period specified under subsection (2) must be not less than 7 and not more than 28 days after the date of the notice.
- (4) If a person refuses or fails to comply with a notice given under subsection (2), the transferor may apply to the Court for the issue of a summons for that person to appear before the Court and show

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cause why the documents mentioned in the notice should not be delivered up or produced as required by the notice.

(5) The Court may:

- (a) if the person appears:
  - (i) examine the person upon oath or affirmation; and
  - (ii) receive other evidence; and
- (b) if the person does not appear after being duly served with the summons—receive evidence in the person's absence; and
- (c) in either case order the person to deliver up such documents to the company upon such terms or conditions as the Court considers just and reasonable.

The costs of the summons and of proceedings on the summons are in the discretion of the Court.

(6) Lists of documents required to be brought in under subsection (2) but not brought in in accordance with a requirement made under subsection (2) or delivered up in accordance with an order under subsection (5), must be:

- (a) exhibited in the office of the company; and
- (b) advertised in the *Gazette* and by publishing a notice in any other manner the company thinks fit.

**1071E Notice of refusal to register transfer**

If a company refuses to register a transfer of a security of the company, it must, within 2 months after the date on which the transfer was lodged with it, give the transferee notice of the refusal.

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

**1071F Remedy for refusal to register transfer or transmission**

(1) If a relevant authority in relation to a company:

- (a) refuses or fails to register; or
- (b) refuses or fails to give its consent or approval to the registration of;

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a transfer or transmission of securities of the company, the transferee or transmittee may apply to the Court for an order under this section.

- (2) If the Court is satisfied on the application that the refusal or failure was without just cause, the Court may:
  - (a) order that the transfer or transmission be registered; or
  - (b) make such other order as it thinks just and reasonable, including:
    - (i) in the case of a transfer or transmission of shares—an order providing for the purchase of the shares by a specified member of the company or by the company; and
    - (ii) in the case of a purchase by the company—an order providing for the reduction accordingly of the capital of the company.
- (3) In this section:

*relevant authority*, in relation to a company, means:

- (a) a person who has, 2 or more persons who together have, or a body that has, authority to register a transfer or transmission of securities of the company; or
- (b) a person, 2 or more persons, or a body, whose consent or approval is required before a transfer or transmission of securities of the company is registered.

### **1071G Certification of transfers**

- (1) The certification by a company of an instrument of transfer of securities of the company:
  - (a) is taken as a representation by the company to any person acting on the faith of the certification that there have been produced to the company such documents as on the face of them show *prima facie* title to the securities in the transferor named in the instrument of transfer; and
  - (b) is not taken as a representation that the transferor has any title to the securities.

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- (2) If a person acts on the faith of a false certification by a company made negligently, the company is under the same liability to the person as if the certification had been made fraudulently.
- (3) A certification may be expressed to be limited to 42 days or any longer period from the date of certification. If it is, the company and its officers and employees are not, in the absence of fraud, liable in respect of the registration of any transfer of securities comprised in the certification after the end of:
  - (a) the period so limited; or
  - (b) any extension of that period given by the company;if the instrument of transfer has not, within that period, been lodged with the company for registration.
- (4) For the purposes of this section:
  - (a) an instrument of transfer is taken to be certified if it bears the words “certificate lodged” or words to the like effect; and
  - (b) the certification of an instrument of transfer is taken to be made by a company if:
    - (i) the person issuing the instrument is a person authorised to issue certified instruments of transfer on the company’s behalf; and
    - (ii) the certification is signed by a person authorised to certify transfers on the company’s behalf or by an officer of the company or of a body corporate so authorised; and
  - (c) a certification that purports to be authenticated by a person’s signature or initials (whether handwritten or not) is taken to be signed by the person unless it is shown that the signature or initials:
    - (i) was not or were not placed there by the person; and
    - (ii) was not or were not placed there by any other person authorised to use the signature or initials;for the purpose of certifying transfers on the company’s behalf.

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Section 1071H**1071H Duties of company with respect to issue of certificates**

- (1) Subject to subsection (2), within 2 months after a company issues a security, the company must:
  - (a) complete and have ready for delivery to the holder of the security all the appropriate certificates or other title documents in connection with the issue of the security; and
  - (b) unless otherwise instructed by the holder, send or deliver the completed certificates or other title documents to:
    - (i) the holder; or
    - (ii) if the holder has instructed the company in writing to send them to a nominated person—that person.

Paragraph (a) has effect in relation to shares subject to the conditions on which the shares are issued.

- (2) If the operating rules of a prescribed CS facility include a provision to the effect that:
  - (a) no document is required by subsection (1) to be completed and delivered by a company in relation to the issue of a security in specified circumstances; or
  - (b) the only document required by subsection (1) to be completed and delivered by a company in relation to the issue of a security in specified circumstances is the document required by the provision;the provision has effect accordingly.
- (3) Within one month after the date on which a transfer of a security is lodged with a company, the company must:
  - (a) complete and have ready for delivery to the transferee all the appropriate transfer and title documents in connection with the transfer; and
  - (b) unless otherwise instructed by the transferee, send or deliver the completed documents to:
    - (i) the transferee; or
    - (ii) if the transferee has instructed the company in writing to send them to a nominated person—that person.

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This subsection does not apply to a transfer that the company is for any reason entitled to refuse to register and does not register.

- (4) The only document required by subsection (3) to be completed and delivered by a company in relation to a transfer covered by the operating rules of a prescribed CS facility is the document (if any) that those rules require to be completed and delivered.
- (5) A company need not comply:
  - (a) with subsection (1) in relation to the issue of a security; or
  - (b) with subsection (3) in relation to a transfer of a security;

if the person to whom the security is issued, or the transferee, has:

  - (c) applied to ASIC for the making of a declaration under this subsection; and
  - (d) been declared by ASIC, by writing published in the *Gazette*, to be a person in relation to whom this section does not apply.
- (6) If:
  - (a) either:
    - (i) if subsection (1) applies—the holder referred to in that subsection serves a notice on the company requiring the company to remedy a contravention of that subsection; or
    - (ii) if subsection (3) applies—the transferee referred to in that subsection serves a notice on the company requiring the company to remedy a contravention of that subsection; and
  - (b) the company fails to remedy the contravention within 10 days after the service of the notice; and
  - (c) the person entitled to have the documents delivered to him or her applies to the Court for an order under this subsection;

the Court may make an order directing the company and any officer or employee of the company to remedy the contravention within such period as is specified in the order.

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- (7) An order under subsection (6) may provide that all costs of, and incidental to, the application are to be borne by:
- (a) the company; or
  - (b) any officer or employee of the company who was involved in the contravention;
- in such proportions as the Court thinks just and reasonable.

**Subdivision B—Special provisions for shares****1072A Transmission of shares on death (*replaceable rule—see section 135*)**

*If shares not held jointly*

- (1) If a shareholder who does not own shares jointly dies, the company will recognise only the personal representative of the deceased shareholder as being entitled to the deceased shareholder's interest in the shares.
- (2) If the personal representative gives the directors the information they reasonably require to establish the representative's entitlement to be registered as holder of the shares:
  - (a) the personal representative may:
    - (i) by giving a written and signed notice to the company, elect to be registered as the holder of the shares; or
    - (ii) by giving a completed transfer form to the company, transfer the shares to another person; and
  - (b) the personal representative is entitled, whether or not registered as the holder of the shares, to the same rights as the deceased shareholder.
- (3) On receiving an election under subparagraph (2)(a)(i), the company must register the personal representative as the holder of the shares.
- (4) A transfer under subparagraph (2)(a)(ii) is subject to the same rules (for example, about entitlement to transfer and registration of transfers) as apply to transfers generally.

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*If shares held jointly*

- (5) If a shareholder who owns shares jointly dies, the company will recognise only the survivor as being entitled to the deceased shareholder's interest in the shares. The estate of the deceased shareholder is not released from any liability in respect of the shares.

### **1072B Transmission of shares on bankruptcy (replaceable rule—see section 135)**

- (1) If a person entitled to shares because of the bankruptcy of a shareholder gives the directors the information they reasonably require to establish the person's entitlement to be registered as holder of the shares, the person may:
  - (a) by giving a written and signed notice to the company, elect to be registered as the holder of the shares; or
  - (b) by giving a completed transfer form to the company, transfer the shares to another person.
- (2) On receiving an election under paragraph (1)(a), the company must register the person as the holder of the shares.
- (3) A transfer under paragraph (1)(b) is subject to the same rules (for example, about entitlement to transfer and registration of transfers) as apply to transfers generally.
- (4) This section has effect subject to the *Bankruptcy Act 1966*.

### **1072C Rights of trustee of estate of bankrupt shareholder**

- (1) If:
  - (a) because of the *Bankruptcy Act 1966*, a share in a company, being part of the property of a bankrupt, vests in the trustee of the bankrupt's estate; and
  - (b) the bankrupt is the registered holder of that share;this section applies whether or not the trustee has been registered as the holder of the share.

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- (2) On producing such information as the company's directors properly require, the trustee is entitled to:
- (a) the same dividends and other benefits; and
  - (b) the same rights, for example, but without limitation, rights in relation to:
    - (i) meetings of the company; or
    - (ii) documents, including notices of such meetings; or
    - (iii) voting; or
    - (iv) inspection of the company's records;
- as the bankrupt would be entitled to if he or she were not a bankrupt.
- (3) The trustee has the same rights:
- (a) to transfer the share; and
  - (b) to require a person to do an act or give a consent in connection with completing or registering a transfer of the share;
- as the bankrupt would have if he or she were not a bankrupt.
- (4) If the trustee transfers the share, the transfer is as valid as if the trustee had been registered as the holder of the share when the trustee executed the instrument of transfer.
- (5) A person or body whose consent or approval is required for the transfer of shares in the company must not unreasonably withhold consent or approval for the transfer of the share by the trustee.
- (6) If:
- (a) the company's constitution requires:
    - (i) the share to be offered for purchase to a member of the company; or
    - (ii) an invitation to buy the share to be issued to such a member; and
  - (b) as at the end of a reasonable period after the trustee so offers the share, or so issues such an invitation, no such member has agreed to buy the share from the trustee at a reasonable price;
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the trustee may sell and transfer the share to a person other than such a member.

- (7) A provision of the company's constitution is void as against the trustee in so far as, apart from this section, it would affect rights attached to the share:
  - (a) because the bankrupt is a bankrupt; or
  - (b) because of some event that led to the bankrupt becoming, or that indicated that the bankrupt was about to become, or might be about to become, a bankrupt; or
  - (c) for reasons including a reason referred to in paragraph (a) or (b).
- (8) Nothing in this section limits the generality of anything else in it.
- (9) This section has effect despite anything in the company's constitution.

**1072D Transmission of shares on mental incapacity** (*replaceable rule—see section 135*)

- (1) If a person entitled to shares because of the mental incapacity of a shareholder gives the directors the information they reasonably require to establish the person's entitlement to be registered as the holder of the shares:
    - (a) the person may:
      - (i) by giving a written and signed notice to the company, elect to be registered as the holder of the shares; or
      - (ii) by giving a completed transfer form to the company, transfer the shares to another person; and
    - (b) the person is entitled, whether or not registered as the holder of the shares, to the same rights as the shareholder.
  - (2) On receiving an election under subparagraph (1)(a)(i), the company must register the person as the holder of the shares.
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- (3) A transfer under subparagraph (1)(a)(ii) is subject to the same rules (for example, about entitlement to transfer and registration of transfers) as apply to transfers generally.

**1072E Trustee etc. may be registered as owner of shares**

- (1) In this section:

*share*, in relation to a body corporate, means a share in the body that is registered in a register kept in this jurisdiction.

- (2) A trustee, executor or administrator of the estate of a dead person who was the registered holder of a share in a corporation may be registered as the holder of that share as trustee, executor or administrator of that estate.
- (3) A trustee, executor or administrator of the estate of a dead person who was entitled in equity to a share in a corporation may, with the consent of:
- (a) the corporation; and
  - (b) the registered holder of that share;
- be registered as the holder of that share as trustee, executor or administrator of that estate.
- (4) If:
- (a) a person (the *administrator*) is appointed, under a law of a State or Territory relating to the administration of the estates of persons who, through mental or physical infirmity, are incapable of managing their affairs, to administer the estate of a person who is so incapable; and
  - (b) the incapable person is the registered holder of a share in a corporation;
- the administrator may be registered as the holder of that share as administrator of that estate.
- (5) If:
- (a) a person (the *administrator*) is appointed, under a law of a State or Territory relating to the administration of the estates

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of a person who, through mental or physical infirmity, are incapable of managing their affairs, to administer the estate of a person who is so incapable; and

- (b) the incapable person is entitled in equity to a share in a corporation;

the administrator may, with the consent of the corporation and of the registered holder of that share, be registered as the holder of the share as administrator of that estate.

(6) If:

- (a) by virtue of the *Bankruptcy Act 1966*, a share in a body corporate, being the property of a bankrupt, vests in the Official Trustee in Bankruptcy; and

- (b) the bankrupt is the registered holder of that share;

the Official Trustee may be registered as the holder of that share as the Official Trustee in Bankruptcy.

(7) If:

- (a) by virtue of the *Bankruptcy Act 1966*, a share in a body corporate, being the property of a bankrupt, vests in the Official Trustee in Bankruptcy; and

- (b) the bankrupt is entitled in equity to that share;

the Official Trustee may, with the consent of the body and of the registered holder of that share, be registered as the holder of that share as the Official Trustee in Bankruptcy.

(8) A person registered under subsection (2), (3), (4), (5), (6) or (7), is, while registered as mentioned in that subsection:

- (a) subject to the same liabilities in respect of the share as those to which he, she or it would have been subject if the share had remained, or had been, as the case requires, registered in the name of the dead person, the incapable person or the bankrupt, as the case may be; and

- (b) subject to no other liabilities in respect of the share.

(9) Shares in a corporation registered in a register and held by a trustee in respect of a particular trust may, with the consent of the

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corporation, be marked in the register in such a way as to identify them as being held in respect of the trust.

- (10) Except as provided in this section and section 169:
  - (a) no notice of a trust, whether express, implied or constructive, must be entered on a register kept in this jurisdiction or be receivable by ASIC; and
  - (b) no liabilities are affected by anything done under a preceding subsection of this section or under section 169; and
  - (c) nothing so done affects the body corporate concerned with notice of a trust.
- (11) A person must, within one month after beginning to hold shares in a proprietary company as trustee for, or otherwise on behalf of or on account of, a body corporate, serve on the company notice in writing that the person so holds the shares.

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

**1072F Registration of transfers (*replaceable rule—see section 135*)**

- (1) A person transferring shares remains the holder of the shares until the transfer is registered and the name of the person to whom they are being transferred is entered in the register of members in respect of the shares.
  - (2) The directors are not required to register a transfer of shares in the company unless:
    - (a) the transfer and any share certificate have been lodged at the company's registered office; and
    - (b) any fee payable on registration of the transfer has been paid; and
    - (c) the directors have been given any further information they reasonably require to establish the right of the person transferring the shares to make the transfer.
  - (3) The directors may refuse to register a transfer of shares in the company if:
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- (a) the shares are not fully-paid; or
  - (b) the company has a lien on the shares.
- (4) The directors may suspend registration of transfers of shares in the company at the times and for the periods they determine. The periods of suspension must not exceed 30 days in any one calendar year.

**1072G Additional general discretion for directors of proprietary companies to refuse to register transfers (*replaceable rule—see section 135*)**

The directors of a proprietary company may refuse to register a transfer of shares in the company for any reason.

**1072H Notices relating to non-beneficial and beneficial ownership of shares**

- (1) If, upon registration of a transfer of shares in a company, the transferee would hold non-beneficially particular shares (*the relevant shares*), being all or any of the shares to which the transfer relates, the transferee must only lodge the instrument of transfer with the company for registration of the transfer if the instrument of transfer includes a notice that:
- (a) contains a statement to the effect that, upon registration of the transfer, the transferee will hold the relevant shares non-beneficially; and
  - (b) sets out particulars of the relevant shares; and
  - (c) is signed by or on behalf of the transferee.

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

- (2) The fact that a person has failed to comply with subsection (1) does not affect the validity of the registration of a transfer of shares in a company.
- (3) If:
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- (a) an instrument of transfer of shares in a company includes a notice of the kind referred to in paragraph (1)(c) and is lodged with the company for registration of the transfer; and
  - (b) upon registration of the transfer, the transferee holds beneficially particular shares (in this subsection called the **relevant shares**), being all or any of the shares particulars of which are set out in the notice;
- then, before the end of 14 days beginning on registration of the transfer, the transferee must, whether or not the transferee begins before the end of that period to hold all or any of the relevant shares non-beneficially, give to the company a notice that:
- (c) sets out the name and address of the transferee; and
  - (d) contains a statement to the effect that, as from registration of the transfer, the transferee holds the relevant shares beneficially; and
  - (e) sets out particulars of the relevant shares; and
  - (f) is signed by or on behalf of the transferee.

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

## (4) If:

- (a) an instrument of transfer of shares in a company is lodged with the company for registration of the transfer; and
  - (b) upon registration of the transfer, the transferee holds non-beneficially particular shares (in this subsection called the **relevant shares**), being all or any of the shares to which the instrument of transfer relates (other than, in a case in which the instrument of transfer includes a notice of the kind referred to in paragraph (1)(c), the shares particulars of which are set out in the notice);
- then, before the end of 14 days beginning on registration of the transfer, the transferee must, whether or not the transferee begins before the end of that period to hold any of the relevant shares beneficially, give to the company a notice that:
- (c) sets out the name and address of the transferee; and

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- (d) contains a statement to the effect that, as from registration of the transfer, the transferee holds the relevant shares non-beneficially; and
- (e) sets out particulars of the relevant shares; and
- (f) is signed by or on behalf of the transferee.

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

**(5) If:**

- (a) at a particular time, a person holds beneficially shares in a company; and
  - (b) immediately after that time, the person holds non-beneficially particular shares (in this subsection called the *relevant shares*), being all or any of the shares referred to in paragraph (a);
- then, before the end of 14 days beginning at that time, the person must, whether or not the person recommences before the end of that period to hold any of the relevant shares beneficially, give to the company a notice that:
- (c) sets out the name and address of the person; and
  - (d) contains a statement to the effect that, after that time, the person holds the relevant shares non-beneficially; and
  - (e) specifies that time and sets out particulars of the relevant shares; and
  - (f) is signed by or on behalf of the person.

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

**(6) If:**

- (a) at a particular time, a person holds non-beneficially shares in a company; and
- (b) immediately after that time, the person holds beneficially particular shares (in this subsection called the *relevant shares*), being all or any of the shares referred to in paragraph (a);

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then, before the end of 14 days beginning at that time, the person must, whether or not the person recommences before the end of that period to hold any of the relevant shares non-beneficially, give to the company a notice that:

- (c) sets out the name and address of the person; and
- (d) contains a statement to the effect that, after that time, the person holds the relevant shares beneficially; and
- (e) specifies that time and sets out particulars of the relevant shares; and
- (f) is signed by or on behalf of the person.

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

- (7) In proceedings under, or for an offence based on a provision of, this section, a person is, unless the contrary is established, presumed to have been aware at a particular time of a circumstance of which an employee or agent of the person, being an employee or agent having duties or acting in relation to the transfer to, or ownership by, the person of a share or shares in the company concerned, was aware at that time.
- (8) For the purposes of this section and of section 169:
  - (a) if, at a particular time, a person:
    - (i) holds shares in a capacity other than that of sole beneficial owner; or
    - (ii) without limiting the generality of subparagraph (i), holds shares as trustee for, as nominee for, or otherwise on behalf of or on account of, another person;the first-mentioned person is taken to hold the shares non-beneficially at that time; and
  - (b) a person who holds shares at a particular time is taken to hold the shares beneficially at that time unless the person holds the shares non-beneficially at that time.

**Section 1073A**

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**Division 3—Transfer of certain securities effected otherwise than through a prescribed CS facility**

**1073A Application of the Division to certain securities**

- (1) This Division applies to the following securities:
  - (a) shares in a company;
  - (b) debentures of a company;
  - (c) interests in a registered scheme, being interests that are covered by regulations made for the purposes of this paragraph;
  - (d) rights (whether existing or future, and whether contingent or not) to acquire, by way of issue, a security referred to in paragraph (a), (b) or (c) (whether or not on payment of any money or for any other consideration);
  - (da) a CGS depository interest;
  - (db) a simple corporate bonds depository interest;
  - (e) securities declared by ASIC under section 1073E to be securities to which the regulations apply.
- (2) This Division applies to an interest in a registered scheme as if:
  - (a) references to a company were instead references to the responsible entity of the registered scheme; and
  - (b) references to the constitution of a company were instead references to the constitution of the registered scheme; and
  - (c) references to members of a company were instead references to members of the registered scheme.

**1073B Meaning of *transfer***

In this Division and Division 4 ***transfer*** of a financial product means:

- (a) a change in the ownership of the financial product; or
- (b) if the financial product is a right—the renunciation and transfer of the right.

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**1073C Application of Division to certain bodies as if they were companies**

This Division applies to the following as if they were companies:

- (a) a body corporate (other than a company) that:
  - (i) is incorporated in a State or Territory in this jurisdiction; and
  - (ii) is prescribed by regulations made for the purposes of this subparagraph;
- (b) an unincorporated society, association or body, that:
  - (i) is formed or established in a State or Territory in this jurisdiction; and
  - (ii) is included in the official list of a licensed market; and
  - (iii) is prescribed by regulations made for the purposes of this paragraph.

**1073D Regulations may govern transfer of certain securities**

- (1) The regulations may make provision in relation to transfers of securities that are not effected through a prescribed CS facility.

*Regulations may make provision in relation to the transfer of securities*

- (2) The regulations may specify:
  - (a) the way in which a security may be transferred, including:
    - (i) the forms (if any) to be used; and
    - (ii) what amounts to a proper or sufficient transfer of a security; and
  - (b) the legal effect of a proper or sufficient transfer of a security; and
  - (c) the rights, liabilities and obligations of a person in relation to the transfer of a security, including the rights, liabilities and obligations of:
    - (i) the transferor and transferee; and
    - (ii) any other person involved in the transfer; and

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- (d) the circumstances in which a person will be taken to be involved in the transfer of a security for the purposes of the regulations; and
- (e) the circumstances in which a person is required not to register, or give effect to, a transfer.

*Sufficient transfer*

- (3) Without limiting paragraph (2)(a), the regulations may:
  - (a) specify the requirements for a document to be a sufficient transfer of a security; and
  - (b) provide that a document meeting specified requirements may be used:
    - (i) as a proper instrument of transfer for the purposes of section 1071B; and
    - (ii) as an instrument of transfer for the purposes of any other law or instrument governing or relating to the security.

*Rights and liabilities in relation to transfer*

- (4) Without limiting paragraph (2)(c), the regulations may provide that a person:
  - (a) is taken to have:
    - (i) agreed to do, to accept or to be bound by a particular thing; or
    - (ii) done a particular thing; or
    - (iii) given particular warranties; or
    - (iv) done particular things on behalf of another person; or
  - (b) is taken to be authorised to do particular things on behalf of another person; or
  - (c) is taken to be bound by a particular act; or
  - (d) is liable to indemnify another person against particular loss or damage; or
  - (e) is entitled to assume a particular matter without inquiry.

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*Person involved in transfer*

- (5) Without limiting paragraph (2)(d), the regulations may provide for any of the following to be taken to be involved in a transfer of securities:
- (a) a person who carries on a financial services business and who arranges for the transfer; and
  - (b) a person who operates a financial market on which the securities are sold; and
  - (c) a person who operates a licensed CS facility through which the securities are transferred; and
  - (d) a company with which the transfer is lodged for registration; and
  - (e) an associate of a person who is involved in the transfer.

The regulations may specify the circumstances in which a person will be taken to be an associate of another person for the purposes of the regulations.

*Offences*

- (6) Without limiting subsection (2), the regulations may provide for offences in relation to:
- (a) the use, or purported use, of a stamp of a person who:
    - (i) carries on a financial services business; or
    - (ii) operates a financial market; or
    - (iii) operates a clearing and settlement facility; or
  - (b) the execution of a document, or the transmission of an electronic message or other electronic communication, that may be used as a sufficient transfer under this Division; or
  - (c) the lodgment of a transfer document or title document for a security with the issuer of the security; or
  - (d) the use of identifying codes in relation to transfers of securities.

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*Jurisdiction*

- (7) The regulations may apply to conduct engaged in in this jurisdiction or elsewhere.

**1073E ASIC may extend regulations to securities not otherwise covered**

- (1) ASIC may, by writing, declare that:

- (a) particular securities; or  
(b) a particular class of securities;

are securities to which this Division, and regulations made for the purposes of section 1073D, apply.

Note: The securities in respect of which a declaration under this subsection may be made are not limited to those covered by paragraphs 1073A(1)(a) to (db).

- (2) ASIC may specify in the declaration modifications of the regulations that are to have effect in relation to the application of this Division and the regulations to the securities, or the class of securities, to which the declaration relates.

- (3) A declaration under subsection (1) has effect accordingly.

- (4) ASIC must cause a copy of a declaration under subsection (1) to be published in the *Gazette*.

- (5) If conduct (including an omission) of a person would not have constituted an offence if a particular declaration under subsection (1) had not been made, that conduct does not constitute an offence unless, before the conduct occurred (in addition to complying with the gazettal requirement of subsection (4)):

- (a) the text of the declaration was made available by ASIC on the internet; or  
(b) ASIC gave written notice setting out the text of the declaration to the person.

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In a prosecution for an offence to which this subsection applies, the prosecution must prove that paragraph (a) or (b) was complied with before the conduct occurred.

**1073F Operation of this Division and regulations made for its purposes**

- (1) This section deals with the effect of the provisions of:
  - (a) this Division; and
  - (b) the regulations made for the purposes of this Division.
- (2) The provisions apply in relation to a transfer of securities despite anything to the contrary in:
  - (a) this Act (other than this Division); or
  - (b) another law, or instrument, relating to the transfer of the securities.
- (3) Except as provided in the provisions, the provisions do not affect the terms and conditions on which securities are sold.
- (4) Nothing in the provisions affects any right of the issuer of a security to refuse:
  - (a) to acknowledge or register a person as the holder of a security; or
  - (b) to issue a security to a person;on a ground other than an objection to the form of document, or electronic message or other electronic communication, that is lodged with or sent to the issuer and purports to transfer the security to the person.
- (5) The registration of a transfer, or the issue, of a security by means of a transfer effected in accordance with regulations made for the purposes of this Division does not breach any law, constitution, trust deed or other instrument relating to financial products.
- (6) Nothing in the provisions prevents or affects the use of:
  - (a) any other form of transfer of securities; or

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- (b) any other mode of executing a document transferring securities;  
that is otherwise permitted by law.
- (7) A transfer of a security by or to a trustee or legal representative may be effected by means of a transfer in accordance with regulations made for the purposes of this Division. The transfer may be so effected despite the means required by any law or the provisions of the instrument (if any) creating, or having effect in relation to, the trust or will under which the trustee or legal representative is appointed.
- (8) In subsection (7):

*legal representative* means:

- (a) the executor, original or by representation, of a will of a dead person; or  
(b) the administrator of the estate of a dead person.

Section 1074A

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## **Division 4—Transfer of financial products effected through prescribed CS facility**

### **1074A Financial products to which this Division applies**

This Division only applies in relation to particular financial products and a prescribed CS facility if regulations made for the purposes of this section provide that all financial products, or a class of financial products that includes the financial products, are financial products to which this Division applies in relation to the prescribed CS facility (whether or not they are also products to which this Division applies in relation to other prescribed CS facilities).

### **1074C Operating rules of prescribed CS facility may deal with transfer of title**

- (1) The operating rules of a prescribed CS facility may deal with the transfer of financial products through the facility.
- (2) Without limiting subsection (1), the operating rules of a prescribed CS facility may deal with the way in which a financial product may be transferred, including specifying:
  - (a) the financial products that may be transferred through the facility; and
  - (b) how financial products are transferred through the facility; and
  - (c) the person or body (if any) authorised to determine whether a transfer substantially complies with the operating rules of the facility.
- (3) Nothing in subsection (1) or (2) confers a discretion to deal with a matter in the operating rules of a prescribed CS facility if there is an obligation under section 822A for that matter to be dealt with in those rules.

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**1074D Valid and effective transfer if operating rules complied with**

- (1) If a transfer of a financial product is effected:
  - (a) through a prescribed CS facility; and
  - (b) in accordance with the operating rules of the facility;the transfer is valid and effective for the purposes of any law or instrument governing or relating to the way in which the financial product may be transferred.
- (2) For the purposes of this section, the transfer of a financial product is taken to be, and always to have been, effected in accordance with the operating rules of a prescribed CS facility if the person or body authorised to do so under those rules determines that the transfer substantially complies with those rules.

**1074E Regulations may govern transfer of financial products in accordance with operating rules of prescribed CS facility**

*Transfers that regulations may deal with*

- (1) The regulations may make provision in relation to transfers of financial products effected:
  - (a) through a prescribed CS facility; and
  - (b) in accordance with the operating rules of the facility.

*Regulations may make provision in relation to the transfer of financial products*

- (2) The regulations may specify:
  - (a) the legal effect of a transfer of a financial product through the facility in accordance with its operating rules; and
  - (b) the rights, liabilities and obligations of a person in relation to the transfer of a financial product through the facility, including the rights, liabilities and obligations of:
    - (i) the transferor and transferee; and
    - (ii) any other person involved in the transfer; and

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- (c) the circumstances in which a person will be taken to be involved in the transfer of a financial product for the purposes of the regulations; and
- (d) the circumstances in which a person is required not to register, or give effect to, a transfer through the facility; and
- (e) the circumstances in which a person is required not to refuse or fail to register, or give effect to, a transfer through the facility; and
- (f) the circumstances in which a transfer through the facility will be taken to have been made in accordance with the rules of a prescribed CS facility; and
- (g) the circumstances in which a person will be taken to be the holder of a financial product for the purposes of:
  - (i) a meeting; or
  - (ii) paying or transferring money or property to a person because the person holds or held a financial product; or
  - (iii) issuing a financial product to a person because the person holds or held a financial product; or
  - (iv) conferring a right on a person because the person holds or held a financial product.

*Rights and liabilities in relation to transfer*

- (3) Without limiting paragraph (2)(b), the regulations may provide that a person:
  - (a) is taken to have:
    - (i) agreed to do, to accept or to be bound by a particular thing; or
    - (ii) done a particular thing; or
    - (iii) given particular warranties; or
    - (iv) done particular things on behalf of another person; or
  - (b) is taken to be authorised to do particular things on behalf of another person (even if the person has died); or
  - (c) is taken to be bound by a particular act; or
  - (d) is liable to indemnify another person against particular loss or damage; or

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- (e) is entitled to assume a particular matter without inquiry.

*Person involved in transfer*

- (4) Without limiting paragraph (2)(c), the regulations may provide for any of the following to be taken to be involved in a transfer of a financial product:
  - (a) a person who carries on a financial services business and who arranges for the transfer;
  - (b) a person who operates a financial market on which the financial product is sold;
  - (c) a person who operates a licensed CS facility through which the product is transferred;
  - (d) the issuer of the product;
  - (e) an associate of a person who is involved in the transfer.

The regulations may specify the circumstances in which a person will be taken to be an associate of another person for the purposes of the regulations.

*Offences*

- (5) Without limiting subsection (2), the regulations may provide for offences in relation to:
  - (a) the lodgment of a transfer document or title document for a financial product with the issuer of the product; or
  - (b) the use of identifying codes in relation to transfers of financial products; or
  - (c) contraventions of the operating rules of a prescribed CS facility.

*Civil liability*

- (6) The regulations may also:
  - (a) provide for the liability of a person who contravenes the operating rules of a prescribed CS facility to compensate a person for loss or damage the person suffers because of the conduct engaged in in contravention of those rules; and

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- (b) specify the period within which an action for compensation must be begun.
- (7) The regulations do not affect a liability that a person has under any other law.

*Jurisdiction*

- (8) The regulations may apply to conduct engaged in in this jurisdiction or elsewhere.

**1074F Issuer protected from civil liability for person's contravention of prescribed CS facility's certificate cancellation rules**

If:

- (a) a person contravenes the provisions of a prescribed CS facility's operating rules that deal with:
- (i) the cancellation of documents of title to financial products transferred through the facility; and
  - (ii) matters incidental to the cancellation of those documents;
- in relation to the transfer of a particular financial product through the facility; and
- (b) the issuer of the financial product is not involved in the contravention;
- the issuer is not liable to an action or other proceeding for damages in relation to the person's contravention.

**1074G Operation of this Division and regulations made for its purposes**

- (1) This section deals with the effect of the provisions of:
- (a) this Division; and
  - (b) the regulations made for the purposes of this Division.
- (2) The provisions apply in relation to a transfer of financial products despite anything to the contrary in:
- (a) this Act (other than this Division); or

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- (b) another law, or instrument, relating to the transfer of the financial products.
- (3) Except as provided in the provisions, the provisions do not affect the terms and conditions on which financial products are sold.
- (4) Nothing in the provisions (other than in regulations made for the purpose of paragraph 1074E(2)(e)) affects any right of the issuer of a financial product to refuse:
  - (a) to acknowledge or register a person as the holder of a financial product; or
  - (b) to issue a financial product to a person;  
on a ground other than an objection to the form of document, or electronic message or other electronic communication, that is lodged with or sent to the issuer and purports to transfer the financial product to the person.
- (5) The registration of a transfer, or the issue, of a financial product by means of a transfer effected in accordance with the operating rules of a prescribed CS facility does not breach any law, constitution, trust deed or other instrument relating to financial products.
- (6) Nothing in the provisions (other than in regulations made for the purpose of paragraph 1074E(2)(d)) prevents or affects the use of:
  - (a) any other form of transfer of financial products; or
  - (b) any other mode of executing a document transferring financial products;  
that is otherwise permitted by law.
- (7) A transfer of a financial product by or to a trustee or legal representative may be effected by means of a transfer in accordance with the operating rules of a prescribed CS facility despite any law or the provisions of the instrument (if any) creating, or having effect in relation to, the trust or will under which the trustee or legal representative is appointed.
- (8) In subsection (7):

*legal representative* means:

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- (a) the executor, original or by representation, of a will of a dead person; or
  - (b) the administrator of the estate of a dead person.

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**Division 5—Exemptions and modifications**

**1075A ASIC's power to exempt and modify**

- (1) ASIC may:
  - (a) exempt specified financial products, or a specified class of financial products, from a provision of this Part; or
  - (b) declare that this Part applies to specified financial products, or a specified class of financial products, as if specified provisions were omitted, modified or varied as specified in the declaration.
- (2) ASIC's power to grant an exemption or make a declaration under this section may be exercised in relation to financial products, or a class of financial products, only if ASIC is satisfied that:
  - (a) if the exemption were granted or the declaration were made, the interests of the holders of those financial products, or of financial products in that class, would continue to have adequate protection; and
  - (b) the granting of the exemption or the making of the declaration would make the transfer of those financial products, or of financial products in that class, more efficient.
- (3) The exemption or declaration may:
  - (a) apply to all or specified provisions of this Part; and
  - (b) apply to all persons, specified persons, or a specified class of persons; and
  - (c) relate to all financial products, specified financial products or a specified class of financial products; and
  - (d) relate to any other matter generally or as specified.
- (4) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.

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(5) The exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*.

(6) If conduct (including an omission) of a person would not have constituted an offence if a particular declaration under paragraph (1)(b) had not been made, that conduct does not constitute an offence unless, before the conduct occurred (in addition to complying with the gazettal requirement of subsection (5)):

- (a) the text of the declaration was made available by ASIC on the internet; or
- (b) ASIC gave written notice setting out the text of the declaration to the person.

In a prosecution for an offence to which this subsection applies, the prosecution must prove that paragraph (a) or (b) was complied with before the conduct occurred.

(7) For the purposes of this section, the ***provisions of this Part*** include:

- (a) definitions in this Act, or in the regulations, as they apply to references in this Part; and
- (b) any provisions of Part 10.2 (transitional provisions) that relate to provisions of this Part.

Note: Because of section 761H, a reference to this Part or Part 10.2 also includes a reference to regulations or other instruments made for the purposes of this Part or Part 10.2 (as the case requires).

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Section 1100A

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## **Part 7.12—Miscellaneous**

### **Division 1—Qualified privilege**

#### **1100A Qualified privilege for information given to ASIC**

- (1) A person has qualified privilege in respect of the giving of any information to ASIC that the person:
  - (a) is required to give under this Chapter or regulations made for the purposes of this Chapter; or
  - (b) gives in relation to a contravention or suspected contravention of subsection 798H(1) (complying with market integrity rules), 908CF(1) (complying with rules about financial benchmarks) or 981M(1) (complying with client money reporting rules).
- (2) A person or body that is:
  - (a) a market licensee; or
  - (b) a CS facility licensee; or
  - (c) a person acting under an arrangement to operate a licensed market or supervise a licensed CS facility; or
  - (d) a foreign person or body responsible for the supervision of the operation in a foreign country of a financial market or clearing and settlement facility; or
  - (e) a benchmark administrator licensee;also has qualified privilege in respect of the giving of any information to ASIC in connection with the performance or exercise of ASIC's functions or powers under, or in relation to, this Chapter or regulations made for the purposes of this Chapter.
- (3) A person or body that has qualified privilege under subsection (1) or (2) in respect of conduct is also not liable for any action based on breach of confidence in relation to that conduct.

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Section 1100B**1100B Qualified privilege for the conduct of market licensees and CS facility licensees**

- (1) A market licensee, or CS facility licensee, has qualified privilege in respect of actions (including the giving of information) done in connection with:
  - (a) the performance, or purported performance, of the licensee's obligations under this Act; or
  - (b) the exercise or performance, or purported exercise or performance, of the licensee's powers, functions or obligations under the operating rules of the market or facility concerned, if the licensee believes, on reasonable grounds, that the action is necessary:
    - (i) in the case of a market licensee—to ensure the market operates in a fair, orderly and transparent way; or
    - (ii) in the case of a CS facility licensee—to ensure the facility's services are provided in a fair and effective manner or to reduce systemic risk in the provision of those services.
- (2) A market licensee, or CS facility licensee, has qualified privilege in respect of the giving of information:
  - (a) to the operator of a financial market (regardless of where the market is operated) for the purpose of assisting the operator to ensure that market operates in a fair, orderly and transparent way; or
  - (b) to the operator of a clearing and settlement facility (regardless of where the facility is operated) for the purpose of assisting the operator to ensure that facility's services are provided in a fair and effective manner or to reduce systemic risk.
- (3) Despite subsections (1) and (2), a market licensee does not have qualified privilege in respect of the giving of information if:
  - (a) an entity included on the market's official list gave the information to the licensee under a provision of this Act or of the market's operating rules; and

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- (b) this Act, or those rules, expressly or impliedly authorised the entity to limit the purposes for which it gave the information to the licensee; and
  - (c) when giving the information to the licensee, the entity limited those purposes as so authorised; and
  - (d) the giving of the information by the licensee is not solely for one or more of the limited purposes.
- (4) The protections given by this section apply to the giving of information whether or not the recipient of the information has an interest in the information.

**1100C Qualified privilege for information given to market licensees and CS facility licensees etc.**

A person has qualified privilege in respect of the giving of information if:

- (a) the person gives the information to any of the following persons or bodies:
  - (i) a market licensee;
  - (ii) a CS facility licensee;
  - (iii) a person acting under an arrangement to operate a licensed market or supervise a licensed CS facility;
  - (iv) a foreign person or body responsible for the supervision of the operation in a foreign country of a financial market or clearing and settlement facility; and
- (b) the information is in relation to a contravention or suspected contravention of this Act or the operating rules of the market or facility concerned.

**1100D Extension of protections given by this Division**

The protections given by this Division to a person or body in respect of conduct extend to officers, employees and representatives of the person or body.

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Section 1100E**Division 1A—Employee share schemes****Subdivision A—Introduction****1100E Simplified outline of this Division**

This Division provides for regulatory relief for offers of interests (*ESS interests*) under an employee share scheme of:

- (a) a body corporate; or
- (b) a registered scheme that meets certain listing requirements.

Offers may be made to:

- (a) directors and employees of the body corporate or the responsible entity of the registered scheme; and
- (b) directors and employees of an associated entity of the body corporate or the responsible entity of the registered scheme; and
- (c) persons that provide services to the body corporate or responsible entity of the registered scheme.

Offers may also be made to certain related persons of directors, employees and service providers.

The regulatory relief consists of exemptions from the following requirements of this Act:

- (a) the disclosure requirements for the issue, sale and transfer of securities (Parts 6D.2 and 6D.3) and financial products (Part 7.9);
- (b) the restrictions on advertising of offers for the issue, sale and transfer of securities (section 734) or financial products (section 1018A);
- (c) the requirement to make a target market determination for a financial product and distribute financial products

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| (d) | in accordance with a target market determination (Part 7.8A);<br><br>(e) the requirement to hold an Australian financial services licence for a financial service provided in relation to the employee share scheme (section 911A);<br><br>(e) the prohibition on the hawking of financial products (section 992A). |
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An offer of ESS interests for no consideration is eligible to be made under this Division.

An offer of ESS interests for monetary consideration is eligible to be made under this Division if:

- (a) the proportion of shares covered by ESS interests that are offered complies with an issue cap; and
- (b) the terms of the offer include certain terms; and
- (c) streamlined disclosure requirements are met.

An offer of ESS interests by an unlisted body corporate must also generally comply with a monetary cap.

Regulatory relief is revoked if:

- (a) an offer ceases to meet these requirements; or
- (b) the body corporate or responsible entity of the scheme does not comply with a term of the offer dealing with disclosure.

An offer of ESS interests is also eligible to be made under this Division if it could otherwise have been made under section 708, 708AA, 1012D, 1012DAA or 1012DA.

There are offences for making material misleading statements in, or material omissions from, required disclosure documents and information.

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Section 1100F**1100F Geographical coverage of Division**

This Division applies to offers of ESS interests that are received in this jurisdiction, regardless of where any resulting issue, sale or transfer occurs.

**1100G Offers and invitations both covered**

For the purposes of this Division:

- (a) offering ESS interests for issue includes inviting applications for the issue of the ESS interests; and
- (b) offering ESS interests for sale includes inviting offers to purchase the ESS interests.

**1100H Person offering interests**

For the purposes of this Division, the person who offers ESS interests is the person who has the capacity, or who agrees, to issue or transfer the ESS interests if the offer is accepted.

**1100J Offers may also be made in reliance on section 708 or 1012D**

- (1) The fact that a body corporate makes an offer of securities that is eligible to be made under this Division does not prevent the body corporate from also making an offer, in reliance on a provision of section 708, of securities that are of the same class as those offered under the first-mentioned offer.

Note: The interaction of this Division with section 708 is affected by section 1100R and subsection 1100ZC(4).

- (2) The fact that a body corporate or responsible entity of a registered scheme makes an offer of financial products that is eligible to be made under this Division does not prevent the body corporate or responsible entity from also making an offer, in reliance on a provision of section 1012D, of financial products that are of the same kind as those offered under the first-mentioned offer.

Note: The interaction of this Division with section 1012D is affected by section 1100R.

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Section 1100K

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**1100K Financial markets recognised under this Division**

- (1) For the purposes of this Division, the following financial markets are covered by this section:
  - (a) a financial market operated by a market licensee;
  - (b) a foreign financial market determined by ASIC under subsection (2).
- (2) ASIC may, by legislative instrument, determine one or more foreign financial markets for the purposes of this section.

**Subdivision B—Key concepts**

**1100L Meaning of *employee share scheme***

*Meaning of employee share scheme*

- (1) An ***employee share scheme*** of a body corporate, or of a registered scheme that is included in the official list of a financial market covered by section 1100K, means a scheme under which an ESS interest of the body corporate or registered scheme may be issued, sold or transferred to:
  - (a) a person (a ***primary participant***) who is:
    - (i) an employee or director of, or an individual who provides services to, the body corporate or the responsible entity of the registered scheme; or
    - (ii) an employee or director of, or an individual who provides services to, an associated entity of the body corporate or of the responsible entity of the registered scheme, where that associated entity is a body corporate; or
    - (iii) a prospective person to whom subparagraph (i) or (ii) may apply; or
    - (iv) a person prescribed by the regulations for the purposes of this subparagraph; or
  - (b) another person (a ***related person***) on behalf of a primary participant, where the related person is:

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- (i) a spouse, parent, child or sibling of the primary participant; or
- (ii) another body corporate controlled by the primary participant or a person mentioned in subparagraph (i); or
- (iii) a body corporate that is the trustee of a self managed superannuation fund (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) where the primary participant is a director of the body corporate; or
- (iv) a person prescribed in relation to the primary participant by the regulations for the purposes of this subparagraph.

**Note:** An ESS participant who is an employee may be entitled to certain protections, conditions and minimum wages under the *Fair Work Act 2009*, and protections under other laws of the Commonwealth, including section 31 of Schedule 2 to the *Competition and Consumer Act 2010* (misleading conduct relating to employment).

*Meaning of ESS participant*

- (2) A person is an **ESS participant** in an employee share scheme if the person is:
  - (a) a primary participant mentioned in paragraph (1)(a) in relation to the scheme; or
  - (b) a related person mentioned in paragraph (1)(b) in relation to the scheme.

**1100M Meaning of ESS interest***Bodies corporate included in the official list of a financial market*

- (1) An **ESS interest**, in a body corporate that is included in the official list of a financial market covered by section 1100K, means any of the following:
  - (a) a fully paid share in the body corporate that is in a class of shares that is able to be traded on the financial market;
  - (b) a beneficial interest in a fully paid share in the body corporate where the beneficial interest is in a class of interests that is able to be traded on the financial market;

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- (c) a fully paid share in the body corporate that is convertible into an interest referred to in paragraph (b), where the conversion can be made without charge or for a nominal fee;
- (d) a beneficial interest in a fully paid share in the body corporate that is convertible into an interest referred to in paragraph (a), where the conversion can be made without charge or for a nominal fee;
- (e) a unit in an interest mentioned in any of paragraphs (a), (b), (c) or (d);
- (f) a fully paid stapled security that is in a class of stapled securities that is able to be traded on the financial market, that consists of 2 or more interests, each of which would separately be:
  - (i) an ESS interest under any of paragraphs (a) to (e) of the body corporate, or of an associated entity of the body corporate; or
  - (ii) an ESS interest under paragraph (3)(a) or (b) in a registered scheme, where the responsible entity of the scheme is an associated entity of the body corporate;
- (g) a unit in a stapled security mentioned in paragraph (f);
- (h) an incentive right granted in relation to, or an option to acquire, an interest mentioned in any of paragraphs (a), (b), (c), (d) or (f) (the ***underlying ESS interest***);
- (i) any other interest in the body corporate prescribed by the regulations for the purposes of this paragraph.

*Meaning of ESS interest in other bodies corporate*

- (2) An ***ESS interest***, in a body corporate to which subsection (1) does not apply, means:
  - (a) a fully paid share in the body corporate; or
  - (b) a unit in an interest mentioned in paragraph (a); or
  - (c) an incentive right granted in relation to, or an option to acquire, an interest mentioned in paragraph (a) (the ***underlying ESS interest***); or

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- (d) any other interest in the body corporate prescribed by the regulations for the purposes of this paragraph.

*Meaning of ESS interest in a registered scheme*

- (3) An **ESS interest**, in a registered scheme that is included in the official list of a financial market covered by section 1100K, means:
  - (a) an interest in the scheme that is of the same kind as an interest in the scheme that is able to be traded on the financial market; or
  - (b) a unit in an interest mentioned in paragraph (a); or
  - (c) an incentive right granted in relation to, or an option to acquire, an interest mentioned in paragraph (a) (the **underlying ESS interest**); or
  - (d) any other interest in the scheme prescribed by the regulations for the purposes of this paragraph.

*Meaning of incentive right*

- (4) **Incentive right**, in relation to a security or financial product, means:
    - (a) a conditional right to acquire the security or financial product; or
    - (b) a conditional right to be paid a cash amount where the amount is determined (wholly or in part) with reference to any of the following:
      - (i) the price or value of the security or financial product at a particular time;
      - (ii) the change in the price or value of the security or financial product over a particular period;
      - (iii) the amount of dividends or distributions paid in respect of the security or financial product at a particular time;
      - (iv) the change in the amount of dividends or distributions paid in respect of the security or financial product over a particular period; or
    - (c) a conditional right to:
      - (i) acquire the security or financial product; and
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- (ii) be paid a cash amount where the amount is determined (wholly or in part) with reference to any of the matters mentioned in subparagraphs (b)(i) to (iv).

**Subdivision C—Offers that are eligible to be made under this Division**

**1100N Offers that are eligible to be made under this Division**

An offer for the issue, sale or transfer of ESS interests of a body corporate or registered scheme to ESS participants in connection with an employee share scheme is eligible to be made under this Division if:

- (a) the offer is covered by any of the following:
  - (i) section 1100P (about offers for no monetary consideration);
  - (ii) section 1100Q (about offers for monetary consideration);
  - (iii) section 1100R (about offers that would otherwise not need disclosure); and
- (b) the offer is expressed to be made under this Division.

**1100P Offers for no monetary consideration**

An offer for the issue or transfer of ESS interests of a body corporate or registered scheme to ESS participants in connection with an employee share scheme is covered by this section if:

- (a) no monetary consideration is to be provided for the issue or transfer of the interests; and
- (b) if the offer is of options or incentive rights—no monetary consideration is to be provided on the exercise of the options or rights; and
- (c) any trust that may issue or transfer ESS interests under the scheme meets the requirements in section 1100S; and
- (d) the offer meets any requirements prescribed in the regulations for the purposes of this paragraph.

**Section 1100Q****1100Q Offers for monetary consideration**

- (1) An offer for the issue, sale or transfer of ESS interests to ESS participants in connection with an employee share scheme of a body corporate or registered scheme is covered by this section if:
  - (a) either or both of the following apply:
    - (i) the interests are offered for issue or sale in return for monetary consideration, and the interests will be acquired by the ESS participant who pays for the interests;
    - (ii) the interests are options or incentive rights and monetary consideration is to be provided on the exercise of the options or rights; and
  - (b) any trust that may issue or transfer ESS interests under the scheme meets the requirements in section 1100S; and
  - (c) any plan under which an ESS participant may acquire ESS interests by making regular payments, or having regular deductions made from the participant's salary or wages, is an ESS contribution plan for the offer (see section 1100T); and
  - (d) any loan offered by the body corporate or relevant responsible entity, or an associated entity of the body corporate or responsible entity, in connection with the scheme complies with section 1100U; and
  - (e) the offer complies with the issue cap (see section 1100V); and
  - (f) the offer complies with section 1100W (about disclosure); and
  - (g) the terms of the offer comply with sections 1100Y and 1100Z; and
  - (h) the offer meets any additional requirements prescribed in the regulations for the purposes of this paragraph.

*Additional requirements for unlisted bodies corporate*

- (2) However, if the offer is of ESS interests in a body corporate that is not included in the official list of a financial market covered by

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section 1100K, the offer is not eligible to be made under this Division unless:

- (a) if the interests are offered for issue or sale in return for monetary consideration—the offer is accompanied by the supporting information required by section 1100X; and
- (b) the offer complies with section 1100ZA (about the monetary cap); and
- (c) the offer meets any additional requirements prescribed in the regulations for the purposes of this paragraph.

## **1100R Offers that would otherwise not need disclosure**

### *Offers other than small scale offerings*

- (1) An offer for the issue, sale or transfer of ESS interests to ESS participants in connection with an employee share scheme of a body corporate or registered scheme is covered by this section if:
  - (a) the offer would not require disclosure to any investor under Part 6D.2 (if that Part otherwise applied to the offer) because of section 708 (apart from subsection 708(1) or (15)) or 708AA; or
  - (b) the offer would not require any person to be given a Product Disclosure Statement under Part 7.9 (if that Part otherwise applied to the offer) because of section 1012D (apart from subsection 1012D(5) or (6)), 1012DAA or 1012DA.

Note: This subsection puts beyond doubt that the no consideration exemptions from disclosure in subsections 708(15) and 1012D(5) and (6) cannot be used to exempt an offer of ESS interests from disclosure under Part 6D.2 or 7.9.

### *Small scale offerings*

- (2) An offer for the issue, sale or transfer of ESS interests to ESS participants in connection with an employee share scheme of a body corporate or registered scheme is covered by this section if:
  - (a) either:

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- (i) the offer would not require disclosure to any investor under Part 6D.2 (if that Part otherwise applied to the offer) because of subsection 708(1); or
- (ii) the offer would not require any person to be given a Product Disclosure Statement under Part 7.9 (if that Part otherwise applied to the offer) because of subsection 1012E(2); and
- (b) any trust that may issue or transfer ESS interests under the scheme meets the requirements in section 1100S; and
- (c) any plan under which an ESS participant may acquire ESS interests by making regular payments, or having regular deductions made from the participant's salary or wages, is an ESS contribution plan for the offer (see section 1100T); and
- (d) any loan offered by the body corporate or relevant responsible entity, or an associated entity of the body corporate or responsible entity, in connection with the scheme complies with section 1100U.

**1100S Requirements for trusts**

- (1) A trust meets the requirements in this section for an employee share scheme of a body corporate or registered scheme under which an ESS interest may be issued or transferred by the trustee of the trust if:
  - (a) the trust is covered by subsection (2); and
  - (b) either:
    - (i) the trustee acquires the ESS interest in connection with the employee share scheme for the purposes of the trustee transferring the ESS interest to an ESS participant; or
    - (ii) if the ESS interest is a unit in another ESS interest—the trustee acquires the other ESS interest in connection with the employee share scheme for the purposes of the trustee issuing or transferring the unit to an ESS participant.
- (2) A trust is covered by this subsection if the trust deed of the trust:

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- (a) provides that, in its capacity as trustee of the trust, the activities of the trustee are limited to managing employee share schemes of the body corporate or registered scheme referred to in subsection (1); and
- (b) requires the trustee of the trust to keep written records on the administration of the trust; and
- (c) prevents the trustee of the trust charging any fees or charges for administering the trust, other than:
  - (i) reasonable disbursements charged to the trust; or
  - (ii) amounts charged to the body corporate or responsible entity of the registered scheme; and
- (d) if the trustee of the trust is an associated entity of the body corporate or the relevant responsible entity—provides that the trustee may only exercise voting rights associated with the ESS interests in accordance with the instructions of the holder of the interests or consistent with the trustee's fiduciary duties; and
- (e) contains terms that meet any requirements prescribed in the regulations for the purposes of this paragraph.

**1100T Meaning of ESS contribution plan**

An *ESS contribution plan*, for an offer for the issue or sale of ESS interests, means a plan with terms that:

- (a) allow an ESS participant to make regular payments, or elect to have regular deductions made from their wages or salary, for the purpose of acquiring the ESS interests under the offer; and
- (b) provide that, before the participant acquires the ESS interests under the offer, the payments or deductions are held on trust in an account with an Australian ADI that is kept solely for that purpose; and
- (c) allow the participant to elect to discontinue the deductions or payments at any time; and
- (d) provide that, if the participant so elects:

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- (i) any deductions from the participant's wages or salary will cease, and any deductions made after the election will be repaid to the participant, within 45 days of the election; and
- (ii) the amount of the deductions or payments standing, at the time when the election is made, to the credit of the account for the participant, and any interest on that amount, will be repaid to the participant within 45 days of the election; and
- (e) require the participant to agree in writing to the terms of the plan before participating in the plan; and
- (f) meet any requirements prescribed in the regulations for the purposes of this paragraph.

**1100U Requirements for connected loans**

- (1) A loan offered by a body corporate or responsible entity, or an associated entity of a body corporate or responsible entity, in connection with an employee share scheme complies with this section if:
  - (a) the loan is offered on the following terms:
    - (i) that the loan has no interest or fees payable;
    - (ii) that the rights of the body corporate, responsible entity or associated entity as against the ESS participant, in the event of default in payment of the loan, are wholly limited to forfeiture of the ESS interests acquired using the loan; and
  - (b) the borrower is the ESS participant who will acquire ESS interests offered under the employee share scheme; and
  - (c) the terms of the loan meet any requirements prescribed in the regulations for the purposes of this paragraph.

*Additional requirement for unlisted bodies corporate*

- (2) However, if the offer is of ESS interests in a body corporate that is not included in the official list of a financial market covered by section 1100K, a loan does not comply with this section if it is
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offered or made by the body corporate to any ESS participant who, at the time the loan is offered or made (as the case may be), is a shareholder of the body corporate.

**1100V Issue cap for offers involving consideration**

(1) An offer of ESS interests in a body corporate or registered scheme complies with the issue cap if, at the time the offer is made, the body corporate or responsible entity of the registered scheme reasonably believes:

- (a) the total number of fully paid shares in the body corporate or interests in the registered scheme that are, or are covered by, the ESS interests of the body corporate or scheme that may be issued under the offer; and
- (b) the total number of fully paid shares in the body corporate or interests in the registered scheme that are, or are covered by, the ESS interests that have been issued, or could have been issued, under offers made in connection with the employee share scheme at any time during the 3 year period ending on the day the offer is made;

does not exceed the percentage referred to in subsection (2) of the number of those fully paid shares or interests actually issued by the body corporate or scheme (whether in connection with the employee share scheme or otherwise) as at the start of the day the offer is made.

(2) The percentage is:

- (a) if the constitution of the body corporate or registered scheme specifies an issue cap percentage—that percentage; or
- (b) if paragraph (a) does not apply—the greater of the following:
  - (i) for a body corporate or registered scheme that is included in the official list of a financial market covered by section 1100K—5%;
  - (ii) for a body corporate that is not included in the official list of a financial market covered by section 1100K—20%;

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- (iii) the percentage (if any) prescribed by the regulations for the purposes of this subparagraph.

*Modification for stapled securities*

- (3) However, if the ESS interest is, or covers, a stapled security, then:
  - (a) each body corporate or registered scheme mentioned in paragraph 1100M(1)(f) in relation to an interest that comprises the stapled security is treated as offering that interest; and
  - (b) to comply with the issue cap, subsection (1) must be satisfied in relation to each of those offers.

**1100W Disclosure requirements for offers involving consideration**

- (1) An offer of ESS interests in connection with an employee share scheme complies with this section if the offer is made in, or accompanied by, a document that meets the requirements of subsections (2) and (3).

*ESS offer document*

- (2) A document (an *ESS offer document*) meets the requirements of this subsection for an offer of ESS interests in connection with an employee share scheme if the document:
  - (a) includes the terms of the offer, or a summary of the terms of the offer with a statement that, on request, a copy of the full terms of the offer will be provided to the ESS participant; and
  - (b) provides general information about the risks of acquiring and holding the ESS interests being offered; and
  - (c) states that advice given in relation to the offer does not take into account the ESS participant's objectives, financial situation and needs; and
  - (d) suggests that the ESS participant obtain personal advice in relation to the offer; and
  - (e) states the period (the *application period*) during which the ESS participant may accept the offer; and

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- (f) for an employee share scheme of a body corporate that is included in the official list of a financial market covered by section 1100K:
  - (i) states either the acquisition price of the ESS interests or, if the acquisition price will be determined at a future date, how the acquisition price will be determined; and
  - (ii) explains how the ESS participant may ascertain the market price of the shares or, if beneficial interests, units, options or incentive rights are offered, how the ESS participant may ascertain the market price of the underlying ESS interest; and
- (g) if ESS interests may be acquired under the offer using a loan or ESS contribution plan—includes:
  - (i) the terms of the loan or plan; or
  - (ii) a summary of the terms of the loan or plan and a statement that, on request, a copy of the terms of the plan or loan will be provided to the ESS participant; and
- (h) if ESS interests will be held on trust for ESS participants (other than by a body corporate of the kind mentioned in subparagraph 1100L(1)(b)(iii) (which is about self managed superannuation funds))—includes:
  - (i) the trust deed; or
  - (ii) a summary of the trust deed and a statement that, on request, a copy of the full deed will be provided to the ESS participant; and
- (i) includes, or directs the participant to, any of the following documents (if they exist) that relate to the same class of ESS interests as those being offered:
  - (i) a disclosure document prepared under Part 6D.2 in relation to an offer of securities, where that offer was made in the 12 months before the start of the application period;
  - (ii) a Product Disclosure Statement prepared under Part 7.9 in relation to an offer of financial products for issue or sale, where that offer was made in the 12 months before the start of the application period; and

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- (j) includes any other information prescribed by the regulations for the purposes of this paragraph.

*Additional requirement for unlisted bodies corporate*

- (3) If the offer is of ESS interests in a body corporate that is not included in the official list of a financial market covered by section 1100K, the ESS offer document must also include the following:
  - (a) a statement that the ESS interests may not have any value and that the value of the ESS interests will depend on future events that may not occur;
  - (b) if the ESS interests are:
    - (i) shares that are not ordinary shares; or
    - (ii) units in, incentive rights granted in relation to, or options to acquire, shares that are not ordinary shares; a description of the rights that attach to the shares, and how the shares differ from ordinary shares.

*Regulations may provide other ways of complying with this section*

- (4) An offer also complies with this section if the offer is of a kind prescribed by the regulations for the purposes of this subsection.

**1100X Additional disclosure requirements for offers by unlisted bodies corporate***Supporting information for offers by unlisted bodies corporate*

- (1) The supporting information required by this section is:
    - (a) the financial information mentioned in subsection (2), accompanied by a statement as to whether that financial information has been audited; and
    - (b) a document covered by subsection (3) (about valuations) in relation to the ESS interests being offered; and
    - (c) a statement that the body corporate is solvent; and
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- (d) any other financial information prescribed by the regulations for the purposes of this paragraph.

*Financial information*

- (2) The financial information is:
  - (a) if the body corporate must lodge a report for a financial year with ASIC under section 319—a copy of the most recent report lodged with ASIC; or
  - (b) if the body corporate is a registered foreign company—a copy of the most recent documents lodged with ASIC under section 601CK; or
  - (c) otherwise—a balance sheet and profit and loss statement prepared in compliance with either the accounting standards or the international accounting standards (within the meaning of the *Australian Securities and Investments Commission Act 2001*).

*Valuation information*

- (3) This subsection covers the following documents:
  - (a) a copy of a valuation of the ESS interest that has been prepared consistently with an applicable method approved by the Commissioner of Taxation under section 960-412 of the *Income Tax Assessment Act 1997*;
  - (b) if securities in the same class as the ESS interests are on offer at the same time as the ESS interests—a disclosure document for that offer that has been lodged with ASIC as mentioned in section 727;
  - (c) if financial products in the same class as the ESS interests are on offer at the same time as the ESS interests—a disclosure document or statement (within the meaning of section 952B) in relation to those financial products;
  - (d) a copy of an executed agreement under which ESS interests in the same class as the ESS interests are to be acquired on arm's length terms by a third party who is not an associate of the person making the offer, where the agreement specifies

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the amount of monetary consideration to be paid for an ESS interest in that class;

- (e) a copy of a draft agreement under which ESS interests in the same class as the ESS interests are to be acquired on arm's length terms by a third party who is not an associate of the person making the offer, where the agreement specifies the amount of monetary consideration to be paid for an ESS interest in that class;
- (f) a document prescribed by the regulations for the purposes of this paragraph.

**1100Y Terms of the offer—disclosure etc.**

- (1) The terms of an offer of ESS interests in connection with an employee share scheme comply with this section if, under those terms:
  - (a) an ESS participant cannot acquire an ESS interest under the offer until at least 14 days after receiving the ESS offer document and any supporting information required under section 1100X (if applicable) for the offer; and
  - (b) if the ESS offer document included only a summary of the terms of the offer—the person who makes the offer must provide an ESS participant with a copy of the full terms of the offer within 10 business days of the ESS participant requesting a copy of those full terms; and
  - (c) if the ESS offer document included only a summary of the terms of a loan or ESS contribution plan—the person who makes the offer must provide an ESS participant with a copy of the full terms of the loan or plan within 10 business days of the ESS participant requesting a copy of those full terms; and
  - (d) if the ESS offer document included only a summary of a trust deed—the person who makes the offer must provide an ESS participant with a copy of the full trust deed within 10 business days of the ESS participant requesting a copy of the full trust deed; and

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- (e) if the offer is made by a trustee of a trust that meets the requirements of section 1100S—the trustee must comply with the trust deed.

Note: If an offer contravenes a term mentioned in this subsection, or subsection (3) or (4) (if applicable), regulatory relief for the offer is revoked: see section 1100ZG.

*Additional requirements for unlisted bodies corporate*

- (2) Subsections (3) and (4) apply if the offer is of ESS interests in a body corporate that is not included in the official list of a financial market covered by section 1100K.
- (3) The terms of the offer must also provide that, if the ESS participant is given a draft sale agreement in satisfaction of paragraph 1100X(3)(e) (about valuations), the ESS participant cannot acquire an ESS interest until a sale agreement that is not materially different from the draft sale agreement has been executed.
- (4) If the offer is of options or incentive rights, and monetary consideration is to be provided on the exercise of the options or incentive rights, the terms of the offer must also be such that:
  - (a) the options cannot be exercised, or the incentive rights cannot vest, unless the following documents are provided to the ESS participant at least 14 days before the exercise of the option or vesting of the incentive right:
    - (i) the financial information mentioned in subsection 1100X(2), accompanied by a statement as to whether that financial information has been audited;
    - (ii) a document covered by subsection 1100X(3) (about valuations) in relation to the underlying ESS interest;
    - (iii) a statement that the body corporate is solvent;
    - (iv) any other information prescribed by the regulations for the purposes of this subparagraph; and
  - (b) the person who made the offer must provide the ESS participant with the information mentioned in paragraph (a)

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at least 14 days before the option becomes exercisable or the incentive right vests; and

- (c) if the ESS participant is given a draft sale agreement in satisfaction of subparagraph (a)(ii)—the ESS participant cannot exercise the option or right until a sale agreement that is not materially different from the draft sale agreement has been executed.

*Regulations may provide other ways of complying with this section*

- (5) An offer also complies with this section if the offer is of a kind prescribed by the regulations for the purposes of this subsection.

### **1100Z Terms of the offer—misleading statements and omissions**

- (1) The terms of an offer of ESS interests in connection with an employee share scheme comply with this section if, under those terms:
  - (a) the ESS offer document, any supporting information required under section 1100X (if applicable), and the terms of the offer:
    - (i) must not include a misleading or deceptive statement; and
    - (ii) must not omit any information that would result in the ESS offer document, supporting information or terms of the offer being misleading or deceptive; and
  - (b) the person who makes the offer (the *offeror*) must provide each ESS participant with an updated ESS offer document as soon as practicable after becoming aware that the document that was provided has become out of date, or is otherwise not correct, in a material respect; and
  - (c) if the offer is of options or incentive rights and monetary consideration is to be provided on the exercise of the options or incentive rights—the offeror must provide each ESS participant with updated documents in satisfaction of paragraph 1100Y(4)(a) as soon as practicable after becoming aware that the information that was provided has become out of date, or is otherwise not correct, in a material respect; and

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- (d) each person mentioned in items 2, 3 and 4 of the table in subsection (2) must notify, in writing, the offeror as soon as practicable if, during the application period for the offer mentioned in paragraph 1100W(2)(e), the person becomes aware that:
  - (i) a material statement in the documents mentioned in paragraph (a) is misleading or deceptive; or
  - (ii) information was omitted from any of those documents that has resulted in one or more of those documents being misleading or deceptive; or
  - (iii) a new circumstance has arisen during the application period which means the ESS offer document is out of date, or otherwise not correct, in a material respect; and
- (e) if the offer is of options or incentive rights and monetary consideration is to be provided on the exercise of the options or incentive rights—each person mentioned in items 2, 3 and 4 of the table in subsection (2) must notify, in writing, the offeror as soon as practicable if, after the documents mentioned in paragraph 1100Y(4)(a) have been provided to an ESS participant in accordance with that paragraph, the person becomes aware that:
  - (i) a material statement in the documents is misleading or deceptive; or
  - (ii) information was omitted from any of the documents that has resulted in one or more of those documents being misleading or deceptive; or
  - (iii) a new circumstance has arisen since the documents were provided to an ESS participant which means the documents are out of date, or otherwise not correct, in a material respect; and
- (f) an ESS participant who suffers loss or damage because of a contravention of a term of the offer covered by paragraph (a), (b), (c), (d) or (e) of this subsection can recover the amount of loss or damage in accordance with the table in subsection (2).

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- (2) For the purposes of paragraph (1)(f), an ESS participant must be able to recover loss or damage in accordance with the following table:

| <b>Item</b> | <b>An ESS participant may recover loss or damage suffered as a result of a contravention of ...</b>   | <b>from these people ...</b>  |
|-------------|---|---|
| 1           | <p>a term of the offer covered by any of the following paragraphs:</p> <ul style="list-style-type: none"> <li>(a) paragraph (1)(a) (misleading or deceptive statements and omissions);</li> <li>(b) paragraph (1)(b) (out of date ESS offer document);</li> <li>(c) paragraph (1)(c) (out of date option or incentive right information)</li> </ul> | the body corporate or responsible entity making the offer   |
| 2           | <p>a term of the offer covered by any of the following paragraphs:</p> <ul style="list-style-type: none"> <li>(a) paragraph (1)(a) (misleading or deceptive statements and omissions);</li> <li>(b) paragraph (1)(b) (out of date ESS offer document);</li> <li>(c) paragraph (1)(c) (out of date option or incentive right information)</li> </ul> | each director of the body corporate or responsible entity making the offer  |
| 3           | <p>a term of the offer covered by any of the following paragraphs:</p> <ul style="list-style-type: none"> <li>(a) paragraph (1)(a) (misleading or deceptive statements and omissions);</li> <li>(b) paragraph (1)(b) (out of date ESS offer document);</li> <li>(c) paragraph (1)(c) (out of date option or incentive right information)</li> </ul> | a person named, with their consent, in an ESS offer document, any supporting information required under section 1100X (if applicable) or the terms of the offer as a proposed director of the body corporate or responsible entity of a registered scheme whose ESS interests are being offered |

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| <b>Item</b> | <b>An ESS participant may recover loss or damage suffered as a result of a contravention of ... information)</b>  | <b>from these people ...</b>   |
|-------------|---|--|
| 4           | a term of the offer covered by paragraph (1)(a) (misleading or deceptive statements and omissions)  | a person named, with their consent, in the ESS offer document, any supporting information required under section 1100X (if applicable) or the terms of the offer as having made:<br>(a) the misleading or deceptive statement; or<br>(b) a statement on which the misleading or deceptive statement is based |
| 5           | a term of the offer covered by paragraph (1)(d) or (e) (failure to notify body corporate or responsible entity of misleading or deceptive statement and omissions or new circumstances) | the person mentioned in item 2, 3 or 4 of this table who failed to notify the body corporate or responsible entity in accordance with the term covered by paragraph (1)(d) or (e)  |

Note: Item 2—*director* includes a shadow director (see section 9).

*Additional terms of the offer—no liability terms*

- (3) The terms of the offer may also include terms to the effect that a person mentioned in the table in subsection (2) is not liable for any loss or damage suffered by an ESS participant because of a contravention of a term of the offer covered by paragraph (1)(a), (b) or (c) if:
- (a) the person:
    - (i) made all inquiries (if any) that were reasonable in the circumstances; and
    - (ii) after doing so, believed on reasonable grounds that the statement was not misleading or deceptive; or
  - (b) the person did not know that the statement was misleading or deceptive; or

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- (c) the person placed reasonable reliance on information given to the person by:
    - (i) if the person is a body corporate or a responsible entity of a registered scheme—someone other than a director, employee or agent of the body corporate or responsible entity; or
    - (ii) if the person is an individual—someone other than an employee or agent of the individual; or
  - (d) for a person mentioned in column 2 of item 3 or 4 of the table in subsection (2)—the person proves that they publicly withdrew their consent to being named in the document in that way; or
  - (e) the contravention arose because of a new circumstance that has arisen since the ESS offer document was prepared and the person proves that they were not aware of the matter.
- (4) The terms of the offer must not limit liability of a person mentioned in the table in subsection (2) in any way other than as required by subsection (3).

**1100ZA Monetary cap for offers by unlisted bodies corporate**

- (1) An offer complies with this section if it is made on terms that could not result in a breach of the monetary cap for any primary participant in relation to the scheme for:
- (a) the 12-month period starting on the day that an offer was first accepted by the participant or a related person of the participant in connection with the scheme; or
  - (b) any subsequent 12-month period starting immediately after the end of the previous 12-month period.

Note 1: For who is a primary participant in an employee share scheme, see paragraph 1100L(1)(a).

Note 2: For who is a related person of a primary participant, see paragraph 1100L(1)(b).

- (2) The offer breaches the monetary cap for a 12-month period if the amount worked out under subsection (3) for the participant for the

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period exceeds the monetary cap worked out under subsection (5) for the participant for the period.

*Amounts that use up the cap*

- (3) The amount worked out under this subsection for a 12-month period is the sum of the following amounts, worked out in accordance with subsection (4):
  - (a) the maximum amount the participant could pay in the 12-month period under the terms of any offer made in connection with any employee share scheme operated by the body corporate or an associate of the body corporate;
  - (b) the maximum amount that could be paid by related persons of the participant in the 12-month period under the terms of any offer made in connection with any employee share scheme operated by the body corporate or an associate of the body corporate.
- (4) In working out amounts under subsection (3):
  - (a) subject to paragraph (b), include amounts payable on the exercise of options and incentive rights, and amounts paid out of any related ESS contribution plan; and
  - (b) do not include any amounts that are excluded from the monetary cap under section 1100ZB.

*Amount of the monetary cap*

- (5) The monetary cap for a primary participant for a 12-month period (**the *current period***) is the sum of:
  - (a) the amount referred to in subsection (6); and
  - (b) 70 per cent of the amount of any distributions received in the current period by the participant or a related person on an ESS interest acquired under the scheme (whether under the offer mentioned in subsection (1) or under another offer); and
  - (c) 70 per cent of the amount of any cash remuneration received in the current period by the participant, to the extent the remuneration was conditional on the achievement of objectives; and

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- (d) if the current period is not the first 12-month period—the sum of any amount carried forward under subsection (7) for each previous 12-month period that started:
  - (i) at or after the start of the first 12-month period; and
  - (ii) not earlier than 4 years before the start of the current period.
- (6) The amount (the **basic cap amount**) is:
  - (a) unless paragraph (b) applies—\$30,000; or
  - (b) if an amount is prescribed in the regulations for the purposes of this paragraph—that amount.

*Carry-forward of unused cap*

- (7) If the amount worked out for a 12-month period by:
  - (a) starting with the lesser of:
    - (i) the basic cap amount; and
    - (ii) the amount that would be worked out under subsection (3) and in accordance with subsection (4), if the only amounts included were amounts payable on the exercise of options and incentive rights; and
  - (b) subtracting the total amount paid in the 12-month period by the participant and each related person under the terms of any offer made in connection with any employee share scheme operated by the body corporate or an associate of the body corporate on the exercise of options and incentive rights;
- is greater than nil, then that amount is carried forward for the purposes of paragraph (5)(d).

*Regulations may provide other ways of complying with this section*

- (8) An offer also complies with this section if the offer is of a kind prescribed by the regulations for the purposes of this subsection.

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**1100ZB Amounts that are excluded from the monetary cap**

- (1) Each amount mentioned in a subsection of this section is not included in working out under section 1100ZA whether an offer breaches the monetary cap.
- (2) An amount paid into an ESS contribution plan for the offer.
- (3) An amount payable by a participant or related person for the issue or sale of ESS interests to the extent that, under the terms of the offer, the amount can only become payable during a liquidity period for the ESS interests.
- (4) An amount payable on the exercise of options or incentive rights to the extent that, under the terms of the offer, the amount can only become payable during a liquidity period for the underlying ESS interests.
- (5) An amount payable by an ESS participant for the issue or sale of ESS interests to the extent that, under the terms of the offer:
  - (a) the amount can only become payable no longer than 7 days before the start of a liquidity period for the ESS interests; and
  - (b) all application money received from ESS participants before the start of a liquidity period must be held on trust for the ESS participants until:
    - (i) the start of the liquidity period; or
    - (ii) the money is returned to the ESS participants; and
  - (c) if application money needs to be returned to an ESS participant, it must be returned as soon as practicable.
- (6) An amount payable by an ESS participant on the exercise of options or incentive rights to the extent that, under the terms of the offer:
  - (a) the amount can only become payable no longer than 7 days before the start of a liquidity period for the underlying ESS interests; and
  - (b) all application money received from ESS participants before the start of a liquidity period must be held in trust for the ESS participants until:

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- (i) the start of the liquidity period; or
- (ii) the money is returned to the ESS participants; and
- (c) if application money needs to be returned to an ESS participant, it must be returned as soon as practicable.

*Liquidity period for ESS interests*

- (7) A ***liquidity period*** for an ESS interest is a period during which:
- (a) the ESS interest is in a class of interests that is able to be traded on the official list of a financial market covered by section 1100K; or
  - (b) an executed sale agreement constituting an offer to acquire ESS interests in the same class as the ESS interest is open for acceptance; or
  - (c) a circumstance prescribed by the regulations for the purposes of this paragraph exists.

*Regulations may prescribe other amounts*

- (8) The regulations may prescribe an amount for the purposes of this subsection.

**Subdivision D—Making offers under this Division****1100ZC Making offers under this Division**

- (1) This section applies (subject to section 1100ZG) in relation to an offer for the issue, sale or transfer of ESS interests in connection with an employee share scheme if the offer is eligible to be made under this Division (see Subdivision C).

*Relief relating to disclosure*

- (2) Parts 6D.2 and 6D.3 do not apply in relation to the offer.
- (3) Part 7.9 does not apply in relation to the offer, or any issue or sale of the interest to an ESS participant under the offer.

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- (4) Unless the issue or sale is eligible to be made under this Division only because of subsection 1100R(2), issues and sales of securities or financial products that result from the offer are to be disregarded when counting issues and sales, and the amount raised from issues and sales, for the purposes of subsection 708(1) (for securities) and 1012E(2) (for financial products).
- (5) Section 1012A (about disclosure in relation to personal advice) does not apply in relation to financial product advice relating to the offer.
- (6) Part 7.8A (about the design and distribution requirements relating to financial products for retail clients) does not apply in relation to the issue, sale or transfer of a security that is an ESS interest under the offer.

*Relief relating to Australian financial services licensing*

- (7) A person is exempt from the requirement under subsection 911A(1) to hold an Australian financial services licence for a financial service they provide if:
  - (a) the service:
    - (i) is the provision of general advice by the person in connection with the offer; or
    - (ii) is, or is provided incidentally to, a custodial or depository service that is provided by the person in connection with the offer; or
    - (iii) the service is issuing or dealing in a financial product by the person in connection with the offer; or
    - (iv) is dealing in an interest in an ESS contribution plan for the offer; and
  - (b) the person is:
    - (i) the body corporate or the responsible entity of the registered scheme to which the offer relates; or
    - (ii) an associated entity of that body corporate or responsible entity.

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*Relief relating to hawking of financial products*

- (8) Subsection 992A(1) does not apply in relation to the offer.

**1100ZD Regulatory relief for certain subsequent sale offers of ESS interests**

The provisions of Part 6D.2, 6D.3 and 7.9 do not apply in relation to an offer of ESS interests in a body corporate or registered scheme for sale if:

- (a) the body corporate or scheme operates an employee share scheme; and
- (b) the person making the offer reasonably believes that:
  - (i) the person acquired the interests under the employee share scheme; and
  - (ii) the person is making the offer only to persons who are ESS participants in relation to the body corporate or registered scheme.

**1100ZE Dealing with money received before ESS interest is issued**

- (1) If a person offers ESS interests for issue or sale to an ESS participant in connection with an employee share scheme, the person must hold:
    - (a) all application money received from ESS participants applying for ESS interests in connection with the employee share scheme; and
    - (b) all other money paid by them on account of the ESS interests before they are issued or transferred;
 in trust under this section for the ESS participants until:
    - (c) the ESS interests are issued or transferred; or
    - (d) the money is returned to the ESS participants.
  - (2) If the application money needs to be returned to an ESS participant, the person must return the money as soon as practicable.
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- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

**1100ZF Dealing with money received before liquidity period**

- (1) If a person is required by the terms of an offer of ESS interests in a body corporate that is not included in the official list of a financial market covered by section 1100K to hold application money received from ESS participants in trust until the start of a liquidity period, the person must hold the application money in trust under this section until:
  - (a) the start of the liquidity period; or
  - (b) the money is returned to the ESS participants.
- (2) If the application money needs to be returned to an ESS participant, the person must return the money as soon as practicable.
- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

**1100ZG Revocation of regulatory relief in certain circumstances**

*Revocation of regulatory relief—general case*

- (1) Section 1100ZC does not apply, and is taken never to have applied, to an offer for the issue, sale or transfer of ESS interests in connection with an employee share scheme of a body corporate or registered scheme if:
  - (a) at the time the offer was made, it was eligible to be made under this Division because of the operation of section 1100Q (offers for monetary consideration); and
  - (b) at any time after the offer is made, an ESS participant makes a payment to acquire ESS interests under the offer, or makes a payment to exercise options or incentive rights that were acquired under the offer; and
  - (c) at any time after the offer is made, any of the following occur:

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- (i) for an offer under which an ESS interest of the body corporate or registered scheme may be issued or transferred by the trustee of a trust—the trust ceases to meet the requirements in section 1100S or the trustee of the trust does not comply with a term of the trust deed;
- (ii) the offer results in a breach of the issue cap (see section 1100V);
- (iii) the offer results in a breach of the monetary cap (if applicable) for a primary participant (see section 1100ZA);
- (iv) any plan under which an ESS participant may acquire the ESS interests by making regular payments, or having regular deductions made from the participant's salary or wages, ceases to be an ESS contribution plan for the offer (see section 1100T);
- (v) any loan offered by the body corporate or relevant responsible entity, or an associated entity of the body corporate or responsible entity, in connection with the scheme ceases to comply with section 1100U;
- (vi) the person who makes the offer contravenes a term of the offer mentioned in section 1100Y (terms of the offer—disclosure).

**Note:** The terms of an offer for the issue or sale of ESS interests for monetary consideration (or a summary of those terms) must be set out in the offer document for the offer: see section 1100W.

*Revocation of regulatory relief—no monetary consideration offers using trusts*

- (2) Section 1100ZC does not apply, and is taken never to have applied, to an offer for the issue, sale or transfer of ESS interests in connection with an employee share scheme of a body corporate or registered scheme if:
  - (a) at the time the offer was made, it was eligible to be made under this Division because of the operation of section 1100P (offers for no monetary consideration); and

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- (b) under the offer, an ESS interest of the body corporate or registered scheme may be issued or transferred by the trustee of a trust; and
- (c) at any time after the offer is made, an ESS participant acquires ESS interests under the offer; and
- (d) at any time after the offer is made, the trust ceases to meet the requirements in section 1100S or the trustee of the trust does not comply with a term of the trust deed.

*Revocation of regulatory relief—small scale offers using trusts, contribution plans or loans*

- (3) Section 1100ZC does not apply, and is taken never to have applied, to an offer for the issue, sale or transfer of ESS interests in connection with an employee share scheme of a body corporate or registered scheme if:
  - (a) at the time the offer was made, it was eligible to be made under this Division because of the operation of subsection 1100R(2) (small scale offers); and
  - (b) at any time after the offer is made, an ESS participant makes a payment to acquire ESS interests under the offer, or makes a payment to exercise options or incentive rights that were acquired under the offer; and
  - (c) at any time after the offer is made, any of the following occur:
    - (i) for an offer under which an ESS interest of the body corporate or registered scheme may be issued or transferred by the trustee of a trust—the trust ceases to meet the requirements in section 1100S or the trustee of the trust does not comply with a term of the trust deed;
    - (ii) any plan under which an ESS participant may acquire the ESS interests by making regular payments, or having regular deductions made from the participant's salary or wages, ceases to be an ESS contribution plan for the offer (see section 1100T);
    - (iii) any loan offered by the body corporate or relevant responsible entity, or an associated entity of the body

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corporate or responsible entity, in connection with the scheme ceases to comply with section 1100U.

*When contravention occurs*

- (4) Subsection (5) applies if subsection (1), (2) or (3) operates to treat section 1100ZC as never having applied to an offer of ESS interests because of an event (**a revocation event**) occurring as described in any of the following provisions of this section:
  - (a) subparagraphs (1)(c)(i) to (vi);
  - (b) paragraph (2)(d);
  - (c) subparagraphs (3)(c)(i) to (iii).
- (5) For the purposes of determining:
  - (a) under section 1316 when proceedings for an offence against this Act may be instituted; and
  - (b) under section 1317K when proceedings for a declaration of a contravention of a provision of this Act may be started;
 the act or omission alleged to constitute the offence or the contravention (as the case requires) is taken to have occurred when the revocation event occurs.

**Subdivision E—Prohibitions and defences****1100ZH Misstatement in, or omission from, disclosure information**

- (1) A person must not make an offer that is expressed to be made under this Division, or distribute an application form for such an offer, to ESS participants if paragraph 1100Q(1)(a) applies to the offer and there is:
    - (a) a misleading or deceptive statement in:
      - (i) a document that purports to be an ESS offer document required by section 1100W for the offer; or
      - (ii) information that purports to be supporting information required under section 1100X for the offer; or
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- (b) an omission of information from a document mentioned in subparagraph (a)(i) or (ii) that would result in the document or information being misleading or deceptive; or
  - (c) a new circumstance that:
    - (i) has arisen during the application period for the offer mentioned in paragraph 1100W(2)(e); and
    - (ii) if the new circumstance had occurred before the offer was made, would have been required to be included in any of the documents mentioned in paragraph (a).
- (2) For the purposes of subsection (1), a person is taken to offer ESS interests to ESS participants at all times during which the participants may accept the offer.

*Forecasts and other forward-looking statements*

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

*Offence if statement or new circumstance is materially adverse*

- (4) A person commits an offence if:
- (a) the person contravenes subsection (1); and
  - (b) the misleading or deceptive statement or omission, or the new circumstance, is materially adverse from the point of view of an ESS participant.

*Defence—due diligence*

- (5) A person does not commit an offence against subsection (4) because of a misleading or deceptive statement in, or an omission from, a document mentioned in paragraph (1)(a) if the person proves that the person:
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- (a) made all inquiries (if any) that were reasonable in the circumstances; and
- (b) after doing so, believed on reasonable grounds that the statement was not misleading or deceptive.

*Defence—lack of knowledge*

- (6) A person does not commit an offence against subsection (4) because of a misleading or deceptive statement in a document mentioned in paragraph (1)(a) if the person proves that the person did not know that the statement was misleading or deceptive.
- (7) A person does not commit an offence against subsection (4) because of an omission from a document mentioned in paragraph (1)(a) in relation to a particular matter if the person proves that the person did not know that there was an omission from the document in relation to that matter.
- (8) A person does not commit an offence against subsection (4) because of a new circumstance that had arisen as mentioned in paragraph (1)(c) if the person did not know that the new circumstance had arisen.

*Defence—reasonable reliance on information given by someone else*

- (9) A person does not commit an offence against subsection (4) because of a misleading or deceptive statement in a document mentioned in paragraph (1)(a) if the person proves that the person placed reasonable reliance on information given to them by:
  - (a) if the person is a body corporate or a responsible entity of a registered scheme—someone other than a director, employee or agent of the body corporate or responsible entity; or
  - (b) if the person is an individual—someone other than an employee or agent of the individual.
- (10) For the purposes of subsection (9), a person is not the agent of a body corporate or responsible entity merely because the person

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performs a particular professional or advisory function for the body corporate or responsible entity.

*Defence—provision of updated information*

- (11) A person does not commit an offence against subsection (4) because of a new circumstance that has arisen as mentioned in paragraph (1)(c) if the person proves that, as soon as reasonably practicable after the circumstance arose:
  - (a) the documents mentioned in paragraph (1)(a) were updated to include all relevant information about the new circumstance; and
  - (b) copies of those updated documents were given to the ESS participants.

**1100ZI Misstatement in, or omission from, financial information for options and incentive rights**

- (1) A person must not offer ESS interests that are options or incentive rights to ESS participants if subparagraph 1100Q(1)(a)(ii) and subsection 1100Y(4) apply to the offer and there is:
  - (a) a misleading or deceptive statement in any information provided to the ESS participants in purported satisfaction of the term of the offer mentioned in paragraph 1100Y(4)(a) (about the provision of valuations and financial information); or
  - (b) an omission from information provided as mentioned in paragraph (a) that would result in the information provided being misleading or deceptive; or
  - (c) a new circumstance that:
    - (i) has arisen during the period that the option is exercisable or the incentive right is vested; and
    - (ii) if the new circumstance had occurred before the option became exercisable or the incentive right vested, would have been required to be included in the information mentioned in paragraph (a).

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- (2) For the purposes of subsection (1), a person is taken to offer options and incentive rights to ESS participants at all times during which the options are exercisable or the incentive rights are vested.

*Forecasts and other forward-looking statements*

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

*Offence if statement or new circumstance is materially adverse*

- (4) A person commits an offence if:
- (a) the person contravenes subsection (1); and
  - (b) the misleading or deceptive statement or omission, or the new circumstance, is materially adverse from the point of view of an ESS participant.

*Defence—due diligence*

- (5) A person does not commit an offence against subsection (4) because of a misleading or deceptive statement in, or an omission from, information mentioned in paragraph (1)(a) if the person proves that the person:
- (a) made all inquiries (if any) that were reasonable in the circumstances; and
  - (b) after doing so, believed on reasonable grounds that the statement was not misleading or deceptive.

*Defence—lack of knowledge*

- (6) A person does not commit an offence against subsection (4) because of a misleading or deceptive statement in information mentioned in paragraph (1)(a) if the person proves that the person did not know that the statement was misleading or deceptive.
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- (7) A person does not commit an offence against subsection (4) because of an omission from information mentioned in paragraph (1)(a) in relation to a particular matter if the person proves that the person did not know that there was an omission from the information in relation to that matter.
- (8) A person does not commit an offence against subsection (4) because of a new circumstance that had arisen as mentioned in paragraph (1)(c) if the person did not know that the new circumstance had arisen.

*Defence—reasonable reliance on information given by someone else*

- (9) A person does not commit an offence against subsection (4) because of a misleading or deceptive statement in information mentioned in paragraph (1)(a) if the person proves that the person placed reasonable reliance on information given to them by:
  - (a) if the person is a body corporate or a responsible entity of a registered scheme—someone other than a director, employee or agent of the body corporate or responsible entity; or
  - (b) if the person is an individual—someone other than an employee or agent of the individual.
- (10) For the purposes of subsection (9), a person is not the agent of a body corporate or responsible entity merely because the person performs a particular professional or advisory function for the body corporate or responsible entity.

*Defence—provision of updated information*

- (11) A person does not commit an offence against subsection (4) because of a new circumstance that has arisen as mentioned in paragraph (1)(c) if the person proves that, as soon as reasonably practicable after the circumstance arose:
    - (a) the information mentioned in paragraph (1)(a) was updated to include all relevant information about the new circumstance; and
    - (b) the updated information was given to the ESS participants.
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Section 1100ZJ**1100ZJ Obligation to inform person about deficiencies in disclosure documents**

- (1) This section applies to offers of ESS interests that are expressed to be made under this Division, if:
  - (a) paragraph 1100Q(1)(a) applies to the offer; and
  - (b) the offer is made in, or accompanied by, a document that purports to be an ESS offer document required by section 1100W for the offer.
- (2) A person covered by subsection (3) must notify, in writing, the body corporate or responsible entity of a registered scheme making the offer as soon as practicable if, during the application period for the offer mentioned in paragraph 1100W(2)(e), the person becomes aware that:
  - (a) a material statement in any of the following documents is misleading or deceptive:
    - (i) a document that purports to be an ESS offer document required by section 1100W for the offer;
    - (ii) information that purports to be supporting information required under section 1100X for the offer; or
  - (b) there is a material omission of information from any of the documents mentioned in paragraph (a) that would result in any of those documents being misleading or deceptive; or
  - (c) a material new circumstance exists that:
    - (i) has arisen during the application period for the offer mentioned in paragraph 1100W(2)(e); and
    - (ii) if the new circumstance had occurred before the offer was made, would have been required to be included in any of the documents mentioned in paragraph (a).
- (3) The following persons are covered by this subsection:
  - (a) each director of the body corporate or responsible entity;
  - (b) a person named, with the person's consent, in any document mentioned in paragraph (2)(a) as a proposed director of the body corporate or responsible entity;

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- (c) a person named, with the person's consent, in any document mentioned in paragraph (2)(a) as having made a statement:
  - (i) that is included in any such document; or
  - (ii) on which a statement made in any such document is based.

(4) An offence based on subsection (2) is an offence of strict liability.

*Defence—withdrawal of consent*

- (5) A person does not commit an offence against subsection (2) if:
  - (a) the person is named, with the person's consent, in any document mentioned in paragraph (2)(a):
    - (i) as a director or proposed director of the body corporate or responsible entity; or
    - (ii) as having made a statement that is included in any such document or on which a statement made in any such document is based; and
  - (b) at any time, the person publicly withdraws the person's consent to being named in the document in that way.

**Subdivision F—ASIC powers**

**1100ZK ASIC's power to make exemptions and declare modifications etc. in relation to this Division**

*Application*

- (1) This section applies in relation to Chapters 2L, 5, 5C, 6D and 7 (the *covered Chapters*) and this Division.

*Exemptions and declarations on application of this Division*

- (2) ASIC may do either or both of the following:
  - (a) exempt a person from all or specified provisions of the covered Chapters or this Division;

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- (b) declare that the covered Chapters or this Division apply in relation to a person, as if specified provisions were omitted, modified or varied as specified in the declaration.
- (3) The exemption or declaration may do all or any of the following:
  - (a) relate to all persons, specified persons or a specified class of persons;
  - (b) relate to any other matter generally or as specified.

*Imposition of conditions on exemption*

- (4) An exemption may apply unconditionally or subject to specified conditions.
- (5) An entity to whom a condition specified in an exemption applies must comply with the condition.
- (6) The Court may order the entity to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.

*Exemptions and declarations relating to all or a class of persons*

- (7) An exemption or declaration that relates to all persons, or a specified class of persons, must be made by legislative instrument.

*Exemptions and declarations relating to specified persons*

- (8) An exemption or declaration that relates to a specified person must be made by notifiable instrument.
- (9) ASIC must give a copy of an exemption or declaration that relates to a specified person to the person as soon as is reasonably practicable after the exemption or declaration is made.

**1100ZL ASIC stop orders**

- (1) This section applies if, in relation to an offer of ESS interests that is purportedly made under this Division, ASIC is satisfied that:
    - (a) information in any of the following is not worded and presented in a clear, concise and effective manner:
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- (i) an application form for the offer;
  - (ii) a document that purports to be an ESS offer document for the offer;
  - (iii) a document that purports to be supporting information required under section 1100X for the offer;
  - (iv) if the offer is not in a document mentioned in subparagraph (i) or (ii)—the document that contains the offer; or
  - (b) a document that purports to be an ESS offer document for the offer does not meet the requirements of subsection 1100W(2); or
  - (c) the terms of the offer do not comply with section 1100Y or 1100Z; or
  - (d) a document that purports to be supporting information required under section 1100X for the offer does not meet the relevant requirements under that section for that document; or
  - (e) the document that purports to be the ESS offer document, information that purports to be supporting information required under section 1100X, or the terms of the offer:
    - (i) include a misleading or deceptive statement; or
    - (ii) omit information in such a way that results in any of those documents being misleading or deceptive; or
  - (f) a person has contravened, or is likely to contravene, a term of the offer covered by section 1100Y or 1100Z.
- (2) ASIC may order that no offers, issues, sales or transfers of the ESS interests be made while the order is in force.
- (3) Before making an order under subsection (2), ASIC must:
- (a) hold a hearing; and
  - (b) give a reasonable opportunity to any interested people to make oral or written submissions to ASIC on whether an order should be made.
- (4) If ASIC considers that any delay in making an order under subsection (2) pending the holding of a hearing would be
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prejudicial to the public interest, ASIC may make an interim order that no offers, issues, sales or transfers of the ESS interests be made while the interim order is in force. The interim order may be made without holding a hearing and lasts for 21 days after the day on which it is made unless revoked before then.

- (5) At any time during the hearing, ASIC may make an interim order that no offers, issues, sales or transfers of the ESS interests be made while the interim order is in force. The interim order lasts until:
  - (a) ASIC makes an order under subsection (2) after the conclusion of the hearing; or
  - (b) the interim order is revoked;whichever happens first.
- (6) An order under subsection (2), (4) or (5) must be in writing and must be served on the person who is ordered not to offer, issue, sell or transfer ESS interests.

**1100ZM ASIC's power to request documents**

- (1) ASIC may require a person who makes, or purports to make, an offer of ESS interests to produce to ASIC such documents, or to give to ASIC such information, as ASIC thinks necessary in order to form an opinion about whether the provisions of this Division have been complied with.
- (2) The person must provide the information within such reasonable period, and in such form, as are specified by ASIC.
- (3) An offence based on subsection (2) is an offence of strict liability.

**Section 1101A**

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**Division 2—Codes of conduct**

**Subdivision A—Approved codes of conduct**

**1101A Approved codes of conduct**

*Applications*

- (1) If an application is made to approve a code of conduct, ASIC may, by legislative instrument, approve the code of conduct.

*Identifying enforceable code provisions*

- (2) In the approval, ASIC may identify a provision of the code of conduct as an enforceable code provision if ASIC considers that:
  - (a) the provision represents a commitment to a person by a subscriber to the code relating to transactions or dealings performed for, on behalf of or in relation to the person; and
  - (b) a breach of the provision is likely to result in significant and direct detriment to the person; and
  - (c) additional criteria prescribed by the regulations for the purposes of this paragraph (if any) are satisfied; and
  - (d) it is appropriate to identify the provision of the code as an enforceable code provision, having regard to the matters prescribed by the regulations for the purposes of this paragraph (if any).

Note: See also section 1101AD.

*ASIC to be satisfied of certain matters before making approval*

- (3) ASIC must not approve a code of conduct unless it is satisfied that:
  - (a) to the extent that the code is inconsistent with this Act or any other law of the Commonwealth under which ASIC has regulatory responsibilities—the code imposes an obligation on a subscriber that is more onerous than that imposed by

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this Act or any other law of the Commonwealth under which ASIC has regulatory responsibilities; and

- (b) each enforceable code provision:
  - (i) has been agreed with the applicant; and
  - (ii) is legally effective; and
- (c) it is appropriate to approve the code, having regard to the following matters:
  - (i) whether the obligations of subscribers to the code are capable of being enforced;
  - (ii) whether the applicant has effective administrative systems for monitoring compliance with the code and making information obtained as a result of monitoring publicly available;
  - (iii) whether the applicant has effective administrative systems for maintaining, and making publicly available, an accurate list of subscribers to the code.

*Revocation*

- (4) ASIC may, by legislative instrument, revoke an approval of an approved code of conduct:
  - (a) on application by the applicant for the approval; or
  - (b) if ASIC ceases to be satisfied of the matters mentioned in subsection (3); or
  - (c) if a review of the operation of the code is not completed by the applicant within the timeframe required by section 1101AB.
- (5) Subsection (4) does not, by implication, limit the application of subsection 33(3) of the *Acts Interpretation Act 1901*.

**1101AA Variations to approved codes of conduct**

- (1) If an application is made to vary an approved code of conduct, ASIC may, by legislative instrument, approve the variation.

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- (2) Subsections 1101A(2) and (3) apply in relation to an application under subsection (1) as if it were an application to approve a code of conduct.

### **1101AB Review of approved codes of conduct**

- (1) The applicant, in relation to an approved code of conduct, must ensure that, every 5 years, an independent review is undertaken of the operation of the approved code of conduct.
- (2) A review under subsection (1) must make provision for public consultation.
- (3) A review of an approved code of conduct must be completed:
- (a) for the first review—before the end of the 5 year period beginning on the day the code of conduct was approved; and
  - (b) for a subsequent review—within 5 years after the completion of the previous review.
- (4) For the purposes of this section, a review is completed when a report of the review is given to ASIC.
- (5) Within 10 business days of completing a review, the applicant must publish the report of the review on its website.

### **1101AC Obligation to comply with enforceable code provisions**

If a person holds out that they comply with an approved code of conduct, the person must not breach an enforceable code provision of the approved code of conduct.

Civil penalty: 300 penalty units.

### **1101AD Regulations**

The regulations may:

- (a) prescribe criteria of which ASIC must be satisfied before it identifies a provision of a code of conduct as an enforceable code provision; or

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- (b) prescribe matters to which ASIC must have regard before it identifies a provision of a code of conduct as an enforceable code provision.

**Subdivision B—Mandatory codes of conduct****1101AE Mandatory codes of conduct**

- (1) The regulations may prescribe a code of conduct for the purposes of this Division and declare it to be a mandatory code of conduct.
- (2) Regulations declaring a code of conduct a mandatory code of conduct may also:
  - (a) confer functions and powers on a person or body for the purposes of:
    - (i) monitoring compliance with the code of conduct; and
    - (ii) dealing with disputes or complaints arising under, or in relation to, the code of conduct; and
    - (iii) dealing with other associated administrative matters; or
  - (b) provide for and in relation to:
    - (i) the keeping of records by persons bound by the code of conduct; and
    - (ii) reporting obligations of such persons.
- (3) If regulations prescribe a code of conduct, the code of conduct may prescribe pecuniary penalties not exceeding 1,000 penalty units for civil penalty provisions of the code of conduct.
- (4) To avoid doubt, subsections 1317G(3) and (4) do not apply in relation to the contravention of a civil penalty provision of a mandatory code of conduct.

**1101AF Obligation to comply with mandatory code of conduct**

A person must not contravene a mandatory code of conduct.

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**Division 3—Other matters**

**1101B Power of Court to make certain orders**

*Court's power to make orders in relation to certain contraventions*

- (1) The Court may make such order, or orders, as it thinks fit if:
  - (a) on the application of ASIC, it appears to the Court that a person:
    - (i) has contravened a provision of this Chapter, or any other law relating to dealing in financial products or providing financial services; or
    - (ii) has contravened a condition of an Australian market licence, Australian CS facility licence, Australian derivative trade repository licence or Australian financial services licence; or
    - (iii) has contravened a provision of the operating rules, or the compensation rules (if any), of a licensed market; or
    - (v) has contravened a condition on an exemption from the requirement to hold an Australian market licence or an Australian CS facility licence; or
    - (vi) is about to do an act with respect to dealing in financial products or providing a financial service that, if done, would be such a contravention; or
  - (aa) on the application of ASIC or the Reserve Bank or both, it appears to the Court that a person has contravened a provision of the operating rules of a licensed CS facility; or
  - (b) on the application of a market licensee, it appears to the Court that a person has contravened the operating rules, or the compensation rules (if any), of a licensed market operated by the licensee; or
  - (c) on the application of a CS facility licensee, it appears to the Court that a person has contravened a provision of the operating rules of a licensed CS facility operated by the licensee; or

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- (d) on the application of a person aggrieved by an alleged contravention by another person of subsection 798H(1) (complying with market integrity rules) or 981M(1) (complying with client money reporting rules) or a provision of the operating rules, or the compensation rules (if any), of a licensed market, or subsection 908CF(1) (complying with rules about financial benchmarks), it appears to the Court that:
  - (i) the other person did contravene the provision; and
  - (ii) the applicant is aggrieved by the contravention.

However, the Court can only make such an order if the Court is satisfied that the order would not unfairly prejudice any person.

Note: For examples of orders the Court could make, see subsection (4).

- (2) For the purposes of paragraph (1)(d), if a body corporate contravenes a provision of the operating rules of a licensed market, a person who holds financial products of the body corporate that are able to be traded on the licensed market is taken to be a person aggrieved by the contravention.
- (3) Subsection (2) does not limit the circumstances in which a person may be aggrieved by a contravention for the purposes of paragraph (1)(d).

*Examples of orders the Court may make*

- (4) Without limiting subsection (1), some examples of orders the Court may make under subsection (1) include:
  - (a) an order restraining a person from carrying on a business, or doing an act or classes of acts, in relation to financial products or financial services, if the person has persistently contravened, or is continuing to contravene:
    - (i) a provision or provisions of this Chapter; or
    - (ii) a provision or provisions of any other law relating to dealing in financial products or providing financial services; or
    - (iii) a condition on an Australian market licence, Australian CS facility licence, Australian derivative trade

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- repository licence or Australian financial services licence; or
- (v) a condition of an exemption from a requirement to hold an Australian market licence or Australian CS facility licence; or
  - (vi) a provision of the operating rules, or the compensation rules (if any), of a licensed market or of the operating rules of a licensed CS facility; or
- (b) an order giving directions about complying with a provision of the market integrity rules, of the derivative transaction rules, of the derivative trade repository rules or of the client money reporting rules, or a provision of the operating rules, or the compensation rules (if any), of a licensed market or of the operating rules of a licensed CS facility, or a provision of the financial benchmark rules or the compelled financial benchmark rules, to a person (or the directors of the body corporate, if the person is a body corporate) who contravened the provision; and
  - (c) an order requiring a person to disclose to the public or to specified persons, in accordance with the order, specified information that the person to whom the order is directed possesses or to which that person has access, if the person:
    - (i) contravened a provision of the market integrity rules, of the derivative transaction rules, of the derivative trade repository rules or of the client money reporting rules, or a provision of the operating rules of a licensed market, or a provision of the financial benchmark rules or the compelled financial benchmark rules, or a condition relating to the disclosure or provision of information; or
    - (ii) was involved in such a contravention; and
  - (d) an order requiring a person to publish advertisements in accordance with the order at that person's expense, if the person:
    - (i) contravened a provision of the market integrity rules, of the derivative transaction rules, of the derivative trade repository rules or of the client money reporting rules,

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or a provision of the operating rules of a licensed market, or a provision of the financial benchmark rules or the compelled financial benchmark rules, or a condition relating to the disclosure or provision of information; or

- (ii) was involved in such a contravention; and
- (e) an order restraining a person from acquiring, disposing of or otherwise dealing with any financial products that are specified in the order; and
- (f) an order restraining a person from providing any financial services that are specified in the order; and
- (g) an order appointing a receiver of property (see subsection (9)) of a financial services licensee; and
- (h) an order declaring a contract relating to financial products or financial services to be void or voidable; and
- (i) an order directing a person to do or refrain from doing a specified act, if that order is for the purpose of securing compliance with any other order under this section; and
- (j) any ancillary order considered to be just and reasonable in consequence of the making of an order under any of the preceding provisions of this subsection.

*Interim orders*

- (5) Before considering an application to the Court under subsection (1), the Court may make an interim order of the kind applied for to apply pending the determination of the application, if in the opinion of the Court it is desirable to do so.
- (6) However, if ASIC, a market licensee or a CS facility licensee applies for an order under subsection (1), the Court must not require the applicant, or any other person, to give any undertakings as to damages as a condition of making an interim order under subsection (5).

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*Power to give notice of applications*

- (7) Before making an order under subsection (1), the Court may do either or both of the following:
- (a) direct that notice of the application be given to such persons as it thinks fit;
  - (b) direct that notice of the application be published in such manner as it thinks fit.

*Powers of receivers appointed under Court orders*

- (8) A person appointed by order of the Court under subsection (1) as a receiver of the property (see subsection (12)) of a financial services licensee:
- (a) may require the financial services licensee to:
    - (i) deliver to the person any property of which the person has been appointed receiver; or
    - (ii) give to the person all information concerning that property that may reasonably be required; and
  - (b) may acquire and take possession of any property of which the person has been appointed receiver; and
  - (c) may deal with any property that the person has acquired, or of which the person has taken possession, in any way in which the financial services licensee might lawfully have dealt with the property; and
  - (d) has such other powers in respect of the property as the Court specifies in the order.

*Duty to comply with order*

- (10) A person must not, without reasonable excuse, contravene:
- (a) an order under this section; or
  - (b) a requirement imposed under paragraph (8)(a) or (8)(d) by a receiver appointed by order of the Court under subsection (1).

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

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**Section 1101C***Power to rescind or vary order*

- (11) The Court may rescind or vary an order made by it under this section or suspend the operation of such an order.
- (12) In this section:

*property*, in relation to a financial services licensee, includes:

- (a) money; or
- (b) financial products; or
- (c) documents of title to financial products; or
- (d) other property;

entrusted to, or received on behalf of, any other person by the financial services licensee or another person in the course of, or in connection with, a financial services business carried on by the financial services licensee.

**1101C Preservation and disposal of records etc.***Registers*

- (1) A person who is required by a provision of this Chapter to keep a register in relation to a business carried on by the person must preserve it for 5 years after the day on which the last entry was made in the register.

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

*Financial records*

- (2) A person who is required by a provision of this Chapter to keep any financial record in relation to a business carried on by the person must preserve it for 7 years after the transactions covered by the record are completed.

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

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*Other records*

- (3) A person who is required by a provision of this Chapter or the regulations to keep any other record must preserve it for 5 years after the day on which the last entry was made in the record.

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

*Exceptions*

- (4) Registers and records must be preserved in accordance with this section (even if the person stops carrying on the business to which they relate during the period for which they must be preserved), unless:

- (a) the regulations provide that those documents, or a class to which they belong, need not be preserved; and
- (b) any conditions specified in or under those regulations have been complied with.

Note: A defendant bears an evidential burden in relation to the matters in this subsection. See subsection 13.3(3) of the *Criminal Code*.

**1101D Destruction of records by ASIC**

ASIC may destroy or otherwise dispose of any document that is lodged under, or for the purposes of, a provision of this Chapter if:

- (a) ASIC is of the opinion that it is no longer necessary or desirable to retain it; and
- (b) it has been in the possession of ASIC for such period as is specified in the regulations, either generally or in relation to a particular document or class of documents.

**1101E Concealing etc. of books**

- (1) A person must not:

- (a) conceal, destroy, mutilate or alter a book:
  - (i) relating to the business carried on by a financial services licensee or an authorised representative of such a licensee; or

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- (ii) required under a provision of this Chapter to be kept by a market licensee, a CS facility licensee, a financial services licensee or an authorised representative of a financial services licensee; or
- (b) send such a book out of this jurisdiction.

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

- (2) In any proceedings against a person for an offence based on subsection (1), it is a defence if the person did not act with intent to:
  - (a) defraud; or
  - (b) defeat the objects of this Chapter; or
  - (c) prevent, delay or obstruct the carrying out of an examination, investigation or audit, or the exercise of a power, under this Chapter.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2). See subsection 13.3(3) of the *Criminal Code*.

## 1101F Falsification of records

- (1A) A person must not engage in conduct that results in the falsification of:
  - (a) a book required to be kept by a provision of this Chapter; or
  - (b) a register or any accounting or other record referred to in section 1101C.

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

- (1) If matter that is used, or intended to be used, in connection with:
    - (a) the keeping of a book required to be kept by a provision of this Chapter; or
    - (b) a register or any accounting or other record referred to in section 1101C;
- is recorded or stored in an illegible form by means of a mechanical device, an electronic device or any other device, a person must not:
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## Section 1101G

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- (c) record or store by means of that device matter that the person knows to be false in a material particular or materially misleading; or
- (d) destroy, remove or falsify matter that is recorded or stored by means of that device, or has been prepared for the purpose of being recorded or stored, or for use in compiling other matter to be recorded or stored, by means of that device; or
- (e) fail to record or store matter by means of that device, with intent to falsify any entry made or intended to be compiled, wholly or in part, from that matter.

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

- (2) In any proceedings against a person for an offence based on subsection (1A) or (1), it is a defence if it is proved that the person acted honestly and that in all the circumstances the act or omission constituting the offence should be excused.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2). See subsection 13.3(3) of the *Criminal Code*.

## 1101G Precautions against falsification of records

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

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

## 1101GA How Part 9.3 applies to books required to be kept by this Chapter etc.

- (1) In this section:

***Chapter 7 book*** means:

- (a) a book (by whatever name it is known) that a provision of this Chapter requires to be kept; or

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- (b) a document lodged under, or for the purposes of, a provision of this Chapter; or
  - (c) a book relating to the business carried on by a financial services licensee or an authorised representative of a financial services licensee; or
  - (d) a register or accounting record referred to in section 1101C.
- (2) Part 9.3 does not apply in relation to a Chapter 7 book except as provided in the following paragraphs:
- (a) section 1303 applies to a Chapter 7 book;
  - (b) section 1305, and subsections 1306(5) and (6), apply to a Chapter 7 book as if references in section 1305 to a body corporate were instead references to a person;
  - (c) regulations made for the purposes of this paragraph may provide that other provisions of Part 9.3 apply in relation to a Chapter 7 book, or a class of Chapter 7 books, with such modifications (if any) as are specified in the regulations.

**1101H Contravention of Chapter does not generally affect validity of transactions etc.**

- (1) Subject to subsection (2), a failure to comply with any requirement of this Chapter (including requirements in regulations made for the purposes of this Chapter) does not affect the validity or enforceability of any transaction, contract or other arrangement.
- (2) Subsection (1) has effect subject to any express provision to the contrary in:
  - (a) this Chapter; or
  - (b) regulations made for the purposes of another provision of this Chapter; or
  - (c) regulations referred to in subsection (3).
- (3) Regulations made for the purposes of this subsection may provide that a failure to comply with a specified requirement referred to in subsection (1) has a specified effect on the validity or enforceability of a transaction, contract or arrangement.

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**1101I Gaming and wagering laws do not affect validity of contracts relating to financial products**

Despite any law of a State or Territory in this jurisdiction about gaming and wagering:

- (a) a person may enter into a contract that is a financial product; and
- (b) the contract is valid and enforceable.

**1101J Delegation**

- (1) The Minister may delegate all or any of the Minister's powers under this Chapter (other than powers under Part 7.2, 7.2A, 7.3, 7.3A, 7.3B, 7.4, 7.5 or 7.5A) to:
  - (a) ASIC; or
  - (b) a member of ASIC (within the meaning of section 9 of the *Australian Securities and Investments Commission Act 2001*); or
  - (c) a staff member of ASIC who is a senior staff member (within the meaning given by subsection 5(1) of that Act).
- (2) However, the Minister must not delegate the Minister's powers under section 1023H, 1023J, 1023K or 1023M (which deal with product intervention orders) to a person other than ASIC.

Section 1200A

## Chapter 8—Mutual recognition of securities offers

### Part 8.1—Preliminary

#### 1200A Meaning of some terms relating to mutual recognition of securities offers

(1) In this Act:

*foreign recognition scheme* means the provisions of a law of a recognised jurisdiction that are prescribed by the regulations as comprising a foreign recognition scheme.

*law of a recognised jurisdiction* includes law of part of a recognised jurisdiction.

*recognised jurisdiction* means a foreign country prescribed by the regulations as a recognised jurisdiction.

(2) For the purposes of this Chapter, paragraph (b) of the definition of *debenture* in section 9 is taken to include a reference to an undertaking by an institution, authorised by or under the law of a recognised jurisdiction as a deposit-taking institution (however described), to repay money deposited with it, or lent to it, in the ordinary course of its banking business.

(3) For the purposes of this Chapter:

(a) paragraph (c) of the definition of *managed investment scheme* in section 9 is taken to include a reference to a partnership that, if this Act applied to it, would not need to be incorporated or formed under an Australian law because of regulations made for the purposes of subsection 115(2); and

(b) paragraph (i) of the definition of *managed investment scheme* in section 9 is taken to include a reference to a scheme operated by an institution, authorised by or under the law of a recognised jurisdiction as a deposit-taking institution

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(however described), in the ordinary course of its banking business.

## **Part 8.2—Foreign offers that are recognised in this jurisdiction**

### **Division 1—Recognised offers**

#### **1200B Meaning of *recognised offer***

- (1) An offer of securities becomes a *recognised offer*, in relation to a recognised jurisdiction, on the day the offer is first made in this jurisdiction, if the conditions in section 1200C are met in relation to the offer on that day.
- (2) The offer continues to be a recognised offer after that day, even if a condition in section 1200C ceases to be met after that day.
- (3) If, at the time an offer is first made in this jurisdiction, the offer would be a recognised offer but for a failure to meet the condition in subsection 1200C(5) or (6) that ASIC is satisfied is minor or technical, ASIC may declare in writing that the offer is a recognised offer within the meaning of subsection (1).
- (4) If ASIC makes a declaration under subsection (3) in relation to an offer, the condition is taken to have been met at the time the offer was first made in this jurisdiction.
- (5) A declaration under subsection (3) is not a legislative instrument.

#### **1200C Conditions that must be met to be a recognised offer**

- (1) For the purposes of subsection 1200B(1), the conditions that must be met are those set out in this section.
- (2) The person offering the securities must be:
  - (a) a person incorporated by or under the law of the recognised jurisdiction; or
  - (b) a natural person resident in the recognised jurisdiction; or

**Chapter 8** Mutual recognition of securities offers

**Part 8.2** Foreign offers that are recognised in this jurisdiction

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- (c) a legal person established by or under the law of the recognised jurisdiction; or
  - (d) a person of a kind prescribed by regulations made in relation to the recognised jurisdiction for the purposes of this paragraph.
- (3) The person offering the securities must not be banned under section 1200P.
- (4) The offer must be an offer of a kind prescribed by the regulations in relation to the recognised jurisdiction.
- (5) At least 14 days before the day on which the offer is first made in this jurisdiction, the person making the offer must have lodged with ASIC:
- (a) a notice in the prescribed form (if any) of the person's intention to make a recognised offer; and
  - (b) the documents and information required to be lodged under section 1200D.
- (6) If:
- (a) before the offer is first made in this jurisdiction; and
  - (b) after a document or information was lodged with ASIC under section 1200D;
- either:
- (c) an event of a kind mentioned in the table in subsection 1200G(9) happened; or
  - (d) the address for service in this jurisdiction of the person proposing to offer the securities changed;
- the person making the offer must have lodged with ASIC:
- (e) if paragraph (c) applies—the document or information that would have been required to have been lodged under subsection 1200G(9) for the event if that subsection had applied; and
  - (f) if paragraph (d) applies—the changed address for service.

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## 1200D Required documents and information

- (1) For the purposes of paragraph 1200C(5)(b), the documents and information required to be lodged under this section are:
  - (a) any offer document required by the law of the recognised jurisdiction; and
  - (b) the warning statement that is to be included with an offer document in this jurisdiction (which, if regulations are in force for the purposes of section 1200E, must comply with those regulations); and
  - (c) unless paragraph (d) applies—the constitution of the body whose securities are to be the subject of the offer; and
  - (d) if the securities that are to be the subject of the offer are interests in a managed investment scheme, rights or interests in such interests, or options to acquire such interests by way of issue—the constituent document of the scheme; and
  - (e) details, in the prescribed form (if any), of any exemption from the securities law of the recognised jurisdiction that applies, but not exclusively, to the offer or to the offeror in relation to the offer; and
  - (f) if the offeror is relying on subsection (2)—notice of the document or information that is not being lodged because of the offeror's reliance on that subsection; and
  - (g) an address for service in this jurisdiction, in the prescribed form (if any); and
  - (h) a copy of any exemption from the securities law of the recognised jurisdiction that applies exclusively to the offer or to the offeror; and
  - (i) any other documents or information prescribed by the regulations.
- (2) For the purposes of this Chapter, a person is taken to have lodged a document or information under this section if:
  - (a) the document or information has been lodged under Division 2 or 3 of Part 5B.2; or
  - (b) the document or information is not required to be lodged because of section 601CDA or 601CTA.

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- (3) For the purposes of this Chapter, a person is taken to have lodged a document or information under this section if the person lodged the document or information in compliance with subsection 1200C(6).

### **1200E Warning statement**

The regulations may, in relation to offer documents used in this jurisdiction for recognised offers, prescribe either or both of the following:

- (a) statements to be included with those documents that relate to the status of an offer as a recognised offer and the laws that regulate the offer;
- (b) details to be given in statements to be included with those documents that relate to the status of an offer as a recognised offer and the laws that regulate the offer.

## Division 2—Effect of a recognised offer

### 1200F Effect of a recognised offer

- (1) The provisions listed in the table do not apply, in relation to a recognised offer, to the things specified in the table for those provisions.

Note: Recognised offers must comply with Division 3 instead.

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#### Provisions that do not apply in relation to a recognised offer

| Item | These provisions:  | do not apply, in relation to the offer, to:   |
|------|--|---|
| 1    | Chapter 2L   | if the recognised offer is an offer of debentures—the offeror.  |
| 2    | Chapter 5C   | if the recognised offer is an offer of interests in a managed investment scheme—the operator of the managed investment scheme.  |
| 3    | Chapter 6D   | (a) the recognised offer; or<br>(b) the offeror of the recognised offer; or<br>(c) any offer document for the offer.  |
| 4    | Parts 7.6, 7.7 and 7.8, other than section 992A                | (a) the issue or disposal of a security under the recognised offer; or<br>(b) general advice contained in any offer document for the offer; or<br>(c) general advice contained in an advertisement for the recognised offer issued by, or on behalf of, the offeror; or<br>(d) the provision of a custodial or depository service in relation to interests in a managed investment scheme that are the subject of the recognised offer. |
| 5    | Part 7.9, other than sections 1020AB, 1020AC, 1020AD and 1020B | the offeror of the recognised offer.  |

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## Section 1200F

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- (2) Despite subsection (1), the regulations may:
- (a) apply a provision listed in the table in subsection (1) to a person or class of persons; or
  - (b) apply a provision listed in the table in subsection (1) to a security or class of securities; or
  - (c) provide that a provision listed in the table in subsection (1) applies with the modifications specified in the regulations.

## Division 3—Ongoing conditions for recognised offers

### 1200G Offering conditions

*When the offering conditions apply*

- (1) The offering conditions in this section apply in relation to a recognised offer until the recognised offer closes in this jurisdiction.

Note: Failure to comply with an offering condition is an offence (see sections 1200Q and 1311).

*Offering conditions*

- (2) The offer must be made in the recognised jurisdiction as well as in this jurisdiction.
- (3) The offeror must meet the conditions in subsections 1200C(2) and (3).
- (4) The offer must meet the condition in subsection 1200C(4).
- (5) The offer must comply with the law of the recognised jurisdiction.
- (6) There must be no person concerned in the management of the offeror:
  - (a) who is disqualified from managing corporations for the purposes of Part 2D.6; or
  - (b) who is disqualified from being concerned in the management of the offeror under the law of the recognised jurisdiction; or
  - (c) who is subject to a banning order; or
  - (d) who is subject to a court order under paragraph 921A(2)(a).
- (7) An offer document provided to a person in this jurisdiction must have included with it:
  - (a) the warning statement lodged under subsection 1200D(1) for that offer document; or

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- (b) if a changed warning statement is lodged with ASIC under subsection 1200G(9)—the changed warning statement.
- (8) The offeror must, on request by a person in this jurisdiction, provide a copy of the constitution or constituent document lodged under paragraph 1200D(1)(c) or (d).
- (9) If an event mentioned in an item of this table occurs in relation to the offer or offeror, the offeror must lodge with ASIC the document, statement or notice specified in the table for that event, by the time specified for that event.

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**Offering condition under subsection (9)**

| Item | If:   | the offeror must lodge<br>with ASIC:                      | by this time:  |
|------|---|---|--|
| 1    | a change is made to an offer document, or any other document, required by the law of the recognised jurisdiction in relation to the offer | a copy of the document as changed                         | no later than 7 days after the day on which the offeror notified (or should have notified) the home regulator of the change.                         |
| 2    | a change is made to the warning statement that is included with the offer document in this jurisdiction                                   | a copy of the warning statement as changed                | no later than 7 days after the day on which the offeror notified (or should have notified) the home regulator of the change.                         |
| 3    | a supplementary or replacement offer document is required by the law of the recognised jurisdiction                                       | a copy of the supplementary or replacement offer document | no later than 7 days after the day on which the supplementary or replacement offer document is (or should have been) lodged with the home regulator. |

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**Offering condition under subsection (9)**

| <b>Item</b> | <b>If:</b>  | <b>the offeror must lodge with ASIC:</b>  | <b>by this time:</b>   |
|-------------|---|---|--|
| 4           | a change is made to the constitution or constituent document lodged under paragraph 1200D(1)(c) or (d)  | a copy of the constitution or constituent document as changed   | no later than 7 days after the day on which the offeror notified (or should have notified) the home regulator of the change. |
| 5           | the home regulator makes, changes or revokes an exemption that applies, but not exclusively, to the offer or the offeror under the law of the recognised jurisdiction | written notice in the prescribed form (if any) of the details of the exemption, change or revocation                          | no later than 14 days after the making, change or revocation occurs.   |
| 6           | the home regulator makes, changes or revokes an exemption that applies exclusively to the offer or the offeror under the law of the recognised jurisdiction           | a copy of the exemption, the exemption as changed, or notice in the prescribed form (if any) of the details of the revocation | no later than 7 days after the making, change or revocation occurs.  |
| 7           | the home regulator begins enforcement action, or exercises a power it has under law, in relation to the offeror or offer  | written notice in the prescribed form (if any) of the details of the action taken or power exercised                          | no later than 7 days after the action is taken or the power is exercised.  |

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- (10) For the purposes of this Chapter, a person is taken to have lodged a document under subsection (9) if:
- (a) the document has been lodged under Division 2 or 3 of Part 5B.2; or
  - (b) the document is not required to be lodged because of section 601CDA or 601CTA.
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(11) If:

- (a) an event mentioned in the table in subsection (9) occurs while the offering conditions in this section apply; and
- (b) the time by which an offeror is required to lodge a document, statement or notice with ASIC because of that event is after the offering conditions cease to apply;

then, for the purposes of this section and paragraph 1200Q(1)(b), the offering conditions are taken to continue to apply until that time in relation to the offer to the extent necessary to require the offeror to lodge the document, statement or information by that time.

(12) The offer must meet any other conditions prescribed by the regulations.

*Home regulator*

- (13) For the purposes of subsection (9), the ***home regulator*** for a recognised jurisdiction is an authority in the recognised jurisdiction whose functions under the law of the recognised jurisdiction include functions equivalent to any of those of ASIC under this Act and that is prescribed by the regulations as the home regulator for that jurisdiction.
- (14) If there is more than one authority in a recognised jurisdiction whose functions include functions under the law of the recognised jurisdiction equivalent to any of those of ASIC under this Act and that is prescribed under subsection (13), the regulations may prescribe the matters in relation to which that authority is to be regarded as the home regulator.

Section 1200H

## 1200H Address for service condition

*When the address for service condition applies*

- (1) The address for service condition in this section applies in relation to a recognised offer:
  - (a) until the end of the last day on which a person who resides in this jurisdiction could acquire securities under the offer; and
  - (b) if a person who resides in this jurisdiction acquires securities under the offer—at all times when the offeror’s records indicate that someone who resides in this jurisdiction holds securities in the class of securities that was the subject of the recognised offer.

Note: Failure to comply with the address for service condition is an offence (see sections 1200Q and 1311).

*Address for service condition*

- (2) The offeror must lodge with ASIC written notice, in the prescribed form (if any), of any change in its address for service in this jurisdiction, no later than the end of the seventh day after the day on which the address changed.
- (3) If:
  - (a) the offeror’s address for service in this jurisdiction changes while the address for service condition in this section applies; and
  - (b) the time by which the offeror is required to lodge notice with ASIC because of the change is after the address for service condition ceases to apply;then, for the purposes of this section and subparagraph 1200Q(2)(b)(i), the address for service condition is taken to continue to apply until that time to the extent necessary to require the offeror to lodge notice by that time.

## Section 1200J

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### **1200J Dispute resolution condition**

*When the dispute resolution condition applies*

- (1) The dispute resolution condition in this section applies, to a person who is or who has been the offeror of a recognised offer, at all times when the person's records indicate that someone who resides in this jurisdiction holds securities in the class of securities that was the subject of the recognised offer.

Note: Failure to comply with the dispute resolution condition is an offence (see sections 1200Q and 1311).

*Dispute resolution condition*

- (2) The person must have a dispute resolution process that complies with subsection 1017G(2), if the recognised offer was an offer of:
  - (a) interests in a managed investment scheme; or
  - (b) rights or interests in such interests, or options to acquire such interests by way of issue.

*Exemption from the dispute resolution condition*

- (3) ASIC may, on application by a person in the prescribed form (if any), grant the person an exemption from the dispute resolution condition in this section, subject to any conditions specified in the exemption.
- (4) If ASIC grants a person an exemption under subsection (3), then, for the purposes of this Chapter, the person is taken to comply with the dispute resolution condition in this section for so long as the exemption is in force.
- (5) ASIC may, in relation to an exemption under subsection (3):
  - (a) vary, or impose, a condition in relation to the exemption; or
  - (b) revoke the exemption.
- (6) A variation, imposition or revocation under subsection (5) takes effect:

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- (a) if the person has an address for service in this jurisdiction—when it is served on the person at that address; or
  - (b) if the person does not have an address for service in this jurisdiction—on publication in the *Gazette*.

**Section 1200K**

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**Division 4—Modification of provisions of this Act**

**1200K Additional operation of section 675 (continuous disclosure)**

In relation to a disclosing entity that has been the offeror of a recognised offer, sections 675 and 675A also have the operation they would have if paragraphs 675(2)(c) and 675A(2)(c) were replaced by the following paragraph:

- (c) the information is not required, by the law of the recognised jurisdiction to which the offer relates, to be included in a supplementary or replacement offer document; and

**1200L Pre-offer advertising**

*Offers that need a disclosure document*

- (1) Subsection 734(4) also has the operation it would have if:
  - (a) the reference in that subsection to a disclosure document that has been lodged with ASIC were a reference to an offer document lodged with ASIC for the purposes of this Chapter; and
  - (b) the reference in that subsection to section 739 were a reference to section 1200N.
- (2) Subsection 734(5) also has the operation it would have if:
  - (a) references in that subsection to a disclosure document were references to an offer document that complies with the law of a recognised jurisdiction; and
  - (b) references in that subsection to completing an application form were references to completing an application process under the law of that recognised jurisdiction.
- (3) Subsection 734(6) also has the operation it would have if:
  - (a) references in that subsection to a disclosure document were references to an offer document lodged with ASIC for the purposes of this Chapter; and

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- (b) references in that subsection to completing an application form were references to completing an application process under the law of the recognised jurisdiction to which the offer relates.

*Offers that need a Product Disclosure Statement*

- (4) Subsection 1018A(2) also has the operation it would have if:
- (a) a reference in that subsection to a Product Disclosure Statement were a reference to an offer document that complies with the law of a recognised jurisdiction; and
  - (b) a reference in that subsection to sale offers to which section 1012C will apply were a reference to sale offers to which section 1012C would apply if the financial product, when made available, were not made available under a recognised offer.
- (5) Subsection 1018A(3) also has, in relation to subsection 1018A(2), the operation it would have if:
- (a) the reference in that subsection to a Product Disclosure Statement were a reference to an offer document that complies with the law of a recognised jurisdiction; and
  - (b) the reference to section 1020E were a reference to section 1200N.

## **1200M Modification by the regulations**

The regulations may modify a provision of this Act in relation to its application in respect of a recognised offer or a proposed offer of securities that may become a recognised offer.

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- (1) If, in relation to a thing mentioned in an item of this table, ASIC is satisfied of the matters specified in the table item for that thing, ASIC may make either or both of the orders specified in the table item about that thing.

| <b>Stop orders</b> |  |  |   |
|--------------------|--|--|---|
| <b>Item</b>        | <b>If, in relation to:</b>   | <b>ASIC is satisfied that:</b>   | <b>ASIC may order:</b>  |
| 1                  | (a) an offer document lodged under paragraph 1200D(1)(a); or (b) a warning statement lodged under paragraph 1200D(1)(b); or (c) a document or information lodged under paragraph 1200D(1)(i) | there is a misleading or deceptive statement in, or a material omission from, the document, statement or information | (a) that no offers, issues, sales or transfers of the securities to which the document, statement or information relates be made while the order is in force; (b) that specified conduct in respect of those securities, or in respect of the document, statement or information, must not be engaged in while the order is in force. |

Section 1200N

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**Stop orders**

| Item | If, in relation to:  | ASIC is satisfied that:  | ASIC may order:  |
|------|--|--|--|
| 2    | a document, statement or notice lodged under subsection 1200G(9)   | the change results in there being a misleading or deceptive statement in, or a material omission from, the document, statement or notice | (a) that no offers, issues, sales or transfers of the securities to which the document, statement or notice relates be made while the order is in force;<br>(b) that specified conduct in respect of those securities, or in respect of the document, statement or notice, must not be engaged in while the order is in force. |
| 3    | (a) an advertisement of securities the subject of a recognised offer; or<br>(b) a published statement that is reasonably likely to induce people to acquire securities the subject of a recognised offer | there is a misleading or deceptive statement in, or a material omission from, the advertisement or statement                             | (a) that no offers, issues, sales or transfers of the securities to which the advertisement or statement relates be made while the order is in force;<br>(b) that specified conduct in respect of those securities, or in respect of the advertisement or statement, must not be engaged in while the order is in force.       |

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**Chapter 8** Mutual recognition of securities offers**Part 8.2** Foreign offers that are recognised in this jurisdiction**Division 5** ASIC's powers in relation to recognised offers**Section 1200N****Stop orders**

| Item | If, in relation to:   | ASIC is satisfied that:  | ASIC may order:  |
|------|---|--|--|
| 4    | an offer document lodged under paragraph 1200D(1)(a)                                | a new circumstance has arisen since lodgment and that circumstance would have been required by the law of the recognised jurisdiction to be included in the offer document, if the circumstance had arisen before the document was lodged with the home regulator (as defined in subsection 1200G(13)) | (a) that no offers, issues, sales or transfers of the securities to which the document relates be made while the order is in force;<br><br>(b) that specified conduct in respect of those securities, or in respect of the document, must not be engaged in while the order is in force. |
| 5    | a notice of intention to make a recognised offer lodged under paragraph 1200C(5)(a) | one or more of the requirements in section 1200C is not met in relation to the proposed offer  | (a) that no offers, issues, sales or transfers of the securities that are proposed to be offered be made while the order is in force;<br><br>(b) that specified conduct in respect of those securities must not be engaged in while the order is in force.                               |

Section 1200N

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**Stop orders**

| Item | If, in relation to: | ASIC is satisfied that:  | ASIC may order:  |
|------|---------------------|--|--|
| 6    | a recognised offer  | an offering condition in section 1200G, the address for service condition in section 1200H or the dispute resolution condition in section 1200J is not being met | (a) that no offers, issues, sales or transfers of the securities be made while the order is in force;<br>(b) that specified conduct in respect of those securities must not be engaged in while the order is in force. |

- (2) The order may include a statement that specified conduct engaged in contrary to the order will be regarded as not meeting a specified ongoing condition in Division 3.
- (3) Before making an order under subsection (1), ASIC must:
- hold a hearing; and
  - give a reasonable opportunity to any interested people to make oral or written submissions to ASIC on whether an order should be made.
- (4) If ASIC considers that any delay in making an order under subsection (1) pending the holding of a hearing would be prejudicial to the public interest, ASIC may make an interim order. The interim order may be made without holding a hearing and lasts for 21 days after the day on which it is made unless revoked before then.
- (5) At any time during the hearing, ASIC may make an interim order. The interim order lasts until:
- ASIC makes an order under subsection (1) after the conclusion of the hearing; or
  - the interim order is revoked;
-

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whichever happens first.

- (6) An order under subsection (1), (4) or (5) must be in writing and must be served on the person who is ordered not to offer, issue, sell or transfer securities or not to engage in specified conduct.

- (7) The person on whom the order is served must take reasonable steps to ensure that other people who engage in conduct to which the order applies are aware of the order.

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

- (8) The person on whom the order is served, or a person who is aware of the order, must not engage in conduct contrary to the order.

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

- (9) A statement under subsection (2) has effect accordingly in relation to a person on whom the order is served, or who is aware of it, who engages in conduct contrary to the order. This applies in addition to any other consequence that is provided for in this Act.

**1200P Ban on making subsequent recognised offers**

- (1) ASIC may declare in writing that a person is, for the time specified in the declaration (which must be no longer than 5 years from the day the declaration takes effect), banned from making a recognised offer if:

- (a) the person, or an associate of the person, has been convicted (whether or not in this jurisdiction) of an offence constituted by conduct engaged in in relation to a recognised offer; or
- (b) a court in this jurisdiction has made a civil penalty order against the person, or an associate of the person, for a contravention in relation to a recognised offer; or
- (c) a court in a recognised jurisdiction has made an order against the person, or an associate of the person, for a contravention of the law of the recognised jurisdiction (other than an offence) in relation to an offer that is a recognised offer in this jurisdiction.

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- (2) Before making the declaration, ASIC must give the person an opportunity:
- to appear, or be represented, at a hearing before ASIC that takes place in private; or
  - to make submissions to ASIC on the matter.
- This subsection does not apply if the person does not have an address for service in this jurisdiction.
- (3) ASIC may, in writing, vary or cancel the declaration, on ASIC's own initiative or on application lodged by the person in the prescribed form (if any) together with any prescribed documents, if ASIC is satisfied that a circumstance on which ASIC based the declaration has changed.
- (4) If ASIC proposes to reject an application by the person to vary or cancel the declaration, ASIC must give the person an opportunity:
- to appear, or be represented, at a hearing before ASIC that takes place in private; or
  - to make submissions to ASIC on the matter.
- (5) The declaration, and any variation or cancellation of the declaration, takes effect:
- if the person to whom the declaration applies has an address for service in this jurisdiction—when it is served on the person at that address; or
  - if the person to whom the declaration applies does not have an address for service in this jurisdiction—when it is published in the *Gazette* under subsection (7).
- (6) A declaration that is served on a person under paragraph (5)(a) must be accompanied by a statement of ASIC's reasons for the declaration.
- (7) ASIC must publish a notice in the *Gazette* as soon as practicable after making, varying or cancelling the declaration. The notice:
- must state when the action takes or took effect; and
  - in the case of the making of a declaration—set out a copy of the declaration; and

## Section 1200Q

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- (c) in the case of the varying of a declaration—set out a copy of the declaration as varied.
- (8) A declaration under this section is not a legislative instrument.

### **1200Q Offence of breaching an ongoing condition**

- (1) A person commits an offence if, at any particular time:
  - (a) the person is the offeror of a recognised offer; and
  - (b) an offering condition in section 1200G applies in relation to the offer; and
  - (c) the condition is not met in relation to the offer.
- (2) A person commits an offence if:
  - (a) the person is or has been the offeror of a recognised offer; and
  - (b) at any particular time:
    - (i) the address for service condition in section 1200H; or
    - (ii) the dispute resolution condition in section 1200J;applies in relation to the offer; and
  - (c) the condition is not met in relation to the offer.

Section 1200R

## **Division 6—Miscellaneous**

### **1200R Service of documents**

- (1) For the purposes of any law, a document may be served on a person who is, or who has been, the offeror of a recognised offer by leaving it at, or posting it to, the person's address for service in this jurisdiction.
- (2) The person's address for service in this jurisdiction is:
  - (a) the address lodged under paragraph 1200D(1)(g); or
  - (b) if a change to that address has been lodged with ASIC under section 1200H—the changed address, on and from the later of:
    - (i) the day that is 7 days after the day on which the change (or, if more than one change has been lodged, the latest change) was lodged; or
    - (ii) the day specified in the notice of change as the day from which the change is to take effect.
- (3) This section does not affect:
  - (a) any other provision of this Act, or any provision of another law, that permits a document to be served in a different way; or
  - (b) the power of a court to authorise a document to be served in a different way.
- (4) This section does not apply in relation to a person who is, or who has been, the offeror of a recognised offer if the address for service condition in section 1200H does not apply to the person.

Section 1200S

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## **Part 8.3—Offers made under foreign recognition schemes**

### **1200S Notice to ASIC**

If:

- (a) a body proposes to make an offer of securities in a recognised jurisdiction under a foreign recognition scheme; and
- (b) under the foreign recognition scheme, the offer is to be regulated by the law of this jurisdiction;

the body must lodge with ASIC written notice, in the prescribed form (if any), of its intention to make the offer under the foreign recognition scheme, no later than the time it notifies the recognised jurisdiction of that intention.

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

### **1200T Extension of this Act to recognised jurisdictions**

(1) If:

- (a) a body proposes to make, or is making, an offer of securities in a recognised jurisdiction under a foreign recognition scheme; and
- (b) under the foreign recognition scheme, the offer is to be regulated by the law of this jurisdiction;

this Act applies in the recognised jurisdiction in relation to the offer as if it were an offer being made in this jurisdiction.

(2) Despite subsection (1), the regulations may:

- (a) exempt a person or class of persons from all or specified provisions of this Act as it applies by force of subsection (1); or

Section 1200U

- (b) exempt a security or a class of securities from all or specified provisions of this Act as it applies by force of subsection (1); or
- (c) provide that a provision of this Act as it applies by force of subsection (1) applies with the modifications specified in the regulations.

**1200U ASIC stop order for advertising in a recognised jurisdiction**

- (1) If ASIC is satisfied that:
  - (a) an offer of securities is being made or has been made in a recognised jurisdiction under a foreign recognition scheme; and
  - (b) there is a contravention of section 734 or 1018A (as they apply by force of section 1200T) constituted by conduct in the recognised jurisdiction in relation to the offer;ASIC may order that no offers, issues, sales or transfers of the securities the subject of the offer be made in the recognised jurisdiction while the order is in force.
- (2) Before making an order under subsection (1), ASIC must:
  - (a) hold a hearing; and
  - (b) give a reasonable opportunity to any interested people to make oral or written submissions to ASIC on whether an order should be made.
- (3) If ASIC considers that any delay in making an order under subsection (1) pending the holding of a hearing would be prejudicial to the public interest, ASIC may make an interim order that no offers, issues, sales or transfers of the securities be made while the interim order is in force. The interim order may be made without holding a hearing and lasts for 21 days after the day on which it is made unless revoked before then.
- (4) At any time during the hearing, ASIC may make an interim order that no offers, issues, sales or transfers of the securities be made while the interim order is in force. The interim order lasts until:

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- (a) ASIC makes an order under subsection (1) after the conclusion of the hearing; or
  - (b) the interim order is revoked;  
whichever happens first.
- (5) An order under subsection (1), (3) or (4) must be in writing and must be served on the person who is ordered not to offer, issue, sell or transfer securities.
- (6) The person on whom the order is served must take reasonable steps to ensure that other people who engage in conduct to which the order applies are aware of the order.
- Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (7) The person on whom the order is served, or a person who is aware of the order, must not engage in conduct contrary to the order.
- Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

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Section 1210

## Chapter 8A—Asia Region Funds Passport

### Part 8A.1—Preliminary

#### 1210 Meaning of *participating economy*

A Participant, within the meaning of the Memorandum of Cooperation, is a *participating economy* at a particular time if:

- (a) the Asia Region Funds Passport Joint Committee established under the Memorandum of Cooperation has published notification on the Passport website under subparagraph 5.6 of the Memorandum, at or before that time, that the Participant has effected implementation; and
- (b) at that time:
  - (i) the Memorandum of Cooperation has not been terminated; and
  - (ii) the Participant has not withdrawn from the Memorandum of Cooperation.

#### 1210A List of participating economies

- (1) The Minister must, by notifiable instrument, publish a list of participating economies.
- (2) The Minister must:
  - (a) include in the instrument the date on which each Participant, within the meaning of the Memorandum of Cooperation, became a participating economy; and
  - (b) if a Participant, within the meaning of the Memorandum of Cooperation, ceases to be a participating economy—include in the instrument the date on which that Participant ceases to be a participating economy; and
  - (c) ensure that the instrument is updated as soon as is reasonably practicable after a Participant, within the meaning of the Memorandum of Cooperation, becomes, or ceases to be, a participating economy.

**Section 1210B**

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**1210B Minister may determine that funds not to offer interests in this jurisdiction**

- (1) The Minister may, by legislative instrument, determine that the operators of passport funds, or a class of passport funds, the home economy for which is specified in the determination, must not offer interests in the funds in this jurisdiction.
- (2) The Minister may only make a determination under subsection (1), if:
  - (a) the Minister is satisfied that:
    - (i) under the Memorandum of Cooperation, there are grounds for requiring the operators of the funds to which the determination applies not to offer interests in the funds in this jurisdiction; and
    - (ii) the processes that, under the Memorandum of Cooperation, are to be followed before requiring the operators of the funds to which the determination applies not to offer interests in the funds in this jurisdiction, have been complied with; or
  - (b) the Memorandum of Cooperation has been terminated; or
  - (c) Australia or the home economy for the funds to which the determination applies withdraws from the Memorandum of Cooperation.
- (3) If the Minister makes a determination under this section, the regulations may deal with matters of a transitional nature relating to the movement of funds to which the determination applies from participation in this jurisdiction under this Chapter to participation in this jurisdiction under the other provisions of the Corporations legislation dealing with managed investment schemes.

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Section 1211

## Part 8A.2—Passport Rules

### 1211 Minister may make Passport Rules for this jurisdiction

- (1) The Minister may, by legislative instrument, make rules that provide for matters relating to passport funds, or entities connected with passport funds.
- (2) The rules made by the Minister under subsection (1) must be substantially the same as the Passport Rules set out in Annex 3 to the Memorandum of Cooperation.
- (3) If the rules made by the Minister under subsection (1) taken together with other provisions of the Corporations legislation have substantially the same effect as the Passport Rules set out in Annex 3 to the Memorandum of Cooperation, the rules made by the Minister under subsection (1) are taken to be substantially the same as the Passport Rules set out in Annex 3 to the Memorandum of Cooperation.

### 1211A Meaning of *Passport Rules*

*Passport Rules for this jurisdiction*

- (1) **Passport Rules** for this jurisdiction, means rules made by the Minister under section 1211 as in force from time to time.

*Passport Rules for a participating economy other than Australia*

- (2) **Passport Rules** for a participating economy other than Australia, means rules that are:
  - (a) substantially the same as the Passport Rules set out in Annex 3 to the Memorandum of Cooperation; and
  - (b) in force from time to time in that participating economy.

**Section 1211B**

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**1211B Compliance with the Passport Rules**

- (1) A person contravenes this subsection if:
  - (a) an obligation is imposed on the person in relation to an Australian passport fund under the Passport Rules for this jurisdiction; and
  - (b) the person does not comply with the obligation.
- (2) A person contravenes this subsection if:
  - (a) an obligation is imposed on the person in relation to a notified foreign passport fund under the Passport Rules for this jurisdiction; and
  - (b) the person does not comply with the obligation; and
  - (c) the failure to comply results, or is likely to result, in a person in this jurisdiction who holds an interest in the fund suffering financial or other disadvantage.
- (3) A person commits an offence if the person contravenes subsection (1) or (2).

Penalty:

  - (a) for an individual—5 years imprisonment, 2,000 penalty units, or both; and
  - (b) for a body corporate—20,000 penalty units.
- (4) A person commits an offence of strict liability if the person contravenes subsection (1) or (2).

Penalty: 60 penalty units.
- (5) Section 15.1 of the *Criminal Code* (extended geographical jurisdiction—category A) applies to an offence against subsection (3) or (4).

Section 1212

## Part 8A.3—Australian passport funds

### 1212 Application for registration

(1) A person may lodge an application with ASIC to have a scheme or sub-fund in an item in column 1 of the following table (a *collective investment fund*) registered as a passport fund if the person is the entity mentioned in the corresponding item in column 2 of the table (the *proposed operator* of the fund).

| Who may apply to be a passport fund |   |   |
|-------------------------------------|---|---|
| Item                                | Column 1<br><b>Collective investment fund</b>   | Column 2<br><b>Proposed operator</b>          |
| 1                                   | a managed investment scheme that is a registered scheme   | the responsible entity of the scheme          |
| 2                                   | a managed investment scheme in respect of which an application for registration under section 601EB has been made | the proposed responsible entity of the scheme |
| 3                                   | a sub-fund of a retail CCIV   | the corporate director of the CCIV            |

- (2) The application must:
- be in the prescribed form; and
  - include a copy of the Product Disclosure Statement that the proposed operator of the collective investment fund would be required to prepare if:
    - the proposed operator were a regulated person required to give a Product Disclosure Statement to a retail client under subsection 1012B(3); and
    - the fund were registered as a passport fund.

## Section 1212A

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- (3) The applicant may withdraw the application by notice lodged in the prescribed form at any time before the fund is registered as a passport fund.
- (4) ASIC may, by legislative instrument, determine that information that is lodged with ASIC under this section will not be available for inspection or copying from ASIC if it is of a kind specified in the determination.

### **1212A Registration of Australian passport funds**

- (1) ASIC must register a collective investment fund that is a registered scheme or a sub-fund of a retail CCIV as a passport fund if ASIC is of the opinion that:
  - (a) the proposed operator of the fund is an eligible entity, within the meaning of section 3 of Annex 2 of the Memorandum of Cooperation; and
  - (b) each of the following is likely to be complied with in relation to the fund:
    - (i) this Act (including the Passport Rules for this jurisdiction);
    - (ii) the ASIC Act.
- (2) A collective investment fund is registered as a passport fund by ASIC:
  - (a) assigning a unique number to the passport fund (the **Australian Passport Fund Registration Number** or **APFRN** for the passport fund); and
  - (b) ensuring that details of the fund are entered on the Register of Passport Funds.

### **1212B All documents etc. lodged with ASIC to bear APFRN**

After a collective investment fund is registered as a passport fund, all documents relating to the fund that are lodged with ASIC must set out the fund's APFRN.

Section 1212C

**1212C Notifying ASIC if offering interests in another participating economy in another name**

- (1) The operator of an Australian passport fund must notify ASIC in accordance with this section if:
  - (a) the operator of the fund offers interests in the fund in a participating economy other than Australia; and
  - (b) the name of the fund in the other participating economy is not the same as the name of the Australian passport fund.
- Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (2) The notice must be given:
  - (a) in the prescribed form; and
  - (b) within 7 days after interests in the fund begin to be offered under that name.

Section 1213

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## **Part 8A.4—Notified foreign passport funds**

### **Division 1—Becoming a notified foreign passport fund**

#### **1213 Notice of intention to offer interests in a foreign passport fund**

- (1) The operator of a foreign passport fund may lodge with ASIC a notice of intention to offer interests in the fund to persons in this jurisdiction, provided the operator is a registered foreign company.
- (2) The notice must:
  - (a) be in the prescribed form; and
  - (b) include a copy of the Product Disclosure Statement that the operator of the foreign passport fund would be required to prepare if:
    - (i) the operator were a regulated person required to give a Product Disclosure Statement to a retail client under subsection 1012B(3); and
    - (ii) the fund were a notified foreign passport fund.
- (3) The operator of the foreign passport fund may withdraw the notice of intention by notice lodged in the prescribed form at any time during the consideration period for the notice.
- (4) ASIC may, by legislative instrument, determine that information that is lodged with ASIC under this section will not be available for inspection or copying from ASIC if it is of a kind specified in the determination.

#### **1213A ASIC may notify operator that notice of intention lacks information required**

- (1) ASIC may, within the consideration period for the notice of intention, notify the operator of the foreign passport fund that ASIC is of the opinion that information required under the prescribed form has not been provided.

**Section 1213B**

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- (2) ASIC's notification must be given in writing.

**1213B Rejecting a notice of intention**

*Circumstances in which ASIC may reject a notice of intention*

- (1) ASIC may, within the consideration period for the notice of intention, reject the notice if:
  - (a) ASIC is of the opinion that one or more of the following has not been, is not being or is not likely to be complied with in relation to the fund:
    - (i) this Act (other than the Passport Rules for this jurisdiction);
    - (ii) the ASIC Act;
    - (iii) the law of the home economy for the fund, to the extent that the law is administered by the home regulator for the fund (including the Passport Rules for the home economy for the fund); or
  - (b) ASIC is of the opinion that it is not in the public interest in this jurisdiction for the operator to offer interests in the passport fund in this jurisdiction; or
  - (c) both of the following are satisfied:
    - (i) an exemption has been given, or a modification made, to the Passport Rules for the home economy for the passport fund that affects the fund or entities connected with the fund;
    - (ii) ASIC does not consent to the exemption or modification; or
  - (d) the name of the passport fund in relation to which the operator has given notice is not available in this jurisdiction.
- (2) In determining its opinion in relation to a matter mentioned in subparagraph (1)(a)(iii), ASIC must:
  - (a) make a request, in writing, to the home regulator for the fund for the opinion of the home regulator on the matter; and
  - (b) specify in the request the basis for ASIC's concerns about compliance with the law of the home economy; and

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- (c) state a reasonable period during which ASIC will wait for a reply before acting; and
  - (d) if the home regulator replies to the request within that period—give effect to the opinion of the home regulator on the matter.
- (3) In paragraph (1)(b), ***public interest*** does not include any benefit in this jurisdiction that may arise from limiting competition for managed investment schemes, or CCIVs, operating principally in this jurisdiction.
- (4) Nothing in this section requires ASIC to conduct an assessment of the public interest in this jurisdiction in each case.
- (5) A name is not available to a foreign passport fund in this jurisdiction for the purposes of paragraph (1)(d) if:
- (a) the name is:
    - (i) identical (under rules set out in the regulations) to a name that is reserved or registered under this Act for another body; or
    - (ii) identical (under rules set out in the regulations) to a name of a managed investment scheme that is the subject of an application for registration that has been lodged under section 601EA but not yet determined; or
    - (iii) identical (under rules set out in the regulations) to a name of a foreign passport fund in relation to which a notice of intention under section 1213 has already been lodged; or
    - (iv) identical (under rules set out in the regulations) to a name that is held or registered on the Business Names Register in respect of another individual or body who is not the operator; or
    - (v) unacceptable for registration under the regulations; and
  - (b) the operator of the fund has not notified ASIC and the home regulator for the fund in writing that it will adopt an available alternative name for the fund in this jurisdiction.

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- (6) The Minister may consent in writing to a name being available to a foreign passport fund in this jurisdiction even if the name would not otherwise be available because of paragraph (5)(a).
- (7) The Minister's consent may be given subject to conditions.

*Circumstances in which ASIC must reject a notice of intention*

- (8) ASIC must, within the consideration period for the notice of intention, reject the notice if:
  - (a) the Minister has made a determination under subsection 1210B(1) that the operators of passport funds, or a class of passport funds, the home economy for which is specified in the determination, must not offer interests in the fund in this jurisdiction; and
  - (b) the determination applies to the passport fund.

*ASIC must notify operator of decision to reject*

- (9) The notice of intention is rejected by ASIC giving the operator of the foreign passport fund notification in writing of the rejection.

**1213C Notified foreign passport funds—authority to offer interests in this jurisdiction**

- (1) A foreign passport fund becomes a *notified foreign passport fund* if:
  - (a) the operator of the fund has lodged a notice of intention to offer interests in the fund to persons in this jurisdiction with ASIC under section 1213; and
  - (b) the operator of the fund has not withdrawn the notice of intention under subsection 1213(3); and
  - (c) within the consideration period for the notice of intention, ASIC has not given the operator:
    - (i) notification under section 1213A that ASIC is of the opinion that information required under the prescribed form has not been provided; or

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- (ii) notification under section 1213B that the notice of intention has been rejected.
- (2) The foreign passport fund becomes a ***notified foreign passport fund*** on the first day after the end of the consideration period for the notice of intention.
- (3) The foreign passport fund ceases to be a ***notified foreign passport fund*** if it is removed as a notified foreign passport fund under Division 2 of Part 8A.7.
- (4) A notified foreign passport fund may offer interests in the fund to persons in this jurisdiction.

**1213D Meaning of *consideration period***

- (1) The ***consideration period***, for a notice of intention to offer interests in a foreign passport fund in this jurisdiction, is:
  - (a) a period of 15 business days beginning on the day after the notice is lodged with ASIC; or
  - (b) if ASIC and the operator agree that the period is to be extended under subsection (2)—the extended period.
- (2) ASIC and the operator of the foreign passport fund may agree, in writing, to one or more extensions of the consideration period. However, each extension must be for no more than 5 business days.

## **Division 2—Treatment of notified foreign passport funds**

### **1213E Notified foreign passport funds to be treated as managed investment schemes**

- (1) A notified foreign passport fund is a managed investment scheme for the purposes of this Act, even if it would not otherwise be a managed investment scheme for the purposes of this Act because of the way in which that term is defined in section 9.

Note: This subsection does not affect the other legal characteristics of a notified foreign passport fund for the purposes of this Act. For example, if a notified foreign passport fund is a body corporate, it remains a body corporate for the purposes of this Act.

- (2) The constituent document (as defined in the Passport Rules for this jurisdiction) for the notified foreign passport fund is taken to be the constitution of the fund as a managed investment scheme.

### **1213F Operators and notified foreign passport funds not to be treated as companies etc.**

To avoid doubt:

- (a) neither the operator of a notified foreign passport fund nor the fund is to be treated as a company for the purposes of the corporations legislation, merely because the operator or the fund is registered as a foreign company under Division 2 of Part 5B.2; and
- (b) a reference in the corporations legislation to a share does not include an interest in a notified foreign passport fund unless the fund is also a company.

### **1213G Offences relating to the operation of notified foreign passport funds**

- (1) This section applies if:

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- (a) one of the following persons engages in conduct that constitutes an alleged offence against this Act or the ASIC Act:
    - (i) a notified foreign passport fund;
    - (ii) the operator of a notified foreign passport fund;
    - (iii) a person with responsibilities in relation to a notified foreign passport fund; and
  - (b) the conduct occurs in relation to the operation of the fund; and
  - (c) the conduct occurs wholly in a foreign country; and
  - (d) the person who engages in the conduct is not:
    - (i) an Australian citizen; or
    - (ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; and
  - (e) it is not otherwise a physical element of the offence that the conduct results, or is likely to result, in a person in this jurisdiction who has an interest in the fund suffering financial or other disadvantage.
- (2) It is a physical element of the offence that the conduct results, or is likely to result, in a person in this jurisdiction who has an interest in the fund suffering financial or other disadvantage.
- (3) In this section:

***person with responsibilities in relation to a notified foreign passport fund*** means a person (other than a regulator) who has functions or duties in relation to the fund under the Passport Rules for this jurisdiction.

Section 1213H

## **Division 3—Conduct of notified foreign passport funds in this jurisdiction**

### **1213H Notified foreign passport funds must not issue debentures in this jurisdiction**

The operator of a notified foreign passport fund commits an offence if the operator or the fund:

- (a) makes an offer of debentures in this jurisdiction that needs disclosure to investors under Chapter 6D, or does not need disclosure to investors under Chapter 6D because of subsection 708(14) (disclosure document exclusion for debenture roll overs) or section 708A (sale offers that do not need disclosure); or
- (b) makes an offer of debentures in this jurisdiction or elsewhere as consideration for the acquisition of securities under an off-market takeover bid.

Penalty: 60 penalty units.

Note: For rules about when an offer of debentures will need disclosure to investors under Chapter 6D, see sections 706, 707, 708, 708AA and 708A.

**Section 1213J**

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**Division 4—Providing key information in relation to notified foreign passport funds**

**Subdivision A—Obligations to provide information to members in this jurisdiction**

**1213J Constitution—right to obtain a copy**

*Right to a copy of the consolidated constitution*

- (1) The operator of a notified foreign passport fund commits an offence of strict liability if:
  - (a) a person makes an application to the operator in accordance with subsection (2) for a copy of the consolidated constitution of the fund; and
  - (b) the person is:
    - (i) an Australian member of the fund; or
    - (ii) a former member of the fund who acquired an interest in the fund in this jurisdiction, or is ordinarily resident in this jurisdiction; and
  - (c) the person pays the reasonable costs of the operator, up to a prescribed amount, in providing a copy of the consolidated constitution; and
  - (d) the operator fails, or refuses, to give the person a copy of the consolidated constitution in accordance with this section; and
  - (e) as a result, the person does not obtain a copy of the consolidated constitution of the fund in accordance with this section.

Penalty: 60 penalty units.

*Application for a copy of the consolidated constitution*

- (2) An application to the operator of a notified foreign passport fund is in accordance with this subsection if the application is in writing.

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Section 1213K

*Manner in which the consolidated constitution must be provided*

- (3) If, in the application, the applicant requests a paper copy of the consolidated constitution, the operator must post the applicant a copy of the consolidated constitution within 7 days after the application is made.
- (4) Otherwise, the operator must give the applicant a copy of the consolidated constitution electronically, within 7 days after the application is made.
- (5) ASIC may allow a longer period for the operator to give the applicant a copy of the consolidated constitution.

*Language in which consolidated constitution must be provided*

- (6) If, in the application, the applicant requests that the copy of the consolidated constitution be in an official language of the home economy of the fund (other than English), the copy of the consolidated constitution given to the applicant must be in that language.
- (7) Otherwise, the copy of the consolidated constitution given to the applicant must be in English.

*Geographical jurisdiction*

- (8) Section 15.1 of the *Criminal Code* (extended geographical jurisdiction—category A) applies to an offence against subsection (1).

## 1213K Register of members—right to obtain a copy

*Right to a copy of the register of members of a fund*

- (1) The operator of a notified foreign passport fund commits an offence of strict liability if:
  - (a) a person makes an application to the operator in accordance with subsection (2) for a copy of the register of members for the fund; and

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- (b) the person is:
  - (i) in this jurisdiction; or
  - (ii) an Australian member of the fund; or
  - (iii) a former member of the fund who acquired an interest in the fund in this jurisdiction, or is ordinarily resident in this jurisdiction; and
- (c) the person pays the reasonable costs of the operator, up to a prescribed amount, in providing a copy of the register; and
- (d) the operator fails, or refuses, to give the person a copy of the register in accordance with this section; and
- (e) as a result, the person does not obtain a copy of the register of the fund in accordance with this section.

Penalty: 60 penalty units.

*Application for a copy of the register*

- (2) An application to the operator of a notified foreign passport fund is in accordance with this subsection if:
  - (a) the application is in writing; and
  - (b) the application states each purpose for which the applicant wishes to obtain a copy of the register; and
  - (c) none of those purposes is a prescribed purpose.

*Manner in which register must be provided*

- (3) If, in the application, the applicant requests a paper copy of the register, the operator must post the applicant a copy of the register within 7 days after the application is made.
- (4) Otherwise, the operator must give the applicant a copy of the register electronically, within 7 days after the application is made.
- (5) ASIC may allow a longer period for the operator to give the applicant a copy of the register.

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Section 1213L

*Language in which register must be provided*

- (6) If, in the application, the applicant requests that the copy of the register be in an official language of the home economy of the fund (other than English), the copy of the register given to the applicant must be in that language.
- (7) Otherwise, the copy of the register given to the applicant must be in English.

*Geographical jurisdiction*

- (8) Section 15.1 of the *Criminal Code* (extended geographical jurisdiction—category A) applies to an offence against subsection (1).

## **1213L Use of information on register of members**

*Offence—using information obtained from the register to contact members*

- (1) A person who obtains a copy of a register of members of a notified foreign passport fund under section 1213K must not:
  - (a) use information about a person (the *other member*) obtained from the register to contact or send material to the person; or
  - (b) disclose information of that kind knowing that the information is likely to be used to contact or send material to the other member.

Penalty: 60 penalty units.

Note: An example of using information to send material to a person is putting a person's name and address on a mailing list for advertising material.

*Exception*

- (2) Subsection (1) does not apply if the use or disclosure of the information is:

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- (a) relevant to the holding of the interests recorded in the register or the exercise of the rights attaching to them; or
- (b) approved by the operator of the fund.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

*Offence—using information obtained from the register for a prescribed purpose*

- (3) A person who obtains a copy of a register of members of a notified foreign passport fund under section 1213K must not:
  - (a) use information obtained from the register for any purpose prescribed by regulations made for the purposes of paragraph 1213K(2)(c); or
  - (b) disclose information of that kind knowing that the information is likely to be used for any such purpose.

Penalty: 60 penalty units.

*Strict liability*

- (4) An offence based on subsection (1) or (3) is an offence of strict liability.

*Geographical jurisdiction*

- (5) Section 15.1 of the *Criminal Code* (extended geographical jurisdiction—category A) applies to an offence against subsection (1) or (3).

*Liability to pay compensation*

- (6) A person who contravenes subsection (1) or (3) is liable to compensate anyone else who suffers loss or damage because of the contravention.

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*Returning profits made by contravening subsection (1) or (3)*

- (7) A person who makes a profit by contravening subsection (1) or (3) owes a debt to the fund. The amount of the debt is the amount of the profit.
- (8) If a person owes a debt under subsection (7) to the fund:
  - (a) the debt may be recovered by the operator of the fund as a debt due to it; and
  - (b) any amount paid or recovered in respect of the debt forms part of the property of the fund.

**1213M Reports required under the law of the home economy**

*Right to a copy of reports*

- (1) The operator of a notified foreign passport fund commits an offence of strict liability if:
  - (a) the operator or the fund is required under the law of the home economy for the fund to prepare a report (however described) in relation to the fund; and
  - (b) the operator or the fund makes the report available to members of the fund in the home economy without charge; and
  - (c) the operator does not give Australian members of the fund, in accordance with this section:
    - (i) a copy of the report; and
    - (ii) if a summary in English of all or part of the report is required under subsection (5)—a summary in English of all or that part of the report.

Penalty: 60 penalty units.

*Manner in which report must be made available*

- (2) The report must be given to Australian members of the fund within 7 days after the first day on which the report is made available to a member of the fund in the home economy without charge.
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- (3) The report may be given to Australian members of the fund by:
  - (a) putting the report on the fund's website so that it is accessible to Australian members of the fund; and
  - (b) if members of the fund in the home economy are notified that the report is available on the fund's website, or notified how those members may access it—giving equivalent notice to Australian members of the fund.
- (4) The report must be given without charge.

### *English summary of the report*

- (5) If all or part of the report is not in English, the operator must also give an Australian member of the fund a summary of the report, or that part of the report, in English in the same manner as the operator gives the report under subsections (2), (3) and (4).

### *Exception*

- (6) Subsection (1) does not apply if the operator of the fund is required under another provision of this Act to lodge the report, or to give the report to Australian members of the fund.

### *Geographical jurisdiction*

- (7) Section 15.1 of the *Criminal Code* (extended geographical jurisdiction—category A) applies to an offence against subsection (1).

## **1213N Order for copies of books of a notified foreign passport fund**

- (1) A person may apply to the Court for an order under subsection (2) if the person is:
  - (a) an Australian member of the fund; or
  - (b) a former member of the fund who acquired an interest in the fund in this jurisdiction, or is ordinarily resident in this jurisdiction.

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- (2) On application by the member or former member, the Court may order the operator of the fund to give the member or former member an electronic copy of any or all of the following:
  - (a) all or a specified part of the books of the operator that relate to the fund;
  - (b) all or a specified part of the books of the fund;
  - (c) an English translation of all or a specified part of the books of the operator that relate to the fund;
  - (d) an English translation of all or a specified part of the books of the fund.
- (3) The Court may make the order only if it is satisfied that:
  - (a) the applicant is acting in good faith; and
  - (b) the books, or the specified part of the books, are to be obtained for a proper purpose.
- (4) The member or former member may make copies of the books, or the specified part of the books, unless the Court orders otherwise.

## **Subdivision B—Obligations to provide information to ASIC**

### **1213P Register of members—ASIC may require lodgment**

- (1) The operator of a notified foreign passport fund commits an offence of strict liability if:
  - (a) ASIC requires the operator of the fund to lodge a copy of the whole or a specified part of the register of members of the fund, in accordance with subsections (2) and (3); and
  - (b) the operator fails, or refuses, to lodge a copy of the register in accordance with this section.

Penalty: 60 penalty units.

#### *Notice requiring operator to lodge register of members*

- (2) ASIC may, by written notice given to the operator of a notified foreign passport fund, require the operator to lodge a copy of the whole or a specified part of the register of members of the fund.

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- (3) ASIC may, in the notice, require the copy of the whole or the specified part of the register to be lodged in English.

*Manner in which register must be lodged*

- (4) The operator must lodge a copy of the register with ASIC electronically, within 7 days after being given notice to do so in accordance with subsections (2) and (3).
- (5) ASIC may allow a longer period for the operator to lodge a copy of the register.

*Language in which register must be provided*

- (6) If, in the notice, ASIC requires a copy of the whole or a specified part of the register to be lodged in English, the operator must lodge the whole or that part of the register in English.

*Geographical jurisdiction*

- (7) Section 15.1 of the *Criminal Code* (extended geographical jurisdiction—category A) applies to an offence against subsection (1).

**1213Q Destruction of records by ASIC**

ASIC may destroy or otherwise dispose of any document that is lodged under, or for the purposes of, a provision of this Chapter or the Passport Rules for this jurisdiction if:

- (a) ASIC is of the opinion that it is no longer necessary or desirable to retain it; and
- (b) it has been in the possession of ASIC for such period as is specified in the regulations, either generally or in relation to a particular document or class of documents.

Section 1214

## Part 8A.5—Register of Passport Funds

### 1214 Register of Passport Funds

- (1) ASIC must either:
  - (a) establish and maintain a Register of Passport Funds; or
  - (b) ensure that a Register of Passport Funds is established and maintained.
- (2) If the Register of Passport Funds is established and maintained by ASIC, ASIC may do so in any form that ASIC considers appropriate.
- (3) The Register of Passport Funds:
  - (a) must include the prescribed details of Australian passport funds and notified foreign passport funds; and
  - (b) must include the prescribed details of funds that have been deregistered as Australian passport funds and funds that have been removed as notified foreign passport funds; and
  - (c) may include details of other passport funds.
- (4) For the purposes of the Corporations legislation, a reference to a register kept by ASIC under this Act is taken to include a Register of Passport Funds that ASIC ensures is established and maintained under paragraph (1)(b).

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## **Part 8A.6—Stop orders**

### **1215 Stop order—Australian passport funds**

*ASIC may make stop orders*

- (1) ASIC may, by written instrument, order the operator of an Australian passport fund to do one or more of the following:
  - (a) cease to offer, or not to begin offering, interests in the fund to persons in this jurisdiction either indefinitely or for a period specified in the order;
  - (b) cease to offer, or not to begin offering, interests in the fund to persons in another participating economy either indefinitely or for a period specified in the order;
  - (c) take other action specified in the order;
  - (d) cease to take other action specified in the order.

The order is a *stop order*.

- (2) A stop order may include a statement that specified conduct engaged in contrary to the order will be regarded as not complying with the requirements of a specified provision of this Act.

*Basis on which stop orders may be made*

- (3) However, ASIC may only make a stop order under this section if ASIC is of the opinion that:
  - (a) one or more of the following has not been, is not being or is not likely to be complied with in relation to the fund (whether in this jurisdiction or in any other place):
    - (i) this Act (including the Passport Rules for this jurisdiction);
    - (ii) the ASIC Act; or
  - (b) if the order is made under paragraph (1)(c)—taking the action specified in the order is reasonably necessary to ensure that

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- an order made under paragraph (1)(a) or (b) is complied with;  
or
- (c) if the order is made under paragraph (1)(d)—not taking the action specified in the order is reasonably necessary to ensure that an order made under paragraph (1)(a) or (b) is complied with.

*Hearing before stop order made*

- (4) Before making a stop order, ASIC must:
- hold a hearing; and
  - give a reasonable opportunity to any interested people to make oral or written submissions to ASIC on whether an order should be made.

*ASIC must give notice if stop order made*

- (5) If ASIC makes a stop order under this section, ASIC must give the operator of the fund a copy of the order as soon as reasonably practicable after it is made.

**1215A Stop order—notified foreign passport fund**

*ASIC may make stop orders*

- (1) ASIC may, by written instrument, order the operator of a notified foreign passport fund to do one or more of the following:
- cease to offer, or not to begin offering, interests in the fund to persons in this jurisdiction either indefinitely or for a period specified in the order;
  - take other action specified in the order;
  - cease to take other action specified in the order.
- The order is a *stop order*.
- (2) A stop order may include a statement that specified conduct engaged in contrary to the order will be regarded as not complying with the requirements of a specified provision of this Act.
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*Basis on which stop orders may be made*

- (3) However, ASIC may only make a stop order under this section if:
  - (a) subsections (4) and (7) are satisfied; or
  - (b) the operator of the fund has ceased to be a registered foreign company; or
  - (c) the operator of the fund has not had a local agent for more than 21 days; or
  - (d) both of the following are satisfied:
    - (i) the Minister has made a determination under subsection 1210B(1) that the operators of passport funds, or a class of passport funds, the home economy for which is specified in the determination, must not offer interests in the fund in this jurisdiction;
    - (ii) the determination applies to the passport fund;
  - (e) if the order is made under paragraph (1)(b)—taking the action specified in the order is reasonably necessary to ensure that an order made under paragraph (1)(a) is complied with; or
  - (f) if the order is made under paragraph (1)(c)—not taking the action specified in the order is reasonably necessary to ensure that an order made under paragraph (1)(a) is complied with.
- (4) For the purposes of paragraph (3)(a), this subsection is satisfied if ASIC is of the opinion that one or more of the following has not been, is not being or is not likely to be complied with in relation to the fund (whether in this jurisdiction or in any other place):
  - (a) this Act (including the Passport Rules for this jurisdiction);
  - (b) the ASIC Act;
  - (c) the law of the home economy for the fund, to the extent that the law is administered by the home regulator for the fund (including the Passport Rules for the home economy of the fund).
- (5) In determining its opinion in relation to compliance with the Passport Rules for this jurisdiction, as mentioned in paragraph (4)(a), ASIC must make a request, in writing, to the

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home regulator for the fund for the opinion of the home regulator on the interpretation of any provision of the Passport Rules for the home economy that is equivalent to a provision of the Passport Rules for this jurisdiction under consideration by ASIC.

- (6) In determining its opinion in relation to a matter mentioned in paragraph (4)(c), ASIC must:
  - (a) make a request, in writing, to the home regulator for the fund for the opinion of the home regulator on the matter; and
  - (b) specify in the request the basis for ASIC's concerns about compliance with the law of the home economy; and
  - (c) state a reasonable period during which ASIC will wait for a reply before acting; and
  - (d) if the home regulator replies to the request within that period—give effect to the opinion of the home regulator on the matter.
- (7) For the purposes of paragraph (3)(a), this subsection is satisfied if ASIC is of the opinion that the stop order is necessary, having regard to:
  - (a) the impact on the members and prospective members of the fund of the failure, or potential failure, to comply with a law mentioned in subsection (4); and
  - (b) any action taken, or that may be taken, by the home regulator for the fund.

*Hearings before certain stop orders made*

- (8) Before making a stop order on the basis of subsections (4) and (7), ASIC must:
  - (a) hold a hearing; and
  - (b) give a reasonable opportunity to any interested people to make oral or written submissions to ASIC on whether an order should be made.

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*ASIC must give notice if stop order made*

- (9) If ASIC makes a stop order under this section, ASIC must give the operator of the fund a copy of the order as soon as reasonably practicable after it is made.

**1215B Interim stop orders**

- (1) ASIC may make an interim stop order, if ASIC is of the opinion that:
- (a) any delay in making a stop order under section 1215 or 1215A would be prejudicial to the public interest; and
  - (b) either:
    - (i) in the case of an order that is to be made in relation to an Australian passport fund—one or more of the circumstances mentioned in subsection 1215(3) exists; or
    - (ii) in the case of an order that is to be made in relation to a notified foreign passport fund—one or more of the circumstances mentioned in subsection 1215A(3) exists.
- (2) An interim stop order under subsection (1):
- (a) may be made without holding a hearing, or during a hearing; and
  - (b) must be in writing; and
  - (c) lasts:
    - (i) if the stop order is made during a hearing—until ASIC makes a stop order after the conclusion of the hearing, or the interim stop order is revoked; and
    - (ii) otherwise—for 21 days after the day on which it is made, unless sooner revoked.
- (3) If ASIC makes an interim stop order, ASIC must give the operator of the fund a copy of the order as soon as reasonably practicable after it is made.

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**1215C Revocation of stop order made under section 1215 or 1215A**

- (1) The operator of an Australian passport fund may make an application to ASIC, in accordance with this section, to have a stop order that is in force in relation to the fund revoked on the basis that there are no longer grounds for the order under subsection 1215(3).
- (2) The operator of a notified foreign passport fund may make an application to ASIC, in accordance with this section, to have a stop order that is in force in relation to the fund revoked on the basis that there are no longer grounds for the order under subsection 1215A(3).
- (3) An application under subsection (1) or (2) must:
  - (a) be in the prescribed form; and
  - (b) without limiting paragraph (a), set out the basis on which the operator of the fund believes that there are no longer grounds for the stop order.
- (4) ASIC must:
  - (a) revoke a stop order made under section 1215 in relation to an Australian passport fund if:
    - (i) an application is made under subsection (1) of this section; and
    - (ii) ASIC is of the opinion that there are no longer grounds for the stop order; and
  - (b) revoke a stop order made under section 1215A in relation to a notified foreign passport fund if:
    - (i) an application is made under subsection (2) of this section; and
    - (ii) ASIC is of the opinion that there are no longer grounds for the stop order.
- (5) Nothing in this section limits the circumstances in which ASIC may revoke or vary a stop order made under section 1215 or 1215A.

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**1215D Compliance with stop orders**

(1) This section applies if:

- (a) ASIC gives the operator of an Australian passport fund a copy of a stop order under subsection 1215(5) or an interim stop order under subsection 1215B(3); or
- (b) ASIC gives the operator of a notified foreign passport fund a stop order under subsection 1215A(9) or an interim stop order under subsection 1215B(3).

(2) The operator must not contravene the order.

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

(3) The operator must take reasonable steps to ensure that any other person who might engage in conduct that is contrary to the order, is aware of the order.

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

(4) A person who is aware of the order must not engage in conduct that is contrary to the order.

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

## **Part 8A.7—Deregistration and denotification**

### **Division 1—Deregistration of Australian passport funds**

#### **Subdivision A—Voluntary deregistration**

##### **1216 Application to deregister**

- (1) The operator of an Australian passport fund may lodge an application for deregistration of the fund as an Australian passport fund.
- (2) The application must be in the prescribed form.

##### **1216A ASIC to deregister**

- (1) On an application under section 1216, ASIC must deregister a fund as an Australian passport fund if ASIC is satisfied that:
  - (a) there are no members of the fund who became members (whether in this jurisdiction or any host economy for the fund) after the fund became an Australian passport fund; and
  - (b) there are no members of the fund who became members (whether in this jurisdiction or any host economy for the fund) on the expectation that the fund would become an Australian passport fund.
- (2) For the purposes of subsection (1), ignore any member of the fund that:
  - (a) is, or has at any time been, the operator of the fund; or
  - (b) is a related party of an entity that is, or has at any time been, the operator of the fund.

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**1216B When is there an expectation that a fund would become an Australian passport fund?**

For the purposes of this Act (including the Passport Rules for this jurisdiction), a person becomes a member of a fund on the **expectation** that it would become an Australian passport fund if:

- (a) a representation has been made by the fund or the operator of the fund in any document, or other means of communication, that might reasonably be expected to be available to persons considering acquiring an interest in the fund that the fund will become, or that it is intended or expected that the fund will become, an Australian passport fund; and
- (b) the person acquires an interest in the fund after that representation was made.

**Subdivision B—Deregistration initiated by ASIC**

**1216C Deregistration—initiated by ASIC**

- (1) ASIC may decide to deregister an Australian passport fund if ASIC is of the opinion that one or more of the following has not been, is not being or is not likely to be complied with in relation to an Australian passport fund (whether in this jurisdiction or in any other place):
  - (a) this Act (including the Passport Rules for this jurisdiction);
  - (b) the ASIC Act.
- (2) However, ASIC must not decide to deregister an Australian passport fund if ASIC is of the opinion that to do so would not be in the interests of:
  - (a) members of the fund who became members (whether in this jurisdiction or any host economy for the fund) after the fund became an Australian passport fund; and
  - (b) members of the fund who became members (whether in this jurisdiction or any host economy for the fund) on the expectation that the fund would become an Australian passport fund.

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(3) For the purposes of subsection (2), ignore any member of the fund that:

- (a) is, or has at any time been, the operator of the fund; or
- (b) is a related party of an entity that is, or has at any time been, the operator of the fund.

Note: See section 1216B for the circumstances in which a person becomes a member of a fund on the expectation that it would become an Australian passport fund.

(4) Before deciding to deregister the fund as an Australian passport fund, ASIC must give the operator of the fund a written notice that requires the operator to show cause, at a hearing before a specified person, why the fund should not be deregistered as an Australian passport fund.

(5) The notice must specify:

- (a) the grounds on which it is proposed to deregister the fund as an Australian passport fund; and
- (b) a reasonable time and place at which the hearing is to be held.

However, if the operator consents, the person conducting the hearing may fix a different time or place.

(6) The person conducting the hearing must:

- (a) give the operator an opportunity to be heard at the hearing; and
- (b) give ASIC:
  - (i) a report about the hearing; and
  - (ii) a recommendation about the grounds in the notice on which it is proposed to deregister the fund.

(7) After considering the report and recommendation, ASIC may decide to:

- (a) take no further action in relation to the matter and give written advice of that decision to the operator; or
- (b) deregister the fund as an Australian passport fund.

(8) Neither of the following is a legislative instrument:

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- (a) a notice under subsection (4);
- (b) a report under subsection (6) (if it is in writing).

**Subdivision C—Process for deregistration**

**1216D Process for deregistration**

*Notice before deregistration*

- (1) If ASIC proposes to deregister a fund as an Australian passport fund under subsection 1216A(1) or paragraph 1216C(7)(b), ASIC must give written notice setting out the date on which ASIC proposes to deregister the fund as an Australian passport fund to:
  - (a) the operator of the fund; and
  - (b) each host regulator for the fund.
- (2) The notice must be given at least 5 business days before the fund is deregistered.

*Deregistration*

- (3) The fund is deregistered as an Australian passport fund by including an annotation on the Register of Passport Funds that the fund has been deregistered. The fund ceases to be an Australian passport fund on the day on which the annotation is made.

*Notice of deregistration*

- (4) If ASIC deregisters a fund as an Australian passport fund under subsection 1216A(1) or paragraph 1216C(7)(b), ASIC must give written notice that the fund has been deregistered and of the date of deregistration to:
  - (a) the operator of the fund; and
  - (b) each host regulator for the fund.
- (5) The notice must be given within 5 business days after the fund is deregistered.

## **Division 2—Denotification of notified foreign passport funds**

### **Subdivision A—Voluntary denotification**

#### **1216E Application to be removed as a notified foreign passport fund**

- (1) The operator of a notified foreign passport fund may lodge an application for the fund to be removed as a notified foreign passport fund.
- (2) The application must be in the prescribed form.

#### **1216F ASIC to remove fund as a notified foreign passport fund**

- (1) On an application under section 1216E, ASIC must remove a fund as a notified foreign passport fund if ASIC is satisfied that:
  - (a) there are no members of the fund who became members in this jurisdiction after the fund became a notified foreign passport fund; and
  - (b) there are no members of the fund who became members in this jurisdiction on the expectation that the fund would become a notified foreign passport fund.
- (2) For the purposes of subsection (1), ignore any member of the fund that:
  - (a) is, or has at any time been, the operator of the fund; or
  - (b) is a related party of an entity that is, or has at any time been, the operator of the fund.

#### **1216G When is there an expectation that a fund would become a notified foreign passport fund?**

For the purposes of this Act (including the Passport Rules for this jurisdiction), a person becomes a member of a fund on the ***expectation*** that it would become a notified foreign passport fund if:

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- (a) a representation has been made by the fund or the operator of the fund in any document, or other means of communication, that might reasonably be expected to be available to persons considering acquiring an interest in the fund that the fund will become, or that it is intended or expected that the fund will become, a notified foreign passport fund; and
- (b) the person acquires an interest in the fund after that representation was made.

**Subdivision B—Notified foreign passport fund deregistered in the fund’s home economy**

**1216H ASIC to remove a fund as a notified foreign passport fund**

ASIC must remove a fund as a notified foreign passport fund if the home regulator for the fund notifies ASIC that the fund has been deregistered as a passport fund in the home economy for the fund.

**Subdivision C—Process for removal as a notified foreign passport fund**

**1216J Process for removal as a notified foreign passport fund**

*Notice before removal*

- (1) If ASIC proposes to remove a fund as a notified foreign passport fund under section 1216F or 1216H, ASIC must give written notice setting out the date on which ASIC proposes to remove the fund as a notified foreign passport fund to:
  - (a) the operator of the fund; and
  - (b) the home regulator for the fund and each other host regulator for the fund.
- (2) The notice must be given at least 5 business days before the fund is removed.

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*Removing the fund as a notified foreign passport fund*

- (3) The fund is removed as a notified foreign passport fund by including an annotation on the Register of Passport Funds to that effect. The fund ceases to be a notified foreign passport fund on the day on which the annotation is made.

*Notice of removal*

- (4) If ASIC removes a fund as a notified foreign passport fund under section 1216F or 1216H, ASIC must give written notice that the fund has been removed and of the date of removal to:
- (a) the operator of the fund; and
  - (b) the home regulator for the fund and each other host regulator for the fund.
- (5) The notice must be given within 5 business days after the fund is removed.

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**Division 3—Continued application of the Corporations legislation**

**1216K ASIC's power to continue the application of the Corporations legislation**

*Declarations on continued application of the Corporations legislation*

- (1) ASIC may:
  - (a) declare that the Corporations legislation continues to apply:
    - (i) in relation to a fund that has been deregistered as an Australian passport fund or removed as a notified foreign passport fund; and
    - (ii) to an entity in relation to a fund that has been deregistered as an Australian passport fund or removed as a notified foreign passport fund; and
  - (b) declare that the Corporations legislation continues to apply:
    - (i) in relation to a fund that has been deregistered as an Australian passport fund or removed as a notified foreign passport fund; and
    - (ii) to an entity in relation to a fund that has been deregistered as an Australian passport fund or removed as a notified foreign passport fund;  
as if specified provisions were omitted, modified or varied as specified in the declaration.
- (2) The continued application of the Corporations legislation may:
  - (a) apply to all or specified provisions of the Corporations legislation; and
  - (b) apply to all entities, a specified class of entities or a specified entity; and
  - (c) apply to all former passport funds, a specified class of former passport funds or a specified former passport fund; and
  - (d) relate to any other matter generally or as specified.

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*Declarations relating to all or a class of entities or passport funds*

- (3) A declaration that relates to all entities, a specified class of entities, all former passport funds or a specified class of former passport funds, must be made by legislative instrument.

*Declarations relating to specified entities or passport funds*

- (4) A declaration that relates to a specified entity or a specified former passport fund must be made by notifiable instrument.
- (5) ASIC must also:
- (a) give a copy of a declaration that relates to a specified entity to the entity; and
  - (b) give a copy of a declaration that relates to a specified former passport fund to the most recent operator of the fund.

ASIC must do so as soon as is reasonably practicable after the declaration is made.

## **1216L Regulations may continue the application of the Corporations legislation**

The regulations may:

- (a) provide that the Corporations legislation continues to apply:
  - (i) in relation to a fund, all funds of a specified class or all funds that have been deregistered as Australian passport funds or removed as notified foreign passport funds; and
  - (ii) to an entity, all entities of a specified class or all entities in relation to a fund, all funds of a specified class or all funds that have been deregistered as Australian passport funds or removed as notified foreign passport funds; and
- (b) provide that the Corporations legislation continues to apply:
  - (i) in relation to a fund, all funds of a specified class or all funds that have been deregistered as Australian passport funds or removed as notified foreign passport funds; and
  - (ii) to an entity, all entities of a specified class or all entities in relation to a fund, all funds of a specified class or all

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funds that have been deregistered as Australian passport funds or removed as notified foreign passport funds; and as if specified provisions were omitted, modified or varied as specified in the regulations.

## Part 8A.8—Exemptions and modifications

### 1217 ASIC's power to make exemptions and declare modifications etc. in relation to this Chapter

*Exemptions and declarations on application of this Chapter*

- (1) ASIC may:
  - (a) exempt an entity from a provision of this Chapter; or
  - (b) declare that this Chapter applies to an entity as if specified provisions were omitted, modified or varied as specified in the declaration.
- (2) The exemption or declaration may:
  - (a) apply to all or specified provisions of this Chapter; and
  - (b) apply to all entities, a specified class of entities or a specified entity; and
  - (c) apply to all passport funds, a specified class of passport funds or a specified passport fund; and
  - (d) relate to any other matter generally or as specified.

*Imposition of conditions on exemption*

- (3) An exemption may apply unconditionally or subject to specified conditions.
- (4) An entity to whom a condition specified in an exemption applies must comply with the condition.
- (5) The Court may order the entity to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.

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*Exemptions and declarations relating to all or a class of entities or passport funds*

- (6) An exemption or declaration that relates to all entities, a specified class of entities, all passport funds or a specified class of passport funds, must be made by legislative instrument.

*Exemptions and declarations relating to specified entities or passport funds*

- (7) An exemption or declaration that relates to a specified entity or a specified passport fund must be made by notifiable instrument.

- (8) ASIC must also:

- (a) give a copy of an exemption or declaration that relates to a specified entity to the entity; and
- (b) give a copy of an exemption or declaration that relates to a specified passport fund to the operator of the fund.

ASIC must do so as soon as is reasonably practicable after the exemption or declaration is made.

*Definitions*

- (9) In this section:

*provisions of this Chapter* include:

- (a) regulations made for the purposes of this Chapter; and
- (b) definitions in this Act or the regulations as they apply to references in:
  - (i) this Chapter; or
  - (ii) regulations made for the purposes of this Chapter.

**1217A ASIC's power to make exemptions and declare modifications etc. in relation to the Passport Rules**

*Exemptions and declaration on Passport Rules*

- (1) ASIC may:
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- (a) exempt an entity from a provision of the Passport Rules for this jurisdiction; or
  - (b) declare that the Passport Rules for this jurisdiction apply to an entity as if specified provisions were omitted, modified or varied as specified in the declaration.
- (2) The exemption or declaration may:
- (a) apply to all or specified provisions of the Passport Rules for this jurisdiction; and
  - (b) apply to all entities, a specified class of entities or a specified entity; and
  - (c) apply to all passport funds, a specified class of passport funds or a specified passport fund; and
  - (d) relate to any other matter generally or as specified.
- (3) However:
- (a) ASIC may only give an exemption or make a declaration under subsection (1) in relation to an Australian passport fund if each host regulator for the fund has agreed to the exemption being given or the declaration being made; and
  - (b) ASIC may only give an exemption or make a declaration under subsection (1) in relation to a foreign passport fund if the home regulator for the fund has granted an equivalent exemption or made a similar omission, modification or variation of the Passport Rules for the home economy for the fund.

*Imposition of conditions on exemption*

- (4) An exemption may apply unconditionally or subject to specified conditions.
- (5) An entity to whom a condition specified in an exemption applies must comply with the condition.
- (6) The Court may order the entity to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.

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*Exemptions and declarations relating to all or a class of entities or passport funds*

- (7) An exemption or declaration that relates to all entities, a specified class of entities, all passport funds or a specified class of passport funds, must be made by legislative instrument.

*Exemptions and declarations relating to specified entities or passport funds*

- (8) An exemption or declaration that relates to a specified entity or a specified passport fund must be made by notifiable instrument.
- (9) ASIC must also:
- (a) give a copy of an exemption or declaration that relates to a specified entity to the entity; and
  - (b) give a copy of an exemption or declaration that relates to a specified passport fund to the operator of the fund.
- ASIC must do so as soon as is reasonably practicable after the exemption or declaration is made.

**1217B Exemptions and modification by regulations**

The regulations may:

- (a) exempt from all or specified provisions of the Corporations legislation (which includes this Chapter and the Passport Rules for this jurisdiction):
  - (i) a passport fund, all passport funds of a specified class or all passport funds; or
  - (ii) an entity, all entities of a specified class or all entities, in relation to a passport fund, all passport funds of a specified class or all passport funds;
- (b) provide that the Corporations legislation (which includes this Chapter and the Passport Rules for this jurisdiction) applies in relation to:
  - (i) a passport fund, all passport funds of a specified class or all passport funds; or

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- (ii) an entity, all entities of a specified class or all entities, in relation to a passport fund, all passport funds of a specified class or all passport funds; as if specified provisions of the Corporations legislation were omitted, modified or varied as specified in the regulations.

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## **Chapter 8B—Corporate collective investment vehicles**

### **Part 8B.1—Preliminary**

#### **1221 Objects of this Chapter**

The objects of this Chapter are:

- (a) to provide a regulatory framework for corporate collective investment vehicles that is fair, efficient and competitive; and
- (b) together with Chapter 7, to promote confident and informed decision making by consumers of financial products and services related to shares in corporate collective investment vehicles.

## **Part 8B.2—Registration of CCIVs**

### **Division 1—Registering a CCIV**

#### **Subdivision A—Requirements for registration as a CCIV**

##### **1222 Requirements for registration as a CCIV**

The requirements for registration of a company as a CCIV are as follows:

- (a) the company is a company limited by shares;
- (b) the company has a constitution;
- (c) the sole proposed director of the company is a public company that holds an Australian financial services licence authorising it to operate the business and conduct the affairs of a CCIV;
- (d) the company will, upon registration, have at least one sub-fund;
- (e) each sub-fund of the company will, upon registration, have at least one member;
- (f) a notice under subsection 1222A(4) (about whether a CCIV is to be a retail CCIV or a wholesale CCIV) has been lodged with the application;
- (g) if the company will, on registration, be a retail CCIV—the company has a compliance plan.

Note: CCIV is short for corporate collective investment vehicle, which is a type of company that can be registered under this Act: see section 112.

#### **Subdivision B—How a CCIV is registered**

##### **1222A Applying for registration**

- (1) This section applies in relation to an application for registration made under subsection 117(1) if the type of company that is proposed to be registered under this Act is a CCIV.

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- (2) The application is not required to state the information mentioned in paragraphs 117(2)(d), (e), (f), (ma) and (mb).
- (3) In addition to the information required by subsection 117(2) as modified by subsection (2) of this section, the application must also state:
  - (a) the name, and the address of the registered office, of the public company that consents in writing to become the director of the CCIV; and
  - (b) the proposed name of each sub-fund the CCIV is to have when it is registered; and
  - (c) for each such proposed sub-fund:
    - (i) which of the members identified under paragraph 117(2)(c) are to be members of the sub-fund; and
    - (ii) which of the shares identified under paragraph 117(2)(k) are to be referable to the sub-fund.

Note: For paragraph (b), see section 1222V.

- (4) A notice stating whether the CCIV is to be a retail CCIV or a wholesale CCIV must be lodged with the application.

- (5) A copy of the CCIV's constitution must be lodged with the application.

Note: The requirement for a CCIV to have a constitution is set out in section 1223B.

- (6) If the CCIV is to be a retail CCIV, a copy of the compliance plan signed by all the directors of the proposed corporate director of the CCIV must be lodged with the application.

Note: The requirement for a retail CCIV to have a compliance plan is set out in section 1226.

- (7) Subsection 117(5) applies as if the consents referred to in subsection (3) of this section were referred to in subsection 117(2).

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**1222B No other way to register a CCIV**

A body may not be taken under section 5H to be registered under this Act as a CCIV.

**1222C Registration of a CCIV**

If:

- (a) an application to register a company as a CCIV is lodged under section 117; and
- (b) the company meets the requirements for registration as a CCIV set out in section 1222;

ASIC may take the steps set out in paragraphs 118(1)(a), (b) and (c) for the company.

Note 1: The CCIV comes into existence on registration: see section 119.

Note 2: ASIC must also register at least one sub-fund of the CCIV: see paragraph 1222(d) and section 1222R.

**1222D Corporate director and members of a CCIV**

- (1) A public company becomes the director of a CCIV on registration if the public company is specified in the application with its consent as the proposed corporate director of the CCIV.
- (2) A person becomes a member of a CCIV on registration if the person is specified in the application with their consent as a proposed member of the CCIV.

Note: The shares taken to be issued to the member are those specified in the application: see subsection 120(2).

- (3) Subsection 120(1) does not apply in relation to a CCIV.

**Chapter 8B** Corporate collective investment vehicles

**Part 8B.2** Registration of CCIVs

**Division 1** Registering a CCIV

Section 1222E

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**Subdivision C—Names of CCIVs**

**1222E Special requirements for naming of CCIVs**

- (1) Subsection 148(1) applies to a CCIV as if the reference to subsections (2) and (3) of section 148 were instead a reference to subsection (2) of this section.
- (2) A CCIV must have the expression “Corporate Collective Investment Vehicle” at the end of its name.

**1222F Special requirements for acceptable abbreviations of CCIV names**

Section 149 has effect as if the following item were added to the table in subsection (1) of that section:

|    |  |      |
|----|--|------|
| 10 | Corporate Collective<br>Investment Vehicle | CCIV |
|----|--|------|

**1222G Carrying on business using “CCIV” in name**

Section 156 has effect as if paragraph 156(1)(a) included a reference to the words “Corporate Collective Investment Vehicle” (or an abbreviation of those words).

**1222H Change of name not allowed while sub-fund in liquidation**

No application may be lodged with ASIC under section 157A in relation to a CCIV.

**Subdivision D—Retail CCIVs and wholesale CCIVs**

**1222J Meaning of *retail CCIV* and *wholesale CCIV***

- (1) A CCIV is a *retail CCIV* if:
  - (a) the CCIV satisfies the retail CCIV test in section 1222K; or

**Section 1222K**

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- (b) the CCIV is notified as a retail CCIV (see section 1222L).
- (2) A CCIV that is not a retail CCIV is a ***wholesale CCIV***.

**1222K Retail CCIV test**

- (1) A CCIV satisfies the retail CCIV test in this section if any of the following apply:
  - (a) at least one member of the CCIV is covered by subsection (2) (about protected retail clients);
  - (b) at least one member of the CCIV is covered by subsection (3) (about protected clients under custodial arrangements);
  - (c) at least one member of the CCIV is covered by subsection (4) (about protected members of passport funds).

*When a person is a protected retail client of a CCIV*

- (2) For the purposes of paragraph (1)(a), a person is covered by this subsection in relation to a CCIV if all of the following apply:
  - (a) the person acquires a security (within the meaning of Chapter 7) issued by the CCIV, by way of:
    - (i) an issue of the security to the person (rather than a transfer of the security to the person); or
    - (ii) a transfer of the security to the person in circumstances described in subsection 1012C(5), (6) or (8) (secondary sales that require a Product Disclosure Statement);
  - (b) the person acquired the security as a retail client for the purposes of Chapter 7;
  - (c) the person is not associated (within the meaning of subsection 1241S(3)) with the CCIV;
  - (d) if the person acquired the security by way of an issue—the issue was not made in a situation, or pursuant to an offer made in a situation, to which section 1012E (about small scale offerings) applies.

Note: Section 1012E applies to financial products that are securities in a CCIV: see subsection 1241S(6).

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**Chapter 8B** Corporate collective investment vehicles

**Part 8B.2** Registration of CCIVs

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*When a person is a protected client under a custodial arrangement*

- (3) For the purposes of paragraph (1)(b), a person is covered by this subsection in relation to a CCIV if all of the following apply:
  - (a) an acquisition of a security (within the meaning of Chapter 7) in the CCIV occurs pursuant to an instruction given by the person under a custodial arrangement (within the meaning of section 1012IA);
  - (b) if there were an equivalent direct acquisition (within the meaning of subsection 1012IA(2)) by the person, the person would acquire the security as a retail client for the purposes of Chapter 7;
  - (c) the person is not associated (within the meaning of subsection 1241S(3)) with the CCIV.

*When a person is a protected passport fund member*

- (4) For the purposes of paragraph (1)(c), a person is covered by this subsection in relation to a CCIV if:
  - (a) a sub-fund of the CCIV is an Australian passport fund; and
  - (b) the person became a member of the sub-fund (whether in this jurisdiction or any host economy for the fund):
    - (i) on the expectation that the sub-fund would become an Australian passport fund; or
    - (ii) after the sub-fund became an Australian passport fund; and
  - (c) the person:
    - (i) is not, and has not at any time been, the corporate director of the CCIV; and
    - (ii) is not a related party of an entity that is, or has at any time been, the corporate director of the CCIV.

Note: See section 1216B for the circumstances in which a person becomes a member of a fund on the expectation that it would become an Australian passport fund.

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**Section 1222L***Regulations*

- (5) The regulations may do either or both of the following:
- (a) prescribe additional circumstances in which a person is covered by subsection (2), (3) or (4) in relation to a CCIV;
  - (b) provide that a particular class of person is not covered by subsection (2), (3) or (4) in relation to a CCIV.

**1222L Notifying ASIC of status as a retail CCIV or wholesale CCIV**

- (1) For the purposes of paragraph 1222J(1)(b), a CCIV is notified as a retail CCIV if:
- (a) the most recent notice lodged with ASIC under this section is a notice that the CCIV is, or wishes to be, a retail CCIV; or
  - (b) both:
    - (i) the notice required by subsection 1222A(4) to be lodged with the application to register the CCIV stated that the CCIV was to be a retail CCIV; and
    - (ii) the CCIV has not lodged a notice with ASIC under this section stating that the CCIV is eligible to be, and wishes to be, a wholesale CCIV.
- (2) Subject to this section, a CCIV may at any time:
- (a) lodge with ASIC a notice in the prescribed form stating that the CCIV is, or wishes to be, a retail CCIV; or
  - (b) lodge with ASIC a notice in the prescribed form stating that the CCIV is eligible to be, and wishes to be, a wholesale CCIV.

Note: A CCIV that lodges a notice under paragraph (2)(b) will be a retail CCIV despite the notice if it is not eligible to be a wholesale CCIV because it passes the retail CCIV test: see section 1222J. Lodging a notice under paragraph (2)(b) in this situation is an offence: see subsection (7).

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**Chapter 8B** Corporate collective investment vehicles**Part 8B.2** Registration of CCIVs**Division 1** Registering a CCIV**Section 1222M***When a retail CCIV notice must be lodged*

- (3) A CCIV must lodge a notice under paragraph (2)(a) if, because of the operation of paragraph 1222J(1)(a) (about the retail CCIV test), the CCIV becomes a retail CCIV.
- (4) A notice required by subsection (3) must be lodged within 2 business days of the CCIV becoming a retail CCIV.
- (5) An offence based on subsection (3) is an offence of strict liability.
- (6) In any proceedings against a person for an offence based on subsection (3), it is a defence if at the relevant time the person did not know, and could not reasonably be expected to have known, that the CCIV satisfied the retail CCIV test.

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

*When a wholesale CCIV notice must not be lodged*

- (7) A CCIV commits an offence if:
  - (a) the CCIV lodges a notice under paragraph (2)(b); and
  - (b) the CCIV satisfies the retail CCIV test.
- (8) An offence based on subsection (7) is an offence of strict liability.

**1222M Table of provisions that apply only to retail CCIVs**

The following table sets out the main provisions of this Act that apply only in relation to retail CCIVs. If a provision is not set out in this table, disregard that fact in deciding whether or not the provision applies only to retail CCIVs.

| <b>Provisions that apply only to retail CCIVs</b> |  |                     |
|---|--|---------------------|
| <b>Item</b>                                       | <b>Topic</b>   | <b>Provision(s)</b> |
| 1   | A sub-fund of a retail CCIV may be registered as an Australian passport fund | Part 8A.3           |

**Section 1222M****Provisions that apply only to retail CCIVs**

| <b>Item</b> | <b>Topic</b>  | <b>Provision(s)</b>                      |
|-------------|---|--|
| 2           | ASIC may direct a retail CCIV to modify its constitution  | section 1223C                            |
| 3           | Content requirements for the constitution of a retail CCIV  | sections 1223G and 1223H                 |
| 4           | Duties owed by a director of a retail CCIV  | subsection 1224D(2)                      |
| 5           | The corporate director of a retail CCIV must have external directors  | section 1224G                            |
| 6           | Extended responsibility of corporate director of a retail CCIV for certain acts of agents                                   | section 1224M                            |
| 7           | Limitation on right of the corporate director of a retail CCIV to fees and indemnities                                      | section 1224N                            |
| 8           | Limitation on right of the corporate director of a retail CCIV to acquire shares in the CCIV                                | section 1224P                            |
| 9           | Duties owed by the officers of the corporate director of a retail CCIV  | section 1225                             |
| 10          | Duties owed by the employees of the corporate director of a retail CCIV   | section 1225F                            |
| 11          | Requirement for a retail CCIV to have a compliance plan   | Division 4 of Part 8B.3                  |
| 12          | Requirement for member approval for certain related party transactions relating to retail CCIVs (application of Chapter 2E) | Subdivision A of Division 5 of Part 8B.3 |
| 13          | Further requirements for redemptions of shares by a retail CCIV   | sections 1230G to 1230K                  |
| 14          | Requirements for self-acquisition by retail CCIV  | subsection 1231J(2)                      |
| 15          | Part 2M.3 (financial reporting and sustainability)  | section 1232                             |

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**Subdivision E—Listing not permitted for certain CCIVs and sub-funds**

**1222N Certain CCIVs and sub-funds must not be listed**

The following must not be included in the official list of a declared financial market operated in this jurisdiction:

- (a) a wholesale CCIV;
- (b) a retail CCIV that has more than one sub-fund;
- (c) a sub-fund of a wholesale CCIV;
- (d) a sub-fund of a retail CCIV that has more than one sub-fund.

Note 1: This section does not prohibit either or both of the following from being included in the official list of a declared financial market operated in this jurisdiction:

- (a) a sub-fund of a retail CCIV that has only one sub-fund;
- (b) that retail CCIV.

Note 2: A retail CCIV will be a listed company if its single sub-fund is included in such an official list even if the retail CCIV is not so included (see the definition of *listed* in section 9).

**Subdivision F—Changing company type not permitted**

**1222P Part 2B.7 does not apply to a CCIV**

Part 2B.7 (about changing company type) does not apply to a CCIV.

## **Division 2—Registering a sub-fund of a CCIV**

### **Subdivision A—What is a sub-fund of a CCIV**

#### **1222Q What is a *sub-fund* of a CCIV**

- (1) A ***sub-fund*** of a CCIV is all or part of the business of the CCIV that is registered as a sub-fund under section 1222S.

Note: A sub-fund of a CCIV may be registered as a passport fund: see Part 8A.3.

- (2) A sub-fund does not have legal personality.

- (3) A person is a ***member*** of a sub-fund of a CCIV if the person:

- (a) is a member of the CCIV; and  
(b) holds one or more shares that are referable to the sub-fund.

Note: For when a share is referable to a sub-fund, see section 1230.

### **Subdivision B—How a sub-fund of a CCIV is registered**

#### **1222R Initial sub-funds to be registered when the CCIV is registered**

If ASIC registers a CCIV, ASIC must also register one or more sub-funds of the CCIV.

Note: If ASIC deregisters a sub-fund, and as a result the CCIV has no sub-funds, ASIC must deregister the CCIV: see section 1239K.

#### **1222S Registration of a sub-fund**

##### *Registration of initial sub-funds*

- (1) ASIC may register a sub-fund of a CCIV if:
- (a) ASIC registers the CCIV; and  
(b) the proposed name of the sub-fund is specified in the application to register the CCIV.

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### *Registration of further sub-funds*

- (2) ASIC may also register a sub-fund of a CCIV if an application to register the sub-fund is lodged under section 1222U.

### *ASIC to give sub-fund an ARFN*

- (3) If ASIC registers a sub-fund, ASIC must give the sub-fund an ARFN.

### *ASIC must keep record of registration*

- (4) ASIC must keep a record of the registration. Subsections 1274(2) and (5) apply to the record as if it were a document lodged with ASIC.

## **1222T Sub-fund is established on registration**

- (1) A sub-fund of a CCIV is established at the beginning of the day on which the sub-fund is registered.
- (2) The sub-fund's name is the name specified in ASIC's record of the registration.

## **1222U Application to register further sub-funds**

- (1) To register a sub-fund of a CCIV, a person may lodge an application with ASIC.  
Note: A CCIV must have at least one sub-fund when it is first registered: see section 1222R.
- (2) The application must state:
  - (a) the name and ACN of the CCIV; and
  - (b) the proposed name of the sub-fund; and
  - (c) the name and address of each person who consents to become a member of the sub-fund; and
  - (d) the following:
    - (i) the number and class of shares each member agrees in writing to take up;

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- (ii) the amount (if any) each member agrees in writing to pay for each share;
- (iii) whether the shares each member agrees in writing to take up will be fully paid on registration;
- (iv) if that amount is not to be paid in full on registration—the amount (if any) each member agrees in writing to be unpaid on each share;
- (v) whether or not the shares each member agrees in writing to take up will be beneficially owned by the member on registration.

(3) The application must be in the prescribed form.

**Subdivision C—Names of sub-funds****1222V A sub-fund's name***CCIV using ACN*

- (1) If a CCIV has as its name the expression “Australian Company Number” followed by the CCIV’s ACN, a sub-fund of the CCIV may have as its name the expression “Australian Registered Fund Number” followed by the sub-fund’s ARFN.

*CCIV using available name*

- (2) If a CCIV has as its name an available name, a sub-fund of the CCIV may have as its name an expression comprising the following 3 elements, in the following order:
    - (a) first element—the CCIV’s name (without the words “Corporate Collective Investment Vehicle” at the end of the name);
    - (b) second element—a name that meets the requirements in subsection (3);
    - (c) third element—the expression “Sub-fund”.
  - (3) A name meets the requirements in this subsection unless the name is:
-

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- (a) identical to a name that is used as the second element of the name of another sub-fund of the same CClV; or
- (b) identical to a name that is reserved by ASIC in respect of another person who is not the person applying to have the name; or
- (c) unacceptable for registration under the regulations.

**1222W Using sub-fund name and ARFN on documents**

- (1) A CClV must set out a sub-fund's name and ARFN on all its public documents and negotiable instruments that relate to the sub-fund.
- (2) An offence based on subsection (1) is an offence of strict liability.

**1222X Acceptable abbreviations of sub-fund names**

- (1) The abbreviations set out in the following table may be used:
  - (a) instead of words that this Act requires to be part of a sub-fund's name or to be included in a document or negotiable instrument; and
  - (b) instead of words that are part of a sub-fund's name; and
  - (c) with or without full stops.

| Acceptable abbreviations |                                   |              |
|--------------------------|-----------------------------------|--------------|
| Item                     | Word                              | Abbreviation |
| 1                        | Sub-fund                          | SF           |
| 2                        | Australian Registered Fund Number | ARFN         |
| 3                        | Australian                        | Aust         |
| 4                        | Number                            | No           |
| 5                        | and                               | &            |

- (2) If a sub-fund's name includes any of these abbreviations, the word or words corresponding to the abbreviation may be used instead.

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**Section 1222Y****1222Y Sub-fund changing its name**

- (1) To change the name of a sub-fund of a CCIV, the CCIV may lodge an application to ASIC in the prescribed form stating the proposed name of the sub-fund.
- (2) However, no application may be lodged with ASIC under subsection (1) while the sub-fund is in liquidation.
- (3) If the proposed name meets the requirements of section 1222V, ASIC must change the sub-fund's name by altering ASIC's record of the sub-fund's registration to reflect the change. The change of name takes effect when ASIC alters ASIC's record of the sub-fund's registration.

**1222Z ASIC's power to direct CCIV to change a sub-fund's name**

- (1) ASIC may direct a CCIV in writing to change the name of a sub-fund of the CCIV within 2 months if:
  - (a) the name should not have been registered; or
  - (b) ASIC has directed the CCIV to change its name under section 158.
- (2) The CCIV must comply with the direction within 2 months after being given it.
- (3) An offence based on subsection (2) is an offence of strict liability.
- (4) If the CCIV does not comply with subsection (2), ASIC may change the sub-fund's name to the expression "Australian Registered Fund Number" followed by the sub-fund's ARFN. ASIC does this by altering ASIC's record of the sub-fund's registration to reflect the change.

Note: For ASIC's record of the registration of a sub-fund, see subsection 1222S(4).

- (5) A change of name under subsection (4) takes effect when ASIC alters ASIC's record of the sub-fund's registration.

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**1222ZA Effect of name change**

A change of the name of a sub-fund of a CCIV does not:

- (a) create a legal entity; or
- (b) affect the sub-fund's existing property, rights or obligations;  
or
- (c) render defective any legal proceedings by or against the  
CCIV and relating to the sub-fund.

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## **Division 3—Registers**

### **1222ZB Registers relating to CCIVs**

- (1) The register of members kept by a CCIV in accordance with section 169 must, in addition to the information mentioned in subsection 169(3), also show the following:
  - (a) the sub-fund of the CCIV to which each share is referable;
  - (b) if the CCIV holds a share in the CCIV:
    - (i) the sub-fund of the CCIV to which the share is referable; and
    - (ii) the other sub-fund of the CCIV for which the share has been acquired;
  - (c) if another CCIV holds a share in the CCIV:
    - (i) the sub-fund of the CCIV to which the share is referable; and
    - (ii) the sub-fund of the other CCIV for which the share has been acquired.
- (2) The register of option holders kept by a CCIV in accordance with section 170 must, as part of the description of an unissued share mentioned in paragraph 170(1)(d), also show the following:
  - (a) the sub-fund of the CCIV to which the share is referable;
  - (b) if the CCIV holds an option over the share:
    - (i) the sub-fund of the CCIV to which the share is referable; and
    - (ii) the other sub-fund of the CCIV for which the option over the share has been acquired;
  - (c) if another CCIV holds an option over the share:
    - (i) the sub-fund of the CCIV to which the share is referable; and
    - (ii) the sub-fund of the other CCIV for which the option over the share has been acquired.

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- (3) The register of debenture holders kept by a CCIV in accordance with section 171 must also contain information about the following:
- (a) the sub-fund of the CCIV to which each debenture is referable;
  - (b) if the CCIV holds a debenture issued by the CCIV:
    - (i) the sub-fund of the CCIV to which the debenture is referable; and
    - (ii) the other sub-fund of the CCIV for which the debenture has been acquired;
  - (c) if another CCIV holds a debenture issued by the CCIV:
    - (i) the sub-fund of the CCIV to which the debenture is referable; and
    - (ii) the sub-fund of the other CCIV for which the debenture has been acquired.

## **Part 8B.3—Corporate governance of CCIVs**

### **Division 1—Governance rules**

#### **Subdivision A—How a CCIV exercises company powers**

##### **1223 Execution of documents (including deeds) by the CCIV itself**

- (1) A document is taken to have been signed in accordance with subsection 127(1) if the document is signed by:
- (a) 2 directors of the corporate director of the CCIV; or
  - (b) a director and a company secretary of the corporate director of the CCIV.

Note: If a document is signed in this way, a person will be able to rely on the assumptions in subsection 129(5) for dealings in relation to the CCIV.

- (2) A CCIV's common seal (if any) is taken to have been fixed to a document in accordance with subsection 127(2) if:
- (a) the CCIV's common seal is fixed to the document; and
  - (b) the fixing of the seal is witnessed by:
    - (i) 2 directors of the corporate director of the CCIV; or
    - (ii) a director and a company secretary of the corporate director of the CCIV.

Note: If a CCIV executes a document in this way, a person will be able to rely on the assumptions in subsection 129(6) for dealings in relation to the CCIV.

- (3) A CCIV may execute a document as a deed if the document is expressed to be executed as a deed and is executed in accordance with subsection 127(1) or (2), as affected by this section.
- (4) This section does not limit the ways in which a CCIV may execute a document (including a deed).
- (5) This section does not limit Part 2B.1, as it applies to a CCIV subject to the modifications set out in this Chapter.
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Note 1: A CCIV may appoint an agent: see section 126.

Note 2: Some provisions of this Chapter modify section 124, for example sections 1230 and 1231N.

### **Subdivision B—Constitution**

#### **1223A Replaceable rules do not apply to a CCIV**

- (1) A section or subsection whose heading contains the words *replaceable rule* does not apply as a replaceable rule to a CCIV.
- (2) Subsection (1) applies despite paragraph 135(1)(a).

#### **1223B Requirement for a CCIV to have a constitution**

- (1) A CCIV must have a constitution. A CCIV may not repeal its constitution unless it replaces the constitution with a new constitution.

*Minimum content requirements for the constitution*

- (2) The constitution of a CCIV must comply with the requirements applicable to the CCIV under Subdivision C.

*Strict liability offence*

- (3) A CCIV commits an offence of strict liability if it fails to ensure it has a constitution that complies with the requirements applicable to the CCIV under Subdivision C.

#### **1223C Retail CCIV—ASIC may direct CCIV to modify its constitution**

- (1) ASIC may direct a retail CCIV to modify its constitution, as set out in the direction, to ensure that the CCIV's constitution complies with the content requirements applicable to the CCIV under Subdivision C. The direction is to be given by notice in writing to the CCIV.

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- (2) ASIC may also direct a retail CCIV to modify its constitution, as set out in the direction, to ensure that the CCIV's constitution deals in adequate detail with:
  - (a) the matters required to be included in the constitution under Subdivision C; and
  - (b) the specification (if any) of any rights of the corporate director to be paid fees out of assets of a sub-fund of the CCIV, as mentioned in section 1224N.
- (3) Despite section 1223D, the corporate director may modify the constitution to comply with the direction.
- (4) The CCIV must comply with the direction within 14 days after being given it.
- (5) The CCIV must lodge with ASIC a copy of the modified constitution within 14 days after the modification.
- (6) An offence based on subsection (4) or (5) is an offence of strict liability.

**1223D Adoption, modification and repeal of constitution**

- (1) A CCIV adopts on registration the constitution lodged with the application to register the CCIV.
- (2) The constitution of a CCIV may be modified, or repealed and replaced with a new constitution:
  - (a) if the CCIV is a retail CCIV:
    - (i) by special resolution of the members of the CCIV; or
    - (ii) by the corporate director, if the corporate director reasonably considers the change will not adversely affect members' rights; or
    - (iii) by special resolution of the members of a sub-fund of the CCIV, if the corporate director reasonably considers the change will not adversely affect the rights of any member of any other sub-fund of the CCIV; or

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- (b) if the CCIV is a wholesale CCIV—by complying with the requirements set out in the constitution for the modification or repeal.
- (3) If the constitution of a CCIV is modified, or repealed and replaced with a new constitution, the CCIV must lodge with ASIC:
  - (a) a copy of the modification, or the new constitution; and
  - (b) if the corporate director of the CCIV determines a later date mentioned in paragraph (5)(b) or (c) for the modification or replacement to take effect—notice of the later date;within 14 days after the modification or replacement.

Note: The constitution may be modified or repealed by Court order: see section 233.

- (4) An offence based on subsection (3) is an offence of strict liability.
- (5) If section 137 does not set the date on which the modification or repeal and replacement of a CCIV's constitution takes effect, it takes effect on the latest of the following:
  - (a) the date on which the modification or the new constitution is lodged with ASIC;
  - (b) if the CCIV is a retail CCIV, and the corporate director determines a later date for the modification or replacement to take effect—that later date;
  - (c) if the CCIV is a wholesale CCIV, and a later date is determined in accordance with any requirements in the constitution of the CCIV—that later date.
- (6) Section 136 does not apply to a CCIV.

**1223E Effect of constitution**

In addition to the effect mentioned in subsection 140(1), a CCIV's constitution also has effect as a contract between the corporate director and each member of the CCIV.

## **Subdivision C—Minimum content requirements for the constitution of a CCIV**

### **1223F Wholesale CCIV—Basic content requirement**

A wholesale CCIV's constitution must specify the requirements that must be complied with for the CCIV to modify its constitution, or repeal its constitution and replace it with a new one.

### **1223G Retail CCIV—Basic content requirements**

A retail CCIV's constitution must do the following:

- (a) make provision for the establishment of sub-funds, and classes of shares referable to sub-funds;
- (b) make provision for the method by which complaints made by members in relation to the CCIV are to be dealt with;
- (c) state that the CCIV has the power to borrow or raise money;
- (d) if there are to be any limits on the CCIV's exercise of the power to borrow or raise money—sets out those limits;
- (e) if the CCIV is to acquire in respect of any of its sub-funds, one or more shares that are referable to another of its sub-funds—make provision for such acquisitions.

### **1223H Retail CCIV—Additional content requirement for redemption of shares**

- (1) This section applies if all or some of the shares in a retail CCIV are redeemable shares or redeemable preference shares.
- (2) The CCIV's constitution must make provision for the shares to be redeemed. The provision must:
  - (a) specify a period within which a redemption must ordinarily be satisfied while section 1230H (about when a sub-fund is liquid) applies to the sub-fund to which the share is referable; and
  - (b) be fair and reasonable to the members of the sub-fund to which the share is referable; and

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- (c) set out a price, or a method for determining a price, at which shares in the CCIV are to be redeemed if, at the time of the redemption, section 1230H (about when a sub-fund is liquid) applies to the sub-fund to which the shares are referable.

## **Division 2—Officers and employees of the CCIV**

### **Subdivision A—Officers and employees generally**

#### **1224 A CCIV has a single corporate director**

*A CCIV may only have one director*

- (1) A CCIV must not appoint more than one director.

Note: For who can be the director of a CCIV, see sections 1224F and 1224G.

*Position of director is the position of corporate director*

- (2) The position of director of a CCIV is the position of corporate director.

- (3) **Corporate director** of a CCIV means the company named in ASIC's record of the CCIV's registration as the corporate director or temporary corporate director of the CCIV.

Note: The corporate director is first appointed through the registration process for the CCIV: see sections 1222A and 1222D.

*No alternate directors*

- (4) There is no position of alternate director of a CCIV.

- (5) The corporate director of a CCIV commits an offence if the corporate director appoints an alternate director.

Note: For the corporate director's power to appoint an agent, see section 1224L.

*Definition of **director** not limited*

- (6) This section does not limit the operation of paragraph (b) of the definition of **director** in section 9 in relation to a CCIV.

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**1224A A CCIV has no secretary and no employees**

- (1) A CCIV must not appoint a secretary.

Note: The secretary of the corporate director is responsible for certain corporate contraventions by the CCIV: see Division 3 of this Part.

- (2) A CCIV must not have any employees.

Note: However, a CCIV may appoint an agent: see section 126.

**1224B Meaning of *officer* of a CCIV**

In this Act:

*officer* of a corporation that is a CCIV means:

- (a) a director of the CCIV; or
- (b) a receiver, or receiver and manager, of the property of a sub-fund of the CCIV; or
- (c) a liquidator of a sub-fund of the CCIV; or
- (d) a trustee or other person administering a compromise or arrangement made between the CCIV and someone else.

Note: Part 8B.6 is about external administration of sub-funds.

**1224C General duties owed by officers**

- (1) Division 1 of Part 2D.1 (about general duties) applies to a CCIV with the modifications set out in this section.
- (2) In applying Division 1 of Part 2D.1 (about general duties) in relation to an officer (other than a director) of a CCIV:
- (a) treat references to the best interests of the corporation as instead being references to the best interests of the sub-fund referred to in subsection (3); and
  - (b) treat references to causing detriment to the corporation as instead being references to causing detriment to the sub-fund referred to in subsection (3); and

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- (c) treat references to the business operations of the corporation as instead being references to the business operations of the sub-fund referred to in subsection (3).
- (3) The sub-fund is:
  - (a) for a receiver, or receiver and manager, of the property of a sub-fund of the CCIV—the sub-fund; or
  - (b) for a liquidator of a sub-fund of the CCIV—the sub-fund; or
  - (c) for a trustee or other person administering a compromise or arrangement made between the CCIV and someone else—the sub-fund on whose members or creditors the compromise or arrangement is binding.

**1224D Duties owed by director**

*Duties owed by a director of any CCIV*

- (1) A director of a CCIV must, in exercising its powers and carrying out its duties:
  - (a) act honestly; and
  - (b) act in the best interests of the members of the CCIV and, if there is a conflict between the interests of those members and its own interests, give priority to the members' interests; and
  - (c) act in the best interests of the members, as a whole, of each sub-fund of the CCIV and:
    - (i) if there is a conflict between the interests of the members, as a whole, of a sub-fund and its own interests, give priority to the members' interests; and
    - (ii) if there is a conflict between the interests of the members, as a whole, of a sub-fund and the best interests of the members of the CCIV, give priority to the interests of the members of the CCIV; and
  - (d) have in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the director in exercising those powers and carrying out those duties; and

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- (e) not make use of information acquired through being a director of the CCIV in order to:
  - (i) gain an improper advantage for the director or another person; or
  - (ii) cause detriment to the members of the CCIV.

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

*Additional duties owed by a director of a retail CCIV*

- (2) A director of a retail CCIV must, in exercising its powers and carrying out its duties:
  - (a) exercise the degree of care and diligence that a reasonable person would exercise in the director's position; and
  - (b) treat members of the CCIV who hold shares of the same class equally; and
  - (c) treat members of the CCIV who hold shares of different classes fairly; and
  - (d) treat members of different sub-funds of the CCIV fairly; and
  - (e) ensure that the CCIV's constitution meets the requirements of this Act; and
  - (f) ensure that the CCIV's compliance plan meets the requirements of section 1226A; and
  - (g) comply with the CCIV's compliance plan; and
  - (h) ensure that:
    - (i) assets and liabilities of the sub-funds of the CCIV are clearly identified; and
    - (ii) any property of the CCIV to which section 1233K (about property that has to be converted) applies is clearly identified; and
    - (iii) any liabilities of the CCIV to which section 1233M (about liabilities allocated to 2 or more sub-funds) applies is clearly identified; and
  - (i) ensure that assets of a sub-fund of the CCIV are held in the manner required by section 1234J; and
  - (j) ensure that the assets of a sub-fund of the CCIV are valued at regular intervals appropriate to the nature of the assets; and

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- (k) ensure that all payments out of the assets of the CCIV are made in accordance with the CCIV's constitution and this Act; and
- (l) carry out or comply with any other duty, not inconsistent with this Act, that is conferred on the director by the CCIV's constitution.

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

*Additional duties owed by a director of a wholesale CCIV*

- (3) A director of a wholesale CCIV must, in exercising its powers and carrying out its duties:
  - (a) exercise the degree of care and diligence that a reasonable person would exercise in the director's position; and
  - (b) treat members of the CCIV who hold shares of the same class equally; and
  - (c) treat members of the CCIV who hold shares of different classes fairly; and
  - (d) treat members of different sub-funds of the CCIV fairly.
- (4) A director of a wholesale CCIV contravenes this subsection if:
  - (a) the director contravenes paragraph (3)(a), (b), (c) or (d); and
  - (b) either:
    - (i) the constitution of the CCIV does not exempt the director from liability for the contravention; or
    - (ii) the contravention was dishonest or involved a lack of good faith.

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

*Duties under this section prevail in case of conflict*

- (5) If there is a conflict between a duty owed by a director of a CCIV under this section and a duty owed by the director under Part 2D.1, the duty owed under this section prevails.

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*Interaction with other laws etc.*

- (6) Subsection (1) or (2):
- (a) has effect in addition to, and not in derogation of, any rule of law relating to the duty or liability of a person because of their office or employment in relation to a corporation; and
  - (b) does not prevent the commencement of civil proceedings for a breach of a duty or in respect of a liability referred to in paragraph (a).

*Interaction with section 199A*

- (7) Section 199A does not prevent a wholesale CCIV from exempting or indemnifying a director of the CCIV from a liability incurred in relation to a contravention of subsection (3) if the contravention:
- (a) is not dishonest; and
  - (b) does not involve a lack of good faith.
- To avoid doubt, this subsection does not affect the operation of section 199A in relation to a contravention of a duty owed under Part 2D.1.

*Interaction with section 199B*

- (8) Section 199B applies to a CCIV as if paragraph 199B(1)(b) included a reference to this section.

Note: There are additional modifications of section 199B, relevant to officers and auditors of the corporate director, in section 1225E.

**1224E Certain provisions in Chapter 2D do not apply to CCIVs**

The following do not apply to a CCIV:

- (a) Part 2D.3 (about appointment, remuneration and cessation of appointment of directors);
  - (b) Part 2D.4 (about appointment of secretaries);
  - (c) Part 2D.5 (about public information about directors and secretaries);
  - (d) Part 2D.6 (about disqualification from managing corporations);
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- (e) Part 2D.7 (about ban on hedging remuneration of key management personnel);
- (f) Part 2D.8 (about remuneration recommendations in relation to key management personnel for disclosing entities).

**Subdivision B—The corporate director of a CCIV****1224F Who can be the director of a CCIV**

The only kind of person who may be appointed as the director of a CCIV is a public company that:

- (a) holds an Australian financial services licence authorising it to operate the business and conduct the affairs of the CCIV; and
- (b) is not a Chapter 5 body corporate.

**1224G Retail CCIV—additional rules about who can be the director**

- (1) At least half of the directors of the corporate director of a retail CCIV must be external directors.
- (2) A director of the corporate director is an external director if the director:
  - (a) is not, and has not been in the previous 2 years, an employee of the corporate director or a related body corporate; and
  - (b) is not, and has not been in the previous 2 years, a senior manager of the corporate director or a related body corporate; and
  - (c) is not, and has not been in the previous 2 years, substantially involved in business dealings, or in a professional capacity, with the corporate director or a related body corporate; and
  - (d) is not a member of a partnership that is, or has been in the previous 2 years, substantially involved in business dealings, or in a professional capacity, with the corporate director or a related body corporate; and
  - (e) does not have a material interest in the corporate director or a related body corporate; and

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- (f) is not a relative of a person who has a material interest in the corporate director or a related body corporate.
- (3) The corporate director of a retail CCIV must not fail to comply with subsection (1) for a period exceeding 14 days (or a longer period allowed in writing by ASIC).

*Fault-based offence*

- (4) A person commits an offence if the person intentionally or recklessly fails to comply with subsection (3).

*Strict liability offence*

- (5) A person commits an offence of strict liability if the person fails to comply with subsection (3).
- (6) In agreeing to a longer period under subsection (3), ASIC may impose conditions to be complied with and the corporate director must comply with them.
- (7) An offence based on subsection (6) is an offence of strict liability.

**1224H Effectiveness of acts by corporate director**

- (1) An act done by the company named in ASIC's record of a CCIV's registration as the corporate director or temporary corporate director of the CCIV is effective even if:
  - (a) the company's appointment as corporate director or temporary corporate director did not comply with the CCIV's constitution or any provision of this Act; or
  - (b) the continuance of the company's appointment as corporate director or temporary corporate director does not comply with the CCIV's constitution or any provision of this Act.
- (2) Subsection (1) does not deal with the question whether an effective act by a corporate director:
  - (a) binds the CCIV in its dealings with other people; or
  - (b) makes the CCIV liable to another person.

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Note: The kinds of acts that this section validates are those that are only legally effective if the person doing them is a director (for example, calling a meeting of the company's members). Sections 128 to 130 contain rules about the assumptions people are entitled to make when dealing with a company and its officers.

**1224J Corporate director must operate the CCIV**

- (1) The corporate director of a CCIV is to:
  - (a) operate the business and conduct the affairs of the CCIV; and
  - (b) perform the functions conferred on the corporate director by the CCIV's constitution and this Act.

Note 1: If a CCIV commits an offence or contravenes a civil penalty provision, the corporate director is generally responsible: see Division 7 of this Part.

Note 2: Section 1224Q is about the exercise of powers by the corporate director while a sub-fund is in liquidation.

- (2) The corporate director of a CCIV may exercise all the powers of the CCIV except any powers that this Act or the CCIV's constitution requires:
  - (a) the CCIV to exercise in general meeting; or
  - (b) the members of a sub-fund of the CCIV to exercise in a meeting of members of the sub-fund.

**1224K Corporate director not required to disclose material personal interest**

Subject to section 1225C (about the directors of the corporate director), section 191 does not require a director of a CCIV to give notice of an interest.

Note: Section 1225C is about the obligations of the directors of the corporate director to disclose material personal interests relating to the affairs of the CCIV.

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**1224L Corporate director may appoint an agent or engage a person**

*Agents appointed by corporate director*

- (1) The corporate director has power to appoint an agent, or otherwise engage a person, to do anything that the corporate director is authorised to do in connection with the CCIV.

Note: A CCIV may also have an agent: see section 126.

*Agents appointed by CCIV and sub-agents*

- (2) An agent appointed, or a person otherwise engaged, by:
  - (a) an agent or person referred to in subsection (1); or
  - (b) the CCIV; or
  - (c) a person who is taken under this subsection to be an agent of the corporate director;to do anything that the corporate director is authorised to do in connection with the CCIV is taken to be an agent appointed by the corporate director to do that thing for the purposes of this section.

*Delegation*

- (3) Section 198D does not apply to a CCIV.

**1224M Retail CCIV—responsibility of corporate director for certain acts of agents**

- (1) Subsection (2) applies in relation to a retail CCIV for the purpose of determining whether:
  - (a) there is a liability to the CCIV or the CCIV's members; or
  - (b) the corporate director has properly performed its duties for the purposes of section 1224N.

Note: A CCIV's constitution may provide for the corporate director to be indemnified for liabilities—see section 1224N.

*Extended liability for acts of agents*

- (2) If:
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- (a) the corporate director appoints an agent, or otherwise engages a person, under section 1224L; or
- (b) an agent or person is taken under subsection 1224L(2) (about sub-agents) to be an agent of the corporate director; the corporate director is taken to have done (or failed to do) anything that the agent or person has done (or failed to do) because of the appointment or engagement, even if the person or agent was acting fraudulently or outside the scope of the authority or engagement.

Note: This subsection does not apply to receivers: see section 1236F.

**1224N Retail CCIV—limitation on right of corporate director to fees and indemnities**

If the corporate director of a retail CCIV is to have any rights to be paid fees out of assets of a sub-fund of the CCIV, or to be indemnified out of assets of a sub-fund of the CCIV for liabilities or expenses incurred in relation to the performance of its duties, those rights:

- (a) must be specified in the CCIV's constitution; and
- (b) must be available only in relation to the proper performance of those duties;

and any other agreement or arrangement has no effect to the extent that it purports to confer such a right.

Note 1: ASIC may direct the CCIV to modify its constitution to ensure such rights are dealt with in adequate detail: see subsection 1223C(2).

Note 2: Sections 199A to 199C may prohibit giving an indemnity for the corporate director of a CCIV. Those sections have extended operation in relation to a CCIV: see section 1225E.

**1224P Retail CCIV—limitation on right of corporate director to acquire shares in CCIV**

- (1) The corporate director of a retail CCIV may acquire and hold a share in the CCIV, but the corporate director must only do so:
    - (a) for not less than the consideration that would be payable if the share were acquired by another person; and
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- (b) subject to terms and conditions that would not disadvantage other members.

Note: If the corporate director holds a share in the CCIV, the corporate director does so subject to section 253E, as affected by section 1228G (certain members cannot vote or be counted).

- (2) A corporate director who contravenes subsection (1), and any person who is involved in a corporate director's contravention of that subsection, contravenes this subsection.

Note 1: Section 79 defines involved.

Note 2: This subsection is a civil penalty provision (see section 1317E).

- (3) A person must not intentionally be involved in a corporate director's contravention of subsection (1).

**1224Q Exercise of powers while sub-fund is in liquidation**

*Powers of corporate director while sub-fund in liquidation*

- (1) The corporate director of a CCIV contravenes this subsection if:
- (a) a sub-fund of the CCIV is being wound up, or a provisional liquidator of a sub-fund of the CCIV is acting; and
  - (b) the corporate director purports to do any of the following:
    - (i) carry on the business of the sub-fund;
    - (ii) enter into a transaction or dealing on behalf of the CCIV affecting the property of the sub-fund.
- (2) However, subsection (1) does not apply to the extent that the corporate director is acting:
- (a) with the written approval of the liquidator of the sub-fund or the Court; or
  - (b) in circumstances in which, despite the fact that the sub-fund is being wound up, the corporate director is permitted by this Act to act.
- (3) Despite subsection 13.3(3) of the *Criminal Code*, in a prosecution for an offence based on subsection (1) of this section, a defendant
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does not bear an evidential burden in relation to the matter in paragraph (2)(b).

*Fault-based offence*

- (4) A person commits an offence if the person contravenes subsection (1).

*Strict liability offence*

- (5) A person commits an offence of strict liability if the person contravenes subsection (1).

*Functions and powers of liquidator prevail in case of conflict*

- (6) If subsection (2) applies and there is a conflict between a function or power of the liquidator of the sub-fund and a function or power of the corporate director in relation to the CCIV, the liquidator's function or power prevails.

*Effect of section*

- (7) This section does not remove the corporate director of a CCIV from office.
- (8) Nothing in this section affects a secured creditor's right to realise or otherwise deal with the security interest.
- (9) Section 198G does not apply to a CCIV.
- (10) A provision of this Act that applies despite section 198G also applies despite this section.

*Definitions*

- (11) In this section:

**liquidator** includes a provisional liquidator.

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**Subdivision C—Replacing the corporate director**

**1224R Changes only take effect when ASIC alters record of registration**

Despite anything in this Subdivision, the company named in ASIC's record of registration as the corporate director or temporary corporate director of a CCIV remains the CCIV's corporate director until the record is altered to name another company as the CCIV's corporate director or temporary corporate director.

**1224S CCIV does not have an eligible corporate director**

If a CCIV does not have a corporate director that meets the requirements of section 1224F, an application to the Court for the appointment of a temporary corporate director of the CCIV under section 1224V may be made by any of the following:

- (a) ASIC;
- (b) a member, or group of members, of the CCIV.

**1224T Retirement of corporate director**

- (1) If the corporate director of a CCIV wants to retire as corporate director, it must call a members' meeting to explain its reason for wanting to retire and to enable the members to vote on a resolution to choose a company to be the new corporate director. The resolution must be a special resolution.
- (2) The notice of meeting of the CCIV's members must:
  - (a) set out the corporate director's reason for wanting to retire; and
  - (b) nominate as the new corporate director a company (the *nominated company*) that:
    - (i) meets the requirements of section 1224F; and
    - (ii) has consented in writing to being chosen as the new corporate director of the CCIV.

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- (3) If the members choose the nominated company to be the new corporate director, as soon as practicable and in any event within 2 business days after the day of the meeting, the current corporate director must lodge a notice with ASIC asking it to alter the record of the CCIV's registration to name the nominated company as the corporate director of the CCIV.
- (4) If:
  - (a) the members choose the nominated company to be the new corporate director; and
  - (b) the current corporate director does not lodge the notice required by subsection (3);the nominated company may lodge that notice.
- (5) An offence based on subsection (3) is an offence of strict liability.
- (6) If the members do not choose the nominated company to be the new corporate director, an application to the Court for appointment of a temporary corporate director under section 1224V may be made by the current corporate director of the CCIV.

**1224U Replacement of corporate director by members**

- (1) If members of a CCIV want to replace the corporate director, the members may take action under Part 2G.4 (as that Part applies to the CCIV under section 1228A) for the calling of a meeting of the CCIV's members to consider and vote on:
  - (a) a special resolution that the current corporate director should be removed; and
  - (b) a special resolution choosing a company to be the new corporate director.
- (2) The notice of meeting of the CCIV's members must:
  - (a) set out the intention to remove the current corporate director; and
  - (b) nominate, as the new corporate director of the CCIV, a company that:
    - (i) meets the requirements of section 1224F; and

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- (ii) has consented in writing to being appointed as the new corporate director of the CCIV.
  - (3) If both resolutions are passed, the CCIV is taken, on the day of the meeting, to have appointed the company nominated in the notice as the new corporate director of the CCIV.
- Note: See also section 1224R (when changes take effect).
- (4) The current corporate director must, as soon as practicable and in any event within 2 business days after the appointment, lodge a notice with ASIC asking it to alter the record of the CCIV's registration to name the company as the corporate director of the CCIV.
  - (5) If the current corporate director does not lodge the notice required by subsection (4), the company chosen by the members to be the new corporate director may lodge that notice.
  - (6) An offence based on subsection (4) is an offence of strict liability.

**1224V Appointment of temporary corporate director by Court**

- (1) On application under section 1224S or subsection 1224T(6) or 1224X(2), the Court may:
  - (a) if the CCIV has a current corporate director—order the removal of the current corporate director; and
  - (b) order the appointment of a company as the temporary corporate director of the CCIV; and
  - (c) make any further orders that the Court considers appropriate.

Note: See also section 1224R (when changes take effect).

- (2) The Court must not make an order under paragraph (1)(a) or (b) unless:
  - (a) the Court is satisfied that:
    - (i) the appointment is in the interests of the members of the CCIV; and
    - (ii) the company meets the requirements of section 1224F; and

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- (b) the company consents in writing to becoming the CCIV's temporary corporate director.
- (3) The person who made the application for the order must, as soon as practicable and in any event within 2 days after the Court's order appointing the temporary corporate director, lodge a notice with ASIC informing ASIC of the appointment made by the Court.
- (4) If the person referred to in subsection (3) does not lodge the notice required by that subsection, the company appointed by the Court as the temporary corporate director may lodge that notice.
- (5) An offence based on subsection (3) is an offence of strict liability.

**1224W Temporary corporate director to initiate appointment of permanent corporate director**

- (1) This section applies if the Court appoints a temporary corporate director of a CCIV under section 1224V.
- (2) The temporary corporate director must, within the period applicable under subsection (3), call a members' meeting for the purpose of the members, by special resolution, choosing a company to be the new permanent corporate director.
- (3) The temporary corporate director must call the meeting within:
  - (a) unless paragraph (b) applies—3 months of the appointment; or
  - (b) if the Court has extended the period under subsection (4)—the extended period.
- (4) The Court may, on application by the temporary corporate director, grant an extension of the period referred to in paragraph (3)(a).
- (5) The temporary corporate director may, within the period applicable under subsection (3), call further meetings of the CCIV's members to consider and vote on a special resolution choosing a company to be the permanent corporate director.

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- (6) For the purposes of subsections (2) and (5), the written notice of the meeting must nominate as the permanent corporate director a company (which may be the temporary corporate director) that:
    - (a) meets the requirements of section 1224F; and
    - (b) has consented in writing to being appointed as the permanent corporate director of the CCIV.
  - (7) If the resolution is passed, the CCIV is taken, on the day of the meeting, to have appointed the company nominated in the notice as the permanent corporate director of the CCIV.
- Note: See also section 1224R (when changes take effect).
- (8) The current corporate director must, as soon as practicable and in any event within 2 business days after the appointment, lodge a notice with ASIC asking it to alter the record of the CCIV's registration to name the company as the corporate director of the CCIV.
  - (9) If the current corporate director does not lodge the notice required by subsection (8), the company chosen by the members to be the new corporate director may lodge that notice.
  - (10) An offence based on subsection (2) or (8) is an offence of strict liability.

**1224X Temporary corporate director fails to initiate appointment of permanent corporate director**

- (1) This section applies if:
    - (a) a temporary corporate director is appointed by the Court under section 1224V; and
    - (b) the temporary corporate director fails to call a members' meeting to consider and vote on a special resolution choosing a company to be the permanent corporate director within the period applicable under subsection 1224W(3).
  - (2) An application to the Court for the appointment of a temporary corporate director of the CCIV under section 1224V may be made by any of the following:
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- (a) ASIC;
- (b) a member, or group of members, of the CCIV.

**1224Y Members fail to appoint permanent corporate director**

- (1) This section applies if:
  - (a) a temporary corporate director is appointed by the Court under section 1224V; and
  - (b) within the period applicable under subsection 1224W(3), the temporary corporate director calls one or more members' meetings to consider and vote on a special resolution choosing a company to be the permanent corporate director; and
  - (c) the CCIV's members do not pass a special resolution choosing a permanent corporate director.
- (2) An application to the Court for a winding up of all the sub-funds of the CCIV must be made by the corporate director of the CCIV.  
Note: For provisions about winding up a sub-fund of a CCIV, see Division 5 of Part 8B.6.
- (3) An application to the Court for a winding up of all the sub-funds of the CCIV may be made by any of the following, if the corporate director does not do so:
  - (a) ASIC;
  - (b) a member, or group of members, of the CCIV.
- (4) On an application under this section, the Court may:
  - (a) order the winding up of all the sub-funds of the CCIV; and
  - (b) make any further orders that the Court considers appropriate.

**1224Z Former corporate director to hand over books and provide reasonable assistance**

- (1) If the corporate director of a CCIV changes, the former corporate director must:

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- (a) as soon as practicable give the new corporate director any books in the former corporate director's possession or control that this Act requires to be kept in relation to the CCIV; and
  - (b) give other reasonable assistance to the new corporate director to facilitate the change of corporate director.
- (2) An offence based on subsection (1) is an offence of strict liability.

**1224ZA Rights, obligations and liabilities of former corporate director**

- (1) If the corporate director of a CCIV changes, the rights, obligations and liabilities of the former corporate director in relation to the CCIV become rights, obligations and liabilities of the new corporate director.
- (2) Despite subsection (1), the following rights and liabilities remain rights and liabilities of the former corporate director:
  - (a) any right of the former corporate director to be paid fees for the performance of its functions before it ceased to be the corporate director;
  - (b) any right of the former corporate director to be indemnified for expenses it incurred before it ceased to be the corporate director;
  - (c) any right, obligation or liability that the former corporate director had as a member of the CCIV;
  - (d) any liability for which the former corporate director could not have been indemnified out of the assets of the CCIV if it had remained the CCIV's corporate director;
  - (e) any liability arising out of a contravention by the former corporate director of a provision of this Act.

**1224ZB Effect of change of corporate director on documents etc. to which former corporate director is party**

- (1) If the corporate director of a CCIV changes, a document relating to the CCIV:
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- (a) to which the former corporate director is a party, in which a reference is made to the former corporate director, or under which the former corporate director has acquired or incurred a right, obligation or liability, or might have acquired or incurred a right, obligation or liability if it had remained the corporate director; and
  - (b) that is capable of having effect after the change, has effect as if the new corporate director (and not the former corporate director) were a party to it, were referred to in it or had or might have acquired or incurred the right, obligation or liability under it.
- (2) Subsection (1) does not apply to a right, obligation or liability that remains a right, obligation or liability of the former corporate director because of subsection 1224ZA(2).

**Subdivision D—Termination payments****1224ZC Member approval not needed for benefit specified in constitution**

Despite subsection 200AB(1), for the purposes of Division 2 of Part 2D.2, a ***benefit*** does not include a payment made by the CCIV to its corporate director if:

- (a) the corporate director is entitled to the payment under provisions of the constitution; and
- (b) for a retail CCIV—the provisions comply with section 1224N.

**1224ZD Modified member approval for CCIVs**

- (1) Sections 200B and 200C apply in relation to a benefit given by a CCIV as if:
- (a) the members whose approval is required under those provisions were the members of the sub-fund of the CCIV that would be affected by the giving of the benefit; and

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- (b) the member approval mentioned in paragraph (a) were required to be given under section 200E as modified by subsection (3) of this section.

Note: If the CCIV is a retail CCIV, there are additional restrictions on giving benefits: see section 1224N.

- (2) If the giving of the benefit would affect 2 or more sub-funds of the CCIV, then the approval of each affected sub-fund must be obtained in the way mentioned in subsection (1).

*Member approval*

- (3) Section 200E applies in relation to a CCIV as if a reference to a general meeting were instead a reference to a meeting of the members of the affected sub-fund.

**1224ZE Benefits paid to corporate director not covered by exemptions**

To avoid doubt, a benefit that is a payment to the corporate director of a CCIV is not a benefit to which paragraph 200F(1)(a), subsection 200F(2), or section 200G applies.

## **Division 3—Officers, employees and auditors of the corporate director**

### **Subdivision A—Officers and auditors of the corporate director**

#### **1225 Retail CCIV—duties owed by officers of corporate director**

- (1) An officer of the corporate director of a retail CCIV must, in performing functions and exercising powers relating to the CCIV:
  - (a) act honestly; and
  - (b) exercise the degree of care and diligence that a reasonable person would exercise in the officer's position; and
  - (c) act in the best interests of the members of the CCIV and, if there is a conflict between the interests of those members and the interests of the corporate director, give priority to the members' interests; and
  - (d) act in the best interests of the members, as a whole, of each sub-fund of the CCIV and:
    - (i) if there is a conflict between the interests of the members, as a whole, of a sub-fund and the interests of the corporate director, give priority to the members' interests; and
    - (ii) if there is a conflict between the interests of the members, as a whole, of a sub-fund and the best interests of the members of the CCIV, give priority to the interests of the members of the CCIV; and
  - (e) not make use of information acquired through being an officer of the corporate director in order to:
    - (i) gain an improper advantage for the officer or another person; or
    - (ii) cause detriment to the members of the CCIV; and
  - (f) not make improper use of their position as an officer to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the CCIV; and

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- (g) take all steps that a reasonable person would take, in the officer's position, to ensure that the corporate director complies with:
  - (i) this Act; and
  - (ii) any conditions imposed on the corporate director's Australian financial services licence; and
  - (iii) the CCIV's constitution; and
  - (iv) the CCIV's compliance plan.

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

- (2) A person must not intentionally or recklessly contravene, or be involved in a contravention of, subsection (1).

*Duties under this section prevail in case of conflict*

- (3) If there is a conflict between a duty owed by an officer of the corporate director of a retail CCIV under this section and a duty owed by the officer under Part 2D.1, the duty owed under this section prevails.

*Interaction with other laws etc.*

- (4) Subsection (1):
  - (a) has effect in addition to, and not in derogation of, any rule of law relating to the duty or liability of a person because of their office or employment in relation to a corporation; and
  - (b) does not prevent the commencement of civil proceedings for a breach of a duty or in respect of a liability referred to in paragraph (a).

**1225A Responsibility of secretary of corporate director for certain contraventions by CCIV**

A secretary of the corporate director of a CCIV contravenes subsection 188(1) if the CCIV contravenes a corporate responsibility provision.

Note: Subsection 188(1) is a civil penalty provision (see section 1317E).

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## 1225B Responsibility of secretary of corporate director for certain contraventions by corporate director

For the purposes of subsection 188(1) as it applies to the secretary of the corporate director, the provisions identified in column 1 of the following table, in addition to the provisions mentioned in subsection 188(1), are taken to be *corporate responsibility provisions*:

| <b>Provisions that are taken to be <i>corporate responsibility provisions</i></b> |   |   |
|---|---|---|
| <b>Item</b>   | <b>Column 1</b><br><b>Provision(s)</b>  | <b>Column 2</b><br><b>Topic</b>   |
| 1   | (a) subsection 1222L(3);<br>(b) subsection 1222L(7)                             | notifying ASIC of status as a retail CCIV or wholesale CCIV                                 |
| 2   | (a) subsection 1223C(5);<br>(b) subsection 1223D(3)                             | lodgement of modified or replaced constitution and notifying ASIC when changes takes effect |
| 3   | (a) subsection 1224T(3);<br>(b) subsection 1224U(4);<br>(c) subsection 1224W(8) | lodgement of notices about the corporate director of a CCIV                                 |
| 4   | (a) subsection 1226(3);<br>(b) subsection 1226D(4);<br>(c) subsection 1226E(3)  | lodgement of compliance plans etc.<br>(retail CCIV only)                                    |
| 5   | subsection 1226G(4)   | lodgement of report of auditor of compliance plan (retail CCIV only)                        |
| 6   | subsection 1226K(1)   | notifying ASIC when auditor of compliance plan changes (retail CCIV only)                   |
| 7   | subsection 1230J(5)   | lodgement of a redemption offer   |
| 8   | subsection 1230J(8)   | notifying ASIC of the cancellation of a redemption offer                                    |

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**1225C Extended obligation of directors of corporate director**

- (1) For the purposes of Division 2 of Part 2D.1, a material personal interest in a matter that relates to the affairs of a CCIV is treated as being a material personal interest in a matter that relates to the affairs of the corporate director of the CCIV.

Note: The effect of this subsection is that Division 2 of Part 2D.1 applies to directors of the corporate director of a CCIV in relation to material personal interests those directors have in matters relating to the affairs of the CCIV.

- (2) Subsection (1) does not affect the operation of Division 2 of Part 2D.1 in relation to an interest that, apart from that subsection, is a material personal interest in a matter that relates to the affairs of the corporate director.
- (3) For an offence based on subsection 191(1), as it applies to the director of a corporate director as a result of subsection (1) of this section, strict liability applies to the circumstance, that the director of the corporate director has a material personal interest in a matter that relates to the affairs of the CCIV.
- (4) For the purposes of determining under subsection 191(2) whether the director does not need to give notice of the interest, references in that subsection to the company are taken to be references to the CCIV, unless the reference is to the director's position as director, or officer, of the company.
- (5) Nothing in this section limits:
  - (a) the effect sections 191 and 192 have in relation to the director of the corporate director apart from this Subdivision; or
  - (b) the effect section 193 has in relation to sections 191 and 192 as those sections apply as a result of this section.

Note: Section 193 is about the interaction of sections 191 and 192 with other laws etc.

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**Section 1225D**

**1225D Right of access to CCIV books**

- (1) Section 198F applies in relation to a director of a corporate director of a CCIV as if the person were a director of the CCIV.
- (2) For the purposes of subsection (1), a person is taken to cease being a director of the CCIV if either of the following occurs:
  - (a) the person ceases to be a director of the corporate director;
  - (b) the company of which the person is a director ceases to be the corporate director of the CCIV.

**1225E Extended operation of sections 199A and 199B (about indemnities and insurance)**

- (1) The operation of sections 199A and 199B in relation to a CCIV and a related body corporate of a CCIV is extended by:
  - (a) treating an officer of the corporate director of the CCIV as an officer of the CCIV; and
  - (b) treating an auditor of the corporate director of the CCIV as an auditor of the CCIV.

Note: If the CCIV is a retail CCIV, there are additional restrictions: see section 1224N.

- (2) For the purposes of subsection (1), section 199B applies to a CCIV as if paragraph 199B(1)(b) included a reference to section 1225.

Note: For the duties relevant to the actual director of the CCIV, see subsection 1224D(8).

**Subdivision B—Employees of the corporate director**

**1225F Retail CCIV—duties owed by employees of corporate director**

- (1) An employee of the corporate director of a retail CCIV must not, in performing functions and exercising powers relating to the CCIV:
  - (a) make use of information acquired through being an employee of the corporate director in order to:

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

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

- (2) A person must not intentionally or recklessly contravene, or be involved in a contravention of, subsection (1).

*Duties under this section prevail in case of conflict*

- (3) If there is a conflict between a duty owed by an employee of the corporate director of a retail CCIV under this section and a duty owed by the employee under Part 2D.1, the duty owed under this section prevails.

*Interaction with other laws etc.*

- (4) Subsection (1):
- (a) has effect in addition to, and not in derogation of, any rule of law relating to the duty or liability of a person because of their office or employment in relation to a corporation; and
  - (b) does not prevent the commencement of civil proceedings for a breach of a duty or in respect of a liability referred to in paragraph (a).

## **Division 4—Compliance plan for retail CCIVs**

### **Subdivision A—Documenting the compliance plan**

#### **1226 Requirement for compliance plan**

- (1) A retail CCIV must have a compliance plan.

Note: A copy of the compliance plan must be lodged with ASIC with the application to register a CCIV that is to be a retail CCIV: see subsection 1222A(6).

- (2) A wholesale CCIV is not required to have a compliance plan.

- (3) A CCIV must lodge a copy of its compliance plan with ASIC within 14 days of becoming a retail CCIV. The copy must be signed by all the directors of the corporate director.

Note: Section 1222J defines *retail CCIV*.

- (4) An offence based on subsection (3) is an offence of strict liability.

#### **1226A Contents of the compliance plan**

The compliance plan of a retail CCIV must set out adequate measures that the corporate director is to apply in fulfilling its responsibilities in relation to the CCIV to ensure compliance with this Act and the CCIV's constitution.

#### **1226B Compliance plan may incorporate provisions from another CCIV's plan**

- (1) The compliance plan of a retail CCIV may be expressed to incorporate specified provisions of a compliance plan of another CCIV, provided both CCIVs have the same corporate director. The provisions may be incorporated as in force at a specified time, or as in force from time to time.

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- (2) The specified provisions, as in force at the specified time, or as in force from time to time (as the case requires) are taken to be included in the plan.

### **1226C ASIC may require further information about compliance plan**

- (1) ASIC may give the corporate director of a retail CCIV a direction, in writing, to give ASIC information about the arrangements contained in the compliance plan. The direction must specify the period (which must be at least 14 days after the direction is given) within which the corporate director must give the information.
- (2) The corporate director must comply with the direction within the period specified.
- (3) An offence based on subsection (2) is an offence of strict liability.

### **1226D Changing the compliance plan**

#### *Corporate director's powers*

- (1) The corporate director of a CCIV may modify the CCIV's compliance plan or repeal it and replace it with a new compliance plan.

#### *ASIC may require modifications*

- (2) ASIC may give the corporate director of a retail CCIV a direction, in writing, to modify the CCIV's compliance plan, as set out in the direction, to ensure that the plan is consistent with section 1226A. The direction must specify the period (which must be at least 14 days after the direction is given) within which the corporate director must make the modification.
- (3) The corporate director must comply with the direction within the period specified.

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**Section 1226E***Lodgement of modification or new plan*

- (4) The corporate director must lodge with ASIC a copy of a modification of the CCIV's compliance plan or of a new compliance plan within 14 days after the modification is made or the old plan is repealed. The copy must be signed by all the directors of the corporate director.
- (5) An offence based on subsection (3) or (4) is an offence of strict liability.

**1226E ASIC may require consolidation of compliance plan to be lodged**

- (1) ASIC may give the corporate director of a retail CCIV a direction, in writing, to lodge a consolidated copy of the CCIV's compliance plan with ASIC. The direction must specify the period (which must be at least 14 days after the direction is given) within which the corporate director must lodge the consolidation.
- (2) The consolidation must set out:
  - (a) the plan as modified to the time of lodgement; and
  - (b) if required by ASIC's direction—the full text of provisions taken to be included in the plan by subsection 1226B(2).
- (3) The corporate director must comply with the direction within the period specified in the notice.
- (4) An offence based on subsection (3) is an offence of strict liability.

**Subdivision B—Auditing the compliance plan****1226F Engaging auditor**

- (1) The corporate director of a retail CCIV must ensure that at all times a registered company auditor, an audit firm or an authorised audit company is engaged to audit compliance with the CCIV's compliance plan in accordance with this section. This auditor, firm or company is referred to as the *auditor of the compliance plan*.

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- (2) An offence based on subsection (1) is an offence of strict liability.
- (3) A person is not eligible to act as the individual auditor, lead auditor or review auditor of a CCIV's compliance plan if the person is:
  - (a) the corporate director; or
  - (b) an associate of the corporate director; or
  - (c) a person who holds money or property of the CCIV; or
  - (d) an associate of a person covered by paragraph (c); or
  - (e) the auditor of the corporate director's financial statements.
- (4) However:
  - (a) the auditor of the compliance plan and the auditor of the corporate director's financial statements may work for the same firm of auditors or audit company; and
  - (b) the lead auditor or review auditor of the compliance plan (on the one hand) and the lead auditor or review auditor of the corporate director's financial statements (on the other hand) may work for the same firm of auditors or audit company.
- (5) This Subdivision does not prevent the corporate director from arranging for the auditor of the compliance plan to carry out audits in addition to those required by this Subdivision.

## 1226G Audit and audit report

- (1) Within 3 months after the end of a financial year of the retail CCIV, the auditor of the compliance plan must:
  - (a) examine the CCIV's compliance plan; and
  - (b) carry out:
    - (i) if the CCIV has only had one corporate director during the financial year—an audit of the corporate director's compliance with the compliance plan during the financial year; or
    - (ii) if the CCIV has had more than one corporate director during the financial year—an audit of each corporate director's compliance with the compliance plan during

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- that part of the financial year when it was the CCIV's corporate director; and
- (c) give to the CCIV's current corporate director a report that states whether, in the auditor's opinion:
- (i) the corporate director, or each corporate director, complied with the CCIV's compliance plan during the financial year or that part of the financial year when it was the CCIV's corporate director; and
  - (ii) the plan continues to meet the requirements of this Division.
- (2) The auditor of the compliance plan:
- (a) has a right of access at all reasonable times to the books of the CCIV; and
  - (b) may require an officer of the corporate director to give the auditor information and explanations for the purposes of the audit.
- (3) An officer of the corporate director must:
- (a) allow the auditor of the compliance plan to have access to the books of the CCIV; and
  - (b) give the auditor information or an explanation required under subsection (2); and
  - (c) otherwise assist the conduct of the audit.
- (4) The corporate director must lodge the auditor's report under subsection (1) with ASIC at the same time as the financial statements and reports in respect of the CCIV are to be lodged with ASIC (see sections 292, 319 and 1232C).
- (5) The auditor of the compliance plan has qualified privilege in respect of:
- (a) a statement made in a report under subsection (1); or
  - (b) a notification to ASIC under any of the following:
    - (i) paragraph 1226H(1)(c);
    - (ii) paragraph 1226H(2)(c);
    - (iii) paragraph 1226H(3)(d).

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- (6) An offence based on subsection (1), (3) or (4) is an offence of strict liability.

### **1226H Contraventions by auditor**

#### *Contravention by individual auditor*

- (1) An individual auditor conducting an audit of a compliance plan contravenes this subsection if:
- (a) the auditor is aware of circumstances that:
    - (i) the auditor has reasonable grounds to suspect amount to a contravention of this Act; or
    - (ii) amount to an attempt, in relation to the audit, by any person to unduly influence, coerce, manipulate or mislead a person involved in the conduct of the audit (see subsection (7)); or
    - (iii) amount to an attempt, by any person, to otherwise interfere with the proper conduct of the audit; and
  - (b) if subparagraph (a)(i) applies:
    - (i) the contravention is a significant one; or
    - (ii) the contravention is not a significant one and the auditor believes that the contravention has not been or will not be adequately dealt with by commenting on it in the auditor's report or bringing it to the attention of the directors; and
  - (c) the auditor does not notify ASIC in writing of those circumstances as soon as practicable, and in any case within 28 days, after the auditor becomes aware of those circumstances.

#### *Contravention by audit company*

- (2) An audit company conducting an audit of a compliance plan contravenes this subsection if:
- (a) the lead auditor for the audit is aware of circumstances that:
    - (i) the lead auditor has reasonable grounds to suspect amount to a contravention of this Act; or

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- (ii) amount to an attempt, in relation to the audit, by any person to unduly influence, coerce, manipulate or mislead a person involved in the conduct of the audit (see subsection (7)); or
- (iii) amount to an attempt, by any person, to otherwise interfere with the proper conduct of the audit; and
- (b) if subparagraph (a)(i) applies:
  - (i) the contravention is a significant one; or
  - (ii) the contravention is not a significant one and the lead auditor believes that the contravention has not been or will not be adequately dealt with by commenting on it in the auditor's report or bringing it to the attention of the directors; and
- (c) the lead auditor does not notify ASIC in writing of those circumstances as soon as practicable, and in any case within 28 days, after the lead auditor becomes aware of those circumstances.

*Contravention by lead auditor*

- (3) A person contravenes this subsection if:
  - (a) the person is the lead auditor for an audit of a compliance plan; and
  - (b) the person is aware of circumstances that:
    - (i) the person has reasonable grounds to suspect amount to a contravention of this Act; or
    - (ii) amount to an attempt, in relation to the audit, by any person to unduly influence, coerce, manipulate or mislead a person involved in the conduct of the audit (see subsection (7)); or
    - (iii) amount to an attempt, by any person, to otherwise interfere with the proper conduct of the audit; and
  - (c) if subparagraph (b)(i) applies:
    - (i) the contravention is a significant one; or
    - (ii) the contravention is not a significant one and the person believes that the contravention has not been or will not

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be adequately dealt with by commenting on it in the auditor's report or bringing it to the attention of the directors; and

- (d) the person does not notify ASIC in writing of those circumstances as soon as practicable, and in any case within 28 days, after the person becomes aware of those circumstances.

*Significant contraventions*

- (4) In determining for the purposes of this section whether a contravention of this Act is a significant one, have regard to:
- (a) the level of penalty provided for in relation to the contravention; and
  - (b) the effect that the contravention has, or may have, on:
    - (i) the overall financial position of a sub-fund of the CCIV; or
    - (ii) the adequacy of the information available about the overall financial position of a sub-fund of the CCIV; and
  - (c) any other relevant matter.
- (5) Without limiting paragraph (4)(a), a penalty provided for in relation to a contravention of a provision of Part 2M.2 or 2M.3 includes a penalty for failing to take reasonable steps to comply with, or to secure compliance with, that provision imposed on each of the following:
- (a) the corporate director, because of the operation of sections 344 and 1232T;
  - (b) a director of the corporate director, because of the operation of sections 344 and 1232T.

*Fault-based offence*

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

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*Person involved in audit*

(7) In this section:

**person involved in the conduct of an audit** means:

- (a) the auditor; or
- (b) the lead auditor for the audit; or
- (c) the review auditor for the audit; or
- (d) a professional member of the audit team for the audit; or
- (e) any other person involved in the conduct of the audit.

## **1226J Removal and resignation of auditors**

*Removal of auditor by corporate director*

(1) The corporate director of a retail CCIV:

- (a) must remove the auditor of the compliance plan if the auditor becomes ineligible under subsection 1226F(3) to act as auditor of the compliance plan; and
- (b) may, with ASIC's written consent, remove the auditor of the compliance plan.

(2) An offence based on paragraph (1)(a) is an offence of strict liability.

*Resignation of auditor*

(3) The auditor of the compliance plan may resign by written notice to the corporate director if:

- (a) the auditor:
  - (i) applies to ASIC in writing for its consent to the resignation; and
  - (ii) gives the corporate director written notice of the application at or about the same time as applying to ASIC; and
- (b) ASIC consents to the resignation.

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- (4) As soon as practicable after receiving the application, ASIC must notify the auditor and the corporate director whether it consents to the resignation.
  - (5) A statement by the auditor in the application or in answer to an inquiry by ASIC relating to the reasons for the application:
    - (a) is not admissible in evidence in any civil or criminal proceedings against the auditor (other than proceedings for a contravention of section 1308); and
    - (b) may not be made the ground of a prosecution (other than a prosecution for a contravention of section 1308), action or suit against the auditor.
- A certificate by ASIC that the statement was made in the application, or in answer to an inquiry by ASIC, is conclusive evidence that the statement was so made.
- (6) The auditor's resignation takes effect on the later of:
    - (a) the day (if any) specified in the notice of resignation; or
    - (b) the day ASIC consents to the resignation; or
    - (c) the day (if any) fixed by ASIC for the purpose.

## 1226K Action on change of auditor of compliance plan

- (1) If the auditor of the compliance plan of a retail CCIV changes, the corporate director must, within 7 days and in the prescribed form, ask ASIC to alter the record of the CCIV's registration to show the name of the new auditor as the auditor of the CCIV's compliance plan. ASIC must comply with the request if the change complies with this Act.
- (2) An offence based on subsection (1) is an offence of strict liability.

## **Division 5—Member protection**

### **Subdivision A—Related party transactions by retail CCIVs to be approved at sub-fund level**

#### **1227 Application of Chapter 2E to retail CCIVs**

- (1) Subject to this Part, Chapter 2E applies:
  - (a) to a retail CCIV in the same way as it applies to a public company; and
  - (b) to an entity a retail CCIV controls in the same way as it applies to an entity a public company controls.
- (2) In its application in relation to a retail CCIV, the members whose interests the rules in Chapter 2E are designed to protect are:
  - (a) if one sub-fund would be affected by the giving of the relevant financial benefit to the related party—the members, as a whole, of that sub-fund; or
  - (b) if 2 or more sub-funds would be affected by the giving of the relevant financial benefit to the related party—the members, as a whole, of each such sub-fund.
- (3) Chapter 2E does not apply to a wholesale CCIV.

#### **1227A Need for member approval for financial benefit**

- (1) Section 208 applies in relation to a retail CCIV as if:
  - (a) the members whose approval is required to be obtained under subparagraph 208(1)(a)(i) were the members of the sub-fund of the CCIV that would be affected by the giving of the financial benefit; and
  - (b) the member approval mentioned in paragraph (a) were required to be given in the way set out in sections 217 to 227 (as modified by this Part).

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Note 1: For the civil and criminal liability of a person involved in a contravention of section 208 as it applies to a retail CCIV under this section, see section 209.

Note 2: For provisions about meetings of members of sub-funds, see section 1228A.

Note 3: Some kinds of financial benefits are prohibited by sections 199A to 199C. For CCIVs, those sections have an extended application: see section 1225E.

- (2) If the giving of a financial benefit would affect 2 or more sub-funds of the CCIV, paragraph 208(1)(a) applies as if it required the CCIV or entity to:
- obtain the approval of each affected sub-fund in the way mentioned in subsection (1) of this section; and
  - give the benefit within 15 months after the first such approval is given.

*Exception for certain fees and indemnities payable to corporate director*

- (3) Subsection 208(1) does not apply in relation to a financial benefit if:
- the financial benefit is fees, or an indemnity, to be given to the corporate director by the CCIV; and
  - the corporate director is entitled to the fees, or the indemnity, under provisions of the constitution; and
  - the provisions comply with section 1224N (about fees and indemnities must be available only in relation to the proper performance of duties).

**1227B Exceptions not available for a retail CCIV**

- (1) The following provisions of Division 2 of Part 2E.1 do not apply where the financial benefit is, or is to be, given by a retail CCIV:
- section 211 (which deals with remuneration and reimbursement for an officer or employee);
  - section 213 (which deals with small amounts given to a related party);

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- (c) section 214 (which deals with financial benefits given to a closely held subsidiary).
- (2) Subsection (1) does not affect the application of those provisions where the financial benefit is, or is to be, given by an entity the retail CCIV controls.

**1227C Requirements for explanatory statement to members**

- (1) Section 219 applies to a retail CCIV as if:
  - (a) the requirements in paragraphs 219(1)(c) and (d) applied in relation to:
    - (i) the corporate director of the CCIV; and
    - (ii) each director of the corporate director of the CCIV; and
  - (b) the requirement in paragraph 219(1)(e) were a requirement to set out all other information that:
    - (i) is reasonably required by members in order to decide whether or not it is in the sub-fund's interests to pass the proposed resolution; and
    - (ii) is known to the corporate director of the CCIV or to any of the directors of the corporate director of the CCIV.
- (2) An example of the kind of information referred to in paragraph (1)(b) is the kind of information mentioned in subsection 219(2).

**1227D Modified references**

Division 3 of Part 2E.1 of Chapter 2E applies in relation to a retail CCIV as if:

- (a) a reference to a general meeting were instead a reference to a meeting of the members of the affected sub-fund; and
- (b) a reference to section 250D were instead a reference to section 253B.

**1227E Related parties of a CCIV**

- (1) Section 228 does not apply in relation to a CCIV.
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*Corporate director etc*

- (2) The following are related parties of a CCIV:
  - (a) the corporate director of the CCIV;
  - (b) an entity that controls the corporate director of the CCIV.

*Directors and their spouses*

- (3) The following persons are related parties of a CCIV:
  - (a) directors of the corporate director of the CCIV;
  - (b) directors (if any) of an entity that controls the corporate director of the CCIV;
  - (c) if the corporate director of the CCIV is controlled by an entity that is not a body corporate—each of the persons making up the controlling entity;
  - (d) spouses of the persons referred to in paragraphs (a), (b) and (c).

*Relatives of directors and spouses*

- (4) The following relatives of persons referred to in subsection (3) are related parties of the CCIV:
  - (a) parents;
  - (b) children.

*Entities controlled by other related parties*

- (5) An entity controlled by a related party referred to in subsection (2), (3) or (4) is a related party of the CCIV unless the entity is also controlled by the CCIV.

*Related party in previous 6 months*

- (6) An entity is a related party of a CCIV at a particular time if the entity was a related party of the CCIV of a kind referred to in subsection (2), (3), (4) or (5) at any time within the previous 6 months.

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*Entity has reasonable grounds to believe it will become related party in future*

- (7) An entity is a related party of a CCIV at a particular time if the entity believes or has reasonable grounds to believe that it is likely to become a related party of the CCIV of a kind referred to in subsection (2), (3), (4) or (5) at any time in the future.

*Acting in concert with related party*

- (8) An entity is a related party of a CCIV if the entity acts in concert with a related party of the CCIV on the understanding that the related party will receive a financial benefit if the CCIV gives the entity a financial benefit.

## **Subdivision B—Rights and remedies of members of a CCIV**

### **1227F Grounds for Court order**

In addition to the grounds in section 232, the Court may also make an order under section 233, in respect of a CCIV, if a matter listed in paragraph 232(a), (b) or (c) is contrary to the interests of the members as a whole of one or more sub-funds of the CCIV.

### **1227G Orders the Court can make**

*Court may appoint receiver etc. of any or all of a sub-fund's property*

- (1) Paragraph 233(1)(h) has effect in relation to a CCIV as if the reference in that paragraph to the company's property were instead a reference to the property of a sub-fund of the CCIV.

Note: A receiver may only be appointed in relation to property of a particular sub-fund of a CCIV: see section 1236B.

*Order altering constitution*

- (2) Subsection 233(3) applies to a CCIV as if the reference to section 136 were instead a reference to:

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- (a) if the CCIV is a retail CCIV—section 1223D; or
- (b) if the CCIV is a wholesale CCIV—the CCIV’s constitution.

### **1227H Applying for and granting leave**

- (1) For the purposes of subsection 237(3), a person is a third party if the company is a CCIV and the person is not a related party of the CCIV.
- (2) Paragraph 237(4)(a) does not apply to a CCIV.

Note: *Related party*, in relation to a CCIV, is defined in section 1227E.

### **1227J Varying and cancelling class rights**

In its application to a CCIV whose constitution does not set out the procedure for varying or cancelling rights attached to shares in a class of shares, subsection 246B(2) is taken to require a special resolution of the members of the sub-fund of the CCIV to which the shares are referable, instead of a special resolution of the CCIV.

Note: Paragraphs 246B(2)(c) and (d) will also require either a special resolution of members of the affected class or the written consent of members with at least 75% of the votes in the class.

### **1227K Certain actions taken to vary rights etc.**

If:

- (a) a CCIV has a sub-fund to which only one class of shares is referable (the *existing shares*); and
- (b) the CCIV issues new shares that are also referable to that sub-fund; and
- (c) the rights attaching to the new shares are not the same as the rights attached to the existing shares; and
- (d) the rights attaching to the new shares are not provided for in:
  - (i) the CCIV’s constitution; or
  - (ii) a notice, document or resolution that is lodged with ASIC;

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the issue is taken to vary the rights attached to the existing shares.

**1227L Company must lodge documents and resolutions with ASIC**

Subsection 246F(3) applies to a CCIV in the same way as it applies to a public company.

Note: Failure to comply with subsection 246F(3) is an offence: see subsection 1311(1) and Schedule 3.

**Subdivision C—Civil liability of corporate director to members**

**1227M Civil liability of corporate director to members**

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

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## **Division 6—Meetings**

### **Subdivision A—Directors' meetings**

#### **1228 Resolutions of CCIVs**

- (1) The corporate director of a CCIV may pass a resolution by the directors of the corporate director passing a resolution that:
  - (a) expressly states that the resolution is passed on behalf of the corporate director in its capacity as corporate director; and
  - (b) if the corporate director is the corporate director of more than one CCIV—expressly states the CCIV on behalf of which the resolution is passed.
- (2) Part 2G.1 (about directors' meetings) does not apply to a CCIV.
- (3) To avoid doubt, subsection (2) does not affect:
  - (a) the application of Part 2G.1 to a resolution of, or a meeting of, the directors of the corporate director of a CCIV; or
  - (b) the application of Part 2G.3 (about minutes and members' access to minutes) to a resolution passed under subsection (1).

### **Subdivision B—Meetings of members of CCIVs or sub-funds**

#### **1228A Meetings of members of CCIVs**

- (1) Parts 2G.2 (about meetings of members of companies) and 2G.3 (about minutes and members' access to minutes) do not apply to a CCIV or its members.
- (2) Subject to the modifications set out in this Subdivision, Part 2G.4 (about meetings of members of registered managed investment schemes) applies in relation to a CCIV and its members as if:
  - (a) the CCIV were a registered scheme; and
  - (b) the members of the CCIV were the members of that scheme; and

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- (c) the corporate director of the CCIV were the responsible entity of that scheme; and
  - (d) the CCIV's constitution were the scheme's constitution; and
  - (e) the CCIV's compliance plan were the compliance plan of that scheme.
- (3) Any power to prescribe, for the purposes of a provision of Part 2G.4, a number of members of a particular registered scheme or class of scheme includes a power to prescribe, for the purposes of that provision as it applies under this section, a number of members of:
- (a) a particular CCIV; or
  - (b) a particular class of CCIV.

Note: Subsections 252B(1A), 252L(1A) and 252N(2A) provide for the prescribing of numbers of members.

**1228B Meetings of members of sub-funds**

- (1) Subject to the modifications set out in this Subdivision, Part 2G.4 (about meetings of members of registered managed investment schemes) applies in relation to a sub-fund of a CCIV and the members of the sub-fund as if:
  - (a) the sub-fund were a registered scheme; and
  - (b) the members of the sub-fund were the members of that scheme; and
  - (c) the corporate director of the CCIV were the responsible entity of that scheme; and
  - (d) the CCIV's constitution were the scheme's constitution; and
  - (e) the CCIV's compliance plan were the compliance plan of that scheme.
- (2) Any power to prescribe, for the purposes of a provision of Part 2G.4, a number of members of a particular registered scheme or class of scheme includes a power to prescribe, for the purposes of that provision as it applies under this section, a number of members of:
  - (a) a particular sub-fund of a CCIV; or

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- (b) a particular class of sub-funds of one or more CCIVs.

Note: Subsections 252B(1A), 252L(1A) and 252N(2A) provide for the prescribing of numbers of members.

## 1228C Auditors of scheme compliance plans

In applying a provision of Part 2G.4 in relation to a wholesale CCIV, or a sub-fund of a wholesale CCIV, disregard any application of the provision in relation to the auditor of the scheme compliance plan.

Note: Provisions that apply in relation to the auditor of the scheme compliance plan are subsections 252G(1), 252H(1) and 252T(1).

## 1228D Copy of the register of members—sub-funds

- (1) Subsection 252C(3) does not apply in relation to a CCIV or a sub-fund of a CCIV.
- (2) To call a meeting of the members of a CCIV, the members requesting the meeting may ask the CCIV under section 173 for a copy of the register of members.
- (3) To call a meeting of the members of a sub-fund of a CCIV, the members requesting the meeting may ask the CCIV under section 173 for a copy of so much of the register of members as relates to membership of the sub-fund.
- (4) Despite paragraph 173(3)(b), the CCIV must, without charge, give the members requesting the meeting:
  - (a) if subsection (2) of this section applies—the copy of the register; or
  - (b) if subsection (3) of this section applies—so much of the register of members as relates to membership of the sub-fund.
- (5) An offence based on subsection (4) is an offence of strict liability.

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## 1228E Members' resolutions

- (1) Subsection 252L(1B) applies in relation to a CCIV as if:
  - (a) the requirement in paragraph 252L(1B)(c) that the registered scheme be listed did not apply; and
  - (b) the resolution is subject to a further requirement that it must not treat members of any sub-fund of the CCIV differently from members of any other sub-fund of the CCIV.

Note: The effect of paragraph (1)(a) is that subsection 252L(1B) will apply to all CCIVs, including a CCIV that is a listed company.

- (2) Subsection 252L(1B) applies in relation to one or more sub-funds of a CCIV as if:
  - (a) paragraph 252L(1B)(c) did not apply; and
  - (b) the resolution is subject to a further requirement that it must not affect the interests of any member of any other sub-fund of the CCIV.

Note: A CCIV that is a listed company has only one sub-fund, see section 1222N.

## 1228F Voting at meetings of members

- (1) Sections 253C and 253D do not apply in relation to a CCIV or a sub-fund of a CCIV.
- (2) At a meeting of members of a CCIV:
  - (a) on a show of hands, each member has 1 vote; and
  - (b) on a poll, each member has 1 vote for each dollar of the value of the total shares in the CCIV that the member holds; and
  - (c) the chair has a casting vote, and also, if the chair is a member, any vote the chair has in the chair's capacity as a member; and
  - (d) if a share is held jointly and more than one member votes in respect of that share—only the vote of the member whose name appears first in the register of members counts.
- (3) At a meeting of members of a sub-fund of a CCIV:
  - (a) on a show of hands, each member has 1 vote; and

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- (b) on a poll, each member has 1 vote for each dollar of the value of the total shares in the CCIV that:
  - (i) are held by the member; and
  - (ii) are referable to the sub-fund; and
- (c) the chair has a casting vote, and also, if the chair is a member, any vote the chair has in the chair's capacity as a member; and
- (d) if a share that is referable to the sub-fund is held jointly and more than one member votes in respect of that share—only the vote of the member whose name appears first in the register of members counts.

## **1228G Corporate director and associates cannot vote if interested in resolution**

- (1) Section 253E applies in relation to a CCIV as if the associates of the corporate director of the CCIV were also the CCIV's associates.
- (2) Section 253E applies in relation to a sub-fund of a CCIV as if the associates of the corporate director of the CCIV, and the CCIV's associates, were also the sub-fund's associates.

## **1228H How to work out the value of a share**

- (1) For the purposes of section 1228F, the value of a share in a CCIV is the amount worked out under this section.
- (2) The value of a share in a CCIV (other than a share to which subsection (3), (4) or (5) applies) is the amount that the corporate director of the CCIV determines in writing to be the price that a willing but not anxious buyer would pay for the share if it was sold on the business day immediately before the day on which the poll is taken.
- (3) The value of a share in a listed CCIV is the last sale price on the relevant declared financial market on the trading day immediately before the day on which the poll is taken.

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- (4) The value of a share in a retail CCIV where:
- (a) the CCIV is not listed; and
  - (b) the share is redeemable; and
  - (c) the share is referable to a sub-fund to which section 1230H applies (about when a sub-fund is liquid);
- is the amount that, under the constitution of the CCIV, would be paid to redeem the share on the business day immediately before the day on which the poll is taken.
- (5) The value of a share in a wholesale CCIV where:
- (a) the share is redeemable; and
  - (b) the share is referable to a sub-fund to which section 1230H applies (about when a sub-fund is liquid); and
  - (c) the CCIV has a provision in its constitution as to the amount to be paid for redeeming the share;
- is the amount that, under the provision, would be paid to redeem the share on the business day immediately before the day on which the poll is taken.
- (6) Section 253F does not apply in relation to a CCIV or a sub-fund of a CCIV.

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**Division 7—Corporate contraventions**

**Subdivision A—General provisions relating to establishing civil and criminal liability under Commonwealth laws**

**1229 Application of this Subdivision**

This Subdivision applies to a CCIV in relation to all laws of the Commonwealth.

**1229A Other rules for corporate contraventions do not apply**

*Part 2.5 of Criminal Code does not apply*

- (1) Part 2.5 of the *Criminal Code* does not apply in determining whether a body corporate that is a CCIV has committed an offence.

Note: Section 1229B applies instead.

*Other rules for corporate contraventions do not apply*

- (2) A provision of a law of the Commonwealth (other than this Subdivision) does not apply in relation to a CCIV to the extent the provision would, apart from this subsection:
  - (a) treat conduct (however described) engaged in by a person other than a CCIV as having been engaged in by the CCIV; or
  - (b) treat conduct (however described) engaged in by a person in relation to another person other than a CCIV as having been engaged in by the person in relation to the CCIV; or
  - (c) treat a state of mind (however described) held by a person other than a CCIV as being sufficient to show that the CCIV had the state of mind; or
  - (d) require an element of:
    - (i) an offence; or
    - (ii) a provision in relation to a contravention of which a civil penalty may be imposed;

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done by a person other than a CCIV to be attributed to the CCIV.

Note 1: Section 1229B applies instead.

Note 2: For paragraph (a), an example is subsection 769B(1).

Note 3: For paragraph (b), an example is subsection 769B(2).

Note 4: For paragraph (c), an example is subsection 769B(3).

Note 5: For paragraph (d), an example is section 1317QE.

## **1229B General rule for attributing conduct and state of mind to a CCIV**

### *Attributing conduct to a CCIV*

- (1) Conduct engaged in by a person (other than a CCIV) is taken to have been engaged in also by a CCIV if:
  - (a) the person is specified in column 1 of an item of the table in subsection (4) in relation to the CCIV; and
  - (b) the conduct was engaged in on behalf of the CCIV; and
  - (c) in engaging in the conduct, the person met any conditions specified in column 2 of that item of the table.

### *Attributing conduct to a person in relation to a CCIV*

- (2) Conduct engaged in by a person in relation to another person (other than a CCIV) (the **counterparty**) is taken to have also been engaged in in relation to a CCIV if:
  - (a) the counterparty is specified in column 1 of an item of the table in subsection (4) in relation to the CCIV; and
  - (b) the counterparty was acting on behalf of the CCIV; and
  - (c) in acting on behalf of the CCIV, the counterparty met any conditions specified in column 2 of that item of the table.

Note: For example, money given to a person specified in column 1 of an item of the table in relation to a CCIV is taken to have been given to the CCIV, if the person was acting on behalf of the CCIV when they received the money.

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*Attributing state of mind to a CCIV*

- (3) If, for the purposes of a provision of a law of the Commonwealth, it is necessary to establish a CCIV's state of mind in relation to particular conduct, it is sufficient to show that:
- a person specified in column 1 of an item of the table in subsection (4) in relation to the CCIV engaged in the conduct on behalf of the CCIV; and
  - in engaging in the conduct, the person met any conditions specified in column 2 of that item of the table; and
  - the person had that state of mind.

*Specified persons and applicable conditions*

- (4) For the purposes of subsections (1), (2) and (3), the table is as follows:

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| <b>Persons whose conduct and state of mind may be attributed to a CCIV</b> |   |   |
|--|---|---|
| <b>Item</b>  | <b>Column 1</b><br><b>Person specified for a CCIV:</b>  | <b>Column 2</b><br><b>Condition:</b>  |
| 1  | An agent of the CCIV (other than an agent covered by subsection (5))  | the agent was acting within the scope of that agent's actual or apparent authority in relation to the CCIV.                                 |
| 2  | A director of the CCIV  | no specified conditions.  |
| 3  | An employee, director or agent (an <i>official</i> ) of the corporate director of the CCIV  | the official was acting within the scope of the official's actual or apparent authority in relation to the corporate director.              |
| 4  | Any other person acting at the direction, or with the consent or agreement (whether express or implied) of, a person (the <i>first person</i> ) specified in another item of this table in relation to the CCIV | in giving the direction, consent or agreement, the first person meets any conditions specified in this column of the applicable table item. |

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- (5) For the purposes of item 1 of the table in subsection (4), this subsection covers the following:
- (a) an agent who is, or is appointed by, a receiver, or receiver and manager, of property of a sub-fund of the CCIV;
  - (b) an agent who is, or is appointed by, a liquidator or provisional liquidator of a sub-fund of the CCIV;
  - (c) an agent who is, or is appointed by, a trustee or other person administering a compromise or arrangement made between the CCIV and someone else.
- (6) For the purposes of this section, treat a person as acting on behalf of a CCIV if the person acted on behalf of the corporate director of the CCIV in its capacity as director of the CCIV.

*Interpretation*

- (7) In this section:

*conduct* has the same meaning as it has in section 769B.

*state of mind* has the same meaning as it has in section 769B.

**1229C Exceptions etc. specific to this Act**

Nothing in this Subdivision excludes or limits the operation of section 1224M.

**Subdivision B—Consequences of contraventions of Commonwealth laws****1229D Corporate director generally taken to commit offences committed by CCIV**

- (1) This section applies if:
- (a) a CCIV commits an offence against a law of the Commonwealth; and
  - (b) the conduct constituting the offence was not engaged in by the CCIV solely as a result of an exercise of powers by:
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- (i) a liquidator or provisional liquidator of a sub-fund of the CCIV; or
- (ii) a receiver, or receiver and manager, of the property of a sub-fund of the CCIV; or
- (iii) a trustee or other person administering a compromise or arrangement made between the CCIV and someone else.

*Corporate director taken to also commit the offence*

- (2) The person who was the corporate director of the CCIV at the time of the commission of the offence is taken to also commit the offence.
- (3) To avoid doubt, despite subsection 13.3(3) of the *Criminal Code*, a person referred to in subsection (2) does not bear an evidential burden in relation to any matter in subsection (1) of this section.

*CCIV not liable for any penalty*

- (4) The CCIV is not liable for any penalty in respect of the offence.

*Infringement notices*

- (5) If, as a result of the operation of subsection (2), an infringement notice (however described) may be given under a law of the Commonwealth to a person who was the corporate director of a CCIV for an alleged commission of an offence by the person:
  - (a) the person may be given the infringement notice; and
  - (b) the CCIV may not be given an infringement notice for the alleged commission of the offence.

**1229E Corporate director generally liable for civil penalties for which the CCIV would be liable**

- (1) This section applies if:
  - (a) a CCIV contravenes a provision covered by subsection (2); and

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- (b) the conduct constituting the contravention was not engaged in by the CCIV solely as a result of an exercise of powers by:
  - (i) a liquidator or provisional liquidator of a sub-fund of the CCIV; or
  - (ii) a receiver, or receiver and manager, of the property of a sub-fund of the CCIV; or
  - (iii) a trustee or other person administering a compromise or arrangement made between the CCIV and someone else.

*Commonwealth civil penalty provisions*

- (2) This subsection covers a provision (a **Commonwealth civil penalty provision**) that is:
  - (a) a civil penalty provision (within the meaning of this Act); or
  - (b) a provision of a law of the Commonwealth (other than this Act), if a civil penalty may be imposed in relation to a contravention of the provision.

*Corporate director taken to also contravene the provision*

- (3) The person who was the corporate director of the CCIV at the time of the contravention is taken to also contravene the provision.

Note: This subsection applies whether or not a declaration of contravention by the CCIV has been made by a Court.

*CCIV not liable*

- (4) The CCIV is not liable for any penalty in respect of the contravention.

*Infringement notices*

- (5) If, as a result of the operation of subsection (3), an infringement notice (however described) may be given under a law of the Commonwealth to a person who was the corporate director of a CCIV for an alleged contravention by the person of a Commonwealth civil penalty provision:
    - (a) the person may be given the infringement notice; and
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- (b) the CCIV may not be given an infringement notice for the alleged contravention.

**Subdivision C—Consequences of contraventions of State and Territory laws**

**1229F Compensation orders—State and Territory laws**

*Compensation for penalties incurred etc.*

- (1) A Court may on application under subsection (5) order a person to compensate a CCIV for loss or damage suffered by the CCIV if:
  - (a) the CCIV contravened, or allegedly contravened, a provision covered by subsection (2); and
  - (b) the loss or damage is:
    - (i) a pecuniary penalty to which the CCIV is liable in respect of the contravention or alleged contravention; or
    - (ii) an amount paid by the CCIV in settlement of proceedings in respect of the contravention or alleged contravention; and
  - (c) the person was the corporate director of the CCIV at the time of the contravention or alleged contravention; and
  - (d) the exception in subsection (3) does not apply.

The order must specify the amount of the compensation.

*State and Territory offences and civil penalty provisions*

- (2) A provision of a law of a State or Territory is covered by this subsection if a contravention of the provision is an offence, or subject to a civil penalty.

*Exception where liquidator etc. acting*

- (3) Subsection (1) does not apply if the conduct constituting the contravention or alleged contravention was engaged in solely as a result of an exercise of powers by:

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- (a) a liquidator or provisional liquidator of a sub-fund of the CCIV; or
- (b) a receiver, or receiver and manager, of the property of a sub-fund of the CCIV; or
- (c) a trustee or other person administering a compromise or arrangement made between the CCIV and someone else.

*Recovery of damage*

- (4) A compensation order may be enforced as if it were a judgment of the Court.

*Who may apply*

- (5) An application for a compensation order under this section may be made by any of the following:
  - (a) ASIC;
  - (b) a member of the CCIV;
  - (c) the CCIV.

*Other laws not affected*

- (6) This section does not affect any liability that a person has under any other law.

**1229G Time limit for application for compensation order**

Proceedings for a compensation order may be started not later than:

- (a) for a proven contravention—6 years after the contravention was proved; or
- (b) for an unproven contravention—6 years after the contravention or alleged contravention.

**1229H Civil evidence and procedure rules for compensation orders**

The Court must apply the rules of evidence and procedure for civil matters when hearing proceedings for a compensation order.

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## **Part 8B.4—Corporate finance, financial reporting and sustainability reporting for CCIVs**

### **Division 1—Shares**

#### **Subdivision A—Issuing and converting shares in a CCIV**

##### **1230 Shares can only be issued in respect of sub-funds**

- (1) A CCIV can issue a share only if the rights attaching to the share, so far as the rights are in respect of the assets of the CCIV, are restricted to rights in respect of the assets of one (and only one) sub-fund of the CCIV. This is the sub-fund to which the share is *referable*.
- (2) The sub-fund to which the share is referable does not change if, after the share is issued, the CCIV acquires the share in respect of another of its sub-funds.

Note: For cross-investment between sub-funds, see Subdivision F.

- (3) Subsection (1) and regulations made for the purposes of subsection (5) limit paragraph 124(1)(a) and section 254A in relation to a CCIV.

Note: Subsection (1) effectively also limits some other paragraphs of subsection 124(1), such as paragraph (c) (about granting options over unissued shares in a company).

- (4) A Court must not make an order under section 254E that is inconsistent with subsection (1) of this section, or regulations made for the purposes of subsection (5) of this section, unless the Court considers that the interests of justice require otherwise.
- (5) Regulations made for the purposes of this subsection may make provision for and in relation to further requirements for the issue of shares by a CCIV.

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- (6) Without limiting subsection (5), regulations made for the purposes of that subsection may prescribe requirements for the issue of shares, or classes of shares, in relation to one or more of the following:
- (a) all CCIVs;
  - (b) a specified class of CCIVs;
  - (c) all sub-funds of all CCIVs;
  - (d) a specified class of sub-funds of CCIVs;
  - (e) all sub-funds of a specified class of CCIVs.

**1230A Minimum of one class of shares per sub-fund**

- (1) The shares in a CCIV that are referable to the same sub-fund of the CCIV, if not divided into 2 or more classes, constitute a class.

Note: A CCIV can issue shares only if the rights attaching to the shares are referable to one (and only one) sub-fund of the CCIV: see section 1230.

- (2) A class of shares is **referable** to a sub-fund of a CCIV if the shares in the class are referable to the sub-fund.

*Part 2F.2 does not permit variation contrary to this section*

- (3) Nothing in Part 2F.2 permits rights attached to shares in a class of shares to be varied or cancelled in a manner that results in a contravention of this section.

**1230B Power to issue redeemable shares**

- (1) Subject to section 1230, a CCIV's power under section 124 to issue shares includes the power to issue redeemable shares.
- (2) All, some, or none of the shares in a CCIV may be redeemable shares.

Note: Subsections (1) and (2) reflect the fact that CCIVs may be open-ended investment vehicles.

- (3) This section operates concurrently with section 254A.

## Section 1230C

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- (4) A **redeemable share**, in a CCIV, is a share (other than a preference share) in a CCIV that is liable to be redeemed at the option of one or more of the following:
- the CCIV;
  - the member.

*Option to redeem is not a preference*

- (5) In determining whether a share in a CCIV is a preference share, any rights attaching to shares in the CCIV with respect to redemption are to be disregarded.

Note: As a result, a CCIV may have ordinary shares that are redeemable as well as ordinary shares that are not redeemable. Preferences relating to redemption (including preferences relating to who has the option to redeem) are ignored in determining whether a share is a preference share.

## 1230C Conversion of shares

- (1) A CCIV may convert a share of any kind into a share of a kind mentioned in an item in column 1 of the following table if the requirements (if any) specified in column 2 of the item are met.

| <b>Conversion of shares</b> |   |   |
|-----------------------------|---|---|
| <b>Item</b>                 | <b>Column 1</b><br><b>To convert a share into a share of this kind:</b> | <b>Column 2</b><br><b>These requirements must be met:</b>   |
| 1                           | An ordinary share (other than a redeemable share)                       | No specified requirements (but see Note 1)  |
| 2                           | A redeemable share  | The conversion has been approved by a special resolution of the sub-fund of the CCIV to which the share is referable (see also Notes 1 and 2) |

Section 1230D

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**Conversion of shares**

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| Item | Column 1<br>To convert a share into a<br>share of this kind:  | Column 2<br>These requirements must be met:   |
|------|---|---|
| 3    | A preference share (other than a redeemable preference share) | The holders' rights with respect to the matters mentioned in subsection 254G(2) are set out in the CCIV's constitution (if any) or have been otherwise approved by special resolution of the sub-fund of the CCIV to which the share is referable (see also Note 1) |

Note 1: The variation of class rights provisions (sections 246B to 246G) will apply to the conversion.

Note 2: For a director's duty to prevent insolvent trading on converting shares into redeemable shares, see sections 588G and 1238C.

- (2) A CCIV may not convert a share into a redeemable preference share.
- (3) A CCIV may convert all or any of its shares into a larger or smaller number. Any amount unpaid on shares being converted is to be divided equally among the replacement shares.
- (4) This section replaces sections 254G and 254H for a CCIV.

## **Subdivision B—Redemption of shares**

### **1230D Redemptions to which this Subdivision applies**

- (1) This Subdivision applies to both of the following:
  - (a) a redemption by a CCIV of a redeemable share;
  - (b) a redemption by a CCIV of a redeemable preference share.

Note: A CCIV may reduce its share capital if the reduction results from a redemption permitted by this Subdivision: see section 1231D.

- (2) Part 2H.2 does not apply to the redemption of redeemable preference shares in a CCIV.

Section 1230E

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**1230E Redeemed shares to be cancelled**

On redemption by a CCIV, a share is cancelled.

**1230F Requirements for redemptions by all CCIVs**

*Redemption must be in accordance with terms of issue*

- (1) A CCIV must not redeem shares if the redemption is not on the terms on which the shares are on issue.

*Sub-fund must be solvent*

- (2) A CCIV must not redeem shares if, immediately before the redemption:
  - (a) the sub-fund to which the shares are referable is insolvent; or
  - (b) there are reasonable grounds for suspecting that the sub-fund to which the shares are referable is insolvent, or would become insolvent immediately after the redemption.

Note 1: For when a sub-fund of a CCIV is *solvent*, or *insolvent*, see section 1231A.

Note 2: The directors of the corporate director have a duty to prevent insolvent trading by sub-funds: see section 588G (as modified by Division 6 of Part 8B.6).

*Consequences of contravention*

- (3) If a CCIV redeems shares in contravention of subsection (1) or (2):
  - (a) the contravention does not affect the validity of the redemption or of any contract or transaction connected with it; and
  - (b) the CCIV does not commit an offence.

*Fault-based offence*

- (4) A person commits an offence if the person is involved in a CCIV's contravention of subsection (1) or (2) and the involvement is dishonest.

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*Civil liability*

- (5) A person who is involved in a CCIV's contravention of subsection (1) or (2) contravenes this subsection.

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

**1230G Further requirements for redemptions by retail CCIVs**

*Redemption must be permitted by constitution*

- (1) A retail CCIV must not redeem shares if the redemption is not permitted by the CCIV's constitution.

*Redemption price must be in accordance with constitution*

- (2) A retail CCIV must not redeem shares if:
- (a) at the time of the redemption, section 1230H (about when a sub-fund is liquid) applies to the sub-fund to which the shares are referable; and
  - (b) the redemption is not in accordance with the CCIV's constitution.

*Redemption must comply with sections 1230J and 1230K if sub-fund is not liquid*

- (3) A retail CCIV must not redeem shares if:
- (a) at the time of the redemption, section 1230H (about when a sub-fund is liquid) does not apply to the sub-fund to which the shares are referable; and
  - (b) any of the following apply:
    - (i) the CCIV has not offered members an opportunity to redeem shares under section 1230J;
    - (ii) the redemption is not made in satisfaction of a redemption request made in response to the offer;
    - (iii) the redemption does not comply with section 1230K.

## Section 1230H

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### *Strict liability offence*

- (4) An offence based on subsection (1), (2) or (3) is an offence of strict liability.

### *Consequences of contravention*

- (5) If a CCIV redeems shares in contravention of this section, the contravention does not affect the validity of the redemption or of any contract or transaction connected with it.

### *Court orders*

- (6) If the Court is satisfied, on application under subsection (7), that the consideration for a redemption of shares by a retail CCIV is not in accordance with this section, the Court may make any orders the Court considers appropriate.
- (7) An application to the Court for an order under subsection (6) may be made by any of the following:
- (a) ASIC;
  - (b) the corporate director of the CCIV;
  - (c) a member, or group of members, of the CCIV.

## 1230H When a sub-fund is liquid

- (1) This section applies to a sub-fund of a CCIV at a time if liquid assets account for at least 80% of the value of the assets of the sub-fund at that time.
- (2) For the purposes of subsection (1):
- (a) the following are liquid assets unless it is proved that the CCIV cannot reasonably expect to realise them within the period specified in the constitution for satisfying redemptions while the sub-fund is liquid:
    - (i) money in an account or on deposit with a bank;
    - (ii) bank accepted bills;
    - (iii) marketable securities (as defined in section 9);

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- (iv) property of a kind prescribed by regulations made for the purposes of this subparagraph; and
- (b) any other property is a liquid asset if the corporate director reasonably expects that the property can be realised for its market value within the period specified in the constitution for satisfying redemptions while the sub-fund is liquid.

**1230J Redemption offers for non-liquid sub-funds of retail CCIVs**

- (1) A retail CCIV may offer members an opportunity to redeem shares in the CCIV if:
  - (a) section 1230H (about when a sub-fund is liquid) does not apply to the sub-fund to which the shares are referable; and
  - (b) the offer is made to the extent that particular assets of the sub-fund are available and able to be converted to money in time to satisfy redemption requests that members may make in response to the offer; and
  - (c) no other redemption offer is open in relation to the sub-fund.
- (2) The redemption offer must:
  - (a) be in writing; and
  - (b) if the constitution of the CCIV specifies procedures for making redemption offers under this section while section 1230H does not apply to the sub-fund—be made in accordance with those procedures.
- (3) The redemption offer must specify:
  - (a) the period during which the offer will remain open (this period must last for at least 21 days after the offer is made); and
  - (b) the assets that will be used to satisfy redemption requests; and
  - (c) the amount of money that is expected to be available when those assets are converted to money; and
  - (d) the method for dealing with redemption requests if the money available is insufficient to satisfy all requests.

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The method specified under paragraph (d) must comply with section 1230K.

- (4) For joint members, a copy of the redemption offer need only be given to the joint member named first in the register of members.
- (5) As soon as practicable after making the redemption offer, the CCIV must lodge a copy of the offer with ASIC.
- (6) A CCIV that makes a redemption offer under this section:
  - (a) may cancel a redemption offer before it closes if the offer contains a material error; and
  - (b) must cancel a redemption offer before it closes if it is in the best interests of the members of the sub-fund as a whole to do so.
- (7) If the constitution of the CCIV specifies procedures for cancelling redemption offers under subsection (6), the cancellation must be made in accordance with those procedures.
- (8) As soon as practicable, and in any event within 2 business days, after the cancellation, the CCIV must lodge written notice of the cancellation with ASIC.

### *Strict liability offence*

- (9) An offence based on subsection (5) or (8) is an offence of strict liability.

## **1230K Satisfying redemption requests for non-liquid sub-funds of retail CCIVs**

- (1) A retail CCIV that makes a redemption offer under section 1230J must ensure that redemption requests made in response to the offer are satisfied within 21 days after the offer closes.
- (2) No request made under the redemption offer may be satisfied while the offer is still open.

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- (3) If an insufficient amount of money is available from the assets specified in the offer to satisfy all requests, the requests are to be satisfied proportionately in accordance with the formula:

$$\frac{\text{Amount of money available}}{\text{Total of all amounts shareholders request to redeem}} \times \frac{\text{Amount shareholder requested to redeem}}{\text{Total of all amounts shareholders request to redeem}}$$

### **Subdivision C—Partly-paid shares**

#### **1230L Section 254N does not apply to a CCIV**

Section 254N does not apply to a CCIV.

### **Subdivision D—Dividends**

#### **1230M Circumstances in which a dividend may be paid**

- (1) A CCIV must not pay a dividend on a share if, immediately before the dividend is paid:
- (a) the sub-fund to which the share is referable is insolvent; or
  - (b) there are reasonable grounds for suspecting that the sub-fund to which the share is referable is insolvent, or would become insolvent immediately after the dividend is paid.

Note 1: For when a sub-fund of a CCIV is *solvent*, or *insolvent*, see section 1231A.

Note 2: The directors of the corporate director have a duty to prevent insolvent trading by sub-funds: see section 588G (as modified by Division 6 of Part 8B.6).

- (2) Section 254T does not apply to a CCIV.

#### **1230N Dividend rights**

Each share in a class of shares in a CCIV has the same dividend rights unless:

- (a) the CCIV's constitution provides for the shares to have different dividend rights; or

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- (b) different dividend rights are provided for by special resolution of the sub-fund to which the shares are referable.

**Subdivision E—Notice requirements**

**1230P Part 2H.6 does not apply to a CCIV**

Part 2H.6 does not apply to a CCIV.

**Subdivision F—Cross-investment between sub-funds of a CCIV**

**1230Q Cross-investment between sub-funds is permitted**

- (1) Despite any law, a CCIV may acquire in respect of any of its sub-funds, one or more shares that are referable to another of its sub-funds.

Note: Requirements or restrictions may apply, see section 1230R.

- (2) To avoid doubt, a law referred to in subsection (1) includes:
  - (a) any written law; or
  - (b) any unwritten law such as a principle or rule of common law or equity;

that is or has been in force anywhere in Australia or elsewhere.

**1230R Requirements or restrictions for cross-investment**

- (1) Regulations made for the purposes of this subsection may prescribe either or both of the following:
  - (a) one or more requirements for a CCIV to make an acquisition mentioned in subsection 1230Q(1);
  - (b) one or more restrictions on a CCIV making an acquisition mentioned in subsection 1230Q(1).
- (2) Without limiting subsection (1), regulations made for the purposes of that subsection may prescribe requirements or restrictions in relation to one or more of the following:
  - (a) all CCIVs;

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- (b) a specified class of CCIVs;
- (c) all sub-funds of all CCIVs;
- (d) a specified class of sub-funds of CCIVs;
- (e) all sub-funds of a specified class of CCIVs.

**1230S Consequences for failing to comply with requirements or restrictions for cross-investment**

- (1) A CCIV to which regulations made for the purposes of subsection 1230R(1) apply in relation to an acquisition must comply with any applicable requirements or restrictions in those regulations.

*Consequences for CCIV of contravention*

- (2) If a CCIV contravenes subsection (1):
  - (a) the contravention does not affect the validity of the acquisition or of any contract or transaction connected with it; and
  - (b) the CCIV does not commit an offence.

*Fault-based offence*

- (3) A person commits an offence if the person is involved in a CCIV's contravention of subsection (1) and the involvement is dishonest.

*Civil liability*

- (4) A person who is involved in a CCIV's contravention of subsection (1) contravenes this subsection.

Note 1: This subsection is a civil penalty provision (see section 1317E).

Note 2: There are other possible consequences for such a contravention, including the suspension or cancellation of an Australian financial services licence held by the CCIV's corporate director (see paragraph 915C(1)(a)).

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**1230T Requirements or restrictions on membership rights for shares acquired from cross-investment**

*Voting at a meeting of the CCIV's members*

- (1) Despite any other provision of this Act, a CCIV's acquisition mentioned in subsection 1230Q(1) of one or more shares referable to one of its sub-funds does not entitle the CCIV to vote as a member on a resolution at a meeting of the CCIV's members.

*Voting at a meeting of members of a sub-fund of the CCIV*

- (2) A CCIV's acquisition mentioned in subsection 1230Q(1) of one or more shares referable to one of its sub-funds entitles the CCIV to vote as a member on a resolution at a meeting of the members of the sub-fund.
- (3) A CCIV's entitlement to vote as described in subsection (2) applies:
  - (a) despite any other provision of this Act; but
  - (b) subject to any requirements or restrictions prescribed by regulations made for the purposes of this paragraph.

**1230U Cross-investment between sub-funds is not a share buy-back**

For the purposes of section 1231C and Division 2 of Part 2J.1, the acquisition by a CCIV of any of its shares is not a buy-back of the share if:

- (a) the acquisition is in respect of a sub-fund of the CCIV; and
- (b) the share is referable to another of the CCIV's sub-funds.

**1230V General duties still apply for cross-investment between sub-funds**

None of the following:

- (a) the corporate director of a CCIV;
- (b) an officer, or employee, of the corporate director of a CCIV;

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is relieved from any of their duties under this Act, or their fiduciary duties, in connection with an acquisition merely because the acquisition is permitted by this Subdivision.

Note: These duties include those in sections 180, 181, 182, 183 and 184 and in Divisions 2 and 3 of Part 8B.3.

Section 1231

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**Division 2—Transactions affecting share capital**

**Subdivision A—Reductions in share capital and share buy-backs**

**1231 Purpose**

Section 256A does not apply in relation to a CCIV.

**1231A CCIV may make reduction not otherwise authorised**

- (1) A CCIV may reduce its share capital in a way that is not otherwise authorised by law if:
  - (a) the reduction is permitted by the CCIV's constitution; and
  - (b) immediately before the reduction:
    - (i) each sub-fund that the reduction affects is solvent; and
    - (ii) there are no reasonable grounds for suspecting that any sub-fund that the reduction affects would become insolvent immediately after the reduction; and
  - (c) the reduction complies with any requirements prescribed by regulations made for the purposes of this paragraph.

Note: This Subdivision also deals with some other situations (such as share redemptions) in which reductions of share capital are authorised.

*When a sub-fund is **solvent** and **insolvent***

- (2) A sub-fund is **solvent** if, and only if, the CCIV is able to pay all the debts that are liabilities of the sub-fund, as and when they become due and payable.

Note: The liabilities of a sub-fund can only be met from assets of the sub-fund: see section 1234A.

- (3) A sub-fund that is not solvent is **insolvent**.

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*Regulations*

- (4) Without limiting paragraph (1)(c), regulations made for the purposes of that paragraph may prescribe requirements for reductions of share capital, or classes of reductions of share capital, in relation to one or more of the following:
  - (a) all CCIVs;
  - (b) a specified class of CCIVs;
  - (c) all sub-funds of all CCIVs;
  - (d) a specified class of sub-funds of CCIVs;
  - (e) all sub-funds of a specified class of CCIVs.

Note: An example of a class of a reduction of share capital is an off-market share buy-back.

*Certain provisions do not apply to a CCIV*

- (5) Division 1 of Part 2J.1 does not apply to a CCIV.

**1231B Consequences of making an unauthorised reduction**

- (1) A CCIV must not make a reduction in share capital if the reduction:
  - (a) does not comply with subsection 1231A(1); and
  - (b) is not otherwise authorised by law.
- (2) If a CCIV contravenes subsection (1):
  - (a) the contravention does not affect the validity of the reduction or of any contract or transaction connected with it; and
  - (b) the CCIV does not commit an offence.

*Fault-based offence*

- (3) A person commits an offence if the person is involved in a CCIV's contravention of subsection (1) and the involvement is dishonest.

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### *Civil liability*

- (4) A person who is involved in a CClV's contravention of subsection (1) contravenes this subsection.

Note 1: This subsection is a civil penalty provision (see section 1317E).

Note 2: Section 79 defines *involved*.

## 1231C A CClV's power to buy back its own shares

- (1) A CClV may buy back its own shares, including redeemable shares and redeemable preference shares.

Note: Cross-investment between sub-funds is not a buy-back (see section 1230U).

- (2) However, if the buy-back involves a reduction of share capital, the reduction must be authorised by law.

Note: A share buy-back that involves a reduction of share capital will be authorised by law if, for example, the buy-back complies with subsection 1231A(1).

- (3) If a CClV has entered into an agreement to buy back shares, all rights attaching to the shares are suspended. The suspension is lifted if the agreement is terminated.

- (4) A CClV must not dispose of shares it buys back. An agreement entered into in contravention of this subsection is void.

- (5) Immediately after the registration of the transfer to the CClV of the shares bought back, the shares are cancelled.

- (6) Division 2 of Part 2J.1 does not apply to a CClV.

## 1231D Authorised reductions—share redemptions

A CClV may reduce its share capital if:

- (a) the reduction is involved in the redemption of a redeemable share or a redeemable preference share; and
- (b) the redemption complies with section 1230F; and

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- (c) for a retail CCIV—the redemption also complies with section 1230G.

**1231E Authorised reductions—regulations**

A CCIV may reduce its share capital in circumstances prescribed by regulations made for the purposes of this section.

**1231F Authorised reductions—Court orders**

A CCIV may reduce its share capital under a Court order.

**1231G Authorised reductions—return of financial product**

A CCIV may cancel shares returned to it under Division 5 of Part 7.9 (as that Division applies to the CCIV under section 1241ZA) and any reduction in the CCIV's share capital that is involved is authorised by this section.

**1231H Other share capital reductions**

- (1) Division 3 of Part 2J.1 applies to a CCIV subject to the modifications set out in this section.
- (2) Section 258D applies in relation to a CCIV as if a reference to a general meeting were instead a reference to a meeting of the members of each sub-fund of the CCIV to which the shares are referable.
- (3) Sections 258E and 258F do not apply to a CCIV.

**Subdivision B—Self-acquisition and control of shares**

**1231J Directly acquiring own shares**

- (1) A CCIV must not acquire shares (or units of shares) in itself except:
  - (a) in buying back shares under section 1231C; or
  - (b) under a court order; or

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- (c) in circumstances covered by section 1230Q (about cross-investment).
- (2) Section 259A does not apply to a CCIV.
- (3) Subject to subsection (1), a retail CCIV may acquire and hold a share in the CCIV, but it must only do so:
  - (a) for not less than the consideration that would be payable if the share were acquired by another person; and
  - (b) subject to terms and conditions that would not disadvantage other members.
- Note: A similar limitation applies to the corporate director of a retail CCIV: see section 1224P.
- (4) If a CCIV contravenes subsection (1) or (3):
  - (a) the contravention does not affect the validity of the acquisition or security or of any contract or transaction connected with it; and
  - (b) the CCIV is not guilty of an offence.

### *Civil liability*

- (5) Any person who is involved in a CCIV's contravention of subsection (1) or (3) contravenes this subsection.

Note 1: This subsection is a civil penalty provision (see section 1317E).

Note 2: Section 79 defines *involved*.

### *Fault-based offence*

- (6) A person commits an offence if they are involved in a CCIV's contravention of subsection (1) or (3) and the involvement is dishonest.

## **1231K Taking security over own shares**

Subsection 259B(3) (about special exemptions for financial institutions) does not apply to a CCIV.

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Note: The consequences of contravening subsection 259B(1) are set out in section 259F.

**Subdivision C—Financial assistance**

**1231L Part 2J.3 does not apply to a CCIV**

Part 2J.3 does not apply to a CCIV.

**Subdivision D—Interaction with other duties**

**1231M Other duties still apply**

To avoid doubt, for the purposes of section 260E, the duties of a director under this Act include the duties of a corporate director under this Act, including under a provision of this Chapter.

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## **Division 3—Debentures**

### **1231N Debentures can only be issued in respect of sub-funds**

- (1) A CCIV can issue a debenture only if the debenture holder's rights in respect of assets of the CCIV are restricted to rights in respect of the assets of one (and only one) sub-fund of the CCIV. This is the sub-fund to which the debenture is *referable*.
- (2) Subsection (1) limits paragraph 124(1)(b) in relation to a CCIV.
- (3) If a security interest is included in or created by a debenture or the trust deed required by section 283AB, the security interest must not be over property of the CCIV that forms part of the assets of a different sub-fund of the CCIV.

### **1231P Modified operation of section 283AA**

Paragraph 283AA(1)(a) has effect in relation to a CCIV as if an offer of debentures was an offer of the kind referred to in that paragraph if the offer gave rise to an obligation to give a Product Disclosure Statement under Chapter 7 (as that Chapter applies to securities in the CCIV under Division 4 of Part 8B.7).

## **Division 4—Financial reports, sustainability reports and audit of CCIVs**

### **Subdivision A—Application of Chapter 2M to CCIVs and their sub-funds**

#### **1232 Application of Chapter 2M to CCIVs**

##### *Application of Chapter 2M to retail CCIVs*

- (1) Subject to the modifications set out in this Division, Chapter 2M (about financial reports, sustainability reports and audit) applies to a retail CCIV as if:
  - (a) references in that Chapter to the directors of, or a director of, the company were instead references to the corporate director of the CCIV; and
  - (b) references in that Chapter to a resolution of the directors of the company were instead references to a resolution of the corporate director, passed as director of the CCIV.

Note: Section 1228 deals with directors' resolutions for CCIVs.

##### *Application of Part 2M.2 to wholesale CCIVs*

- (2) Subject to the modifications set out in Subdivision B of this Division, Part 2M.2 (about financial records) applies to a wholesale CCIV as if references in that Part to the directors of, or a director of, the company were instead references to the corporate director of the CCIV.

##### *Part 2M.3 does not apply to wholesale CCIVs*

- (3) Part 2M.3 (about financial reporting) does not apply to a wholesale CCIV.

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**Subdivision B—Financial records (all CCIVs)**

**1232A Obligation to keep financial records for sub-funds**

- (1) Without limiting the application of subsection 286(1) to the retail or wholesale CCIV, the CCIV must also, for each sub-fund of the CCIV, keep written financial records that:
  - (a) correctly record and explain the transactions relating to the sub-fund and the financial position and performance of the sub-fund; and
  - (b) would enable true and fair financial statements to be prepared and audited for the sub-fund; and
  - (c) comply with any further requirements prescribed by regulations made for the purposes of this paragraph.

Note: Section 9 defines *financial records*.

- (2) The remaining provisions of Part 2M.2 apply in relation to the financial records for the sub-fund as if the sub-fund were the CCIV.
- (3) This section does not apply if the CCIV has only one sub-fund.

**1232B Access to financial records of CCIVs and sub-funds**

Without limiting the application of subsection 290(1) or section 1232A, a director of the corporate director of the retail or wholesale CCIV has the same rights as a director of the CCIV:

- (a) under subsection 290(1) to access the financial records of the CCIV; and
- (b) under that subsection, as applied by section 1232A, to access the financial records of a sub-fund of the CCIV; and
- (c) under subsection 290(2) to apply to the Court for an order.

## **Subdivision C—Financial and sustainability reporting (retail CCIVs only)**

### **1232C Annual financial reports, sustainability reports and directors' reports for sub-funds—general rules**

- (1) Division 1 of Part 2M.3 applies to a retail CCIV as if:
  - (a) subsection 292(1) required the CCIV to prepare a financial report for each of its sub-funds for each financial year; and
  - (aa) in a case in which subsection 292A(1) requires the CCIV to prepare a sustainability report for a financial year—that subsection requires the CCIV to prepare a sustainability report for each of its sub-funds for the financial year; and
  - (b) subsections 292(1) and 298(1) required the CCIV to prepare a directors' report for each of its sub-funds for each financial year.

Note: The CCIV is not required to prepare such reports for the CCIV itself.

- (2) The remaining provisions of Division 1 of Part 2M.3 apply in relation to the following documents relating to each sub-fund of the retail CCIV:
  - (a) a financial report, a sustainability report and a directors' report referred to in subsection (1) of this section;
  - (b) the documents of which the financial report consists under subsection 295(1);
  - (c) the documents of which the sustainability report consists under subsection 296A(1);as if the sub-fund were the CCIV.

Note: The combined effect of subsection 1232(1) and this subsection is that references in the remaining provisions of Division 1 of Part 2M.3 to the company are, where appropriate, to be read as referring to the sub-fund.

Example: References in the remaining provisions of Division 1 of Part 2M.3 to a listed company will be read as referring to the sub-fund if the sub-fund is listed (see also paragraph (c) of the definition of **listed** in section 9).

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- (3) Without limiting subsection (2), Division 1 of Part 2M.3 so applies as if references in that Division to members (other than references to members of an audit firm) were instead references to members of the sub-fund.
- (4) Despite subsection (2), Division 1 of Part 2M.3 applies to the retail CCIV in relation to each of its sub-funds as if:
  - (a) references in that Division to the officers of, or an officer of, the company were instead references to each of the following:
    - (i) an officer of the CCIV;
    - (ii) an officer of the corporate director of the CCIV; and
  - (b) despite paragraph 1232(1)(a), references in that Division to the directors of, or a director of, the company were instead references to each of the following:
    - (i) the corporate director of the CCIV;
    - (ii) a director of the corporate director of the CCIV.
- (5) Subparagraphs (4)(a)(i) and (b)(i) are included for the avoidance of doubt.

**1232D Annual financial reports, sustainability reports and directors' reports for sub-funds—special rules for financial reports and sustainability reports**

- (1) Despite subsection 1232C(2), paragraph 295(4)(c) applies to a directors' declaration relating to a sub-fund referred to in subsection 1232C(1) as if the debts mentioned in that paragraph were only the debts referable to the sub-fund.
  - (2) Despite subsection 1232C(2), subsection 301(1) applies to a CCIV referred to in subsection 1232C(1) in relation to the financial report for each of its sub-funds.
  - (2A) Despite subsection 1232C(2), section 301A applies to a CCIV referred to in subsection 1232C(1) in relation to the sustainability report for each of its sub-funds.
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- (3) A financial report for a sub-fund referred to in subsection 1232C(1) must comply with any further requirements prescribed by regulations made for the purposes of this subsection.
- (4) A sustainability report for a sub-fund referred to in subsection 1232C(1) must comply with any further requirements prescribed by regulations made for the purposes of this subsection.

**1232E Annual financial reports and directors' reports for sub-funds—special rules for directors' reports**

- (1) Section 300 applies in relation to a sub-fund of a CCIV referred to in subsection 1232C(1) as if:
  - (a) a reference in that section to options, shares or interests relating to the CCIV were instead a reference to options, shares or interests referable to the sub-fund; and
  - (b) a reference in that section to indemnities given, or insurance premiums paid, in relation to the CCIV were instead a reference to indemnities given, or insurance premiums paid, out of the assets of the sub-fund.

Note: This translation rule applies in addition to the translation rules in subsections 1232C(2) to (4).

- (2) Subsection 300(13) applies in relation to a sub-fund of a CCIV referred to in subsection 1232C(1) as if:
  - (a) the sub-fund were a registered scheme; and
  - (b) the corporate director of the CCIV were the responsible entity for the scheme; and
  - (c) references in that subsection to interests in the scheme were instead references to shares in the CCIV referable to the sub-fund; and
  - (d) references in that subsection to scheme property were instead references to the property of the sub-fund.

Note: This translation rule applies in addition to the translation rules in subsections 1232C(2) to (4).

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- (3) If a sub-fund of a CCIV referred to in subsection 1232C(1) is a listed sub-fund, section 300A does not apply in relation to the sub-fund.

**1232F Half-year financial reports and directors' reports for sub-funds with ED securities on issue**

- (1) Section 302 does not apply to a CCIV that is a disclosing entity except as set out in this section.
- (2) If any securities referable to a sub-fund of a retail CCIV are ED securities, section 302 applies to the CCIV as if the requirement in paragraph 302(a) required the CCIV to prepare a financial report and directors' report for each half-year for the sub-fund.

Note: For ED securities in a CCIV, see subsection 111AF(3), and section 111AI as affected by section 1231P.

- (3) For the purposes of subsection (2), ED securities that are units of shares in a CCIV are referable to the sub-fund of the CCIV to which the shares are referable.
- (4) The remaining provisions of Division 2 of Part 2M.3 apply in relation to the following documents relating to the sub-fund:
- (a) a financial report and directors' report prepared under paragraph 302(a) as applied by subsection (2) of this section;
  - (b) the documents of which the financial report consists under subsection 303(1);
- as if the sub-fund were the CCIV.

Note: The combined effect of subsection 1232(1) and this subsection is that references in the remaining provisions of Division 2 of Part 2M.3 to the disclosing entity are, where appropriate, to be read as referring to the sub-fund.

- (5) Despite subsection (4) of this section, paragraph 303(4)(c) applies to a directors' declaration relating to the sub-fund as if the debts mentioned in that paragraph were only the debts referable to the sub-fund.

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- (6) Section 306 applies to the sub-fund of the CCIV as if the requirement in subsection 306(1) were instead a requirement for the directors' report for the sub-fund for each half-year to include:
- (a) a review of the sub-fund's operations during the half-year and the results of those operations; and
  - (b) details of:
    - (i) the name of each corporate director of the CCIV at any time during or since the end of the half-year, and the period for which each was the corporate director; and
    - (ii) the name of each director of the corporate director of the CCIV at any time during or since the end of the half-year, and the period for which each was a director of the corporate director.

**1232G Audit and auditor's report for sub-funds**

- (1) Subject to the modifications set out in this section, Division 3 of Part 2M.3 applies in relation to a sub-fund of a retail CCIV, and in relation to the following documents relating to the sub-fund:
- (a) a financial report prepared as described in subsection 1232C(1);
  - (aa) a sustainability report prepared as described in subsection 1232C(1);
  - (b) a financial report prepared as described in section 1232F; as if the sub-fund were the CCIV.

Note: The combined effect of subsection 1232(1) and this subsection is that references in the remaining provisions of Division 3 of Part 2M.3 to the company are, where appropriate, to be read as referring to the sub-fund.

- (2) Without limiting subsection (1), Division 3 of Part 2M.3 so applies as if:
- (a) references in that Division to members (other than references to members of an audit firm) were instead references to members of the sub-fund; and
  - (b) references in that Division to an officer included references to an officer of the corporate director of the CCIV.
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### *Audit*

- (3) Section 307 applies in relation to the sub-fund of the CCIV as if the requirements in paragraphs 307(c) and (d) do not apply, and as if those paragraphs instead require the auditor to form an opinion about whether the CCIV has kept:
  - (a) financial records, relating to the sub-fund, sufficient to enable a financial report, relating to the sub-fund, to be prepared and audited; and
  - (b) other records and registers, relating to the sub-fund, as required by this Act.

### *Reporting to ASIC*

- (4) Section 311 applies in relation to the sub-fund of the CCIV as if the requirement in paragraph 311(4)(b) were a requirement to have regard to the effect that the contravention has, or may have, on:
  - (a) the overall financial position of either the CCIV or the sub-fund, or both; or
  - (b) the adequacy of the information available about the overall financial position of either the CCIV or the sub-fund, or both.

## **Subdivision D—Annual financial reporting to members (retail CCIVs only)**

### **1232H Annual financial and sustainability reporting to members of sub-funds**

- (1) Section 314 applies to a retail CCIV, in relation to each sub-fund of the CCIV, as if the requirement in subsection 314(1) were instead a requirement to report to members of the sub-fund for the year by providing either of the following in accordance with subsection 314(1AE):
  - (a) all of the following reports:
    - (i) the financial report, sustainability report and directors' report relating to the sub-fund for the year;
    - (ii) the auditor's reports;

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- (b) a concise report relating to the sub-fund for the year that complies with subsection 314(2).
- (2) Division 4 of Part 2M.3 applies in relation to a report relating to the sub-fund as if references in that Division to members were instead references to members of the sub-fund.

**1232J Deadline for reporting to members of sub-funds**

Section 315 applies to a retail CCIV in relation to the members of each sub-fund of the CCIV as if the CCIV were a registered scheme.

**1232K Consideration of reports at AGM**

Section 317 does not apply in relation to a retail CCIV.

**1232L Additional reporting by CCIVs that are debenture issuers**

If a retail CCIV was a borrower in relation to debentures at the end of a financial year, section 318 applies to the CCIV, in relation to each sub-fund of the CCIV, as if:

- (a) the requirement in subsection 318(1) were instead a requirement to give to the trustee for debenture holders, by the deadline for the financial year set by section 315 as applied by section 1232J, a copy of each of the reports mentioned in paragraph 1232H(1)(a) for the sub-fund; and
- (b) the right of a debenture holder under paragraph 318(2)(a) were instead the right to ask the CCIV for copies of the last reports provided under subsection 1232H(1) to members of the sub-fund; and
- (c) the right of a debenture holder under paragraph 318(2)(b) were instead the right to ask the CCIV for copies of:
  - (i) the full financial report and directors' report described in section 1232C for the sub-fund and prepared for the last financial year; and
  - (ii) the auditor's report relating to the sub-fund for the last financial year; and

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- (d) the requirement in subsection 318(4) were instead a requirement to give to the trustee for debenture holders a copy of the half-year financial report, prepared for the sub-fund under section 302 as applied by section 1232F, within 75 days after the end of the half-year.

**Subdivision E—Lodging reports with ASIC (retail CCIVs only)**

**1232M Relodgement if financial reports, sustainability reports or directors' reports relating to sub-fund amended after lodgement**

Section 322 applies in relation to a financial report, sustainability report or directors' report relating to a sub-fund of a retail CCIV as if references in that section to a member were instead references to a member of the sub-fund.

**Subdivision F—Appointment and removal of auditors (retail CCIVs only)**

**1232N Conflict of interest situation**

- (1) Subsection 324CD(2) has effect as if the following item were added to the table in that subsection:

|   |               |  |
|---|---------------|--|
| 4 | a retail CCIV | the corporate director or a former corporate director of the CCIV; or<br>a current or former director of the corporate director; or<br>a person currently or formerly involved in the management of the CCIV; or<br>a person currently or formerly involved in the management of the corporate director. |
|---|---------------|--|

- (2) Subsection 1232(1) does not apply for the purposes of subsection 324CD(2).

## 1232P Auditor independence—specific requirements

Subdivision B of Division 3 of Part 2M.4 applies in relation to a retail CCIV as if:

- (a) references in the table in subsection 324CH(1) to the audited body included references to the corporate director of the CCIV; and
- (b) references in subsection 324CH(3) and sections 324CI, 324CJ and 324CK to a listed entity do not include references to a CCIV that is a listed company.

## 1232Q People who are regarded as officers of a CCIV

Section 324CL applies in relation to a retail CCIV as if references in paragraph 324CL(1)(a) or (b) or subsection 324CL(2), (3) or (4) to the company included references to the corporate director of the CCIV.

## 1232R Appointment, removal and fees of auditors for CCIVs

- (1) Division 6 of Part 2M.4 (about appointment, removal and fees of auditors for companies) does not apply to a CCIV.
- (2) Division 7 of Part 2M.4 (about appointment, removal and fees of auditors for registered schemes) applies to a retail CCIV as if:
  - (a) the CCIV were a registered scheme; and
  - (b) the corporate director of the CCIV were the responsible entity of that scheme.

## 1232S Effect of winding up of sub-fund on office of auditor

*Audit and auditor's report not required to cover a sub-fund in respect of which a CCIV is being wound up*

- (1) An auditor of a CCIV is not required by Division 3 of Part 2M.3, as it applies under subsection 1232G(1), to do a thing in relation to a sub-fund at a time if the sub-fund is being wound up at that time.

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*Auditor ceases to hold office if CCIV is being wound up in respect of all of its sub-funds*

- (2) An auditor of a CCIV ceases to hold office if an event mentioned in subsection (3) has occurred in relation to each sub-fund of the CCIV.
  - (3) The events are as follows:
    - (a) a special resolution is passed for the voluntary winding up of a sub-fund of the CCIV;
    - (b) an order is made by the Court for the winding up of a sub-fund of the CCIV.
  - (4) Section 330 does not apply to a CCIV.

**Subdivision G—Sanctions for contravention of Chapter 2M**

**1232T Extended liability of directors of the corporate director for contraventions of Chapter 2M**

- (1) Section 344 applies as if each of the following were a director of a CCIV:
  - (a) the corporate director of the CCIV;
  - (b) a director of the corporate director of the CCIV.

Note:      Section 344 creates civil and criminal liability for contraventions of certain provisions in Chapter 2M.

- (2) Paragraph (1)(a) is included for the avoidance of doubt.

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## **Division 5—Updating ASIC information about CCIVs**

### **1232U Solvency resolutions**

- (1) Part 2N.3 (about solvency resolutions) does not apply in relation to a CCIV.
- (2) Section 348C (about ASIC requiring a solvency resolution and statement) does not apply in relation to a CCIV.

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## **Part 8B.5—Operating a CCIV**

### **Division 1—Preliminary**

#### **1233 Meaning of *property***

In this Part:

*property* of a CCIV includes PPSA retention of title property, if the security interest in the property is vested in the CCIV because of the operation of any of the following provisions:

- (a) section 267 or 267A of the *Personal Property Securities Act 2009* (property subject to unperfected security interests);
- (b) section 588FL of this Act (collateral not registered within time).

Note: See sections 9 (definition of *property*) and 51F (PPSA retention of title property).

#### **1233A References to liabilities of a CCIV**

- (1) A reference in this Act to the liabilities of a CCIV includes a reference to:
  - (a) debts of the CCIV (including contingent and prospective debts); and
  - (b) expenses of the CCIV; and
  - (c) anything not covered by paragraphs (a) and (b) that might give rise to a debt of the CCIV, or a claim against the CCIV (present or future, certain or contingent, ascertained or sounding only in damages).
- (2) For the purposes of this Part, a liability of a CCIV arises when the circumstances giving rise to the debt, expense or claim occur.
- (3) This section does not apply for the purposes of Chapter 2M (about financial reports and audit).

## **Division 2—Requirement to operate sub-funds as separate businesses**

### **1233B Sub-funds to be operated as separate businesses**

- (1) A part of the business of a CCIV must not be operated if it is not registered as a sub-fund.
- (2) A part of the business of a CCIV that is registered as a sub-fund must be operated as a separate business from the business of any other sub-fund of the CCIV.

*Requirement for corporate director to operate sub-funds as separate businesses*

- (3) The corporate director of a CCIV contravenes this subsection if:
  - (a) the corporate director operates a part of the business of the CCIV; and
  - (b) the operation contravenes subsection (1) or (2).

*Fault-based offence*

- (4) A person commits an offence if the person contravenes subsection (3).

*Strict liability offence*

- (5) A person commits an offence of strict liability if the person contravenes subsection (3).

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**Division 3—Requirement for assets and liabilities to be allocated between sub-funds**

**Subdivision A—The CCIV’s allocation register**

**1233C Corporate director to keep allocation register**

- (1) The corporate director of a CCIV must set up and maintain a register of the assets and liabilities of the sub-funds of the CCIV. The register is the CCIV’s allocation register.

Note: The register may be kept on computer (see section 1306).

*Strict liability offence*

- (2) A person commits an offence of strict liability if the person contravenes subsection (1).

*Corporate director must maintain allocation register during liquidation*

- (3) For the purposes of section 1224Q (about exercise of powers while sub-fund in liquidation), the maintenance of the allocation register is a function the corporate director is required by this section to perform even when one or more, or all, of the sub-funds of the CCIV are being wound up.

Note: However, the corporate director may not make allocation determinations in relation to assets and liabilities while all the sub-funds are being wound up: see subsections 1233J(7) and 1233M(7).

**1233D Requirement to enter assets on the allocation register**

- (1) The assets of a sub-fund of a CCIV must be clearly identified in the allocation register as assets of the sub-fund.
- (2) If section 1233K (about property that has to be converted into money etc.) applies to an item of property of a CCIV:

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- (a) the item of property must be clearly identified in the allocation register as an item of property to which that section applies; and
  - (b) the proportion of the property applicable to each sub-fund under subsection 1233H(3) must be clearly identified in the allocation register as the proportion applicable to the sub-fund.
- (3) The corporate director must make entries in the allocation register as required in order to ensure the allocation register makes the identifications required by subsections (1) and (2).
- (4) An entry required by subsection (3) must be made within:
- (a) for a case where money or property is acquired by the CCIV:
    - (i) 5 business days after the money or property is acquired, unless subparagraph (ii) applies; or
    - (ii) if an allocation determination is required to be made in relation to the money or property under section 1233J—5 business days after the determination is made; or
  - (b) for a case where money or property is disposed of, or otherwise ceases to be money or property of the CCIV—5 business days after the disposal or cessation.

*Fault-based offence*

- (5) A person commits an offence if:
- (a) the person is subject to a requirement under subsection (3); and
  - (b) the person fails to comply with the requirement.

*Strict liability offence*

- (6) A person commits an offence of strict liability if the person contravenes subsection (3).

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**1233E Requirement to enter liabilities on the allocation register**

- (1) The liabilities of a sub-fund of a CCIV must be clearly identified in the allocation register as liabilities of the sub-fund.
- (2) If section 1233M (about liabilities allocated to 2 or more sub-funds) applies to a liability of a CCIV:
  - (a) the liability must be clearly identified in the allocation register as a liability to which that section applies; and
  - (b) the proportion of the liability applicable to each sub-fund under subsection 1233L(2) must be clearly identified in the allocation register as the proportion applicable to the sub-fund.
- (3) The corporate director must make entries in the allocation register as required in order to ensure the allocation register makes the identifications required by subsections (1) and (2).
- (4) An entry required by subsection (3) must be made within:
  - (a) for a case where a liability arises—5 business days after the liability arises; or
  - (b) for a case where a liability is discharged, or otherwise ceases to be a liability of the sub-fund—5 business days after the discharge or cessation.

Note: For the liabilities of a CCIV, and when they arise, see section 1233A.

*Fault-based offence*

- (5) A person commits an offence if:
  - (a) the person is subject to a requirement under subsection (3); and
  - (b) the person fails to comply with the requirement.

*Strict liability offence*

- (6) A person commits an offence of strict liability if the person contravenes subsection (3).

### **1233F Liquidator may require corporate director to record debt, claim or property in allocation register**

- (1) This section applies if:
  - (a) a debt payable by, or claim against, a CCIV (present or future, certain or contingent, ascertained or sounding only in damages) is not entered as a liability of any sub-fund of the CCIV in the allocation register of the CCIV; or
  - (b) property of the CCIV is not entered as an asset of any sub-fund of the CCIV in the allocation register of the CCIV.
- (2) A liquidator of a sub-fund of the CCIV may, by notice in writing given to the corporate director of the CCIV, require the corporate director to make entries in the allocation register within the period (which must be at least one business day after the notice is given) specified in the notice.

Note: See also section 1233Q (about Court orders the liquidator can apply for).

- (3) The notice must include sufficient information to enable the corporate director to identify the debt, claim or property.

Note 1: Only liabilities of a sub-fund of a CCIV are provable in a winding up of the sub-fund: see section 1237W.

Note 2: If the asset or liability has to be allocated between sub-funds, the corporate director will have to determine the allocation in order to update the records: see sections 1233J and 1233M.

- (4) The corporate director must comply with the notice within the period specified.
- (5) An offence based on subsection (4) is an offence of strict liability.

### **1233G Requirement to retain records of allocations for 7 years**

- (1) The corporate director must retain a record of:
  - (a) entries made in the allocation register in relation to assets and liabilities of the CCIV; and

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- (b) determinations made under Subdivision B or C in relation to assets and liabilities of the CCIV (including variations made under section 1233N).
- (2) The records must be retained for 7 years after the end of the year in which:
  - (a) for money or property—the money or property is disposed of or otherwise ceases to be money or property of the CCIV; and
  - (b) for a liability—the liability is discharged or otherwise ceases to be a liability of the CCIV.

*Fault-based offence*

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

*Strict liability offence*

- (4) A person commits an offence of strict liability if the person contravenes subsection (1).

**Subdivision B—What are the assets of a particular sub-fund**

**1233H Meaning of *assets*—sub-fund of a CCIV**

- (1) Money or property forms part of the *assets* of a sub-fund to the extent the money or property was obtained by the application of assets of the sub-fund.

Note: Division 4 of this Part requires assets of a sub-fund to be applied only for purposes relating to the sub-fund.

- (2) Subject to subsection (1), the *assets* of a sub-fund of a CCIV at a particular time are the following:
  - (a) amounts paid up in consideration for the issue of shares that are referable to the sub-fund;
  - (b) money deposited with or lent to the CCIV under debentures that are referable to the sub-fund;

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- (c) shares acquired by the CCIV in respect of the sub-fund that are shares in the CCIV that are referable to another of the CCIV's sub-funds;
- (d) money or property of the CCIV not covered by paragraph (a), (b) or (c), to the extent the money or property, at the time it is acquired, relates solely to the business of the sub-fund;
- (e) if there is money or property of the CCIV not covered by paragraph (a), (b), (c) or (d) at the time it is acquired—the proportion (which may be nil) of the money or property that it is fair and reasonable, in the circumstances, to allocate to the sub-fund at that time.

*Effect of an allocation determination*

- (3) Despite subsections (1) and (2), if:
  - (a) the corporate director of a CCIV determines under section 1233J that a particular proportion of certain money or property of a CCIV is allocated to a sub-fund of the CCIV; and
  - (b) the determination is operative (see subsection 1233J(4));that proportion of the money or property is taken to form part of the **assets** of the sub-fund, and to have been part of the **assets** of the sub-fund from the time the money or property was acquired.

Note: If there is a single item of property that forms part of the assets of 2 or more sub-funds, it may not be held by the CCIV as an investment but must instead be converted into money or other fungible assets (see section 1233K).

*Effect of a Court order about an arrangement or reconstruction*

- (4) Despite subsections (1), (2) and (3), the **assets** of a sub-fund of a CCIV:
  - (a) include assets that, in accordance with a Court order made under section 1235F (about arrangements and reconstructions of sub-funds), are to be assets of the sub-fund; and
  - (b) do not include assets that, in accordance with an order made under that section, are no longer to be assets of the sub-fund.

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Note: Subsection (1) of this section applies to money or property obtained by the application of these assets of a sub-fund.

### *Regulations*

- (5) The regulations may provide for and in relation to matters to be considered in determining the extent to which money or property of a CCIV forms part of the assets of a sub-fund of the CCIV.

## **1233J When an allocation determination is required**

- (1) This section applies if money or property acquired by a CCIV in a single transaction does not become wholly part of the assets of a single sub-fund of the CCIV under section 1233H.
- (2) The corporate director must determine (whether in the CCIV's allocation register or otherwise in writing) the proportion (including nil) of the money or property that is to be allocated to each sub-fund of the CCIV.

### *Requirements for determination*

- (3) The determination:
  - (a) must be fair and reasonable in the circumstances and having regard to section 1233H; and
  - (b) must result in the money or property being wholly allocated; and
  - (c) must be made as soon as practicable after the money or property is acquired.

### *When the determination is operative*

- (4) If the determination is one that a reasonable person in the corporate director's position could make, the determination is operative from the time the money or property is acquired, which may be earlier than the time at which the determination is made.
  - (5) A determination under this section is irrevocable.
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*Fault-based offence*

- (6) A person commits an offence if:
  - (a) the person is subject to a requirement under this section; and
  - (b) the person fails to comply with the requirement.

*Determinations during winding up and controllership*

- (7) Subsection (2) does not apply if all of the CCIV's sub-funds are being wound up.
- (8) Despite subsection 13.3(3) of the *Criminal Code*, in a prosecution for an offence based on subsection (6) of this section, a defendant does not bear an evidential burden in relation to the matter in subsection (7).
- (9) A liquidator of a sub-fund of a CCIV, or a receiver of property of a sub-fund of a CCIV, may not make a determination under this section.

Note: A liquidator may apply to the Court for an order under section 1233Q.

**1233K When property must be converted into money etc.**

- (1) This section applies if, as a result of the operation of section 1233H, a single item of property of a CCIV forms part of the assets of 2 or more sub-funds of the CCIV.
- (2) For the purposes of subsection (1), treat an item of property as a single item if the item would generally be applied or dealt with as an indivisible item in the ordinary course of commercial dealing.

Note: An example of a single item of property is a share or unit in a unit trust.

- (3) The corporate director of the CCIV must apply the item of property to obtain other money or fungible property, so as to achieve the result that, when subsection 1233H(1) is applied to the other money or property to determine the extent to which it forms part of the assets of the sub-funds, no single item of property forms part of the assets of 2 or more sub-funds.

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Note: This conversion is intended to ensure that the assets of a sub-fund can be kept separate and distinct from the assets of other sub-funds.

- (4) The conversion required by subsection (3) must be completed as soon as practicable after the item of property is acquired.

*Fault-based offence*

- (5) A person commits an offence if:
- (a) the person is subject to a requirement under this section; and
  - (b) the person fails to comply with the requirement.

## **Subdivision C—What are the liabilities of a particular sub-fund**

### **1233L Meaning of *liabilities*—sub-fund of a CCIV**

- (1) The *liabilities* of a sub-fund of a CCIV at a particular time are the following:
- (a) liabilities of the CCIV that relate solely to the business of the sub-fund;
  - (b) liabilities of the CCIV not covered by paragraph (a), to the extent that it is fair and reasonable in the circumstances to allocate the liability to the sub-fund at the time having regard to the following matters:
    - (i) the extent to which the liability, when it arose, related to the business of the sub-fund;
    - (ii) the extent to which assets of the sub-fund, and assets of other sub-funds, of the CCIV have been applied to meet the liability;
    - (iii) the regulations (if any) made for the purposes of subsection (4).

Note: Section 1233A is about references to the liabilities of a CCIV.

*Effect of an allocation determination*

- (2) Despite subsection (1), if:
- (a) a particular proportion of a liability of a CCIV is allocated to a sub-fund of the CCIV at a time under a determination made
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- under section 1233M (including a determination as varied under section 1233N); and
- (b) the determination is operative at the time (see subsection 1233M(4));
- that proportion of the liability is taken to form part of the ***liabilities*** of the sub-fund at that time.

*Effect of a Court order about an arrangement or reconstruction*

- (3) Despite subsections (1) and (2), the ***liabilities*** of a sub-fund of a CCIV:
- (a) include liabilities that, in accordance with a Court order made under section 1235F (about arrangements and reconstructions of sub-funds), are to be liabilities of the sub-fund; and
- (b) do not include liabilities that, in accordance with an order made under that section, are no longer to be liabilities of the sub-fund.

*Regulations*

- (4) The regulations may provide for and in relation to matters to be considered in determining the extent to which a liability of a CCIV forms part of the liabilities of a sub-fund of the CCIV.

## 1233M When an allocation determination is required

- (1) This section applies if a liability of a CCIV does not relate solely to the business of one sub-fund of the CCIV.
- (2) The corporate director must determine (whether in the CCIV's allocation register or otherwise in writing) the proportion (including nil) of the liability that is to be allocated to each sub-fund of the CCIV.

*Requirements for determination*

- (3) The determination:

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- (a) must be fair and reasonable in the circumstances and having regard to the matters referred to in paragraph 1233L(1)(b); and
- (b) must result in the liability being wholly allocated; and
- (c) must be made as soon as practicable after the liability arises; and
- (d) must be expressed to apply from the time the liability arises (which may be earlier than the time at which the determination is made).

*When the determination is operative*

- (4) A determination under this section (including a determination as varied under section 1233N) is operative at a time if:
  - (a) the determination applies at that time; and
  - (b) the determination is one that a reasonable person in the corporate director's position could make.
- (5) A determination under this section is irrevocable, however it may be varied under section 1233N even if it has become inoperative.

*Fault-based offence*

- (6) A person commits an offence if:
  - (a) the person is subject to a requirement under this section; and
  - (b) the person fails to comply with the requirement.

*Determinations during winding up and controllership*

- (7) Subsection (1) does not apply if all of the CCIV's sub-funds are being wound up.
- (8) Despite subsection 13.3(3) of the *Criminal Code*, in a prosecution for an offence based on subsection (6) of this section, a defendant does not bear an evidential burden in relation to the matter in subsection (7).

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- (9) A liquidator of a sub-fund of a CCIV, or a receiver of property of a sub-fund of a CCIV, may not make a determination under this section.

Note: A liquidator may apply to the Court for an order under section 1233Q.

**1233N Variations of proportional allocation of liabilities**

- (1) The corporate director may vary a determination made under section 1233M if it is necessary to do so to ensure that the determination remains operative for the purposes of subsection 1233M(4).
- (2) If, as a result of a change in circumstances, a determination has or will become inoperative, the corporate director must vary the determination as soon as is practicable.

Note: The variation may take effect retrospectively to make operative a determination that has become inoperative: see paragraph (3)(b).

- (3) The variation:
- (a) must be fair and reasonable in the circumstances and having regard to:
- (i) the matters referred to in paragraph 1233L(1)(b); and
- (ii) the time at which it starts to apply; and
- (b) must specify the time at which it starts to apply, which may be earlier or later than the time at which the variation is made; and
- (c) must result in the liability being wholly allocated; and
- (d) must be made in writing.

*Effect of variation*

- (4) The variation takes effect from the time at which it starts to apply.

*Fault-based offences*

- (5) A person commits an offence if:
- (a) the person is subject to a requirement under subsection (2); and

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- (b) the person fails to comply with the requirement.

**1233P Creditor may require corporate director to provide information about allocation**

- (1) A creditor of a CCIV may, by notice in writing given to the corporate director of the CCIV, require the corporate director to provide the creditor with the following information about the debt owing to the creditor:
  - (a) the sub-fund or sub-funds of the CCIV of which the debt is a liability;
  - (b) if the debt is a liability of 2 or more sub-funds of the CCIV—the proportion of the debt allocated to each sub-fund; within the period (which must be at least 14 days after the notice is given), and in the manner, specified in the notice.
- (2) The notice must include sufficient information to enable the corporate director to identify the debt.

*Strict liability offence*

- (3) A person commits an offence of strict liability if the person fails to comply with a notice given to the person in accordance with subsection (1).

**Subdivision D—Orders the Court can make**

**1233Q Orders the Court can make in relation to assets and liabilities of sub-funds**

- (1) The Court may, on an application under subsection (3), make any orders, and give any directions, that the Court considers appropriate in relation to the assets and liabilities of the sub-funds of a CCIV, including any of the following:
  - (a) an order requiring the corporate director to update or correct the CCIV's allocation register;
  - (b) an order declaring that money or property of a CCIV forms part of the assets of a particular sub-fund of the CCIV;

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- (c) an order declaring that a determination made by the corporate director under section 1233J is not operative;
  - (d) an order requiring the corporate director to make one or more determinations under section 1233J;
  - (e) an order declaring the extent to which the money or property forms part of the assets of each sub-fund of the CCIV;
  - (f) an order declaring that a liability of a CCIV forms part of the liabilities of a particular sub-fund of the CCIV;
  - (g) an order declaring that a determination made by the corporate director under section 1233M (including a determination as varied under section 1233N), is not operative;
  - (h) an order requiring the corporate director to make one or more determinations under section 1233M, or to vary a determination under section 1233N;
  - (i) an order declaring the extent to which a liability forms part of the liabilities of each sub-fund of the CCIV at a time.
- (2) The Court may make an order or give directions under subsection (1) if any of the following applies:
- (a) the Court is satisfied a determination made by the corporate director under section 1233J or 1233M (including a determination varied under section 1233N) is not operative;
  - (b) the Court is satisfied that the CCIV's allocation register is otherwise incorrect or deficient;
  - (c) all of the CCIV's sub-funds are being wound up.
- (3) An application for an order or directions under subsection (1) may be made by any of the following:
- (a) the corporate director of the CCIV;
  - (b) a liquidator of a sub-fund of the CCIV;
  - (c) a controller of property of a sub-fund of the CCIV.
- (4) If the Court makes an order under paragraph (1)(b), (e) or (i), the corporate director does not have the power under section 1233J, 1233M or 1233N (as the case requires) to make a determination that is inconsistent with the order unless:

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- (a) the order states that the corporate director does have the power to make an inconsistent determination; or
- (b) the corporate director first obtains the leave of the Court.

## **Division 4—Purposes for which sub-fund assets may be applied**

### **1234 Unallocated money and property may not be applied for any purpose**

Money or property of a CCIV that has not been clearly identified in the CCIV's allocation register as forming part of the assets of a sub-fund or sub-funds of the CCIV may not be applied, or dealt with, whether directly or indirectly, for any purpose.

### **1234A Requirement for segregated application of assets of sub-funds**

- (1) The assets of a sub-fund of a CCIV must not be applied, or dealt with, whether directly or indirectly:
  - (a) subject to paragraph (b), for any purpose other than a purpose covered by section 1234B; or
  - (b) for a purpose prescribed by regulations made for the purposes of this paragraph.

Note: For the consequences of a contravention of this requirement, see section 1234F.

- (2) Subsection (1) does not apply to:
  - (a) money or property to which section 1234 applies; or
  - (b) assets of a sub-fund of the CCIV, to the extent the assets consist of property to which section 1233K (about property that has to be converted into money etc.) applies.

Note: For paragraph (b), see instead section 1234C.

- (3) The assets of 2 or more sub-funds of a CCIV must not be applied jointly to acquire a single item of property of the CCIV.

Note: A single item of property that forms part of the assets of 2 or more sub-funds must be converted into money or other fungible property: see section 1233K.

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*Liquidators*

- (4) However, a liquidator or provisional liquidator of a sub-fund of a CCIV may:
- (a) make a disposition of assets of the sub-fund that is an exempt disposition for the purposes of subsection 468(2), as that subsection applies to the sub-fund under Division 5 of Part 8B.6; or
  - (b) disclaim property of a sub-fund under Division 7A of Part 5.6, as that Division applies to the sub-fund under Division 5 of Part 8B.6.

**1234B Purposes for which sub-fund assets may be applied**

This section covers the following purposes:

- (a) meeting liabilities of the sub-fund;
- (b) carrying on the business of the sub-fund;
- (c) paying a dividend to members of the sub-fund;
- (d) providing consideration to a member of the sub-fund in respect of a reduction of share capital affecting the sub-fund;
- (e) redeeming redeemable shares or redeemable preference shares that are referable to the sub-fund;
- (f) making a payment covered by section 1237Y (about winding up);
- (g) making a payment covered by section 1236K (about certain priority payments by a receiver);
- (h) complying with a compromise or arrangement relating to the sub-fund and approved by the Court under paragraph 411(4)(b), or an order made under section 413 in relation to such a compromise or arrangement;
- (i) making any other distribution to members of the sub-fund that the CCIV is permitted by this Act and its constitution to make;
- (j) a purpose prescribed by regulations made for the purposes of this paragraph.

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Note: The assets may also be applied in accordance with a court order: see subsection 1234E(2).

**1234C Property that is required to be converted to be applied only for that purpose**

An item of property of a CCIV to which section 1233K applies may not be applied for any purpose, except for the purpose of the conversion required by that section.

Note: For the consequences of a contravention of this requirement, see section 1234F.

**1234D Requirement for security interests to be segregated**

A CCIV must not grant a security interest in personal property of the CCIV if the personal property comprises assets of 2 or more sub-funds of the CCIV.

Note: For the consequences of a contravention of this requirement, see section 1234F.

**1234E Court orders**

- (1) In a proceeding to which a CCIV is a party, a court must not make an order that is inconsistent with section 1234, 1234A, 1234C or 1234D, unless the court considers that the interests of justice require it to do so.
- (2) If a court makes an order that is inconsistent with section 1234, 1234A, 1234C or 1234D, the assets of a sub-fund must be applied for the purpose of complying with the court order, in priority to any other permitted application of the assets.

**1234F Consequences of non-compliant application of assets**

- (1) If money or property of a CCIV is applied or dealt with in contravention of section 1234, 1234A, 1234C or 1234D, the contravention does not affect the validity of any contract or transaction connected with the application or dealing.

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Note: A Court may order an injunction to stop the CCIV applying or dealing with the asset (see section 1324).

- (2) A CCIV contravenes this subsection if:
- (a) the CCIV applies or deals with money or property of the CCIV; and
  - (b) the application or dealing contravenes section 1234, 1234A, 1234C or 1234D.

*Fault-based offence*

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

*Strict liability offence*

- (4) A person commits an offence of strict liability if the person contravenes subsection (2).

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## **Division 5—How CCIV assets must be held**

### **1234G Who may hold the assets of a CCIV**

- (1) The money and property of a CCIV may be held by the CCIV or another person.
- (2) Subsection (1) is subject to the regulations made for the purposes of this subsection.

Note: This Division contains requirements for holding the money and property of a CCIV. Further requirements that apply to a CCIV or another person who holds such assets may be prescribed by regulations made for the purposes of subsection (2).

### **1234H Person other than CCIV holds money or property on trust**

- (1) A person other than the CCIV who holds money or property of the CCIV is taken to hold the money or property on trust for the CCIV.
- (2) To avoid doubt, nothing in this Chapter is intended to have the effect of making a CCIV or its corporate director a trustee or trustees of the money or property of the CCIV.

### **1234J How CCIV money and property must be held**

- (1) A person who holds assets of a sub-fund of a CCIV that have been clearly identified as such in the CCIV's allocation register must hold the assets separately from any other property (including from assets of any other sub-fund of the CCIV).

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

- (2) A person who holds money or property of a CCIV that has not yet been clearly identified in the CCIV's allocation register as forming part of the assets of a sub-fund or sub-funds of the CCIV must hold that money or property separately from any other property.

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

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- (3) Despite subsection (1), a person who holds an item of property of a CCIV to which section 1233K (about property that has to be converted into money etc.) applies must hold that item of property separately from any other property.

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

- (4) Subsections (1), (2) and (3) are subject to the regulations made for the purposes of this subsection.

*Strict liability offence*

- (5) An offence based on subsection (1), (2) or (3) is an offence of strict liability.

## 1234K Regulations may create exceptions

- (1) The regulations may provide that prescribed classes of assets:
- (a) are assets to which the provisions of this Division do not apply; or
  - (b) are assets to which prescribed provisions of this Division do not apply.
- (2) The regulations may make provision in relation to the holding of assets of a sub-fund of a CCIV that are in a class of assets prescribed by the regulations for the purposes of subsection (1).
- (3) Without limiting subsection (1), regulations made for the purposes of that subsection may prescribe assets that are held outside of Australia in prescribed circumstances as a class of assets.

## **Part 8B.6—External administration and deregistration**

### **Division 1—Preliminary**

#### **1235 Construing terms and expressions affected by substituted references**

*Terms or expressions that have a particular meaning in relation to a sub-fund*

(1) To avoid doubt, if:

- (a) a term or expression has a particular meaning in this Act in relation to a sub-fund of a CCIV; and
- (b) the term or expression occurs in a provision, in relation to a reference (including an implied reference) that is required by this Part to be substituted with a reference to a sub-fund;

then the meaning the term or expression has in relation to the sub-fund in the provision is the meaning referred to in paragraph (a).

Note: Examples of terms or expressions that have a particular meaning in relation to a sub-fund of a CCIV include the following:

- (a) contributory (see section 9);
- (b) creditor and secured creditor (see section 9);
- (c) deregister (see Division 9 of this Part);
- (d) extraordinary resolution (see section 9);
- (e) member (see section 1222Q);
- (f) property (see subsection 51F(3));
- (g) solvent and insolvent (see section 1231A);
- (h) special resolution (see section 9).

*Terms or expressions that do not have a particular meaning in relation to a sub-fund*

(2) If:

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- (a) a term or expression has a particular meaning in this Act or in a provision of this Act in relation to a company, corporation or body corporate; and
- (b) because of a reference (including an implied reference) that is required by this Part to be substituted with a reference to a sub-fund, it is necessary to determine the meaning of the term or expression in relation to a sub-fund of a CCIV; and
- (c) the term or expression does not have a particular meaning in relation to a sub-fund of a CCIV;

then the meaning the term or expression has in relation to the sub-fund is the meaning the term or expression would have in relation to the CCIV if the CCIV had no other sub-funds.

Note: For example, the term ***related entity*** is defined in section 9 in relation to a body corporate, and is not defined in relation to a sub-fund of a CCIV. To determine whether a person is a related entity of a sub-fund:

- (a) first, assume that the CCIV has no other sub-funds (this includes disregarding any shares held by the CCIV that are assets of other sub-funds of the CCIV); and
- (b) then, apply the definition of ***related entity*** in section 9 to the CCIV based on that assumption.

As a result, a member of the CCIV (paragraph (d) of the definition of ***related entity***) will only be a related entity of a sub-fund of the CCIV if the person is a member of the sub-fund.

## **Division 2—Arrangements and reconstructions of sub-funds**

### **1235A Object of this Division**

The object of this Division is to provide for arrangements and reconstructions of sub-funds of CCIVs to occur in the same way that arrangements and reconstructions of Part 5.1 bodies occur.

### **1235B Compromises etc. not to be made between 2 or more sub-funds**

The Court may not approve a compromise or arrangement between a CCIV and:

- (a) the creditors of 2 or more sub-funds of a CCIV; or
- (b) the members of 2 or more sub-funds of a CCIV.

Note: However, the Court may approve a further compromise or arrangement between the CCIV and another sub-fund. If this is done as part of a scheme for the amalgamation or reconstruction of a sub-fund or sub-funds, the Court may make appropriate orders: see section 1235E.

### **1235C Applying arrangements and reconstructions provisions to sub-funds**

- (1) If a compromise or arrangement is proposed between a CCIV and the creditors of a sub-fund or any class of them, or between a CCIV and the members of a sub-fund or any class of them, the arrangements and reconstructions provisions referred to in subsection (2) apply to the proposed compromise or arrangement subject to:
  - (a) such modifications as are set out in this Division; and
  - (b) such other modifications as are made necessary by the fact that the CCIV is proposing to enter into a compromise or arrangement relating to only one sub-fund of the CCIV.

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*Arrangements and reconstructions provisions*

- (2) The provisions (the ***arrangements and reconstructions provisions***) are as follows:
- (a) Part 5.1 (other than a provision excluded by subsection (3));
  - (b) the other provisions of the Corporations legislation (other than a provision excluded by subsection (3)) to the extent to which they relate to the operation of the provisions referred to in paragraph (a).
- (3) For the purposes of subsection (2), the provisions excluded from the arrangements and reconstructions provisions are as follows:
- (a) section 410;
  - (b) subsections 411(1A), (1B) and (1C);
  - (c) a provision prescribed by regulations made for the purposes of this paragraph.

*Translation rules*

- (4) In the application of the arrangements and reconstructions provisions, those provisions apply as if the substitutions set out in the following table were made.

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| <b>Substitutions to be made</b> |   |   |
|---------------------------------|---|---|
| <b>Item</b>                     | <b>Column 1</b><br><b>If the provision ...</b>  | <b>Column 2</b><br><b>substitute a reference to ...</b> |
| 1                               | refers to the Part 5.1 body (the <b><i>relevant body</i></b> ) (whether the reference is express or implied, and (if the reference is express) whether the Part 5.1 body is referred to as a Part 5.1 body, a company, a body corporate, a corporation, or in some other way), and the reference is not covered by another item of this table | the sub-fund (but see subsections (5) and (6))          |

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**Substitutions to be made**

| <b>Item</b> | <b>Column 1<br/>If the provision ...</b>                     | <b>Column 2<br/>substitute a reference to ...</b>   |
|-------------|--|---|
| 2           | refers to the directors, or a director, of the relevant body | each of the following:<br>(a) the corporate director;<br>(b) a director of the corporate director   |
| 3           | refers to an officer of the relevant body                    | each of the following:<br>(a) a director of the CCIV;<br>(b) a person covered by paragraph (b), (c) or (d) of the definition of <i>officer</i> of a CCIV in section 1224B in relation to the sub-fund |
| 4           | refers to shares in the relevant body                        | shares referable to the sub-fund  |
| 5           | refers to debentures of the relevant body                    | debentures referable to the sub-fund  |

Note: For item 2—for example, the draft explanatory statement provided for in subsection 411(2) must state any material interests of the corporate director and of the directors of the corporate director.

- (5) Despite item 1 of the table in subsection (4), a reference covered by column 1 of that item is taken to be a reference to the CCIV if the context of the reference so requires (for example, because the reference requires the legal capacity and powers of a company).

Note 1: For example, references to the Part 5.1 body, in the context of the body as a party to a compromise or arrangement, are references to the CCIV, because the CCIV is the legal person that is a party to, and that is bound by, the compromise or arrangement.

Note 2: For example, references to the Part 5.1 body, in the context of identifying a liquidator, are references to the sub-fund, because winding up of a CCIV takes place at the sub-fund level.

- (6) If a reference in a provision to the relevant body is, as a result of subsection (5), taken to be a reference to the CCIV, the operation of the provision in relation to the CCIV is confined, to the extent possible, to the sub-fund.
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**1235D Persons not to be appointed to administer compromise or arrangement**

Subsection 411(7) has effect in relation to a CCIV as if the persons referred to in that subsection included a person who holds money or property of the CCIV.

**1235E Provisions for facilitating reconstruction and amalgamation of sub-funds within a CCIV**

(1) If:

- (a) a compromise or arrangement is proposed for the purposes of, or in connection with, a scheme for the reconstruction of a sub-fund or sub-funds or the amalgamation of 2 or more sub-funds; and
- (b) under the scheme, the whole or any part of the undertaking or of the property of a sub-fund concerned in the scheme (the *transferor sub-fund*) is to become a part of the undertaking or of the property of another sub-fund of the same CCIV;

the Court may by order provide for any of the matters referred to in subsection 413(1) as if the other sub-fund were the transferee company referred to in that subsection.

(2) Nothing in this section limits the orders a Court may make under section 413 if it approves a compromise or arrangement relating to a sub-fund of a CCIV.

**1235F Court may make order in relation to assets and liabilities of sub-funds**

If a Court approves a compromise or arrangement between a CCIV and the creditors of a sub-fund or any class of them, or between a CCIV and the members of a sub-fund or any class of them, the Court may also make any order it considers appropriate in relation to the assets and liabilities of the sub-fund.

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## **Division 3—Receivers, and other controllers, of property of sub-funds**

### **Subdivision A—Preliminary**

#### **1236 Object of this Division**

The object of this Division is to preserve the segregated application of assets of sub-funds by requiring appointments of controllers to be made separately in respect of the property of each sub-fund of the CCIV.

#### **1236A Meaning of *property* and *receiver*—sub-fund of a CCIV**

In this Division:

*property*, in relation to a sub-fund of a CCIV, means property in Australia or outside Australia.

*receiver*, in relation to property of a sub-fund of a CCIV, includes a receiver and manager.

### **Subdivision B—Appointment of controllers**

#### **1236B Appointment of a controller of property of a sub-fund of a CCIV**

- (1) An appointment covered by subsection (2):
  - (a) may not be made in relation to all the property of a CCIV; and
  - (b) may be made only in relation to property of a CCIV that is property of a particular sub-fund of the CCIV.
- (2) The appointments covered by this subsection are appointments, whether made under a power contained in an instrument, or by a Court, of a person to act as a:
  - (a) receiver; or

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- (b) receiver and manager; or  
(c) controller;  
of property of the CCIV.

Note: A Court may appoint a receiver under section 233, 283HB, 1101B or 1323.

**1236C Persons not to act as receivers**

- (1) A person is not qualified to be appointed, and must not act, as receiver of property of a sub-fund of a CCIV if the person:
    - (a) is a secured party in relation to any property (including PPSA retention of title property) of the sub-fund; or
    - (b) is the corporate director of the CCIV; or
    - (c) is a person who holds money or property of the CCIV; or
    - (d) is an auditor of the CCIV or the sub-fund; or
    - (e) is a director, secretary, senior manager or employee of a body corporate that is a secured party in relation to any property (including PPSA retention of title property) of the sub-fund; or
    - (f) is not a registered liquidator; or
    - (g) is a director, secretary, senior manager or employee of:
      - (i) the corporate director; or
      - (ii) a body corporate related to the corporate director; or
      - (iii) a body corporate related to the CCIV; or
    - (h) unless ASIC directs in writing that this paragraph does not apply in relation to the person in relation to the sub-fund of the CCIV—has at any time within the last 12 months been:
      - (i) a corporate director or promoter of the CCIV; or
      - (ii) a director, secretary, senior manager, employee or promoter of the corporate director or a related body corporate of the CCIV or the corporate director.
  - (2) Paragraph (1)(f) does not apply in relation to a body corporate authorised by or under a law of the Commonwealth, of a State or of a Territory to act as receiver of property of the sub-fund concerned.
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- (3) Section 418 does not apply to a CCIV.
- (4) In this section:
  - senior manager* does not include a receiver and manager.

**1236D Notifying of appointment or cessation of controller**

If:

- (a) a person (the *controller*) is appointed as, or ceases to be, the controller of property of a sub-fund of a CCIV; and
- (b) one or more persons, other than the CCIV, holds assets of the sub-fund of the CCIV;

the controller must, as soon as practicable, and in any event within 3 business days after the controller's appointment or cessation, notify each such person in writing of the appointment or cessation.

**Subdivision C—Application of Part 5.2 to control of property of sub-funds**

**1236E Applying Part 5.2 etc. to sub-funds**

- (1) The controller provisions referred to in subsection (2) apply to a CCIV with:
  - (a) the modifications set out in this Division; and
  - (b) such other modifications as are made necessary by the fact that the provisions are applying to a sub-fund instead of to a corporation.

*Controller provisions*

- (2) The provisions (the *controller provisions*) are as follows:
  - (a) Part 5.2 and Division 2B of Part 5.7B (other than a provision excluded by subsection (3));
  - (b) the other provisions of the Corporations legislation (other than a provision excluded by subsection (3)) to the extent to which they relate to the operation of the provisions referred to in paragraph (a).

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- (3) For the purposes of subsection (2), the provisions excluded from the controller provisions are as follows:
- (a) section 416;
  - (b) section 418;
  - (c) a provision prescribed by regulations made for the purposes of this paragraph.

Note: Section 1236C applies instead of section 418.

*Translation rules*

- (4) In the application of the controller provisions, those provisions apply as if the substitutions set out in the following table were made.

| <b>Substitutions to be made</b> |   |   |
|---------------------------------|---|---|
| <b>Item</b>                     | <b>Column 1</b><br><b>If the provision ...</b>  | <b>Column 2</b><br><b>substitute a reference to ...</b> |
| 1                               | refers to the corporation (the <b>relevant corporation</b> ) in relation to whose property a controller has been, or is to be appointed (whether the reference is express or implied, and (if the reference is express) whether the corporation is referred to as a corporation, a company, a body corporate, or in some other way), and the reference is not covered by another item of this table | the sub-fund (but see subsections (5) and (6))          |
| 2                               | refers to the directors, or a director, or the board of the relevant corporation  | the corporate director of the CCIV                      |

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**Substitutions to be made**

| <b>Item</b> | <b>Column 1<br/>If the provision ...</b>         | <b>Column 2<br/>substitute a reference to ...</b>   |
|-------------|--|---|
| 3           | refers to an officer of the relevant corporation | each of the following:<br>(a) a director of the CCIV;<br>(b) a person covered by paragraph (b), (c) or (d) of the definition of <i>officer</i> of a CCIV in section 1224B in relation to the sub-fund |
| 4           | refers to shares in the relevant corporation     | shares referable to the sub-fund  |
| 5           | refers to debentures of the relevant corporation | debentures referable to the sub-fund  |

- (5) Despite item 1 of the table in subsection (4), a reference covered by column 1 of that item is taken to be a reference to the CCIV if the context of the reference so requires (for example, because the reference requires the legal capacity and powers of a company).
- (6) If a reference in a provision to the relevant corporation is, as a result of subsection (5), taken to be a reference to the CCIV, the operation of the provision in relation to the CCIV is confined, to the extent possible, to the sub-fund.

**Subdivision D—Modified duties and powers of receivers etc.**

**1236F Liability of controller**

- (1) Section 1224M (about extended liability for acts of agents) does not apply to a person who, as agent for the CCIV, enters into possession or assumes control of any property of a sub-fund of the CCIV for the purposes of enforcing any security interest.
- (2) Subsection (1) does not affect the application of section 419.

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**1236G Powers of receiver**

If:

- (a) a receiver is appointed in respect of property of a sub-fund of a CCIV; and
- (b) one or more persons, other than the CCIV, holds assets of the sub-fund of the CCIV;

the powers conferred under section 420 on the receiver are taken to include the power to instruct each such person in relation to dealing with the assets of the sub-fund.

**1236H Controller may require reports relating to other sub-funds if necessary**

The affairs of a CCIV about which a controller of property of a sub-fund of the CCIV may require a report under section 430 include:

- (a) the affairs of the sub-fund; and
- (b) the affairs of any other sub-fund, to the extent the information about those affairs is required by the controller for the purpose of attaining the objectives for which the controller was appointed.

**1236J Controller may inspect books of CCIV**

The books of a CCIV that a controller of property of a sub-fund of the CCIV is entitled under section 431 to inspect at any reasonable time include:

- (a) the allocation register kept by the corporate director under section 1233C (about the allocation of assets and liabilities to sub-funds); and
- (b) any books of the CCIV, to the extent the inspection of those books is necessary for the purpose of attaining the objectives for which the controller was appointed.

Note: A person entitled to inspect a book may make copies or take extracts: see subsection 1300(3).

## **Subdivision E—Other modifications**

### **1236K Application of sub-fund property to meet certain priority payments**

If a receiver is appointed in respect of property of a sub-fund of a CCIV, the assets of the sub-fund may be applied for the purposes of paying debts or amounts that, under section 433, must be paid in priority to any claim for principal or interest in respect of the debentures referred to in that section.

### **1236L Transfer of books to ASIC etc.**

- (1) Before ASIC destroys, in accordance with subsection 422D(9), books relating to the control of property of a sub-fund of a CCIV, ASIC must notify the CCIV that it intends to do so.
- (2) Despite subsection 422D(9), if:
  - (a) ASIC retains books under subsection 422D(8) in relation to the control of property of a sub-fund of a CCIV; and
  - (b) the retention period mentioned in that subsection ends; and
  - (c) the CCIV, by resolution of the corporate director, directs ASIC not to destroy the books;ASIC must, as soon as practicable, transfer possession or control of those books to the CCIV.

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**Division 4—Administration and restructuring**

**1236M Part 5.3A does not apply to a CCIV**

Part 5.3A (about the administration of a company's affairs with a view to executing a deed of company arrangement) does not apply to a CCIV or a sub-fund of a CCIV.

**1236N Part 5.3B does not apply to a CCIV**

Part 5.3B (about restructuring a company) does not apply to a CCIV or a sub-fund of a CCIV.

## **Division 5—Winding up of sub-funds**

### **Subdivision A—Preliminary**

#### **1237 Object of this Division**

The object of this Division is to preserve the segregated application of assets of sub-funds by requiring a separate winding up procedure for each sub-fund.

#### **1237A No winding up of a CCIV**

A CCIV cannot be wound up, or placed in liquidation.

Note: If a CCIV has no sub-funds, ASIC must deregister the CCIV: see section 1239K.

### **Subdivision B—Application of winding up provisions to winding up of sub-funds**

#### **1237B Applying winding up provisions to sub-funds**

- (1) An application to wind up a sub-fund of a CCIV, and the winding up of a sub-fund of a CCIV, are regulated:
  - (a) by the provisions of this Division; and
  - (b) by the winding up provisions referred to in subsection (2), applying, so far as they are capable of so doing, subject to:
    - (i) such modifications as are set out in this Division; and
    - (ii) such other modifications as are made necessary by the fact that the provisions are applying to a sub-fund instead of to a company.

#### *Winding up provisions*

- (2) The provisions (the *winding up provisions*) are as follows:
  - (a) sections 53 and 91, paragraph 233(1)(a), Parts 5.4, 5.4A, 5.4B, 5.5 and 5.6, Divisions 2 and 2A of Part 5.7B and

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Schedule 2 (other than a provision excluded by subsection (3));

- (b) the other provisions of the Corporations legislation (other than a provision excluded by subsection (3)) to the extent to which they relate to the operation of the provisions referred to in paragraph (a).

Note 1: Parts 5.8 and 5.9 also apply to CCIVs with modifications: see Divisions 8 and 9 of this Part.

Note 2: Part 5.4C does not apply to CCIVs or sub-funds of CCIVs.

- (3) For the purposes of subsection (2), the provisions excluded from the winding up provisions are as follows:
- (a) section 459T;
  - (b) Subdivision B of Division 3 of Part 5.5 (about simplified liquidation process);
  - (c) Division 8 of Part 5.6 (about pooling);
  - (d) a provision prescribed by regulations made for the purposes of this paragraph.

*Translation rules*

- (4) In the application of the winding up provisions, those provisions apply as if the substitutions set out in the following table were made.

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**Substitutions to be made**

| <b>Item</b> | <b>Column 1<br/>If the provision ...</b>  | <b>Column 2<br/>substitute a reference to ...</b> |
|-------------|---|---|
| 1           | refers to the company (the <i>relevant company</i> ) that is being, is to be, or has been wound up, or is the subject of an application for a winding up order (whether the reference is express or implied, and (if the reference is express) whether the company is referred to as a company, a body corporate, a | the sub-fund (but see subsections (5) and (6))    |

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**Substitutions to be made**

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| <b>Item</b> | <b>Column 1<br/>If the provision ...</b>   | <b>Column 2<br/>substitute a reference to ...</b>   |
|-------------|--|---|
|             | corporation, or in some other way),<br>and the reference is not covered by<br>another item of this table                             |   |
| 2           | refers to the directors, or a director,<br>or the board of the relevant<br>company   | the corporate director of the CCIV  |
| 3           | refers to an officer of the relevant<br>company  | each of the following:<br>(a) a director of the CCIV;<br>(b) a person covered by<br>paragraph (b), (c) or (d) of the<br>definition of <i>officer</i> of a CCIV in<br>section 1224B in relation to the<br>sub-fund |
| 4           | refers to shares in the relevant<br>company  | shares referable to the sub-fund  |
| 5           | refers to debentures of the relevant<br>company  | debentures referable to the sub-fund  |
| 6           | refers to a general meeting, in<br>relation to the relevant company<br>(other than a reference to the<br>company in general meeting) | a members' meeting of the sub-fund<br>(see section 1228B)   |
| 7           | refers to the relevant company in<br>general meeting   | the members of the sub-fund at a<br>members' meeting of the sub-fund  |
| 8           | refers to the incorporation of the<br>relevant company   | the registration of the sub-fund  |

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Note 1: Item 1—for example, in paragraph 459P(1)(b) there is an implied reference to “of the company” after “a creditor”, and in paragraph 459P(1)(c) there is an implied reference to “of the company” after “a contributory”. For a CCIV, both these implied references would be substituted with implied references to “of the sub-fund”.

Note 2: Item 4—for example, if the winding up of a sub-fund of a CCIV commences, section 468A will operate to void a transfer of shares in the CCIV only if the shares are referable to the sub-fund.

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Note 3: Item 7—for example, subsection 495(1) requires the members of the sub-fund to appoint a liquidator or liquidators.

- (5) Despite item 1 of the table in subsection (4), a reference covered by column 1 of that item is taken to be a reference to the CCIV if the context of the reference so requires (for example, because the reference requires the legal capacity and powers of a company).

Note 1: For example, the references in paragraphs 459P(1)(a) and 462(2)(a) to “the company” are taken to be references to “the CCIV” because an application to the Court would be made by the legal person that is the CCIV.

Note 2: For example, the reference in subsection 461(2) to “A company must lodge” is taken to be a reference to “The CCIV must lodge” because the lodging of documents with ASIC would be done by the legal person that is the CCIV.

Note 3: For example, the reference in section 493 to the “corporate state and corporate powers of the company” is a reference to the “corporate state and corporate powers of the CCIV”.

- (6) If a reference in a provision to the relevant company is, as a result of subsection (5), taken to be a reference to the CCIV, the operation of the provision in relation to the CCIV is confined, to the extent possible, to the sub-fund.

Note: For example, the first reference in paragraph 471B(a) to “the company” is a reference to the CCIV, because only a legal person can be a party to a proceeding in a court. However, the operation of section 471B to prevent proceedings against the CCIV is confined to proceedings that relate to the sub-fund.

**1237C References to debts etc. of a sub-fund**

For the purposes of the application of the winding up provisions, as those provisions apply subject to item 1 of the table in subsection 1237B(4):

- (a) a debt of the CCIV is taken to be a debt of a sub-fund to the extent (if any) that the debt is a liability of the sub-fund; and
- (b) a claim against the CCIV is taken to be a claim against a sub-fund of the CCIV to the extent (if any) that the claim is a liability of the sub-fund.

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Note: A reference to a liability of a sub-fund of a CCIV includes debts and claims: see section 1233A.

**Subdivision C—Winding up of a sub-fund in insolvency**

**1237D When a sub-fund is presumed to be insolvent**

Paragraph 459C(2)(a) is taken to be satisfied in relation to a sub-fund of a CCIV if:

- (a) the CCIV failed (as defined by section 459F) to comply with a statutory demand; and
- (b) the failure affects the sub-fund (see subsection 1237E(3)).

**1237E Statutory demand—creditor may serve demand on CCIV**

- (1) A person may serve a statutory demand on a CCIV under section 459E.
- (2) However, subsection 459E(2) applies to a statutory demand served on a CCIV as if it also required the demand to specify, in relation to each debt to which the demand relates:
  - (a) the sub-fund or sub-funds of the CCIV of which the debt is a liability; and
  - (b) if the debt is a liability of 2 or more sub-funds of the CCIV—the proportion of the debt allocated to each sub-fund at the time the demand is served.
- (3) Whether a CCIV has failed to comply with a statutory demand is determined under section 459F. If the CCIV has failed to comply with a statutory demand, the failure affects each sub-fund specified in the demand.

Note: The sub-funds specified may be affected by a variation made by the Court under subsection 1237H(3).

**1237F Statutory demand—CCIV may apply to set aside demand**

- (1) A CCIV may apply to the Court under section 459G for an order setting aside a statutory demand served on the CCIV.

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- (2) Division 3 of Part 5.4 applies in relation to the application subject to the modifications set out in sections 1237G to 1237J.

**1237G Statutory demand—determining application to set aside where there is a dispute or offsetting claim**

- (1) Paragraph 459H(1)(b) applies in relation to a debt to which a demand relates only if the CCIV has an offsetting claim that is an asset of the sub-fund of which the debt or a proportion of the debt (as the case requires) is a liability.
- (2) Subsection 459H(2) has effect as if it required the Court to calculate a separate substantiated amount in relation to each sub-fund specified in the statutory demand.
- (3) For the purposes of the calculation:
  - (a) the amount of the debt is to be determined having regard only to a debt or a proportion of a debt (as the case requires) that is a liability of the sub-fund; and
  - (b) the amount of an offsetting claim is to be determined having regard only to so much of an offsetting claim as is an asset of the sub-fund.

**1237H Statutory demand—determining application to set aside where there is a dispute about the sub-fund**

- (1) This section applies if:
  - (a) a CCIV applies under section 459G for an order setting aside a statutory demand served on the CCIV; and
  - (b) within the statutory period referred to in subsection 459G(3):
    - (i) a notice complying with subsection (6) is filed with the Court; and
    - (ii) a copy of the notice is served on the person who served the demand on the CCIV; and
  - (c) the information specified in the notice about a debt is not the same as the information specified in the demand about the debt; and

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- (d) section 459H does not apply.
- (2) The Court must determine the following information for the debt:
- (a) the sub-fund or sub-funds of the CCIV of which the debt is a liability;
  - (b) if the debt is a liability of 2 or more sub-funds of the CCIV—the proportion of the debt allocated to each sub-fund.
- (3) If the information determined by the Court under subsection (2) is different from the information specified in the demand, the Court may make an order:
- (a) varying the demand as specified in the order; and
  - (b) declaring the demand to have had effect, as so varied, as from when the demand was served on the CCIV.
- The order may be made subject to conditions.
- (4) This section has effect subject to section 459J.
- (5) Section 459L has effect as if the orders referred to in that section included an order under this section.
- (6) A notice complies with this subsection in relation to a statutory demand if the notice specifies the following information for each debt to which the demand relates:
- (a) the sub-fund or sub-funds of the CCIV of which the debt is a liability;
  - (b) if the debt is a liability of 2 or more sub-funds of the CCIV—the amount of the debt allocated to each sub-fund.

**1237J Substitution of sub-fund where statutory demand not relied on**

- (1) This section applies if:
- (a) a creditor applies under section 459P for a sub-fund of the CCIV to be wound up in insolvency; and
  - (b) the application does not rely on a failure by the CCIV to comply with a statutory demand.

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- (2) The Court may by order substitute, in an application under section 459P, the sub-fund or sub-funds of the CCIV in respect of which the application is made.
- (3) The Court may only make an order if:
  - (a) a notice complying with subsection (5) is filed with the Court; and
  - (b) the Court thinks it is appropriate to do so.
- (4) After the order is made, the application has effect, and may be proceeded with, as if the substituted sub-fund or sub-funds had been the original sub-fund or sub-funds.
- (5) A notice complies with this subsection in relation to a creditor if the notice specifies the following information for each of the creditor's debts:
  - (a) the sub-fund or sub-funds of the CCIV of which the debt is a liability;
  - (b) if the debt is a liability of 2 or more sub-funds of the CCIV—the amount of the debt allocated to each sub-fund.

### **1237K Declaration of solvency**

A written declaration under section 494 about the affairs of a sub-fund may be made by the corporate director of the CCIV.

### **Subdivision CA—Voluntary winding up**

#### **1237KA Declaration of relevant relationships**

Paragraph 60(2)(a) has effect in relation to a liquidator of a sub-fund of a CCIV as if the persons referred to in subparagraphs 60(2)(a)(iv) to (vii) included each other sub-fund (if any) of the CCIV.

## **Subdivision D—Modified duties and powers of liquidator of a sub-fund**

### **1237L Disqualification of liquidator**

Paragraph 532(2)(c) has effect in relation to a sub-fund of a CCIV as if the persons referred to in that paragraph included the following:

- (a) a director of the corporate director of the CCIV;
- (b) a person (if any), other than the CCIV, who holds assets of the sub-fund.

### **1237M Notifying of appointment, resignation or removal of liquidator**

(1) If:

- (a) a liquidator of a sub-fund of a CCIV is appointed, resigns or is removed from office; and
- (b) one or more persons, other than the CCIV, holds assets of the sub-fund of the CCIV;

the liquidator must, as soon as practicable, and in any event within 3 business days after the liquidator's appointment, resignation or removal, notify each such person in writing of the appointment, resignation or removal.

(2) In this section:

*liquidator* includes a provisional liquidator.

### **1237N Duties and powers of liquidator**

*Liquidator's powers relate only to the sub-fund*

- (1) The functions and powers of a liquidator of a sub-fund of a CCIV:
  - (a) include functions and powers conferred on the liquidator of a sub-fund of a CCIV by a provision of this Chapter; and

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- (b) to the extent those functions and powers are conferred on the liquidator by the winding up provisions referred to in subsection 1237B(2), as those provisions apply under this Division, extend only to matters that relate solely to the carrying on of the business of the sub-fund.
- (2) However, the books of a CCIV that a liquidator of a sub-fund is entitled under subsection 477(3) to inspect at any reasonable time include:
- (a) the allocation register kept by the corporate director under section 1233C (about the allocation of assets and liabilities to sub-funds); and
  - (b) any other books of the CCIV, to the extent the inspection of those books is necessary for the liquidator to perform or exercise the functions or powers of that office.

Note 1: A person entitled to inspect a book may make copies or take extracts: see subsection 1300(3).

Note 2: A provisional liquidator also has the power under subsection 477(3): see paragraph 472(4)(b).

*Liquidator may instruct person who holds assets of a sub-fund*

- (3) If:
- (a) a liquidator of a sub-fund of a CCIV is appointed; and
  - (b) one or more persons, other than the CCIV, holds assets of the sub-fund of the CCIV;
- the powers conferred on the liquidator are taken to include the power to instruct each such person in relation to dealing with the assets of the sub-fund.

*Liquidator may inspect certain books*

- (4) If:
- (a) a liquidator of a sub-fund of a CCIV is appointed; and
  - (b) one or more persons, other than the CCIV, holds assets of the sub-fund of the CCIV;

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the liquidator is entitled to inspect at any reasonable time books of each such person, to the extent the inspection of those books is necessary for the liquidator to perform or exercise the functions or powers of that office.

Note: A person entitled to inspect a book may make copies or take extracts: see subsection 1300(3).

*Definitions*

- (5) In this section:

*liquidator* includes a provisional liquidator.

**1237P Retention and destruction of books**

- (1) The following provisions do not apply in relation to a winding up of a sub-fund:
- (a) subsection 70-35(3) of Schedule 2 (about when an external administrator is not required to retain books);
  - (b) subsection 70-35(4) of Schedule 2 (about when an external administrator may destroy books).

*Liquidator must transfer books to CCIV*

- (2) If:
- (a) books are retained under section 70-35 of Schedule 2 by a liquidator of a sub-fund in relation to a winding up of the sub-fund; and
  - (b) the retention period mentioned in subsection 70-35(1) of that Schedule ends; and
  - (c) before the end of the retention period, the CCIV requests the liquidator by notice in writing to transfer possession or control of the books to the CCIV;
- the liquidator must, as soon as practicable after the end of the retention period, transfer possession or control of those books to the CCIV.

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- (3) Otherwise, the books may be destroyed at the end of the retention period.

*Offence*

- (4) A person commits an offence if:
- (a) the person is subject to a requirement under subsection (2); and
  - (b) the person intentionally or recklessly fails to comply with the requirement.

**Subdivision E—Modified duties and powers of officers of corporate director and CCIV**

**1237Q Officers of corporate director to help liquidator**

- (1) Section 530A applies as if each of the following were an officer of a CCIV:
- (a) an officer of the CCIV;
  - (b) an officer of the corporate director of the CCIV;
  - (c) an officer of a former corporate director of the CCIV.
- (2) Paragraph (1)(a) is included for the avoidance of doubt.
- (3) In this section:

*officer* includes former officer.

**1237R Corporate director may retain certain books**

- (1) The corporate director of a CCIV is entitled, as against a liquidator of a sub-fund of the CCIV, to retain possession of books of the CCIV that relate to:
- (a) the business or affairs of the CCIV as a whole; or
  - (b) the business or affairs of other sub-funds of the CCIV.

Note: Books that the corporate director is not entitled to retain must be delivered to the liquidator: see section 530A.

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(2) Subsection (1) applies despite subsection 530B(1).

(3) In this section:

*liquidator* includes a provisional liquidator.

**1237S Corporate director may access certain books**

The corporate director of a CCIV is entitled to inspect at any reasonable time books relating to the winding up of a sub-fund of the CCIV, to the extent the inspection of those books is necessary for the corporate director to perform or exercise the functions or powers of that office.

Note: A person entitled to inspect a book may make copies or take extracts: see subsection 1300(3).

**1237T Corporate director may direct ASIC not to destroy books**

(1) Before ASIC destroys, in accordance with subsection 70-31(9) of Schedule 2, books relating to the winding up of a sub-fund of a CCIV, ASIC must notify the CCIV that it intends to do so.

(2) Despite subsection 70-31(9) of Schedule 2, if:

- (a) ASIC retains books under subsection 70-31(8) of Schedule 2 in relation to the winding up of a sub-fund of a CCIV; and
- (b) the retention period mentioned in that subsection ends; and
- (c) the CCIV, by resolution of the corporate director, directs ASIC not to destroy the books;

ASIC must, as soon as practicable, transfer possession or control of those books to the CCIV.

**1237U Mandatory examination**

- (1) Section 596A applies in relation to a CCIV as if the following were officers of the CCIV:
- (a) a natural person who is an officer of the CCIV;
  - (b) a natural person who is a director of the corporate director of the CCIV.

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(2) Paragraph (1)(a) is included for the avoidance of doubt.

**1237V Court may make order imposing liability on unlicensed person operating CCIV**

Where:

- (a) a sub-fund of a CCIV is being wound up; and
  - (b) within the period of 4 years ending before the relation-back day, a person not meeting the requirements in subsection 1224F(1) for the director of a CCIV operated the business and conducted the affairs of the CCIV;
- the Court may, on the application of the sub-fund's liquidator, order that the person is personally liable for so much of the sub-fund's debts and liabilities as does not exceed an amount specified in the order.

**Subdivision F—Proof and ranking of claims**

**1237W Liquidator must be satisfied debt or claim is a liability of the sub-fund**

- (1) The liquidator of a sub-fund must determine that the whole or a part of a debt of the CCIV is not admissible to proof against the sub-fund if the liquidator is satisfied that the debt or the part of the debt (as the case requires) is not a liability of the sub-fund.
- (2) Such a determination does not have the effect of extinguishing the debt or the part of the debt.

**1237X Determination of debts and claims that relate to the business of 2 or more sub-funds and are of uncertain value**

- (1) This section applies if, in the winding up of a sub-fund, the liquidator admits a debt or claim that:
  - (a) is a liability of the CCIV that does not relate solely to the business of the sub-fund; and
  - (b) as at the relevant date, did not bear a certain value.

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Note: If the liability relates solely to the business of the sub-fund but is of uncertain value, the liquidator must estimate the value of the debt or claim (paragraph 554A(2)(a)) or refer the question of the value of the debt or claim to the Court (paragraph 554A(2)(b)).

- (2) Section 554A applies in relation to the debt or claim as if the value of the debt or claim that is to be estimated as at the relevant date were the value of the whole of the debt or claim (not just the proportion that is applicable to the sub-fund under subsection 1233L(2)).
- (3) However, despite subsection 554A(8), for the purposes of Division 6 of Part 5.6, the amount of the debt or claim that is admissible to proof is the product of:
  - (a) the value as estimated or worked out under section 554A (as modified by this section); and
  - (b) the proportion of the liability applicable to the sub-fund under subsection 1233L(2).

**1237Y Application of sub-fund property**

If a sub-fund of a CCIV is being wound up, the assets of the sub-fund may be applied for the purposes of paying debts and claims that, under section 556 as it applies in relation to the winding up of the sub-fund, must be paid in priority to all other unsecured debts and claims.

**Subdivision G—Powers of Courts**

**1237Z Warrant in relation to books**

- (1) This section applies in relation to a warrant issued by a Court under subsection 530C(2) on application by the liquidator or provisional liquidator of a sub-fund of a CCIV.
- (2) The books of a CCIV that may be searched for under the warrant are any books of the CCIV.
- (3) The books of the CCIV that may be seized under the warrant are books of the CCIV that relate to the sub-fund.

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*Specified person to be in possession of warrant*

- (4) When executing the warrant, the specified person must be in possession of the warrant or a copy of the warrant.

*Notification of entry*

- (5) Subsections (6) and (7) apply if:
- (a) the warrant is being executed in relation to premises; and
  - (b) the occupier of the premises, or another person who apparently represents the occupier, is present at the premises.
- (6) Before entering the premises under the warrant, the specified person must:
- (a) announce that the person is authorised to enter the premises; and
  - (b) show the occupier or other person evidence of the person's identity that:
    - (i) includes a photograph of the person; and
    - (ii) has not expired.
- (7) The specified person must, as soon as practicable:
- (a) make a copy of the warrant available to the occupier or other person; and
  - (b) inform the occupier or other person in writing of the rights and responsibilities of the occupier or other person under this section and section 530C.

*Books to be used only for purpose of liquidation*

- (8) A book of the CCIV seized under the warrant may be used only for the purpose for which it was seized.

*Return of seized things*

- (9) Despite subsection 530C(4), and subject to any contrary order of the Court, a person who has custody of property or a book because of the execution of the warrant must take reasonable steps to return the property or book to the CCIV when the property or book is no
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longer required to be retained for the purpose for which it was seized.

*Receipts*

- (10) If property or a book is seized under the warrant, the specified person must provide a receipt for the property or book.
- (11) If 2 or more books or items of property are seized, they may be covered by the one receipt.

## **Subdivision H—Recovering property**

### **1237ZA Presumptions to be made in recovery proceedings**

A reference in section 588E to financial records a company is required by subsection 286(1) to keep is taken, in relation to a winding up of a sub-fund of a CCIV, to be a reference to both of the following:

- (a) financial records that the CCIV is required to keep and retain for the sub-fund under subsection 286(1), as that subsection applies in relation to the sub-fund under section 1232A;
- (b) financial records that the CCIV is required to keep and retain for itself under subsection 286(1), as that subsection applies to the CCIV under section 1232.

### **1237ZB Directors of the corporate director**

- (1) Sections 588FDA and 588FGA apply in relation to a sub-fund of a CCIV as if each of the following were a director of a CCIV:
  - (a) a director of the CCIV;
  - (b) a director of the corporate director of the CCIV.
- (2) Paragraph (1)(a) is included for the avoidance of doubt.

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**1237ZC Vesting of PPSA security interests if collateral not registered within time**

Section 588FL applies in relation to a PPSA security interest granted by a CCIV if:

- (a) an order is made, or a resolution is passed, for the winding up of a sub-fund of the CCIV; and
- (b) the PPSA security interest is in collateral that is an asset of the sub-fund of the CCIV.

## Division 6—Recovering property of sub-funds

### 1238 Duties owed by directors of corporate director of a CCIV

The object of this Division is to ensure that the officers of the corporate director of a CCIV, instead of the corporate director itself, owe the duties in Divisions 3, 4, 5 and 6 of Part 5.7B.

### 1238A Applying property recovery provisions to CCIVs

- (1) The property recovery provisions referred to in subsection (2) apply to a CCIV subject to:
  - (a) such modifications as are set out in this Division; and
  - (b) such other modifications as are made necessary by the facts that:
    - (i) for a CCIV, solvency and insolvency are determined at the level of a sub-fund, instead of at the level of the CCIV; and
    - (ii) the officers to whom the provisions are directed are the officers of the corporate director, instead of the officers of the CCIV.

#### *Property recovery provisions*

- (2) The provisions (the *property recovery provisions*) are as follows:
  - (a) Divisions 3, 4, 5 and 6 of Part 5.7B (other than a provision excluded by subsection (3));
  - (b) the other provisions of the Corporations legislation (other than a provision excluded by subsection (3)) to the extent to which they relate to the operation of the provisions referred to in paragraph (a).
- (3) For the purposes of subsection (2), the regulations may specify provisions that are excluded from the property recovery provisions.

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- (4) In the application of the property recovery provisions, those provisions apply as if the substitutions set out in the following table were made.

| <b>Substitutions to be made</b> |   |  |
|---------------------------------|---|--|
| <b>Item</b>                     | <b>Column 1</b><br><b>If the provision ...</b>  | <b>Column 2</b><br><b>substitute a reference to ...</b>                          |
| 1                               | refers to the company (the <i>relevant company</i> ) in relation to which the provision applies (whether the reference is express or implied, and (if the reference is express) whether the company is referred to as a company, a body corporate, a corporation, or in some other way), and the reference is not covered by another item of this table | the sub-fund (but see subsections (5) and (6))                                   |
| 2                               | refers to the directors, or a director, or the board of the relevant company  | the directors, or a director, or the board of the corporate director of the CCIV |
| 3                               | refers to an officer of the relevant company  | an officer of the corporate director   |
| 4                               | refers to shares in the relevant company  | shares referable to the sub-fund   |

- (5) Despite item 1 of the table in subsection (4), a reference covered by column 1 of that item is taken to be a reference to the CCIV if the context of the reference so requires (for example, because the reference requires the legal capacity and powers of a company).
- (6) If a reference in a provision to the relevant company is, as a result of subsection (5), taken to be a reference to the CCIV, the operation of the provision in relation to the CCIV is confined, to the extent possible, to the sub-fund.

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## 1238B References to incurring debts

For the purposes of the application of the property recovery provisions, as those provisions apply subject to item 1 of the table in subsection 1238A(4), a sub-fund is taken to incur a debt if:

- (a) the CCIV incurs the debt; and
- (b) the debt is, to any extent, a liability of the sub-fund.

The sub-fund incurs the debt at the time the CCIV incurs the debt.

## 1238C When debts arise in relation to redeemable shares

- (1) For the purposes of section 588G, if a CCIV takes action set out in column 1 of an item of the following table, it incurs a debt at the time set out in column 2 of the item.

| <b>When debts are incurred</b> |  |   |
|--------------------------------|--|---|
| <b>Item</b>                    | <b>Column 1<br/>Action of company</b>  | <b>Column 2<br/>When debt is incurred</b> |
| 1                              | redeeming redeemable shares that are redeemable only at its option   | when the company exercises the option     |
| 2                              | issuing redeemable shares that are issued on terms that they are liable to be redeemed otherwise than only at its option                           | when the shares are issued                |
| 3                              | converting under section 1230C a share that is not a redeemable share into a share that is liable to be redeemed otherwise than only at its option | when the shares are converted             |

- (2) This section has effect in relation to a CCIV in addition to the table set out in subsection 588G(1A).

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## **Division 7—External administration offences**

### **1238D Applying external administration offences to CCIVs**

- (1) The external administration offences provisions referred to in subsection (3) apply to a CCIV.
- (2) In addition to the application referred to in subsection (1), the external administration offences provisions apply to a CCIV subject to:
  - (a) such modifications as are set out in this Division; and
  - (b) such other modifications as are necessary.

*External administration offences provisions*

- (3) The provisions (the *external administration offences provisions*) are as follows:
  - (a) Part 5.8 (other than a provision excluded by subsection (4));
  - (b) the other provisions of the Corporations legislation (other than a provision excluded by subsection (4)) to the extent to which they relate to the operation of the provisions referred to in paragraph (a).
- (4) For the purposes of subsection (3), the regulations may specify provisions that are excluded from the external administration offences provisions.

*Translation rules*

- (5) In the application of the external administration offences provisions, those provisions apply as if the substitutions set out in the following table were made.

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**Substitutions to be made**

| Item | Column 1<br>If the provision ...  | Column 2<br>substitute a reference to ...   |
|------|---|---|
| 1    | refers to the company (the <i>relevant company</i> ) in relation to which the provision applies (whether the reference is express or implied, and (if the reference is express) whether the company is referred to as a company, a body corporate, a corporation, or in some other way), and the reference is not covered by another item of this table | the sub-fund (but see subsections (6) and (7))  |
| 2    | refers to the directors, or a director, or the board of the relevant company  | the corporate director of the CCIV  |
| 3    | refers to an officer of the relevant company  | each of the following:<br>(a) a director of the CCIV;<br>(b) a person covered by paragraph (b), (c) or (d) of the definition of <i>officer</i> of a CCIV in section 1224B in relation to the sub-fund |
| 4    | refers to shares in the relevant company  | shares referable to the sub-fund  |

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- (6) Despite item 1 of the table in subsection (5), a reference covered by column 1 of that item is taken to be a reference to the CCIV if the context of the reference so requires (for example, because the reference requires the legal capacity and powers of a company).
- (7) If a reference in a provision to the relevant company is, as a result of subsection (6), taken to be a reference to the CCIV, the operation of the provision in relation to the CCIV is confined, to the extent possible, to the sub-fund.

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**1238E Interpretation of ceased to carry on business**

- (1) For the purposes of Part 5.8, a sub-fund is taken to have ceased to carry on business only if:
  - (a) 2 months have passed since a notice under subsection 1239(5) (about voluntary deregistration of a sub-fund) relating to the sub-fund was published and ASIC has not been informed that the part of the business of the CCIV that is registered as the sub-fund is being carried on; or
  - (b) ASIC has published a notice under subsection 1239B(1) (about ASIC initiated deregistration of a sub-fund) relating to the sub-fund.
- (2) Subsection 589(3) does not apply to determine when a sub-fund of a CCIV is taken to have ceased to carry on business.

**1238F Frauds by officers**

- (1) Section 596 applies in relation to a CCIV as if the following were officers of the CCIV:
  - (a) a natural person who is an officer of the CCIV;
  - (b) a natural person who is a director of the corporate director of the CCIV.
- (2) Paragraph (1)(a) is included for the avoidance of doubt.

## Division 8—Miscellaneous

### 1238G Applying external administration miscellaneous provisions to sub-funds

- (1) The external administration miscellaneous provisions referred to in subsection (2) apply to a CCIV subject to:
  - (a) such modifications as are set out in this Division; and
  - (b) such other modifications as are necessary.

*External administration miscellaneous provisions*

- (2) The provisions (the *external administration miscellaneous provisions*) are as follows:
  - (a) Part 5.9 (other than a provision excluded by subsection (3));
  - (b) the other provisions of the Corporations legislation (other than a provision excluded by subsection (3)) to the extent to which they relate to the operation of the provisions referred to in paragraph (a).
- (3) For the purposes of subsection (2), the regulations may specify provisions that are excluded from the external administration miscellaneous provisions.

*Translation rules*

- (4) In the application of the external administration miscellaneous provisions, those provisions apply as if the substitutions set out in the following table were made.

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**Substitutions to be made**

| Item | Column 1<br>If the provision ...  | Column 2<br>substitute a reference to ...   |
|------|---|---|
| 1    | refers to the corporation (the <b>relevant corporation</b> ) in relation to which the provision applies (whether the reference is express or implied, and (if the reference is express) whether the corporation is referred to as a company, a body corporate, a corporation, or in some other way), and the reference is not covered by another item of this table | the sub-fund (but see subsections (5) and (6))  |
| 2    | refers to an officer of the relevant corporation  | each of the following:<br>(a) a director of the CCIV;<br>(b) a person covered by paragraph (b), (c) or (d) of the definition of <b>officer</b> of a CCIV in section 1224B in relation to the sub-fund |
| 3    | refers to shares in the relevant corporation  | shares referable to the sub-fund  |

- (5) Despite item 1 of the table in subsection (4), a reference covered by column 1 of that item is taken to be a reference to the CCIV if the context of the reference so requires (for example, because the reference requires the legal capacity and powers of a company).
- (6) If a reference in a provision to the relevant corporation is, as a result of subsection (5), taken to be a reference to the CCIV, the operation of the provision in relation to the CCIV is confined, to the extent possible, to the sub-fund.

## **Division 9—Deregistration and transfer of registration**

### **Subdivision A—Deregistration**

#### **1239 Deregistration of a sub-fund—voluntary**

*Who may apply for deregistration*

- (1) An application to deregister a sub-fund of a CCIV may be lodged with ASIC by:
  - (a) the CCIV; or
  - (b) the corporate director of the CCIV; or
  - (c) a liquidator of the sub-fund.

If the CCIV lodges the application, it must nominate a person to be given notice of the deregistration.

*Circumstances in which application can be made*

- (2) A person may apply only if:
  - (a) the sub-fund has no assets or liabilities; and
  - (b) the CCIV is not a party to any legal proceedings that relate to the sub-fund.
- (3) The application must be in the prescribed form.

*ASIC may ask for information about officers*

- (4) The applicant must give ASIC any information that ASIC requests about the following officers:
  - (a) the current and former officers of the CCIV;
  - (b) the current and former officers of the corporate director of the CCIV.

*Deregistration procedure*

- (5) If:

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- (a) ASIC decides to deregister the sub-fund under this section; and
- (b) ASIC is not aware of any failure to comply with subsections (1) to (4);  
ASIC must:
  - (c) give notice of the proposed deregistration on ASIC database; and
  - (d) publish notice of the proposed deregistration in the prescribed manner.
- (6) When 2 months have passed since the publication of the notice under paragraph (5)(d), ASIC may deregister the sub-fund.
- (7) ASIC must give notice of the deregistration to:
  - (a) the applicant; or
  - (b) the person nominated in the application to be given the notice.

*Notices taken to have been given under section 601AA*

- (8) For the purposes of the provisions of this Act (other than a provision of this Chapter):
  - (a) a notice given under paragraph (5)(c) is taken to have been given under paragraph 601AA(4)(c); and
  - (b) a notice published under paragraph (5)(d) is taken to have been published under subsection 601AA(4)(d).

*ASIC must not deregister a sub-fund that is an Australian passport fund if the fund has certain members*

- (9) However, ASIC must not decide, under this section, to deregister a sub-fund that is an Australian passport fund if:
  - (a) there are members of the fund who became members (whether in this jurisdiction or any host economy for the fund) after the fund became an Australian passport fund; or
  - (b) there are members of the fund who became members (whether in this jurisdiction or any host economy for the

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fund) on the expectation that the fund would become an Australian passport fund.

- (10) For the purposes of subsection (9), ignore any member of the fund that:

- (a) is, or has at any time been, the operator of the fund; or
- (b) is a related party of an entity that is, or has at any time been, the operator of the fund.

Note: See section 1216B for the circumstances in which a person becomes a member of a fund on the expectation that it would become an Australian passport fund.

## **1239A Deregistration of a sub-fund—ASIC initiated**

### *Circumstances in which ASIC may deregister*

- (1) ASIC may decide to deregister a sub-fund of a CCIV if:
  - (a) the CCIV has not lodged any documents that relate to the sub-fund under this Act in the last 18 months; and
  - (b) ASIC has no reason to believe that the part of the business of the CCIV that is registered as the sub-fund is being carried on.
- (2) ASIC may also decide to deregister a sub-fund of a CCIV if:
  - (a) the CCIV's review fee in respect of a review date has not been paid in full at least 12 months after the due date for payment; and
  - (b) the review fee is to any extent a liability of the sub-fund.
- (3) ASIC may also decide to deregister a sub-fund of a CCIV if the sub-fund is being wound up and ASIC has reason to believe that:
  - (a) the liquidator of the sub-fund is no longer acting; or
  - (b) the sub-fund's affairs have been fully wound up and a return that the liquidator should have lodged is at least 6 months late; or
  - (c) the sub-fund's affairs have been fully wound up under Part 5.4 (as modified by this Part) and the assets of the

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sub-fund are not enough to cover the costs of obtaining a Court order for the sub-fund's deregistration.

- (4) However, ASIC must not decide, under this section, to deregister a sub-fund that is an Australian passport fund if ASIC is of the opinion that to do so would not be in the interests of:
- (a) members of the fund who became members (whether in this jurisdiction or any host economy for the fund) after the fund became an Australian passport fund; and
  - (b) members of the fund who became members (whether in this jurisdiction or any host economy for the fund) on the expectation that the fund would become an Australian passport fund.
- (5) For the purposes of subsection (4), ignore any member of the fund that:
- (a) is, or has at any time been, the operator of the fund; or
  - (b) is a related party of an entity that is, or has at any time been, the operator of the fund.

Note: See section 1216B for the circumstances in which a person becomes a member of a fund on the expectation that it would become an Australian passport fund.

*Show cause notice*

- (6) Before deciding to deregister a sub-fund, ASIC must give the CCIV a written notice that requires the CCIV to show cause, at a hearing before a specified person, why the sub-fund should not be deregistered.
- (7) The notice must specify:
- (a) the grounds on which it is proposed to deregister the sub-fund; and
  - (b) a reasonable time and place at which the hearing is to be held.

However, if the CCIV consents, the person conducting the hearing may fix a different time or place.

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- (8) The person conducting the hearing must:
  - (a) give the CCIV an opportunity to be heard at the hearing; and
  - (b) give ASIC:
    - (i) a report about the hearing; and
    - (ii) a recommendation about the grounds in the notice on which it is proposed to deregister the sub-fund.
- (9) After considering the report and recommendation, ASIC may decide to:
  - (a) take no further action in relation to the matter and give written advice of that decision to the CCIV; or
  - (b) deregister the sub-fund.
- (10) Neither of the following is a legislative instrument:
  - (a) a notice under subsection (6);
  - (b) a report under subsection (8) (if it is in writing).

**1239B Process for ASIC initiated deregistration of a sub-fund**

- (1) If ASIC decides under section 1239A to deregister a sub-fund of a CCIV, it must:
  - (a) give notice setting out the date on which ASIC proposes to deregister the sub-fund:
    - (i) to the CCIV; and
    - (ii) to the liquidator of the sub-fund (if any); and
    - (iii) to the corporate director; and
    - (iv) on the ASIC database; and
  - (b) publish notice of the date on which ASIC proposes to deregister the sub-fund in the prescribed manner.
- (2) A notice under paragraph (1)(a) must be given at least 5 business days before the sub-fund is deregistered.
- (3) ASIC may deregister the sub-fund if:
  - (a) 5 business days have passed since the publication of the notice under paragraph (1)(b); and

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- (b) at the time ASIC deregisters the sub-fund, ASIC has reason to believe that there is no property of the CCIV to which section 1233K (about property that has to be converted) applies.
- (4) ASIC does not have to give a person notice under paragraph (1)(a) if ASIC does not have the necessary information about the person's identity or address.
- (5) If ASIC deregisters a sub-fund of a CCIV under this section, ASIC must give notice that the fund has been deregistered, and the date on which it has been deregistered, to everyone who was notified of the proposed deregistration under subparagraph (1)(a)(ii) or (iii).
- (6) The notice must be given within 5 business days after the sub-fund is deregistered.

*Notices taken to have been given under section 601AB*

- (7) For the purposes of the provisions of this Act (other than a provision of this Chapter):
  - (a) a notice given under paragraph (1)(a) is taken to have been given under paragraph 601AB(3)(a); and
  - (b) a notice published under paragraph (1)(b) is taken to have been published under subsection 601AB(3)(b).

**1239C Deregistration of a sub-fund—following amalgamation or winding up**

ASIC must deregister a sub-fund of a CCIV if the Court orders the deregistration of the sub-fund under:

- (a) paragraph 413(1)(d) (reconstruction and amalgamation of Part 5.1 bodies); or
- (b) paragraph 481(5)(b) (release of liquidator); or
- (c) subsection 509(2) (deregistration after end of administration return is lodged).

Note: These provisions apply to a sub-fund of a CCIV with modifications: see Divisions 1 to 8 of this Part.

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## 1239D Effect of deregistration of a sub-fund

### *Effect on assets of the CCIV*

- (1) Subsections 601AD(1A) to (4) and section 601AE apply in relation to the deregistration of a sub-fund of a CCIV.

Note: Subsection 601AD(1) does not apply in relation to the deregistration of a sub-fund of a CCIV. The CCIV will continue to exist until the CCIV itself is deregistered.

- (2) Those provisions apply as if a reference to property were instead a reference to property of the sub-fund.

Note: For references to property of a sub-fund, see subsection 51F(3).

### *Books*

- (3) If a sub-fund of a CCIV is deregistered, the CCIV must keep the CCIV's books that relate to the sub-fund (other than books that a liquidator has to keep under subsection 70-35(1) of Schedule 2) for 3 years after the deregistration.

Note: If the CCIV itself is deregistered, the corporate director of the CCIV immediately before it is deregistered is required to retain all books of the CCIV including these books: see section 1239L.

- (4) An offence based on subsection (3) is an offence of strict liability.

### *Consequences of deregistration on status as an Australian passport fund*

- (5) If:

- (a) a sub-fund of a CCIV is deregistered; and  
(b) the sub-fund was an Australian passport fund;

ASIC must annotate the Register of Passport Funds to indicate that the sub-fund is no longer an Australian passport fund, or cause that annotation to be made on the Register.

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**1239E The Commonwealth's and ASIC's power to fulfil outstanding obligations in relation to deregistered sub-fund**

The Commonwealth or ASIC may do an act on behalf of the CCIV of a deregistered sub-fund or the liquidator of the sub-fund if the Commonwealth or ASIC is satisfied that the CCIV or liquidator would be bound to do the act if the sub-fund had not been deregistered.

Note: This power is a general one and is not limited to acts in relation to property vested in the Commonwealth under subsection 601AD(1A), or ASIC under subsection 601AD(2). The Commonwealth or ASIC has all the powers that automatically flow from the vesting of property under that subsection (see subsections 601AD(3A) and (4)) and may exercise those powers whether or not the CCIV was bound to do so.

**1239F Claims against insurers in relation to deregistered sub-fund**

A person may recover from the insurer of a CCIV an amount that was payable to the CCIV under the insurance contract if:

- (a) a sub-fund of the CCIV is deregistered; and
- (b) the CCIV has a liability to the person that was a liability of the sub-fund; and
- (c) the insurance contract covered that liability immediately before the sub-fund was deregistered.

**1239G Reinstatement of a sub-fund**

- (1) The registration of a sub-fund of a CCIV may be reinstated under section 601AH as if the sub-fund were a company.

Note: Notice of the reinstatement must be given: see section 1239J.

- (2) If the registration of a sub-fund of a CCIV is reinstated under section 601AH, the sub-fund is taken to have been registered throughout the period it was deregistered.
- (3) The Court's power to make an order under subsection 601AH(3) includes the power to make an order in relation to the following:
  - (a) the assets or liabilities of a sub-fund of a CCIV whose registration is reinstated;

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- (b) the assets or liabilities of any other sub-fund of the CCIV which is affected by the reinstatement.
- (4) If the registration of a sub-fund of a CCIV is reinstated under section 601AH, any property of the CCIV that was property of the sub-fund that is still vested in the Commonwealth or ASIC revests in the CCIV. If the CCIV held particular property subject to a security or other interest or claim, the CCIV takes the property subject to that interest or claim.
- Note: The CCIV must allocate the property to the sub-fund in accordance with Subdivision B of Division 3 of Part 8B.5.
- (5) Subsections 601AH(1A), (4), (4A) and (5) do not apply in relation to the reinstatement of the registration of a sub-fund of a CCIV.

*Registration as an Australian passport fund not reinstated*

- (6) The reinstatement of the registration of a sub-fund of a CCIV does not result in the sub-fund's registration as a passport fund under Part 8A.3 being reinstated, even if the sub-fund was an Australian passport fund immediately before its deregistration.

**1239H CCIV reinstated following reinstatement of a sub-fund**

- (1) If a CCIV is deregistered and:
- (a) ASIC reinstates the registration of a sub-fund of the CCIV under subsection 601AH(1); or
- (b) the Court makes an order that ASIC reinstate the registration of the sub-fund under subsection 601AH(2);
- ASIC must also reinstate the registration of the CCIV.

Note: Notice of the reinstatement of the registration of the CCIV must be given: see section 1239J.

*Effect of reinstatement*

- (2) If the registration of a CCIV is reinstated the CCIV is taken to have continued in existence as if it had not been deregistered.

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Note: Any property of the CCIV that comprised assets of the sub-fund that is still vested in the Commonwealth or ASIC reverts in the CCIV: see subsection 1239G(4).

- (3) To avoid doubt, the reinstatement of the registration of the CCIV also has the effect of reinstating, at the time the registration is reinstated, ASIC's record, kept as part of the registration, of the company that is the corporate director or temporary corporate director of the CCIV.

Note: The company named in the record as the corporate director or temporary corporate director of the CCIV is the corporate director of the CCIV (see subsection 1224(3)). See section 1224S for what happens if the corporate director does not meet the requirements of section 1224F.

**1239J Notices relating to reinstatement of a sub-fund**

If the registration of a sub-fund of a CCIV is reinstated under section 601AH, ASIC must publish notice in the Gazette and give notice to the corporate director of the CCIV of the following:

- (a) the reinstatement of the registration of the sub-fund;
- (b) if as a result of reinstating the sub-fund the registration of the CCIV is also reinstated under section 1239H—the reinstatement of the registration of the CCIV.

**1239K Deregistration of a CCIV**

*CCIV must be deregistered if it has no registered sub-funds*

- (1) If, as the result of ASIC deregistering a sub-fund of a CCIV, the CCIV has no registered sub-funds, ASIC must deregister the CCIV.

Note: Subject to this Subdivision, sections 601AD to 601AG apply in relation to the deregistration of the CCIV.

- (2) ASIC must give the corporate director of the CCIV written notice that the CCIV has been deregistered and the date on which it has been deregistered.

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- (3) The notice must be given within 5 business days after the date the CCIV has been deregistered.

*CCIV may not be deregistered under section 601AA, 601AB or 601AC*

- (4) ASIC may not deregister a CCIV under section 601AA, 601AB or 601AC.

**1239L Books of the CCIV to be kept by former corporate director**

- (1) If a CCIV is deregistered, the corporate director of the CCIV immediately before the deregistration must keep the CCIV's books (other than books that a liquidator has to keep under subsection 70-35(1) of Schedule 2) for 3 years after the deregistration.
- (2) An offence based on subsection (1) is an offence of strict liability.
- (3) Books that the corporate director of the CCIV is required to keep under subsection (1) are taken to be books of the corporate director for the purposes of subsections 601AD(5) to (7) as those sections apply in relation to deregistration of the corporate director.

Note: If the corporate director is deregistered, the directors of the corporate director immediately before deregistration must keep the corporate director's books for 3 years after the deregistration: see subsection 601AD(5).

- (4) Subsections 601AD(5) to (7) do not apply in relation to the deregistration of a CCIV.

**1239M A CCIV may not be reinstated under section 601AH**

The registration of a CCIV may not be reinstated under section 601AH.

Note: If a CCIV has been deregistered and the registration of a sub-fund is reinstated under section 601AH, ASIC must reinstate the registration of the CCIV: see section 1239H.

**Chapter 8B** Corporate collective investment vehicles

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### **Subdivision B—Transfer of registration**

#### **1239N Registration of CCIV cannot be transferred**

Part 5A.2 does not apply to a CCIV.

## **Part 8B.7—Control, financial services and disclosure**

### **Division 1—Takeovers, compulsory acquisitions and buy-outs**

#### **1240A Takeovers—prohibition on acquisitions of shares in a listed CCIV**

The prohibitions in subsections 606(1) and (2) only apply to an acquisition of a relevant interest in issued voting shares in a CCIV if the CCIV is a listed company (including an acquisition resulting from an acquisition of a legal or equitable interest in securities).

Note: A retail CCIV that has only one sub-fund may be a listed company, see section 1222N.

#### **1240B Takeovers—directors of the corporate director of a listed CCIV**

- (1) The provisions mentioned in subsection (2) apply as if each of the following were a director of a CCIV that is a listed company:
  - (a) the corporate director of the CCIV;
  - (b) a director of the corporate director of the CCIV.
- (2) The provisions are the following:
  - (a) subsection 609(9);
  - (b) subsection 638(1A);
  - (c) subsection 638(3);
  - (d) subsection 639(1);
  - (e) subsection 640(1);
  - (f) subsection 642(1);
  - (g) subsection 658C(5);
  - (h) subsection 670B(1);
  - (i) subsection 670D(3).

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(3) Paragraph (1)(a) is included for the avoidance of doubt.

### **1240C Takeovers—bidder's statement content**

- (1) Subsection 636(1) has effect as if:
  - (a) a reference in paragraph 636(1)(c) to a company or body did not include a reference to a CCIV that is a listed company; and
  - (b) subsection 636(1) also included the following paragraph:  
“(da) if the target is a CCIV that is a listed company—details of the bidder's intentions regarding:
    - (i) the continued operation of the CCIV; and
    - (ii) any major changes to be made to the operation of the CCIV, including any redeployment of the property of the CCIV; and
    - (iii) any plans to remove the current corporate director of the CCIV and appoint a new corporate director;”.
- (2) Subsection 636(1) also has effect as if:
  - (a) a reference in paragraph 636(1)(g) to securities did not include a reference to securities in a CCIV that is a listed company; and
  - (b) subsection 636(1) also included the following paragraph:  
“(gb) if any securities in a CCIV that is a listed company are offered as consideration under the bid and the bidder is:
    - (i) a retail CCIV; or
    - (ii) the corporate director of a retail CCIV; or
    - (iii) a person who controls a retail CCIV or the corporate director of a retail CCIV;all material that would be required by section 1013C to be included in a Product Disclosure Statement given to a person in an issue situation in relation to those securities;”.

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**1240D Takeovers Panel—declaration of unacceptable circumstances may only be made in relation to a listed CCIV**

The Takeovers Panel may only declare under section 657A circumstances to be unacceptable circumstances in relation to the affairs of a CCIV if the CCIV is a listed company.

**1240E Compulsory acquisition—only available for securities in a listed CCIV**

- (1) Securities in a CCIV may only be compulsorily acquired or bought out under Chapter 6A if the CCIV is a listed company.
- (2) If Part 6A.1 applies to a CCIV that is a listed company at the end of the bid period for a takeover, that Part continues to apply to the CCIV in relation to the takeover bid even if the CCIV ceases to be listed.
- (3) If Part 6A.2 applies to a CCIV that is a listed company when a compulsory acquisition notice under section 664C is lodged, that Part (including Division 2 of that Part) continues to apply to the CCIV in relation to the notice even if the CCIV ceases to be listed.

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**Division 2—Continuous disclosure**

**1240F Continuous disclosure—CCIVs**

Paragraph 675(2)(c) applies in relation to securities in a CCIV in the same way the paragraph applies in relation to securities that are managed investment products.

## Division 3—Fundraising

### 1240G Fundraising rules do not apply to CCIVs

Subject to subsection 1240H(6), in Chapter 6D, *securities* does not include a security in a CCIV.

### 1240H Offering securities of a CCIV or sub-fund that does not exist

- (1) A person must not offer securities of a CCIV that does not exist if the offer would give rise to an obligation to give a Product Disclosure Statement under Chapter 7 (as that Chapter applies to securities in a CCIV under Division 4 of Part 8B.7) if the CCIV did exist.
- (2) A person must not offer securities of a CCIV that are referable to a sub-fund of the CCIV that has not been established if the offer would give rise to an obligation to give a Product Disclosure Statement under Chapter 7 (as that Chapter applies to securities in a CCIV under Division 4 of Part 8B.7) if the sub-fund were established.

Note 1: For when a sub-fund is established, see section 1222T.

Note 2: For when shares and debentures are referable to a sub-fund of a CCIV, see sections 1230 (for shares) and 1231N (for debentures).

- (3) Subsections (1) and (2) apply even if it is proposed to incorporate the CCIV or register the sub-fund.
- (4) In this section, *securities* has the same meaning as it has in Chapter 6D (apart from section 1240G).

- (5) For the purposes of subsection (2), a security referred to in paragraph 95(c) or (d) is taken to be referable to the sub-fund of the CCIV to which the relevant security covered by paragraph 95(a) or (b) is, or would be, referable.

Note: For example, an option to acquire by way of issue a share in a CCIV (covered by paragraph 95(d)) is referable to the sub-fund of the CCIV to which the share (covered by paragraph 95(a)) is referable.

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**Chapter 8B** Corporate collective investment vehicles

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- (6) The following provisions apply in relation to this section in the same way the provisions apply in relation to Chapter 6D:
- (a) subsection 700(4);
  - (b) sections 702, 703 and 703A.

## Division 4—Financial services and markets

### 1241 Application of Chapter 7 to CCIVs

Chapter 7 applies to a CCIV subject to the modifications set out in this Division.

#### 1241A For Chapter 7, treat the corporate director as providing financial services etc. being provided by the CCIV

- (1) This section applies to a provision of Chapter 7 that applies in relation to:
  - (a) a financial services licensee; or
  - (b) a financial service or a financial services business; or
  - (c) a matter prescribed by the regulations for the purposes of this paragraph.

##### *General rule*

- (2) For the purposes of that provision of Chapter 7:
  - (a) treat any conduct engaged in by, or on behalf of, a CCIV as also being engaged in by, or on behalf of, the corporate director of the CCIV; and
  - (b) treat any conduct relating to the CCIV that is engaged in by a person (other than the corporate director of the CCIV) as also being engaged in by that person in relation to the corporate director of the CCIV.
- (3) In subsection (2), ***conduct*** means an act, an omission to perform an act or a state of affairs.

##### *Exceptions*

- (4) If the CCIV issues a security in the CCIV, then subsection (2) does not treat the corporate director of the CCIV as also being the issuer of the security.

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- (5) If the CCIV is a participant in:
  - (a) a clearing and settlement facility; or
  - (b) a financial market;subsection (2) does not treat the corporate director of the CCIV as also being a participant in relation to the facility or market.
- (6) Subsection (2) does not apply in any circumstances prescribed by the regulations for the purposes of this subsection.

**1241B Certain licensing concepts do not apply to CCIVs**

- (1) Subsection 911A(1) (about the requirement to be licensed to carry on a financial services business) does not apply to a CCIV.

Note: That subsection will instead apply to the corporate director of the CCIV in relation to any financial services business carried on by the CCIV (see subsection 1241A(2)).

- (2) Subsection 911B(1) (about requirements for providing financial services on behalf of another person) does not apply to a CCIV.

Note: This subsection confirms that the CCIV is not subject to extra requirements if it is viewed as providing financial services on behalf of its corporate director.

- (3) For the purposes of Chapter 7, treat a CCIV as not being a representative of the corporate director of the CCIV.

Note: Activities of the CCIV relating to a financial service etc. are instead treated as activities of the corporate director (see subsection 1241A(2)).

- (4) For the purposes of Chapter 7, a CCIV cannot be authorised under Division 5 (about authorised representatives of licensees) of Part 7.6.

Note: Activities of the CCIV relating to a financial service etc. are instead treated as activities of the corporate director (see subsection 1241A(2)).

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**1241C Extra kinds of financial services relating to CCIVs**

- (1) Subject to paragraph 766A(2)(b), treat subsection 766A(1) as also providing that a person provides a *financial service* if:
  - (a) the person operates the business and conducts the affairs of a CCIV; and
  - (b) the person is the corporate director of the CCIV.

Note: Subsection (1) means persons other than the corporate director will not be treated as providing that financial service if they operate the business and conduct the affairs of the CCIV while:

- (a) acting as an agent of the CCIV, or as an agent or employee of the corporate director; or
- (b) taking steps to wind up the CCIV.

- (2) For the purposes of Chapter 7, each of the members of a CCIV covered by subsection (1) is a client for the financial service covered by that subsection.

**1241D CCIV buy-back or redemption facility does not make a market**

Subsection 766D(1) does not apply to a CCIV, nor to the corporate director of a CCIV, for:

- (a) a proposed buy-back by the CCIV; or
- (b) the proposed issuing or redeeming by the CCIV of:
  - (i) redeemable shares in the CCIV; or
  - (ii) redeemable preference shares in the CCIV.

**1241E Certain conduct relating to CCIVs is not providing a custodial or depository service**

Treat subsection 766E(3) as also providing that none of the following conduct constitutes providing a *custodial or depository service*:

- (a) operating as a CCIV;
- (b) operating the business and conducting the affairs of a CCIV;
- (c) holding the money or property of a CCIV.

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Note: Holding the assets of a sub-fund of a CCIV is covered by paragraph (c) and does not constitute providing a *custodial or depository service*.

### 1241F Australian financial services licences

- (1) For the purposes of Chapter 7, a single Australian financial services licence can cover operating the business and conducting the affairs of more than one CCIV.  
Note: This confirms that a corporate director of several CCIVs could be granted a single licence to operate the business and conduct the affairs of those CCIVs.
- (2) Treat subsection 911A(4) as also providing that a person is not exempt under any paragraph of subsection 911A(2) for a financial service they provide if:
  - (a) the service is operating the business and conducting the affairs of a CCIV; and
  - (b) the person is the corporate director of the CCIV.
- (3) Despite paragraph 912A(4)(b), paragraph 912A(1)(d) also applies to an RSE licensee that is the corporate director of a CCIV.
- (4) Despite subsection 912A(5), paragraph 912A(1)(h) also applies to an RSE licensee that is the corporate director of a CCIV, except to the extent that the risk relates solely to the operation of a regulated superannuation fund by the RSE licensee.
- (5) Treat subsection 912D(4) as also providing that, for the purposes of section 912D, a breach of a core obligation is taken to be **significant** in the case of a CCIV if the breach results, or is likely to result, in material loss or damage to a member of members of the CCIV.

### 1241G Immediate suspensions or cancellations of licences

Treat subsection 915B(3) as also providing that ASIC may suspend or cancel an Australian financial services licence held by a body corporate, by giving written notice to the body, if:

- (a) the body is the corporate director of a CCIV; and

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- (b) the CCIV or the members of the CCIV have suffered, or are likely to suffer, loss or damage because the corporate director or the CCIV has breached this Act.

**1241H Restriction on use of certain words or expressions**

Treat subsection 923A(1) as also providing that a CCIV contravenes that subsection if the CCIV assumes or uses, in this jurisdiction, a restricted word or expression in relation to a financial services business or financial service.

**1241J Agreements with certain unlicensed persons**

- (1) Subdivision B of Division 11 of Part 7.6 also applies to an agreement entered into by:
- (a) a CCIV (in that Subdivision called the non-licensee); and
  - (b) another person (in that Subdivision called the client) who is not a financial services licensee;
- that constitutes, or relates to, the provision of a financial service by the corporate director of the CCIV (in that Subdivision called the corporate director) if:
- (c) the agreement is entered into in the course of a financial services business carried on by the corporate director; and
  - (d) the corporate director does not hold an Australian financial services licence covering the provision of the financial service; and
  - (e) the corporate director is not exempt from the requirement to hold such a licence.

Note 1: A CCIV does not need to be licensed to provide a financial service, instead the CCIV's corporate director needs to be (see subsection 1241B(1)). This means section 924A will work appropriately only if the agreement mentioned in that section is between the corporate director and the client.

Note 2: This section works similarly to section 924A to ensure that the appropriate result happens if the agreement mentioned in section 924A is instead between the CCIV and the client.

Note 3: This section applies whether the financial service is provided to the client as a wholesale client or as a retail client.

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- (2) Subdivision B of Division 11 of Part 7.6 applies to the agreement whether or not anyone else is a party to the agreement.
- (3) That Subdivision applies to the agreement as if subsections 925A(4) and (5) were replaced by the following:
  - “(4) The client is not entitled to give a notice under this section if, within a reasonable period before the agreement was entered into, the non-licensee informed the client (whether or not in writing) that the corporate director did not hold an Australian financial services licence.
  - (5) If, at a time when an Australian financial services licence held by the corporate director was suspended, the non-licensee informed the client that the licence was suspended, the non-licensee is to be taken for the purposes of subsection (4) to have informed the client at that time that the corporate director did not hold the licence.”.

### **1241K Treat the CCIV as a professional investor**

Treat the definition of *professional investor* in section 9 as also meaning a CCIV if and while the corporate director of the CCIV holds an Australian financial services licence.

### **1241L Financial services disclosure does not apply to operating the business and conducting the affairs of CCIVs**

Part 7.7 does not apply to a financial service if:

- (a) the financial service consists only of operating the business and conducting the affairs of a CCIV; and
- (b) the financial service is provided by the corporate director of the CCIV.

### **1241M Financial records of the corporate director of a CCIV**

When section 988E applies to a licensee because the licensee is the corporate director of a CCIV, treat that section as requiring the particulars of the matters in paragraphs 988E(a) to (g) to be shown so that they are clearly identifiable for each sub-fund of the CCIV.

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Note: Section 988E is about the categories of information to be shown in the licensee's financial records.

**1241N Prohibition on hawking of securities in a CCIV**

- (1) Treat subsection 992A(2) as also providing that subsection 992A(1) does not apply to the offering of securities in a CCIV, hawking of which is prohibited by section 992AA (as extended by this section).
- (2) Subsection 992AA(1) also applies as if the reference in that subsection to interests in managed investment schemes included a reference to securities in a CCIV.

Note: Failure to comply with subsection 992AA(1) is an offence (see subsection 1311(1)).

- (3) Subsection 992AA(1), as it applies because of subsection (2) of this section, does not apply to an offer of securities in a CCIV if:
  - (a) the offer is not to a retail client; or
  - (b) the CCIV is a listed company and the offer is an offer of securities in the CCIV made by telephone by a financial services licensee; or
  - (c) the offer is made to a client by a financial services licensee through whom the client has acquired or disposed of a security in a CCIV in the previous 12 months.

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

- (4) For the purposes of subsection 992AA(1), as it applies because of subsection (2) of this section:
  - (a) a reference to offering securities in a CCIV for issue includes a reference to inviting an application for the issue of securities in the CCIV; and
  - (b) a reference to offering securities in a CCIV for sale includes a reference to inviting an offer to purchase securities in the CCIV.
- (5) Subsection 736(1) (about prohibiting the hawking of securities) does not apply to securities in a CCIV.

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

**1241P Modifications of Part 7.8A**

- (1) Paragraph 994B(3)(d) (about an exception to making a target market determination for a financial product) does not apply to a fully paid ordinary share in a CCIV.
- (2) If a contravention referred to in paragraph 994M(1)(a) is a contravention by a CCIV, subsection 994M(1) applies to authorise recovery by action against the CCIV's corporate director instead of against the CCIV.

Note: Subsection 994M(1) authorises a client to recover the amount of loss or damage suffered because of certain contraventions.

**1241Q Part 7.9 applies to the issue or sale of securities in a CCIV**

- (1) Despite subsection 1010A(1), Part 7.9 applies to securities in a CCIV.

Note: This and other sections in this Part extend and modify how Part 7.9 applies for a CCIV. A consequence is that, for a CCIV, references outside of Part 7.9 to provisions of Part 7.9 become references to those provisions as they apply because of this Part.

- (2) Despite subsection 1010B(1), Part 7.9 applies in relation to the issue of any security in a CCIV.
- (3) If the corporate director of a CCIV is, apart from this subsection, a regulated person (within the meaning of Division 2 of Part 7.9) because it is the seller of a security in the CCIV, treat the CCIV as being the regulated person within the meaning of that Division instead of the corporate director.

Note 1: The corporate director of the CCIV will continue to be a regulated person for any other case.

Note 2: The CCIV will also be the regulated person for an issue of securities in the CCIV (see subsection 1241A(4) and section 1011B).

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- (4) If a reference in Part 7.9 to a seller of a financial product applies to the corporate director of a CCIV as the seller of a security in the CCIV, treat the reference as referring to the CCIV.
- (5) Subsections (3) and (4) apply despite subsection 1241A(2).

Note: This subsection confirms that the general rule in subsection 1241A(2) does not affect subsections (3) and (4) of this section.

**1241R Product Disclosure Statements—when a security in a CCIV is of the same kind as another product**

For the purposes of sections 1012C and 1012D (as affected by this Part), a security in a CCIV that is referable to a sub-fund of the CCIV is of the same kind as another product only if the other product:

- (a) is also a security in the CCIV; and
- (b) is also referable to that sub-fund of the CCIV; and
- (c) is issued on the same terms and conditions (other than price) as the first-mentioned security.

**1241S Product Disclosure Statements—situations when not required for CCIVs**

*No consideration to be provided*

- (1) Paragraph 1012D(5)(b) also applies to the case where the financial product is not an option and is a security in a CCIV.

*Client is associated with the CCIV*

- (2) Treat section 1012D as also providing that, in a recommendation situation, an issue situation or a sale situation, the regulated person does not have to give the client a Product Disclosure Statement if:
  - (a) the financial product is a security in a CCIV; and
  - (b) the client is associated (within the meaning of subsection (3) of this section) with the CCIV.

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- (3) For the purposes of subsection (2), the client is associated with the CCIV if the client is:
- (a) the corporate director of the CCIV; or
  - (b) a director or secretary of that corporate director; or
  - (c) a senior manager of the corporate director or of a related body corporate of that corporate director; or
  - (d) a spouse, parent, child, brother or sister of a person who is a director or senior manager of:
    - (i) that corporate director; or
    - (ii) a related body corporate of that corporate director; or
  - (e) a body corporate controlled by a person referred to in paragraph (a), (b), (c) or (d).

*Dividend reinvestment plan or bonus share plan*

- (4) Treat section 1012D as also providing that, in a recommendation situation or issue situation, the regulated person does not have to give the client a Product Disclosure Statement for a fully-paid share in a CCIV if:
- (a) the client already holds a share, of the same kind, in the CCIV; and
  - (b) either:
    - (i) in a recommendation situation—the advice that constitutes the relevant conduct relates to an offer made under a dividend reinvestment plan or bonus share plan; or
    - (ii) in an issue situation—the offer or issue that constitutes the relevant conduct is made under a dividend reinvestment plan or bonus share plan.

Note: For when such a share is of the same kind, see section 1241R.

*Compromise or arrangement under Part 5.1*

- (5) Treat section 1012D as also providing that, in an issue situation or a sale situation, the regulated person does not have to give the client a Product Disclosure Statement if the issue situation or sale situation is an offer:
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- (a) of securities in a CCIV; and
- (b) made under a compromise or arrangement under Part 5.1 approved at a meeting held as a result of an order under subsection 411(1) or (1A).

*Rights issues*

- (6) Subsection 1012DAA(3) also applies to contraventions of the following provisions:
  - (a) if the relevant product is a security in a CCIV—the provisions of Chapter 2M (as affected by Division 4 of Part 8.4B), or the provisions of that Division, as they:
    - (i) apply to the CCIV; or
    - (ii) apply for a sub-fund of the CCIV;
  - (b) if the relevant product is a security in a CCIV—section 675 as it applies to the CCIV.
- (7) Treat subsection 1012DAA(7) as:
  - (a) providing that paragraph 1012DAA(7)(d) applies only if the relevant product is an interest in a registered scheme; and
  - (b) also including the following paragraph:
    - “(da) if the relevant product is a security in a CCIV—states that, as at the date of the notice, the CCIV has complied with the provisions of Chapter 2M (as affected by Division 4 of Part 8.4B), and the provisions of that Division, as they:
      - (i) apply to the CCIV; and
      - (ii) apply for each sub-fund of the CCIV; and”.

*Small scale offerings*

- (8) Section 1012E also applies to financial products that are securities in a CCIV. For the purposes of that section, to the extent that those securities are referable to a sub-fund of the CCIV, treat the:
  - (a) 20 purchasers ceiling (subsections 1012E(6) and (7)); and
  - (b) \$2 million ceiling (subsections 1012E(6) and (7));as applying only to financial products that are securities referable to that sub-fund of the CCIV.

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**1241T Product Disclosure Statements—content requirements**

*Main requirements*

- (1) Treat subsection 1013D(1) as also including the following paragraph:  
“(la) if the product is a share in a CCIV, and the CCIV’s constitution makes provision for acquisitions described in paragraph 1223G(e)—a statement to the effect that the CCIV may acquire, in respect of any of its sub-funds, one or more shares that are referable to another of its sub-funds; and”.
- (2) Treat subsection 1013D(2A) as also including securities in a CCIV.

*Extra requirements for ED securities in a CCIV*

- (3) Section 1013I also applies as if:
  - (a) references in that section to managed investment products included references to securities in a CCIV; and
  - (b) references in that section to a scheme included references to the CCIV.

**1241U Product Disclosure Statements—replacement statements**

Section 1014G also applies as if the reference in paragraph 1014G(a) to an interest in a managed investment scheme included a reference to an interest that is a security in a CCIV.

**1241V Product Disclosure Statements—lodging with ASIC**

- (1) Section 1015B also applies as if:
  - (a) a reference in that section to a managed investment product included a reference to a security in a CCIV; and
  - (b) paragraph 1015B(1)(ba) were not enacted; and
  - (c) an extra paragraph of subsection 1015B(1) provided that the financial product is a security that:
    - (i) is in a CCIV; and

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- (ii) is referable to a sub-fund of the CCIV that is an Australian passport fund.
- (2) When section 1015B so applies, treat subsection 1015B(2) as instead providing that the lodgement with ASIC of a Statement in relation to a security in the CCIV requires the consent of every director of the corporate director of the CCIV.
- Note: This is the case whether the Statement is an issue Statement or a sale Statement.

### **1241W Product Disclosure Statements—use of application forms**

Treat the definition of *relevant financial product* in subsection 1016A(1) as also meaning a security in a CCIV.

### **1241X Product Disclosure Statements—if lodged, then security not to be issued or sold before specified period**

Section 1016B does not apply in relation to a financial product to which a Product Disclosure Statement relates if the financial product is a security that:

- (a) is in a CCIV; and
- (b) is referable to a sub-fund of the CCIV that is an Australian passport fund.

Note: This section does not prevent section 1016B from applying in relation to a security in the CCIV referable to any other kind of sub-fund of the CCIV.

### **1241Y Remedies for person acquiring financial product under defective Product Disclosure Document**

If, for the purposes of subsection 1016F(2), the responsible person is a CCIV, treat the reference in that subsection to the directors of the responsible person as if it were instead a reference to the directors of the corporate director of the CCIV.

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**1241Z Disclosure obligations of issuers of securities in CCIVs**

- (1) Subsection 1017B(2) also applies in relation to a financial product that is an ED security in a CCIV.

Note: A defendant bears an evidential burden in relation to the matter in subsection 1017B(2) (see subsection 13.3(3) of the *Criminal Code*).

- (2) Paragraph 1017D(1)(b) also applies as if it referred to a product that is a security in a CCIV.

**1241ZA Cooling-off periods**

Division 5 of Part 7.9 also applies as if securities in a CCIV were another class of financial product covered by paragraph 1019A(1)(a).

**1241ZB Unsolicited offers to purchase securities in CCIVs off-market**

For financial products that are securities in a CCIV, treat paragraph 1019D(1)(d) as also providing that the offer is not made to the corporate director of the CCIV.

**1241ZC Product intervention orders**

If a contravention referred to in paragraph 1023Q(1)(a) is a contravention by a CCIV, subsection 1023Q(1) applies to authorise recovery by action against the CCIV's corporate director instead of against the CCIV.

Note: Subsection 1023Q(1) authorises a client to recover the amount of loss or damage suffered because of contraventions of a product intervention order.

**1241ZD Insider trading—exceptions**

*Buy-back of shares in a CCIV*

- (1) Treat section 1043B as also providing that subsection 1043A(1) does not apply in respect of the acquisition of shares as part of a
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buy-back by a CCIV if the amount paid to each affected member of the CCIV for the buy-back is calculated (so far as is reasonably practicable) by reference to:

- (a) the underlying value of the assets of the sub-fund to which the shares are referable; less
- (b) any reasonable charge for the buy-back.

*Redemption of shares in a CCIV*

- (2) Treat section 1043B as also providing that subsection 1043A(1) does not apply in respect of the redemption of shares in a CCIV if the amount paid to each affected member on redemption is calculated (so far as is reasonably practicable) by reference to:
  - (a) the underlying value of the assets of the sub-fund to which the shares are referable; less
  - (b) any reasonable charge for that redemption.

*Officer or employee is aware of certain transactions*

- (3) Subsections 1043I(2) and (3) apply to a body corporate that is a CCIV as if the reference in subsection 1043I(2) to an officer or employee of the body corporate were instead a reference to:
  - (a) the corporate director of the CCIV acting on behalf of the CCIV; or
  - (b) an officer or employee (an *official*) of the corporate director of the CCIV acting:
    - (i) on behalf of the CCIV; and
    - (ii) within the scope of the official's actual or apparent authority in relation to the corporate director;
- and as if subsection 1043I(3) were not enacted, and the reference to that subsection in subsection 1043I(2) were omitted.
- (4) If the second person for the purposes of section 1043J is a CCIV, that section applies as if the reference in subsection 1043J(1) to the first person were instead a reference to:
  - (a) an agent of the CCIV acting:
    - (i) on behalf of the CCIV; and

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- (ii) within the scope of the agent's actual or apparent authority in relation to the CCIV; or
  - (b) the corporate director of the CCIV acting on behalf of the CCIV; or
  - (c) an officer or employee (an *official*) of the corporate director of the CCIV acting:
    - (i) on behalf of the CCIV; and
    - (ii) within the scope of the official's actual or apparent authority in relation to the corporate director;
- and as if subsection 1043J(2) were not enacted, and the reference to that subsection in subsection 1043J(1) were omitted.

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## Part 8B.8—Miscellaneous

### 1242 Director identification numbers

Treat subsection 1272B(1) as also providing that an *eligible officer* does not include the corporate director of a CCIV.

### 1242A Registers

Treat paragraph 1274(2)(a) as also providing that the constitution of a wholesale CCIV that is lodged with ASIC may not be inspected by a person.

### 1242B Inspection of books

Section 1300 applies to a CCIV as if the CCIV were a proprietary company.

### 1242C Falsification of books

- (1) Subsection 1307(1) applies as if:
  - (a) each of the following were an officer of a CCIV:
    - (i) an officer of the CCIV;
    - (ii) an officer of the corporate director of the CCIV; and
  - (b) each of the following were a former officer of a CCIV:
    - (i) a former officer of the CCIV;
    - (ii) a former officer of the corporate director of the CCIV; and
  - (c) an employee of the corporate director of a CCIV were an employee of the CCIV; and
  - (d) a former employee of the corporate director of a CCIV were a former employee of the CCIV.
- (2) Subparagraphs (1)(a)(i) and (b)(i) are included for the avoidance of doubt.

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**1242D Application of Part 9.4**

- (1) Sections 1309 and 1317 apply as if:
  - (a) each of the following were a director of a CCIV:
    - (i) the corporate director of the CCIV;
    - (ii) a director of the corporate director of the CCIV; and
  - (b) each of the following were an officer of a CCIV:
    - (i) an officer of the CCIV;
    - (ii) an officer of the corporate director of the CCIV; and
  - (c) an employee of the corporate director of a CCIV were an employee of the CCIV; and
  - (d) each of the following were an agent of a CCIV:
    - (i) an agent of the CCIV;
    - (ii) an agent of the corporate director of the CCIV.
- (2) Subparagraphs (1)(a)(i), (b)(i) and (d)(i) are included for the avoidance of doubt.

**1242E Disclosures qualifying for protection under Part 9.4AAA**

*Eligible whistleblower*

- (1) Treat section 1317AAA as also providing that an individual is an ***eligible whistleblower*** in relation to a regulated entity that is a CCIV if the individual is, or has been, any of the following:
  - (a) an officer of the corporate director of the CCIV;
  - (b) an employee of the corporate director of the CCIV;
  - (c) a relative of an individual referred to in paragraph (a) or (b);
  - (d) a dependant of an individual referred to in paragraph (a) or (b), or of such an individual's spouse.

*Eligible recipient*

- (2) Treat subsection 1317AAC(1) as also providing that each of the following is an ***eligible recipient*** in relation to a regulated entity that is a CCIV:
  - (a) an officer of the corporate director of the CCIV;

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- (b) a senior manager of the corporate director of the CCIV.

*Whistleblower policies*

- (3) Treat subsection 1317AI(5) as also providing that the matters that must be set out in a policy for a corporate director of a CCIV also include the following:
- (a) information about to whom disclosures in relation to the CCIV that qualify for protection under Part 9.4AAA may be made, and how they may be made;
  - (b) information about how the CCIV will support whistleblowers and protect them from detriment;
  - (c) information about how the CCIV will investigate disclosures that qualify for protection under Part 9.4AAA;
  - (d) information about how the policy is to be made available to officers of the CCIV;
  - (e) any matters prescribed by the regulations for the purposes of this paragraph.

**1242F Powers of Courts—irregularities**

Subparagraph 1322(1)(b)(i) applies to:

- (a) a meeting of the members of a sub-fund of the CCIV in the same way as it applies in relation to a meeting of a corporation; and
- (b) a joint meeting of creditors and members of a sub-fund of a CCIV in the same way as it applies in relation to a joint meeting of creditors and members of a corporation.

**1242G Fees payable to the Commonwealth**

Subsection 1351(4) has effect in relation to a review fee payable to the Commonwealth by a CCIV in relation to a review date in a year as if paragraph 1351(4)(a) were substituted with the following:

- “(a) all of the following apply:

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- (i) ASIC has given notice of the proposed deregistration of a sub-fund of the CCIV in accordance with paragraph 1239(5)(c), and published notice of the proposed deregistration of the sub-fund in accordance with paragraph 1239(5)(d);
- (ii) as a result of ASIC deregistering the sub-fund, ASIC will be required to deregister the CCIV under section 1239K;
- (iii) the review date for that year falls in the 2 month period before or after the publication of the notice published in accordance with paragraph 1239(5)(d); or”.

## Part 8B.9—Subordinate legislation relating to CCIVs

### 1243 ASIC's power to make exemption and modification orders

- (1) This section applies in relation to the following (the *CCIV provisions*):
  - (a) Part 8B.2 (registration of CCIVs);
  - (b) Part 8B.3 (corporate governance of CCIVs);
  - (c) sections 1230J and 1230K (about redemptions for non-liquid sub-funds);
  - (d) Division 4 of Part 8B.4 (financial reports and audits of CCIVs);
  - (e) Division 9 of Part 8B.6 (deregistration and transfer of registration);
  - (f) Part 8B.7 (control, financial services and disclosure).
- (2) ASIC may do either or both of the following:
  - (a) exempt from all or specified provisions of the CCIV provisions:
    - (i) a specified CCIV, a specified class of CCIVs or all CCIVs; or
    - (ii) a specified class of sub-funds of CCIVs, all sub-funds of a specified class of CCIVs, or all sub-funds of all CCIVs; or
    - (iii) a specified entity, a specified class of entities or all entities, in relation to a specified CCIV, a specified class of CCIVs or all CCIVs; or
    - (iv) a specified entity, a specified class of entities or all entities, in relation to a specified class of sub-funds of CCIVs, all sub-funds of a specified class of CCIVs, or all sub-funds of all CCIVs;
  - (b) declare that the CCIV provisions apply in relation to:

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- (i) a specified CCIV, a specified class of CCIVs or all CCIVs; or
  - (ii) a specified class of sub-funds of CCIVs, all sub-funds of a specified class of CCIVs, or all sub-funds of all CCIVs; or
  - (iii) a specified entity, a specified class of entities or all entities, in relation to a specified CCIV, a specified class of CCIVs or all CCIVs; or
  - (iv) a specified entity, a specified class of entities or all entities, in relation to a specified class of sub-funds of CCIVs, all sub-funds of a specified class of CCIVs, or all sub-funds of all CCIVs;
- as if specified provisions were omitted, modified or varied as specified in the declaration.
- (3) The exemption or declaration may:
- (a) relate to a specified security, a specified class of securities or all securities; and
  - (b) relate to any other matter generally or as specified.
- (4) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for the order.

*Exemptions and declarations relating to all or a class of persons*

- (5) An exemption or declaration must be made by legislative instrument if it relates to:
- (a) all CCIVs, a specified class of CCIVs, or 2 or more specified CCIVs; or
  - (b) all sub-funds of all CCIVs, all sub-funds of a specified class of CCIVs, or a specified class of sub-funds of CCIVs; or
  - (c) all entities, a specified class of entities, or 2 or more specified entities.

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*Exemptions and declarations relating to specified persons*

- (6) Subject to subsection (5), an exemption or declaration must be made by notifiable instrument if it relates to a specified CCIV or specified entity.
- (7) An exemption or declaration that relates to a specified CCIV may apply to the CCIV in respect of a specified sub-fund, a specified class of sub-funds or all sub-funds of the CCIV.
- (8) An exemption or declaration that relates to a specified entity may apply to the entity in respect of a specified sub-fund, a specified class of sub-funds or all sub-funds of a specified CCIV.
- (9) ASIC must also give a copy of an exemption or declaration that relates to a specified CCIV or a specified entity to the CCIV or entity. ASIC must do so as soon as is reasonably practicable after the exemption or declaration is made.

**1243A Modification by regulations**

- (1) The regulations may modify the operation of this Chapter or any other provisions of this Act in relation to:
  - (a) a specified CCIV; or
  - (b) a specified class of CCIVs; or
  - (c) all CCIVs; or
  - (d) a specified class of sub-funds of CCIVs; or
  - (e) all sub-funds of a specified class of CCIVs; or
  - (f) all sub-funds of all CCIVs.
- (2) Regulations made for the purposes of subsection (1) in relation to a specified CCIV may apply to the CCIV in respect of a specified sub-fund, a specified class of sub-funds or all sub-funds of the CCIV.