



GUIDELINES FOR THE EXERCISE OF POWERS  
DELEGATED TO ASIC UNDER CHAPTER 7 OF THE  
*CORPORATIONS ACT 2001*

The Minister for Small Business and Assistant Treasurer

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# 1. Background

## ***Minister's powers under the Corporations Act 2001***

The *Corporations Act 2001* (the Corporations Act) ascribes the responsible Minister various powers relating to the regulation of financial markets and financial market infrastructures (FMIs) – clearing and settlement (CS) facilities and trade repositories.

Some of the matters of regulation to which these powers relate are:

- licensing and operating rules of financial markets;
- compensation arrangements for financial markets; and
- licensing and operating rules of CS facilities.

These matters are hereafter collectively referred to as the *regulatory matters*.

Some of the powers the Minister has in respect of licensing of financial markets and CS facilities are the power to grant, impose or vary conditions on a licence and suspend or cancel a licence. The Minister has also the power to disallow changes to operating rules of financial markets and CS facilities.

Under the Corporations Act, the Australian Securities and Investment Commission (ASIC) has a role in the regulatory matters, which includes providing advice to the Minister about applications for a market licence and changes to operating rules and enforcing market licensees' compliance with their obligations.

With respect to the regulation of CS facilities, ASIC and the Reserve Bank of Australia (RBA) share regulatory responsibility, with ASIC administering license obligations and compliance obligations and the RBA overseeing other compliance obligations. Under the Corporations Act, the RBA is responsible for determining Financial Stability Standards (FSS) and assessing whether licensees have complied with the FSS and taken other necessary steps to reduce systemic risk. ASIC is responsible for ensuring that CS facilities comply with all other obligations, including for the fair and effective provision of services.

## ***List of powers delegated to authorised ASIC officers***

In accordance with section 1101J of the Corporations Act, the responsible Minister – at the time of writing, the Minister for Small Business and Assistant Treasurer, the Hon Kelly O'Dwyer – has delegated some of the regulatory matters to authorised ASIC officers by way of an instrument (the Delegation Instrument).

The authorised ASIC officers (the delegate) are:

- (a) each member of ASIC (within the meaning of section 9 of the Australian Securities and Investments Act 2001 (ASIC Act)); and
- (b) each staff member (within the meaning of subsection 5(1) of the ASIC Act) who is an SES employee (within the meaning of section 34 of the Public Service Act 1999) or who holds an office or position that is at a level equivalent to that of an SES employee.

Under Parts 7.2, 7.3 and 7.5 of the Corporations Act, the Minister has various powers relating to the licensing, operating rules and compensation arrangements of financial markets and CS facilities. The powers under these parts that have been delegated are outlined in Table 1.

**Table1. Delegated powers under Parts 7.2, 7.3 and 7.5 of the Corporations Act**

<b>Power</b>	<b>Financial market</b>	<b>CS facility</b>
<b><i>Licensing</i></b>		
Issue/revoke exemption from holding a licence and set/vary/revoke conditions on an exemption	791C	820C
Direct audit of annual report	792F	821E
Approve change of country by foreign licensee	792H	821F
Issue/vary/revoke directions	794A	823A
Require a special report including an audited special report	794B	823B
Issue domestic licence	795B(1)	824B(1)
Issue overseas licence	795B(2)	824B(2)
Gazette the licence	795C	824C
Impose/vary/revoke conditions on licence	796A	825A
Vary licence	797A	826A
Suspend/cancel licence and vary or revoke suspension	797B	826B
	797C	826C
	797D	826D
	797E	826E
	797F	826F
<b><i>Operating rules</i></b>		
Disallow changes to operating rules	793E	822E
<b><i>Compensation arrangements</i></b>		
Consider whether market will be covered by Division 4 of Part 7.5 of the Corporations Act	881D	
Approve compensation arrangements with grant of license	882A	
Approve compensation arrangements after license is granted	882B	
Revoke an approval of compensation arrangements	882C	
Issue directions to licensee	882D	
Disallow changes to compensation rules	884B	
Approve changes to compensation arrangements	884C	
Assess adequacy of compensation rules and arrangements	885B	
	885C	
	885J	
Disallow changes to the operating rules of the Securities Exchanges Guarantee Corporation	890H	
Request a risk assessment report	892K	

## ***Purpose of the guidelines***

These guidelines set out the approach that the delegate is expected to take in exercising the delegated powers and have been issued by the Minister in conjunction with the Delegation Instrument. Therefore, these guidelines describe:

- the matters the delegate should or must consider when exercising the delegated powers, including the appropriate timeframes for exercising the delegated powers;
- the reporting requisite for the delegate to provide a quarterly report on both: upcoming regulatory matters which will require the exercise of the delegated powers over the next quarter, and regulatory matters for which the delegate has exercised the delegated powers over the previous quarter;
- the procedure for allowing the Minister to ‘call up’ (request) regulatory matters for which the Minister deems that it is appropriate that he or she should exercise his or her powers instead of the delegate; and
- other matters regarding the Minister’s rights during the delegation and vary or revoke the delegation.

## **2. Matters the delegate should have regard to when exercising the delegated powers**

### ***Objectives of regulation***

The purpose of regulation is to provide certain outcomes that are in the public interest which would otherwise not be produced by competition or other market forces. Consistent with international standards<sup>1</sup>, the overarching objectives of:

- *regulation of financial markets* – are protecting investors, ensuring that markets are fair, efficient and transparent and reducing systemic risk; and
- *FMI regulation* – are to enhance safety and efficiency, to limit systemic risk and foster transparency and financial stability.
- In exercising the delegated powers, the delegate is expected to take into account these objectives.

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1 The relevant international standards are the International Organization of Securities Commissions (IOSCO) *Principles of Securities Regulation* and the Committee on Payments and Market Infrastructures (CPMI)-IOSCO *Principles for Financial Market Infrastructures*.

### ***Matters Minister must have regard to under the Corporations Act***

When exercising a delegated power, the delegate is subject to the same limits that the Minister would be subject to if the Minister was exercising the power. For instance:

- when making decisions in relation to granting a licence; imposing, varying or revoking licence conditions; suspending or cancelling a licence; or disallowing a change to the operating rules of a licensed market or CS facility, the delegate must have regard to the factors outlined in sections 798A and 827A of the Corporations Act; and
- when making a decision to vary a licence condition so as to add another market or CS facility, the delegate must be satisfied of the matters mentioned in subsections 795E(3) and 824E(3) of the Corporations Act.

### ***Consideration of ASIC's aims***

The delegate should have regard to subsection 1(2) of the *Australian Securities and Investments Commission Act 2001*, which states that in performing its functions and exercising its powers, ASIC must strive to:

- maintain, facilitate and improve the performance of the financial system and entities within the system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy;
- promote confident and informed participation by investors and consumers in the financial system;
- administer the law effectively and with minimal procedural requirements; and
- enforce and give effect to the law.

### ***Consideration of competition***

- The delegate should, to the degree practicable, ensure that the exercise of any delegated power promotes competition. In meeting this condition, the delegate should therefore strive to:
- facilitate competition between entities who are subject to the regulation; and
- consider the impact of matters under the delegation on other stakeholders that may be affected by the decision, including other market operators.

### ***Consideration of Government's commitments and priorities***

The delegate is expected to exercise the delegated powers in a way that aligns with the Government's priorities and commitments. For example, one of the Government's priorities is to stimulate innovation in the financial system in order to better support the operation of the economy. The Government also maintains a strong commitment to establish Australia as a financial hub within the Asia Pacific region.

### ***Consideration of RBA's aims***

When exercising the delegated powers relating to CS facilities, the delegate is expected to:

- ensure there has been adequate consultation with the RBA ahead of any exercise of the delegated powers, allowing adequate time for consideration and response taking into account the nature of the power being exercised;
- consider any advice and recommendation provided by the RBA (and ASIC) when exercising any delegated power in relation to CS facilities; and
- ensure delegated powers do not frustrate crisis management actions including, once the RBA has such powers, the RBA's issuance of directions in recovery or actions in resolution.

### ***Timeframes for the exercise of the delegated powers***

In exercising the delegated powers, the delegate will be subject to the same statutory timeframes as the Minister for decision-making. However, in order to enhance efficiencies, the delegate is expected to set more expedient performance indicators for the execution of the delegated powers and periodically review the indicators. If required, the delegate should share performance indicators with the Minister.

## **3. Reporting requisites, call up procedure and notifications to licensee**

### ***Reporting to the Minister***

The delegate must provide a quarterly report (the ASIC Regulatory Report) to the Minister and the RBA containing information on:

- all known upcoming regulatory matters which will require the exercise of the delegated powers over the next quarter; and
- all regulatory matters for which the delegate has exercised the delegated powers over the preceding quarter.
- To the extent that matters relate to CS facilities, the delegate should seek the RBA's input on the relevant parts of the ASIC Regulatory Report.

The ASIC Regulatory Report must include the following information, as practicable and applicable to each regulatory matter:

- the nature of the regulatory matter;
- information regarding the financial market(s) or FMI(s) involved, or affected by the regulatory matter;

- background and a description of the regulatory matter, including:
  - the most relevant section of the Corporations Act under which the Minister’s powers relate to the regulatory matter, informal lodgement dates and any legislated timeframes imposed on the use of these powers for the regulatory matter, and
  - the reasons the Minister’s powers are required to, or may, be exercised for the particular regulatory matter;
- whether the regulatory matter will require the Minister’s decision (see *Role of the Minister-matters to be called up* section); and
- any other details the Minister deem necessary and instruct the delegate to provide.
- ASIC should also notify the Minister of applications received in between ASIC regulatory reports that fall within one of the call up circumstances identified below.

### ***Publication of the ASIC Regulatory Report***

To the extent permitted under the law, the delegate should publish on ASIC’s website, the section of the ASIC Regulatory Report that outlines the regulatory matters for which, during the previous quarter, the delegate has exercised the delegated functions and powers.

### ***Call up procedure***

If the Minister become aware of a matter (through the ASIC Regulatory Report or otherwise), they can request that a regulatory matter be called up for the Minister’s decision. To call up a regulatory matter, the Minister will notify the delegate (and the RBA, in respect of CS facilities) that, in regards to the particular regulatory matter, it is appropriate that the Minister, and not the delegate, exercise the appropriate power(s) as ascribed to the Minister under Chapter 7 of the Corporations Act.

Upon receiving a notification that a regulatory matter will be called up for the Minister’s decision, the delegate will be required to provide to the Minister, once the financial market or FMI has made formal lodgement or as soon as is practicable, the documents required for the Minister to exercise these powers, including (as applicable):

- any formal lodgement letter from the financial market or FMI;
- a letter from ASIC providing advice on the regulatory matter;
- a letter from the RBA providing advice on the regulatory matter; and
- any other documents.



### **Matters to be called up**

The Minister can still exercise the powers delegated as the Minister deems necessary. The Minister will particularly call up regulatory matters that:

- are of national significance (for example, the introduction of a new clearing and settlement facility);
- materially affect the structure or nature of the Australian financial system, including those of significant novelty (for example, the introduction of innovative ways to provide finance such as crowd-source funding and peer-to-peer lending);
- are referred to the Minister by the delegate (for example, where the delegate does not agree with the advice of the regulators with respect to the relevant regulatory matter, matters of national significance and/or materially affect the structure or nature of the Australian financial system);
- are otherwise referred to the Minister for decision by ASIC or the RBA (for example, where there is a disagreement between ASIC and the RBA with respect to matters related to the oversight of CS facilities); and
- the Minister deems it necessary, particularly during those events of financial turbulence.

### ***Formal notification to licensee***

- To ensure that licensees understand the circumstances where there are regulatory concerns, ASIC should provide a formal written notification to the licensee explaining the reasons as to why the outcome of certain regulatory determination is negative (for example, ASIC disallows an operating rule amendment).
- ASIC should take reasonable steps to provide an applicant with an opportunity to respond to any concerns prior to ASIC making a decision.

## **4. Other matters**

### ***Use of the delegated powers by the Minister during the delegation***

The delegation of the Minister's powers to the delegate by way of the Delegation Instrument does not prohibit the exercise of these powers, by the Minister, at any time.

### ***Minister's right to vary or revoke the delegation or guidelines at any time***

The Minister reserves the right to change or revoke the delegation of his or her powers at any time. The revocation will take effect from the date the Minister notifies the delegate in writing. The Minister may also vary the Delegation Instrument at any time by signing and issuing a new Delegation Instrument, which has the effect of superseding any previous Delegation Instrument.

The Minister may also vary the guidelines at any time, which take effect, and supersede any previous guidelines, upon being notified to the delegate in writing. Any notice of revocation, new or amended delegation and new or amended guidelines will be copied to the RBA at the same time as the relevant document is sent to the delegate.