

EXPOSURE DRAFT

2016-2017

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES/THE SENATE

EXPOSURE DRAFT

Corporations Amendment (Financial Benchmarks) Bill 2017

No. , 2017

(Treasury)

**A Bill for an Act to amend the law relating to
corporations and financial products and services,
and for related purposes**

EXPOSURE DRAFT

EXPOSURE DRAFT

Contents

1	Short title.....	1
2	Commencement	1
3	Schedules	2
Schedule 1—Amendments		3
Part 1—Main amendments		3
	<i>Corporations Act 2001</i>	3
Part 2—Main consequential amendments		37
	<i>Corporations Act 2001</i>	37
Part 3—Other consequential amendments		45
	<i>Treasury Laws Amendment (2016 Measures No. 1) Act 2017</i>	45

EXPOSURE DRAFT

1
2 **A Bill for an Act to amend the law relating to**
3 **corporations and financial products and services,**
4 **and for related purposes**

5 The Parliament of Australia enacts:

6 **1 Short title**

7 This Act is the *Corporations Amendment (Financial Benchmarks)*
8 *Act 2017*.

9 **2 Commencement**

10 (1) Each provision of this Act specified in column 1 of the table
11 commences, or is taken to have commenced, in accordance with
12 column 2 of the table. Any other statement in column 2 has effect
13 according to its terms.
14

Commencement information

Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details

1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	
---------------------------------------------------------------------------------	---------------------------------------------	--

2. Schedule 1, Parts 1 and 2	The day after this Act receives the Royal Assent.	
------------------------------	---------------------------------------------------	--

3. Schedule 1, Part 3	Immediately after the commencement of Schedule 5 to the <i>Treasury Laws Amendment (2016 Measures No. 1) Act 2017</i> .	4 April 2018
-----------------------	-------------------------------------------------------------------------------------------------------------------------	--------------

15 Note: This table relates only to the provisions of this Act as originally
16 enacted. It will not be amended to deal with any later amendments of
17 this Act.

EXPOSURE DRAFT

1 (2) Any information in column 3 of the table is not part of this Act.
2 Information may be inserted in this column, or information in it
3 may be edited, in any published version of this Act.

4 **3 Schedules**

5 Legislation that is specified in a Schedule to this Act is amended or
6 repealed as set out in the applicable items in the Schedule
7 concerned, and any other item in a Schedule to this Act has effect
8 according to its terms.

1 **Schedule 1—Amendments**

2 **Part 1—Main amendments**

3 *Corporations Act 2001*

4 **1 After Part 7.5A**

5 Insert:

6 **Part 7.5B—Regulation of financial benchmarks**

7 **Division 1—Preliminary**

8 **908AA Simplified outline of this Part**

9 Administrators of significant financial benchmarks must be
10 licensed under this Part. Administrators of other financial
11 benchmarks may voluntarily opt in to the same licensing scheme.

12 Licensees are subject to certain obligations.

13 ASIC may make financial benchmark rules that apply in relation to
14 licensees and the financial benchmarks they administer.

15 ASIC may also make compelled financial benchmark rules to deal
16 with circumstances such as the failure of a licensee to administer a
17 significant financial benchmark specified in its licence.

18 Several offences and civil penalty provisions apply to conduct that
19 could unduly manipulate a financial benchmark.

20 **908AB Meaning of *financial benchmark***

21 A *financial benchmark* is a price, estimate, rate, index or value
22 that:

- 23 (a) is made available to users (whether or not for a fee); and
24 (b) is calculated periodically from one or more:

EXPOSURE DRAFT

Schedule 1 Amendments

Part 1 Main amendments

- 1 (i) transactions, instruments, currencies, prices, estimates,
2 rates, indices, values, financial products, bank accepted
3 bills or negotiable certificates of deposit; or
4 (ii) other interests or goods (whether tangible or intangible);
5 and
6 (c) is referenced or otherwise used for purposes that include one
7 or more of the following:
8 (i) calculating the interest, or other amounts, payable under
9 financial products, bank accepted bills or negotiable
10 certificates of deposit;
11 (ii) calculating the price at which a financial product, bank
12 accepted bill or negotiable certificate of deposit may be
13 traded, redeemed or dealt in;
14 (iii) calculating the value of a financial product, bank
15 accepted bill or negotiable certificate of deposit;
16 (iv) measuring the performance of a financial product, bank
17 accepted bill or negotiable certificate of deposit.

18 **908AC Meaning of *significant financial benchmark***

- 19 (1) A *significant financial benchmark* is a financial benchmark that is
20 declared under subsection (2).
- 21 (2) ASIC may, by legislative instrument, declare a financial
22 benchmark to be a significant financial benchmark if ASIC is
23 satisfied that:
24 (a) the benchmark is systemically important to the Australian
25 financial system; or
26 (b) there is a material risk of financial contagion, or systemic
27 instability, in Australia if the availability or integrity of the
28 benchmark were disrupted; or
29 (c) there would be a material impact on retail or wholesale
30 investors in Australia if the availability or integrity of the
31 benchmark were disrupted.

32 Note 1: For declaration by class, see subsection 13(3) of the *Legislation Act*
33 *2003*.

34 Note 2: For variation and revocation of a declaration, see subsection 33(3) of
35 the *Acts Interpretation Act 1901*.

EXPOSURE DRAFT

Amendments **Schedule 1**
Main amendments **Part 1**

1

Ministerial consent to a declaration

2

(3) ASIC must not make a declaration under subsection (2) unless consent for it has been given under subsection (4).

3

4

(4) The Minister may, in writing, consent to the making of a declaration under subsection (2).

5

6

(5) However, ASIC may make a declaration under subsection (2) without the consent of the Minister if ASIC is of the opinion that it is necessary, or in the public interest, to do so in order to protect:

7

8

9

(a) the Australian economy; or

10

(b) the efficiency, integrity and stability of the Australian financial system.

11

12

(6) If ASIC makes a declaration under subsection (2) without the consent of the Minister, ASIC must:

13

14

(a) provide the Minister, on the following day, with a written explanation of the need for the declaration; and

15

16

(b) revoke the declaration in accordance with any direction under subsection (7).

17

18

(7) The Minister may give ASIC a written direction to revoke a declaration made as described in subsection (5).

19

20

(8) A direction under subsection (7) is not a legislative instrument.

21

908AD ASIC to supervise financial benchmarks that are specified in benchmark administrator licences

22

23

(1) ASIC has the function of supervising financial benchmarks that are specified in benchmark administrator licences.

24

25

(2) If such a financial benchmark is wholly or partly generated or administered in a foreign country, ASIC may, to such extent as ASIC considers appropriate, perform the function of supervising the financial benchmark by satisfying itself:

26

27

28

(a) that the regulatory regime that applies in relation to the financial benchmark in that country provides for adequate supervision of the financial benchmark; or

29

30

31

(b) that adequate cooperative arrangements are in place with an appropriate authority of that country to ensure that the

32

33

EXPOSURE DRAFT

Schedule 1 Amendments

Part 1 Main amendments

1 financial benchmark will be adequately supervised by that
2 authority.

3 **908AE Extraterritorial application**

4 Subject to subsection 908BB(2) and section 908DE, this Part
5 applies to acts, omissions, matters and things in Australia or
6 outside Australia.

7 **Division 2—Licensing of financial benchmarks**

8 **Subdivision A—Requirement to be licensed**

9 **908BA Administrators of significant financial benchmarks must be** 10 **licensed**

11 (1) A person commits an offence if:

12 (a) the person:

13 (i) administers a significant financial benchmark; or

14 (ii) holds out that the person administers a significant
15 financial benchmark; and

16 (b) the person does not hold a benchmark administrator licence
17 that specifies the financial benchmark; and

18 (c) the period applying under subsection (2) for the financial
19 benchmark has ended.

20 Penalty: 500 penalty units or imprisonment for 5 years, or both.

21 (2) The period for the purposes of paragraph (1)(c):

22 (a) starts on the day (the *start day*) the financial benchmark is
23 declared under subsection 908AC(2) to be a significant
24 financial benchmark; and

25 (b) ends at the end of the later of the following days:

26 (i) the 90th day after the start day;

27 (ii) if, before the end of that 90th day, the person applies for
28 a benchmark administrator licence specifying the
29 financial benchmark—either the day the person
30 withdraws the application, or the day ASIC decides to
31 grant or refuse to grant the licence.

1 **908BB Other prohibitions on holding out**

2 (1) A person commits an offence if:

3 (a) the person holds out that:

4 (i) the person holds a benchmark administrator licence that
5 specifies a significant financial benchmark; or

6 (ii) the administration of a significant financial benchmark
7 by the person is authorised by a benchmark
8 administrator licence; or

9 (iii) a significant financial benchmark is specified in a
10 benchmark administrator licence; or

11 (iv) a financial benchmark is a significant financial
12 benchmark; or

13 (v) a financial benchmark is not a significant financial
14 benchmark; and

15 (b) this is not the case.

16 Penalty: 500 penalty units or imprisonment for 5 years, or both.

17 (2) A person commits an offence if:

18 (a) in Australia, the person holds out that:

19 (i) the person holds a benchmark administrator licence; or

20 (ii) the administration of a financial benchmark by the
21 person is authorised by a benchmark administrator
22 licence; or

23 (iii) a financial benchmark is specified in a benchmark
24 administrator licence; or

25 (iv) a financial benchmark is a significant financial
26 benchmark; or

27 (v) a financial benchmark is not a significant financial
28 benchmark; and

29 (b) this is not the case.

30 Penalty: 500 penalty units or imprisonment for 5 years, or both.

EXPOSURE DRAFT

Schedule 1 Amendments

Part 1 Main amendments

1 **Subdivision B—Granting licences**

2 **908BC When a licence may be granted**

3 *Granting licences—general*

- 4 (1) ASIC may grant an applicant a licence (a ***benchmark***
5 ***administrator licence***) to administer a specified financial
6 benchmark if ASIC is satisfied that:
7 (a) the application was made in accordance with section 908BD;
8 and
9 (b) the applicant will comply with the obligations that will apply
10 if the licence is granted; and
11 (c) no disqualified individual appears to be involved in the
12 applicant.

13 The licence may be granted subject to conditions.

14 Note 1: ASIC must also have regard to the matters in section 908BO in
15 deciding whether to grant a licence.

16 Note 2: A licence is required if the benchmark is a significant financial
17 benchmark (see section 908BA). Licences are not required, but can
18 still be granted, for other financial benchmarks.

19 *Foreign bodies*

- 20 (2) Despite subsection (1), if the applicant is a foreign body corporate,
21 ASIC must not grant the applicant a licence unless the applicant is
22 registered under Division 2 of Part 5B.2.

23 *Disqualified individuals*

- 24 (3) Despite subsection (1), ASIC must not grant the applicant a licence
25 unless 42 days have passed since the application was made and
26 ASIC has not given a notice under subsection 853D(2) to the
27 applicant within that 42 days.

28 *Notice of decision*

- 29 (4) ASIC must give the applicant written notice of:
30 (a) ASIC's decision whether to grant the applicant a licence; and

- 1 (b) if the licence is granted—any conditions to which the licence
2 is subject.

3 **908BD Applying for a licence**

- 4 (1) A body corporate may, by lodging an application with ASIC that is
5 in a form approved by ASIC in writing, apply for a benchmark
6 administrator licence for a particular financial benchmark.

7 Note: For fees for lodging applications, see Part 9.10.

- 8 (2) ASIC may, by written notice given to an applicant, require the
9 applicant to lodge with ASIC, within the period specified in the
10 notice, further information in connection with the application.

- 11 (3) If the applicant fails to lodge the further information as required,
12 ASIC may, by written notice given to the applicant:

- 13 (a) refuse to consider the application; or
14 (b) refuse to take any action, or any further action, in relation to
15 the application.

16 **908BE More than one financial benchmark may be specified in the**
17 **same licence**

- 18 (1) The same benchmark administrator licence may specify 2 or more
19 financial benchmarks.

- 20 (2) In that case, a reference in this Chapter to the financial benchmark
21 specified in the licence is taken instead to be a reference to each of
22 those financial benchmarks severally.

- 23 (3) A benchmark administrator licence that specifies 2 or more
24 financial benchmarks may be suspended or cancelled under
25 Subdivision D in respect of one or some of those financial
26 benchmarks only, as if the licensee held a separate licence for each
27 of the financial benchmarks.

28 **908BF Publishing details of licences**

29 If ASIC grants a benchmark administrator licence, ASIC must
30 publish a notice stating:

EXPOSURE DRAFT

Schedule 1 Amendments

Part 1 Main amendments

- 1 (a) the name of the licensee and of the financial benchmark
2 specified in the licence; and
3 (b) when the licence was granted; and
4 (c) any conditions to which the licence is subject; and
5 (d) when the licence takes effect.

6 **Subdivision C—Conditions on licences**

7 **908BG Conditions, including varying and revoking conditions**

- 8 (1) ASIC may, at any time, take action to:
9 (a) impose conditions, or additional conditions, on a benchmark
10 administrator licence; or
11 (b) vary or revoke any conditions to which a benchmark
12 administrator licence is subject (whether imposed under
13 paragraph (a) or under subsection 908BC(1));
14 by giving written notice to the licensee. ASIC must also publish a
15 notice with details of the action and when it took effect.

16 Note 1: As well as complying with the requirements in this section, ASIC
17 must have regard to the matters in section 908BO.

18 Note 2: A licensee is also subject to other obligations in this Part (for example,
19 see Divisions 3 and 4).

- 20 (2) ASIC may take action under subsection (1):
21 (a) on its own initiative, subject to subsection (3); or
22 (b) if the licensee lodges an application with ASIC, in a form
23 approved by ASIC in writing, seeking:
24 (i) the imposition of conditions; or
25 (ii) the variation or revocation of conditions.

26 Note: For fees for lodging applications, see Part 9.10.

- 27 (3) ASIC may only take action on its own initiative to impose
28 conditions or additional conditions, or to vary or revoke conditions,
29 to which the licence is subject if:
30 (a) ASIC considers it appropriate to do so having regard to:
31 (i) the licensee's obligations under this Part; and
32 (ii) the licensee's obligations under rules made under
33 Division 3; and

- 1 (iii) any change in the administration of the financial
2 benchmark specified in the licence; and
3 (b) ASIC gives the licensee written notice of the proposed action
4 and an opportunity to make a submission before the proposed
5 action is to take effect.
6 This subsection does not apply to ASIC imposing conditions when
7 a licence is granted.

8 **Subdivision D—When a licence can be varied, suspended or**
9 **cancelled**

10 **908BH Varying licences**

- 11 ASIC may vary a benchmark administrator licence to:
12 (a) take account of a change in the licensee’s name; or
13 (b) take account of a change in the financial benchmark specified
14 in the licence; or
15 (c) specify one or more further financial benchmarks;
16 if the licensee seeks the variation by lodging an application with
17 ASIC in a form approved by ASIC in writing.

18 Note 1: The conditions on the licence can be varied under section 908BG.

19 Note 2: For a variation referred to in paragraph (b) or (c), ASIC must also
20 have regard to the matters in section 908BO.

21 Note 3: For fees for lodging applications, see Part 9.10.

22 **908BI Immediate suspension or cancellation**

- 23 (1) ASIC may, by giving written notice to a benchmark administrator
24 licensee, suspend the licensee’s licence for a specified period, or
25 cancel it, if:
26 (a) the licensee ceases to carry on the business of administering
27 the financial benchmark specified in the licence; or
28 (b) the licensee is a Chapter 5 body corporate, or under a foreign
29 law is in a similar position to a Chapter 5 body corporate; or
30 (c) the licensee asks ASIC to do so.
31 (2) However, before doing so, ASIC must have regard to anything that
32 is required, or could be required, of the licensee under the
33 compelled financial benchmark rules.
-

EXPOSURE DRAFT

Schedule 1 Amendments Part 1 Main amendments

908BJ Suspension or cancellation following hearing and report

(1) If ASIC considers that a benchmark administrator licensee has breached, or is in breach of:

- (a) any conditions to which the licence is subject; or
- (b) any of its obligations under this Part; or
- (c) any of its obligations under rules made under Division 3;

ASIC may give the licensee a written notice that requires the licensee to show cause, at a hearing before a specified person, why the licence should not be suspended or cancelled.

(2) The notice must specify:

- (a) the grounds on which it is proposed to suspend or cancel the licence; and
- (b) a reasonable time and place at which the hearing is to be held.

However, if the licensee consents, the person conducting the hearing may fix a different time or place.

(3) The person conducting the hearing must:

- (a) give the licensee 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 suspend or cancel the licence.

(4) After considering the report and recommendation, ASIC may:

- (a) decide to take no further action in relation to the matter and give written advice of that decision to the licensee; or
- (b) suspend the licence for a specified period, or cancel the licence, by giving written notice to the licensee.

Note: ASIC must also have regard to the matters in section 908BO.

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

908BK Effect of suspension

(1) A person whose benchmark administrator licence is suspended is taken not to hold that licence while it is suspended.

- 1 (2) However, ASIC may specify in the written notice to the licensee
2 under section 908BI, or paragraph 908BJ(4)(b), that subsection (1)
3 of this section does not apply for specified purposes.

4 **908BL Varying or revoking a suspension**

5 ASIC may at any time vary or revoke a suspension of a benchmark
6 administrator licence by giving written notice to the licensee.

7 **908BM Publishing details of suspensions or cancellations of licences**

- 8 (1) If ASIC takes action to:
9 (a) suspend, or vary or revoke a suspension of, a benchmark
10 administrator licence; or
11 (b) cancel a benchmark administrator licence;
12 ASIC must publish a notice to that effect.
13 (2) The notice must state when the action took effect.

14 **908BN Variations, suspensions or cancellations only in accordance** 15 **with this Subdivision**

16 A benchmark administrator licence cannot be varied, suspended or
17 cancelled otherwise than in accordance with this Subdivision.

18 Note: The conditions on the licence can be varied under section 908BG.

19 **Subdivision E—Matters to which ASIC must have regard**

20 **908BO Matters to which ASIC must have regard**

- 21 (1) ASIC must have regard to certain matters in deciding whether to
22 take any of the following actions in relation to a financial
23 benchmark:
24 (a) grant under section 908BC a benchmark administrator
25 licence that specifies the financial benchmark;
26 (b) impose, vary or revoke conditions on such a licence under
27 section 908BC or 908BG;
28 (c) vary such a licence under section 908BH for a change
29 referred to in paragraph 908BH(b) or (c);
30 (d) suspend or cancel such a licence under section 908BJ.
-

EXPOSURE DRAFT

Schedule 1 Amendments

Part 1 Main amendments

- 1 (2) The matters ASIC must have regard to are as follows:
- 2 (a) how the financial benchmark is, or is to be, administered;
- 3 (b) the nature and purpose of the financial benchmark;
- 4 (c) the manner in which the financial benchmark is, or is to be,
- 5 used;
- 6 (d) the persons who are, or may be, required to report data or
- 7 other information to the licensee for the purposes of
- 8 generating or administering the financial benchmark;
- 9 (e) for an entity that is authorised to administer the same or a
- 10 similar financial benchmark in the foreign country in which
- 11 its principal place of business is located:
- 12 (i) the criteria that the entity satisfied to obtain an
- 13 authorisation to administer that financial benchmark in
- 14 that country; and
- 15 (ii) the obligations the entity must continue to comply with
- 16 to keep the authorisation; and
- 17 (iii) the level of supervision to which the administration of
- 18 that financial benchmark in that country is subject; and
- 19 (iv) whether adequate arrangements exist for cooperation
- 20 between ASIC and the authority that is responsible for
- 21 that supervision;
- 22 (f) whether it would be in the public interest to take the action
- 23 referred to in subsection (1).
- 24 (3) ASIC may also have regard to any other matter that ASIC
- 25 considers relevant.

26 Subdivision F—Other obligations of licensees

27 908BP General obligations

- 28 A benchmark administrator licensee must:
- 29 (a) comply with the conditions on the licence; and
- 30 (b) if the licensee is a foreign body corporate—be registered
- 31 under Division 2 of Part 5B.2; and
- 32 (c) take all reasonable steps to ensure that no disqualified
- 33 individual becomes, or remains, involved in the
- 34 administration of the financial benchmark specified in the
- 35 licence.

EXPOSURE DRAFT

Amendments **Schedule 1**
Main amendments **Part 1**

1 Note: The licensee also needs to comply with the rules made under
2 Division 3 (see section 908CF).

3 **908BQ Obligation to notify ASIC of certain matters**

- 4 (1) A person commits an offence if:
5 (a) the person is a benchmark administrator licensee; and
6 (b) the licensee becomes aware of any of the following events:
7 (i) that the licensee may no longer be able to comply with
8 an obligation under section 908BP;
9 (ii) that the licensee has failed to comply with an obligation
10 under section 908BP;
11 (iii) that a person becomes or ceases to be a director,
12 secretary or senior manager of the licensee;
13 (iv) that a person becomes or ceases to be a director,
14 secretary or senior manager of a holding company of the
15 licensee; and
16 (c) the licensee fails to give written notice to ASIC of:
17 (i) the event; and
18 (ii) such related information (if any) as is prescribed by the
19 regulations for the purpose of this subparagraph;
20 as soon as practicable after becoming aware of the event.

21 Penalty: 100 penalty units.

- 22 (2) Without limiting subparagraph (1)(b)(iii) or (iv), that subparagraph
23 applies to the case where a person:
24 (a) changes from one of the positions mentioned in that
25 subparagraph to another; or
26 (b) changes from a position mentioned in that subparagraph to a
27 position mentioned in the other subparagraph.

28 **908BR Obligation to assist ASIC, APRA and the Reserve Bank**

- 29 (1) ASIC, APRA and the Reserve Bank of Australia are each a
30 regulator to which this section applies.
31 (2) A person commits an offence if:
32 (a) the person is a benchmark administrator licensee; and

EXPOSURE DRAFT

Schedule 1 Amendments

Part 1 Main amendments

- 1 (b) a regulator to which this section applies reasonably requests,
2 in writing, the person to:
- 3 (i) give the regulator access to the person's books that
4 relate to the person's capacity as such a licensee; or
- 5 (ii) give other assistance to the regulator in relation to the
6 performance of the regulator's functions; and
- 7 (c) the person fails to comply with the request.

8 Penalty: 100 penalty units.

9 **908BS Obligation to give ASIC access to licensee's facilities**

10 A person commits an offence if:

- 11 (a) the person is a benchmark administrator licensee; and
- 12 (b) ASIC requests, in writing, the person to provide reasonable
13 access to any of the person's facilities for any of the purposes
14 of this Part; and
- 15 (c) the facilities relate to the person's capacity as such a licensee;
16 and
- 17 (d) the person fails to comply with the request.

18 Penalty: 100 penalty units.

19 **Subdivision G—Directions to licensees**

20 **908BT ASIC's power to give directions to licensee not complying** 21 **with obligations**

- 22 (1) If ASIC considers that a benchmark administrator licensee is not
23 complying with:
- 24 (a) any of its obligations under this Part; or
- 25 (b) any of its obligations under rules made under Division 3;
- 26 ASIC may give the licensee a written direction to do specified
27 things that ASIC believes will promote the licensee's compliance
28 with those obligations.
- 29 (2) The licensee must comply with the direction.

EXPOSURE DRAFT

Amendments **Schedule 1**
Main amendments **Part 1**

- 1 (3) If the licensee fails to comply with the direction, ASIC may apply
2 to the Court for, and the Court may make, an order that the licensee
3 comply with the direction.
- 4 (4) ASIC may vary or revoke a direction at any time by giving written
5 notice to the licensee.
- 6 (5) A direction under subsection (1) is not a legislative instrument.

7 **908BU Minister may disallow all or part of an ASIC direction etc.**

- 8 (1) As soon as practicable after giving the benchmark administrator
9 licensee:
10 (a) a direction under subsection 908BT(1); or
11 (b) a notice of variation or revocation under
12 subsection 908BT(4);
13 ASIC must give the Minister a copy of the direction or notice.
- 14 (2) Within 30 days after ASIC gives the licensee the copy of the
15 direction or notice, the Minister may, by written instrument,
16 disallow all or a specified part of that direction or notice.
- 17 (3) In deciding whether to do so, the Minister must have regard to:
18 (a) the consistency of the direction or notice with the licensee's
19 obligations referred to in subsection 908BT(1); and
20 (b) the matters referred to in subsection 908BO(2).
- 21 (4) As soon as practicable after all or a part of a direction or notice is
22 disallowed, ASIC must give notice of the disallowance to the
23 licensee. The direction or notice ceases to have effect, to the extent
24 of the disallowance, when the licensee receives notice of the
25 disallowance.
- 26 (5) An instrument under subsection (2) is not a legislative instrument.

27 **908BV ASIC's power to give directions requiring reports**

- 28 (1) ASIC may, in writing, direct a benchmark administrator licensee to
29 give ASIC a report that:
30 (a) deals with specified matters; and

EXPOSURE DRAFT

Schedule 1 Amendments

Part 1 Main amendments

1 (b) if ASIC requires—includes an audit statement on the
2 licensee's report on those matters.

3 If paragraph (b) applies, the direction must specify a person or
4 body that is suitably qualified to prepare the audit statement.

5 (2) ASIC may give a copy of the report to the Minister.

6 (3) A person commits an offence if:

7 (a) the person is a benchmark administrator licensee; and

8 (b) the person is given a direction under subsection (1); and

9 (c) the person fails to comply with the direction.

10 Penalty: 100 penalty units.

11 (4) A direction under subsection (1) is not a legislative instrument.

12 Subdivision H—Other matters

13 908BW ASIC may assess licensee's compliance

14 (1) ASIC may do an assessment of how well a benchmark
15 administrator licensee is complying with one or more of its
16 obligations:

17 (a) under this Part; or

18 (b) under rules made under Division 3.

19 In doing the assessment, ASIC may take account of any
20 information and reports that it thinks appropriate.

21 (2) As soon as practicable after doing an assessment under this section,
22 ASIC must give a written report on the assessment to the licensee.
23 ASIC may give a copy of the report to the Minister.

24 (3) If an assessment, or part of an assessment, relates to any other
25 person's affairs to a material extent, ASIC may, at the person's
26 request or on its own initiative, give the person a copy of the report
27 on the assessment or the relevant part of the report.

28 (4) If an assessment, or part of an assessment, relates to a serious
29 contravention of a law of the Commonwealth or of a State or
30 Territory, ASIC may give a copy of the report on the assessment,
31 or the relevant part of the report, to:

EXPOSURE DRAFT

Amendments **Schedule 1**
Main amendments **Part 1**

- 1 (a) the Australian Federal Police; or
2 (b) the Chief Executive Officer of the Australian Crime
3 Commission or a member of the staff of the ACC (within the
4 meaning of the *Australian Crime Commission Act 2002*); or
5 (c) the Director of Public Prosecutions; or
6 (d) a person or body prescribed by the regulations for the
7 purposes of this paragraph.
- 8 (5) ASIC may publish all or part of the written report on an
9 assessment.

10 **908BX Basis of licences**

- 11 (1) A benchmark administrator licence is granted under this Part on the
12 basis that:
13 (a) the licence may be varied, suspended or cancelled, or made
14 subject to conditions (or additional conditions), by or under:
15 (i) this Division; or
16 (ii) later legislation; and
17 (b) no compensation is payable if the licence is varied,
18 suspended or cancelled, or made subject to conditions (or
19 additional conditions), as mentioned in paragraph (a).
- 20 (2) Subsection (1) does not, by implication, affect the interpretation of
21 any other provision:
22 (a) of this Act; or
23 (b) of an instrument made under this Act.

24 **Division 3—Financial benchmark rules and compelled** 25 **financial benchmark rules**

26 **Subdivision A—Power to make financial benchmark rules**

27 **908CA ASIC may make financial benchmark rules**

28 Subject to this Division, ASIC may, by legislative instrument,
29 make rules (the *financial benchmark rules*) dealing with one or
30 more of the matters permitted by this Subdivision.

31 Note: Subdivision D deals with the process of making the rules.

EXPOSURE DRAFT

Schedule 1 Amendments

Part 1 Main amendments

1 **908CB Main permitted matters that may be dealt with in the rules**

2 The main permitted matters are the following:

- 3 (a) the responsibilities of benchmark administrator licensees,
4 including for their oversight of internal and external parties
5 who have a role in the generation and administration of their
6 financial benchmarks;
- 7 (b) the generation and administration of financial benchmarks
8 specified in benchmark administrator licences, including:
9 (i) the design of the financial benchmarks; and
10 (ii) the use of data or information in generating the financial
11 benchmarks; and
12 (iii) the method for generating the financial benchmarks; and
13 (iv) the approach for changing the design referred to in
14 subparagraph (i) or changing the method referred to in
15 subparagraph (iii); and
16 (v) the public disclosure of one or more of the matters
17 referred to in this paragraph;
- 18 (c) the manner in which benchmark administrator licensees may
19 or must provide their services, including the manner and
20 conditions (including fees) on which they provide access to
21 their financial benchmarks;
- 22 (d) business continuity planning for financial benchmarks
23 specified in benchmark administrator licences, including the
24 possible transition of such benchmarks to new licensees;
- 25 (e) the governance, management and resources (including
26 financial, technological and human resources) of benchmark
27 administrator licensees, including the following:
28 (i) the handling of conflicts of interest;
29 (ii) the handling of complaints;
30 (iii) the monitoring and enforcing of compliance with
31 obligations;
32 (iv) the resources that benchmark administrator licensees
33 must have (including requirements relating to the
34 experience, qualifications or fitness for office of their
35 officers and employees);
36 (v) the integrity and security of computer systems and other
37 systems;

EXPOSURE DRAFT

Amendments **Schedule 1**
Main amendments **Part 1**

- 1 (vi) operational reliability;
2 (vii) business continuity planning;
3 (viii) the operational separation of functions;
4 (ix) the outsourcing of functions to other entities;
5 (f) the public disclosure of conditions (including fees) on which
6 benchmark administrator licensees provide their services;
7 (g) the handling or use of financial benchmark data by
8 benchmark administrator licensees and their officers and
9 employees, including the following:
10 (i) the acceptance and retention of such data;
11 (ii) the creation of statistical data from such data;
12 (iii) the use and disclosure of, and provision of access to,
13 such data (including statistical data referred to in
14 subparagraph (ii));
15 (h) the responsibilities of entities whose activities result in the
16 provision of data or information to holders of benchmark
17 administrator licences for the generation or administration of
18 the financial benchmarks specified in those licences;
19 (i) the reporting to ASIC or other regulators of matters relating
20 to:
21 (i) benchmark administrator licensees; or
22 (ii) the generation or administration of financial
23 benchmarks specified in benchmark administrator
24 licences;
25 (j) a matter prescribed by the regulations for the purposes of this
26 paragraph.

27 Note: For paragraph (c), the rules may (for example) require benchmark
28 administrator licensees to provide open and non-discriminatory access
29 to their financial benchmarks, including as to price.

30 **908CC Other permitted matters that may be dealt with in the rules**

- 31 The other permitted matters are matters incidental or related to the
32 matters permitted under section 908CB, including the following:
33 (a) subject to section 908CP, the persons who are obliged to
34 comply with requirements imposed by the rules;
35 (b) the manner and form in which persons must comply with
36 requirements imposed by the rules;

EXPOSURE DRAFT

Schedule 1 Amendments

Part 1 Main amendments

- 1 (c) the circumstances in which persons are, or may be, relieved
2 from complying with requirements in the rules that would
3 otherwise apply to them;
- 4 (d) the keeping of records, or the provision of records or other
5 information, relating to compliance with (or determining
6 whether there has been compliance with) the rules;
- 7 (e) any other matters that the provisions of this Act provide may
8 be dealt with in the financial benchmark rules.

9 **Subdivision B—Power to make compelled financial benchmark** 10 **rules**

11 **908CD ASIC may make compelled financial benchmark rules**

12 Subject to this Division, ASIC may, by legislative instrument,
13 make rules (the *compelled financial benchmark rules*) conferring
14 one or more of the powers, or dealing with one or more of the
15 matters, permitted by this Subdivision.

16 Note: Subdivision D deals with the process of making the rules.

17 **908CE Permitted powers and matters that may be dealt with in the** 18 **rules**

- 19 (1) The permitted powers and matters are the following:
- 20 (a) the power for ASIC to require, by written notice, an entity
21 referred to in paragraph 908CB(h):
- 22 (i) to continue to provide data or information to the holder
23 of a benchmark administrator licence for the generation
24 or administration of a significant financial benchmark
25 specified in that licence; and
- 26 (ii) to provide ASIC with some or all of that data or
27 information for purposes relating to the generation or
28 administration of that significant financial benchmark;
- 29 (b) the power for ASIC to require, by written notice, the holder
30 of a benchmark administrator licence that specifies a
31 significant financial benchmark:
- 32 (i) to continue to generate or administer the significant
33 financial benchmark; or

EXPOSURE DRAFT

Amendments **Schedule 1**
Main amendments **Part 1**

- 1 (ii) to generate or administer the significant financial
2 benchmark in a particular way;
- 3 (c) powers or matters incidental or related to:
- 4 (i) one or more of the above powers; or
- 5 (ii) the compulsory generation or administration of a
6 significant financial benchmark specified in a
7 benchmark administrator licence;
- 8 including a power or matter prescribed by the regulations for
9 the purposes of this paragraph.
- 10 (2) However, ASIC may only require something under a power
11 referred to in subsection (1) if ASIC reasonably believes it is in the
12 public interest to do so.

13 **Subdivision C—Compliance with each set of rules etc.**

14 **908CF Obligation to comply with each set of rules**

- 15 (1) A person (whether a benchmark administrator licensee or
16 otherwise) must comply with:
- 17 (a) provisions of the financial benchmark rules; and
18 (b) provisions of the compelled financial benchmark rules;
19 that apply to the person.
- 20 Note 1: This subsection is a civil penalty provision (see section 1317E). For
21 the maximum penalty amount for contravening a provision of the
22 rules, see section 908CO and subsection 1317G(1DD). For relief from
23 liability to a civil penalty relating to this subsection, see
24 section 1317S.
- 25 Note 2: The regulations may limit the persons on whom each set of rules may
26 impose requirements (see section 908CP).
- 27 (2) If there is an inconsistency between the financial benchmark rules
28 and the compelled financial benchmark rules, the compelled
29 financial benchmark rules prevail to the extent of the
30 inconsistency.
- 31 (3) If there is an inconsistency between any of the rules made under
32 this Division and any of the other rules made under other
33 provisions of this Chapter, those other rules prevail to the extent of
34 the inconsistency.

EXPOSURE DRAFT

Schedule 1 Amendments

Part 1 Main amendments

1 **908CG Alternatives to civil proceedings**

- 2 (1) The regulations may provide for a person who is alleged to have
3 contravened subsection 908CF(1) to do one or more of the
4 following as an alternative to civil proceedings:
5 (a) pay a penalty to the Commonwealth;
6 (b) undertake or institute remedial measures (including education
7 programs);
8 (c) accept sanctions other than the payment of a penalty to the
9 Commonwealth.
- 10 (2) The penalty payable under regulations made under paragraph (1)(a)
11 in relation to a rule must not exceed one-fifth of the penalty
12 amount specified for the rule in the applicable set of rules.

13 **908CH Infringement notices**

- 14 (1) Subsection 908CF(1) is subject to an infringement notice under
15 Part 5 of the Regulatory Powers Act.
- 16 *Infringement officer*
- 17 (2) For the purposes of Part 5 of the Regulatory Powers Act, each staff
18 member of ASIC who holds, or is acting in, an office or position
19 that is equivalent to an SES employee is an infringement officer in
20 relation to subsection 908CF(1) of this Act.
- 21 *Relevant chief executive*
- 22 (3) For the purposes of Part 5 of the Regulatory Powers Act, each
23 member of ASIC (within the meaning of section 9 of the ASIC
24 Act) is the relevant chief executive in relation to
25 subsection 908CF(1) of this Act.

26 **908CI Enforceable undertakings**

- 27 (1) Subsection 908CF(1) is enforceable under Part 6 of the Regulatory
28 Powers Act (about enforceable undertakings).

1 *Authorised person*

2 (2) For the purposes of Part 6 of the Regulatory Powers Act, each staff
3 member of ASIC who holds, or is acting in, an office or position
4 that is equivalent to an SES employee is an authorised person in
5 relation to subsection 908CF(1) of this Act.

6 *Relevant courts*

7 (3) For the purposes of Part 6 of the Regulatory Powers Act, each of
8 the following courts is a relevant court in relation to
9 subsection 908CF(1) of this Act:
10 (a) the Federal Court of Australia;
11 (b) the Federal Circuit Court of Australia;
12 (c) a court of a State or Territory that has jurisdiction in relation
13 to the matter.

14 **908CJ Protection from liability for compliance in good faith**

15 If:

- 16 (a) a person (the *protected person*):
- 17 (i) provides financial benchmark data, or other information,
18 to another person; or
- 19 (ii) otherwise allows another person access to financial
20 benchmark data, or other information; and
- 21 (b) the protected person does so, in good faith, in compliance
22 with a requirement imposed by the compelled financial
23 benchmark rules;

24 the protected person is not liable to an action or other proceeding,
25 whether civil or criminal, for or in relation to that conduct.

26 **Subdivision D—Matters relating to the making of each set of** 27 **rules**

28 **908CK Matters to which ASIC has regard when making rules**

29 In considering whether to make a rule under this Division, ASIC:
30 (a) must have regard to:

EXPOSURE DRAFT

Schedule 1 Amendments

Part 1 Main amendments

- 1 (i) the final report titled “Principles for Financial
2 Benchmarks”, dated July 2013 and published by the
3 Board of the International Organization of Securities
4 Commissions, as amended from time to time; and
5 (ii) the likely effect of the proposed rule on the Australian
6 economy, and on the efficiency, integrity and stability
7 of the Australian financial system; and
8 (iii) the likely regulatory impact of the proposed rule; and
9 (b) may have regard to any other matters that ASIC considers
10 relevant.

11 Note 1: The Principles for Financial Benchmarks could in 2017 be viewed on
12 the International Organization of Securities Commissions website
13 (<https://www.iosco.org>).

14 Note 2: Matters that ASIC may have regard to under paragraph (b) could, for
15 example, include foreign laws relating to financial benchmarks, and
16 any matters raised in consultations under section 908CL.

17 **908CL ASIC to consult before making rules**

- 18 (1) ASIC must not make a rule under this Division unless ASIC:
19 (a) has consulted the public about the proposed rule; and
20 (b) has also consulted any other person or body as required by
21 regulations made for the purpose of this paragraph.

22 Note: In some situations, consultation is not required (see section 908CN).

- 23 (2) Without limiting the ways in which ASIC may comply with the
24 obligation in paragraph (1)(a) to consult the public about a
25 proposed rule, ASIC is taken to comply with that obligation if
26 ASIC, on its website:
27 (a) makes the proposed rule, or a description of the content of
28 the proposed rule, available; and
29 (b) invites the public to comment on the proposed rule.

- 30 (3) A failure to consult as required by subsection (1) does not
31 invalidate a rule.

32 **908CM Ministerial consent to rules required**

- 33 (1) ASIC must not make a rule under this Division unless consent for
34 it has been given under subsection (2).
-

EXPOSURE DRAFT

Amendments **Schedule 1**
Main amendments **Part 1**

1 Note: In some situations, consent is not required (see section 908CN).

2 (2) The Minister may, in writing, consent to the making of a rule under
3 this Division.

4 **908CN Emergency rules: consultation and consent not required**

5 (1) ASIC may make a rule under this Division without consulting as
6 required by section 908CL, and without the consent of the Minister
7 as required by section 908CM, if ASIC is of the opinion that it is
8 necessary, or in the public interest, to do so in order to protect:

9 (a) the Australian economy; or

10 (b) the efficiency, integrity or stability of the Australian financial
11 system; or

12 (c) the security or confidentiality of financial benchmark data.

13 (2) However, if ASIC does so, ASIC must:

14 (a) provide the Minister, on the following day, with a written
15 explanation of the need for the rule; and

16 (b) vary or revoke the rule in accordance with any direction
17 under subsection (3).

18 (3) The Minister may give ASIC a written direction to vary or revoke a
19 rule made as described in subsection (1).

20 (4) A direction under subsection (3) is not a legislative instrument.

21 **908CO Requirements and penalty amounts**

22 Each of the financial benchmark rules and compelled financial
23 benchmark rules may:

24 (a) deal with a matter by imposing requirements; or

25 (b) specify a penalty amount for a rule.

26 A penalty amount must not exceed 5,550 penalty units (for any
27 entity).

28 **908CP Regulations may limit how rules may deal with certain** 29 **matters**

30 (1) The regulations may prescribe limits on:

EXPOSURE DRAFT

Schedule 1 Amendments

Part 1 Main amendments

- 1 (a) the extent to which, or the way in which, the financial
2 benchmark rules may deal with matters permitted by
3 Subdivision A; or
4 (b) the classes of persons on whom those rules may impose
5 requirements; or
6 (c) the extent to which those rules may impose requirements (or
7 certain kinds of requirements) on certain classes of persons.
- 8 (2) The regulations may prescribe limits on:
9 (a) the extent to which, or the way in which, the compelled
10 financial benchmark rules may deal with matters permitted
11 by Subdivision B; or
12 (b) the classes of persons on whom those rules may impose
13 requirements; or
14 (c) the extent to which those rules may impose requirements (or
15 certain kinds of requirements) on certain classes of persons.

908CQ Varying or revoking the rules

- 16
17 (1) ASIC may vary or revoke a rule made under this Division in like
18 manner and subject to like conditions (see subsections 33(3) and
19 (3AA) of the *Acts Interpretation Act 1901*).
- 20 (2) However, the requirements of sections 908CK, 908CL and 908CM
21 do not apply in relation to a variation or revocation pursuant to a
22 direction by the Minister under subsection 908CN(3).

Division 4—Offences and civil penalties relating to manipulation of financial benchmarks

908DA Manipulation of financial benchmarks

Civil penalty provisions

- 26
27 (1) A person contravenes this subsection if:
28 (a) the person does, or omits to do, one or more acts; and
29 (b) the acts or omissions have or are likely to have the effect of a
30 financial benchmark being generated or administered at a
31 level that is artificial (whether or not it was previously
32 artificial).

EXPOSURE DRAFT

Amendments **Schedule 1**
Main amendments **Part 1**

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

3 Note 2: Section 908DE (about geographical scope) causes this subsection to
4 be read down so that it covers persons who are Australian entities, or
5 persons whose acts or omissions occur wholly or partly in Australia
6 etc.

- 7 (2) A person contravenes this subsection if:
- 8 (a) paragraphs (1)(a) and (b) apply in relation to the person, one
9 or more acts or omissions, and a financial benchmark; and
10 (b) either:
- 11 (i) the financial benchmark is a significant financial
12 benchmark; or
13 (ii) the acts or omissions result, or are likely to result, in an
14 Australian entity suffering financial or other
15 disadvantage from use of the financial benchmark.

16 Note 1: This is a civil penalty provision (see section 1317E). For relief from
17 liability, see section 1317S.

18 Note 2: This subsection extends subsection (1) so that persons, who are not
19 otherwise covered, will be covered if a result of their acts or omissions
20 occurs wholly or partly in Australia etc.

21 *Offence*

- 22 (3) A person commits an offence if the person contravenes
23 subsection (1) or (2).

24 Note: For the penalty for the offence, see section 908DD. For its
25 geographical scope, see section 908DE.

26 **908DB False or misleading statements or information that could** 27 **affect financial benchmarks**

28 *Civil penalty provisions*

- 29 (1) A person contravenes this subsection if:
- 30 (a) the person makes one or more statements, or disseminates
31 information; and
32 (b) the statements or information:
33 (i) are false or misleading; or

EXPOSURE DRAFT

Schedule 1 Amendments

Part 1 Main amendments

- 1 (ii) omit any matter or thing without which the statements
2 or information are misleading; and
3 (c) the person knows the statements or information could be used
4 in the generation or administration of a financial benchmark.

5 Note 1: This is a civil penalty provision (see section 1317E). For relief from
6 liability, see section 1317S.

7 Note 2: Section 908DE (about geographical scope) causes this subsection to
8 be read down so that it covers persons who are Australian entities, or
9 persons whose conduct occurs wholly or partly in Australia etc.

- 10 (2) A person contravenes this subsection if:
11 (a) paragraphs (1)(a) to (c) apply in relation to the person, one or
12 more statements or information, and a financial benchmark;
13 and
14 (b) either:
15 (i) the financial benchmark is a significant financial
16 benchmark; or
17 (ii) making the statements or disseminating the information
18 results, or is likely to result, in an Australian entity
19 suffering financial or other disadvantage from use of the
20 financial benchmark.

21 Note 1: This is a civil penalty provision (see section 1317E). For relief from
22 liability, see section 1317S.

23 Note 2: This subsection extends subsection (1) so that persons, who are not
24 otherwise covered, will be covered if a result of their conduct occurs
25 wholly or partly in Australia etc.

26 *Offence*

- 27 (3) A person commits an offence if the person contravenes
28 subsection (1) or (2).

29 Note: For the penalty for the offence, see section 908DD. For its
30 geographical scope, see section 908DE.

31 **908DC Dishonest conduct that could affect financial benchmarks**

32 *Civil penalty provisions*

- 33 (1) A person contravenes this subsection if:
-

EXPOSURE DRAFT

Amendments **Schedule 1**
Main amendments **Part 1**

- 1 (a) the person does, or omits to do, one or more acts in relation
2 to the generation or administration of a financial benchmark;
3 and
4 (b) the acts or omissions:
5 (i) are dishonest according to the standards of ordinary
6 people; and
7 (ii) are known by the person to be dishonest according to
8 the standards of ordinary people.

9 Note 1: This is a civil penalty provision (see section 1317E). For relief from
10 liability, see section 1317S.

11 Note 2: Section 908DE (about geographical scope) causes this subsection to
12 be read down so that it covers persons who are Australian entities, or
13 persons whose acts or omissions occur wholly or partly in Australia
14 etc.

- 15 (2) A person contravenes this subsection if:
16 (a) paragraphs (1)(a) and (b) apply in relation to the person, one
17 or more acts or omissions, and a financial benchmark; and
18 (b) either:
19 (i) the financial benchmark is a significant financial
20 benchmark; or
21 (ii) the acts or omissions result, or are likely to result, in an
22 Australian entity suffering financial or other
23 disadvantage from use of the financial benchmark.

24 Note 1: This is a civil penalty provision (see section 1317E). For relief from
25 liability, see section 1317S.

26 Note 2: This subsection extends subsection (1) so that persons, who are not
27 otherwise covered, will be covered if a result of their acts or omissions
28 occurs wholly or partly in Australia etc.

29 *Offence*

- 30 (3) A person commits an offence if the person contravenes
31 subsection (1) or (2).

32 Note: For the penalty for the offence, see section 908DD. For its
33 geographical scope, see section 908DE.

EXPOSURE DRAFT

Schedule 1 Amendments

Part 1 Main amendments

1 **908DD Penalties for offences against this Division**

2 *Penalty for an individual*

- 3 (1) An offence against this Division committed by an individual is
4 punishable on conviction by either or both of the following:
- 5 (a) imprisonment for not more than 10 years;
 - 6 (b) a fine of not more than the greater of:
 - 7 (i) 4,500 penalty units; and
 - 8 (ii) if the court can determine the total value of the benefits
9 that have been obtained by one or more persons and are
10 reasonably attributable to the commission of the
11 offence—3 times that total value.

12 *Penalty for a body corporate*

- 13 (2) An offence against this Division committed by a body corporate is
14 punishable on conviction by a fine of not more than the greater of:
- 15 (a) 45,000 penalty units; and
 - 16 (b) if the court can determine the total value of the benefits that
17 have been obtained by one or more persons and are
18 reasonably attributable to the commission of the offence—3
19 times that total value; and
 - 20 (c) if the court cannot determine the total value of those
21 benefits—10% of the body corporate's annual turnover
22 during the 12-month period ending at the end of the month in
23 which the body corporate committed, or began committing,
24 the offence.

25 **908DE Geographical scope of offences and civil penalty provisions**

26 *Offences*

- 27 (1) Section 15.2 of the *Criminal Code* (extended geographical
28 jurisdiction—category B) applies to each offence against this
29 Division.

EXPOSURE DRAFT

Amendments **Schedule 1**
Main amendments **Part 1**

1

Contraventions of civil penalty provisions

2

(2) A declaration of contravention by a person must not be made under section 1317E relating to an alleged contravention by the person of a civil penalty provision in this Division unless:

3

4

5

(a) the person's conduct that allegedly contravenes the provision occurs:

6

7

(i) wholly or partly in Australia; or

8

(ii) wholly or partly on board an Australian aircraft or an Australian ship; or

9

10

(b) the person's conduct that allegedly contravenes the provision occurs wholly outside Australia and a result of the conduct occurs:

11

12

13

(i) wholly or partly in Australia; or

14

(ii) wholly or partly on board an Australian aircraft or an Australian ship; or

15

16

(c) the person's conduct that allegedly contravenes the provision occurs wholly outside Australia and, at the time of the alleged contravention, the person is an Australian entity.

17

18

19

Defences relating to contraventions of civil penalty provisions

20

(3) In proceedings under section 1317E for a declaration of contravention by a person relating to an alleged contravention by the person of a civil penalty provision in this Division, it is a defence if:

21

22

23

(a) the conduct constituting the alleged contravention occurs wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and

24

25

26

(b) the person is neither:

27

28

(i) an Australian citizen; nor

29

(ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; and

30

31

(c) there is not in force in:

32

33

(i) the foreign country where the conduct constituting the alleged contravention occurs; or

EXPOSURE DRAFT

Schedule 1 Amendments

Part 1 Main amendments

1 (ii) the part of the foreign country where the conduct
2 constituting the alleged contravention occurs;
3 a law of that foreign country, or a law of that part of that
4 foreign country, that provides for a pecuniary or criminal
5 penalty for such conduct.

6 (4) A defendant bears an evidential burden in relation to the matter in
7 subsection (3).

8 *Attorney-General's consent needed for certain proceedings*

9 (5) The Attorney-General's prior written consent must be obtained to
10 commence proceedings under section 1317E for a declaration of
11 contravention by a person relating to an alleged contravention by
12 the person of a civil penalty provision in this Division if:

13 (a) the conduct constituting the alleged contravention occurs
14 wholly in a foreign country; and

15 (b) at the time of the alleged contravention, the person is neither:

16 (i) an Australian citizen; nor

17 (ii) a body corporate incorporated by or under a law of the
18 Commonwealth or of a State or Territory.

19 *When conduct taken to occur partly in Australia*

20 (6) For the purposes of (but without limiting) this section, if a person
21 sends a thing, or causes a thing to be sent:

22 (a) from a point outside Australia to a point in Australia; or

23 (b) from a point in Australia to a point outside Australia;

24 that conduct is taken to have occurred partly in Australia.

25 (7) For the purposes of (but without limiting) this section, if a person
26 sends, or causes to be sent, an electronic communication:

27 (a) from a point outside Australia to a point in Australia; or

28 (b) from a point in Australia to a point outside Australia;

29 that conduct is taken to have occurred partly in Australia.

30 *Definitions*

31 (8) In this section:

32 *Australian aircraft* has the same meaning as in the *Criminal Code*.

- 1 *Australian ship* has the same meaning as in the *Criminal Code*.
2 *conduct* has the same meaning as in the *Criminal Code*.
3 *electronic communication* has the same meaning as in the
4 *Criminal Code*.
5 *evidential burden* has the same meaning as in the *Criminal Code*.
6 *foreign country* has the same meaning as in the *Criminal Code*.
7 *point* has the same meaning as in section 16.2 of the *Criminal*
8 *Code*.

9 **Division 5—Other provisions**

10 **908EA Making provision by referring to instruments as in force** 11 **from time to time**

- 12 (1) This section applies to the following instruments:
13 (a) regulations made for the purpose of a provision of this Part;
14 (b) rules made under Division 3.
- 15 (2) An instrument to which this section applies may make provision in
16 relation to a matter by applying, adopting or incorporating any
17 matter contained in an instrument or other writing:
18 (a) as in force or existing at a particular time; or
19 (b) as in force or existing from time to time.
- 20 (3) Subsection (2) has effect despite subsection 14(2) of the
21 *Legislation Act 2003*.

22 **908EB Exemptions by the regulations or by ASIC**

- 23 (1) The *provisions covered by this section* are:
24 (a) the following provisions:
25 (i) the provisions of this Part;
26 (ii) the provisions of regulations made for the purposes of
27 provisions of this Part;
28 (iii) the provisions of rules made under Division 3; and

EXPOSURE DRAFT

Schedule 1 Amendments

Part 1 Main amendments

- 1 (b) definitions in this Act, or in the regulations, as they apply to
2 references in provisions referred to in paragraph (a).
- 3 (2) The regulations, or ASIC by written instrument, may:
4 (a) exempt a person or class of persons from all or specified
5 provisions covered by this section; or
6 (b) exempt a financial benchmark or class of financial
7 benchmarks from all or specified provisions covered by this
8 section.
- 9 (3) An exemption may apply unconditionally or subject to specified
10 conditions. A person to whom a condition specified in an
11 exemption applies must comply with the condition. The Court
12 may, on application by ASIC, order the person to comply with the
13 condition in a specified way.
- 14 (4) An exemption by ASIC is a legislative instrument if the exemption
15 is expressed to apply in relation to:
16 (a) a class of persons; or
17 (b) a class of financial benchmarks;
18 (whether or not it is also expressed to apply in relation to one or
19 more persons or financial benchmarks identified otherwise than by
20 reference to membership of a class).
- 21 (5) If subsection (4) does not apply to an exemption by ASIC, ASIC
22 must publish the exemption.
- 23 (6) If there is an inconsistency between:
24 (a) an exemption prescribed by regulations made for the
25 purposes of subsection (2); and
26 (b) an exemption by ASIC under that subsection;
27 (including in relation to any conditions specified by ASIC), the
28 regulations prevail to the extent of the inconsistency.

EXPOSURE DRAFT

Amendments **Schedule 1**
Main consequential amendments **Part 2**

1 **Part 2—Main consequential amendments**

2 ***Corporations Act 2001***

3 **2 Section 9 (paragraph (c) of the definition of *civil penalty***
4 ***order*)**

5 Omit “or 1317HB”, substitute “, 1317HB or 1317HC”.

6 **3 Section 9**

7 Insert:

8 *Regulatory Powers Act* means the *Regulatory Powers (Standard*
9 *Provisions) Act 2014*.

10 **4 Paragraph 199A(2)(b)**

11 Omit “or 1317HB”, substitute “, 1317HB or 1317HC”.

12 **5 Subsection 199A(3) (note 1)**

13 Omit “or 1317HB”, substitute “, 1317HB or 1317HC”.

14 **6 Section 761A**

15 Insert:

16 *Australian entity* means:

- 17 (a) an Australian citizen; or
18 (b) a resident of Australia (within the meaning of the *Criminal*
19 *Code*); or
20 (c) a body corporate incorporated by or under a law of the
21 Commonwealth or of a State or Territory.

22 *benchmark administrator licence* means a licence granted under
23 section 908BC.

24 *benchmark administrator licensee* means a person who holds a
25 benchmark administrator licence.

26 *compelled financial benchmark rules* means rules made under
27 section 908CD.

EXPOSURE DRAFT

Schedule 1 Amendments

Part 2 Main consequential amendments

1 *financial benchmark* has the meaning given by section 908AB.

2 *financial benchmark data* means:

3 (a) information obtained to generate or administer a financial
4 benchmark; or

5 (b) information (including statistical data) that is created or
6 derived from information referred to in paragraph (a).

7 *financial benchmark rules* means rules made under
8 section 908CA.

9 **7 Section 761A (note at the end of the definition of *financial*** 10 ***product*)**

11 Repeal the note, substitute:

12 Note: Some references in this Chapter to financial products have effect
13 subject to particular express exclusions (for example, see
14 sections 1010A and 1074A) or inclusions (see section 1040B).

15 **8 Section 761A**

16 Insert:

17 *significant financial benchmark* has the meaning given by
18 section 908AC.

19 **9 Section 853B**

20 Omit “or a derivative trade repository licensee”, substitute “, a
21 derivative trade repository licensee or a benchmark administrator
22 licensee”.

23 **10 Subsection 853C(1)**

24 Omit “or a derivative trade repository licensee”, substitute “, a
25 derivative trade repository licensee or a benchmark administrator
26 licensee”.

27 **11 Paragraphs 853D(2)(a) and (b)**

28 Omit “or an Australian derivative trade repository licence”, substitute “,
29 an Australian derivative trade repository licence or a benchmark
30 administrator licence”.

EXPOSURE DRAFT

Amendments **Schedule 1**
Main consequential amendments **Part 2**

1 **12 Subsections 853F(1) and (2)**

2 Omit “or a derivative trade repository licensee”, substitute “, a
3 derivative trade repository licensee or a benchmark administrator
4 licensee”.

5 **13 Section 853G**

6 Omit “or a derivative trade repository licensee”, substitute “, a
7 derivative trade repository licensee or a benchmark administrator
8 licensee”.

9 **14 After section 1040A**

10 Insert:

11 **1040B Treat certain instruments as if they were financial products**

12 (1) This Part applies to the following as if they were financial
13 products:

- 14 (a) a bank accepted bill;
15 (b) a negotiable certificate of deposit.

16 (2) Subsection (1) does not, by implication, affect the interpretation of
17 any other provision:

- 18 (a) of this Act; or
19 (b) of an instrument made under this Act.

20 **15 Paragraph 1100A(1)(b)**

21 After “798H(1) (complying with market integrity rules)”, insert “,
22 908CF(1) (complying with rules about financial benchmarks)”.

23 **16 Paragraph 1101B(1)(d)**

24 After “a licensed market,”, insert “or subsection 908CF(1) (complying
25 with rules about financial benchmarks)”.

26 **17 Paragraph 1101B(4)(b)**

27 After “operating rules of a licensed CS facility”, insert “, or a provision
28 of the financial benchmark rules or the compelled financial benchmark
29 rules”.

EXPOSURE DRAFT

Schedule 1 Amendments

Part 2 Main consequential amendments

1 **18 Subparagraph 1101B(4)(c)(i)**

2 After “a licensed market”, insert “, or a provision of the financial
3 benchmark rules or the compelled financial benchmark rules,”.

4 **19 Subparagraph 1101B(4)(d)(i)**

5 After “a licensed market,”, insert “or a provision of the financial
6 benchmark rules or the compelled financial benchmark rules,”.

7 **20 Before paragraph 1312(2)(a)**

8 Insert:

9 (aa) subsection 908DA(3), 908DB(3) or 908DC(3);

10 **21 Subsection 1312(2) (note)**

11 After “are”, insert “generally”.

12 **22 Before paragraph 1317C(ge)**

13 Insert:

14 (gdf) a decision by ASIC to make a declaration under
15 subsection 908AC(2), or to vary or revoke such a declaration
16 (about significant financial benchmarks); or

17 (gdg) a decision by the Minister under:

18 (i) subsection 908AC(4) to consent to the making of a
19 declaration under subsection 908AC(2); or

20 (ii) subsection 908AC(7) to direct ASIC to revoke a
21 declaration made under subsection 908AC(2); or

22 (gdh) a decision of the Minister under subsection 908BU(2) to
23 disallow a direction or notice given by ASIC under
24 section 908BT (about compliance directions or notices given
25 to benchmark administrator licensees); or

26 (gdi) a decision by ASIC to make rules under Division 3 of
27 Part 7.5B, or to vary or revoke such rules; or

28 (gdj) a decision by ASIC to do or not do anything under
29 regulations made for the purposes of subsection 908CG(1)
30 (alternatives to civil proceedings for contraventions of rules
31 about financial benchmarks); or

32 (gdk) a decision by the Minister:

EXPOSURE DRAFT

Amendments **Schedule 1**
Main consequential amendments **Part 2**

- 1 (i) under subsection 908CM(2) to consent to the making of
2 rules under Division 3 of Part 7.5B; or
3 (ii) under subsection 908CN(3) to direct ASIC to vary or
4 revoke rules made under Division 3 of Part 7.5B; or
5 (gdl) a decision by ASIC to require something, by giving written
6 notice, under the compelled financial benchmark rules; or

7 **23 Subsection 1317E(1) (after table item 17)**

8 Insert:

- 17A subsection 908CF(1) complying with financial benchmark
rules or compelled financial benchmark
rules
17B subsection 908DA(1) or (2), manipulating financial benchmarks
908DB(1) or (2) or 908DC(1) or
(2)

9 **24 At the end of subsection 1317E(1)**

10 Add:

- 11 Note 3: Section 908DE contains some matters relevant for making
12 declarations of contravention for the civil penalty provisions
13 mentioned in table item 17B (about manipulating financial
14 benchmarks).

15 **25 After subsection 1317G(1DB)**

16 Insert:

17 *Financial benchmark rules and compelled financial benchmark*
18 *rules*

19 (1DC) A Court may order a person to pay the Commonwealth a pecuniary
20 penalty if:

- 21 (a) a declaration of contravention by the person has been made
22 under section 1317E; and
23 (b) the contravention is of subsection 908CF(1) (complying with
24 rules about financial benchmarks).

25 (1DD) The maximum amount that the court may order the person to pay
26 for contravening a financial benchmark rule, or a compelled
27 financial benchmark rule, is the penalty amount specified in those
28 rules for the rule that has been contravened.

EXPOSURE DRAFT

Schedule 1 Amendments

Part 2 Main consequential amendments

1

Manipulating financial benchmarks

2

(1DE) A Court may order a person to pay the Commonwealth a pecuniary penalty if:

3

4

(a) a declaration of contravention by the person has been made under section 1317E; and

5

6

(b) the contravention is of subsection 908DA(1) or (2), 908DB(1) or (2) or 908DC(1) or (2).

7

8

(1DF) The maximum amount that the court may order the person to pay for contravening a provision mentioned in paragraph (1DE)(b) is:

9

10

(a) \$200,000 for an individual; or

11

(b) \$1 million for a body corporate.

12

26 After section 1317HB

13

Insert:

14

1317HC Compensation orders—financial benchmark rules or compelled financial benchmark rules

15

16

Compensation for damage suffered

17

(1) A Court may order a person (the *liable person*) to compensate another person (including a corporation), or a registered scheme, for damage suffered by the person or scheme if:

18

19

20

(a) the liable person has contravened subsection 908CF(1)

21

(complying with rules about financial benchmarks); and

22

(b) the damage resulted from the contravention.

23

The order must specify the amount of compensation.

24

Note: An order may be made under this subsection whether or not a declaration of contravention has been made under section 1317E.

25

26

Damage includes profits

27

(2) In determining the damage suffered by a person or scheme for the purposes of making a compensation order, include profits made by any person resulting from the contravention.

28

29

EXPOSURE DRAFT

Amendments **Schedule 1**
Main consequential amendments **Part 2**

1 *Damage to scheme includes diminution of value of scheme*
2 *property*

3 (3) In determining the damage suffered by a registered scheme for the
4 purposes of making a compensation order, include any diminution
5 in the value of the property of the scheme.

6 *Recovery of damage*

7 (4) A compensation order may be enforced as if it were a judgment of
8 the Court.

9 **27 Subsection 1317S(1) (paragraphs (a) and (b) of the**
10 **definition of *eligible proceedings*)**

11 Omit “or 1317HB”, substitute “, 1317HB or 1317HC”.

12 **28 Section 1324B**

13 After “section 901E or 903D”, insert “, subsection 908CF(1)”.

14 **29 Subsections 1325(1), (2) and (3)**

15 After “subsection 798H(1)” (wherever occurring), insert “or 908CF(1)”.

16 **30 In the appropriate position in Chapter 10**

17 Insert:

18 **Part 10.30—Transitional provisions relating to the**
19 **Corporations Amendment (Financial**
20 **Benchmarks) Act 2017**
21

22 **1639 Definitions**

23 In this Part:

24 *start day* means the later of:

- 25 (a) 1 January 2018; and
26 (b) the day after the *Corporations Amendment (Financial*
27 *Benchmarks) Act 2017* receives the Royal Assent.

EXPOSURE DRAFT

Schedule 1 Amendments

Part 2 Main consequential amendments

1 **1640 Application—obligation to comply with rules about financial**
2 **benchmarks**

3 Subsection 908CF(1) applies on or after the start day in relation to
4 rules made before, on or after that day.

5 **1641 Application—offences relating to manipulation of financial**
6 **benchmarks**

7 Division 4 of Part 7.5B applies in relation to acts or omissions
8 occurring on or after the start day (whether or not the financial
9 benchmark to which the acts or omissions relate is first generated
10 or administered before, on or after the start day).

EXPOSURE DRAFT

Amendments **Schedule 1**
Other consequential amendments **Part 3**

1 **Part 3—Other consequential amendments**

2 *Treasury Laws Amendment (2016 Measures No. 1) Act 2017*

3 **31 Items 27 and 28 of Schedule 5**

4 Repeal the items, substitute:

5 **27 Section 1324B**

6 After “subsection 908CF(1)”, insert “or 981M(1)”.

7 **28 Subsections 1325(1), (2) and (3)**

8 Omit “or 908CF(1)” (wherever occurring), insert “, 908CF(1) or
9 981M(1)”.