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| **EXPOSURE DRAFT** |

Inserts for

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

| Commencement information | | |
| --- | --- | --- |
| Column 1 | Column 2 | Column 3 |
| Provisions | Commencement | Date/Details |
| 1. |  |  |
| 2. Schedule 2 | The day after this Act receives the Royal Assent. |  |

Schedule 2—Financial markets infrastructure: new and enhanced regulatory powers

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

Corporations Act 2001

1 After paragraph 821A(1)(e)

Insert:

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

2 Subsection 821A(2)

After “(e),”, insert “(ea),”.

3 Subsection 824B(1)

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

4 Subsection 824B(1)

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

5 Subsection 824B(1) (note)

Omit “The Minister”, substitute “ASIC”.

6 Subsection 824B(2)

Omit “the Minister”, substitute “ASIC”.

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

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

8 Subsection 824B(2)

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

9 Subsections 824B(3) and (4)

Repeal the subsections, substitute:

Disqualified individuals

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

(a) 42 days have passed since the application was made for the licence; and

(b) ASIC has not given under subsection 853D(2) a notice to the applicant within those 42 days.

Consultation with Reserve Bank

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

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

Corporations Act 2001

10 Paragraph 797B(a)

Repeal the paragraph, substitute:

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

(aa) there has been no acceptance, for a period of at least 12 months, of any offers made through the market to acquire or dispose of financial products to which the licence relates; or

(ab) if the licence is subject to a condition specifying that the licensee is authorised to engage in specified conduct or activity that constitutes operating that market—the licensee has, for a period of at least 12 months, ceased engaging in all such specified conduct or activity; or

11 After paragraph 797B(c)

Insert:

(ca) an application has been made under section 601AA to deregister the licensee as a company; or

(cb) ASIC has decided under section 601AB to deregister the licensee as a company; or

12 Subparagraph 797B(d)(ii)

Repeal the subparagraph, substitute:

(ii) there is a change to the regulatory regime applying in relation to the financial market to which the licence relates in that country and, because of that change, ASIC is no longer satisfied of the matters in paragraph 795B(2)(c); or

(iii) the cooperation (including information sharing) between ASIC and the authority or authorities responsible for supervising the operation of that market in that country has materially deteriorated or is otherwise inadequate; or

13 Paragraph 826B(a)

Repeal the paragraph, substitute:

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

(aa) the licensee has not, for a period of at least 12 months, provided the facility’s services to which the licence relates; or

(ab) if the licence is subject to a condition specifying that the licensee is authorised to engage in specified conduct or activity that constitutes operating that facility—the licensee has, for a period of at least 12 months, ceased engaging in all such specified conduct or activity; or

14 After paragraph 826B(c)

Insert:

(ca) the licensee ceases to be registered under:

(i) if the licence was granted under subsection 824B(1) (domestic licensees)—Chapter 2A; or

(ii) if the licence was granted under subsection 824B(2) (overseas licensees)—Division 2 of Part 5B.2; or

(cb) an application has been made under section 601AA to deregister the licensee as a company; or

(cc) ASIC has decided under section 601AB to deregister the licensee as a company; or

15 Subparagraph 826B(d)(ii)

Repeal the subparagraph, substitute:

(ii) there is a change to the regulatory regime applying in relation to the facility to which the licence relates in that country and, because of that change, ASIC is no longer satisfied of the matters in paragraph 824B(2)(c); or

(iii) the cooperation (including information sharing) between ASIC or the Reserve Bank and the authority or authorities responsible for supervising the operation of that facility in that country has materially deteriorated or is otherwise inadequate; or

16 Paragraph 905H(a)

Repeal the paragraph, substitute:

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

(aa) the licensee has not, for a period of at least 12 months, provided the repository’s services to which the licence relates; or

(ab) if the licence is subject to a condition specifying that the licensee is authorised to engage in specified conduct or activity that constitutes operating that repository—the licensee has, for a period of at least 12 months, ceased engaging in all such specified conduct or activity; or

17 After paragraph 905H(c)

Insert:

(ca) an application has been made under section 601AA to deregister the licensee as a company; or

(cb) ASIC has decided under section 601AB to deregister the licensee as a company; or

18 Paragraph 908BI(1)(a)

Repeal the paragraph, substitute:

(a) the licensee ceases to carry on the business of administering the financial benchmark specified in the licence; or

(aa) the licensee has not, for a period of at least 12 months, administered the financial benchmark specified in the licence; or

(ab) if the licence is subject to a condition specifying that the licensee is authorised to engage in specified conduct or activity that constitutes administering that financial benchmark—the licensee has, for a period of at least 12 months, ceased engaging in all such specified conduct or activity; or

19 After paragraph 908BI(1)(c)

Insert:

(ca) an application has been made under section 601AA to deregister the licensee as a company; or

(cb) ASIC has decided under section 601AB to deregister the licensee as a company; or

Part 3—Declared financial markets and widely held market bodies

Division 1—Declared financial markets

Corporations Act 2001

20 Section 9

Insert:

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

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

Repeal the definition.

22 At the end of Division 1 of Part 1.2

Add:

9D Meaning of *declared financial market*

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

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

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

23 After paragraph 1317C(b)

Insert:

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

24 Amendments of listed provisions

| Further amendments | | | |
| --- | --- | --- | --- |
| Item | Provision | Omit (wherever occurring) | Substitute |
| 1 | Section 9 (definition of ***l******isted***) | prescribed financial market | declared financial market |
| 2 | Section 9 (definition of ***listed corporation***) | prescribed financial market | declared financial market |
| 3 | Section 9 (definition of ***market traded option***) | prescribed financial market | declared financial market |
| 4 | Section 9 (definition of ***on‑market***) | prescribed financial market | declared financial market |
| 5 | Section 9 (definition of ***on‑market buy‑back***) | prescribed financial market | declared financial market |
| 6 | Section 9 (definition of ***public company***) | prescribed financial market | declared financial market |
| 7 | Section 9 (definition of ***quoted security***) | prescribed financial market | declared financial market |
| 8 | Section 9 (paragraph (a) of the definition of ***relevant financial market***) | prescribed financial market | declared financial market |
| 9 | Section 9 (paragraph (b) of the definition of ***relevant financial market***) | prescribed financial markets | declared financial markets |
| 10 | Section 111AE | prescribed financial market | declared financial market |
| 11 | Paragraph 167AC(b) | prescribed financial market | declared financial market |
| 12 | Paragraph 167AH(2)(b) | prescribed financial market | declared financial market |
| 13 | Subsection 170(3B) | prescribed financial market | declared financial market |
| 14 | Subparagraph 250V(1)(b)(ii) | prescribed financial market | declared financial market |
| 15 | Section 253F | prescribed financial market | declared financial market |
| 16 | Section 257B | prescribed financial market | declared financial market |
| 17 | Subsection 300(12) | prescribed financial market | declared financial market |
| 18 | Section 611 (table item 14) | prescribed financial market | declared financial market |
| 19 | Subsection 621(2) | prescribed financial market | declared financial market |
| 20 | Subsection 633(1) | prescribed financial market | declared financial market |
| 21 | Paragraph 647(3)(b) | prescribed financial market | declared financial market |
| 22 | Subsection 671B(5) | prescribed financial market | declared financial market |
| 23 | Paragraph 708AA(2)(c) | prescribed financial market | declared financial market |
| 24 | Paragraph 708A(5)(b) | prescribed financial market | declared financial market |
| 25 | Paragraph 713(5)(a) | prescribed financial market | declared financial market |
| 26 | Section 713A | prescribed financial market | declared financial market |
| 27 | Subsection 727(3A) | prescribed financial market | declared financial market |
| 28 | Paragraph 1012DAA(2)(c) | prescribed financial market | declared financial market |
| 29 | Paragraph 1012DA(5)(b) | prescribed financial market | declared financial market |
| 30 | Section 1222N | prescribed financial market | declared financial market |
| 31 | Subsection 1228H(3) | prescribed financial market | declared financial market |
| 32 | Subparagraph 1317DAE(7)(a)(i) | prescribed financial market | declared financial market |
| 33 | Subclause 29(8) of Part 5 of Schedule 4 (definition of ***unlisted company***) | prescribed financial market | declared financial market |
| 34 | Paragraph 32(1)(h) of Part 5 of Schedule 4 | prescribed financial market | declared financial market |

Division 2—Other amendments about declared financial markets

Bankruptcy Act 1966

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

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

Personal Property Securities Act 2009

26 Section 49

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

Division 3—Widely held market bodies

Corporations Act 2001

27 Section 9

Insert:

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

28 Paragraph 792A(1)(h)

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

29 Paragraph 792A(1)(h)

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

30 Paragraph 821A(1)(g)

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

31 Paragraph 821A(1)(g)

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

32 Section 850A

Repeal the section, substitute:

850A Scope of Division

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

Meaning of **widely held market body**

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

(a) is:

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

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

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

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

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

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

(4) The matters are:

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

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

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

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

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

(d) any other matters that ASIC considers relevant.

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

(a) the Minister has approved it in writing; and

(b) if the proposed declaration relates to a body corporate mentioned in subparagraph (2)(a)(ii)—ASIC has consulted the Reserve Bank about it.

(6) However, a failure to consult as required by paragraph (5)(b) does not invalidate the declaration.

33 Section 851I (heading)

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

34 Subsection 851I(1)

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

(1) If:

(a) a person holds, at a particular time, a particular percentage of voting power in a body corporate that would (apart from this section) constitute an unacceptable control situation in relation to the body and in relation to the person; and

(b) at that time, the body becomes specified in a declaration in force under subsection 850A(3);

then, the person is taken to be granted at that time an approval under section 851B to hold that percentage of voting power in the body.

35 Subsection 851I(3)

Repeal the subsection.

36 Before paragraph 1317C(gd)

Insert:

(gcm) a decision by ASIC under subsection 850A(3) to declare a body corporate; or

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

Corporations Act 2001

37 Subsection 850B(1)

Omit “(1)”.

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

Repeal the paragraphs, substitute:

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

39 Subsection 850B(2)

Repeal the subsection.

40 Subsection 851A(1)

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

Part 5—Approval for control of certain Australian licensees

Corporations Act 2001

41 Section 9

Insert:

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

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

42 After Division 1 of Part 7.4

Insert:

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

Subdivision A—Scope and interpretation

852DA Scope of Division

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

Meaning of **controlled Australian financial body**

(2) A body corporate is a ***controlled Australian financial body*** if the body is:

(a) registered under Chapter 2A; and

(b) any of the following:

(i) a market licensee;

(ii) a CS facility licensee;

(iii) a derivative trade repository licensee;

(iv) a benchmark administrator licensee;

(v) the holding company of a licensee mentioned in any of subparagraphs (i) to (iv); and

(c) not a widely held market body.

852DB Meaning of *unacceptable control situation*

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

(a) unless paragraph (b) applies—15%; or

(b) if an approval of a higher percentage is in force under Subdivision C for the body and the person—that higher percentage.

852DC Meaning of *passes the legitimate control test*

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

(a) if the body is a licensee mentioned in any of subparagraphs 852DA(2)(b)(i) to (iv)—the body’s ability to meet one or more of its obligations as such a licensee under this Act; or

(b) if the body is the holding company of a licensee mentioned in any of subparagraphs 852DA(2)(b)(i) to (iv)—the licensee’s ability to meet one or more of its obligations as such a licensee under this Act.

Subdivision B—15% voting power limit

852DD Acquisition of shares

A person contravenes this section if:

(a) the person acquires, or the person with one or more other persons under an arrangement acquire, shares in a body corporate; and

(b) the acquisition has the result that:

(i) an unacceptable control situation comes into existence in relation to a controlled Australian financial body and a person; or

(ii) if an unacceptable control situation already exists in relation to a controlled Australian financial body and a person (the ***controller***)—there is an increase in the voting power of the controller in the controlled Australian financial body.

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

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

852DE Remedial orders

(1) If an unacceptable control situation exists in relation to a controlled Australian financial body and a person, the Court may make such orders as the Court considers appropriate for the purpose of ensuring that the unacceptable control situation ceases to exist.

(2) However, the Court may only make orders under this section on application by:

(a) ASIC; or

(b) the body; or

(c) a person who has any voting power in the body.

(3) Without limiting subsection (1), the Court’s orders may include:

(a) an order directing the disposal of shares; or

(b) an order restraining the exercise of any rights attached to shares; or

(c) an order prohibiting or deferring the payment of any sums due to a person in respect of shares held by the person; or

(d) an order that any exercise of rights attached to shares be disregarded; or

(e) an order directing any person to do or refrain from doing a specified act, for the purpose of securing compliance with any other order made under this section; or

(f) an order containing such ancillary or consequential provisions as the Court thinks just.

(4) Before making an order under this section, the Court may direct that notice of the application be given to such persons as the Court thinks fit or be published in such manner as the Court thinks fit, or both.

(5) The Court may, by order:

(a) rescind, vary or discharge an order made by the Court under this section; or

(b) suspend the operation of such an order.

852DF Injunctions

(1) If any conduct (including a refusal or failure to act) amounts or would amount to a contravention of this Division in relation to a particular controlled Australian financial body, the body is taken, for the purposes of section 1324, to be a person whose interests are affected by the conduct.

(2) Subsection (1) does not limit the class of persons whose interests are affected by the conduct.

(3) Sections 852DE and 1324 do not limit each other.

Subdivision C—Approvals to exceed 15% voting power limit

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

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

(a) the percentage of voting power (if any) the person currently has in the body; and

(b) the percentage of voting power the person is seeking approval to have in the body; and

(c) the period (whether indefinite or not) the person is seeking the approval for; and

(d) the person’s reasons for making the application.

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

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

852DH Decision on the application

(1) ASIC must, by written notice given to the applicant, approve the applicant having a specified percentage of voting power in the body if:

(a) ASIC is satisfied the specified percentage is the highest percentage (up to that sought by the applicant) of voting power in the body for which the applicant:

(i) passes the legitimate control test; and

(ii) is likely to continue to do so either for a specified period (the ***approved period***) or indefinitely from a specified day (the ***approval start day***); and

(b) ASIC believes relevant information in the application, or later provided by the applicant, to be correct;

otherwise ASIC must, by written notice given to the applicant, refuse such an approval.

(2) A notice of approval under subsection (1) must specify that the approval to have the specified percentage of voting power in the body is in force either:

(a) for the approved period, which may be extended under section 852DJA; or

(b) indefinitely from the approval start day;

but may be varied under section 852DL or revoked under section 852DM.

Note: The notice may also specify that the approval is subject to conditions (see subsection 852DK(1)).

(3) ASIC must give a copy of a notice under subsection (1) to the body.

852DJ Duration of approval

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

852DJA Extension of approval

(1) If a person’s approval under subsection 852DH(1) to have a specified percentage of voting power in a controlled Australian financial body is in force for a specified period (including an extended period from a previous operation of this section), the person may apply to extend that period by lodging with ASIC an application that sets out:

(a) the extended period the person is seeking; and

(b) the person’s reasons for making the application.

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

Note 2: ASIC can vary the period of an approval on its own initiative (see subsection 852DL(4)).

(2) ASIC must, by written notice given to the applicant, extend the period of the applicant’s approval to have the specified percentage of voting power in the body if:

(a) ASIC is satisfied the extended period is the longest period (up to that sought by the applicant) for which the applicant is likely to continue to pass the legitimate control test for having the specified percentage of voting power in the body; and

(b) ASIC believes relevant information in the application, or later provided by the applicant, to be correct;

otherwise ASIC must, by written notice given to the applicant, refuse such an extension.

(3) A notice of extension under subsection (2) must specify that the approval:

(a) is in force for the extended period, which may be further extended under this section; and

(b) may be varied under section 852DL or revoked under section 852DM.

(4) ASIC must give a copy of a notice under subsection (2) to the body.

852DK Conditions of approval

Conditions of approval

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

Imposing, varying or revoking conditions after approval

(2) ASIC may, by written notice given to a person who holds an approval under subsection 852DH(1) to have a specified percentage of voting power in a controlled Australian financial body:

(a) impose one or more conditions on the approval; or

(b) vary or revoke any condition:

(i) imposed under paragraph (a); or

(ii) specified in the notice of approval.

(3) ASIC must give a copy of a notice under subsection (2) to the body.

Power exercisable on own initiative or by application

(4) ASIC’s power under subsection (2) may be exercised:

(a) on ASIC’s own initiative; or

(b) on application by the person who holds the approval under subsection 852DH(1).

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

Notice of refusal of application

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

Breach of condition

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

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

852DL Varying an approval

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

(a) in a controlled Australian financial body; and

(b) for a specified period or indefinitely (the ***current approved duration***);

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

Application by holder of approval to vary percentage

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

(a) the percentage of voting power the person currently has in the body; and

(b) the percentage of voting power the person is seeking approval to have in the body; and

(c) the person’s reasons for making the application.

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

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

(a) ASIC is satisfied the new specified percentage is the highest percentage (up to that sought by the applicant and greater than the current approved percentage) of voting power in the body for which the applicant:

(i) passes the legitimate control test; and

(ii) is likely to continue to do so for the current approved duration; and

(b) ASIC believes relevant information in the application, or later provided by the applicant, to be correct;

otherwise ASIC must, by written notice given to the applicant, refuse such a variation.

ASIC varying percentage or period on own initiative

(4) ASIC may, on its own initiative, by written notice given to the person, vary the person’s approval as follows:

(a) vary the current approved percentage to a new specified percentage of voting power in the body for the current approved duration; or

(b) vary the current approved duration to a new specified period or an indefinite period (the ***new specified duration***) for the current approved percentage of voting power in the body; or

(c) vary both the current approved percentage and the current approved duration to a new specified percentage of voting power in the body for a new specified period or an indefinite period (also the ***new specified duration***);

if ASIC is satisfied of the matters in subsection (5).

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

(5) The matters are that the specified percentage that is to result from the variation is the highest percentage of voting power in the body for which the person:

(a) passes the legitimate control test; and

(b) is likely to continue to do so for the approved duration that is to result from the variation.

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

Downwards variations

(6) If ASIC varies under subsection (4) either or both of the following:

(a) the current approved percentage to a lower new specified percentage;

(b) the current approved duration to a shorter new specified duration;

then:

(c) the variation takes effect on the day specified in the notice of variation; and

(d) the specified day must be at least 90 days after the day on which the notice is given under subsection (4).

Upwards variations

(7) If ASIC:

(a) varies under subsection (3) the current approved percentage; or

(b) varies under subsection (4) the current approved percentage or the current approved duration otherwise than as described in subsection (6);

the variation takes effect on the day the notice of variation is given under subsection (3) or (4) (as applicable).

Notice to the body

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

852DM Revoking an approval

(1) ASIC may, on its own initiative, by written notice given to a person holding an approval under subsection 852DH(1) to have a specified percentage of voting power in a controlled Australian financial body, revoke the approval if ASIC is satisfied that:

(a) the person no longer passes the legitimate control test for the specified percentage of voting power in the body; or

(b) an unacceptable control situation exists in relation to the body and the person; or

(c) there has been a contravention of a condition to which the approval is subject; or

(d) information contained in an application given by the person under this Subdivision was incorrect and the person did not give ASIC the correct information before the application was decided.

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

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

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

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

852DP Further information about applications

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

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

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

852DQ Applicant must update ASIC with correct information

If information contained in an application lodged under this Subdivision:

(a) is incorrect; or

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

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

852DR Time limit for ASIC’s decision

Time limit

(1) ASIC must decide an application lodged under this Subdivision within the 90‑day period starting on the day the application was lodged. This subsection has effect subject to subsections (2), (3) and (5).

Extending the time limit

(2) Before the end of the period mentioned in subsection (1):

(a) ASIC may, by written notice given to the applicant, extend the period by up to 30 days; and

(b) if ASIC does so, this section has effect as if references to the period mentioned in subsection (1) were references to the period as so extended.

Stopping the clock

(3) In working out the period mentioned in subsection (1), disregard:

(a) the period:

(i) starting on the day ASIC gives the applicant a notice under section 852DP requesting information about the application; and

(ii) ending on the day the applicant gives ASIC all of the information requested under, or ASIC otherwise disposes of, the notice; and

(b) any day on which ASIC believes relevant information currently before ASIC, that was provided by the applicant in relation to the application, is incorrect.

Deemed approval

(4) If ASIC has not decided the application by the end of the period mentioned in subsection (1):

(a) ASIC is taken to have granted whatever was applied for on the day after the end of that period; and

(b) as soon as practicable afterwards, ASIC must give a notice to that effect to:

(i) the applicant; and

(ii) the controlled Australian financial body concerned.

Application of this section

(5) This section does not apply in relation to an application lodged under section 852DG or 852DL if an unacceptable control situation exists in relation to the applicant and the controlled Australian financial body concerned at any time before ASIC decides the application.

Subdivision D—Other matters

852DS Acquisition of property

(1) The Court must not make an order under section 852DE if:

(a) the order would result in the acquisition of property from a person otherwise than on just terms; and

(b) the order would be invalid because of paragraph 51(xxxi) of the Constitution.

(2) Section 1350 does not apply in relation to the making of an order under section 852DE.

(3) In this section:

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

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

852DT Anti‑avoidance

(1) If:

(a) one or more persons enter into, begin to carry out or carry out a scheme; and

(b) it would be concluded that the person, or any of the persons, who:

(i) entered into; or

(ii) began to carry out; or

(iii) carried out;

the scheme or any part of the scheme did so for the sole or dominant purpose of avoiding the application of any provision of Subdivision B in relation to any person or persons (whether or not mentioned in paragraph (a)); and

(c) as a result of the scheme or a part of the scheme, a person (the ***controller***) increases (including from a starting point of nil) the controller’s voting power in a controlled Australian financial body;

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

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

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

43 In the appropriate position in Schedule 3

Insert:

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

Part 6—Limits on certain market licences and CS facility licences

Corporations Act 2001

44 After paragraph 791A(1)(b)

Insert:

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

45 After paragraph 791B(c)

Insert:

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

46 Section 791B (note)

Omit “subsection”, substitute “section”.

47 Subsection 791C(1)

Repeal the subsection, substitute:

(1) ASIC may exempt:

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

(b) a person or class of persons;

from all or specified provisions of this Part.

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

(1A) An exemption may apply:

(a) unconditionally or subject to specified conditions; and

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

48 After subparagraph 791C(2)(a)(ii)

Insert:

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

49 Paragraph 791C(3)(a)

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

50 Paragraph 791C(3)(b)

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

51 Paragraph 791C(3)(b)

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

52 Subsection 791C(4)

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

53 Subsection 791C(4)

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

54 Section 795C

Omit “stating”, substitute “that includes”.

55 After paragraph 820A(1)(b)

Insert:

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

56 After paragraph 820B(c)

Insert:

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

57 Section 820B (note)

Omit “subsection”, substitute “section”.

58 Subsection 820C(1)

Repeal the subsection, substitute:

(1) ASIC may exempt:

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

(b) a person or class of persons;

from all or specified provisions of this Part.

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

(1A) An exemption may apply:

(a) unconditionally or subject to specified conditions; and

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

59 After subparagraph 820C(2)(a)(ii)

Insert:

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

60 Paragraph 820C(3)(a)

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

61 Paragraph 820C(3)(b)

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

62 Paragraph 820C(3)(b)

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

63 Subsection 820C(4)

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

64 Subsection 820C(4)

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

65 Section 824C

Omit “stating”, substitute “that includes”.

66 Paragraph 824C(b)

Omit “date”, insert “day”.

67 Subsection 825A(5)

Repeal the subsection, substitute:

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

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

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

68 At the end of subsection 827A(3)

Add:

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

(i) the facility’s services are provided in a fair and effective way in this jurisdiction; and

(ii) the integrity of, and public confidence in, the operation of the facility in this jurisdiction; and

(iii) the overall stability in the Australian financial system.

Part 7—Rulemaking power for CS facility licensees

Corporations Act 2001

69 Section 9

Insert:

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

70 After paragraph 793B(2)(a)

Insert:

(aa) the CS facility rules;

71 Before paragraph 822B(2)(a)

Insert:

(aa) the CS facility rules;

72 After Division 3 of Part 7.3

Insert:

Division 3A—CS facility rules

Subdivision A—Power to make CS facility rules

826H CS facility rules

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

Subdivision B—Compliance with CS facility rules

826J Complying with CS facility rules

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

(a) operators of licensed CS facilities;

(b) participants in licensed CS facilities;

(c) entities prescribed by the regulations for the purposes of this paragraph.

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.

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

826K Inconsistency with other instruments

Inconsistency with other rules

(1) If there is an inconsistency between the CS facility rules and any of the following rules:

(a) the CS services rules;

(b) the derivative transaction rules;

(c) the derivative trade repository rules;

the CS facility rules prevail to the extent of the inconsistency.

Inconsistency with the financial stability standards

(2) If the Reserve Bank considers there is an inconsistency between a CS facility rule and one or more standards determined under section 827D, the Reserve Bank must refer the matter to the Minister.

(3) The Minister may, if the Minister considers it appropriate after being referred the matter, direct ASIC to vary or revoke the CS facility rule.

(4) ASIC must comply with the direction.

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

826L Alternatives to civil proceedings

(1) The regulations may provide for a person who is alleged to have contravened subsection 826J(1) (complying with CS facility rules) to do one or more of the following as an alternative to civil proceedings:

(a) pay a penalty to the Commonwealth;

(b) undertake or institute remedial measures (including education programs);

(c) accept sanctions other than the payment of a penalty to the Commonwealth;

(d) enter into a legally enforceable undertaking.

(2) The penalty payable under regulations made under paragraph (1)(a) in relation to an alleged contravention of a CS facility rule must not exceed:

(a) for an individual—3,000 penalty units; and

(b) for a body corporate—15,000 penalty units.

(3) Without limiting regulations that may be made under paragraph (1)(d), those regulations may provide for one or more of the following kinds of undertakings:

(a) an undertaking to take specified action within a specified period;

(b) an undertaking to refrain from taking specified action;

(c) an undertaking to pay a specified amount within a specified period to the Commonwealth or to some other specified person.

Subdivision C—The process of making CS facility rules

826M ASIC to consult before making rules

(1) ASIC must not make a CS facility rule unless ASIC:

(a) has consulted the public about the proposed rule; and

(b) has also consulted the following about the proposed rule:

(i) the Reserve Bank;

(ii) any other person or body prescribed by the regulations for the purposes of this subparagraph.

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

(2) Without limiting the ways in which ASIC may comply with the obligation in paragraph (1)(a) to consult the public about a proposed rule, ASIC is taken to comply with that obligation if ASIC, on its website:

(a) makes the proposed rule, or a description of the content of the proposed rule, available; and

(b) invites the public to comment on the proposed rule.

(3) A failure to consult as required by subsection (1) does not invalidate a CS facility rule.

826N Ministerial consent to rules required

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

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

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

826P Emergency rules: consultation and consent not required

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

(a) the Australian economy; or

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

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

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

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

(4) ASIC must comply with the direction.

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

826Q Variation and revocation of rules

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

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

Subdivision D—Limitations

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

The regulations may prescribe limits on:

(a) the extent to which, or the way in which, the CS facility rules may deal with matters permitted by Subdivision A; or

(b) the classes of persons on whom those rules may impose requirements; or

(c) the extent to which those rules may impose requirements (or certain kinds of requirements) on certain classes of persons.

Subdivision E—Exemptions

826S Provisions covered this Subdivision

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

(a) the following provisions:

(i) the provisions of this Division;

(ii) the provisions of regulations made for the purposes of the provisions of this Division;

(iii) the provisions of the CS facility rules; and

(b) definitions in this Act, or in the regulations, as they apply to references in provisions referred to in paragraph (a).

826T Exemptions and modifications by regulations

(1) The regulations may:

(a) exempt a person or class of persons from all or specified provisions covered by this Subdivision; or

(b) exempt a clearing and settlement facility or class of clearing and settlement facilities from all or specified provisions covered by this Subdivision; or

(c) declare that provisions covered by this Subdivision apply in relation to:

(i) a person or a clearing and settlement facility; or

(ii) a class of persons or clearing and settlement facilities;

as if specified provisions were omitted, modified or varied as specified in the regulations.

(2) If there is an inconsistency between:

(a) an exemption prescribed by regulations made for the purposes of subsection (1); and

(b) an exemption by ASIC under section 826U or 826V;

(including in relation to any conditions specified by ASIC), the regulations prevail to the extent of the inconsistency.

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

(1) ASIC may, by legislative instrument, exempt:

(a) a class of persons; or

(b) a class of clearing and settlement facilities;

from all or specified provisions covered by this Subdivision. An exemption may be unconditional, or subject to specified conditions.

(2) ASIC may, by legislative instrument:

(a) vary such an exemption to:

(i) impose conditions, or additional conditions, on the exemption; or

(ii) vary or revoke any of the conditions on the exemption; or

(b) revoke such an exemption.

(3) However, ASIC may only take action under subsection (2) if:

(a) a notice is published on ASIC’s website allowing a reasonable period for the operator of each clearing and settlement facility covered by the exemption to make submissions on the proposed action; and

(b) that period has ended.

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

(1) ASIC may, by written notice given to a person or an operator of a clearing and settlement facility, exempt the person or facility from all or specified provisions covered by this Subdivision. An exemption may be unconditional, or subject to specified conditions.

(2) ASIC may, by written notice given to the person or operator to whom notice of such an exemption was given:

(a) vary the exemption to:

(i) impose conditions, or additional conditions, on the exemption; or

(ii) vary or revoke any of the conditions on the exemption; or

(b) revoke the exemption.

(3) However, ASIC may only take action under subsection (2) after giving:

(a) notice of the proposed action; and

(b) an opportunity to make submissions on the proposed action;

to the person or to the operator to whom notice of the exemption was given.

(4) ASIC must publish notice of each exemption, variation or revocation under this section on ASIC’s website.

73 Subsection 827D(2A)

Repeal the subsection, substitute:

(2A) If there is an inconsistency between the standards and any of the following:

(a) the CS facility rules;

(b) the CS services rules;

(c) the derivative transaction rules;

(d) the derivative trade repository rules;

the standards prevail to the extent of the inconsistency.

74 Before paragraph 1317C(gcd)

Insert:

(gccc) a decision by ASIC:

(i) under section 826H to make CS facility rules; or

(ii) under subsection 826Q(1) to vary or revoke CS facility rules; or

(gccd) a decision by ASIC to do or not do anything under regulations made for the purposes of section 826L (alternatives to civil proceedings); or

(gcce) a decision by the Minister:

(i) under subsection 826N(1) to consent to the making of a CS facility rule; or

(ii) under subsection 826K(3) or 826P(3) to direct ASIC to vary or revoke a CS facility rule; or

(gccf) a decision by ASIC to grant an exemption under subsection 826U(1); or

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

Insert:

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

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

Corporations Act 2001

76 Section 794D

Repeal the section, substitute:

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

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

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

(b) to take, or refrain from taking:

(i) any actions; or

(ii) one or more specified actions;

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

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

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

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

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

(2) The direction:

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

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

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

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

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

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

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

Referrals to the Minister

(1) If, at any time after a market licensee receives a direction under subsection 794D(1), the licensee requests in writing that ASIC refer the direction to the Minister, ASIC must do so immediately.

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

(3) ASIC must comply with the request.

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

Variations and revocations

(5) ASIC may vary or revoke a direction given under subsection 794D(1):

(a) in like manner; and

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

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

Notifying other affected persons

(6) As soon as practicable after:

(a) giving a direction under subsection 794D(1) to a market licensee; or

(b) varying or revoking such a direction;

ASIC must give written notice of the direction, variation or revocation to the operator of each clearing and settlement facility with which the market licensee has clearing and settlement arrangements for transactions effected through the market.

77 Section 823D

Repeal the section, substitute:

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

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

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

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

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

(b) to take, or refrain from taking:

(i) any actions; or

(ii) one or more specified actions;

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

if subsection (2) applies for the licensee.

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

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

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

(3) The direction:

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

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

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

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

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

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

823DA Matters relating to these ASIC directions

Referrals to the Minister

(1) If, at any time after a CS facility licensee receives a direction under subsection 823D(1), the licensee requests in writing that ASIC refer the direction to the Minister, ASIC must do so immediately.

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

(3) ASIC must comply with the request.

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

Variations and revocations

(5) ASIC may vary or revoke a direction given under subsection 823D(1):

(a) in like manner; and

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

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

Notifying other affected persons

(6) As soon as practicable after:

(a) giving a direction under subsection 823D(1) to a CS facility licensee; or

(b) varying or revoking such a direction;

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

(c) the operator of each financial market with which the facility has arrangements to provide services for transactions effected through the market; and

(d) if the direction relates to one or more specified financial products—each issuer of those products; and

(e) the Reserve Bank.

78 Section 904G

Repeal the section, substitute:

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

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

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

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

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

(2) The direction:

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

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

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

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

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

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

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

Referrals to the Minister

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

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

(3) ASIC must comply with the request.

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

Variations and revocations

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

(a) in like manner; and

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

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

Notifying other affected persons

(6) As soon as practicable after:

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

(b) varying or revoking such a direction;

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

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

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

79 Section 1042E

Omit “794D(2)”, substitute “794D(1)”.

80 Before paragraph 1317C(gca)

Insert:

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

81 In the appropriate position in section 1317C

Insert:

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

82 After paragraph 1317C(gdc)

Insert:

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

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

Omit “823D(5)”, substitute “823D(4)”.

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

Omit “904G(5)”, substitute “904G(3)”.

Part 9—Enhancing regulator powers for CS facility licensees

Division 1—Main amendments

Corporations Act 2001

85 Paragraph 821A(1)(aa)

Repeal the paragraph, substitute:

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

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

86 Section 821D (heading)

Omit “**ASIC**”.

87 Section 821D

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

88 At the end of section 821D

Add:

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

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

89 Subsection 822C(1)

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

90 Paragraph 822C(1)(a)

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

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

Omit “; or”, substitute “;”.

92 Subsection 823B(2)

Repeal the subsection.

93 Subsection 823B(3)

Omit “, and audit report (if any),”.

94 After section 823B

Insert:

823BAA Reserve Bank’s power to require special report

(1) The Reserve Bank may give a CS facility licensee a written notice requiring the licensee to give the Reserve Bank a special report on specified matters.

(2) The licensee must give the special report to the Reserve Bank within the time required by the notice.

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

823BA ASIC’s power to require expert report

Method for appointment

(1) ASIC may, by written notice given to a CS facility licensee and a person (the ***expert***):

(a) appoint the expert to provide ASIC with an expert report on specified matters:

(i) relating to the licensee’s compliance with its obligations as a CS facility licensee under this Chapter; but

(ii) not relating to the licensee’s compliance with its obligations under paragraph 821A(1)(aa) or (ab); and

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

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

(2) ASIC may, by written notice given to a CS facility licensee, direct the licensee to appoint a person to provide ASIC with an expert report on specified matters:

(a) relating to the licensee’s compliance with its obligations as a CS facility licensee under this Chapter; but

(b) not relating to the licensee’s compliance with its obligations under paragraph 821A(1)(aa) or (ab).

Qualifications for appointment

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

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

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

Licensee’s obligations

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

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

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

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

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

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

(b) is recoverable by ASIC in:

(i) the Federal Court; or

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

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

823BB Reserve Bank’s power to require expert report

Method for appointment

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

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

(b) determine a fee equal to the Reserve Bank’s expenses in appointing and paying the expert to provide the report.

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

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

Qualifications for appointment

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

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

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

Licensee’s obligations

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

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

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

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

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

(a) is a debt due and payable to the Reserve Bank; and

(b) is recoverable by the Reserve Bank in:

(i) the Federal Court; or

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

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

95 Section 823E

Repeal the section, substitute:

Subdivision D—Reserve Bank’s directions powers

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

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

(a) paragraph 821A(1)(aa) or (ab); or

(b) section 821BA; or

(c) subsection 821C(3);

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

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

(3) The licensee must comply with the direction.

Referrals to the Minister

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

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

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

823E Directions to increase compliance or reduce systemic risk

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

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

(b) specified action to reduce systemic risk in the provision of the facility’s services, if the Reserve Bank reasonably believes that the licensee:

(i) has not done; or

(ii) is unlikely to do;

all things reasonably practicable to reduce systemic risk in the provision of the facility’s services.

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

(3) The licensee must comply with the direction.

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

823F Directions to preserve stability in the Australian financial system

(1) The Reserve Bank may, by written notice given to a CS facility licensee holding a licence granted under subsection 824B(1) (domestic clearing and settlement facilities), direct the licensee to:

(a) do, or refrain from doing, anything under either or both of the following instruments (the ***operating instruments***):

(i) the licensee’s operating rules;

(ii) the written procedures the licensee must have under regulations made for the purposes of subsection 822A(2); or

(b) amend one or more of those operating instruments; or

(c) subject to sections 823M and 823P:

(i) increase the licensee’s level of share capital to a specified level; or

(ii) issue one or more specified classes of shares, or one or more specified classes of rights to acquire shares, in the licensee; or

(iii) issue one or more specified classes of capital instruments that are prescribed by the regulations; or

(d) refrain from paying a dividend on any shares; or

(e) refrain from repaying any amount paid on shares; or

(f) exercise rights under an agreement (including termination rights);

if subsection (2) applies for the licensee.

Note 1: The direction is a ***recapitalisation direction*** to the extent that it deals with a matter in paragraph (c).

Note 2: The procedures referred to in subparagraph (a)(ii) could relate to matters such as:

(a) the licensee’s operations; or

(b) the conduct of participants in the facility; or

(c) the structure and operation of electronic communications with those participants; or

(d) default management or recovery.

(2) This subsection applies for the licensee if:

(a) the licensee informs the Reserve Bank that the licensee considers that the licensee is likely to become unable to meet one or more of its obligations under paragraphs 821A(1)(aa), (ab) and (d) (its ***critical obligations***); or

(b) the Reserve Bank reasonably believes that, in the absence of external support:

(i) the licensee may become unable to meet one or more of its critical obligations; or

(ii) it is likely that the licensee will be unable to operate the facility in Australia consistently with the stability of the Australian financial system; or

(c) the licensee becomes unable to meet one or more of its critical obligations; or

(d) the Reserve Bank reasonably believes that the licensee is conducting, or is likely to conduct its affairs in a way that may cause or promote instability in the Australian financial system.

(3) For the purposes of paragraph (2)(b), the regulations may specify that a particular form of support:

(a) is external support; or

(b) is not external support.

(4) The direction:

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

(b) may deal with one or more of the matters in the paragraphs or subparagraphs of subsection (1).

(5) The licensee must comply with the direction.

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

823FA Directions to ensure effective crisis resolution

(1) The Reserve Bank may, by written notice given to body corporate that is a CS facility licensee, or a related body corporate of a CS facility licensee that is incorporated in Australia, direct the body corporate to take:

(a) specified measures to comply with all or part of one or more standards in force under section 827DA that applies to the body corporate, if the Reserve Bank reasonably believes that the body corporate is not complying with those standards or parts; or

(b) specified action to manage or resolve an impediment to the effective management of or response to a condition in section 831A being satisfied in relation to the CS facility licensee, if the Reserve Bank reasonably believes that the body corporate:

(i) has not done; or

(ii) is unlikely to do;

all things reasonably practicable to manage or resolve the impediment.

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

(3) The body corporate must comply with the direction.

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

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

Direction to give information or documents

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

(a) specified information; or

(b) specified documents containing specified information;

to the Reserve Bank or a Reserve Bank staff member if subsection (2) applies for the licensee.

(2) This subsection applies for the licensee if the Reserve Bank reasonably believes that:

(a) the licensee can give the information or documents; and

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

(3) The direction:

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

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

(4) The licensee must comply with the direction.

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

(5) 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*.

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

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

823J All Reserve Bank directions—variation or revocation

(1) The Reserve Bank:

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

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

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

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

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

823K Certain Reserve Bank directions—consulting ASIC

Before:

(a) giving a direction under:

(i) subsection 823E(1); or

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

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

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

Subdivision E—Matters relating to Reserve Bank recapitalisation directions

823L Recapitalisation directions—matters relating to compliance

Giving members of the licensee notice of share issue etc.

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

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

(b) that:

(i) identifies the issue; and

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

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

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

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

Issue of shares etc. despite other laws etc.

(4) A CS facility licensee may issue shares, rights to acquire shares, or other capital instruments in compliance with a recapitalisation direction despite all of the following:

(a) this Act;

(b) the licensee’s constitution;

(c) the licensee’s operating instruments referred to in paragraph 823F(1)(a);

(d) any arrangement to which the licensee is a party;

(e) any listing rules of a financial market in whose official list the licensee is included.

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

(1) Before giving a recapitalisation direction directing a CS facility licensee to issue one or more specified classes of:

(a) shares in the licensee; or

(b) rights to acquire shares in the licensee;

the Reserve Bank must:

(c) obtain a report on the fair value of those shares, or those rights, from an expert who is not an associate of the licensee; and

(d) consider the report.

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

(2) The report must set out:

(a) the amount that is, in the expert’s opinion, the fair value for each of those shares or rights; and

(b) the reasons for forming the opinion; and

(c) any relationship between the expert and:

(i) the licensee; or

(ii) a person who is an associate of the licensee;

including any circumstances in which the expert gives the licensee or person advice, or acts on behalf of the licensee or person, in the proper performance of the functions attaching to the expert’s professional capacity or business relationship with the licensee or person; and

(d) any financial or other interest of the expert that could reasonably be regarded as being capable of affecting the expert’s ability to give an unbiased opinion in relation to the matter being reported on.

(3) The Reserve Bank may publish details of, or relating to the report.

(4) Despite subsection (1), the Reserve Bank need not obtain the report if satisfied that doing so would detrimentally affect:

(a) participants, or proposed participants, in the CS facility; or

(b) continuity in the provision of critical services by the CS facility; or

(c) stability in the Australian financial system.

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

Determining the fair value of shares

(1) In determining the fair value for each share in a CS facility licensee for the purposes of paragraph 823M(2)(a), the expert must:

(a) first, assess the value of the licensee as a whole, in accordance with the assumptions (if any) notified to the expert by the Minister for the valuation of the licensee; and

(b) then, allocate that value among the classes of shares in the licensee that:

(i) have been issued; or

(ii) the Reserve Bank proposes to direct be issued (taking into account the relative financial risk, and voting and distribution rights, of the classes); and

(c) then, allocate the value of each class pro rata among the shares in that class that:

(i) have been issued; or

(ii) the Reserve Bank proposes to direct be issued (without allowing a premium or applying a discount for particular shares in that class).

Determining the fair value of rights

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

Ministerial assumptions

(3) The Minister may give the expert written notice of the following:

(a) assumptions for the valuation of the CS facility licensee;

(b) assumptions for the valuation of rights to acquire shares in the CS facility licensee.

(4) The Minister may, by further written notice given to the expert, revoke, but not vary, those assumptions.

(5) A notice given under subsection (3) or (4) is not a legislative instrument.

823P Recapitalisation directions—working out the fair value of other capital instruments

(1) Before giving a recapitalisation direction directing a CS facility licensee to issue one or more specified classes of capital instruments (see subparagraph 823F(1)(c)(iii)), the Reserve Bank must comply with any requirements prescribed by the regulations for ascertaining the fair value of the capital instruments.

(2) Regulations made for the purposes of this section may specify different requirements for different classes of capital instruments.

823Q Recapitalisation directions—contravening certain provisions does not affect the validity of the direction etc.

A contravention of section 823M, 823N or 823P does not affect the validity of a recapitalisation direction or anything done in compliance with the direction.

823R Recapitalisation directions—exceptions to Part IV of the *Competition and Consumer Act 2010*

For the purposes of subsection 51(1) of the *Competition and Consumer Act 2010*, the following things are specified and specifically authorised:

(a) the acquisition of shares in a CS facility licensee as a direct result of:

(i) the issue of the shares in compliance with a recapitalisation direction given to the licensee; or

(ii) the exercise of a right to acquire the shares that was issued in compliance with such a recapitalisation direction;

(b) the acquisition of other capital instruments as a direct result of the issue of those capital instruments in compliance with a recapitalisation direction given to a CS facility licensee.

Subdivision F—Other matters relating to Reserve Bank directions

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

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

(a) subsection 822D(2) (about amendment ceasing to have effect if ASIC not notified);

(b) section 822E (about disallowance).

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

823T All Reserve Bank directions—publishing details about directions

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

(a) a direction given under Subdivision D; or

(b) a variation or revocation of such a direction.

823U All Reserve Bank directions—injunctions

(1) The Reserve Bank has the same powers as ASIC to apply for an injunction under section 1324 in relation to a provision of this Part.

(2) The Reserve Bank may so apply itself or jointly with ASIC.

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

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

(1) This section applies if a body corporate is party to an agreement, whether the proper law of the agreement is:

(a) Australian law; or

(b) foreign law, including the law of part of a foreign country.

(2) None of the matters mentioned in subsection (3) allows the agreement, or a party to the agreement (other than the body corporate), to do any of the following:

(a) deny any obligation under the agreement;

(b) accelerate any debt under the agreement;

(c) terminate or close out the agreement, or any transaction relating to the agreement;

(d) enforce any security under the agreement.

(3) The matters are as follows:

(a) the body corporate being subject to the exercise of a power under this Part by the Reserve Bank;

(b) if the body corporate is a member of a group of bodies corporate—another member of the group being subject to the exercise of such a power.

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

(1) An officer of a CS facility licensee contravenes this subsection if:

(a) the officer fails to take reasonable steps to ensure that the licensee complies with:

(i) a direction given under this Part by ASIC, or the Reserve Bank, to the licensee; or

(ii) subsection 823BA(2) or (4), or 823BB(2) or (4), to the extent to which that subsection is about making a payment relating to an expert report; or

(iii) subsection 823BA(5) or 823BB(5) (about giving assistance etc. relating to an expert report); and

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

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

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

(a) the first day the contravention happens; and

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

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

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

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

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

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

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

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

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

(c) the person is any of the following:

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

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

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

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

(2) For the purposes of paragraph (1)(b), treat it as reasonable for a person to do a thing, or to omit to do a thing, in order to achieve a purpose unless no reasonable person in that person’s position would do the thing, or omit to do the thing, in order to achieve that purpose.

96 Subparagraph 1101B(1)(a)(iii)

Omit “or of the operating rules of a licensed CS facility”.

97 After paragraph 1101B(1)(a)

Insert:

(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

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

Repeal the item, substitute:

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

99 In the appropriate position in Schedule 3 (table)

Insert:

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

100 In the appropriate position in Schedule 3 (table)

Insert:

|  |  |
| --- | --- |
| Subsection 823F(5) | (a) for an individual—100 penalty units for each day, or part of a day, in respect of which the offence is committed; and  (b) for a body corporate—1,000 penalty units for each day, or part of a day, in respect of which the offence is committed |
| Subsection 823FA | 1,000 penalty units for each day, or part of a day, in respect of which the offence is committed |
| Subsection 823G(4) | (a) for an individual—100 penalty units for each day, or part of a day, in respect of which the offence is committed; and  (b) for a body corporate—1,000 penalty units for each day, or part of a day, in respect of which the offence is committed |
| Subsection 823L(2) | (a) for an individual—100 penalty units for each day, or part of a day, in respect of which the offence is committed; and  (b) for a body corporate—1,000 penalty units for each day, or part of a day, in respect of which the offence is committed |
| Subsection 823W(1) | 100 penalty units for each day, or part of a day, in respect of which the offence is committed |

Division 2—Other amendments

Australian Securities and Investments Commission Act 2001

101 After paragraph 246(1)(m)

Insert:

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

Corporations Act 2001

102 Section 9

Insert:

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

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

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

103 Subsection 821C(3)

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

104 Subsection 823C(3)

Omit “of Australia”.

105 Subsection 823CA(1)

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

106 Paragraph 824B(2)(d)

Omit “of Australia”.

107 Paragraphs 827A(2)(h) and (3)(d)

Omit “of Australia”.

108 Section 827C

Omit “of Australia”.

109 Subsection 827D(1)

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

110 Subsections 901B(4) and (6)

Omit “of Australia”.

111 Subparagraph 901J(1)(b)(ii)

Omit “of Australia”.

112 Paragraph 904B(2)(c)

Omit “of Australia”.

113 Paragraph 904D(1)(c)

Omit “of Australia”.

114 Subsection 908BR(1)

Omit “of Australia”.

Reserve Bank Act 1959

115 After section 84

Insert:

84A Protection from liability—crisis powers etc.

Protection from criminal actions or proceedings

(1) A criminal action or proceeding does not lie against a person in relation to anything done, or omitted to be done, in good faith by the person if:

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

(i) performing or purportedly performing any function; or

(ii) exercising or purportedly exercising any power;

conferred or expressed to be conferred by or under:

(iii) section 823F (directions to preserve stability in the Australian financial system) or 823L (recapitalisation directions) of the *Corporations Act 2001*; or

(iv) Part 7.3B (crisis resolution) of that Act; and

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

(c) the person is covered by subsection (3).

Protection from civil actions or proceedings

(2) A civil action or proceeding does not lie against a person in relation to anything done, or omitted to be done, in good faith by the person if:

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

(i) performing or purportedly performing any function; or

(ii) exercising or purportedly exercising any power;

conferred or expressed to be conferred by or under Part 7.3 (clearing and settlement facilities) or 7.3B (crisis resolution) of the *Corporations Act 2001*; and

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

(c) the person is covered by subsection (3).

Persons protected

(3) This subsection covers the following persons:

(a) the Bank;

(b) the Governor;

(c) the Deputy Governor;

(d) a member of the Reserve Bank Board;

(e) a member of the Payments System Board;

(f) a staff member of the Reserve Bank Service;

(g) an officer or employee of:

(i) an Agency (within the meaning of the *Public Service Act 1999*); or

(ii) an authority of the Commonwealth;

whose services are made available to the Bank in connection with the performance or exercise of any of the Bank’s functions or powers.

Reasonableness

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

Part 10—Enhancing ASIC powers for other licensees

Corporations Act 2001

116 After section 794B

Insert:

794BA ASIC’s power to require expert report

Method for appointment

(1) ASIC may, by written notice given to a market licensee and a person (the ***expert***):

(a) appoint the expert to provide ASIC with an expert report on specified matters relating to the licensee’s compliance with its obligations as a market licensee under this Chapter; and

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

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

(2) ASIC may, by written notice given to a market licensee, direct the licensee to appoint a person to provide ASIC with an expert report on specified matters relating to the licensee’s compliance with its obligations as a market licensee under this Chapter.

Qualifications for appointment

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

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

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

Licensee’s obligations

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

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

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

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

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

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

(b) is recoverable by ASIC in:

(i) the Federal Court; or

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

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

117 At the end of Division 5 of Part 7.5A

Add:

Subdivision C—Power of ASIC to require expert report

904L ASIC’s power to require expert report

Method for appointment

(1) ASIC may, by written notice given to a derivative trade repository licensee and a person (the ***expert***):

(a) appoint the expert to provide ASIC with an expert report on specified matters relating to the licensee’s compliance with its obligations as a derivative trade repository licensee under this Chapter; and

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

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

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

Qualifications for appointment

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

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

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

Licensee’s obligations

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

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

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

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

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

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

(b) is recoverable by ASIC in:

(i) the Federal Court; or

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

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

118 After section 908BW

Insert:

908BWA ASIC’s power to require expert report

Method for appointment

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

(a) appoint the expert to provide ASIC with an expert report on specified matters relating to the licensee’s compliance with its obligations as a benchmark administrator licensee under this Chapter; and

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

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

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

Qualifications for appointment

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

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

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

Licensee’s obligations

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

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

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

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

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

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

(b) is recoverable by ASIC in:

(i) the Federal Court; or

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

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

119 In the appropriate position in Schedule 3

Insert:

|  |  |
| --- | --- |
| Subsection 794BA(4) | 2 years imprisonment |
| Subsection 794BA(5) | 2 years imprisonment |

120 In the appropriate position in Schedule 3

Insert:

|  |  |
| --- | --- |
| Subsection 904L(4) | 2 years imprisonment |
| Subsection 904L(5) | 2 years imprisonment |

121 In the appropriate position in Schedule 3

Insert:

|  |  |
| --- | --- |
| Subsection 908BWA(4) | 2 years imprisonment |
| Subsection 908BWA(5) | 2 years imprisonment |

Part 11—Fit, proper and competent person standards

Division 1—Additional obligation for certain licensees

Corporations Act 2001

122 Section 9

Insert:

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

123 After paragraph 792A(1)(h)

Insert:

(ha) take:

(i) all reasonable steps; and

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

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

124 Paragraph 792A(1)(i)

Repeal the paragraph, substitute:

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

(i) disqualified individual; or

(ii) individual against whom an FMI banning order is made;

becomes, or remains, involved in the licensee (see Divisions 2 and 2A of Part 7.4).

125 Subsection 792A(2)

After “(h)”, insert “, (ha)”.

126 After paragraph 821A(1)(g)

Insert:

(ga) take:

(i) all reasonable steps; and

(ii) if the licence was granted under subsection 824B(1) (domestic licensees)—all additional steps (if any) prescribed by the regulations for the purposes of this subparagraph;

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

127 Paragraph 821A(1)(h)

Repeal the paragraph, substitute:

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

(i) disqualified individual; or

(ii) individual against whom an FMI banning order is made;

becomes, or remains, involved in the licensee (see Divisions 2 and 2A of Part 7.4).

128 Subsection 821A(2)

After “(g)”, insert “, (ga)”.

129 Subsections 853C(2) and (3)

Repeal the subsections, substitute:

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

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

130 After paragraph 904A(1)(b)

Insert:

(ba) take:

(i) all reasonable steps; and

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

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

131 Paragraph 904A(1)(c)

Repeal the paragraph, substitute:

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

(i) disqualified individual; or

(ii) individual against whom an FMI banning order is made;

becomes, or remains, involved in the operator (see Divisions 2 and 2A of Part 7.4).

132 Subsection 904A(2)

After “(b)”, insert “, (ba)”.

133 After paragraph 908BP(b)

Insert:

(ba) take:

(i) all reasonable steps; and

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

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

134 Paragraph 908BP(c)

Repeal the paragraph, substitute:

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

(i) disqualified individual; or

(ii) individual against whom an FMI banning order is made;

becomes, or remains, involved in the administration of the financial benchmark specified in the licence (see Divisions 2 and 2A of Part 7.4).

Division 2—Financial market infrastructure banning orders

Corporations Act 2001

135 Section 9

Insert:

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

***FMI licensee*** means:

(a) a market licensee; or

(b) a CS facility licensee; or

(c) a derivative trade repository licensee; or

(d) a benchmark administrator licensee.

136 After Division 2 of Part 7.4

Insert:

Division 2A—Financial market infrastructure banning orders

Subdivision A—Making financial market infrastructure banning orders

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

(1) ASIC may, in writing, make one or more orders (***FMI*** ***banning orders***) against an individual if:

(a) the individual becomes an insolvent under administration; or

(b) the individual is convicted of fraud; or

(c) ASIC has reason to believe that the individual is not a fit and proper person to:

(i) perform one or more functions as a core officer of an FMI licensee; or

(ii) control an FMI licensee; or

(d) ASIC has reason to believe that the individual is not adequately trained, or is not competent, to:

(i) perform one or more functions as a core officer of an FMI licensee; or

(ii) control an FMI licensee; or

(e) the individual has not complied with a financial services law; or

(f) ASIC has reason to believe that the individual is likely to contravene a financial services law; or

(g) the individual has been involved in the contravention of a financial services law by another person; or

(h) ASIC has reason to believe that the individual is likely to become involved in the contravention of a financial services law by another person; or

(i) section 853M applies to the individual in relation to one or more corporations.

Copy of banning order to be given to the individual

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

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

(1) Despite subsection 853H(1), ASIC may make an FMI banning order against an individual only after giving the individual an opportunity:

(a) to appear, or be represented, at a hearing before ASIC that takes place in private; and

(b) to make submissions to ASIC on the matter.

(2) However, ASIC may make an FMI banning order against an individual without giving the individual the opportunities mentioned in subsection (1) if ASIC’s grounds for making the order are or include both of the following:

(a) that the individual is not a fit and proper person under paragraph 853H(1)(c) because the individual is or has been a core officer of an entity that has had a licence suspended or cancelled (see paragraph 853K(2)(a));

(b) that the individual has been convicted of serious fraud.

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

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

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

(2) The matters are as follows:

(a) whether the individual has ever been a core officer of an entity that has held:

(i) an Australian market licence; or

(ii) an Australian CS facility licence; or

(iii) an Australian derivative trade repository licence; or

(iv) a benchmark administrator licence;

that has been suspended or cancelled;

(b) whether any of the following has ever been made against the individual:

(i) an FMI banning order;

(ii) a banning order, or a disqualification order under Subdivision B of Division 8 of Part 7.6;

(iii) a banning order, or a disqualification order, under Part 2‑4 of the *National Consumer Credit Protection Act 2009*;

(c) whether the individual has ever been disqualified under this Act, or any other law of the Commonwealth or of a State or Territory, from managing corporations;

(d) whether the individual has ever been banned from engaging in a credit activity (within the meaning of the *National Consumer Credit Protection Act 2009*) under a law of a State or Territory;

(e) whether the individual has ever been linked to a refusal or failure to give effect to a determination made by AFCA;

(f) whether the individual has ever been an insolvent under administration;

(g) whether, in the last 10 years, the individual has been convicted of an offence;

(h) any relevant information given to ASIC by a State or Territory, or an authority of a State or Territory, in relation to the individual;

(i) any other matter prescribed by the regulations;

(j) any other matter ASIC considers relevant.

Note: To work out whether an individual has been linked as described in paragraph (e), see section 910C.

853L When an individual contravenes a financial services law

For the purposes of subsection 853H(1), an individual contravenes a financial services law if the individual fails to comply with a duty imposed under that law, even if the provision imposing the duty is not an offence provision or a civil penalty provision.

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

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

(a) the individual was a core officer of the corporation when the corporation was an FMI licensee; and

(b) the corporation was wound up either:

(i) while the individual was a core officer of the corporation; or

(ii) within the 12 months after the individual ceased to be a core officer of the corporation; and

(c) a liquidator lodged a report under subsection 533(1) (including that subsection as applied by section 526‑35 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*) about the corporation’s inability to pay its debts.

Subdivision B—Matters relating to financial market infrastructure banning orders

853N What a financial market infrastructure banning order prohibits

(1) An FMI banning order made against an individual may specify that the individual is prohibited from doing one or more of the following:

(a) controlling, whether alone or in concert with one or more other entities, an FMI licensee;

(b) performing any function of an FMI licensee, including as a core officer, manager, employee, contractor or in some other capacity;

(c) performing specified functions of an FMI licensee, including as a core officer, manager, employee, contractor or in some other capacity.

(2) The FMI banning order may specify that a particular prohibition specified in the order applies against the individual:

(a) for a specified period; or

(b) permanently.

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

(3) A FMI banning order may include a provision allowing the individual against whom it was made, subject to any specified conditions:

(a) to do specified acts; or

(b) to do specified acts in specified circumstances;

that the order would otherwise prohibit them from doing.

853P Effect of financial market infrastructure banning orders

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

Fault‑based offence

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

Civil liability

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

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

853Q Variation or cancellation of financial market infrastructure banning orders

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

(2) ASIC may do so:

(a) on its own initiative; or

(b) if the individual against whom the order was made lodges with ASIC an application for ASIC to do so, which is accompanied by the documents, if any, required by regulations made for the purposes of this paragraph.

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

(3) If ASIC proposes not to vary or cancel an FMI banning order in accordance with an application lodged by an individual under paragraph (2)(b), ASIC must give the individual an opportunity:

(a) to appear, or be represented, at a hearing before ASIC that takes place in private; and

(b) to make submissions to ASIC on the matter.

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

(1) An FMI banning order, or variation or cancellation of an FMI banning order, takes effect when it is given to the individual against whom the order is or was made.

(2) ASIC must publish a notice on ASIC’s website as soon as practicable after making, varying or cancelling an FMI banning order. The notice must state when the action took effect and:

(a) in the case of the making of an FMI banning order—set out a copy of the FMI banning order; or

(b) in the case of the variation of an FMI banning order—set out a copy of the FMI banning order as varied.

(3) However, if:

(a) the FMI banning order contains a provision of the kind referred to in subsection 853N(3); and

(b) ASIC considers that the notice on ASIC’s website would be unreasonably long if that provision were included;

the notice may instead set out a summary of the provision’s effect.

853S Statements of reasons

(1) An FMI banning order given to an individual must be accompanied by a statement of reasons for the order.

(2) If ASIC varies an FMI banning order made against an individual, ASIC must, on request by the individual, give the individual a statement of reasons for the variation.

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

Insert:

|  |  |  |
| --- | --- | --- |
| subsection 853P(3) | need to comply with an FMI banning order | uncategorised |

138 In the appropriate position in Schedule 3

Insert:

|  |  |
| --- | --- |
| Subsection 853P(2) | 5 years imprisonment |

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

Corporations Act 2001

139 Section 791D

Repeal the section, substitute:

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

(1) A financial market is taken to be ***operated*** ***in this jurisdiction*** if it:

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

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

(2) ASIC may, by written notice given to a body corporate, declare that a financial market operated by the body corporate has a material connection with this jurisdiction.

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

(1) When ASIC is deciding under subsection 791D(2) whether to declare that a financial market has a material connection with this jurisdiction:

(a) the market must have a connection with this jurisdiction (see subsection (2) of this section); and

(b) ASIC must consider, under subsection (3) of this section, whether the connection is material.

Does the market have a connection with this jurisdiction?

(2) The financial market has a connection with this jurisdiction if one or more of the following paragraphs apply for the market:

(a) the market has operations located in this jurisdiction;

(b) the market provides a market for financial products:

(i) denominated in Australian currency; or

(ii) issued by a domestic corporation or by the Commonwealth, a State or a Territory;

(c) the market provides a market for financial products based on something else (of any nature whatsoever and whether or not deliverable) located or issued in this jurisdiction, including, for example, one or more of the following:

(i) an asset;

(ii) a rate (including an interest rate or exchange rate);

(iii) an index;

(iv) a commodity;

(d) one or more current or expected participants in the market, or users of the market, are resident or based in this jurisdiction;

(e) the market targets investors resident or based in this jurisdiction;

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

If such a connection exists, is it material?

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

(a) the size and extent of current or expected aggregate activity in the market of participants in the market, and users of the market, is material to:

(i) the risk management activities of those participants and users; or

(ii) the efficient allocation of capital or liquidity to the Australian economy; or

(iii) the provision of fair, orderly and transparent financial markets to those participants, and users, who are resident or based in this jurisdiction; or

(iv) confident and informed decision making by consumers of financial products or financial services who are resident or based in this jurisdiction;

(b) a matter in a determination in force under paragraph (4)(b).

Relevant ASIC determinations

(4) ASIC may by legislative instrument:

(a) determine, for the purposes of paragraph (2)(f), additional connections that financial markets may have with this jurisdiction; or

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

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

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

ASIC may request related information

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

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

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

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

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

140 Section 820D

Repeal the section, substitute:

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

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

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

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

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

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

(1) When ASIC is deciding under subsection 820D(2) whether to declare that a clearing and settlement facility has a material connection with this jurisdiction:

(a) the facility must have a connection with this jurisdiction (see subsection (2) of this section); and

(b) ASIC must consider, under subsection (3) of this section, whether the connection is material.

Does the facility have a connection with this jurisdiction?

(2) The clearing and settlement facility has a connection with this jurisdiction if one or more of the following paragraphs apply for the facility:

(a) the facility has operations located in this jurisdiction;

(b) the facility provides services for financial products:

(i) denominated in Australian currency; or

(ii) issued by a domestic corporation or by the Commonwealth, a State or a Territory;

(c) the facility provides services for financial products based on something else (of any nature whatsoever and whether or not deliverable) located or issued in this jurisdiction, including, for example, one or more of the following:

(i) an asset;

(ii) a rate (including an interest rate or exchange rate);

(iii) an index;

(iv) a commodity;

(d) one or more current or expected participants in the facility, or users of the facility, are resident or based in this jurisdiction;

(e) the operator of the facility has entered into an arrangement (either directly or indirectly through one or more interposed entities) with:

(i) the holder of an Australian market licence granted under subsection 795B(1); or

(ii) the holder of an Australian CS facility licence granted under subsection 824B(1); or

(iii) the operator of a payments system that is a system having a connection with Australia;

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

If such a connection exists, is it material?

(3) The clearing and settlement facility’s connection with this jurisdiction is material if ASIC considers that, after applying any principles in force under paragraph (4)(c), one or more of the following paragraphs apply for the facility:

(a) the current or expected number of participants in the facility, or users of the facility, who are resident or based in this jurisdiction is material;

(b) the size and extent of current or expected aggregate activity with the facility of those participants and users is material to:

(i) the risk management activities of those participants and users; or

(ii) the efficient allocation of capital or liquidity to the Australian economy;

(c) the size and extent of current or expected activity in a relevant financial product class offered by the facility is material to:

(i) risk management activities in the Australian financial system; or

(ii) the efficient allocation of capital or liquidity to the Australian economy;

(d) the operator of the facility has an arrangement covered by paragraph (2)(e) that is material;

(e) a matter in a determination in force under paragraph (4)(b).

Relevant ASIC determinations

(4) ASIC may by legislative instrument:

(a) determine, for the purposes of paragraph (2)(f), additional connections that clearing and settlement facilities may have with this jurisdiction; or

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

(c) determine, for each paragraph of subsection (3), principles for working out if that paragraph applies for clearing and settlement facilities.

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

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

ASIC may request related information

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

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

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

(a) after having regard to subsection 820E(2), ASIC considers that the facility does not have a connection with this jurisdiction; or

(b) after having regard to subsection 820E(3), ASIC no longer considers that the facility’s connection with this jurisdiction is material.

141 After paragraph 1317C(gc)

Insert:

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

142 After paragraph 1317C(gcc)

Insert:

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

Part 13—Transitional provisions

Corporations Act 2001

143 In the appropriate position in Chapter 10

Insert:

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

Division 1—Definitions

1706A Definitions

In this Part:

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

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

Division 2—Granting of Australian CS facility licences

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

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

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

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

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

(b) in force immediately before the commencement time.

(2) The licence continues in force (and may be dealt with) at and after the commencement time as if the licence had been granted under subsection 824B(1), as amended by Schedule 2 to the amending Act.

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

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

(a) granted under subsection 824B(2) as in force before the commencement time; and

(b) in force immediately before the commencement time.

(2) The licence continues in force (and may be dealt with) at and after the commencement time as if the licence had been granted under subsection 824B(2), as amended by Schedule 2 to the amending Act.

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

(1) This section applies to an application for an Australian CS facility licence if:

(a) the application is lodged under section 824A as in force before the commencement time; and

(b) before the commencement time, the Minister had not made a decision under section 824B in relation to the application.

(2) This Act as in force immediately before the commencement time (the ***old Act***) continues to apply, at and after the commencement time, in relation to the application despite the amendments made by the amending Act.

(3) However, if at or after the commencement time, the Minister decides the application by granting a licence under section 824B of the old Act, the licence is taken to be (and may be dealt with as if it were) granted as follows:

(a) if the licence is granted under subsection 824B(1) of the old Act—as if the licence had been granted under subsection 824B(1), as amended by that Schedule;

(b) if the licence is granted under subsection 824B(2) of the old Act—as if the licence had been granted under subsection 824B(2), as amended by that Schedule.

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

1706AE Application of amendments—suspension or cancellation of licences

(1) The provisions mentioned in subsection (2) apply to an action taken or decision made by ASIC at or after the commencement time (whether a related licence is granted, change happens or period starts before, at or after the commencement time).

(2) The provisions, as amended by Schedule 2 to the amending Act, are as follows:

(a) section 797B;

(b) section 826B;

(c) section 905H;

(d) section 908BI.

Division 4—Declared financial markets and widely held market bodies

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

(1) This section applies to a financial market that was prescribed by regulations:

(a) in force immediately before the commencement time; and

(b) made for the purposes of the definition of ***prescribed financial market*** in section 9 as in force immediately before the commencement time.

(2) The financial market is, at and after the commencement time, taken to be (and may be dealt with as if it were) specified in a declaration in force under subsection 9D(2) as added by Schedule 2 to the amending Act.

1706AG Translation of references to prescribed financial markets in instruments

(1) This section applies to an instrument (the ***affected instrument***), other than regulations, that:

(a) was made under:

(i) this Act; or

(ii) an instrument made under this Act; and

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

(2) If:

(a) immediately before the commencement time, the affected instrument contained a reference to the expression in column 1 of an item of the following table; and

(b) the expression had the same meaning in the affected instrument as it had in this Act as in force immediately before the commencement time; and

(c) the reference to the expression remains in the affected instrument on the commencement time;

then, at and after the commencement time, the affected instrument applies as if the reference to the expression were instead a reference to the expression in column 2 of that item.

| Translating references in instruments made under this Act | | |
| --- | --- | --- |
| Item | Column 1 | Column 2 |
| 1 | prescribed financial market | declared financial market |
| 2 | prescribed financial markets | declared financial markets |

1706AH Transitional—widely held market bodies

(1) This section applies to a body corporate that was specified in regulations:

(a) in force immediately before the commencement time; and

(b) made for the purposes of section 850A as in force immediately before the commencement time.

(2) The body corporate is, at and after the commencement time, taken to be (and may be dealt with as if it were) specified in a declaration in force under subsection 850A(3) as substituted by Schedule 2 to the amending Act.

1706AI Application of amendments—preservation of voting power

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

(a) becomes specified in a declaration in force under subsection 850A(3); but

(b) not because of subsection 1706AH(2).

1706AJ Transitional—pre‑commencement approvals granted for preservation of voting power

(1) This section applies to an approval to hold a particular percentage of voting power in a body corporate if the approval:

(a) was in force immediately before the commencement time; and

(b) was taken to be granted under section 851B because of the operation of section 851I as in force at that time.

(2) The approval continues in force (and may be dealt with) at and after the commencement time as if the approval were granted under section 851B because of the operation of section 851I as amended by Schedule 2 to the amending Act.

Division 5—Approval for control of certain Australian licensees

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

(1) This section applies to a person if:

(a) at the commencement time, the person holds a particular percentage of voting power in a controlled Australian financial body; and

(b) that percentage is more than 15%.

(2) The person is taken to be granted, at the commencement time, an approval under subsection 852DH(1) to have that percentage of voting power in the body.

Note: ASIC can impose conditions on the approval (see section 852DK).

(3) The approval:

(a) comes into force at the commencement time; and

(b) remains in force indefinitely (unless varied under section 852DL or revoked under section 852DM).

(4) ASIC is taken to have complied with its obligations under Division 1A of Part 7.4 for the granting of the approval.

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

Division 6—Enhancing regulator powers for CS facility licensees

1706AL Transitional—directions power to reduce systemic risk

(1) This section applies to a direction given by ASIC to a CS facility licensee if the direction:

(a) was given under section 823E as in force before the commencement time; and

(a) was in force immediately before the commencement time.

(2) The direction continues in force (and may be dealt with) at and after the commencement time as if the direction were given by the Reserve Bank to the licensee under section 823E as substituted by Schedule 2 to the amending Act.