



# **Financial System Legislation Amendment (Resilience and Collateral Protection) Act 2016**

**No. 43, 2016**

**An Act to amend the law in relation to payment  
systems and netting and other aspects of the  
financial sector, and for related purposes**

Note: An electronic version of this Act is available on the Federal Register of Legislation  
(<https://www.legislation.gov.au/>)



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**An Act to amend the law in relation to payment  
systems and netting and other aspects of the  
financial sector, and for related purposes**

*[Assented to 4 May 2016]*

The Parliament of Australia enacts:

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*No. 43, 2016      Financial System Legislation Amendment (Resilience and Collateral  
Protection) Act 2016      1*

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## 1 Short title

This Act may be cited as the *Financial System Legislation Amendment (Resilience and Collateral Protection) Act 2016*.

## 2 Commencement

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

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<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provisions</b>	<b>Commencement</b>	<b>Date/Details</b>
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	4 May 2016
2. Schedule 1	The 28th day after this Act receives the Royal Assent.	1 June 2016

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Note: This table relates only to the provisions of this Act as originally enacted.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

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

## 3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

## **Schedule 1—Amendments**

### **Part 1—Payment systems and netting**

#### *Payment Systems and Netting Act 1998*

##### **1 Section 5**

Insert:

*APRA* means the Australian Prudential Regulation Authority.

*Business Transfer Act* means the *Financial Sector (Business Transfer and Group Restructure) Act 1999*.

*derivative* has the same meaning as in Chapter 7 of the *Corporations Act 2001*.

*direction stay provision* means any of the following:

- (a) subsection 11CD(1A) of the *Banking Act 1959*;
- (b) subsection 13N(2) of the *Banking Act 1959*;
- (c) subsection 103K(2) of the *Insurance Act 1973*;
- (d) subsection 105(1A) of the *Insurance Act 1973*;
- (e) subsection 230AJ(2) of the *Life Insurance Act 1995*;
- (f) subsection 230C(1A) of the *Life Insurance Act 1995*;
- (g) subsection 101(2) of the *Private Health Insurance (Prudential Supervision) Act 2015*.

*eligible obligation* has the meaning given by section 14A.

##### **2 Section 5 (at the end of the definition of *external administration*)**

Add:

- ; or (d) an ADI statutory manager takes control of the person's business under the *Banking Act 1959*; or
- (e) the person comes under judicial management under the *Insurance Act 1973*; or
- (f) the person, or a part of the person's business, comes under judicial management under the *Life Insurance Act 1995*.

### 3 Section 5 (definition of *external administrator*)

Omit “the person’s property”, substitute “the property, part of the property, the business, or part of the business, of the person”.

### 4 Section 5

Insert:

***financial property*** means any of the following property, regardless of whether the property (or, for paragraph (h), the intermediary or the account) is in Australia or elsewhere:

- (a) a security (within the meaning of section 92 of the *Corporations Act 2001* (for this purpose, disregard subsections 92(3) and (4) of that Act));
- (b) a derivative;
- (c) a financial product (within the meaning of the *Corporations Act 2001*) that is traded on a financial market (within the meaning of that Act) that is:
  - (i) operated in accordance with an Australian market licence (within the meaning of that Act); or
  - (ii) exempt from the operation of Part 7.2 of that Act;
- (d) a negotiable instrument (within the meaning of the *Personal Property Securities Act 2009*);
- (e) currency (whether of Australia or of any other country);
- (f) gold, silver or platinum;
- (g) property declared by the regulations to be financial property for the purposes of this Act;
- (h) if a person (an ***intermediary***) maintains an account to which interests in property or rights to payment or delivery of property of a kind mentioned in any of paragraphs (a) to (g) may be credited or debited—the rights of a person in whose name the intermediary maintains the account, to the extent that those rights relate to the interests in that property or the rights to payment or delivery of that property;
- (i) proceeds (including rights and property) of property that is financial property;

but does not include any property declared by the regulations to not be ***financial property*** for the purposes of this Act.



**foreign exchange contract** has the same meaning as in Chapter 7 of the *Corporations Act 2001*.

**give security** has a meaning affected by section 5A.

**intermediated financial property** means the rights mentioned in paragraph (h) of the definition of **financial property**.

## **5 Section 5 (after paragraph (a) of the definition of *market netting contract*)**

Insert:

- (aa) the rules governing the operation of a netting market, if those rules have effect as a contract between a participant in the netting market and one or more other persons; or

## **6 Section 5**

Insert:

**non-terminal administration**: a person goes into **non-terminal administration** if:

- (a) the person goes into external administration; and
- (b) if the person is a body corporate—the external administration is not a winding up under the *Corporations Act 2001* or a corresponding process under a law of a foreign country; and
- (c) if the person is an individual—the external administration is not the result of the person becoming a bankrupt under the *Bankruptcy Act 1966*, or the person having a corresponding status under a law of a foreign country.

**regulated body** means:

- (a) a body corporate that is an ADI for the purposes of the *Banking Act 1959*; or
- (b) a general insurer within the meaning of the *Insurance Act 1973*; or
- (c) a body corporate that is registered under section 21 of the *Life Insurance Act 1995*; or
- (d) a private health insurer within the meaning of the *Private Health Insurance (Prudential Supervision) Act 2015*.

**regulated business**, of a regulated body, means:

- (a) if the body is an ADI—the body’s banking business (within the meaning of the *Banking Act 1959*); or
- (b) if the body is a general insurer—the body’s insurance business (within the meaning of the *Insurance Act 1973*); or
- (c) if the body is a life company—the body’s life insurance business (within the meaning of the *Life Insurance Act 1995*).

*resolution period* has the meaning given by section 15A.

**7 Section 5 (paragraphs (a) and (b) of the definition of specified provisions)**

Repeal the paragraphs, substitute:

- (a) subsections 11CD(2) and (3), section 11F and subsection 13A(3) of the *Banking Act 1959*; and
- (aa) subsections 105(2) and (3) of the *Insurance Act 1973*; and
- (b) section 187 and subsections 230C(2) and (3) of the *Life Insurance Act 1995*; and

**8 Section 5 (paragraph (d) of the definition of specified provisions)**

Omit “and 468”, substitute “, 440B, 468, 556 and 588FL”.

**9 Section 5 (after paragraph (f) of the definition of specified provisions)**

Insert:

- (fa) subsections 101(3) and (4) of the *Private Health Insurance (Prudential Supervision) Act 2015*; and
- (fb) sections 267 and 267A of the *Personal Property Securities Act 2009*; and

**10 Section 5**

Insert:

***specified stay provision***: each of the following is a ***specified stay provision***:

- (a) subsection 11CD(1A) of the *Banking Act 1959*;
- (b) subsection 13N(2) of the *Banking Act 1959*;
- (c) subsection 14AC(2) of the *Banking Act 1959*;

- (d) subsection 15C(2) of the *Banking Act 1959*;
- (e) subsection 36AA(2) of the Business Transfer Act;
- (f) subsection 62V(2) of the *Insurance Act 1973*;
- (g) subsection 62ZB(2) of the *Insurance Act 1973*;
- (h) subsection 103K(2) of the *Insurance Act 1973*;
- (i) subsection 105(1A) of the *Insurance Act 1973*;
- (j) subsection 165B(2) of the *Life Insurance Act 1995*;
- (k) subsection 168C(2) of the *Life Insurance Act 1995*;
- (l) subsection 230AJ(2) of the *Life Insurance Act 1995*;
- (m) subsection 230C(1A) of the *Life Insurance Act 1995*;
- (n) subsection 101(2) of the *Private Health Insurance (Prudential Supervision) Act 2015*.

**statutory/judicial management:** a person is under **statutory/judicial management** if:

- (a) an ADI statutory manager has control of the person's business under the *Banking Act 1959*; or
- (b) the person is under judicial management under the *Insurance Act 1973*; or
- (c) the person, or a part of the person's business, is under judicial management under the *Life Insurance Act 1995*.

**trigger event**, for a close-out netting contract, means an event of a kind mentioned in paragraph (a) of the definition of **close-out netting contract**.

## **11 Section 5 (definition of voidable)**

Omit "a payment is voidable in an external administration if", substitute "an action or thing is **voidable** in an external administration if".

## **12 At the end of Part 1**

Add:

### **5A Security given over a person's right to require payment or performance of an obligation**

If a person owes payment or performance of an obligation to another person (an **account holder**):

- (a) the account holder may *give security* over the account holder's right to require the payment or performance of the obligation; and
- (b) the persons to whom *security* may be *given* include the person who owes the payment or the performance of the obligation to the account holder.

Example: A person holds an account with a bank. The person may *give security* to the bank over the person's right to require the bank to pay the person money from the account.

### 13 Section 6 (heading)

Repeal the heading, substitute:

### 6 Winding up not to affect transactions carried out on the day of appointment

#### 14 Paragraph 6(1)(a)

After "external administration", insert "(other than non-terminal administration)".

#### 15 Subsection 6(2)

Repeal the subsection, substitute:

- (2) This section has effect despite any other law (including the specified provisions and the specified stay provisions).

Note: Section 5 defines *specified provisions* and *specified stay provision*.

#### 16 After section 6

Insert:

#### 6A Non-terminal administration not to affect transactions

- (1) If:
  - (a) a participant in an approved RTGS system goes into non-terminal administration; and
  - (b) a payment or settlement transaction is executed through the system at any time before the participant goes into, or while the participant is in, non-terminal administration; and

(c) the transaction involves the payment of money, or the transfer of an asset, by the participant;  
the payment or transfer has the same effect it would have had if the participant had not gone into non-terminal administration.

(2) This section has effect despite any other law (including the specified provisions and the specified stay provisions).

Note: Section 5 defines *specified provisions* and *specified stay provision*.

### **17 Paragraph 10(2)(a)**

Before “the party may”, insert “if the external administration is not a non-terminal administration—”.

### **18 After paragraph 10(2)(a)**

Insert:

- (aa) if the external administration is a non-terminal administration—the party may do anything permitted or required by the arrangement in order to net:
  - (i) obligations incurred before the participant goes into, or while the participant is in, non-terminal administration; and
  - (ii) net obligations if the obligations that are directly or indirectly netted are incurred before the participant goes into, or while the participant is in, non-terminal administration; and

### **19 After paragraph 10(2)(e)**

Insert:

- ; and (f) for an arrangement that is governed by the rules of a licensed CS facility as defined in section 761A of the *Corporations Act 2001*—a payment, or a transfer of property, by a party under the arrangement to discharge a net obligation is not to be void or voidable in the external administration; and
- (g) paragraphs (a) to (f) apply despite:
  - (i) any disposal of rights that may be netted under the arrangement; or
  - (ii) the creation of any encumbrance, or any other interest, in relation to those rights; or

- (iii) the operation of any encumbrance, or any other interest, in relation to those rights;  
in contravention of a prohibition in the arrangement.

## 20 Subsection 10(2) (note 1)

Repeal the note, substitute:

- Note 1: Paragraphs (2)(a) and (2)(aa)—These paragraphs only authorise the party to take action to arrive at a net obligation; they do not authorise the party to settle the net obligation by payment or transfer of property.

## 21 Subsection 10(3)

Repeal the subsection, substitute:

- (3) Subsections (1) and (2) have effect despite any other law (including the specified provisions and the specified stay provisions).

Note: Section 5 defines *specified provisions* and *specified stay provision*.

## 22 Before section 14

Insert:

## Division 1—Effectiveness of close-out netting contracts

## 23 After paragraph 14(1)(c)

Insert:

- (ca) security given over financial property, in respect of obligations of a party to the contract, may be enforced in accordance with the terms of the security, provided the terms of the security are evidenced in writing (but see section 14A);

## 24 Paragraph 14(1)(d)

Omit “paragraph (c) applies”, substitute “paragraphs (c) and (ca) apply”.

## 25 Subparagraph 14(1)(d)(ii)

After “those rights”, insert “or financial property mentioned in paragraph (ca)”.

**26 Subparagraph 14(1)(d)(iii)**

After “those rights”, insert “or that financial property”.

**27 Paragraph 14(1)(d)**

Omit “prohibition in the contract”, substitute “prohibition in the contract, or in the security mentioned in paragraph (ca)”.

**28 After paragraph 14(2)(f)**

Insert:

- (fa) security given over financial property, in respect of obligations of a party to the contract, may be enforced in accordance with the terms of the security, provided the terms of the security are evidenced in writing (but see section 14A);
- (fb) if:
  - (i) under section 267 or 267A of the *Personal Property Securities Act 2009* or section 588FL of the *Corporations Act 2001*, a security interest would, but for this paragraph, vest in the grantor before the external administration begins; and
  - (ii) where the security interest did not vest under one of those sections before the external administration begins, the security would be enforceable under paragraph (fa);the security interest does not vest under that section before the external administration begins;

**29 Paragraph 14(2)(g)**

Repeal the paragraph, substitute:

- (g) none of the following is to be void or voidable in the external administration:
  - (i) the netting or termination of obligations under the contract;
  - (ii) a payment by the party to discharge a net obligation under the contract;
  - (iii) the enforcement of security under paragraph (fa);
- (h) paragraphs (c) to (g) apply despite:
  - (i) any disposal of rights that may be netted under the contract; or

- (ii) the creation of any encumbrance, or any other interest, in relation to those rights or financial property mentioned in paragraph (fa); or
- (iii) the operation of any encumbrance, or any other interest, in relation to those rights or that financial property; in contravention of a prohibition in the contract, or in the security mentioned in paragraph (fa).

### 30 Subsections 14(3), (4) and (5)

Repeal the subsections, substitute:

- (3) Subsections (1) and (2) have effect in relation to a close-out netting contract:
  - (a) subject to a specified stay provision that applies to the contract; and
  - (b) despite any other law (including the specified provisions).

Note 1: Section 5 defines *specified provisions* and *specified stay provision*.

Note 2: Division 2 sets out the circumstances in which non-direction stays may cease.

- (4) A person may not rely on the application of subsection (1) or (2) to a right or obligation under a close-out netting contract if:
  - (a) the person acquired the right or obligation from another person with notice that that other person, or the other party to the contract, was at that time unable to pay their debts as and when they became due and payable; and
  - (b) the person acquired the right or obligation otherwise than as a result of the operation of section 22, 35 or 36R of the Business Transfer Act.
- (5) Subsection (1) or (2) does not apply to an obligation owed by a party to a close-out netting contract to another person if:
  - (a) the party goes into external administration; and
  - (b) the party acquired the obligation otherwise than as a result of the operation of section 22, 35 or 36R of the Business Transfer Act; and
  - (c) subsection (6) is satisfied.
- (6) This subsection is satisfied if any of the following are satisfied:



- (a) the other person did not act in good faith in entering into the transaction that created the terminated obligation;
  - (b) when that transaction was entered into, the other person had reasonable grounds for suspecting that the party was insolvent at that time or would become insolvent because of, or because of matters including:
    - (i) entering into the transaction; or
    - (ii) doing an act, or making an omission, for the purposes of giving effect to the transaction;
  - (c) the other person neither provided valuable consideration under, nor changed their position in reliance on, that transaction.
- (7) None of the following things done by a party to a close-out netting contract, while it is under statutory/judicial management and a specified stay provision applies to the contract, is to be void or voidable in an external administration:
- (a) making a payment, or transferring property, to another person to meet an obligation under the contract;
  - (b) creating rights or obligations in another person under the contract;
  - (c) giving any security to another person in relation to the contract;
  - (d) entering into one or more close-out netting contracts with another person;
  - (e) doing anything mentioned in paragraph (a), (b) or (c) under a close-out netting contract mentioned in paragraph (d).
- (8) Subsection (7) does not apply to a thing mentioned in that subsection done by a party to a close-out netting contract in relation to another person if:
- (a) the transaction did not result from the operation of section 22, 35 or 36R of the Business Transfer Act; and
  - (b) either of the following is satisfied:
    - (i) the other person did not act in good faith in entering into the transaction;
    - (ii) the other person neither provided valuable consideration under, nor changed their position in reliance on, the transaction.

- (9) If security is given over financial property, in respect of obligations of a party to a close-out netting contract, then:
- (a) subsection (3) applies in relation to the security in the same way as it applies in relation to the contract; and
  - (b) subsection (4) applies in relation to rights and obligations under the security in the same way as it applies in relation to rights and obligations under the contract; and
  - (c) subsection (5) applies in relation to an obligation owed by a party to the security in the same way as it applies in relation to an obligation owed by a party to the contract; and
  - (d) subsection (7) applies to things done by a party to the security in relation to the security, or a right or obligation under the security, in the same way as it applies in relation to things done by a party to the contract in relation to the contract, or a right or obligation under the contract.

### **31 After section 14**

Insert:

#### **14A Effectiveness of security given in respect of obligations under close-out netting contracts**

- (1) Paragraphs 14(1)(ca) and 14(2)(fa) apply to the enforcement of security over financial property, in respect of obligations of a party to a close-out netting contract, only to the extent that:
- (a) the obligations secured by the financial property, and discharged through the enforcement, are:
    - (i) eligible obligations in relation to the contract; or
    - (ii) obligations under the contract of a party to the contract to pay interest on an eligible obligation; or
    - (iii) obligations of a party to the contract to pay costs and expenses incurred in connection with enforcing security given in respect of an eligible obligation; and
  - (b) before the enforcement, the financial property is transferred or otherwise dealt with so as to be in the possession or under the control of:
    - (i) the secured person; or

- (ii) another person (who is not the grantor) on behalf of the secured person, under the terms of an arrangement evidenced in writing; and
- (c) the enforcement is carried out in a manner that complies with section 420A of the *Corporations Act 2001* (if it applies) and any applicable general law duties that are not inconsistent with the terms of the security.

Note: Section 5 defines *financial property*.

- (2) For the purposes of paragraph (1)(b), financial property is taken not to be in the possession or control of a person mentioned in that paragraph if, under the security, the grantor is free to deal with the financial property in the ordinary course of business until the secured person's interest in the financial property becomes fixed and enforceable.
- (3) Subsection (2) applies even if the secured person's interest in the financial property becomes fixed and enforceable before the enforcement of the security over that property mentioned in subsection (1).
- (4) Without limiting paragraph (1)(b), financial property is taken to be in the possession of a person for the purposes of that paragraph if:
  - (a) in a case where there is an issuer of the financial property—the person is registered by, or on behalf of, the issuer as the registered owner of the financial property; or
  - (b) in a case where the financial property is intermediated financial property—the person is the person in whose name the intermediary maintains the account.
- (5) Without limiting paragraph (1)(b), financial property is taken to be under the control of a person for the purposes of that paragraph if:
  - (a) the financial property is intermediated financial property; and
  - (b) the intermediary is not the grantor (but may be the secured person or any other person); and
  - (c) there is an agreement in force between the intermediary and one or more other persons, one of which is the secured person or the grantor; and
  - (d) the agreement has one or more of the following effects:

- (i) the person in whose name the intermediary maintains the account is not able to transfer or otherwise deal with the financial property;
    - (ii) the intermediary must not comply with instructions given by the grantor in relation to the financial property without seeking the consent of the secured person (or a person who has agreed to act on the instructions of the secured person);
    - (iii) the intermediary must comply, or must comply in one or more specified circumstances, with instructions (including instructions to debit the account) given by the secured person in relation to the intermediated financial property without seeking the consent of the grantor (or any person who has agreed to act on the instructions of the grantor).
  - (6) Without limiting paragraph (1)(b), the fact that a grantor retains a right of one or more of the following kinds does not of itself stop that paragraph from being satisfied:
    - (a) right to receive and withdraw income in relation to the financial property;
    - (b) right to receive notices in relation to the financial property;
    - (c) right to vote in relation to the financial property;
    - (d) right to substitute other financial property that the parties agree is of equivalent value for the financial property;
    - (e) right to withdraw excess financial property;
    - (f) right to determine value of financial property.
  - (7) The regulations may prescribe circumstances in which financial property is, or is not, transferred or dealt with so as to be in the possession or under the control of a person for the purposes of paragraph (1)(b).
  - (8) An obligation is an **eligible obligation** in relation to a close-out netting contract if the obligation is any of the following:
    - (a) an obligation under the contract of a party to the contract that relates to a derivative or foreign exchange contract or is of another prescribed kind;
    - (b) an obligation that results from the netting of 2 or more obligations that are created under the contract that:
-

- (i) must include at least one obligation covered by paragraph (a); and
  - (ii) may include one or more incidental obligations that, taken together, do not form a material part of the net obligation;
  - (c) an obligation declared by the regulations to be an eligible obligation in relation to a close-out netting contract.
- (9) However, an obligation is not an *eligible obligation* in relation to a close-out netting contract if it is declared by the regulations not to be an eligible obligation in relation to the contract for the purposes of this Act.

## **32 At the end of Part 4**

Add:

### **Division 2—Ceasing non-direction stays for derivatives contracts**

#### **15A Ceasing non-direction stays for derivatives contracts**

- (1) This section applies in relation to a close-out netting contract to which a regulated body is a party if:
- (a) an obligation under the contract of a party to the contract is an eligible obligation in relation to the contract or is of another prescribed kind; and
  - (b) a specified stay provision (other than a direction stay provision) applies to a trigger event that happens in relation to the contract.
- (2) This section also applies in relation to a security given over financial property, in respect of an obligation of a party to a close-out netting contract to which a regulated body is a party, if:
- (a) the obligation is an eligible obligation in relation to the contract, or an obligation of a prescribed kind; and
  - (b) a specified stay provision (other than a direction stay provision) applies to a trigger event that happens in relation to the contract.

- (3) A specified stay provision (other than a direction stay provision) ceases to apply to a close-out netting contract or a security:
- (a) at the time when a declaration under section 15B in relation to the contract or security takes effect; or
  - (b) at the end of the resolution period for the trigger event, if no declaration under section 15C in relation to the contract or security is made during that period.
- (4) The **resolution period** for a trigger event is the period starting when the trigger event happens and ending:
- (a) at midnight (by legal time in the Australian Capital Territory) at the end of the first business day after the day on which the trigger event happens, unless the specified stay provision is subsection 36AA(2) of the Business Transfer Act; or
  - (b) for subsection 36AA(2) of the Business Transfer Act:
    - (i) if APRA makes a declaration under subsection (5)—at the time the declaration is made; or
    - (ii) if a certificate of transfer under that Act comes into force—just after the certificate of transfer comes into force.

Note: Subsection 36AA(2) of the Business Transfer Act applies indefinitely if neither subparagraph (b)(i) nor (b)(ii) ends the resolution period.

- (5) If:
- (a) a trigger event happens to which subsection 36AA(2) of the Business Transfer Act applies; and
  - (b) the trigger event is the fact that an act is done for the purposes of Division 2 or 3 of Part 4 of that Act; and
  - (c) APRA is satisfied that APRA will not issue a certificate of transfer under that Act;

APRA may declare, in writing, that the resolution period for that trigger event ends.

- (6) A declaration under subsection (5) is not a legislative instrument.

### **15B When APRA may declare that non-direction stays cease**

- (1) Subsection (2) applies if:
- (a) a trigger event to which a specified stay provision (other than a direction stay provision) applies happens in relation to a

- close-out netting contract to which a regulated body is a party; and
- (b) APRA is satisfied that APRA will not make a declaration under section 15C in relation to a party before the end of the resolution period for the trigger event.
- (2) APRA may, before the end of the resolution period for the trigger event, declare that the specified stay provision is to cease to apply to:
- (a) all close-out netting contracts of the party; and
- (b) all securities given over financial property, in respect of obligations of the party under all close-out netting contracts of the party.
- (3) A declaration under subsection (2) takes effect:
- (a) if the declaration specifies a time before the end of the resolution period when the specified stay provision is to cease to apply—at the specified time; or
- (b) in any other case—at the time when the declaration is made.
- (4) A declaration under subsection (2) cannot be varied or revoked.
- (5) If a declaration under subsection (2) is in writing, the declaration is not a legislative instrument.
- (6) The regulations may do any of the following:
- (a) prescribe requirements relating to how declarations under subsection (2) are to be made (including requirements relating to the content or form of declarations);
- (b) prescribe requirements relating to the notification or publication of declarations under subsection (2);
- (c) include provisions that apply to determining, either generally or for a particular purpose, the time when declarations under subsection (2) are taken to be made.

Note: Regulations under paragraph (c) may (for example) provide that, for the purpose of this section, a declaration is taken not to have been made until certain requirements of regulations under paragraph (b) have been complied with.

### 15C When APRA may declare that non-direction stays continue

- (1) Subsection (2) applies if:
  - (a) a trigger event to which a specified stay provision (other than a direction stay provision) applies happens in relation to a close-out netting contract to which a regulated body is a party; and
  - (b) APRA is satisfied that all the matters in subsection (3) will be satisfied in relation to the party in respect of which the declaration under subsection (2) will be made:
    - (i) unless subparagraph (ii) applies—at the time the declaration will be made; or
    - (ii) if a certificate of transfer will come into force under the Business Transfer Act—just after that coming into force; and
  - (c) the party in respect of which the declaration under subsection (2) will be made is not in external administration (disregarding paragraphs (d), (e) and (f) of the definition of *external administration* in section 5); and
  - (d) APRA has not already made a declaration under section 15B.
- (2) APRA may, before the end of the resolution period for the trigger event, declare that the specified stay provision is to continue to apply to:
  - (a) unless paragraph (b) or (c) applies:
    - (i) all close-out netting contracts to which the regulated body is a party; and
    - (ii) all securities given over financial property, in respect of obligations under those close-out netting contracts; or
  - (b) if a certificate of transfer for a total transfer will come into force under the Business Transfer Act:
    - (i) all close-out netting contracts to which the receiving body (within the meaning of that Act) will become a party; and
    - (ii) all securities given over financial property, in respect of obligations under those close-out netting contracts; or
  - (c) if a certificate of transfer for a partial transfer will come into force under the Business Transfer Act—either or both of the following:



- (i) all close-out netting contracts to which the transferring body (within the meaning of that Act) is a party, and all securities given over financial property in respect of obligations under those contracts;
  - (ii) all close-out netting contracts to which the receiving body (within the meaning of that Act) will become a party, and all securities given over financial property in respect of obligations under those contracts.
- (3) For the purposes of paragraph (1)(b), the matters are as follows:
  - (a) that the party is able to meet all its liabilities under:
    - (i) close-out netting contracts to which it is a party; and
    - (ii) securities given over financial property in respect of obligations of the party under those contracts;as and when they become due and payable;
  - (b) that the party is solvent (within the meaning of the *Corporations Act 2001*);
  - (c) that the party has each material authorisation (however described) necessary for its regulated business;
  - (d) that either subsection (4) or subsection (5) is satisfied.
- (4) This subsection is satisfied if the party's level of capital complies with the minimum capital requirements that apply to it under:
  - (a) the *Banking Act 1959*, the *Insurance Act 1973* or the *Life Insurance Act 1995* (as the case requires); and
  - (b) the applicable prudential standards made under that Act.
- (5) This subsection is satisfied if:
  - (a) arrangements are in place to ensure that the party performs all its obligations under:
    - (i) close-out netting contracts to which it is a party; and
    - (ii) securities given over financial property in respect of obligations of the party under those contracts;as and when they are due to be performed; and
  - (b) those arrangements will remain in place until at least the earliest day on which one or more of the following occurs:
    - (i) subsection (4) is satisfied;
    - (ii) for subsection 15C(2) of the *Banking Act 1959* (ADI statutory manager in control)—APRA makes an

ultimate termination of control under subsection 13C(3) of that Act;

- (iii) for subsection 62V(2) of the *Insurance Act 1973* (judicial manager in control)—an order under section 62ZF of that Act cancelling the judicial management comes into force;
- (iv) for subsection 165B(2) of the *Life Insurance Act 1995* (judicial manager in control)—an order under section 172 of that Act cancelling the judicial management comes into force.

- (6) A declaration under subsection (2) cannot be varied or revoked.
- (7) A declaration under this section is not a legislative instrument.
- (8) The regulations may do any of the following:
  - (a) prescribe requirements relating to how declarations under subsection (2) are to be made (including requirements relating to the content or form of declarations);
  - (b) prescribe requirements relating to the notification or publication of declarations under subsection (2);
  - (c) include provisions that apply to determining, either generally or for a particular purpose, the time when declarations under subsection (2) are taken to be made.

Note: Regulations under paragraph (c) may (for example) provide that, for the purpose of this section, a declaration is taken not to have been made until certain requirements of regulations under paragraph (b) have been complied with.

### **33 Subparagraph 16(2)(g)(iii)**

Omit “to pay a deposit or margin call”.

### **34 After paragraph 16(2)(g)**

Insert:

- ; (h) paragraphs (c) to (g) apply despite:
  - (i) any disposal of rights that may be netted under the contract; or
  - (ii) any disposal of rights or property that may be transferred in accordance with the contract; or

- (iii) the creation of any encumbrance, or any other interest, in relation to those rights or property over which security mentioned in paragraph (fa) is given; or
- (iv) the operation of any encumbrance, or any other interest, in relation to those rights or that property; in contravention of a prohibition in the contract, or in the security mentioned in paragraph (fa).

### **35 Subsection 16(3)**

Repeal the subsection, substitute:

- (3) Subsections (1) and (2) have effect despite any other law (including the specified provisions and the specified stay provisions).

Note: Section 5 defines *specified provisions* and *specified stay provision*.

## Part 2—Other amendments

### *Banking Act 1959*

#### **36 After paragraph 11CD(1A)(c)**

Insert:

; (d) enforce any security under that contract.

#### **37 Subsection 11CD(1A)**

After “subsections (2) and (3)”, insert “of this section and section 31B”.

#### **38 At the end of subsections 13N(2) and 14AC(2)**

Add:

; (d) enforce any security under that contract.

#### **39 At the end of subsection 15C(2)**

Add:

; (d) enforce any security under that contract.

This subsection has effect subject to section 31B.

### *Financial Sector (Business Transfer and Group Restructure) Act 1999*

#### **40 Subsection 4(1)**

Insert:

*approved netting arrangement* has the same meaning as in the *Payment Systems and Netting Act 1998*.

*close-out netting contract* has the same meaning as in the *Payment Systems and Netting Act 1998*.

*market netting contract* has the same meaning as in the *Payment Systems and Netting Act 1998*.

#### **41 At the end of subsection 36AA(2)**

Add:

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; (d) enforce any security under that contract.

## **42 After section 36AA**

Insert:

### **36AB Partial transfer of netting contracts void**

- (1) This section applies if:
- (a) a certificate of transfer comes into force in respect of a partial transfer; and
  - (b) just before the partial transfer, the transferring body is a party to:
    - (i) a close-out netting contract; or
    - (ii) a security given over financial property, in respect of an obligation of the transferring body under a close-out netting contract; or
    - (iii) a market netting contract; or
    - (iv) a security given over property, in respect of an obligation of the transferring body under a market netting contract; or
    - (v) an approved netting arrangement; and
  - (c) the partial transfer covers some (but not all) of the following assets and liabilities:
    - (i) the assets and liabilities the body has, under the close-out netting contract, market netting contract or approved netting arrangement, with respect to another party to the contract or arrangement (the *counterparty*);
    - (ii) those assets that are property over which security is given in respect of an obligation of the transferring body under the close-out netting contract or the market netting contract.
- Note: The *Payment Systems and Netting Act 1998* affects what the assets and liabilities of a party to a close-out netting contract, market netting contract or approved netting arrangement are taken to include.
- (2) The partial transfer is void:
- (a) to the extent of the assets or liabilities the transferring body has, just before the partial transfer, under the close-out

- netting contract, market netting contract or approved netting arrangement, with respect to the counterparty; and
- (b) if security is given over financial property in respect of an obligation of the transferring body under a close-out netting contract—to the extent that the assets are financial property in the possession or control of one of the following persons just before the partial transfer:
    - (i) the counterparty;
    - (ii) another person (who is not the transferring body) on behalf of the counterparty, under the terms of an arrangement evidenced in writing; and
  - (c) if security is given over property in respect of an obligation of the transferring body under a market netting contract—to the extent that the assets are that property.

### ***Insurance Act 1973***

#### **43 At the end of subsections 62V(2), 62ZB(2) and 103K(2)**

Add:

- ; (d) enforce any security under that contract.

#### **44 After paragraph 105(1A)(c)**

Insert:

- ; (d) enforce any security under that contract.

### ***Life Insurance Act 1995***

#### **45 At the end of subsections 165B(2), 168C(2) and 230AJ(2)**

Add:

- ; (d) enforce any security under that contract.

#### **46 After paragraph 230C(1A)(c)**

Insert:

- ; (d) enforce any security under that contract.

***Private Health Insurance (Prudential Supervision) Act 2015***

**47 After paragraph 101(2)(c)**

Insert:

; (d) enforce any security under that contract.

## Part 3—Application

### 48 Application of amendments

- (1) In this item:  
*start time* means the commencement of this Schedule.
- (2) The amendments made by Part 1 apply in relation to approved netting arrangements, market netting contracts and close-out netting contracts entered into after the start time, or that are in existence immediately before the start time.
- (3) Subject to subitem (6), the amendments made by Part 1 do not apply in relation to an external administration that commenced before the start time.
- (4) The amendments made by Part 1 apply in relation to trigger events that occur for a close-out netting contract after the start time.
- (5) The following do not apply to disposals of rights or property, or the creation or operation of encumbrances or interests, before the start time:
  - (a) the amendments made by items 24 to 27;
  - (b) paragraph 10(2)(g) of the *Payment Systems and Netting Act 1998*, as inserted by item 19;
  - (c) paragraph 14(2)(h) of the *Payment Systems and Netting Act 1998*, as inserted by item 29;
  - (d) paragraph 16(2)(h) of the *Payment Systems and Netting Act 1998*, as inserted by item 34.
- (6) The amendment made by item 30 applies in relation to a person being in external administration, whether the external administration commences before or after the start time.
- (7) The amendment made by item 42 applies to a partial transfer if the certificate of transfer comes into force after the start time.
- (8) The amendments made by Parts 1 and 2 apply in relation to the enforcement of a security after the start time, even if the security was given before the start time.



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*[Minister's second reading speech made in—  
House of Representatives on 16 March 2016  
Senate on 3 May 2016]*

*(54/16)*

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