

MINISTERIAL TRADE REPORTING DETERMINATION SECTION 901B(2) CORPORATIONS ACT 2001

EXPLANATORY STATEMENT

Prepared by the Australian Treasury

Corporations Act 2001

Corporations (Derivatives) Determination 2013

1. The Hon Wayne Swan MP, Deputy Prime Minister and Treasurer (DPMT) makes this determination dated under paragraph 901B(2) of the *Corporations Act 2001* (the Act).
2. Paragraph 901B(2) of the Act provides that the Minister may, by legislative instrument, determine one or more classes of derivatives in relation to which execution requirements, reporting requirements, or clearing requirements may be imposed.
3. The date of commencement of this Determination is the day following registration on the Federal Register of Legislative Instruments (FRLI).

Background

4. Paragraph 901B(2) of the legislation provides that the Minister can make a Determination allowing the Australian Securities and Investments Commission (ASIC) to make rules requiring trade reporting in the prescribed classes of derivatives.
5. This provision was inserted into the Act by the Corporations Legislation Amendment (Derivatives Transactions) Act 2012 (the legislation), which was passed in the Spring 2012 Sittings of Parliament and came into effect from 1 January 2013. The legislation introduced a legislative framework allowing the Minister to mandate data reporting, central clearing or platform trading requirements for classes of OTC derivatives transactions, and allows ASIC to write rules that specify the details of any mandatory requirements. The legislative framework also allows ASIC to write rules regulating the licensing and operations of trade repositories.
6. To give effect to the Determination, ASIC is tasked with developing 'derivative transaction rules'. These rules will clarify matters such as the institutional and product scope of the obligation, as well as details of how any relevant mandatory obligations can be complied with. ASIC's decisions to make rules for a class of derivatives will be subject to public consultation. Rules will require the consent of the Minister and will be disallowable legislative instruments. Further, the scope of rules and other technical features

of the scheme may be further limited by regulations, under section 903C of the Act.

7. The legislation also establishes a licensing regime for derivative trade repositories, largely modelled on the existing licensing regimes for market operators and clearing and settlement facilities under the Act. ASIC will have primary responsibility for administering this regime and overseeing any trade repositories licensed under the regime, as well as making 'derivative trade repository rules' under section 903A to govern the conduct of those repositories, in addition to issuing and imposing conditions on individual trade repository licensees.

Purpose of the Ministerial Determination

8. The purpose of this Determination is to empower ASIC, under the Act, to make derivative transaction rules necessary for the implementation of Australia's trade reporting regime, in line with the approach taken internationally and in a manner that takes into account domestic market developments.

Operation of the Ministerial Determination

9. This Determination empowers ASIC, under section 901B(2) of the Act, to make rules requiring the reporting of interest rate, foreign exchange, credit, equity and all commodity derivatives with the exception of electricity derivatives to licensed trade repositories, where these exist.
10. The five derivatives classes in the Determination are intended to align with generally used industry derivatives taxonomies, such as those issued by the International Swaps and Derivatives Association for over the counter (OTC) Derivatives Taxonomies.
11. The broad-based nature of the Determination gives ASIC the flexibility in scope to impose reporting requirements on specific entities and for specific products as required, commensurate with stakeholder consultation feedback, and the implementation of trade reporting arrangements in other jurisdictions.
12. The flexibility also extends to the timing of the imposition of trade reporting obligations. It is expected that the trade reporting obligation will be phased in, with the timing of implementation left to ASIC to determine in consultation with stakeholders and with regard being had to the technical challenges that emerge with respect to particular market participants and derivative classes.
13. In developing the rules, ASIC will need to undertake a consultation process with industry as specified under section 901J. As commodity derivatives (except for electricity derivatives) are included in the Determination, ASIC will be required to consider the impact of the rules on the underlying commodity market prior to finalising the derivative transaction rules. To fulfill

this requirement, ASIC would be expected to consult with commodity market stakeholders, industry groups and regulators in the development of the derivative transaction rules. In addition, there are requirements to prepare regulation impact assessments with respect to this rule making mandate.

14. Restrictions on the coverage of any rules can be provided for by regulations.
15. Electricity derivatives are excluded from the Determination; their future inclusion will be considered following the completion of the Australian Energy Market Commission's (AEMC) financial resilience review, due to report in 2013.
16. While it is proposed that there be a broad-based determination requiring reporting of derivative trades in the first quarter of 2013, the obligations would be phased in through ASIC rule-making.

Statement of Compatibility with Human Rights

17. This instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.
18. A Statement of Compatibility with Human Rights in relation to the trade reporting regime generally is provided at page 55 of the Revised Explanatory Memorandum to the Corporations Legislation Amendment (Derivatives Transactions) Act 2012.

Consultation

19. Consultation on proposals for the prescription of the derivatives for trade reporting rule making purposes commenced on 12 December, with a 15 February 2013 close, by way of the Treasury discussion paper *Implementation of Australia's G-20 over-the-counter derivatives commitments*. The proposals were based on recommendations provided by the Australian Prudential Regulatory Authority, ASIC and the Reserve Bank of Australia contained in the Regulators' Report published in October 2012.
20. Overall 23 formal submissions were received, comprising 20 public submissions and 3 confidential submissions. Respondents included market participants, financial and other professional service providers, financial institutions, financial industry associations, and energy sector firms and associations.
21. Stakeholder submissions were broadly supportive of the Government's approach towards implementing its G-20 OTC derivatives commitments and agreed with the importance of the commitments being implemented in a globally coordinated, least cost manner.

22. Energy sector respondents were comfortable with the position of delaying any decision on the introduction of mandatory trade reporting for electricity derivatives until after the AEMC's financial resilience review had been completed.
23. The Minister for Resources and Energy has been consulted separately on this Determination, given the Determination includes commodity derivatives in ASIC's rule making power.

Regulatory Impact Statement

24. A regulatory impact statement on the proposed trade reporting reforms has been judged as compliant by the Office of Best Practice Regulation (ref: 13512).