

Australian Securities and Investments Commission

Corporations Act 2001—Paragraph 926A(2)(c)—Declaration

Enabling Legislation

1. The Australian Securities and Investments Commission makes this instrument under paragraph 926A(2)(c) of the *Corporations Act 2001* (the *Act*).

Title

2. This instrument is ASIC Class Order [CO 13/1410].

Commencement

3. This instrument commences on the later of:
 - (a) the date it is registered under the *Legislative Instruments Act 2003*;
 - (b) 2 January 2014.

Note: An instrument is registered when it is recorded on the Federal Register of Legislative Instruments (*FRLI*) in electronic form: see *Legislative Instruments Act 2003*, section 4 (definition of *register*). The FRLI may be accessed at <http://www.frli.gov.au/>.

Declarations

4. Part 7.6 of the Act other than Divisions 4 and 8 applies in relation to a financial services licensee as if it were modified or varied by inserting the following section in its relative order in Division 3 of Part 7.6.

“912AAC Minimum standards for providers of custodial or depository services

- (1) This section applies to a financial services licensee that is authorised to provide a custodial or depository service.
- (2) The financial services licensee must do all things necessary to ensure that:
 - (a) custodial property it holds is held on trust for its client unless the custodial property is held under Division 2 or 4 of Part 7.8; and
 - (b) any custodial property held by a person the financial services licensee directly or indirectly engages is held on trust unless the custodial property is held under Division 2 or 4 of Part 7.8; and
 - (c) where the custodial property is held in providing a custodial or depository service on the financial services licensee’s behalf, the custodial property is held on trust for the financial services

licensee unless the custodial property is held under Division 2 or 4 of Part 7.8.

- (3) Subsection (2) does not apply where any of the following apply:
- (a) where both of the following apply:
 - (i) the property is located in a place outside of this jurisdiction where trusts are not known to the law; and
 - (ii) it is reasonable for the property to be held in accordance with the law in that place;
 - (b) where both of the following apply:
 - (i) the property is located in a place outside of this jurisdiction and it is not reasonable for the property to be held on trust in accordance with the law in that place;
 - (ii) the financial services licensee has documented in writing that:
 - (A) it is satisfied that the property is held in a manner that, having regard to the relevant laws, provides reasonably effective protection in case of insolvency of the person holding the property; and
 - (B) the basis on which it is satisfied;
 - (c) the property is held under an arrangement that is exempted from paragraph 984B(1)(a) under ASIC Class Order [CO 03/1110] or where an exemption from paragraph 981B(1)(c) applies to the holding under ASIC Class Order [CO 03/1112];
 - (d) where a person is providing a custodial or depository service as an authorised representative of the financial services licensee by holding custodial property on trust for the client of the financial services licensee if:
 - (i) the financial services licensee is liable to the client for the acts and omissions of the authorised representative as if they were the acts or omissions of the financial services licensee; and
 - (ii) revenue received from the client in relation to the provision of the custodial or depository service is revenue of the financial services licensee.
- (4) The financial services licensee must have reasonable procedures for receiving instructions from the client in relation to the custodial property

that include how the instructions are given and reasonable controls to ensure that the instructions are properly authorised and carried out.

- (5) The financial services licensee must ensure that it and do all things necessary to ensure that any person the financial services licensee directly or indirectly engages to hold custodial property:
- (a) as far as practicable identifies the custodial property as property held on behalf of the person for whom it is held; and
 - (b) holds the custodial property separately from property in which the financial services licensee or the person holding the custodial property has an interest and from the property of any other person other than the client except in relation to custodial property that comprises:
 - (i) a deposit taking facility of a body carrying on a business of accepting money on deposit including rights under that facility; or
 - (ii) securities; or
 - (iii) derivatives;

held separately from property in which the person holding the property or the financial services licensee has an interest other than as a trustee for a person that is not the financial services licensee, except where property is not held separately to comply with paragraph (6)(f).
- (6) The financial services licensee must do all things necessary to ensure that, if custodial property is not held separately from property in which the financial services licensee or the person holding the custodial property has an interest and separately from the property of any other person other than the client:
- (a) the financial services licensee has put in place and keeps for 7 years after it was last relied on, a written policy in relation to not holding custodial property separately which sets out its reasons why that policy is appropriate having regard to any extent to which it might expose its clients to the risks arising from the custodial property not being held separately and its duties to each client; and
 - (b) the financial services licensee reviews the policy at least every 13 months, prepares a written record of the outcome of the review and keep that record for 7 years; and

- (c) adequate records are kept at all times showing each client's entitlement to property that includes the custodial property not held separately; and
 - (d) reconciliation procedures are performed on each business day in relation to the custodial property not held separately or if because of the nature of the property, it is ordinary and reasonable commercial practice in the place where the property is located to reconcile property of that kind less frequently, as frequently as would be performed in accordance with that practice; and
 - (e) not holding the custodial property separately does not restrict the ability of the financial services licensee to meet any obligation it has to act on directions of the client to exercise powers the holder has in relation to the property including in relation to voting rights; and
 - (f) if the property that includes the custodial property is not sufficient to meet the entitlements of all persons in relation to that property, the insufficiency ceases by the second business day after the insufficiency arises, whether through the provision of additional property by the financial services licensee or otherwise.
- (7) The financial services licensee must:
- (a) have an organisational structure that supports compliance with subsection (5)(b); and
 - (b) segregate custodial staff from persons performing other functions, in a way that minimises the potential for conflict, if a conflict of interest exists or might arise between:
 - (i) their duties as custodial staff; and
 - (ii) the interests served or advanced by persons who perform duties to make investment decisions, trading decisions or other discretionary decisions resulting in the transfer or disposal of custodial property other than discretionary decisions in relation to holding a deposit account with a corporation that is regulated for the taking of deposits where the balance of the deposit account is payable on demand and discretionary decisions relating to buying or selling foreign currency; and
 - (c) have a documented policy that is:
 - (i) approved by its directors or governing body, or a senior manager authorised to give approval on behalf of the directors or governing body or, in the case of a foreign company that is carrying on business in this jurisdiction or

registered under Division 2 of Part 5B.2, its most senior officer or employee in this jurisdiction with responsibility for managing the functions of custodial staff; and

- (ii) designed to ensure that custodial staff are not influenced because of a conflict mentioned in paragraph (b) to act other than in accordance with their duties; and
- (d) undertake reasonable checks to find out and document if there has been any attempt to inappropriately influence custodial staff and take reasonable action in the event this happens; and
- (e) structure its business so that:
 - (i) custodial staff can report, directly or through other custodial staff, to the client if the client is a natural person or otherwise to the directors or the governing body of the client or, where the client is a foreign company, the most senior officer or employee of the client in this jurisdiction with duties that relate to the assets in relation to which the custodial staff perform functions; and
 - (ii) the duties of:
 - (A) direct managers of custodial staff; and
 - (B) indirect managers of custodial staff that are not the most senior officer or employee of the financial services licensee in this jurisdiction, or a jurisdiction in which the custodial property is located; and
 - (C) custodial staff;

do not extend to other functions that may create conflicts of interest including that custodial staff and those managers are not responsible for investment decisions, trading decisions or other discretionary decisions resulting in the transfer or disposal of custodial property other than discretionary decisions in relation to holding a deposit account with a corporation that is regulated for the taking of deposits where the balance of the deposit account is payable on demand and discretionary decisions relating to transactions in foreign currency; and

- (iii) custodial staff and persons involved in investment decisions, trading decisions or other discretionary decisions resulting in the transfer or disposal of custodial property other than discretionary decisions in relation to holding a deposit account with a corporation that is

regulated for the taking of deposits where the balance of the deposit account is payable on demand and discretionary decisions relating to transactions in foreign currency are located sufficiently separately during the performance of their duties to reduce, so far as reasonably practicable, the risk of inappropriate influence on decisions relating to holding of custodial property.

- (8) The financial services licensee must ensure that:
- (a) custodial staff have the knowledge and skills necessary to perform their duties properly; and
 - (b) ongoing training and educational programs are provided to custodial staff that provide reasonable assurance to the financial services licensee that the custodial staff have knowledge that remains at a level necessary for performing their duties including knowledge of a financial services licensee's obligations under this Part to the extent relevant to enable the custodial staff to perform their particular duties; and
 - (c) custodial staff have the necessary time and authority to perform their duties as custodial staff; and
 - (d) resources are made available to custodial staff to the extent necessary for them to adequately perform their duties as custodial staff.
- (9) The financial services licensee must do all things necessary to ensure that subsections (7) to (8) are complied with by any person engaged directly or indirectly by the financial services licensee to hold custodial property as if the person were the licensee, except to the extent that, in relation to assets outside this jurisdiction, it is not reasonably practicable for the financial services licensee to do all things necessary to ensure that the person does a particular thing.
- (10) The financial services licensee must keep for 7 years records demonstrating how it complies with subsections (2) to (9).
- (11) If the financial services licensee engages a sub-custodian, the financial services licensee must set out in writing and implement a reasonable process to monitor and assess the sub-custodian's performance of its obligations as a sub-custodian and do all things necessary to ensure that the sub-custodian sets out in writing and implements a reasonable process to monitor and assess the performance of obligations of any person directly or indirectly engaged by the sub-custodian to hold custodial property.
- (12) The financial services licensee must do all things necessary to ensure that if it or a person it directly or indirectly engages to hold custodial property

is involved in discretionary decisions concerning a deposit account, the licensee or that person has set out in writing and implements reasonable processes for:

- (a) determining which account to use; and
 - (b) monitoring performance by the issuer of the account of the issuer's obligations in relation to that account; and
 - (c) taking action in case of failure by the issuer of the account of the issuer's obligations in relation to that account.
- (13) The financial services licensee must keep records of custodial property it holds in a way that enables the holding of the custodial property by the licensee to be conveniently and properly audited by an auditor acting for the client and do all things necessary to ensure that such records are kept in relation to custodial property that is held by a person it directly or indirectly engages.
- (14) The financial services licensee must:
- (a) review the appropriateness of the written processes that exist to comply with subsection (11) and if applicable subsection (12) at least once in every 13 months; and
 - (b) as directed by ASIC in writing, arrange for a report on the effectiveness of or the reasonableness of any of the processes to be prepared and given to ASIC.

The written direction may specify who is to prepare the report and the time by which it must be given to ASIC.

- (15) A financial services licensee that complies with this section is taken to comply with conditions (if any) of its Australian financial services licence that refers to ASIC Policy Statement 133 or ASIC Regulatory Guide 133 as applying on a certain date.
- (16) In this section and in sections 912AAD and 912AAE:

custodial property means a financial product or a beneficial interest in a financial product that is held in providing a custodial or depository service; and

custodial staff means, in relation to a financial services licensee, natural persons who under an arrangement with the licensee have duties relating to holding custodial property, record keeping relating to custodial property, checking authorisations for instructions to transact in custodial property or functions incidental to these functions other than making investment decisions, trading decisions or other discretionary decisions resulting in the transfer or disposal of custodial property other than

discretionary decisions in relation to holding a deposit account with a corporation that is regulated for the taking of deposits where the balance of the deposit account is payable on demand and discretionary decisions relating to transactions in foreign currency.

sub-custodian means, in relation to a financial services licensee, a person the licensee engages to hold custodial property.

- (17) For the purposes of this section and sections 912AAD and 912AAE:
- (a) a person (***first person***) engages another person if the first person engages or authorises the other person; and
 - (b) a person (***first person***) indirectly engages another person (***second person***) if:
 - (i) the first person engages a person and that person engages the second person; or
 - (ii) a person who is indirectly engaged by the first person under subparagraph (i) or this subparagraph (ii) engages the second person.”.

5. Part 7.6 of the Act other than Divisions 4 and 8 applies in relation to a financial services licensee as if it were modified or varied by inserting the following section in its relative order in Division 3 of Part 7.6:

“912AAD Agreements with sub-custodians to hold custodial property

- (1) A financial services licensee that engages a sub-custodian to hold custodial property must ensure that it has a written agreement with the sub-custodian that meets the requirements of subsections (2) to (4) except:
 - (a) to the extent that, in relation to custodial property held outside of this jurisdiction, the financial services licensee holds documents that demonstrate that it is not reasonably practicable to engage another person to hold the custodial property who is willing to include such matters in the agreement; or
 - (b) where the sub-custodian is controlled by the financial services licensee and the financial services licensee is liable to its client for the acts and omissions of the sub-custodian as if they were the acts or omissions of the financial services licensee.
- (2) The agreement with the sub-custodian must have provisions:
 - (a) specifying reasonable rights that the financial services licensee has for the ongoing review and monitoring of the sub-custodian and any person that the sub-custodian directly or indirectly

engages and the standards against which their performance will be assessed; and

- (b) to the effect that the sub-custodian must certify to the financial services licensee in writing at least every 13 months that the sub-custodian believes on reasonable grounds that the sub-custodian and each person engaged directly or indirectly by the sub-custodian to hold the custodial property have met since the date of the previous statement in writing or the commencement of the agreement, and the sub-custodian has no reason to believe that the sub-custodian and each such person will not continue to meet:

- (i) in the case of the sub-custodian, the terms of the agreement; and
- (ii) in any case, the requirements that the financial services licensee must do all things necessary to ensure under subsections 912AAC(5) to (9), (11) and (13) are met by the sub-custodian or such a person in relation to custodial property held by the sub-custodian or such a person (except to the extent that the licensee is not complying with a requirement under paragraphs 912AAC(6)(a) or (b) and the sub-custodian is not aware of any non-compliance);

other than:

- (iii) as disclosed in writing to the financial services licensee; or
- (iv) that the sub-custodian reasonably believes are trivial, and

the sub-custodian acknowledges that it or the person must continue to meet those obligations; and

- (c) to the effect that the sub-custodian must
- (i) acknowledge to the financial services licensee or as requested by the financial services licensee:
- (A) the person for whom the custodial property is held on trust; and
- (B) that the custodial property is held for that person; and
- (ii) notify any other person that the property is so held where the sub-custodian is aware to do so might protect the rights or equitable interest of the person for whom the custodial property is held unless the financial services licensee directs in writing otherwise; and

- (d) specifying how instructions will be given by the financial services licensee to the sub-custodian; and
- (e) to the effect that the sub-custodian must not take or grant a security interest, mortgage, lien or other encumbrance over, or in relation to, the custodial property held under the agreement unless it is in accordance with the agreement and does not cover unpaid fees of the sub-custodian; and
- (f) specifying how the sub-custodian will maintain records of the custodial property to which the agreement relates and the transactions in relation to that custodial property including by whom, when and how transactions were authorised; and
- (g) specifying procedures for reconciliation each business day or, if it is ordinary and reasonable commercial practice in the place the custodial property is located to reconcile certain property less frequently, in accordance with that practice, by checking information the sub-custodian is given as to the existence and quantity of the custodial property against the records of the sub-custodian and for reporting by the sub-custodian to the financial services licensee concerning the outcomes of the reconciliation in case of any unreconciled matter; and
- (h) to the effect that the sub-custodian must provide all reasonable access and assistance to any auditor engaged to audit the financial services licensee's financial statements or to check the financial services licensee is complying with its agreement with its client; and
- (i) to the effect that the sub-custodian will provide the financial services licensee with written notice of and contact information of any other person holding custodial property or to be engaged by the sub-custodian to hold custodial property:
 - (i) as soon as reasonably practicable; and
 - (ii) in any event before the assets are held, except in exceptional circumstances identified in the agreement; and
- (j) to the effect that the financial services licensee may terminate the agreement without:
 - (i) payment other than in relation to entitlements previously accrued or the reasonable expenses involved in transfer of the assets to the financial services licensee or another sub-custodian; and
 - (ii) limiting any right to damages the financial services licensee may have under the agreement, including

recovering expenses referred to in subparagraph (i) if the sub-custodian is in breach;

if the financial services licensee has reasonable grounds for believing that:

- (iii) there is or has been an act or omission of the sub-custodian or any other person engaged directly or indirectly by the sub-custodian to hold custodial property that results in the sub-custodian being in breach of the agreement; and
- (iv) as a result of the act or omission, to a material extent the sub-custodian or any other person engaged directly or indirectly by the sub-custodian is not complying with or is unlikely to comply with the requirements that the financial services licensee must do all things necessary to ensure under subsections 912AAC(5) to (9), (11) and (13) are met by the sub-custodian or the person in relation to custodial property held by the sub-custodian or that the sub-custodian arranged to be held, having regard to any remedy provided or that may be expected to be provided by the sub-custodian or the person; and
- (k) to the effect that on termination of the engagement, the custodial property must be transferred to the persons for whom the custodial property is held or as they direct within a reasonable period subject to reasonable provisions for the obligations of the parties at termination, including the payment of outstanding fees and charges to the sub-custodian and any costs of the transfer; and
- (l) to the effect that the sub-custodian must notify material or systemic breaches of the agreement by it or by the financial services licensee in writing to the financial services licensee within a reasonable time of becoming aware of the breach; and
- (m) specifying the terms on which the sub-custodian is authorised to engage another person to hold the custodial property to which the agreement relates and providing that any such engagement must be either:
 - (i) under a written agreement meeting the requirements of subsections (2) to (4) (including this subparagraph and subparagraph (ii)) as if that other person were the sub-custodian and the sub-custodian were the financial services licensee, except to the extent that, in relation to assets held outside of this jurisdiction, the sub-custodian has provided written reasons to the financial services licensee as to why it reasonably considers that it is not

practicable to engage a person that is willing to include such matters in the agreement; or

- (ii) an arrangement with a related body corporate of the sub-custodian, where the sub-custodian has a written agreement with the financial services licensee that it is liable to the financial services licensee for the acts and omissions of the related body corporate as if those acts and omissions were the acts or omissions of the sub-custodian; and
 - (n) to the effect that the sub-custodian must establish and maintain business continuity arrangements that are reasonable for a business of the nature, scale and complexity of the sub-custodian's business; and
 - (o) to the effect that the sub-custodian must not disclose any confidential information relating to the custodial property, apart from any disclosure to ASIC or as required or permitted by law or by the financial services licensee in writing.
- (3) The financial services licensee must ensure that the agreement with the sub-custodian has reasonable liability provisions and does not include provisions that exclude the liability of the sub-custodian for direct loss that it would have if the exclusion were not included except in particular circumstances that the financial services licensee considers to be reasonable and contains, if appropriate, reasonable indemnity provisions in relation to losses caused to the financial services licensee or to its client or clients by the sub-custodian's acts and omissions that relate to that agreement.
- (4) A financial services licensee who arranges for a sub-custodian to hold custodial property must:
- (a) not permit, under the agreement with the sub-custodian or otherwise, the granting of a security interest, mortgage, lien or other encumbrance in favour of the financial services licensee or its associates unless the financial services licensee reasonably believes for reasons it has recorded in writing that any conflict that may arise as a result of the security interest, mortgage, lien or encumbrance will not materially increase the risks that the sub-custodian will fail to meet its obligations; and
 - (b) keep the written record of reasons for 7 years after the security interest, mortgage, lien or encumbrance has ceased.
- (5) A financial services licensee that complies with this section in relation to an arrangement with a sub-custodian is taken to comply with any condition on its Australian financial services licence concerning the arrangement.”.

6. Part 7.6 of the Act other than Divisions 4 and 8 applies in relation to a financial services licensee as if it were modified or varied by inserting the following section in its relative order in Division 3 of Part 7.6:

“912AAE Agreements with retail clients for custodial or depository services

A financial services licensee that enters into or varies an arrangement to provide a custodial or depository service to a person as a retail client on or after 1 November 2015 must have a written agreement with the person that contains provisions:

- (a) for the licensee to acknowledge to the retail client on request the manner in which it holds the custodial property; and
- (b) specifying how instructions are to be given to the licensee; and
- (c) to the effect that the licensee is liable to the client if there is a loss to the client due to a failure by the licensee or a person it directly or indirectly engages to hold custodial property, in which the retail client has a beneficial interest, to comply with the duties under the agreement or other agreement relating to holding the custodial property or to observe reasonable standards generally applied by providers of custodial or depository services for holding the property held subject to any provision for the licensee to limit its liability resulting from failure of a person it has directly or indirectly engaged if that person is insolvent and the licensee has not failed to take reasonable care in engaging and monitoring compliance by that person; and
- (d) to the effect that the licensee is prohibited from taking or granting a charge, mortgage, lien or other encumbrance over, or in relation to, the assets held under the arrangement unless it is:
 - (i) for expenses and outlays made within the terms of the agreement other than any unpaid fees of the licensee; or
 - (ii) in accordance with the client’s written instructions; and
- (e) specifying how records of the assets held, the transactions and how, by whom and when they were authorised will be kept and maintained by the licensee and made available to the client; and
- (f) to that effect that the licensee will apply verification procedures for the appropriately frequent reconciliation and checking of the property; and
- (g) requiring reporting by the licensee to the client; and
- (h) to the effect that where practicable before arranging for the custodial property to be held by another person and in any event

before the assets are held by the other person, except in exceptional circumstances identified in the agreement, the licensee will provide the client with written notice of the identity of, and contact details of, the other person; and

- (i) to the effect that on termination, subject to any lien in accordance with the agreement or written instructions of the client, the assets must be transferred to the client or otherwise be transferred as the client lawfully directs within a reasonable time; and
- (j) to the effect that the licensee has and must maintain adequate arrangements to enable it to provide the services under the agreement in any contingency for which it should reasonably plan; and
- (k) to the effect that the licensee will keep any information of a confidential nature in confidence, apart from any disclosure to ASIC or as permitted by law or by the client.”.

Transitional Periods

- 7. Paragraph 4 does not apply to a person, who holds an Australian financial services licence authorising the person to provide a custodial or depository service before 2 January 2014, until 2 January 2015.
- 8. Paragraph 5 does not apply to a person, who holds an Australian financial services licence authorising the person to provide a custodial or depository service before 2 January 2014, until 1 November 2015.

Dated this 21st day of November 2013

Signed by Anthony Graham
as a delegate of the Australian Securities and Investments Commission