

## ASIC INSTRUMENT [14/0633]

### EXPLANATORY STATEMENT

Prepared by the Australian Securities and Investments Commission

*Corporations Act 2001*

The Australian Securities and Investments Commission (**ASIC**) makes ASIC Instrument [14/0633] (the **Legislative Instrument**) under paragraph 907D(2)(a) of the *Corporations Act 2001 (Act)*.

Under paragraph 907D(2)(a) of the Act, ASIC may exempt a person or class of persons from all or specified provisions of the derivative transaction rules. ‘Derivative transaction rules’ are rules made by ASIC under subsection 901A(1) of the Act.

An exemption may apply unconditionally or subject to specified conditions, and a person to whom a condition specified in an exemption applies must comply with the condition (see subsection 907D(3) of the Act). An exemption under paragraph 907D(2)(a) is a legislative instrument if it is expressed to apply in relation to a class of persons (see subsection 907D(4) of the Act).

#### 1. Background

In July 2013, ASIC, acting with the consent of the Minister under section 901K of the Act, made the *ASIC Derivative Transaction Rules (Reporting) 2013 (Rules)* under subsection 901A(1) of the Act. The Rules impose reporting requirements (within the meaning of subsection 901A(6) of the Act), and incidental and related requirements (within the meaning of paragraph 901A(2)(d) of the Act), on ‘Reporting Entities’.

The Rules seek to:

- give effect to one of the key commitments<sup>1</sup> made by the Australian Government at the Group of Twenty (**G20**) summit in Pittsburgh in 2009, namely to the reporting (referred to as ‘transaction reporting’) of transaction information on all OTC derivatives to ‘trade repositories’ (centralised registries that maintain an electronic database of records of transactions);
- implement an Australian transaction reporting regime in accordance with the recommendations in the March 2012 report of the Council of Financial Regulators (**CoFR**) entitled *OTC Derivatives Market Reform Considerations*; and
- achieve the objectives of the *Corporations Legislation Amendment (Derivative Transactions) Act 2012*, by increasing transparency in the OTC derivatives markets and giving regulators and market participants access to valuable data with which to assess the risks associated with the OTC derivatives market.

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<sup>1</sup> Australia is implementing the G20 commitments to OTC derivative reforms in close coordination with peer jurisdictions. Transaction reporting regimes are being developed concurrently by regulators overseas, including the US Commodity Futures Trading Commission (**CFTC**), the US Securities and Exchange Commission (SEC), the European Securities and Markets Authority, the Hong Kong Securities and Futures Commission (HK SFC) and the Monetary Authority of Singapore (MAS), for their respective jurisdictions.

Under Rule 2.2.1 of the Rules, ‘Reporting Entities’ are required to report information about their Derivative Transactions in ‘OTC Derivatives’ (referred to in the Rules as ‘Reportable Transactions’), and positions in relation to OTC Derivatives (referred to in the Rules as ‘Reportable Positions’) to a Licensed Repository or a Prescribed Repository. These requirements are referred to as the ‘Reporting Requirements’.

Rule 1.2.4 provides a definition of ‘OTC Derivative’ for the purposes of the Rules. A Derivative is an ‘OTC Derivative’ if the Derivative is in a Prescribed Class (i.e. in the class of Derivatives that the Minister has determined, under section 901B of the Act, is a class of Derivatives in relation to which Reporting Requirements may be imposed and that determination has not been revoked)<sup>2</sup>. However, a Derivative is not an ‘OTC Derivative’ if it is traded on a ‘Part 7.2A Market’ (i.e. a financial market subject to ‘frontline’ supervision by ASIC under Part 7.2A of the Act), or a financial market in a foreign jurisdiction (referred to in the Rules as a ‘Regulated Foreign Market’) that ASIC has determined is subject to supervision and requirements that are sufficiently equivalent, in relation to market integrity and market transparency, to the supervision and requirements to which a Part 7.2A Market is subject. On 13 September 2013, ASIC made a determination of 51 Regulated Foreign Markets under Rule 1.2.4 (see the ASIC Regulated Foreign Markets Determination [OTC DET 13/1145]).

Rule 1.2.5 defines ‘Reportable Transaction’ in relation to each kind of Reporting Entity. Table 1 below summarises the definitions in Rule 1.2.5.

**Table 1 – Reporting Entities and Reportable Transactions**

Reporting Entity	Reportable Transactions
<p>An Australian Entity<sup>3</sup>.</p> <hr/> <p>A foreign subsidiary of an Australian Entity where that Australian Entity is an Australian ADI<sup>5</sup> or an AFS Licensee<sup>6</sup>.</p>	<p>Entry into, modification, termination or assignment of an OTC Derivative to which the Reporting Entity is a counterparty, regardless of where the OTC Derivative is entered into<sup>4</sup></p>
<p>A Foreign ADI that has a branch located in this jurisdiction</p> <hr/> <p>A foreign company that is required to be registered under Division 2 of Part 5B.2 of the Act</p>	<p>Entry into, modification, termination or assignment of an OTC Derivative:</p> <ul style="list-style-type: none"> <li>• booked to the profit or loss account of a branch of the Reporting Entity located in this jurisdiction; or</li> <li>• entered into by the Reporting Entity in this jurisdiction</li> </ul>

Part S1.1 of Schedule 1 provides for phased implementation of the Transaction Reporting Requirements for different kinds of Reporting Entities and Part S1.2 of Schedule 2 provides for the Derivative Transaction Information to be reported. Part S1.2 of Schedule 1 provides for

<sup>2</sup> Currently, under the Corporations (Derivatives) Determination 2013: credit derivatives, equity derivatives, foreign exchange derivatives, interest rate derivatives, and commodity derivatives that are not electricity derivatives.  
<sup>3</sup> Defined in Rule 1.2.3 as an entity (including a corporation, partnership, managed investment scheme or trust) that is incorporated or formed in this jurisdiction.  
<sup>4</sup> A Reporting Entity that is, for example, both a foreign subsidiary of an Australian Entity and is also required to be registered under Division 2 of Part 5B.2 of the Act, would be required to report all Derivative Transactions in OTC Derivatives to which it is a counterparty, and not just those booked to the profit and loss account of a branch of the Reporting Entity located in this jurisdiction, or entered into by the Reporting Entity in this jurisdiction.  
<sup>5</sup> Defined in Rule 1.2.3 as an Australian Entity that is an Australian ADI as defined in section 9 of the Act.  
<sup>6</sup> Defined in Rule 1.2.3 as a holder of an Australian financial services licence granted under section 913B of the Act.

phased implementation of the Position Reporting Requirements for different kinds of Reporting Entities and Part S2.2 of Schedule 2 provides for the Derivative Position Information to be reported.

Under “Phase 3” Reporting Requirements Australian ADIs, AFS Licensees, CS Facility Licensees, Exempt Foreign Licensees and Foreign ADIs that were not required to report as part of “Phase 1” or “Phase 2”, are required to start reporting from 1 October 2014. Table 2 summarises the Reporting Requirements that apply to Reporting Entities in Phase 3.

**Table 2 – Reporting Requirements that apply in Phase 3**

Phase 3	Summary of requirements
Stage 1 - Transaction Reporting	From 1 October 2014 to 31 March 2015 (inclusive), Phase 3 Reporting Entities must report their Reportable Transactions in credit derivatives and interest rate derivatives to a Licensed Repository.
Stage 1 - Position Reporting	By 1 April 2015, Phase 3 Reporting Entities must report outstanding positions as at 1 October 2014 in OTC Derivatives that are credit derivatives and interest rates derivatives to a Licensed Repository.
Stage 2 – Transaction Reporting	From 1 April 2015, Phase 3 Reporting Entities must start reporting their Reportable Transactions in all asset classes (credit derivatives, equity derivatives, foreign exchange derivatives, interest rate derivatives and commodity derivatives that are not electricity derivatives) to a Licensed Repository.
Stage 2 – Position Reporting	By 1 October 2015, Phase 3 Reporting Entities must report outstanding positions as at 1 April 2015 in OTC Derivatives that are equity derivatives, foreign exchange derivatives and commodity derivatives that are not electricity derivatives to a Licensed Repository.

## 2. Purpose of the Legislative Instrument

The purpose of the Legislative Instrument is to provide limited transitional relief, for varying periods, to Reporting Entities (referred to in the Legislative Instrument as “*Phase 3 Reporting Entities*”) that are subject to “Phase 3” Reporting Requirements (*Phase 3 Reporting Requirements*).

The relief will provide the Phase 3 Reporting Entities with additional time to start complying with the Phase 3 Reporting Requirements, subject to specified conditions being met. The relief recognises that a number of Phase 3 Reporting Entities are experiencing practical limitations in their efforts to achieve compliance with the Rules in the timeframes set out in Table 2 above. Broadly, the Legislative Instrument

- provides a conditional exemption for the implementation of Phase 3 Reporting Requirements and specifies different implementation times for Phase 3A Reporting Entities and Phase 3B Reporting Entities (as defined in the Legislative Instrument);
- provides, as a condition of the exemption, that Phase 3 Reporting Entities must comply with certain "tagging" requirements, which will permit ASIC to access information being reported under the revised timing for Phase 3 Reporting Entities in the Legislative Instrument;

- provides an unconditional exemption from the requirement to report certain Derivative Transaction Information relating to valuation, collateral and barrier type and value; and
- imposes a requirement on certain Phase 3A Reporting Entities (defined in the Legislative Instrument as Qualifying Phase 3A Reporting Entities) to use reasonable endeavours to obtain express consent from, or to give notice to, a Relevant Counterparty under an Exempt Derivative, to ensure that the Qualifying Phase 3A Reporting Entity is able to comply with the conditions in the Legislative Instrument by reporting "Identifying Information" in relation to an Exempt Derivative.

The Legislative Instrument is described in more detail in Attachment A.

### 3. Commencement of Legislative Instrument

The Legislative Instrument commences on the later of 1 October 2014 and the day on which the instrument is registered under the *Legislative Instruments Act 2003*. The relief under the Legislative Instrument applies during the periods specified in the Legislative Instrument

### 4. Consultation

#### Consultation on Legislative Instrument

ASIC circulated a summary of the proposed terms of the Legislative Instrument and a request for feedback in May 2014 to a number of industry groups including the Association of Superannuation Funds of Australia (*ASFA*), the Financial Services Council (*FSC*), the Australian Bankers Association (*ABA*), the Australian Financial Markets Association (*AFMA*), the Australian Securitisation Forum (*ASF*), the Customer Owned Banking Association (*COBA*) and the International Swaps and Derivatives Association (*ISDA*), as well as other interested market infrastructures and market participants. In response to the May 2014 request for feedback, ASIC received a number of submissions. ASIC has taken those submissions into account, together with ASIC's regulatory objectives, in the final terms of the Legislative Instrument.

#### Consultation on Rules

ASIC also consulted on the Rules to which the Legislative Instrument applies, through Consultation Paper 205 *Derivative transaction reporting* (CP 205)<sup>7</sup> released on 28 March 2013, and a series of meetings with stakeholders, including the Australian Bankers' Association (*ABA*), the Australian Financial Markets Association (*AFMA*), the Global Financial Markets Association (*GFMA*), the Finance and Treasury Association (*FTA*), the FSC and ISDA. ASIC has worked closely with the CoFR agencies, particularly the RBA and APRA, in the overall design and implementation of the Rules.

### 5. Regulation Impact Statement

A Regulation Impact Statement (*G-20 OTC derivatives trade reporting regime*<sup>8</sup>) was prepared in relation to the Rules and approved by Office of Best Practice Regulation (*OBPR*). OBPR has advised that no further Regulatory Impact Statement is required for the Legislative Instrument because it assessed the proposal as having a minor impact on business.

<sup>7</sup> [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp205-published-28-March-2013.pdf/\\$file/cp205-published-28-March-2013.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/cp205-published-28-March-2013.pdf/$file/cp205-published-28-March-2013.pdf)

<sup>8</sup> <http://www.comlaw.gov.au/Details/F2013L01345/Supporting%20Material/Text>

The Legislative Instrument, in conjunction with a number of existing transitional provisions in the Rules<sup>9</sup>, will in ASIC's estimation substantially reduce the short-term regulatory impact of the Rules on Reporting Entities. In addition, the impact on ASIC's regulatory objectives is considered to be minimal.

## **6. Statement of Compatibility with Human Rights**

A Statement of Compatibility with Human Rights is included in this Explanatory Statement at Attachment B.

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<sup>9</sup> These include the availability of "one-sided" reporting, the ability for Reporting Entities to report to prescribed derivative trade repositories overseas, and delayed reporting of certain fields including valuations, collateral and information about "barriers".

## **ATTACHMENT A – Provision-by-provision description of the instrument**

Capitalised terms used in this Attachment have the same meaning as in the Rules.

### **Paragraph 1 - Enabling legislation**

This paragraph provides that ASIC makes the instrument under paragraph 907D(2)(a) of the Act.

### **Paragraph 2 - Title**

This paragraph provides that the title of the instrument is ASIC Instrument [14/0633].

### **Paragraph 3 - Commencement**

This paragraph provides that the instrument commences on the later of 1 October 2014 and the date the instrument is registered under the *Legislative Instruments Act 2003*. The note to this paragraph explains that an instrument is registered when it is recorded on the Federal Register of Legislative Instruments (FRLI) in electronic form.

### **Paragraphs 4 to 12 – Exemptions and conditions**

Paragraphs 4 to 12 set out the exemptions from the Rules, and associated conditions, that apply to Phase 3 Reporting Entities. Phase 3 Reporting Entity is defined in paragraph 20 of the instrument to mean a Reporting Entity that:

- (i) is an Australian ADI, an AFS Licensee, a CS Facility Licensee, an Exempt Foreign Licensee or a Foreign ADI;
- (ii) was not required to report under Phase 1 or Phase 2; and
- (iii) did not opt-in to reporting during Phase 1 or Phase 2 by lodging an Opt-In Notice with ASIC under Rule 2.4.1 of the Rules.

### **Transaction and position reporting**

Paragraph 4(a) of the instrument provides an exemption to a Phase 3 Reporting Entity, from paragraphs 2.2.1(1)(a) and (c) of the Rules to the extent those paragraphs require the Phase 3 Reporting Entity to report information about a Reportable Transaction in an OTC Derivative (**Exempt Derivative**) in a class of OTC Derivatives referred to in column B of Table 1 of the instrument, during the corresponding period set out in column C of Table 1 of the instrument.

Paragraph 4(b) of the instrument provides an exemption to a Phase 3 Reporting Entity, from paragraph 2.2.1(1)(b) of the Rules to the extent that paragraph requires the Phase 3 Reporting Entity to report information about a Reportable Position in an Exempt Derivative, by the applicable Position Reporting Date.

Paragraph 5(a) of the instrument provides that it is a condition of the exemption set out in Paragraph 4 of the instrument that the Phase 3 Reporting Entity reports in accordance with the Rules, Derivative Transaction Information about each of its Reportable Transactions in the Exempt Derivative starting from no later than the corresponding date (**Revised Transaction Reporting Date**) set out in column D of Table 1 of the instrument.

Paragraph 5(b) of the instrument provides it is a condition of the exemption set out in paragraph 4 of the instrument that the Phase 3 Reporting Entity reports Derivative Position Information about each of its outstanding positions in the Exempt Derivative as at the Revised Transaction Reporting Date or such earlier date as the Phase 3 Reporting Entity starts to report its Reportable Transactions in the Exempt Derivative, by or on the corresponding date (***Revised Position Reporting Date***) set out in column E of Table 1 of the instrument.

Table 1 of the instrument sets out, for the purposes of the exemption in paragraph 4, the detail of Exempt Reporting Entities (column A), Exempt Derivatives by class (column B), the period of the exemptions given in paragraph 4 for Transaction Reporting (columns C and D) and for Position Reporting (column E): as follows:

- (a) Exempt Reporting Entities are:
  - (i) Phase 3A Reporting Entities (defined in paragraph 20 of the instrument as a Phase 3 Reporting Entity that as at 30 June 2014 holds total gross notional outstanding positions of AUD \$5 billion or more, calculated in accordance with paragraphs 12 to 14 of the instrument); and
  - (ii) Phase 3B Reporting Entities (defined in paragraph 20 of the instrument as a Phase 3 Reporting Entity that is not a Phase 3A Reporting Entity).
- (b) Phase 3A Reporting Entities have a period of exemption for Reportable Transactions in credit derivatives and interest rate derivatives from 1 October 2014 to the day before the Revised Transaction Reporting Date (inclusive). The Revised Transaction Reporting Date for these classes is:
  - (i) If an Opt-In Notice has been given by the Phase 3A Reporting Entity, the Effective Date specified in that Opt-In Notice in relation to the class of Exempt Derivatives the subject of the Opt-In Notice;
  - (ii) If no Opt-in Notice has been given by the Phase 3A Reporting Entity for a class of Exempt Derivatives, and the Licensing Date is on or before 13 October 2014, 13 April 2015;
  - (iii) If no Opt-in Notice has been given by the Phase 3A Reporting Entity for a class of Exempt Derivatives, and the Licensing Date is after 13 October 2014, the first Monday that is a Business Day, of the month that is 7 calendar months after the Licensing Date.
- (c) Phase 3A Reporting Entities have a period of exemption for Reportable Positions in credit derivatives and interest rate derivatives to the first Monday that is a Business Day after the end of the period of 6 calendar months beginning on the Revised Transaction Reporting Date;
- (d) Phase 3A Reporting Entities have a period of exemption for Reportable Transactions in equity derivatives, foreign exchange derivatives and commodity derivatives that are not electricity derivatives from 1 April 2015 to the day before the Revised Transaction Reporting Date (inclusive). The Revised Transaction Reporting Date for these classes is the earlier of the following dates:
  - (i) 12 October 2015;
  - (ii) the first Monday that is a Business Day, of the month that is 13 calendar months after the Licensing Date; and

- (iii) the Effective Date specified in an Opt-In Notice given by the Phase 3A Reporting Entity in relation to the class of Exempt Derivatives;
- (e) Phase 3A Reporting Entities have a period of exemption for Reportable Positions in equity derivatives, foreign exchange derivatives and commodity derivatives that are not electricity derivatives to the first Monday that is a Business Day after the end of the period of 6 calendar months beginning on the Revised Transaction Reporting Date;
- (f) Phase 3B Reporting Entities have a period of exemption for Reportable Transactions in credit derivatives, interest rate derivatives, equity derivatives, foreign exchange derivatives and commodity derivatives that are not electricity derivatives from 1 October 2014 to the day before the Revised Transaction Reporting date (inclusive). The Revised Transaction Reporting Date for these classes is the earlier of the following dates:
  - (i) 12 October 2015;
  - (ii) the first Monday that is a Business Day, of the month that is 13 calendar months after the Licensing Date; and
  - (iii) the Effective Date specified in an Opt-In Notice given by the Phase 3B Reporting Entity in relation to the class of Exempt Derivatives;
- (g) Phase 3B Reporting Entities have a period of exemption for Reportable Positions in credit derivatives, interest rate derivatives, equity derivatives, foreign exchange derivatives and commodity derivatives that are not electricity derivatives to the first Monday that is a Business Day after the end of the period of 6 calendar months beginning on the Revised Transaction Reporting Date.

The effect of the conditions in paragraph 5, and Table 1 of the instrument is to delay the implementation of the Phase 3 Reporting Requirements as set out in the Rules and to impose different, later deadlines for the introduction of Phase 3 Reporting Requirements, depending on whether the Reporting Entity is a Phase 3A Reporting Entity or a Phase 3B Reporting Entity.

Paragraph 6 of the instrument provides that it is a condition of the exemption set out in paragraph 4 of the instrument that the Phase 3 Reporting entity must report information referred to in paragraph 5 of the instrument to a Licensed Repository, or if there is no Licensed Repository at the time the information is required to be reported, to a Prescribed Repository.

#### **Tagging requirement**

Paragraph 7 of the instrument provides that it is a condition of the exemption in paragraph 4 that where a Phase 3 Reporting Entity, on a day prior to the Licensing Date (as defined in the instrument), complies with the conditions in paragraphs 5 and 6 of the instrument, by reporting Derivative Transaction Information or Derivative Position Information about an Exempt Derivative to a Prescribed Repository, the Phase 3 Reporting Entity must designate the Derivative Transaction Information and Derivative Position Information reported as being able to be provided to ASIC by the Prescribed Repository to which the information is reported.

Paragraph 7 imposes a "tagging" requirement on the Phase 3 Reporting Entity when reporting Derivative Transaction Information or Derivative Position Information to a Prescribed Repository in order to permit ASIC to have access to such information.

#### **Valuations, collateral and barriers**



Paragraph 8 of the instrument provides an exemption to a Phase 3 Reporting Entity from the Rules and the conditions in paragraphs 5, 6 and 7 of the instrument to the extent that the Rules or those conditions require the Phase 3 Reporting Entity to report the following items of Derivative Transaction Information in Table S2.1(1) of the Rules about a Reportable Transaction or outstanding position in an Exempt Derivative:

- (a) Items 30–32 (mark-to-market, mark-to-model, or other valuation);
- (b) Items 40–44 (collateral); and
- (c) Items 51–52 (barrier type and value).

The exemption in paragraph 8 of the instrument applies during the period from the relevant Revised Transaction Reporting Date (as it applies to the Reporting Entity in relation to an Exempt Derivative) to the day before the first Monday that is a Business Day, of the month that is 7 calendar months after the Revised Transaction Reporting Date.

#### **Counterparty consent and notices – Phase 3A Reporting Entities**

Paragraph 9 of the instrument provides that it is a condition of the exemption set out in paragraph 4 of the instrument that a Phase 3 Reporting Entity that is a Qualifying Phase 3A Reporting Entity (as defined in paragraph 20 of the instrument) must:

- (a) from the Licensing Date, use all reasonable endeavours to obtain as soon as reasonably practicable the express consent of the counterparty to which Identifying Information required to be reported relates, to ensure that the Qualifying Phase 3A Reporting Entity is able to comply with the conditions in paragraph 5, 6 and 7 of the instrument by reporting Identifying Information; and
- (b) where the Qualifying Phase 3A Reporting Entity has determined that it will be required to give a notice to a counterparty before reporting Identifying Information, give the notice by the date (Notice Date) which is one calendar month after the date on which the Phase 3A Reporting Entity determines that it will be required to give the notice. The earliest Notice date is 3 November 2014.

#### **Record-keeping and reporting – Phase 3A Reporting Entities**

Paragraph 10 of the instrument provides that it is a condition of the exemption in paragraph 4 of the instrument that a Phase 3A Reporting Entity must:

- (a) keep records that enable the Phase 3A Reporting Entity to demonstrate it has complied with the conditions in paragraphs 5, 6, 7 and 9 of the instrument that apply to the Reporting Entity;
- (b) keep the records referred to in paragraph (a) for a period of at least five years from the date the record is made or amended; and
- (c) on request by ASIC, provide ASIC with records or other information relating to compliance with or determining whether there has been compliance with the conditions in paragraphs 5, 6, 7, and 9 of the instrument, within the time specified in the request or if no time is specified, within a reasonable time.

Paragraph 11 of the instrument provides that a request by ASIC under paragraph 10(c) must be in writing and give the Phase 3A Reporting Entity a reasonable time to comply.

### ***Interpretation and definitions***

Paragraph 12 of the instrument provides the method for the calculation of the total gross notional outstanding positions held by a Phase 3 Reporting Entity where that phrase is referred to in the instrument. Paragraph 12 replicates the calculations required by Rule 1.2.7, for entities relying on the exemptions in the instrument.

Paragraph 13 of the instrument provides that a Phase 3 Reporting Entity that is an RE or Trustee may determine whether it is a Phase 3A Reporting Entity or a Phase 3B Reporting Entity in relation to each managed investment scheme or trust for which the Phase 3 Reporting Entity is RE or Trustee, by determining whether the Phase 3 Reporting Entity holds total gross notional outstanding positions of \$5 billion or more separately in relation to that managed investment scheme or trust.

Paragraph 14 of the instrument clarifies that where a Phase 3 Reporting Entity has determined in accordance with paragraph 13 that the Phase 3 Reporting Entity holds total gross notional outstanding positions of \$5 billion or more as at 30 June 2014 in relation to a managed investment scheme or trust (in this paragraph, the ***Reporting Scheme or Trust***) for which the Phase 3 Reporting Entity is RE or Trustee, the Phase 3 Reporting Entity:

- (a) may rely on the exemptions in paragraphs 4 and 8 of the instrument, and must comply with the conditions in paragraphs 5, 6, 7, 9 and 10 of the instrument, that apply to a Phase 3A Reporting Entity in relation to Reportable Transactions entered into and Reportable Positions held in its capacity as RE or Trustee of the Reporting Scheme or Trust; and
- (b) may rely on the exemptions in paragraphs 4 and 8 of the instrument, and must comply with the conditions in paragraphs 5, 6, 7, 9 and 10 of the instrument that apply to a Phase 3B Reporting Entity in relation to Reportable Transactions entered into and Reportable Positions held in its capacity as RE or Trustee of each managed investment scheme or trust that is not a Reporting Scheme or Trust.

Paragraphs 15 to 18 of the instrument provides for the lodging of an Opt-in Notice by a Phase 3 Reporting Entity that wishes to assume Phase 3 Reporting Requirements prior to the time prescribed by the conditions of the instrument.

Paragraph 18 of the instrument provides that a Phase 3 Reporting Entity that is an RE or a Trustee may lodge an Opt-In Notice under paragraph 16 in relation to each managed investment scheme or trust for which the Phase 3 Reporting Entity is RE or Trustee.

Paragraph 19 of the instrument provides that, unless otherwise specified, capitalised terms have the meaning given by the Rules.

Paragraph 20 of the instrument provides for definitions of terms used in the instrument as follows:

***calendar month*** means a period commencing at the beginning of a day of one of the 12 months of the year and ending immediately before the beginning of the corresponding day of the next month or, if there is no such corresponding day, ending at the expiration of the next month.

A reference to a period of ***calendar months*** is a reference to a period:

- (a) starting at the start of a day of one of the calendar months (***starting month***); and

(b) ending:

- (i) immediately before the start of the corresponding day of the calendar month that is that number of calendar months after the starting month; or
- (ii) if there is no such day – at the end of the calendar month that is that number of calendar months after the starting month.

**Effective Date** has the meaning given by paragraph 15 of the instrument.

**Identifying Information** means Derivative Trade Data referred to in the following table, or substantially equivalent information:

Table in Rules	Items in Table
Table S2.1(1) (Derivative Transaction Information - Common data)	7, 8, 10 and 11
Table S2.1(3) (Derivative Transaction Information - Equity derivative and credit derivative data)	1, 2, 3 and 4
Table S2.1(5) (Derivative Transaction Information - Interest rate derivative data)	6, 7, 8, 9, 10 and 11
Table S2.2(1) (Derivative Position Information – Common data)	6, 7, 8 and 9
Table S2.2(3) (Derivative Position Information – Equity derivative and credit derivative data)	1, 2, 3 and 4
Table S2.2(5) (Derivative Position Information - Interest rate derivative data)	5, 6, 7, 8, 9 and 10

**Licensing Date** means the day on which ASIC grants a derivative trade repository licence under section 905C of the Act for the first time.

Note: If ASIC grants an applicant an Australian derivative trade repository licence, ASIC must publish a notice in the Gazette stating the name of the licensee, when the licence was granted, and the conditions on the licence: section 905D of the Act.

**Opt-In Notice** means a notice given under paragraph 15 of the instrument that has not been withdrawn under paragraph 17 of the instrument.

**Phase 3 Reporting Entity** means a Reporting Entity that:

- (a) is an Australian ADI, an AFS Licensee, a CS Facility Licensee, an Exempt Foreign Licensee or a Foreign ADI;
- (b) was not required to report under Phase 1 or Phase 2; and
- (c) did not opt-in to reporting during Phase 1 or Phase 2 by lodging an Opt-In Notice with ASIC under Rule 2.4.1 of the Rules.

**Phase 3A Reporting Entity** means a Phase 3 Reporting Entity that as at 30 June 2014 holds total gross notional outstanding positions of AUD \$5 billion or more, calculated in accordance with paragraphs 12 to 14 of the instrument

**Phase 3B Reporting Entity** means a Phase 3 Reporting Entity that is not a Phase 3A Reporting Entity.

**Qualifying Phase 3A Reporting Entity** means a Phase 3A Reporting Entity that:

- (a) will or may be required to comply with the conditions in paragraphs 5 and 6 of the instrument by reporting Identifying Information to a Trade Repository on or after the Revised Transaction Reporting Date; and
- (b) will or may be required to:
  - (i) obtain the express consent (**Consent**) of the counterparty (**Relevant Counterparty**) to which Identifying Information relates before it reports the Identifying Information to the Trade Repository; or
  - (ii) give the Relevant Counterparty a notice (**Notice**) before it reports the Identifying Information to the Trade Repository; and
- (c) if the Phase 3A Reporting Entity does not obtain the Consent or give the Notice before it reports the Identifying Information to the Trade Repository, the Phase 3A Reporting Entity may breach:
  - (i) a duty of confidence owed by the Phase 3A Reporting Entity to the Relevant Counterparty which is actionable at law by the Relevant Counterparty;
  - (ii) a contractual duty owed by the Phase 3A Reporting Entity to the Relevant Counterparty; or
  - (iii) a provision of a law or regulation of a foreign jurisdiction that applies to the Phase 3A Reporting Entity in its dealings with the Relevant Counterparty; and
- (d) has not obtained the Consent of the Relevant Counterparty, or has not given the Relevant Counterparty the Notice (as applicable).

**Trade Repository** means a Licensed Repository or Prescribed Repository.

## **ATTACHMENT B – Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.*

### ***ASIC Instrument [14/0633]***

This legislative 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*.

#### **1. Overview of the Legislative Instrument**

ASIC Instrument [14/0633] (the ***Legislative Instrument***), made by ASIC under paragraph 907D(2)(a) of the *Corporations Act 2001* (the ***Act***), provides a number of exemptions from the reporting requirements under the *ASIC Derivative Transaction Rules (Reporting) 2013* (the ***Rules***).

The Rules, which were made by ASIC under section 901A of the Act acting with the consent of the Minister under section 901K of the Act, impose requirements on ‘Reporting Entities’ to report their ‘Reportable Transactions’ and ‘Reportable Positions’ to Licensed Repositories or Prescribed Repositories. Compliance with the reporting requirements under the Rules is being implemented in phases (referred to in the Rules as Phase 1, Phase 2 and Phase 3). Phase 1 of the Rules commenced on 1 October 2013 and Phase 2 of the Rules commenced on 1 April 2014. Phase 3 is due to commence as specified in the Legislative Instrument.

These exemptions in the Legislative Instrument apply to ‘Phase 3’ Reporting Entities. The exemptions are time-limited and subject to conditions. Broadly, the exemptions apply to:

- the timing of implementation of Phase 3 Reporting Requirements (which includes different timing implementation for Phase 3A Reporting Entities and Phase 3B Reporting Entities);
- compliance with certain "tagging" requirements where a Phase 3 Reporting Entity complies with certain conditions set out in the Legislative Instrument;
- the provision of relief in respect of the reporting of certain Derivative Transaction Information relating to valuation, collateral and barrier type and value; and
- the use of all reasonable endeavours to obtain the Consent from, or give the Notice to, the Relevant Counterparty, as soon as reasonably practicable, to ensure that the Phase 3A Reporting Entity is able to comply with the conditions of the Legislative Instrument by reporting Identifying Information.

#### **2. Human rights implications**

The Legislative Instrument may engage the right to privacy and reputation in Article 17 of the International Covenant on Civil and Political Rights (**ICCPR**) (**Article 17**). Article 17 prohibits unlawful or arbitrary interferences with a person's privacy, family, home (which the UN Human Rights Committee has interpreted as including a person's workplace) and correspondence. It also prohibits unlawful attacks on a person's reputation. It provides that persons have the right to the protection of the law against such interference or attacks. The UN Human Rights Committee has not defined ‘privacy’. The Commonwealth Attorney-General's Department has provided guidance that privacy should be understood to comprise freedom from unwarranted and unreasonable

intrusion into activities that society recognises as falling into the individual sphere of autonomy. To avoid being considered arbitrary, any interference with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances.

#### The Legislative Instrument may engage the right to privacy and reputation in Article 17

The right in Article 17 is engaged by the Legislative Instrument by reason that the Legislative Instrument deals with matters involving the collection, storage, security, use or disclosure of personal information.

Derivative trade data required to be reported under the Rules includes, for each side of an OTC Derivative transaction, information that identifies or is capable of identifying the counterparty or beneficiary to the OTC Derivative (referred to in the Legislative Instrument as 'Identifying Information').

'Identifying Information' may contain 'personal information' as defined in the *Privacy Act 1988*, being information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion. This may be the case where the counterparty or beneficiary is an individual and the Phase 3A Reporting Entity reporting the OTC Derivative elects to provide a code to identify the individual from which the identity of the individual is apparent or can reasonably be ascertained.

#### Compatibility of Legislative Instrument with the rights recognised in Article 17

The Legislative Instrument is compatible with the rights recognised in Article 17 of the ICCPR by reason that it advances those rights. The Legislative Instrument applies in circumstances where a 'Phase 3A Reporting Entity' is required to report 'Identifying Information' in relation to counterparties and beneficiaries of OTC Derivatives, but where such reporting would breach a foreign law or regulation, an actionable duty of confidence owed to the client, or a contractual duty owed to the client.

The Legislative Instrument applies while the Reporting Entity uses all reasonable endeavours to obtain the consent of the counterparty to reporting of the counterparty's 'Identifying Information', or, where notification of intention to report is sufficient, to give notice before reporting the 'Identifying Information'.

If the Legislative Instrument were considered to limit the right in Article 17 of the ICCPR in that it requires the Phase 3A Reporting Entity to work towards reporting of "Identifying Information", ASIC considers that the Legislative Instrument is nevertheless compatible with that right. The right in Article 17 is not absolute. As noted, the right has implied limitations ('unlawful' and 'arbitrary') and may be subject to a permissible limitation where that limitation aims to achieve a legitimate objective, where there is a rational connection between the limitation and the objective, and the limitation is reasonable, necessary and proportionate.

Any limitation imposed on the right by the Legislative Instrument has a clear legal basis, in that it aims to achieve a legitimate objective, has a rational connection with the objective, and is reasonable, necessary and proportionate.

As noted in the CoFR Report:

‘Reporting to trade repositories should facilitate the maintenance of a reliable and comprehensive source of information on participant trading activity, which would be useful to many regulators in performing their respective functions. It is expected that this increased transparency will assist authorities in identifying vulnerabilities in the financial system and, more broadly, to develop well-informed policies to promote financial stability. Information from trade repositories will be particularly useful in times of financial distress, where rapid and reliable access to accurate data may assist prudential and systemic regulators in their functions. From a market supervision perspective, transaction information stored in trade repositories in some product classes in particular, such as equity derivatives and credit derivatives, has the potential to assist investigations into market misconduct.’

Effective regulation of the OTC derivatives market requires regulators to have detailed data on counterparty and beneficiary exposures where these will pose a systemic risk. A requirement to report transactions, and Identifying Information in relation to those transactions, is the most effective method of achieving this legitimate objective.

Both the Rules and the requirements of the Legislative Instrument are necessary to achieve the legitimate objective because they provide ASIC and other regulators with the data they need to assess counterparty exposures, and support the detection and prevention of market abuse. The Rules contains adequate safeguards by only requiring market participants to report the data necessary to achieve that objective, and, in conjunction with section 904B of the Act, to require operators to maintain the confidentiality, security and integrity of that information. Further safeguards are provided by statutory obligations to protect confidential and personal information contained in the data.

### **3. Conclusion**

The Legislative Instrument is compatible with human rights because it advances the protection of human rights and, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.