

EXPLANATORY STATEMENT

Issued by authority of the Treasurer

ASIC Supervisory Cost Recovery Levy Act 2017

Corporations Act 2001

Corporations Legislation Amendment (Financial Markets Infrastructure) Regulations 2024

The *Corporations Act 2001* (the Act) provides for the regulation of corporations and financial products and services.

Subsection 1364 of the *Corporations Act 2001* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 13 of the *ASIC Supervisory Cost Recovery Levy Act 2017* provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of the *Corporations Legislation Amendment (Financial Markets Infrastructure Reforms) Regulations 2024* (the Regulations) is to support the amendments in the *Treasury Laws Amendment (Financial Market Infrastructure and Other Measures) Act 2024* (the Amending Act).

The Amending Act implements recommendations 7 and 8 of the Council of Financial Regulators Advice to Government 2020 (CFR Advice to Government) by providing ASIC with powers to declare a financial market to be a declared financial market and a body corporate to be widely held market body. This replaces the current process of the *Corporations Regulations 2001* (the Corporations Regulations) specifying prescribed financial markets and widely held market bodies for the purposes of the Act.

The Regulations amend the Corporations Regulations to repeal redundant provisions in relation to prescribed financial markets and widely held market bodies that are no longer relevant, and update references to declared financial market (a new term referred to in the Amending Act which replaces prescribed financial market).

The Amending Act also inserts stay clauses as part of the crisis management and resolution regime in respect of CS facility licensees. Stay clauses ensure counterparties of a body corporate are prevented from exercising certain contractual rights solely on the grounds that the RBA has exercised its powers (including directions, statutory management and transfer powers) in respect of the body corporate, a related body corporate or because of the body corporate or a related body corporate's financial position. This allows the RBA to effectively resolve a crisis without interference from body corporates closing out contracts. The Regulations exclude certain contracts from the operation of the stay provision because of the nature of the agreement or the parties to the agreement.

The Act does not specify any conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations were publicly consulted on for a period of 8 weeks from 15 December 2023 to 09 February 2024. ASIC and RBA were subsequently consulted in developing the amendments.

The instrument is not exempt from sunset provisions.

The instrument is not exempt from disallowance.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commenced at the same time as the commencement of the relevant Schedule of the Amendment Act. If the Amendment Act does not commence, then the Regulations will not commence.

The instrument does not contain a retrospective provision.

Details of the Regulations are set out in Attachment A.

A Statement of Compatibility with Human Rights is at Attachment B.

The Office of Impact Analysis has been (OIA) has been consulted. A list of reports certified as equivalent to a Policy Impact Analysis can be found at <https://oia.pmc.gov.au/published-impact-analyses-and-reports/financial-market-infrastructure-fini-regulatory-reforms>. The full list of reports and executive summaries of those reports are also available in the Explanatory Memorandum for the *Treasury Laws Amendment (Financial Markets Infrastructure) Bill 2024* as these reports have been certified for both the Bill and the Regulations.

Details of the Corporations Legislation Amendment (Financial Market Infrastructure) Regulations 2024

Section 1 – Name

This section provides that the name of the regulations is the *Corporations Legislation Amendment (Financial Market Infrastructure) Regulations 2024* (the Regulations).

Section 2 – Commencement

Sections 1 to 4 and anything in the instrument not covered elsewhere by the Commencement provision commenced the day after the instrument is registered.

Schedule 1 Part 1 to the Regulations commenced at the same time as Part 3 of Schedule 2 to the *Treasury Laws (Financial Market Infrastructure and Other Measures) Act 2024* commenced.

Schedule 1 Part 2 of the Regulations commenced at the same time as Part 1 of Schedule 1 to the *Treasury Laws (Financial Market Infrastructure and Other Measures) Act 2024* commenced.

Section 3 – Authority

Section 3 provides that the instrument is made under the *ASIC Supervisory Cost Recovery Levy Act 2017* and the *Corporations Act 2001*.

Section 4 – Schedules

This section provides that each instrument that is specified in the Schedules to this instrument are amended or repealed as set out in the applicable items in the Schedules, and any other item in the Schedules to this instrument has effect according to its terms.

Schedule 1 – Amendments

Part 1 – Declared financial markets and widely held market bodies

Part 1 of the instrument replaces the phrase “prescribed financial market” with “declared financial market” in paragraphs 15(2)(a) and 48(3)(aa) of the *ASIC Supervisory Cost Recovery Levy Regulations 2017*, paragraph 11(2)(h) of the *Corporations (FinTech Sandbox Australian Financial Services Licence Exemption) Regulations 2020*, and in the provisions in the *Corporations Regulations 2001* listed in the table at item 3.

This is because section 9 of the Amending Act repeals the defined term ‘prescribed financial market’ and replaces it with the term ‘declared financial market’. Updating this terminology reduces the risk of confusion in applying the laws and ensures consistency with the Act. Consequently, the instrument repeals the definition of prescribed financial market in Regulation 1.0.02A as this is no longer necessary.

The instrument also repeals the definition of prescribed widely held market bodies under Regulation 7.4.01 of the Regulations. This regulation is directed at prescribing widely held

market bodies for section 850A of the Act. Following the commencement of the Amending Act, the meaning of ‘widely held market body’ in section 850A of the Act is a body corporate that is specified in a declaration by ASIC. Regulation 7.4.01 would no longer be necessary as section 850A of the Act no longer refers to a body corporate that is specified in regulations made for the purposes of that section.

Part 2 – Prescribed kinds of arrangements, rights under which are not subject to stay

The Amending Act inserts section 843A into the Corporations Act. Section 843A of the Bill prevents parties from enforcing certain rights in contracts (for example, the right to terminate a contract) merely because a body corporate (a CS facility licensee) is under statutory management, subject to a transfer determination or subject to a direction under section 840A of the Act by allowing courts to put in place a stay for a period of time (the stay period).

The purpose of this provision is to ensure the RBA and statutory manager can effectively address a crisis or prevent a crisis from arising. This provision is intended to address ‘ipso facto’ clauses, that allow one party to a contract to modify or terminate a contract upon the occurrence of some specific event (such as a company becoming insolvent). This stay on rights means that rights arising from an ipso facto clause cannot be enforced during the stay period, thus allowing the CS facility licensee to continue to operate while under statutory management, or another action by the RBA under the crisis resolution regime.

The Regulations inserts Regulation 7.3B.65 into the Corporations Regulations, which exempts certain contracts from the application of section 843A of the Act, by virtue of the nature of the agreement or the parties to the agreement. Reasons why an ipso facto stay should not apply include the following:

- the operation of an ipso facto clause is inherent to the operation of a contract and staying it would lead to a perverse outcome;
- situations in which sophisticated counterparties traditionally negotiate their own arrangements in relation to complex transactions or complex financial products and the ipso facto stay would undermine those arrangements;
- markets have evolved to depend on established systems and expectations and the stay would disrupt those markets;
- the stay would lead to unintended consequences or would severely disadvantage contracting parties.

The new provision is inserted after Part 7.3 in the Regulations as Part 7.3B – Crisis resolution for CS Facilities, to correspond new Part 7.3B in the Corporations Act.

Statement of Compatibility with Human Rights

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

Corporations Legislation Amendment (Financial Market Infrastructure) Regulations 2024

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*.

Overview of the Legislative Instrument

The Regulations amend the *Corporations Regulations 2001* (Corporations Regulations) to repeal redundant provisions in relation to prescribed financial markets and widely held market bodies that are no longer relevant, and update references to declared financial market (a new term referred to in the Amending Act which replaces prescribed financial market).

The crisis management and resolution regime in respect of CS facility licensees includes stay clauses that ensure counterparties of a body corporate are prevented from exercising certain contractual rights solely on the grounds that the RBA has exercised its powers (including directions, statutory management and transfer powers) in respect of the body corporate, a related body corporate or because of the body corporate or a related body corporate's financial position. The Regulations exclude certain contracts from the operation of the stay provision because of the nature of the agreement or the parties to the agreement.

Human rights implications

The amendments apply to body corporates and do not relate to natural persons. Therefore, no human rights are engaged.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.