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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FINANCIAL SERVICES REFORM BILL 2001

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and New Clauses to be Moved on Behalf of the Government

(Circulated by authority of the Minister for Financial Services and Regulation,
the Hon Joe Hockey, MP)

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FINANCIAL SERVICES REFORM BILL 2001**Amendments and New Clauses to be Moved on Behalf of the Government****Outline**

1.1 The proposed *Financial Services Reform Act 2001* (proposed FSR Act) is the culmination of an extensive reform program examining current regulatory requirements applying to the financial services industry. In particular, the proposed Act provides the legislative response to a number of recommendations of the Financial System Inquiry (FSI).

1.2 The FSI was a comprehensive stocktake of Australia's financial system structure and regulation. The broad policy direction for what were known as the CLERP 6 reforms, now contained in the proposed FSR Act, is consistent with the findings of the FSI.

1.3 The new regulatory regime for the financial services industry is outlined in greater detail in the Explanatory Memorandum to the Financial Services Reform Bill (FSR Bill).

1.4 The amendments proposed to be moved by the Government further refine a number of the provisions in the proposed FSR Act and correct some minor technical or drafting errors. This Explanatory Memorandum provides commentary on the refinements, but does not address in detail the minor corrections.

Financial impact Statement

1.5 The proposed amendments have no financial impact.

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Abbreviations

2.1 The following abbreviations are used in this Explanatory Memorandum:

ADIs	Authorised deposit-taking institutions
APRA	Australian Prudential Regulation Authority
ASIC Act	<i>Australian Securities and Investments Commission Act 1989</i>
ASIC	Australian Securities & Investments Commission
CAMAC	Corporations and Markets Advisory Committee
CASAC	Companies and Securities Advisory Committee
CS facility	Clearing and Settlement facility
DPB	Declared Professional Body
ED securities	Enhanced disclosure securities
FSG	Financial Services Guide
FSR Bill	Financial Services Reform Bill 2001
FSR(CP) Bill	Financial Services Reform (Consequential Provisions) Bill 2001
NGF	National Guarantee Fund
PDS	Product Disclosure Statement
Proposed ASIC Act	<i>Proposed Australian Securities and Investments Commission Act 2001</i>
Proposed Corporations Act	<i>Proposed Corporations Act 2001</i>
Proposed FSR Act	<i>Proposed Financial Services Reform Act 2001</i>
RBA Act	<i>Reserve Bank Act 1959</i>
RSA Act	<i>Retirement Savings Account Act 1997</i>
RSA	Retirement savings account
SEGC	Securities Exchanges Guarantee Corporation
SIS Act	<i>Superannuation Industry (Supervision) Act 1993</i>
SOA	Statement of Advice
SPDS	Supplementary Product Disclosure Statement

3**Notes on amendments****Amendments to Chapter 7 of the proposed Corporations Act 2001***Part 7.1 Definitions****Definition of participant***

3.1 Proposed item 6 amends the definition of ‘participant’ in proposed section 761A so that it includes a ‘recognised affiliate’ in certain nominated provisions where the term ‘participant’ is used. The purpose of these changes is to restore the current situation so that, for example, an affiliate of the Australian Stock Exchange is entitled to call him or herself a stockbroker.

3.2 The term ‘recognised affiliate’ is also defined in section 761A (see proposed item 8).

3.3 Proposed item 85 makes a complementary amendment to proposed paragraph 923B(1)(c) (which restricts the use of certain words or expressions unless their use is authorised in the licence conditions). This amendment will enable the Australian Securities and Investments Commission (ASIC) to permit the representatives of licensees to use the title ‘stockbroker’ or ‘sharebroker’ in appropriate circumstances.

3.4 The proposed change to the meaning of ‘participant’ in section 761A is also recognised in the definition of ‘participant’ in section 9 (see proposed item 173). Both definitions will include the power to specify further provisions where ‘participant’ includes ‘recognised affiliate’ in the regulations.

Definition of ‘class’ and ‘kind’

3.5 Proposed item 9 inserts a new section 761CA that will enable regulations to be made to clarify the meaning of the terms ‘class’ and ‘kind’ in relation to financial products. Consequential amendments to section 761A (by inserting definitions of ‘class’ and ‘kind’ that refer to regulations made for the purposes of section 761CA) are also made by proposed item 1.

Definition of ‘funeral benefit’

3.6 Proposed item 6 amends the definition of ‘funeral benefit’ in section 761A to ensure that only the provision of funds to pay for funeral services is taken to be a financial product and not the provision of the funeral services themselves.

Multiple trustees

3.7 Proposed item 10 inserts a new section 761FA to provide that the meaning of a ‘person’ for the purposes of the new regulatory framework in the proposed FSR Act includes multiple trustees.

It ensures that Chapter 7 applies to the trust as if its trustees constituted a single legal entity (termed the ‘notional entity’).

3.8 The purpose of this amendment is to allow the licensing and conduct provisions of the proposed FSR Act to apply to superannuation funds that are operated by trustees that are not a body corporate but are comprised of a number of individual natural persons. The new section will enable obligations under Chapter 7 that are imposed on the ‘notional entity’ to be imposed on each individual trustee but to be discharged by any individual trustee.

3.9 Contravention of Chapter 7 by the trustee, which would otherwise be taken to be contraventions by the ‘notional entity’, will be taken to be contraventions by each trustee who was involved in the contravention. A single trustee (of a trust that previously had multiple trustees) will be required to comply with obligations imposed by Chapter 7 on the ‘notional entity’ and will be taken to contravene a provision of the Chapter that would otherwise be taken to have been contravened by the ‘notional entity’.

3.10 Consequential amendments are also made to the definition of ‘person’ in section 761A (see proposed item 7) and to the provisions relating to the granting of licences in subsection 913B(3) (see proposed items 69, 70 and 71).

Definition of retail and wholesale clients

3.11 Proposed items 11 and 12 amend subparagraphs 761G(7)(c)(i) and (ii) to replace the current references to specific dollar amounts with powers to make regulations specifying the net assets or gross income that will be required for a person to be a ‘wholesale client’. This amendment will provide greater flexibility to update these amounts in the future. A new subsection 761G(10A) will enable regulations to set out how a person’s net assets or gross income are to be determined, valued or calculated (see proposed item 13).

3.12 Parallel amendments are made to the definition of a ‘sophisticated investor’ in subsection 708(8) of the proposed *Corporations Act 2001* (proposed Corporations Act) by proposed items 176 and 177.

References to Chapter 7 include regulations made for the purposes of Chapter 7

3.13 Proposed items 14, 15 and 16 amend section 761H to ensure that both instruments other than regulations and those transitional provisions that will be inserted in Part 10.2 of the proposed Corporations Act by the Financial Services Reform (Consequential Provisions) Bill 2001 (FSR(CP) Bill) that relate to matters dealt with by Chapter 7 will be taken to be included in references to provisions of Chapter 7.

Specific things that are not financial products

3.14 Proposed item 17 amends paragraph 765A(1)(x) to exclude ‘physical equipment or physical infrastructure’ rather than simply ‘equipment or infrastructure’ from the definition of a ‘financial product’. This amendment will clarify that the relevant exemption applies only to physical equipment or infrastructure and not financial arrangements that could be seen as ‘intangible infrastructure’.

Meaning of financial product advice

3.15 Proposed item 18 redrafts paragraph 766B(1)(b) to clarify that the provision of an ‘exempt document’ is not taken to be the provision of financial product advice (rather than the provision of a piece of information in an exempt document).

Definition of a financial market

3.16 Paragraph 767A(2)(c) of the proposed FSR Act provides that conducting an auction of forfeited shares does not constitute operating a financial market for the purposes of Chapter 7.

3.17 Proposed item 19 amends this provision to ensure that only auctions of forfeited shares conducted by licensed auctioneers would be exempt from regulation as a financial market under this Chapter.

Definition of a clearing and settlement facility

3.18 Subsection 768A(2) of the proposed FSR Act removes from regulation as a clearing and settlement facility (CS facility) certain payment systems. It is now apparent that the relevant paragraphs are cast too widely.

3.19 Proposed item 20 amends subsection 768A(2) to omit proposed paragraphs 768A(2)(f) and (g). The amendment would leave any conduct associated with the payment system that should not be regulated as a CS facility to be removed from the definition via the regulations. The same amendment is to be made to the definition of clearing and settlement facility in proposed subsection 12BAB(18) (see proposed item 163).

Part 7.2 Licensing of Financial Markets**Licensing conditions relating to compensation arrangements**

3.20 Both section 796A and sections 882A and 882B address the matters relating to compensation arrangements which must be included in an Australian market licence when the licensee has approved compensation arrangements.

3.21 Proposed item 22 omits subsection 796A(5) and thus removes this duplication. Following this amendment, these matters will be addressed solely in sections 882A and 882B, with a cross-reference to these provisions included in a note under subsection 796A(4) (see proposed item 21).

Fees for ASIC's functions under section 798C arrangements

3.22 Section 798C of the proposed FSR Act relates to self-listing of a market. In the proposed FSR Act as introduced, there is a note under subsection 798C(4) referring to fees which ASIC may charge for services in this connection, but no such note under subsection 798C(2).

3.23 Proposed item 23 inserts a note under subsection 798C(2) clarifying that fees can be charged by ASIC for performing functions under arrangements with a self-listed entity, as well as under subsection 798C(4), which relates to ASIC's role in supervising the entity's compliance with its own listing rules.

3.24 Amendments to the proposed Corporations (Fees) Act 2001 (which were introduced on 7 June 2001) will make clear that fees can not be charged under both provisions for the one service.

Part 7.3 Licensing of Clearing & Settlement Facilities**Role of the Reserve Bank in the regulation of clearing and settlement facilities**

3.25 Under the current Corporations Law, the Reserve Bank of Australia has no explicit role in the regulation of private CS facilities. ASIC, however, would consult the Bank if matters of systemic risk arose.

3.26 The Reserve Bank clearly has an important role in this area, because of the systemic risk involved in certain clearing and settlement operations. Recent and probable future developments in the industry amplify those risks.

3.27 The proposed FSR Act, as introduced, continues the approach in the current law. When the Bill was introduced, the Minister for Financial Services and Regulation announced that he was still considering how to provide an appropriate role for the Bank and that he would consult with industry on this point.

3.28 Proposed items 24-34, 36-41, 166, 179-180 and 182 developed in consultation with the Reserve Bank and ASIC, will give the Reserve Bank a role explicit on the face of the legislation:

- the Reserve Bank would set financial stability standards and monitor compliance with them and with a licensee's obligation to do all things practicable to reduce systemic risk;
- ASIC would monitor compliance with all other obligations imposed on clearing and settlement facilities, and take action to enforce all obligations imposed on CS facilities. The Reserve Bank would be responsible for requesting ASIC to take such action in relation to systemic risk obligations.

3.29 A more detailed description of the relevant proposed amendments is set out below.

General obligations on CS facilities

3.30 Section 821A of the proposed FSR Act, as it was introduced, lists the general obligations which apply to a CS facility licensee. Paragraph 821A(a) would require a CS facility licensee, to the extent that it is reasonably practicable to do so, to do all things necessary to reduce systemic risk and to ensure that the facility's services are provided in a fair and effective way.

3.31 Proposed item 24 will amend proposed paragraph 821A(a) by:

- inserting a reference to the financial stability standards (to be determined by the Reserve Bank under section 827D), as well as those obligations currently included in paragraph 821A(a); and
- restructuring the paragraph to facilitate the division of responsibility between ASIC and the Reserve Bank in other provisions.

Obligation to notify Reserve Bank of certain matters

3.32 Proposed item 25 will insert a new provision (section 821BA) which will require a CS facility licensee to notify the Reserve Bank as soon as it becomes aware that it has failed to comply with a financial stability standard (see proposed section 827D) (or is likely to do so), or that it may no longer be able to meet, or has breached, its obligation to do all other things necessary to reduce systemic risk.

3.33 Failure to comply with this obligation will be an offence.

3.34 If it considers it appropriate, the Reserve Bank may give the Minister advice about the matter.

3.35 This provision complements proposed section 821B, which was included in the proposed FSR Act as introduced, which requires notification to ASIC.

Obligation to assist the Reserve Bank

3.36 Section 821C, which was included in the proposed FSR Act as introduced, would require CS facility licensees to give ASIC such assistance as it reasonably requests in relation to the performance of ASIC's functions. Failure to do so would be an offence.

3.37 Proposed items 26-28 add subsections (3) and (4) to this section (and make two minor consequential changes). Subsections (3) and (4), which mirror the obligation to assist ASIC, would require CS facility licensees to assist the Reserve Bank in relation to the performance of the Bank's functions under Part 7.3. Failure to do so would be an offence.

Disallowance of changes to operating rules of CS facility licensees

3.38 Section 822E of the proposed FSR Act, as introduced, requires the Minister, in deciding whether or not to disallow changes to operating rules, to have regard to the consistency of the change with the licensee's obligations under Part 7.3 including 'in particular the obligation mentioned in paragraph 821A(a)'.

3.39 Proposed item 29 is consequential on the re-structuring of paragraph 821A(a) (see above) and will replace the reference to that paragraph in proposed subsection 822E(4) with a reference to the obligations mentioned in both paragraphs 821A(aa) and (a).

Subdivision C of Division 2 of Part 7.3 - Powers in relation to CS facility licensees

3.40 Proposed item 30 will amend the title of this Subdivision to include a reference to the power of the Reserve Bank in this connection, as well as the powers of ASIC and the Minister.

ASIC to assess licensee's compliance

3.41 Responsibility for monitoring compliance with obligations under Part 7.3 will be divided between ASIC and the Reserve Bank. This is made clear by the amendment of section 823C and the inclusion of proposed section 823CA (see below).

3.42 Proposed items 31 and 32 will amend section 823C by:

- ensuring that ASIC will not assess compliance with the obligations under paragraph 821A(aa) (the obligation on CS facility licensees, to the extent that it is reasonably practicable to do so, to comply with the financial stability standards and do all things necessary to reduce systemic risk); and
- requiring ASIC to provide a copy of the written report of the assessment to the Reserve Bank.

Reserve Bank to assess licensee's compliance

3.43 Proposed item 33 will insert an additional provision (section 823CA) which will require the Reserve Bank to assess compliance of each CS facility licensee each year in complying with its obligation under paragraph 821A(aa) (the obligation on CS facility licensees, to the extent that it is reasonably practicable to do so, to comply with the financial stability standards and do all things necessary to reduce systemic risk).

3.44 A copy of the report must be given to ASIC and the Minister. If the report relates to a serious contravention of a law, a copy of the report, or the relevant part of the report, may be given to one of the nominated agencies (for example, the Australian Federal Police). In addition, the Minister or the Reserve Bank may cause the written report (or part of it) to be printed or published.

3.45 This provision mirrors the assessment and reporting obligation of ASIC in proposed section 823C.

Directions power - reduction of systemic risk

3.46 Section 823E relates to directions which may be given to a CS facility licensee when it has not done all things reasonably practicable to reduce systemic risk in the provision of the facility's services.

3.47 Proposed items 34 to 36 will amend section 823E by:

- ensuring that directions may be given by ASIC to take specified measures to comply with the whole or a part of a financial stability standard (see proposed section 827D - below), as well as to take other action that ASIC considers will reduce systemic risk in the provision of the facility's services (subsection 823E(1));
- making explicit that if a CS facility licensee fails to comply with a direction relating to systemic risk, then ASIC may seek a court order that the licensee comply with the direction (subsection 823E(3A));
- adding a subsection which provides that ASIC must consult the Reserve Bank before giving, varying or revoking a direction, but providing that a failure to do so does not invalidate the direction, (variation or revocation) (subsection 823E(7));
- adding a subsection which provides that the Reserve Bank may at any time request ASIC to make a direction under section 823E but that ASIC is not required to comply with the request (subsection 823E(8)).

3.48 Failure to comply with the direction will be an offence.

Section 824B - When a licence may be granted (R12A)

3.49 Subsection 824B(2) provides the criteria for granting a CS facility licence to an overseas clearing and settlement facility.

3.50 Paragraph 824B(d) requires the Minister to be satisfied that the applicant undertakes to cooperate with ASIC by sharing information and in other ways.

3.51 Proposed item 37 will amend paragraph 824B(d) to require the Minister also to be satisfied that the applicant undertakes to cooperate with the Reserve Bank by sharing information and in other ways.

Matters to be taken into account by the Minister

3.52 Section 827A requires the Minister to have regard to a variety of matters in making certain decisions - for example, to grant an Australian CS facility licence.

3.53 In the proposed FSR Act, as introduced, the Minister was required to have regard:

- to any relevant advice received from ASIC;
- in the case of a decision in respect of an overseas clearing and settlement facility, to whether adequate arrangements exist for cooperation between ASIC and its overseas counterpart.

3.54 Proposed items 38 and 39 will:

- amend paragraph 827A(h) so that the Minister will also be required to have regard to any relevant advice received from the Reserve Bank;
- amend paragraph 827A(d) so that regard also has to be paid to whether adequate arrangements exist for cooperation between the Reserve Bank and its overseas counterpart.

Reserve Bank may give advice to Minister

3.55 Proposed item 40 will give the Reserve Bank explicit authority to provide advice to the Minister in relation to any matter concerning CS facilities (proposed section 827C).

3.56 This mirrors section 827B which gives a similar authority to ASIC.

Reserve Bank may determine financial stability standards

3.57 Proposed item 41 will insert a new section 827D which will empower the Reserve Bank to determine financial stability standards - that is, standards for the purposes of ensuring that CS facility licensees conduct their affairs in a way that causes or promotes overall stability in the Australian financial system (proposed subsection 827D(1)).

3.58 The proposed provision addresses, among other things:

- who must comply with the standards (proposed subsection 827D(2));
- the consultation requirements before making or varying a standard (proposed subsections 827D(3), (6) and (8));
- when a standard comes into force (proposed subsection 827D(5));
- publication and distribution of the standard (proposed subsections 827D(7), (9) and (10)).

Schedule 3 - Penalties

3.59 Proposed items 179-180 will make complementary amendments to the table of penalties in Schedule 3.

Section 127 of the proposed Australian Securities and Investments Commission Act 2001 - confidentiality

3.60 Proposed item 166 will make a minor amendment to subsection 127(2A) of the proposed *Australian Securities and Investments Commission Act 2001* (proposed ASIC Act) to facilitate the exchange of confidential information and documents between ASIC and the Reserve Bank.

Amendments to the Reserve Bank Act 1959

3.61 To complement the proposed amendments described above, proposed item 182 will make the following additional amendments:

- amendment of section 79A of the *Reserve Bank Act 1959* (the RBA Act), which relates to secrecy, to ensure that the relevant provisions cover information and documents relating to proposed Part 7.3 of the proposed Corporations Act and facilitate appropriate sharing of information and documents for the roles given to the Reserve Bank, ASIC and the Minister;

- amendments to sections 5, 10 and 10B of the RBA Act to ensure that the relevant Part 7.3 functions go to the Payments System Board, rather than the main board of the Bank;
- inclusion of a new section 25M in the RBA Act to require the Payments System Board to report annually to the Minister on financial stability standards made, varied or revoked during the year and developments in the clearing and settlement industry during the relevant year which are relevant to Australia's financial stability.

Part 7.4 Limits on Involvement with Licensees

Deemed approval for pre-specification holdings

3.62 Section 851I of the proposed FSR Act provides for a deemed approval of voting power over the 15 percent limitation at the time of specification of a financial market or clearing and settlement facility of national significance. Time of specification means when the relevant entity is first prescribed for the purposes of Part 7.4 Division 1.

3.63 Proposed items 42 and 43 clarify the operation of the deemed approval of shareholdings where the holding did not offend the current shareholder limitations on the Australian Stock Exchange Limited (Part 7.1A of the current Corporations Law).

Part 7.5 Compensation Regimes for Financial Markets

Actions covered by section 888G

3.64 Section 888G provides that if the Securities Exchanges Guarantee Corporation (SEGC) allows a claim, that does not constitute admission of any liability by anyone, other than liability to pay compensation under Division 4 of Part 7.5. Proposed item 46 adds to this provision so that, in addition, when the SEGC allows a claim, no other act done by the SEGC as a result of allowing the claim constitutes an admission of liability.

Ambit of section 888J qualified privilege

3.65 Section 888J provides that the SEGC has qualified privilege when it enters into a contract of insurance in relation to claims against the NGF. Proposed item 49 ensures that qualified privilege would apply, in addition, to members of the board of the SEGC. This will reinstate the current position.

Section 890A - nomination as the SEGC

3.66 Proposed item 51 corrects the terminology of section 890A, which describes the qualifications for nomination as the SEGC. Section 890A, in the proposed FSR Act as introduced, continued to use terms such as 'eligible exchanges'. These phrases are to be replaced by 'market licensees'. Consequential amendments within the section are also made.

Section 892D powers of relevant authority in relation to subrogated rights

3.67 Section 892D would empower the SEGC and market licensees (the relevant authority) with compensation arrangements approved under Division 3 of Part 7.5 to require a person to provide statements of evidence and documents that the relevant authority considers will assist it in determining a claim for compensation that has been made.

3.68 Proposed item 57 extends the power to the situation where the relevant authority considers the statement or documents are necessary for the purpose of exercising the subrogated rights and remedies it has in relation to a claim by virtue of section 892F. This will reinstate the thrust of subsection 979(1) of the current Corporations Law.

Exemption and modification power

3.69 Proposed item 59 inserts a new section 893A which will empower the making of regulations which would exempt a person or market from all or specified provisions in Part 7.5 (Compensation arrangements) or provide that the Part applies as if specified provisions were omitted or modified.

3.70 The reason for including this provision is to ensure flexibility, particularly if a market is only moving into the FSR regime at a late stage in the two year transition period, possibly after the Companies and Securities Advisory Committee (CASAC) has reported to the Government on compensation arrangements (CASAC has been asked to consider this issue). It is not envisaged that it will be used other than in extraordinary situations.

Part 7.6 Licensing of providers of financial services

Need for an Australian financial services licence

3.71 Proposed item 60 amends paragraph 911A(2)(d) to clarify that the exemption from licensing under Part 7.6 for licensed markets and CS facilities applies to both the actual services provided by these markets and facilities as well as services provided incidentally to their operation.

3.72 Paragraph 911A(2)(k) allows regulations to be made that exempt certain persons from the requirement to hold a licence to provide a particular service. Paragraph 911A(2)(l) similarly allows ASIC to exempt certain persons from the requirement to hold a licence to provide a particular service through a notice published in the Gazette. Proposed item 61 inserts a new subsection (5) to allow exemptions under each of these paragraphs to be subject to conditions. Regulations would enable exemptions provided to certain persons under the current Corporations Law to be maintained as appropriate under the new regime.

3.73 Proposed item 62 and 63 amend subparagraphs 911B(1)(a)(iii) and (iv) to ensure that a person who is the authorised representative of a licensee cannot provide a financial service on behalf of another person unless he or she is also an authorised representative of that person.

Obligations of licensees

3.74 Paragraph 912A(a) currently obliges licensees to provide services ‘competently and honestly’. It is proposed to amend this paragraph to require licensees to provide services ‘efficiently, honestly and fairly’ (in line with the wording of the licensing obligations in Parts 7.3 and 8.3 of the current Corporations Law) (see proposed item 64).

3.75 Paragraph 912A(c) currently requires licensees to take reasonable steps to ensure that their representatives comply with the requirements of the proposed Corporations Act and any other law of the Commonwealth, a State or a Territory that relates to the provision of a financial product. Proposed item 65 refines this paragraph by inserting a reference to ‘financial services laws’. ‘Financial services law’ will be defined in section 761A (see proposed item 3). Proposed item 66 omits paragraph 912A(i).

3.76 Section 912C allows ASIC to direct licensees to provide written statements. Proposed item 67 insert a new subsection 912C(1A) to clarify that ASIC may send out notices at any time,

may send notices to particular licensees, and may require different information from different licensees.

How to get a licence

3.77 Proposed item 68 amends section 913B so that ASIC will not be able to grant a licence unless the applicant has provided any additional information requested by ASIC in relation to matters that can be taken into account in determining whether to grant a licence.

Licence conditions

3.78 Proposed items 72 and 73 amend subsection 914B(3) to clarify that ASIC will not be required to give a hearing when it imposes conditions on a licence when the licence is initially granted. The hearing requirement will apply where ASIC proposes to impose additional conditions on a licence or to vary existing conditions.

3.79 Proposed item 75 amends section 915C so that ASIC will be able to suspend or cancel a licence if the licensee breaches their obligations under section 912A or ASIC has reason to believe that the licensee will not comply with their obligations under section 912A. This is different from the current provision, that would enable ASIC to cancel or suspend a licence if the licensee breaches any provision of the proposed Corporations Act, but would not permit a licence to be suspended or revoked if ASIC had reason to believe that the licensee would not comply with their obligations under section 912A.

Australian Prudential Regulation Authority (APRA) regulated bodies

3.80 Proposed items 74 and 76 amend the current provisions of the proposed FSR Act that relate to ASIC's capacity to impose, vary or revoke conditions on the licences of an APRA-regulated body (or a related body corporate) as well as ASIC's capacity to suspend, cancel or revoke a suspension of the licence of an APRA-regulated body (or a related body corporate).

3.81 The provisions that will apply to ADIs (authorised deposit taking institutions) will differ from those that apply to other (non-ADI) APRA regulated bodies.

Non-ADI APRA regulated bodies

3.82 In relation to non-ADI APRA regulated bodies (such as superannuation funds), where ASIC forms an opinion that a proposed action to impose, vary or revoke conditions on a licence would significantly limit or restrict the capacity of the body to carry out its APRA regulated activities, ASIC must consult with APRA before undertaking the proposed action. In other circumstances, ASIC will be required to inform APRA within one week that it has taken the proposed action.

3.83 Where ASIC forms an opinion that a proposed action to suspend, cancel or revoke a suspension of the licence of an APRA-regulated body would significantly limit or restrict the capacity of the body to carry out its APRA regulated activities, ASIC must consult with APRA before undertaking the proposed action.

APRA regulated bodies that are ADIs

3.84 In relation to APRA regulated bodies that are ADIs, where ASIC forms an opinion that a proposed action to place impose, vary or revoke conditions on a licence or to suspend, cancel or revoke a suspension of a licence would significantly limit or restrict the ADI's capacity to carry on all or any of its banking business, ASIC's powers will instead be those of the Minister (although

ASIC will still be required to conduct any hearing and receive any submissions on the proposed action).

3.85 The Minister must not exercise these powers unless he or she has first considered advice from ASIC. ASIC is also required to consult with APRA before advising the Minister. In common with the rules that apply to other (non-ADI) APRA regulated bodies, where ASIC forms the view that proposed action to impose, vary or revoke conditions on a licence would not impact upon the ADI's banking business, the Commission will be required to inform APRA within one week after it has taken its proposed action. However it will not be able to suspend, cancel or revoke a suspension of a licence of an ADI (or related body corporate) without prior consultation with APRA.

3.86 A validation provision will ensure that any failure to comply with these requirements will not invalidate any action taken by ASIC or the Minister. The purpose of this provision is to prevent an APRA regulated licensee challenging action to place conditions on their licence or to vary, suspend or revoke their licence on the grounds that these provisions were not complied with by the Minister or the relevant agencies.

Authorised representatives

3.87 Proposed item 77 amends subsection 916F(1) so that licensees will be required to lodge with ASIC a written notice after they authorise a person as their representative. This amendment is necessary to ensure that provisions relating to ASIC's powers to prescribe and approve forms will apply in these circumstances.

Declared Professional Bodies

3.88 Proposed item 78 amends section 918C to change the circumstances under which ASIC may vary or revoke a Declared Professional Body (DPB) declaration under section 918B. ASIC will be able to vary or revoke a DPB declaration in the following circumstances: the body has not complied with the general obligations imposed on DPBs under section 919A or ASIC has reason to believe that the body will not comply with these obligations. ASIC will also be empowered to vary or revoke a DPB declaration if its members have contravened a 'financial product advice law'. The meaning of the term 'financial product advice law' will be defined in section 761A (see proposed item 2).

3.89 In line with the proposed amendments to the general obligations on financial services licensees (contained in section 912A), proposed item 79 amends section 919A, which deals with the general obligations of DPBs. Paragraph 919A(b) currently requires DPBs to take reasonable steps to ensure that their members comply with the requirements of the proposed Corporations Act and any other law of the Commonwealth, a State or a Territory that relates to the provision of a financial product. This paragraph will be refined by requiring DPBs to ensure that their members comply with the 'financial product advice laws'. Paragraph 919A(i) will also be amended to require a DPB to comply with relevant obligations under Chapter 7 rather than the entire proposed Corporations Act (see proposed item 80).

3.90 Subsection 919E requires each DPB to establish and maintain a register of members. Proposed item 81 amends subsection 919E(4) to ensure that a person cannot inspect these registers until they have paid any fees to the relevant DPB in accordance with regulations made for the purpose of this subsection.

Banning and disqualification of persons from providing financial services

3.91 Section 920A sets out the circumstances in which ASIC can make a banning order against a person. Proposed items 82 and 83 amend this section so that ASIC will be able to ban persons who

become insolvent under administration as well as persons who have not complied with a ‘financial services law’ (as defined in section 761A) or who ASIC has reason to believe will not comply with a ‘financial services law’. This is consistent with the new obligation that will be placed on licensees to ensure that their representatives comply with ‘financial services laws’.

Registers relating to financial services

3.92 Section 922A requires ASIC to establish and maintain one or more registers relating to financial services. Section 922B sets out provisions relating to the inspection of these registers. Proposed item 84 amends subsection 922B(2) to remove the current prohibition against fees for inspecting financial services registers being such as to amount to taxation. This amendment is necessary because these fees (as with all other fees payable to ASIC) will now be imposed as taxes.

Part 7.7 Financial Services Disclosure

New clarity requirement

3.93 Proposed items 87 to 90 amend sections 942B, 942C, 947B and 947C to require information included in a Financial Services Guide (FSG) or a Statement of Advice (SOA) provided to a retail client by a licensee or an authorised representative ‘to be worded and presented in a clear, concise and effective manner’.

Part 7.8 Other Provisions Relating to Conduct

Dealing with client property

3.94 Proposed item 91 amends paragraph 984A(2)(a) to enable regulations to be made that exempt property (rather than money) from the rules relating to holding client property in Division 3 of Part 7.8.

Part 7.9 Financial Product Disclosure

Obligation to give a PDS in relation to the sale of a financial product

3.95 Section 1012C sets out the secondary sales situations in which there will be an obligation to provide a Product Disclosure Statement (PDS). These provisions are modelled on the anti-avoidance provisions currently contained in section 707 of the Corporations Law. They currently apply to off-market sales by controllers, sales within 12 months of issue that relate to an indirect issue, and off-market sales within 12 months by controllers that amount to an indirect issue.

3.96 It is proposed to amend the ‘purpose tests’ contained in sections 1012C so that a secondary sale requires disclosure where either the issuer issued the securities or the seller acquired the securities with the purpose of on selling them. Currently only the purpose of the issuer is relevant. In addition, the application of the purpose test will be strengthened to make it clear that securities are issued or acquired with this purpose even where there may have been other purposes. Also a person will be taken to have this purpose if other securities have been on sold within 12 months unless it is proved that the circumstances of the issue do not give rise to reasonable grounds for concluding that the purpose existed (see proposed item 97). These amendments are aimed at ensuring that secondary sales cannot be used as a mechanism for avoiding the disclosure requirements in Part 7.9.

3.97 It is also proposed to amend section 707 of the proposed Corporations Act, which deals with offers of securities for sale that require disclosure (see proposed items 174 and 175).

Situations where a PDS is not required

3.98 Proposed item 98 amends subsection 1012D(2) to clarify that in a recommendation, issue or offer situation a regulated person must believe on reasonable grounds that a client *knows* that they have access to the information that a PDS would be required to contain before they are relieved of the obligation to provide that client with a PDS. As this subsection is currently drafted, the regulated person would not have to provide a PDS if he or she believed on reasonable grounds that it was *possible* for the client to access this information.

Situations where a PDS may be given later

3.99 Proposed item 101 amends subparagraph 1012G(3)(a)(iii) to correct a reference to the information that a regulated person is required to provide orally if a PDS is not required. The proposed amendment will replace the requirement in the current provisions to provide general information about any significant taxation implications of the product with information about internal and external dispute resolution procedures available to deal with complaints in relation to the product.

Obligation to give employer PDS in relation to certain superannuation and RSA products

3.100 Section 1012I currently requires an issuer of superannuation products to provide a PDS to an employer who applies to become a standard employer sponsor of a superannuation entity. It also requires RSA providers to provide a PDS to an employer before the employer applies for an retirement savings account (RSA) product on behalf of an employee.

3.101 Proposed item 104 amends subsection 1012I(2) to clarify that a PDS will be required each time an employer applies for a different kind of RSA product. It is also proposed to add new subsections 1012I(2A) and (2B) that will require the issuer of a superannuation product to provide a PDS when another superannuation trustee or an RSA provider apply for a superannuation interest on behalf of a person under either Part 24 of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) or Part 9 of the *Retirement Savings Accounts Act 1997* (RSA Act). As a result of these changes, existing references throughout section 1012I to ‘employer’ will be replaced with references to ‘applicant’.

Extra PDS requirements in relation to managed investment products that are Enhanced Disclosure (ED) securities

3.102 Proposed items 112 and 113 amend subsection 1013I(3) to replace current references to certain documents lodged with ASIC or given ‘before the lodgement of the Product Disclosure Statement with ASIC’ with references to documents lodged or given before the date of the PDS. This amendment is necessary because only PDSs relating to listed managed investment products are required to be lodged with ASIC, while unlisted managed investment products may fall within the definition of ED securities.

Supplementary Product Disclosure Statements (SPDS)

3.103 Proposed item 114 amends paragraph 1014A(c) to clarify that a SPDS may add to (as well as update) the information contained in a PDS.

3.104 It is also proposed to amend section 1014F to clarify that subsections 1013C(3) to (7) also apply in relation to an SPDS in the same way that they apply to a PDS (see proposed item 119). These provisions set out generic content requirements of a PDS (such as the requirement that information be provided in ‘a clear, concise and effective manner’).

Other requirements relating to Product Disclosure Statements

3.105 Proposed item 121 amends subsection 1015D(2) so that a person that is responsible for a PDS that is not required to be lodged with ASIC will be required to 'lodge a notice' with ASIC informing the Commission that the PDS is in use, rather than simply notify ASIC of this event. This change is necessary to ensure that provisions relating to ASIC's powers to prescribe and approve forms will apply to the circumstances described in subsection 1015D(2). Amendments will also clarify that the required notice must be lodged with ASIC within 5 business days of the initial use of the PDS (see proposed item 122).

Application forms

3.106 Proposed item 123 inserts a new section 1016A to accommodate provisions relating to the use of application forms that are currently contained in sections 153 and 153A of the SIS Act and section 51 of the RSA Act.

3.107 It will be an offence for a person to make a restricted issue or a restricted sale of a relevant financial product except pursuant to either an application or (where required) an 'eligible application' for the product. An eligible application is generally defined as an application made on an application form attached to the relevant PDS. The regulations will be able to specify additional requirements to be satisfied for an application to be an eligible application.

3.108 This requirement for an 'eligible application' will also apply in the following situations: when an employer applies to become a standard employer sponsor of a superannuation entity; when a standard employer sponsor first applies for a superannuation interest on behalf of an employee, when another superannuation trustee or RSA provider first applies for a superannuation interest on behalf of a member under either Part 24 of the SIS Act or Part 9 of the RSA Act and when an employer first applies for a particular RSA product on behalf of an employee.

3.109 Proposed subsection 1016A(4) will allow the regulations to create offences and defences in relation to these provisions. This will enable current section 153A of the SIS Act to be replicated under the new regime. Consequential amendments also need to be made to the offence provisions in Schedule 3 of the proposed Corporations Act.

3.110 Consequential amendments will also be made to the provisions of the FSR(CP) Bill 2001 that propose to insert a definition of 'regulatory provision' into the SIS Act and RSA Act.

Other disclosure obligations of the issuer of a financial product

3.111 Proposed item 125 amends section 1017C through the additional of a regulation making power that can be used to provide a definition of the term 'relevant sub-plan' for the purposes of this section.

3.112 It is also proposed to insert a new section 1017DA into the proposed FSR Act. The purpose of this section is to enable regulations to be made that specify additional information that superannuation trustees and RSA providers may be required to provide to product holders and other beneficiaries (as opposed to the information that may be provided on request under section 1017C) (see proposed item 126). This provision will allow obligations currently imposed on these persons under the current legislative framework to be carried across to the new regime. It will be an offence to fail to comply with these requirements. Consequential amendments will be made to the offence provisions in Schedule 3 to the proposed Corporations Act (see proposed item 181).

3.113 Proposed items 127 and 128 amend section 1017F to enable a product issuer to confirm transactions by means of a standing facility either (a) where the relevant product holder has agreed

to this arrangement or (b) where the relevant product holder has been informed of the facility by or on behalf of the regulated person and has not advised that they do not agree to its use as a means of obtaining such confirmations. Regulations may be made that set out requirements that must be satisfied by product issuers before they are able to utilise option (b).

Section 1020G modification powers

3.114 Proposed item 129 amends paragraph 1020G(1)(c) to ensure that regulations to modify Part 7.9 may apply generally rather than only to particular persons or financial products.

Part 7.10 Market misconduct and other prohibited conduct

False trading & market rigging

3.115 It is proposed to amend subsection 1041C(1) to clarify the existing physical elements in the offence provisions relating to false trading and market rigging (see proposed item 130).

Inducing persons to deal

3.116 Proposed item 131 amends section 1041F to extend the coverage of the prohibition to encompass the following conduct: applying to become a standard employer sponsor of a superannuation entity, permitting a person to become a standard employer sponsor of a superannuation entity and applying on behalf of an employee for the employee to become the holder of an RSA product. This will be achieved through the addition of a new subsection 1041F(3).

Misleading or deceptive conduct

3.117 It is proposed to amend paragraph 1041H(2)(b) to ensure that provisions relating to misleading or deceptive conduct apply to the following: applying to become a standard employer sponsor of a superannuation entity; permitting a person to become a standard employer sponsor of a superannuation entity; a trustee of a superannuation entity dealing with a beneficiary of that entity as such a beneficiary; the trustee of a superannuation entity dealing with a standard employer sponsor; applying on behalf of an employee for an RSA product; an RSA provider dealing with an employer who applies on behalf of an employee for an RSA product; or carrying on negotiations or doing any act preparatory to any of the above (see proposed item 132).

3.118 The purpose of these amendments is to ensure that the current prohibitions against misleading or deceptive conduct contained in the SIS Act and the RSA Act are carried over to the proposed Corporations Act.

Insider Trading

3.119 Proposed item 135 clarifies the nature and application of the physical and fault elements in the prohibition against insider trading in proposed section 1043A. The amendments provide that the fault element for the physical element in paragraph (1)(a) is contained in paragraph (1)(b), similarly that the fault element for the physical element in paragraph (2)(a) is contained in paragraph (2)(b). This will ensure that the application of the Commonwealth Criminal Code does not produce any unintended changes to the interpretation of the provision. The amendments also reinstate the objective fault element of 'ought reasonably to know' in paragraphs (1)(b) and (2)(b) that currently applies to this offence.

Part 7.11 Title and Transfer

References to interests in registered schemes

3.120 It is proposed to amend sections 1070A, 1070D, 1070DB, 1071A and 1073A to replace current references to ‘managed investment product’ with references to interests in registered schemes (a subset of managed investment products) (see proposed items 136 to 138, 141, 143 and 144). The proposed amendments are intended to narrow the effect of these provisions, which are currently inappropriately wide in their application.

Section 1073A - to refer to ‘rights’ rather than ‘options’

3.121 Section 1073A lists the securities to which Division 3 of Part 7.11 initially applies. Paragraph 1073A(d), in the proposed FSR Act as introduced, refers to ‘options’. The current comparable provision refers to ‘rights’. It is proposed to reinstate the current position - that the provision apply to rights, and not use the wider term – ‘options’ (see proposed item 145).

Clarification of effect of section 1073E

3.122 Section 1073E empowers ASIC to extend the ambit of Division 3 of Part 7.11 (which relates to paper-based transfer of title) to securities other than those securities to which it initially applies. Proposed item 147 inserts a note under proposed subsection 1073E(1) to clarify that the securities in respect of which ASIC may make a declaration under subsection 1073E(1) are not limited to those covered in paragraphs 1073A(1)(a) to (d).

Section 1074A - financial products to which this Division applies

3.123 Section 1074A currently empowers the making of regulations to take financial products out of the ambit of Division 4 of Part 7.11 (which relates, in effect, to the electronic transfer of legal title by prescribed CS facilities). It is proposed to amend this provision in order to facilitate the making of regulations with respect to particular products and particular facilities under Division 4 of Part 7.11. The potential ambit of ‘financial products’ will be retained, but the focus of the provision will be reversed - financial products will be nominated as being within the scope of the Division, rather than being taken out of its range. It is proposed that the regulations be able to prescribe different ranges of products in respect of different prescribed CS facilities (see proposed item 148).

Part 7.12 Miscellaneous

Section 1101B - inclusion of references to compensation rules

3.124 Section 1101B empowers the Court to make orders in a wide range of situations relating to Chapter 7. It is proposed to ensure that compensation rules (which form part of the compensation arrangements in Part 7.5) can be enforced in the same way as operating rules of markets and CS facilities (see proposed items 151 to 158)

Proposed Australian Securities and Investments Commission Act 2001

Application of proposed ASIC Act to External Territories

3.125 Proposed item 159 amends section 4 of the proposed ASIC Act to allow regulations to be made that apply certain provisions of the ASIC Act to prescribed external Territories in specified circumstances.

3.126 It is also proposed to make a range of other technical amendments to the proposed ASIC Act in order to ensure that relevant provisions will apply properly to prescribed Territories (and that ASIC can properly investigate alleged contraventions in relation to relevant financial products within prescribed external Territories).

3.127 The proposed amendments will ensure that references to ‘Australia’ or ‘in this jurisdiction’ will generally be taken to include the relevant external Territory in relevant circumstances. The definitions of ‘Australia’, ‘foreign country’ and ‘Territory’ will be amended to ensure that a prescribed ‘external Territory’ will be taken to be part of ‘Australia’ and not a ‘foreign country’ for relevant parts of the proposed ASIC Act. The amendments will also ensure that references in the Act to ‘Territory’ include a prescribed ‘external Territory’ to the extent that the provision applies to that external Territory. Proposed item 165 also amends subsection 95(1) to ensure that ASIC will not be required to establish a Regional Office and appoint a separate Regional Commissioner in an external Territory when it is prescribed in relation to particular financial products under subsections 4(1) and 4(2) of the proposed ASIC Act.

3.128 These proposed amendments are largely technical in nature and are designed to maintain the existing regulatory arrangements. They will also ensure that ASIC can continue to enforce relevant regulatory provisions when these are transferred from the SIS Act and RSA Act to the new Chapter 7 of the proposed Corporations Act.

Definition of a financial service

3.129 Proposed item 163 amends paragraphs 12BAB(18)(f) and (g) to reflect proposed changes to the definition of CS facilities in section 768A of the proposed FSR Act.

CASAC

3.130 It is proposed to amend note 2 following section 146 to refer to CAMAC (the Corporations and Markets Advisory Committee) (as CASAC will be re-named following the enactment of the proposed FSR Act) rather than CASAC (see proposed item 169).

Other Changes to the Corporations Act 2001

Application to the Crown

3.131 Proposed item 170 amends section 5A to allow the Crown to be bound by the new Chapter 6CA that will be created by the proposed FSR Act. The Crown will be bound by Chapter 6CA only if regulations state that it is and only in the circumstances specified in the regulations.

Definition of associate

3.132 The definition of ‘associate’ in the proposed FSR Act has been amended to ensure that it will operate satisfactorily in situations where the reference to associate is in relation to a third party. The proposed definition will apply to all occurrences of ‘associate’ in Chapters 6 to 6C as well as outside those Chapters where the references relate to certain matters such as ‘voting power’ and ‘relevant interests’ in securities. This will avoid any doubt about which definition of ‘associate’ applies in provisions in Chapters 6-6C. The definition has also been amended so that it will operate appropriately where the reference is in relation to a body that is a managed investment scheme. A small number of consequential amendments have been made to provisions in Chapter 6, including ensuring that the definition of ‘voting power’ in section 610 operates in relation to a managed investment scheme (see proposed items 183 to 187).

Part 6D.5

3.133 Proposed item 178 inserts a new Part 6D.5 into Chapter 6D of the proposed Corporations Act. The proposed new section 742 will enable regulations to be made that exempt a person or class of persons or security or class of securities from all or specified parts of Chapter 6D. It will also enable regulations to be made that provide that Chapter 6D applies as if specified provisions were omitted, modified or varied as specified in the regulations.

3.134 The proposed section 742 would also permit regulations to be made that apply Chapter 6D to persons, securities, financial products or situations to which they could not otherwise apply. Finally, the regulations will be able to change the person by whom or to whom a document of information is required to be given under Chapter 6D.