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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CORPORATIONS LEGISLATION AMENDMENT (DERIVATIVE
TRANSACTIONS) BILL 2012

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Deputy Prime Minister and Treasurer, the Hon Wayne Swan MP)

Table of contents

Glossary	v
General outline and financial impact.....	vii
Chapter 1 Summary of the Corporations Legislation Amendment (Derivative Transactions) Bill 2012.....	1
Chapter 2 Statement of compatibility with Human Rights	49
Index.....	53

Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
ACCC	Australian Competition and Consumer Commission
AML	Australian market licence (or licensee, depending upon the context used)
APRA	Australian Prudential Regulatory Authority
APRA Act	<i>Australian Prudential Regulation Authority Act 1998</i>
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
CSFL	Clearing and settlement facility licence (or licensee, depending upon the context used)
Corporations Act	<i>Corporations Act 2001</i>
DTR	Derivative transaction rules
DTRR	Derivative trade repository rules
G-20	Group of Twenty (G-20) forum of 19 countries and the European Union
LI Act	<i>Legislative Instruments Act 2003</i>
MABRA	<i>Mutual Assistance in Business Regulation Act 1992</i>
MABRR	<i>Mutual Assistance in Business Regulation Regulations</i>
OBPR	Office of Best Practice Regulation
OTC derivatives	Over-the-counter derivatives
RBA	Reserve Bank of Australia
RB Act	<i>Reserve Bank Act 1959</i>
RIS	Regulation Impact Statement
TR	Trade repository

General outline and financial impact

Outline

The Bill amends the *Australian Prudential Regulation Authority Act 1998*, *Australian Securities and Investments Commission Act 2001*, the *Corporations Act 2001*, the *Mutual Assistance in Business Regulation Act 1992*, and the *Reserve Bank Act 1959* to provide a legislative framework to implement Australia's G-20 commitments in relation to over-the-counter (OTC) derivatives reforms.

Date of effect: All of the amendments take effect on the 28th day after the Act receives Royal Assent.

While the amendments commence at this time, ASIC's derivative transaction rule making power will not be enlivened unless and until the Minister prescribes a derivative class in respect of one or more of the trade reporting, clearing or execution mandates.

Trade repository licensing applications may be lodged from the date of commencement, subject to prescription or approval of the relevant form. However, ASIC would be unable to satisfy itself of the criteria for granting a licence until derivative trade repository rules (which set out the operational requirements of a licensee) are finalised.

Prohibitions will apply from the date of commencement on a person holding themselves out to be a licensed or prescribed facility for the purpose of any of the three mandates, when they are not a licensed or prescribed facility.

Prohibitions on operating an unlicensed trade repository will only come into effect once regulations are made providing that specified classes of trade repository must be licensed.

Proposal announced: This measure was announced in a joint Media Release of the Deputy Prime Minister and Treasurer, the Minister for Financial Services and Superannuation and the Parliamentary Secretary to the Treasurer on 18 April 2012.

Financial impact: Nil.

Human rights implications: This Bill does not raise any human rights issues. See *Statement of Compatibility with Human Rights* — Chapter 2, paragraphs 2.1 to **Error! Reference source not found.****Error! Reference source not found.**

Compliance cost impact: The compliance cost impact of these amendments is low. The compliance costs associated with regulations and rules made under the amendments may vary depending upon their terms.

Regulation impact statement

1.1 The Office of Best Practice Regulation (OBPR) has advised that a Regulation Impact Statement (RIS) is not required for this Bill. However, subsequent RISs will be required for the implementation of further regulatory proposals that will give effect to the broader framework established by the Bill.

Chapter 1

Summary of the Corporations Legislation Amendment (Derivative Transactions) Bill 2012

Outline of chapter

1.1 The Bill amends the *Australian Prudential Regulation Authority Act 1998*, *Australian Securities and Investments Commission Act 2001*, the *Corporations Act 2001*, the *Mutual Assistance in Business Regulation Act 1992*, and the *Reserve Bank Act 1959* to provide a legislative framework to implement Australia's G-20 commitments in relation to over the counter (OTC) derivatives reforms.

1.2 Each amendment will commence on a date determined in accordance with the table in item 2 of the Bill.

Context of amendments

The Australian Government's G-20 commitment

1.3 At the G-20 summit in Pittsburgh in 2009, the Australian Government joined other jurisdictions in committing to substantial reforms to practices in over-the-counter (OTC) derivatives markets.

1.4 Three of the key G-20 commitments in this area were:

- the reporting of all OTC derivatives to trade repositories;
- the clearing of all standardised OTC derivatives through central counterparties; and
- the execution of all standardised OTC derivatives on exchanges or electronic trading platforms, where appropriate.

1.5 The reforms aim to bring transparency to OTC derivative markets and improve risk management practices.

1.6 In particular, trade reporting will increase transparency in the market. It will also give regulators and market participants access to valuable data with which to assess the risks associated with the OTC market.

1.7 Clearing of standardised OTC derivatives will reduce counterparty risk associated with OTC derivative transactions.

Consultation

1.8 Earlier this year the Australian Government consulted on the contents of the regulations to be made under the framework, and on the classes of derivatives that might be prescribed as being subject to the framework. Comments were also sought on the proposed legislative framework and licensing arrangements for trade repositories.

1.9 Treasury, in conjunction with the Australian Prudential Regulation Authority (APRA), the Australian Securities and Investment Commission (ASIC) and the Reserve Bank of Australia (RBA) (hereafter the Agencies) conducted 43 face-to-face meetings with stakeholders and received 37 submissions to the consultation paper.

1.10 Stakeholders were generally supportive of the proposed legislative framework for the implementation of the G-20 OTC derivatives reforms. A wide range of stakeholders understood the need and supported the flexible approach taken by the Australian Government in implementing the reforms.

1.11 A number of stakeholders favoured mandating central clearing rather than relying on market forces to ensure central clearing of OTC derivatives occurs in a timely manner.

1.12 Some stakeholders argued that their use of derivatives was primarily for the hedging of business risk and questioned the systemic importance of their derivatives trading activities.

1.13 The legislative framework will provide the flexibility for consideration of the matters raised before any future decision to mandate reporting, central clearing or on-exchange trading in respect of particular derivatives classes, transactions or parties.

1.14 The Council of Financial Regulators (the Council) had earlier been considering the implementation of reforms for the Australian OTC derivatives market for some time. In 2009 the Council published a survey

of the domestic OTC derivatives market,¹ and in June 2011 the Council released a discussion paper on central clearing as the basis for detailed consultation with interested stakeholders.²

1.15 Following that consultation, the Council provided a report to the Government on 20 March 2012, setting out advice and recommendations on implementing reforms in the Australian market. This report was released for comment as part of the consultation earlier this year.

1.16 A draft version of the amendments to the Corporations Act was consulted on during July and August of 2012. There was general support for the draft with a number of stakeholders calling for the Bill to be implemented as a matter of urgency, noting that in their view, the Bill will help to ensure Australia's compliance with international agreements and overseas requirements that impact across borders.

International developments

1.17 At an international level, in June 2012, the Financial Stability Board (FSB) published its third report on jurisdictions' progress towards meeting G-20 commitments regarding OTC derivatives.³

1.18 The report called on all jurisdictions to aggressively push ahead to achieve full implementation of market changes by the end of 2012 to meet the G-20 commitments in as many reform areas as possible.

1.19 The report noted that all jurisdictions should put legislation and regulations in place promptly, and in a form flexible enough to respond to cross-border consistency and other issues that may arise.

1.20 As of August 2012, the United States Commodities and Futures Trading Commission has recently published proposed guidance on the extra-territorial application of their implementations of the G20 commitments and their expectations of other jurisdictions, such as Australia.

1.21 The proposed guidance highlights the need for Australia to act quickly to ensure that Australian businesses and investors are able to demonstrate that they are subject to an equivalent regulatory regime and so be able to continue to participate in the major derivatives markets of the world while still being primarily regulated in Australia.

1 <http://www.rba.gov.au/payments-system/clearing-settlement/survey-otc-deriv-mkts/index.html>.

2 <http://www.rba.gov.au/publications/consultations/201106-otc-derivatives/index.html>.

3 http://www.financialstabilityboard.org/publications/r_120615.pdf.

1.22 However, the guidance has also highlighted areas of inconsistency and further potential change so it is important for the Australian regime to remain flexible to ensure that future developments can be accommodated.

Summary of new law

1.23 This Bill provides for the implementation of graduated measures to respond proportionally in managing risks in Australian OTC derivatives markets. In outline, the framework will operate as follows:

- The responsible Minister will be empowered by the *Corporations Act 2001* (the Act) to prescribe a certain class of derivatives (in relation to a mandatory obligation).
- A derivatives transaction rule (DTR) may in turn be issued by ASIC to establish one or more mandatory obligations (reporting, clearing or execution) for participants transacting in this prescribed class of derivatives.
- Any rule must be consented to by the Minister before taking effect. The scope of rules and other technical features of the scheme may be further limited by Regulation.
- A new licensing regime will be introduced for a new kind of financial infrastructure entity – trade repositories.

1.24 The establishment of the framework will not in itself introduce any trade reporting, central clearing or trade execution obligations for OTC derivatives transactions. Rather, the framework creates a mechanism by which such obligations may be implemented by supporting regulations and rules.

1.25 ASIC's decisions to prescribe or make rules for a class of derivatives will be subject to public consultation, which will provide opportunities for input from other agencies. Rules will require the consent of the Minister and will be disallowable legislative instruments. The Bill also contains a regulation-making power to narrow the scope of the mandatory obligations (including the parties who will be required to comply with the obligations under the DTRs). These regulations will provide a means of limiting the classes of persons and transactions to which the rules can be applied. That is, the regulations may provide carve outs and exceptions for any potential trade reporting, clearing or execution mandates.

1.26 It is expected that the Minister will make such regulations at the same time as prescribing a class of derivatives as being subject to ASIC's trade reporting, clearing or execution rule-making power.

1.27 Under the rule-making power, ASIC will also be able to specify cases in which certain persons or certain transactions would not be required to report, clear or execute trades in accordance with the DTRs. That is, within the limitations of the rule making power, ASIC may provide for additional carve outs and exceptions.

1.28 While some stakeholders have suggested that some carve outs and exceptions should be hardwired into the primary legislation, the Bill reflects the need to maintain flexibility, particularly in order to adapt our requirements to international developments, to be able to tailor the nature of any carve outs to the requirements for any particular derivative classes and the need to adapt to changing market practices and concerns (including but not limited to avoidance activities). Carve outs and exceptions can be provided under regulations and rules, if it is considered appropriate to do so. Internationally there are a range of carve outs and exceptions that are becoming generally accepted (in adopted G-20 related legislation and in various G-20 related reform proposals) as necessary and appropriate.

1.29 As there is no existing regulation of trade repositories in Australia, trade reporting DTRs will be complemented by a licensing regime for trade repositories. There are no operators of trade repositories (as the term is contemplated by the G-20 commitments) in Australia; therefore no existing operators will be affected. Clearing facilities and trading platforms are already subject to separate licensing regimes.

1.30 The trade repository licensing regime is modelled on the current licensing regimes for Australian market licence holders (AMLs, Part 7.2 of the Act) and Australian clearing and settlement facility licence holders (CSFLs, Part 7.3 of the Act). It has a similar structure to Part 7.2 and Part 7.3, however, no separate overseas licensing regime is necessary as the requirements for licensing will be limited to what would be appropriate for either a domestic or overseas based trade repository.

1.31 The licensing regime will be established at a high level in the amended Act, with regulations and conditions on licences filling in detail (as is the case with the AML and CSFL regimes). ASIC will be given powers to make rules governing the operation of a trade repository in addition to issuing and imposing conditions on individual TR licensees. Similar checks and balances exist in relation to this rule making power to those in relation to the derivative transaction rules set out above.

1.32 It is important that the regime established for licensing and supervising any domestic facility is sufficiently equivalent to the regimes in place in major overseas jurisdictions such as the European Union and the United States of America to facilitate mutual recognition and therefore Australian facilities' access to intermediaries located in those jurisdictions.

1.33 Where the DTRs oblige a person to utilise the services of a trade repository, clearing facility or trading platform, the rules can impose a duty upon the relevant facility to provide non-discriminatory access. Such a requirement is important, given that there may be only one facility offering services for a given derivative class. ASIC will also have power to make additional rules to determine the obligations of trade repositories, clearing facilities or trading platforms in relation to any requirements imposed upon parties to transactions.

1.34 The Bill provides for the protection of trade data through imposing restrictions on the use and disclosure of reported data. The derivative trade repository rules may also impose requirements in relation to the integrity and security of a trade repository's systems.

1.35 ASIC will be given the function of supervising trade repositories, however, it will be able to perform this function in respect of overseas TR licensees by satisfying itself that the home regulator has adequate regulations in place or that adequate arrangements are in place with the home regulator.

1.36 Licensing and associated powers will be exercised by ASIC, although, as with AMLs and CSFLs, the Minister will have a directions power operating in parallel to ASIC's directions power.

1.37 The Bill also provides for consequential amendments to related legislation. These changes will:

- allow for other legislation that contemplates licensed markets and clearing and settlement facilities to also deal with trade repositories, where appropriate; and
- clarify the legislative framework under which ASIC, the Reserve Bank and APRA can receive and share information received from trade repositories.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The responsible Minister will be empowered by the <i>Corporations Act 2001</i> (the Act) to prescribe a certain class of derivatives (in relation to a mandatory obligation).	No current law.
A derivatives transaction rule (DTR) may in turn be issued by ASIC to establish one or more mandatory obligations (reporting, clearing or execution) for participants transacting in this prescribed class of derivatives.	No current law.
Any rule must be consented to by the Minister before taking effect. The scope of rules and other technical features of the scheme may be further limited by Regulation.	No current law.
A new licensing regime will be introduced for a new kind of financial infrastructure entity- trade repositories.	No current law.

Detailed explanation of new law

Item 1 Short Title

1.38 This item provides that the Act may be cited as the *Corporations Legislation Amendment (Derivative Transactions) Act 2012*.

Item 2 Commencement

1.39 This item provides that the amendments effected by the Act, as set out in Schedule 1, will take effect 28 days after the Act receives Royal Assent.

1.41 While the amendments commence at this time, ASIC's derivative transaction rule making power will not be enlivened unless and until the Minister prescribes a derivative class in respect of one or more of the trade reporting, clearing or execution mandates. [**Schedule 1, item 32, Division 2 of Part 7.5A — Regulation of derivative transactions: derivative transaction rules**]

1.42 Trade repository licensing applications may be lodged from the date of commencement, subject to prescription or approval of the relevant form. ASIC would be unable to satisfying itself of the criteria for registration (and therefore be unable to grant a licence) until derivative trade repository rules (which set out the operational requirements of a licensee) are finalised. [**Schedule 1, item 32, Division 6 of Part 7.5A — Regulation of licensed derivative trade repositories: licensing**]

1.43 Prohibitions on operating an unlicensed trade repository will only arise once regulations are made providing that specified classes of trade repository must be licensed. [**Schedule 1, item 32, Section 905A**]

1.44 Prohibitions on a person holding themselves out to be a licensed or prescribed facility for the purpose of any of the three mandates (when they are not) will apply from the date of commencement. [**Schedule 1, item 32, Section 907A**]

Item 3 Schedule

1.45 This item provides that the Acts specified in Schedule 1 are amended as set out in that Schedule.

Schedule 1 — Amendments relating to derivatives transactions

Part 1 — Amendments to the Corporations Act

Corporations Act 2001

1.46 Items 1 to 3 amend section 9 of the Corporations Act.

1.47 It is clarified that *Australian derivative trade repository licence*, *derivative trade repository rules* and *derivative transaction rules*, when used in a provision outside Chapter 7, have the same meaning as in Chapter 7. [**Schedule 1, items 1, 2 and 3, section 9**]

1.48 These new terms are defined in section 761A.

Item 4

1.49 A reference to the new Part 7.5A is inserted into the outline of Chapter 7. [**Schedule 1, item 4, section 760B**]

1.50 The Bill will introduce a new Part 7.5A – Regulation of derivative transactions and derivative trade repositories.

Item 5 to 17

1.51 Items 5 to 17 amend section 761A of the Corporations Act. This section sets out a number of definitions used throughout Chapter 7.

1.52 An *Australian derivative trade repository licence* is defined as a licence referred to in the new section 905B, which authorises a body corporate to operate a derivative trade repository. [**Schedule 1, item 5, section 761A**]

1.53 The Bill creates definitions of execution, clearing and reporting requirements. *Clearing requirements* in relation to derivative transactions are defined as requirements for derivative transactions to be cleared through specified facilities or a specified class of facilities. [**Schedule 1, item 6, section 761A**]. The other requirements are explained further below, in the order in which they appear in the Bill.

1.54 *Derivative trade data* is defined as information about derivative transactions or positions relating to derivative transactions, or information including statistical data that is created or derived from information about derivative transactions or positions. [**Schedule 1, item 7, section 761A**]

1.55 The inclusion of created or derived statistical data within the meaning of this term should be noted. Provisions in the Bill that govern derivative trade data (such as privacy and confidentiality provisions) must therefore be read as also extending to such statistical data.

1.56 It should also be noted that the definition also applies to a snapshot of position data in addition to transaction specific data, and also affects the meaning of provisions dealing with derivative trade data throughout the Bill.

1.57 A *derivative trade repository* is defined as a facility to which information about derivative transactions or derivative positions can be reported [**Schedule 1, item 8, section 761A**]. A facility may still be a derivative trade repository even if other kinds of data are reported to it.

1.58 The term is very widely defined and may potentially apply to a wide range of facilities. This provision is kept broad to ensure that there is flexibility for ASIC to coordinate its approach with other jurisdictions and to accommodate future market innovations.

1.59 A facility will not be subject to the provisions of the new Part 7.5A unless there is a prescription that the Part applies to a class of trade repositories that includes the facility. In addition, a facility will not be subject to regulation as a trade repository under the new Part 7.5A unless it applies for and obtains a licence (and therefore must conform to the other requirements for trade repositories set out in the Act, regulations and rules); it is of a class prescribed by regulation as a prescribed trade repository; or it is prescribed by regulations as a class of trade repository that must be licensed. Any prescribing regulations will more specifically define the types of facility to which they will apply. A derivative trade repository per se is not required to be licensed.

1.60 A person may not comply with a trade reporting rule by reporting to a trade repository unless it is prescribed or licensed.

1.61 A *derivative trade repository licensee* is defined as a person who holds an Australian derivative trade repository licence. **[Schedule 1, item 9, section 761A]**

1.62 The trade repository licensing regime is set out at Division 6 of Part 7.5A.

1.63 There will be two types of rules that may be made pursuant to the new Part 7.5A: derivative trade repository rules and derivative transaction rules.

1.64 *Derivative trade repository rules* are defined as rules governing the conduct of derivative trade repositories, which are made by ASIC as authorised by subsection 903A(1). **[Schedule 1, item 10, section 761A]**. The provisions that set out the process by which these rules may be made, varied or revoked are set out at Division 4, Subdivision C of Part 7.5A. Enforcement mechanisms are set out at Division 4, Subdivision B of Part 7.5A.

1.65 A definition of *derivative transaction* is given. It covers entry into a derivative arrangement, modification, assignment or termination of such an arrangement. The definition also allows for other types of transaction to be included through regulations. This flexibility is required to ensure that the Act can potentially apply to transactions dealt with in the laws of other jurisdictions — to enable rules that facilitate compliance with foreign laws and mutual recognition under foreign laws of compliance with our requirements. **[Schedule 1, item 11, section 761A]**

1.66 The scope of ASIC's derivative transaction rule-making power is limited in part by both this definition and the definitions of clearing requirements, execution requirements and reporting requirements.

1.67 When made, the trade reporting, clearing or execution rules will provide specific detail on various requirements and to which transactions these requirements will apply.

1.68 **Derivative transaction rules** are defined as rules governing derivative transactions, which subsection 901A(1) authorises ASIC to make. [Schedule 1, item 12, section 761A]. The provisions that set out the process by which these rules may be made, varied or revoked, are set out at Division 1, Subdivision C of Part 7.5A. Enforcement mechanisms are set out at Division 1, Subdivision B of Part 7.5A.

1.69 **Execution requirements** in relation to derivative transactions are defined as requirements to execute derivative transactions on specified trading platforms or a specified class of platforms. [Schedule 1, item 13, section 761A]

1.70 **Involved in** a derivative trade repository licensee or applicant means acting as a director, secretary or senior manager of the licensee or applicant, or a holding company, or holding more than 15 per cent of the voting power in a licensee, applicant or holding company [Schedule 1, item 14, section 761A]. This is the same definition of involvement as that which applies to market licensees and CS facility licensees. This term is utilised in the new section 903A, which obliges a licensed trade repository to take all reasonable steps to ensure that no disqualified individual becomes, or remains, involved in the operator; and a corresponding requirement in the new section 904D for ASIC when granting a licence to form the view that no disqualified individual appears to be involved in the applicant.

1.71 The new Part 7.5A provides that trade reporting mandates may require reporting to a licensed or prescribed trade repository. The former will be subject to the licensing regime, including derivative trade repository rules and the information use and restriction obligations in Divisions 3, 4, 5 and 6 of Part 7.5A. The latter is subject to the regulation making power in the proposed new 906A.

1.72 A **licensed derivative trade repository** is defined as a derivative trade repository that is authorised by an Australian derivative trade repository licence. [Schedule 1, item 15, section 761A]

1.73 A **prescribed derivative trade repository** is defined as a facility prescribed by the regulations as the facility to which a class of derivative transactions are to be reported, or that belongs to the class of facilities that

is prescribed by the regulations for this purpose. While normally trade reporting obligations can only be satisfied by reporting to a licensed repository, the Bill provided the potential for obligations to be satisfied by reporting to non-licensed but prescribed facilities. Section 906A provides the mechanism for the creation of regulations to govern their operation. It is expected that prescription (rather than licensing) will be used in very limited circumstances. For example, a government agency may be prescribed for certain reporting obligations; or trade repositories licensed under foreign regimes may be prescribed for the purpose of rules directed at facilitating compliance with foreign trade reporting obligations. **[Schedule 1, item 16, section 761A]**

1.74 **Reporting requirements** in relation to derivative transactions are defined as requirements to report derivative transactions to specified facilities, or a specified class of facilities. **[Schedule 1, item 17, section 761A]**

Item 18

1.75 While it is unlikely that this would be the case, the Bill includes a derivative trade repository in the list of explicit exceptions from the definition of a financial product. Exceptions are already provided for a facility that operates a financial market, clearing and settlement facility or a payment system operated as part of a clearing and settlement facility. **[Schedule 1, item 18, subparagraph 765A(1)(iv)]**

Items 19 to 23

1.76 Section 793B is amended to provide that, in the event of any inconsistency between the derivative transaction rules or derivative trade repository rules and the operating rules of a financial market, the derivative transaction rules or derivative trade repository rules prevail to the extent of the inconsistency. **[Schedule 1, item 19, subsection 793B(2)]**

1.77 Section 798H is amended to provide that, if derivative transaction rules or derivative trade repository rules and market integrity rules are inconsistent, the market integrity rules prevail. **[Schedule 1, item 20, subsection 798H(3)]**

1.78 Section 822B is amended to provide that, in the event of any inconsistency between the derivative transaction rules or derivative trade repository rules and the operating rules of a CS facility, the derivative transaction rules or derivative trade repository rules prevail to the extent of the inconsistency. **[Schedule 1, items 21 and 22, subsection 822B(2)]**

1.79 Section 827D is amended to provide that, in the event of any inconsistency between the derivative transaction rules and the Reserve Bank of Australia's (RBA) financial stability standards, the financial stability standards will prevail to the extent of the inconsistency. **[Schedule 1, item 23, subsection 827D(2A)]**

1.80 Elsewhere, the new section 901E provides that, in the event of any inconsistency between the derivative transaction rules and the derivative trade repository rules, the derivative transaction rules prevail to the extent of the inconsistency. **[Schedule 1, Item 32, subsection 901E(2)]**

Items 24 to 31

1.81 Division 2 of Part 7.4 provides a regime for the disqualification of certain persons from being involved in the operation of an Australian Market Licence (AML) holder or a Clearing and Settlement Facility Licence (CSFL) holder. The Bill amends this regime to apply also to trade repository licence holders.

1.82 An individual may be disqualified from involvement in an Australian derivative trade repository licensee or applicant if ASIC makes a declaration that the individual is unfit, or if they are disqualified from involvement in a corporation. An individual is involved in a licensee or applicant if that individual is a director, secretary or senior manager of the licensee or applicant, or if the individual has more than 15 per cent of the voting power in the licensee or applicant. **[Schedule 1, item 24 section 953B, Schedule 1, item 25 subsection 853C(1) and Schedule 1, item 26, subsection 853C(1)]**

1.83 When ASIC makes a declaration, it must follow a prescribed procedure, which is the same as that for disqualifying an individual from involvement in an AML or CSFL. If ASIC intends to make a declaration that an individual is disqualified from involvement in a derivative trade repository licensee, ASIC must notify that licensee or applicant within 42 days after receiving either an application for a derivative trade repository licence, or information relevant to the disqualification. Notice must also be given to the individual and the Minister, and must state the grounds on which ASIC proposes to make the declaration. ASIC must then conduct a hearing before deciding whether to make the declaration. **[Schedule 1, item 27 paragraphs 853D(2)(a) and (b)]**

1.84 Disqualified individuals must not become involved in a derivative trade repository licensee, and if already involved, must take reasonable steps to cease to be involved in the licensee. **[Schedule 1, item 28, subsection 853F(1) and Schedule 1, item 29, subsection 853F(2)]**

1.85 If ASIC becomes aware of a disqualified individual who is involved in a derivative trade repository licensee, it must notify the individual, the licensee and the Minister as soon as possible. [**Schedule 1, item 30, section 853G**]

1.86 These provisions operate in parallel to any derivative trade repository rules that ASIC may make. These rules may impose requirements in relation to the governance of a trade repository (see **paragraph 903A(2)(c)**) and are not limited only to dealing with conflicts of interest issues.

1.87 The rules may bind licensees and their officers. In contrast, the amended Division 2 imposed obligations upon disqualified individuals (who may be directors, secretaries or senior managers) not to maintain any involvement with a licensee; and the new section 903A obliges a licensed trade repository to take all reasonable steps to ensure that no disqualified individual becomes, or remains, involved in the operator. The definition of *involved in* is referred to above.

1.88 Regulations under the new section 906A may impose obligations, confer powers and provide for offences in relation to a wide range of matters in relation to prescribed trade repositories. These may include regulations dealing with the disqualification of persons involved with a prescribed repository.

1.89 The regulations may require a person to keep and maintain records that will assist in determining whether any disqualified individual is involved in a derivative trade repository licensee. [**Schedule 1, item 31, paragraph 854A(1)(b)**]

1.90 In the event of any inconsistency between the Act and the regulations or rules, the Act will prevail in accordance with general principles of statutory interpretation.

Item 32

1.91 Item 32 inserts into the Corporations Act the new Part 7.5A — Regulation of derivative transactions and derivative trade repositories.

Part 7.5A, Division 1 — Application of Part

1.92 The new section 900A states that Part 7.5A applies to derivatives, derivative transactions, facilities, persons, bodies and other matters located in Australia or outside Australia, unless otherwise stated. This provision states that it does not affect the interpretation of provisions which do not relate to Part 7.5A. That is, this express statement of the Part's application should not be read as implying that existing parts of the

Act that are silent on this issue do not have such a broad application.
[Schedule 1, item 32, section 900A]

1.93 The broad territorial reach of the provision is required to ensure that ASIC is able to coordinate its rule-making with foreign jurisdictions to aid in consistency of regulatory approaches and to assist in ensuring that international capital markets remain open to cross-border participation.

1.94 The definition seeks to address any potential loss of referred State legislative power upon which the Part relies, by providing that the Part does not purport to apply to non-referring States.

***Part 7.5A, Division 2 — Regulation of derivative transactions:
derivative transaction rules***

Subdivision A — Power to make derivative transaction rules

1.95 Once the Minister has made a determination regarding a particular class of derivatives, ASIC may make rules (***derivative transaction rules***) dealing with execution requirements, reporting requirements or clearing requirements. Derivative transaction rules are legislative instruments and are subject to disallowance by Parliament.
[Schedule 1, item 32, section 901A]

1.96 Derivative transaction rules may also specify the classes of transactions that are subject to particular rules, the persons who are subject to rules, the manner in which persons must comply with requirements imposed by the rules, how persons may be exempted from complying with the rules, keeping of records, and other matters.
[Schedule 1, item 32, subsection 901A(3)]

1.97 Derivative transaction rules are not limited in their application to the parties to a transaction. For example, a person involved in arranging a transaction may be made subject to a rule.

1.98 The rules would be expected to contain precise detail specifying who in relation to a given transaction must (or may) comply with a requirement.

1.99 While the modification and exemption powers in the new sections 907D and 907E are also sufficiently broad to apply to the rules (in addition to the Act and any regulations), the rules may also specify the circumstances in which a person may be exempted from complying with the rules (obviating the need to rely on these powers, except in unexpected circumstances).

1.100 The rules may require persons to keep records in relation to their compliance with the rules. It would be expected that any regulation limiting the persons or transactions that may be subject to ASIC's rule making power in relation to a prescribed derivative class would not limit ASIC's power to make rules that impose record keeping requirements in relation to whether the limits have been met or not.

1.101 Rules may also deal with matters that are incidental to execution requirements, reporting requirements or clearing requirements. For example, they may impose obligations upon licensed or prescribed trade repositories to facilitate compliance with trade reporting obligations. The given example of a rule in the section could also be imposed under the derivative trade repository rules in relation to a licensed repository. A regulation to the same effect could also be made in relation to a prescribed trade repository. **[Schedule 1, item 32, section 901A]**

1.102 Derivative transaction rules may specify a penalty amount, which must not exceed 1000 penalty units. The same penalty shall apply to bodies corporate and individuals. The penalties are imposed by way of the civil penalty regime set out at section 1317E of the Corporations Act **[Schedule 1, item 32, subsection 901A(4)]**

1.103 Rules concerning execution requirements may specify a particular facility (or class of facilities) on which a particular class of derivative transactions must be executed. **[Schedule 1, item 32, paragraph 901A(3)(b)]**

1.104 Rules concerning reporting requirements may specify the regulated derivative trade repository (or class of repository) to which information must be reported, and specify the information that must be reported. **[Schedule 1, item 32, paragraph 901A(3)(b)]**

1.105 Rules concerning clearing requirements may specify the CS facility (or class of facilities) through which transactions in a particular class must be cleared, and the time in which transactions must be cleared **[Schedule 1, item 32, paragraph 901A(3)(b)]**

1.106 The rules may require trade reporting, clearing and execution to or on prescribed facilities (in addition to licensed facilities). The ability to prescribe facilities will provide flexibility to: (a) enable non-licensed domestic facilities to be utilised, such as to enable trade reporting in respect of certain classes of derivatives to a non-licensed government body such as a regulator; and (b) to enable rules to be made to support compliance with foreign trade reporting, clearing or execution laws (where such laws involve non-domestically licensed facilities). **[Schedule 1, item 32, subsections 901A(5) to (7)]**

1.107 The derivative transaction rules do not impose requirements retrospectively. They are limited in the obligations they can impose prospectively in relation to transactions entered into prior to their creation. The derivative transaction rules:

- a) cannot impose an execution requirement on a person in relation to a transaction entered into before the requirement started to apply to the person; and
- b) cannot impose a reporting requirement on a person in relation to a transaction entered into before the requirement started to apply to the person, or in relation to a position as it was at a time before the requirement started to apply to the person; and
- c) cannot impose a clearing requirement on a person in relation to a transaction entered into before the requirement started to apply to the person, unless the transaction has not been cleared by the time the requirement starts to apply to the person.

[Schedule 1, item 32, subsection 901A(8)]

1.108 The Minister may determine the classes of derivatives to ASIC may impose requirements. Determinations are legislative instruments and are therefore subject to review by Parliament and, potentially, disallowance. Classes of derivatives may be defined with reference to any matter, including the underlying asset, or the time when the derivatives were issued. In making determinations, the Minister must consider certain matters (such as the impact on the stability, integrity and efficiency of the Australian financial markets) and consult certain bodies (such as APRA, ASIC and RBA). The Minister may amend or revoke a determination.

[Schedule 1, item 32, section 901B]

1.109 These decisions are not reviewable by the Administrative Appeals Tribunal but are reviewable under the *Administrative Decisions (Judicial Review) Act 1977*. **[Schedule 1, item 37, section 1317C]**

1.110 Regulations may limit the requirements which can be imposed on certain classes of derivative transactions. Regulations may also provide that requirements may only be imposed on certain classes of derivative transactions in certain circumstances. **[Schedule 1, item 32, section 901C]**

1.111 Regulations may limit the requirements which can be imposed on certain classes of persons. Regulations may also provide that requirements may only be imposed on certain classes of persons in certain circumstances. **[Schedule 1, item 32, section 901D]**

1.112 These regulations will provide the primary mechanism by which certain persons and transactions are carved out of the potential reach of the derivative transaction rules. For example, they may specify thresholds of activity that must be met before a person might become subject to one or other requirements. Likewise, they may provide that certain transactions for certain purposes cannot be made subject to a certain requirement.

1.113 The regulations (in conjunction with the ability to prescribe non-licensed trade repositories) will provide the means by which the regulator may be given tightly constrained derivative transaction rule making powers to facilitate compliance with foreign trade reporting, clearing or execution requirements.

Subdivision B — Compliance with derivative transaction rules

1.114 Failure to comply with the relevant provisions of the derivative transaction rules is subject to the Corporations Act civil penalty regime. **[Schedule 1, item 32, section 901E]**. The rules themselves will set out the maximum penalty amount that may be imposed for a breach of a provision (up to 1,000 penalty units). **[Schedule 1, item 32, subsection 901A(4)]**

1.115 In the event of any inconsistency between the derivative transaction rules and the derivative trade repository rules, the derivative transaction rules prevail to the extent of the inconsistency. **[Schedule 1, Item 32, subsection 901E(2)]**

1.116 The regulations may allow for alternatives to civil penalty proceedings for a person who is alleged to have breached the derivative transaction rules. The section imposes limits on the alternatives which may be allowed by the regulations. The potential alternatives that may be provided for are limited to: processes for paying a penalty to the Commonwealth (limited to one-fifth the penalty amount specified in the rules); undertaking or instituting remedial measures (including education programs); accepting sanctions other than the payment of a penalty to the Commonwealth; or entering into a legally enforceable undertaking. This provision largely mirrors the existing section 798K which applies to enforcement of market integrity rules. **[Schedule 1, item 32, section 901F]**

1.117 For the sake of certainty for persons entering into derivatives transactions, the Bill provides that failure to comply with derivative transaction rules does not invalidate a transaction. **[Schedule 1, item 32, section 901G]**

Subdivision C — The process of making of derivative transaction rules

1.118 The method by which derivative transaction rules are made is similar to the manner in which market integrity rules are currently made.

1.119 In deciding whether to make a rule, ASIC must have regard to certain matters, including the likely effect of the proposed rule on the economy and the financial system and the likely regulatory impact of the proposed rule. It is expected that ASIC would comply with the requirement to have regard to the likely regulatory impact of a proposed rule by conducting a regulatory impact assessment. It may have regard to other relevant matters, such as any relevant international standards, and matters raised in consultation, if consultation occurred. **[Schedule 1, item 32, section 901H]**

1.120 The amendments will require ASIC to consult with the public prior to making a derivative transaction rule. It must also consult with APRA, the RBA, and other bodies as required by the regulations. It is expected that the regulations may prescribe consultation with specified bodies where the underlying assets upon which a derivative is based falls with the regulatory responsibilities of that body. A failure to consult does not invalidate a derivative transaction rule. **[Schedule 1, item 32, section 901J]**

1.121 ASIC would be expected to rely upon the advice of the RBA in making any assessment on the likely impacts of rules on the stability of the Australian financial system, given ASIC's limited role and the RBA's primary role in regard to such matters.

1.122 Assessments may take place in the absence of full quantitative data and may be largely qualitative in nature. Indeed, a primary objective of imposing trade reporting requirements is to improve transparency in relation to derivative markets and to enable regulators to properly monitor and assess risk.

1.123 There may be limitations on the extent to which some details of any assessments may be able to be made publicly available, given that regulators may be drawing upon confidential and/or sensitive data.

1.124 Ministerial consent is required for ASIC to make derivative transaction rules. A consent is not a legislative instrument. **[Schedule 1, item 32, section 901K]**. This provision is included to assist readers; as such a consent would not in any event be a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003* (LI Act). The provision is not a substantive exemption from the ordinary operation of that Act. While the consent is not disallowable by Parliament, it can

only have the effect of changing a person's rights by way of the rules, which are disallowable..

1.125 A decision to give a consent is not reviewable by the Administrative Appeals Tribunal but is reviewable under the *Administrative Decisions (Judicial Review) Act 1977*. [**Schedule 1, item 37, section 1317C**]

1.126 ASIC has a power to make emergency rules without consultation or Ministerial consent, in particular circumstances. If ASIC does so, it must justify the decision to the Minister on the following day, and follow any written directions of the Minister to vary or revoke the rules. A direction is not a legislative instrument. This provision is included to assist readers; as such a direction is not a legislative instrument within the meaning of section 5 of the LI Act. The provision is not a substantive exemption from the ordinary operation of that Act. While the direction is not disallowable by Parliament, it can only have the effect of changing a person's rights by way of the rules, which are disallowable.. [**Schedule 1, item 32, section 901L**]

1.127 A decision to give such a direction is not reviewable by the Administrative Appeals Tribunal but is reviewable under the *Administrative Decisions (Judicial Review) Act 1977*. [**Schedule 1, item 37, section 1317C**]

1.128 ASIC may amend or revoke a derivative transaction rule. In doing so, ASIC is subject to the same requirements that apply to the making of derivative transaction rules. The requirements to consult, have regard to certain matters, and obtain Ministerial consent do not apply when ASIC amends emergency rules at the direction of the Minister. These requirements do not apply as ASIC is bound to act in accordance with the Minister's directions. [**Schedule 1, item 32, section 901M**]

Part 7.5A, Division 3 — Regulation of licensed derivative trade repositories: supervision by ASIC

1.129 The amendments charge ASIC with the responsibility for supervising licensed derivative trade repositories.

1.130 However, the law will recognise that derivative trade repositories could operate across borders and simultaneously be licensed or at least regulated by other jurisdictions. Regulation in respect of these entities will involve cross-border cooperation between regulators. It is recognised that a given trade repository may be, in practice, primarily regulated by the law of its 'home country'. The law explicitly recognises that ASIC may therefore partially meet its overall responsibilities in respect of a licensed facility by satisfying itself that another country's

regime provides satisfactory regulation or that adequate cooperative arrangements are in place. Generally, it would be expected that, in practice, ASIC would (for most aspects of supervision) need to satisfy itself of both. **[Schedule 1, item 32, section 902A]**

1.131 This allowance must be seen in light of the fact that the licensing regime for trade repositories does not provide for separate domestic and overseas categories of licences (unlike the regime for AMLs and CSFLs). A single kind of licence applies, but ASIC may tailor its regulatory approach and intensity on a case-by-case basis with regard to the circumstances of each licensee, including the various regulatory arrangements to which they are subject to globally and the arrangements and level of cooperation in existence between various regulators.

1.132 ASIC's information sharing and authority to cooperate with foreign regulators is also amended to support this approach.

1.133 The licensing regime provides a high degree of flexibility in imposing licensing requirements upon facilities, such as through licence conditions and derivative trade repository rules. This will facilitate alignment of domestic requirements with those imposed in foreign jurisdictions (in particular the requirements imposed under the laws of the European Union and the United States of America). This in turn will enhance opportunities for ASIC to adopt a cooperative approach to the regulation of trade repositories operating in multiple jurisdictions.

1.134 The law allows ASIC to rely upon foreign regulation to ensure that licensed bodies comply with domestic requirements. This provision enables ASIC to recognise, where appropriate, that compliance with foreign law would have the effect of ensuring compliance with domestic law.

Part 7.5A, Division 4 — Regulation of licensed derivative trade repositories: derivative trade repository rules

Subdivision A — Power to make derivative trade repository rules

1.135 Unlike under the AML and CSFL regime, the trade repository regime does not contemplate that licensed facilities will be required to create operating rules, changes to which are subject to disallowance by the Minister. It is recognised that such a regime may create difficulties for a facility operating in multiple jurisdictions and being subject to multiple licensing regimes. Instead, ASIC will be empowered to make rules dealing with the operation of licensed derivative trade repositories (*derivative trade repository rules*).

1.136 It is not intended that these rules would generally go into the level of detail that operating rules would. Any procedures or arrangements that a trade repository operates under would need to be subject to these higher level requirements.

1.137 While the Act will not impose any requirements to have operating rules, nor impose vetting and disallowance or consent requirements in respect of changes to such, it is open for the derivative trade repository rules to impose such requirements. Requirements of this kind need not apply across the board, but might be imposed by the rules only in relation to areas of particular concern.

1.138 A trade repository operating in another jurisdiction which did have a licensing regime which involved disallowable operating rules could (if appropriately licensed here) operate in Australia in accordance with those operating rules, provided that they were consistent with Australia's derivative trade repository rules.

1.139 Rules can be tailored to operate in a coordinate and consistent way to varying overseas requirements.

1.140 The Division limits the matters that ASIC may make rules regarding; and the penalties which may be set for any breach.
[Schedule 1, item 32, section 903A]

1.141 The Bill itself does not directly provide ASIC with the power to make rules in relation to non-licensed but prescribed trade repositories; with section 906A allowing regulations instead to impose obligations, grant powers and create offences in relation to such facilities.

1.142 The derivative trade repository rules may provide for the manner in which licensed derivative trade repositories provide their services. This may include rules that ensure that services are provided in an open and non-discriminatory manner. This may also include rules regarding the 'bundling' or pricing of services, or about the manner in which licensees may deal with property rights associated with data.

1.143 Rules may govern the handling or use of derivative trade data by licensed derivative trade repositories and their officers and employees. They may govern the acceptance and retention of derivative trade data.

1.144 These rules may require licensed trade repositories to create statistical data from derivative trade data. It should be noted that the Bill defines derivative trade data to include statistical data. The rules also may deal with the use and disclosure of, and provision of access to, derivative trade data.

1.145 The rules might therefore impose an obligation on licensed facilities to create and publish period statistical reports on derivative activities reported to it.

1.146 Regulations may impose limits on the derivative transaction rules that may be made in relation to the acceptance, retention, use, creation and disclosure of data. [Schedule 1, item 32, section 903C]

1.147 Further detail on how the Act, regulations and rules collectively govern use and disclosure of derivative trade data is provided below at paragraph 1.169 onwards.

1.148 The rules may also impose requirements in relation to the governance, management and resources (including financial, technological and human resources) of licensed derivative trade repositories.

1.149 The rules may provide for:

- (i) the handling of conflicts of interest;
- (ii) the monitoring and enforcement of compliance with obligations;
- (iii) the resources that licensed derivative trade repositories should have (including requirements relating to the experience, qualifications or fitness for office of operators and their officers and employees);
- (iv) the integrity and security of computer systems and other systems;
- (v) operational reliability;
- (vi) business continuity planning;
- (vii) the operational separation of functions; and
- (viii) the outsourcing of functions to other entities.

1.150 Rules may impose requirements in relation to the disclosure of conditions (including fees) on which licensed derivative trade repositories provide their services.

1.151 Rules relating to the operational separation of functions includes the separation of trade repository and non-trade repository functions conducted by a person holding a trade repository licence.

1.152 Rules may impose requirements in relation to the reporting to ASIC or other regulators of matters related to licensed derivative trade repositories. These may include both domestic and foreign regulators. No annual reporting requirements are imposed by the primary legislation (unlike for AMLs (see section 792F)). The rules will enable flexibility in reporting arrangements. In part, this is directed at enabling domestic reporting requirements to leverage off foreign licensing reporting requirements (provided our domestic needs are also met by such reports).

1.153 The derivative trade repository rules may only impose requirements on operators of licensed derivative trade repositories and their officers of such operators. The ordinary section 9 definition of officers applies. **[Schedule 1, item 32, section 903B]**

1.154 While derivative trade repository rules do not apply directly to third parties providing services to a licensed operator, the rules may impose requirements on the operator in relation to the outsourcing of functions to other entities. While such requirements could potentially prohibit some kinds of outsourcing, it would be expected that they would generally only require the terms of outsourcing to address a range of specified matters in specified ways.

Subdivision B — Compliance with derivative trade repository rules

1.155 Failure to comply with derivative trade repository rules is a civil penalty provision. This mirrors the provision for derivative transaction rules in the new section 901E. **[Schedule 1, item 32, section 903D]**

1.156 The Bill allows the regulations to provide for alternatives to civil proceedings for a person who is alleged to have breached their obligations under the derivative trade repository rules, and limits the alternatives which may be allowed. This mirrors the provision for derivative transaction rules in the new section 901F. **[Schedule 1, item 32, section 903E]**

Subdivision C — The process of making derivative trade repository rules

1.157 In deciding whether to make a derivative trade repository rule, ASIC must consider certain matters including, the likely effect on the economy and on financial markets and the regulatory impact on any person who would be subject to the rule. ASIC may take into account other matters, such as any relevant international standards and matters raised in consultation with the public. ASIC may also have regard to any other matters it considers relevant. This mirrors the provision for derivative transaction rules in the new section 901H. **[Schedule 1, item 32, section 903F]**

1.158 ASIC must consult with the public before making any derivative trade repository rules. ASIC is also required to consult with certain bodies as prescribed by the regulations. It is contemplated that the regulations may prescribe relevant government agencies where rules that relate to derivatives in respect of underlying assets fall within the portfolio responsibilities of those agencies, for example electricity or water. Where rules relate to trade reporting, other agencies that may be end users of the data may be prescribed, for example the Australian Bureau of Statistics. A failure to consult will not invalidate a derivative transaction rule. This mirrors the provision for derivative transaction rules in the new section 901J. **[Schedule 1, item 32, section 903G]**

1.159 Similar considerations apply as those specified in relation to the making of derivative transactions rules at paragraphs 1.121 to 1.123.

1.160 Ministerial consent, in writing, is required in order for ASIC to make derivative trade repository rules. A Ministerial consent is not a legislative instrument. This provisions is included to assist readers, as such a consent would not be a legislative instrument within the meaning of section 5 of the LI Act. This is therefore not a substantive exemption from the operation of that section. Although a consent is not a legislative instrument, it will only have effect through the operation of the rules. Rules are legislative instruments and will be subject to disallowance. This mirrors the provision for derivative transaction rules in the new section 901K. **[Schedule 1, item 32, section 903H]**

1.161 ASIC has a power to make emergency rules without consultation or Ministerial consent, in particular circumstances. If ASIC does so, it must justify the decision to the Minister on the following day, and follow any written directions of the Minister. A direction is not a legislative instrument. This provision is included to assist readers; as such a direction would be a legislative instrument within the meaning of section 5 of the LI Act. This is therefore not a substantive exemption from the operation of that section. Although a direction is not a legislative instrument it will only have effect through the operation of the rules made pursuant to it. Rules are legislative instruments and will be subject to disallowance. This mirrors the provision for derivative transaction rules in the new section 901L. **[Schedule 1, item 32, section 903J]**

1.162 ASIC may amend or revoke a derivative trade repository rule. If ASIC does so, it must follow the same process that is required to make derivative trade repository rules. This does not apply to any amendment or revocation of an emergency rule that the Minister directs, as ASIC must in any event follow such a direction. This mirrors the provision for derivative transaction rules in the new section 901M. **[Schedule 1, item 32, section 903K]**

1.163 Decisions in relation to derivative trade repository rule-making, consenting to rule-making and directions relating to rule-making are (as is the case with respect to derivative transactions) not reviewable by the Administrative Appeals Tribunal but are reviewable under the *Administrative Decisions (Judicial Review) Act 1977*. [**Schedule 1, item 37, section 1317C**]

Part 7.5A, Division 5 — Regulation of licensed derivative trade repositories: other obligations and powers

Subdivision A — Obligations

1.164 Derivative trade repository licensees will be subject to certain obligations. In particular, licensees must comply with the conditions on the licence, and take all reasonable steps to ensure that no disqualified individual becomes, or remains, involved in the operator. A licensee which is a foreign body corporate must also be registered under Division 2 of Part 5B.2, which applies to foreign companies carrying on business in this jurisdiction. [**Schedule 1, item 32, section 904A**]

1.165 The new provision 904A imposes fewer obligations, compared to their equivalent existing provisions in relation to AMLs (section 792A) and CSFLs (section 821A).

1.166 Trade repositories' operations as trade repositories may be less complex than those of financial markets or clearing and settlement facilities. A different regulatory regime is therefore appropriate. Additionally, the current expectation that there will be fewer trade repositories which will operate in multiple jurisdictions, requires that any obligations be imposed upon them in a way that enable these obligations to be tailored (and subsequently, more easily adjusted) to ensure that any given trade repository is not subject to conflicting obligations and that duplication in compliance obligations is minimised.

1.167 Unlike the equivalent provisions for AMLs and CSFLs, section 904A does not impose obligations to enforce compliance with operating rules or put in place compensation arrangements. The provision does not distinguish between overseas and domestic facilities. There are no requirements for ownership to be widely held.

1.168 Much of the obligations of trade repositories will be imposed through the derivative trade repository rules, rather than hardwired in the Act. As stated elsewhere, the process of imposing obligations in this way will be subject to a range of checks and balances.

1.169 Section 904B imposes obligations relating to trade data on derivative trade repositories and their officers and employees. There are limits on when a repository may use or disclose information.

1.170 The use or disclosure of information is generally permitted if it is for the purpose of or occurs in the course of the provision of trade repository services (or for an employee, performance of their duties in that respect). However, given the potential for uncertainty as to the scope of services that this may entail and the potential for practices to develop that may not be a proper use of trade data, the scope of this permission may be curtailed by regulation.

1.171 It should be noted that subparagraph 904B(1)(a)(i) refers to services provided by the derivative trade repository (which is defined in the section 761A as a *facility* that carries on certain specified activities). The reference is therefore to the services provided by the facility and not the operator of the facility. It therefore must be read as referring to services provided as a trade repository (and not any other non-trade repository activities carried on by a person who operates a trade repository facility).

1.172 Other than for the purpose of providing trade repository services, the use and disclosure of trade data is prohibited unless required or permitted by the Corporations Act, regulations, rules or another law of the Commonwealth, State or Territory.

1.173 Section 904B should be read in conjunction with paragraph 903A(2)(b) and section 903C. The use and disclosure of information may be permitted by the Act, regulations or rules, but the regulations may restrict the ability of the rules to regulate use and handling (including disclosure).

1.174 Commercialisation of trade data is therefore not absolutely prohibited. The regulations or rules may potentially permit some kinds of commercialisation and may deal with the manner in which licensees may deal with property rights associated with data. The regulations may restrict the ability of the rules to permit some kinds of commercialisation.

1.175 Breach of section 904B is a criminal offence punishable by up to 1,000 penalty units (or 5,000 penalty units for a body corporate). The significant penalty is required given the potential financial rewards that may be gained or harm caused from misuse of derivative trade data.

1.176 While trade data must be protected from improper disclosure, a fundamental purpose of the trade reporting regime is to ensure that relevant regulatory bodies have access to trade data.

1.177 It is also intended that trade data might become available to non-regulators. For example, statistical data (which falls within the definition of ‘derivative trade data’) might become available to the market as a whole. Section 904B, therefore also provides that a derivative trade repository must comply with requests for information from certain bodies (ASIC, APRA, RBA or another licensed trade repository). Additional bodies may also be prescribed by the regulations for this purpose, but only if the Minister is satisfied that these bodies have adequate controls on the use or disclosure of any information provided to them. [**Schedule 1, item 32, section 904B**]

1.178 It is intended that the regulations will provide for the sharing of trade data with appropriate foreign financial markets regulators.

1.179 The regulations may provide that certain information must not be provided pursuant to requests or a class of requests. The regulations may excuse compliance or may prohibit compliance with requests in specified circumstances. For example, the regulations might provide that requests from other licensed trade repositories might be complied with only if it meets the reasonable costs of complying with the request for trade data.

1.180 The regulations may impose additional requirements relating to the creation of statistical data. Trade repositories may not merely be permitted to disclose statistical data, but may be obliged by regulation to create and provide statistical data. Provision of statistical data might be to specified persons, such as specified regulators, or generally disseminated. The regulations may provide for the creation of offences. Failure to properly provide mandated statistical data may harm the efficient operation of financial markets in derivatives and may have a significant impact on the participants in those markets. The ordinary limits on the penalties that may be imposed by regulation under the Corporations Act (in paragraph 1364(2)(w) — 50 penalty units) apply. [**Schedule 1, item 32, section 904B**]

1.181 This regulation power operates in parallel to the ability for derivative trade repository rules to impose obligations regarding the creation and disclosure of statistical data (section 903A). This rule making power is subject to any restrictions imposed by regulation (section 903C). Therefore, ultimately, all obligations to create and disseminate statistical data (and handling and use of trade data) are subject to powers to make regulations. This is appropriate to ensure that confidentiality and the privacy of data is protected.

1.182 A derivative trade repository licensee is obliged to notify ASIC if the licensee becomes aware that it may no longer meet its obligations under section 904A. This encompasses a failure to comply with

conditions on its licence, failure to register under Part 5B.2 if it is a foreign body corporate or failure to ensure that no disqualified individuals becomes or remains involved in the operator. ASIC may give advice to the Minister about such a notification. **[Schedule 1, item 32, section 904C]**

1.183 There is no general obligation to notify ASIC of all breaches of obligations under the derivative trade repository rules. This is appropriate given that there may be a wide range of minor obligations in those rules.

1.184 A derivative trade repository licensee must notify ASIC of any changes to directors, secretaries or senior managers. The regulations may prescribe the form in which this information may be given, and any consequential disclosure that is required. Failure to notify ASIC is an offence, and a penalty of 100 penalty units applies (or 500 penalty units for a body corporate). It is important that ASIC becomes aware of changes in management, given its responsibility for enforcing the prohibitions on involvement in trade repositories by disqualified individuals. **[Schedule 1, item 32, section 904C]**

1.185 A derivative trade repository licensee must give assistance to ASIC, APRA and the RBA, if any of these regulators make a reasonable request which relates to the performance of its function. This assistance may include giving the regulator trade data or other information, or allowing the regulator to inspect the licensee's books. Failure to comply with this requirement is an offence, and a penalty of 100 penalty units applies. **[Schedule 1, item 32, section 904D]**

1.186 If ASIC requests access to a repository's facilities and the request is reasonable, the derivative trade repository licensee must give ASIC that access. Failure to comply with this requirement is an offence, and a penalty of 100 penalty units applies (or 500 penalty units for a body corporate). **[Schedule 1, item 32, section 904E]**

1.187 Section 904D applies in respect to the three primary financial regulators (APRA, RBA and ASIC). It is aimed at enabling them to perform their regulatory functions generally. Section 904E, in contrast, relates primarily to ASIC functions as the regulator of trade repositories.

Subdivision B — Powers of Minister and ASIC to give directions etc

1.188 This subdivision provides the Minister and ASIC with powers to ensure that licensed trade repositories conduct their operations appropriately.

1.189 The Minister may give a derivative trade repository licensee a written direction if the Minister believes that the licensee is not complying

with its obligations. The direction may specify certain things that the Minister believes will promote compliance by the licensee with those obligations. The licensee must comply with the direction, and if the licensee fails to do so, ASIC may apply to the Court for an order that the licensee comply with the direction. While the Minister makes the direction, ASIC is responsible to enforce compliance with it. The Minister may vary or revoke a direction at any time by giving written notice to the licensee. This power is based on the Minister's powers of directions in relation to AMLs (section 794A) and CSFLs (section 823A). No criminal penalty applies for non-compliance. **[Schedule 1, item 32, section 904F]**

1.190 ASIC will also be given a power of direction. This mirrors the status quo in relation to AMLs (section 794D) and CSFLs (section 823D). ASIC is given a power to give directions to a derivative trade repository licensee if ASIC believes that the licensee is not complying with its obligations. This is a narrower power than the power that exists in relation to AMLs and CSFLs. Those provisions may be utilised if ASIC forms the view that it is necessary to protect a person dealing in financial products. ASIC need not form a view that a breach has occurred under those provisions. ASIC's power is subject to requirements to provide notices and reasons. Recipients are provided with an opportunity to take steps to address the situation. Unlike the Minister's directions power, ASIC's directions have effect for only a limited period (up to 21 days). It is an offence not to comply with a direction, with a penalty of 100 penalty units per day or part thereof (or 500 penalty units per day for a body corporate). ASIC may also apply to Court for orders requiring compliance. ASIC may vary or revoke a direction at any time by giving written notice to the licensee. **[Schedule 1, item 32, 904G]**

1.191 ASIC may require a derivative trade repository licensee to give ASIC a report on specified matters. ASIC may give a copy of that report to the Minister. ASIC may also require the licensee to give ASIC an audit report of the special report, and may nominate a particular person or body to prepare the report. Failure to comply will be an offence, with a penalty of 100 penalty units (or 500 penalty units for a body corporate). This provision may be contrasted to the equivalent existing provision in relation to AMLs (section 794B) and CSFLs (section 823B) which provide the power to require special reports to the Minister. This is another example of where the new trade repository regime transfers some licensing functions down from the Ministerial level to that of the regulator — see also the provisions regarding the granting etc of trade repository licences. **[Schedule 1, item 32, section 904H]**

1.192 ASIC may assess how well a derivative trade repository licensee is complying with its obligations. ASIC may take account of any information that it thinks is appropriate. ASIC must give a written report

on the assessment to the licensee as soon as practicable after doing the assessment. ASIC may also give a copy to the Minister. **[Schedule 1, item 32, section 904J]**

1.193 In contrast to similar provisions relating to AMLs (section 792E) and CSFLs (section 823C), ASIC may take a risk based approach to the frequency of assessments and is not obliged to conduct annual assessments. One outcome of this approach is that it would be open to ASIC to conduct partial assessments each year, focussing only on certain aspects of the licensee (and potentially, with greater intensity than would otherwise occur).

1.194 ASIC may publish a report, or part of the report. If the assessment relates to a serious contravention of the law of the Commonwealth or a State or Territory, ASIC may also give a copy of the report, or the relevant part of the report to the Australian Federal Police, the Chief Executive Officer or staff of the Australian Crime Commissioner, the Commonwealth Director of Public Prosecutions or other persons or bodies prescribed by regulation. **[Schedule 1, item 32, section 904J]**

1.195 Potentially foreign law enforcement bodies may be prescribed by regulation; so might foreign regulators charged with licensing the trade repository in another jurisdiction, or otherwise regulating its conduct.

1.196 A report on an assessment is not a legislative instrument. This provision is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the LI Act. This is therefore not a substantive exemption from the operation of that section. **[Schedule 1, item 32, section 904J]**

1.197 Trade repositories hold commercially sensitive derivative trade data. Therefore provision needs to be made to address the protection of that data in the event that a derivative trade repository ceases to be licensed.

1.198 If a derivative trade repository ceases to be licensed, ASIC may give the operator (or former operator), or any officers or employees (past or present), written direction relating to any data that was being retained while the repository was licensed. For example, a direction could require that a person destroy all data over which they have control, or transfer all data to another licensed derivative trade repository, or a prescribed trade repository. Failure to comply with a direction is an offence and a penalty of 100 penalty units will apply for each day or part thereof that the offence is committed (or 500 penalty units per day for a body corporate). ASIC may apply to Court for orders to enforce compliance with the direction. It

may vary or revoke the direction by notice to the person to whom it is directed. [Schedule 1, item 32, section 904K]

Part 7.5A, Division 6 — Regulation of licensed derivative trade repositories: licensing

Subdivision A — Requirement for some trade repositories to be licensed

1.199 The Bill does not, by default, require any person falling within the definition of a derivative trade repository to be licensed. The ordinary effect of not being licensed (or specifically prescribed by regulation) is merely that a person subject to a trade reporting rule will not be able to meet their obligations by reporting to the unlicensed trade repository.

1.200 The regulations may identify certain classes of derivative trade repositories that are required to be licensed. A person must hold an Australian derivative trade repository licence if that person operates a derivative trade repository of a class that was identified by the regulations. A person must not hold out that they operate a repository in such a class unless they have a licence that authorises them to operate the repository. Failure to comply with this requirement is an offence, and a penalty of 500 penalty units applies (or 2,500 penalty units for a body corporate). [Schedule 1, item 23, section 905A]

1.201 This provision ensures that a facility which meets the definition of a trade repository but does not provide services with respect to a prescribed derivative product class will not be subject to the requirements of a licensed derivative trade repository. At the same time, the regulations can ensure that any facility providing repository services with respect to a prescribed class is subject to the supervision associated with the licensing regime.

1.202 Prescriptions by regulations will ensure various trade-repository-like data service providers are not inappropriately caught by an obligation to obtain a licence.

1.203 If a class of derivative trade repositories is not prescribed under section 904A, repositories of that class may operate without a licence. A derivative trade repository may be licensed despite not being required to by the regulations.

Subdivision B — Granting of licences

1.204 The licensing regime which applies to derivative trade repositories is similar to the regime which applies to Australian market licences and clearing and settlement facility licences.

1.205 To apply for an Australian derivative trade repository licence, a body corporate must lodge an application with ASIC in the prescribed form. **[Schedule 1, item 32, section 905B]**

1.206 ASIC may grant a licence if it is satisfied that the application was made properly, that the applicant will comply with relevant obligations, and that no individual who is disqualified under Division 2 of Part 7.4 is involved in the applicant. If the applicant is a foreign body corporate, ASIC may only grant a licence if the applicant also meets the requirements in Division 2 of Part 5B.2, which apply to a foreign company carrying on business in Australia. **[Schedule 1, item 32, section 905C]**

1.207 ASIC may only grant an applicant a licence if 42 days have passed since the application was made and in that time ASIC has not given notice to the applicant that it intends to disqualify an individual who is involved in that applicant **[Schedule 1, item 32, subsection 905C(3)]**. This provision ensures that ASIC has adequate time to ensure that all individuals involved in an applicant are fit and proper for their role.

1.208 A non-exclusive list of matters that ASIC must take into account when considering a licensing application is set out at section 905P.

1.209 When ASIC grants an Australian derivative trade repository licence, it must publish a notice in the *Gazette* stating the name of the licensee, when the licence was granted, and the conditions on the licence. **[Schedule 1, item 32, section 905D]**

1.210 An Australian derivative trade repository licence may authorise a licensee to operate two or more derivative trade repositories. If a licensee holds a licence which authorises it to operate two or more derivative trade repositories, ASIC may suspend or cancel the licence for one or some of these repositories only. If a licensee holds a licence that authorises it to operate two or more derivative trade repositories, any reference in this Chapter to the repositories to which the licence relates refers to each of those repositories severally. **[Schedule 1, item 32, section 905E]**

1.211 ASIC may add another derivative trade repository authorisation by varying the conditions on the licence. In doing so, ASIC must have regard to the same matters that apply to the decision to grant a licence. **[Schedule 1, item 32, subsection 905E(3)]**

1.212 A person may hold a trade repository licence notwithstanding that they hold a CSFL or AML. There is no statutory reason why this would not be the case and it is therefore not expressly provided for in the Bill. If a person did hold multiple licences of different types, the

derivative trade repositories could impose requirements in relation to matters such as: operational separation, governance arrangements including conflicts management and restrictions on bundling of services.

Subdivision C — The conditions on a licence

1.213 ASIC may impose, vary or revoke conditions on an Australian derivative trade repository licence at any time. ASIC may do so on a licence on its own initiative, or if the licensee lodges an application for the change. ASIC may impose, vary or revoke conditions if it considers it appropriate to do so given the licensee's obligations, any changes in the operations of the repository, or the conditions in which it is operating. A non-exclusive list of matters that ASIC must take into account is set out at section 905P. ASIC is required to take into account and give weight to these matters to the extent they are relevant to the nature of conditions contemplated. To impose, vary or revoke conditions on a licence, ASIC must give written notice to the licensee and publish a notice in the *Gazette*. [**Schedule 1, item 32, section 905F**]

1.214 Each derivative trade repository will be subject to conditions specifying the particular derivative repository that the licensee is authorised to operate, and the class of derivatives which the repository can provide services in relation to. This subsection does not prohibit trade repositories from voluntarily accepting data, or participants from voluntarily reporting data, outside of this class. It means that a person cannot meet a trade reporting obligation with regards to a class of derivatives by reporting to a person with a licence that does not cover that class. [**Schedule 1, item 32, subsection 905F(4)**]

Subdivision D — When a licence can be varied, suspended or cancelled

1.215 If a licensee changes its name, ASIC may vary that licence to take into account the change of name. ASIC may only do this after the licensee applies in the prescribed form. [**Schedule 1, item 32, section 905G**]

1.216 ASIC may immediately suspend or cancel a derivative trade repository licence if the licensee requests that ASIC does so, if the licensee ceases to operate the derivative trade repository, or if the licensee comes under external administration. To suspend or cancel a licence, ASIC must give written notice to the licensee. [**Schedule 1, item 32, section 905H**]

1.217 ASIC may suspend or cancel a derivative trade repository licence after a hearing and considering the report provided by the person who conducts the hearing, if ASIC considers that the licensee has breached or is in breach of one or more of its obligations. When ASIC

proposes to cancel or suspend a licence, it must first give written notice to the licensee that it intends to do so, and outline the reasons why. The licensee must be given a chance to be heard at a hearing. Neither a notice that ASIC proposes to cancel or suspend a licence, or a report by the person conducting the hearing is a legislative instrument. This provision is included to assist the reader, as a notice or report would not be a legislative instrument within the meaning of section 5 of the LI Act. A report or a notice could only affect a person's rights through a decision to cancel a licence, which would be reviewable by the Administrative Appeals Tribunal. **[Schedule 1, item 32, section 905J]**

1.218 It should be noted that suspension or cancellation does not flow automatically from ASIC determining that a breach has occurred. Such a finding enlivens ASIC's discretion to do so. The exercise of this discretion is subject to review by the Administrative Appeals Tribunal. ASIC may decide to suspend or cancel a licence if it considers it appropriate to do so. A non-exclusive list of matters that ASIC must take into account is set out at section 905P.

1.219 If ASIC suspends an Australian derivative trade repository licence, the licensee is taken not to hold that licence for the period that the licence is suspended. ASIC may give written notice that, for particular purposes, the person is still taken to hold that licence. For example, ASIC may provide for a phased wind down in activity in order to minimise disruption to market participants. **[Schedule 1, item 32, section 905K]**

1.220 ASIC may vary or revoke a suspension of a licence at any time. ASIC may do this by giving written notice to the licensee. **[Schedule 1, item 32, section 905L]**

1.221 When ASIC suspends or cancels an Australian trade derivative repository licence, or varies or revokes a suspension, ASIC must publish a note in the *Gazette*. The notice must also state when the action took effect. **[Schedule 1, item 32, section 905M]**

1.222 An Australian derivative trade repository licence can only be varied, suspended, or cancelled in accordance with the subdivision. **[Schedule 1, item 32, section 905N]**

Subdivision E — Other matters

1.223 There are particular matters which ASIC must take into account when it decides to grant a derivative trade repository licence, suspend or cancel such a licence, or impose, vary or revoke conditions on a licence. These matters are the size and structure of the derivative trade repository, the nature of activities conducted, the technology used, and the persons who are or may be required to report data to the repository. ASIC must

also consider whether the action would be in the public interest. ASIC may take into account any other matters that it considers relevant.

[Schedule 1, item 32 section 905P]

Part 7.5A, Division 7 — Regulation of prescribed derivative trade repositories

1.224 Trade reporting requirements may be satisfied by reporting to either a licensed trade repository or a repository that have been prescribed by regulation.

1.225 The regulations may impose obligations on operators of prescribed derivative trade repositories, and the officers and employees and confer powers on ASIC in relation to prescribed derivative trade repositories. The regulations may also create offences in relation to those obligations and powers.

1.226 Derivative trade repository rules only apply to licensed derivative trade repositories, while regulations apply only to prescribed derivative trade repositories. The regulations may cover similar matters to the derivative trade repository rules, such as the handling of data, the manner in which the licensee provides its services, and the governance arrangements. **[Schedule 1, item 32, section 906A]**

1.227 Among other matters, the regulations may require that prescribed derivative trade repositories do certain things to protect the data that they hold, and that prescribed derivative trade repositories provide access to their services in a fair, non-discriminatory way.

1.228 The regulations may provide that, under particular circumstances, information given to ASIC by the operator of a prescribed derivative trade repository is taken to have been given in confidence, and is therefore subject to the protections and restrictions on dissemination which apply to information given to ASIC in confidence **[Schedule 1, item 32, section 906A(3)]**. This provision ensures that persons who give information to a trade repository can be satisfied that the information will be subject to legal protections if the information is required by ASIC in the course of its functions. This provision does not limit the circumstances in which information given to ASIC by a prescribed derivative trade repository is regarded as having been given in confidence.

Division 8 — Other matters

1.229 A person must not falsely hold out that they hold a derivative trade repository licence if they do not, or that a particular derivative trade repository is licensed if it is not. A person must not hold out that the regulations prescribe that a class of transactions must be reported to,

cleared on or executed on a particular derivative trade repository, if this is not the case. **[Schedule 1, item 32, section 907A]**. Failure to comply with this provision is an offence with a penalty of 500 penalty units (or 2,500 penalty units for a body corporate).

1.230 Determinations, regulations, derivative transaction rules and derivative trade repository rules may incorporate matters contained in writing as in force from time to time, or at a particular time. **[Schedule 1, item 32, section 907B]**. This provision is an exemption from subsection 14(2) of the LI Act. It is necessary as it enables regulations, rules and determinations to incorporate the requirements of foreign jurisdictions as applying to persons regulated in Australia.

1.231 This will help to ensure that requirements in Australia are harmonised with requirements in other jurisdictions to allow for a coordinated international approach and to help to facilitate open international capital markets.

1.232 A person will not be liable for any action, civil or criminal, in relation to disclosure of data or information that is required by the Act, the regulations, derivative transaction rules or derivative trade repository rules **[Schedule 1, item 32, section 907C]**. The purpose of this provision is to clarify that if any disclosure is required by any relevant instrument, that disclosure shall not be considered to be a breach of any restriction on disclosure that would otherwise apply, including restrictions in a contract.

1.233 ASIC may exempt a person or class of persons from all or part of the provisions in this Part, the regulations made for the purpose of this Part, the derivative transaction rules and the derivative trade repository rules. ASIC may also exempt a facility or class of facilities, or a derivative transaction or class of derivative transactions from all or part of the provisions that apply to them. **[Schedule 1, item 32, subsections 907D(1) and 907D(2)]**

1.234 The exemption power has been included to ensure that there is sufficient power to address any unforeseen consequences of the implementation of the requirements under this Part. The amendments included in the Bill are of an innovative nature and due to the ongoing need for international alignment (in an environment of continuing uncertainty as to the final form that other countries' G-20 reform implementations will take, in particular their extraterritorial applications and mutual recognition regimes) require a high degree of flexibility. Given the rapidly evolving nature and the systemic importance of over-the-counter derivative markets it may be necessary to address issues arising from the application of this Part with immediate action.

1.235 The exemption power is also provided to deal with circumstances where the determinations, regulations or rules may operate inadvertently or in a perverse manner, contrary to the underlying intention of the regime. While the framework seeks to provide a high degree of flexibility, there may be cases where it cannot be adapted (without legislative reform) to an unanticipated scenario, or at least not adapted within a sufficiently short time frame to avoid the unintended result.

1.236 In contrast to other provisions existing in the Corporations Act, ASIC's powers under this section are more restricted and do not include a modification power.

1.237 When ASIC grants an exemption, the exemption may be subject to conditions. ASIC can impose conditions on an exemption if it considers it is appropriate to do so, by reference to the list of non-exclusive matters listed in section 905P. A person to whom an exemption applies must comply with any conditions on that exemption. ASIC may apply to the Court for an order that a person comply with the condition in a specified way. [**Schedule 1, item 32, subsection 9072D(3)**]

1.238 An exemption that applies to a class of persons, a class of facilities, or a class of derivative transactions is a legislative instrument, and therefore is disallowable by Parliament. For clarity, this applies even if the exemption also applies to one or more specified persons, facilities or transactions. [**Schedule 1, item 32, subsection 907D(4)**]

1.239 Exemptions that have a general effect on a class (that is, exemptions that do not just relate to a specific person or case) are therefore subject to Parliamentary scrutiny and potential disallowance. This is an important check upon ASIC's power of exemption.

1.240 If a declaration does not apply to a class of persons, facilities or derivatives, the exemption must be in writing and ASIC must publish notice of it in the *Gazette*. [**Schedule 1, item 32, subsection 907D(5)**]

1.241 This requirement ensures that there is transparency regarding the granting of exemptions and that ASIC's exercise of the power is open to public scrutiny.

1.242 The regulations may also grant exemptions to a person or class of persons from all or some provisions in this Part, the regulations made for this part, the derivative transaction rules and the derivative trade repository rules. The regulations may also grant exemptions to a facility or class of facilities, or a derivative transaction or class of derivative transactions from these provisions. The regulations may also modify or vary these provisions as they apply to a person, facility or derivative

transaction, or a class of persons, facilities or derivative transactions.
[Schedule 1, item 32, section 907E]

1.243 Regulations, as legislative instruments, are subject to Parliamentary scrutiny and potential disallowance.

Item 33

1.244 The Federal Court (or a State Supreme Court exercising cross-vested jurisdiction) will have the power to make such orders as it sees fit, if ASIC applies to the Court and it appears to the Court that a person has contravened the conditions of an Australian derivative trade repository licence. **[Schedule 1, item 33, subparagraph 1101B(1)(a)(ii)]**

Item 34

1.245 If a person has persistently contravened a condition on an Australian derivative trade repository licence, the Court may make an order restraining that person from carrying on a business in relation to financial products or financial services. **[Schedule 1, item 34, subparagraph 1101B(4)(a)(iii)]**

Item 35

1.246 If a person contravened a provision of the derivative transaction rules or the derivative trade repository rules, the Court may make an order that that person comply with the provision. If the person is a body corporate, an order may also be given to the directors of that body corporate. **[Schedule 1, item 35, paragraph 1101B(4)(b)]**

Item 36

1.247 If a person has contravened a provision of the derivative transaction rules or the derivative trade repository rules, the Court may make an order that that person disclose specified information to the public or specified persons. The Court may also require the person to publish advertisements at their own expense. **[Schedule 1, item 36, subparagraphs 1101B(4)(c)(i) and 1101B(4)(d)(i)]**

Item 37

1.248 The following decisions will not be reviewable by the Administrative Appeals Tribunal:

- a) a decision by the Minister to make, amend or revoke a determination, to consent to the making of a derivative transaction rule or a derivative

- trade repository rule, or to direct ASIC to amend or revoke a derivative transaction rule or derivative trade repository rule;
- b) a decision by ASIC to make a derivative transaction rule or derivative trade repository rule; and
 - c) a decision by ASIC whether or not to proceed with alternatives to civil proceedings allowed under sections 901F and 903E.

[Schedule 1, item 37, paragraphs 1317C(gda), 1317C(gdb) and 1317C(gdc)]

1.249 The decisions referred to in this item are subject to review under the *Administrative Decisions (Judicial Review) Act 1975*.

1.250 Determinations by the Minister and derivative transaction rules and derivative trade repository rules made by ASIC are legislative instruments, and therefore also subject to other review mechanisms. Further detail is provided in the commentary to those aspects of the Bill.

1.251 A decision by ASIC whether or not to proceed with alternatives to civil proceedings, relates to alternative enforcement processes that may potentially be provided for by regulation. The regulations will set out any procedural protections in relation to a given alternative process. It should be noted that a number of possible alternatives are likely to relate to the respondent being able to consent to pay monies, undertake education etc. as an alternative to prosecution. It should be noted that decisions by regulators to take enforcement action are not generally subject to merits based review.

Item 38

1.252 Failure to comply with derivative transaction rules or derivative trade repository rules is a civil penalty provision. If the Court is satisfied that a person has failed to comply with either of these rules, the Court must make a declaration of contravention. **[Schedule 1, item 38, paragraphs 1317E(1)(jaaca) and 1317E(1)(jaacb)]**

Item 39

1.253 If the Court makes a declaration of contravention by a person for a failure to comply with derivative transaction rules or derivative trade repository rules, the Court may order the person to pay a pecuniary penalty to the Commonwealth. The derivative transaction rules or derivative trade repository rules will specify the maximum amount payable for any contravention. **[Schedule 1, item 39, subsections 1317G(IDA) and 1317G(IDB)]**

Item 40

1.254 If a corporation or listed scheme suffers damages as a result of a breach of the derivative transaction rules or derivative trade repository rules by another person, the corporation or the responsible entity for the listed scheme, may not apply to the Court for a compensation order **[Schedule 1, item 40, subsection 1317J(3B)]**. ASIC may apply for a declaration on the corporation's behalf.

Item 41

1.255 The Bill corrects an omission in the relief provisions in the civil penalty regime, in relation to market integrity rule breaches. This item amends the Act so that, if proceedings for a failure to comply with market integrity rules are brought against a person, and it appears to the Court that the person has acted honestly, and that it would be fair to excuse the person for the contravention, the Court may relieve the person wholly or partly from a liability in relation to that convention. **[Schedule 2, item 5, subsection 1317S(1)]**

Item 42

1.256 If the Court is satisfied that a person has failed to comply with derivative transaction rules or derivative trade repository rules, the Court may make an order requiring that person to disclose specified information to a certain person, a certain class of persons, or the public, in a manner specified in the order. The Court may also make an order requiring that the person publish advertisements with specified materials, at that person's own expense. **[Schedule 1, item 41, subsection 1324B(1)]**

Item 43

1.257 Item 42 lists the offences created by this Bill, and inserts them into the list of offences at Schedule 3 of the Corporations Act. **[Schedule 1, item 42, Schedule 3]**. The offences are as follows:

Offence	Penalty
Unauthorised use or disclosure of derivative trade data (Section 904B)	1,000 penalty units.
Failure to notify ASIC of certain breaches of obligations by a trade repository licensee or changes in management of the licensee (Subsection 904C(1) or (3))	100 penalty units.

Offence	Penalty
Failure by a licensee to provide assistance to ASIC, APRA or the RBA (Subsection 904D(2))	100 penalty units.
Failure to ASIC access to derivative trade repository facilities (Section 904E)	100 penalty units.
Failure by a licensee to comply with an ASIC direction to comply with an obligation (Subsection 904G(5))	100 penalty units for each day, or part of a day, in respect of which the offence is committed.
Failure by a licensee to comply with a direction by ASIC to prepare a special report (Subsection 904H(3))	100 penalty units.
Failure to comply with a direction in relation to trade data of a repository that has ceased to be licensed (Subsection 904K(4))	100 penalty units for each day, or part of a day, in respect of which the offence is committed.
Operating or holding out that a trade repository is being operated without a derivative trade repository licence, when required to do so (Subsection 905A(2))	500 penalty units.
(Section 907A)	500 penalty units.

1.258 These amounts should be read as being subject to section 1312 of the Corporations Act which provides that where a body corporate commits an offence, the maximum penalty is five times the amount otherwise provided for the offence.

1.259 The significant penalties imposed for: a breach of the obligation in section 904B in respect of unauthorised use or disclosure of derivative trade data; or a breach of sections 905A or 907A in respect of the unauthorised operation of a trade repository or holding out as a trade repository, are appropriate given the potential financial rewards that may be gained or harm caused from misuse of derivative trade data and the potential impact on rights to privacy and commercial confidentiality.

Schedule 1 — Amendments relating to derivatives transactions

Part 2 — Amendments to other Acts

1.260 Cross-border cooperation and information sharing is an essential element of the new regime for improving transparency and managing risk in derivatives markets. This is because derivatives markets are generally

global in nature. Parties to derivative transactions may be located in different countries. Parties may use financial market infrastructures (such as trade repositories, clearing facilities or trading platforms) fully or partially located in different countries, and which are subject to supervision by different regulators under different regulatory regimes.

1.261 At its core, the G-20 commitments are directed at different jurisdictions adopting harmonised and cooperative arrangements to ensure transparency and manage risk.

1.262 Therefore, reforms to facilitate appropriate sharing of information between domestic regulators and sharing between regulators in different jurisdictions form a key part of these reforms.

1.263 A number of the amendments to other Acts relate to the sharing of information between regulators and the protection of information in possession of those regulators. These reforms should be read in light of the various protections on trade information contained in Part 7.5A itself.

Australian Prudential Regulation Authority Act 1998

Items 44 to 45

1.264 The Bill extends APRA confidentiality and information protection provisions to data provided pursuant to the new regime.

1.265 A document given to APRA under the new Part 7.5A of the Corporations Act, other than a document which has already been lawfully made available to the public from other sources, is included in the definition of a protected document [**Schedule 1, item 44, subsection 56(1)**]. This means that it is an offence for any person who is, or has been an officer of APRA to produce such a document to any person or a court, unless the disclosure is in accordance with an exemption in the APRA Act.

1.266 Any information that is given to APRA under the new Part 7.5A of the Corporations Act, other than information which has already been lawfully made available to the public from other sources, is also included in the definition of protected information [**Schedule 1, item 45, subsection 56(1)**]. This means that it is an offence for any person who is, or has been, an officer of APRA to disclose such information to any person or a court, unless the disclosure is in accordance with an exemption in the APRA Act.

Australian Securities and Investments Commission Act 2001

Items 46 to 47

1.267 The Bill clarifies that a derivative trade repository is not a financial product for the purpose of the unconscionable conduct provisions in Division 1 of the ASIC Act. [**Schedule 1, items 46, paragraph 12BAA(8)(g)**]. Financial markets and clearing and settlement facilities are also not financial products for the purpose of this Division.

1.268 The Bill also clarifies that the operation of a derivative trade repository is not a financial service for the purpose of the unconscionable conduct provisions in Division 1 of the ASIC Act. [**Schedule 1, item 47, paragraph 12BAB(1)(g)**]

Items 48 to 49

1.269 The Bill expands the following existing investigatory arrangements that apply specifically to financial market and clearing and settlement facilities to trade repositories as well. Other regulatory powers available to ASIC that apply generally in relation to its areas of responsibility will also apply to the new regulatory responsibilities provided for in the Bill.

1.270 The Minister may direct ASIC to investigate a matter relating to the provision of a derivative trade repository, if he or she is of the opinion that such an investigation would be in the public interest. [**Schedule 1, item 48, paragraph 14(2)(g)**]. If the Minister makes such a direction, ASIC must comply. ASIC must prepare a report on the investigation and give a copy for the Minister. The report may also be distributed to other agencies (the Australian Federal Police, the Australian Crime Commission, the Director of Public Prosecutions, or a prescribed agency) and to any person whose affairs the report relates to, and may be published if the Minister chooses to do so.

1.271 ASIC may give written notice to a derivative trade repository, or a member of the board of its operator, requiring that the person give to ASIC specified books relating to the business or affairs of the derivative trade repository. [**Schedule 1, item 49, paragraphs 31(1)(a), (b) and (g)**]

Items 50 to 51

1.272 The Bill clarifies and modifies the application of ASIC's confidentiality and information protection provisions to data provided pursuant to the new regime.

1.273 Any information given to ASIC under the new Part 7.5A of the Corporations Act is taken to be given to it in confidence. ASIC's general confidentiality protection laws then apply. ASIC must take all reasonable steps to protect such information from unauthorised use or disclosure. This provision protects derivative trade data given to ASIC under the framework. **[Schedule 1, item 50, subsection 127(1)]**

1.274 The existing confidentiality provisions are modified so that regulations may authorise disclosure of confidential information by ASIC to a body corporate that holds a derivative trade repository licence or that operates a prescribed derivative trade repository. ASIC may disclose this information if the Chairman is satisfied that the information will enable or assist the body corporate to monitor compliance with, enforce, or exercise powers under the Corporations Act, the business laws of another country, or the operating rules (if any) of the body corporate. **[Schedule 1, item 51, subsection 127(4C)]**. ASIC may impose conditions on the disclosure to be complied with by the body corporate. The Bill imposes restrictions on the use or disclosure of that information by the body corporate. This provision enables the disclosure of information provided to one trade repository to another trade repository, where such disclosure is necessary, while applying strong protections to that data. All bodies corporate to which such information could be disclosed are required to have strict controls on any information given to them.

Items 52 to 53

1.275 The *Financial Transactions Reports Act 1988* imposes restrictions on disclosure of information by cash dealers. If a cash dealer reports certain information to AUSTRAC, they are prohibited from communicating to any other person that they have given that information to AUSTRAC, or that they have formed a suspicion that gave rise to such a report. This amendment to the ASIC Act states that despite the *Financial Transactions Reports Act*, a cash dealer may disclose information to a licensed or prescribed derivative trade repository **[Schedule 1, item 52, paragraph 243D(ca)]**. This provision ensures that a person who reports information to a trade repository in accordance with requirements under the derivative transaction rules will not be in breach of the *Financial Transaction Reports Act 1988*.

1.276 Under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, if a reporting entity communicates information to AUSTRAC, whether because a suspicious activity reporting obligation or because of a request from AUSTRAC, the reporting entity is prohibited from communicating to any other person that they have given this information to AUSTRAC. This amendment to the ASIC Act states that, despite the *Anti-Money Laundering and Counter-Terrorism Financing Act*, a reporting entity may communicate information to a licensed or

prescribed derivative trade repository [**Schedule 1, item 53, paragraph 243E(ca)**]. This provision ensures that a person who reports information to a trade repository in accordance with requirements under the derivative transaction rules will not be in breach of the Anti-Money Laundering and Counter-Terrorism Financing Act.

Mutual Assistance in Business Regulation Act 1992

Item 54

1.277 The *Mutual Assistance in Business Regulation Act 1992* (MABRA) and *Mutual Assistance in Business Regulation Regulations 1992* (MABRR) permit Australian business law regulators, ASIC, APRA and the Australian Competition and Consumer Commission (ACCC) as prescribed in regulation 4 of the MABRR, to respond to requests of foreign counterparts. The MABRA permits a foreign regulator to request that that an Australian business law regulator obtains information, documents or evidence from a person in Australia and then transmit such information or documents to a foreign regulator relating to a matter specified in the request.

1.278 Prior to responding to any request from a foreign regulator to obtain information, documents or evidence, the Australian business law regulator must seek ministerial authorisation under section 8 of the MABRA.

1.279 Under section 22 of the MABRA, the Minister has the power to delegate his authorisation function to the Treasury Secretary or an APS employee in the Treasury. The Bill amends section 22 to permit the delegation of the ministerial authorisation function to members, or members of the board, of Australian business law regulators, such as ASIC Commissioners. The Bill also permits this ministerial authorisation function to be delegated to senior officers employed by the regulators, namely: SES (or acting SES) employees; Executive Level 2 (or acting Executive Level 2) employees; or employees who, whilst not having an APS classification, hold a position at one of the Australian business law regulators that is equivalent to an SES or EL2 officer. This would include senior employees of APRA who are employed under the *Australian Prudential Regulatory Authority Act 1988*.

Reserve Bank Act 1959

Items 55 to 64

1.280 The Bill extends the RBA's confidentiality and information protection provisions to data provided pursuant to the new regime.

1.281 Items 55 and 56 insert new definitions of financial sector supervisory agency and foreign central bank. These definitions are utilised in the new subsection 79A(4) and will include supervisory agencies with any financial supervisory responsibilities, or all such responsibilities

1.282 A document given to the RBA in relation to the performance of its functions under Part 7.5A of the Corporations Act will be a protected document [**Schedule 1, item 57, subsection 79A(1)**] There are restrictions on when an officer or former officer of the RBA can provide such a document to any person or Court, and to whom such a document may be provided. This provision ensures that any documents provided to the RBA under the new Part 7.5A are subject to legal protection.

1.283 Information given to the RBA in relation to the performance of its functions under Part 7.5A of the Corporations Act will be protected information [**Schedule 1, item 58, subsection 79A(1)**] There are restrictions on when an officer or former officer of the RBA can disclose such information to any person or Court, and to whom such information may be disclosed. This provision ensures that any information disclosed to the RBA under the new Part 7.5A is subject to legal protection.

1.284 Subsection 79A(2) allows a person who is, or has been, an officer of the RBA to reveal protected information or protected documents for the purposes of the RB Act, the *Banking Act 1959*, Part 7.3 of the Corporations Act, section 6ZZD of the *Insurance Act 1973*, the *Payment Systems and Netting Act 1998* or the repealed *Banks (Shareholdings) Act 1972*. Unless an exception in another subsection applies, it is an offence if an officer or former officer reveals such information or documents to any person or a court and it is not for this purpose. The RBA's duties under Part 7.5 of the Corporations Act are included in this list of allowable disclosures [**Schedule 1, item 59, subsection 79A(2)**]

1.285 Notwithstanding subsection 79A(2), a person may disclose protected information or a protected document if the person to whom the information relates is their employer, or has given written permission for that disclosure. There is an error in this section that the Bill corrects. A reference to 'prohibited information,' a term which is not defined in the RB Act, is replaced with a correct reference to 'protected information,' [**Schedule 1, item 60, subsection 79A(3)**]

1.286 Notwithstanding subsection 79A(2), the Bill will provide that a person may disclose protected information or produce a protected document to a financial sector supervisory agency or a foreign central bank if the person is satisfied that this disclosure will assist the agency or central bank to perform its functions or exercise its powers [**Schedule 1, item 61, subsection 79A(4)**]. This amendment enables the RBA to share

information with other regulatory authorities, including for the purpose of ensuring financial system stability, as it relates to derivative transactions.

1.287 Notwithstanding subsection 79A(2), a person may disclose protected information or produce a protected document, to ASIC if that information or document will assist ASIC in performing its functions or exercising its powers under Part 7.5A of the Corporations Act **[Schedule 1, item 62, subsection 79A(6A)]**. This provision currently permits information sharing with ASIC to assist it to perform its functions or exercise its powers in relation to clearing and settlement facilities.

1.288 This amendment enables the RBA to share information with ASIC, including for the purpose of ensuring financial system stability as it relates to derivative transactions. ASIC officers are subject to restrictions on the circumstances in which they may disclose information obtained in the course of their duties, so information provided to ASIC by the RBA is subject to appropriate legal protections.

1.289 A person may disclose protected information or protected information that is obtained under Part 7.5A of the Corporations Act to the Minister, the Secretary of the Department, or an authorised officer of the Department **[Schedule 1, item 63, subsection 79A(6B)]**. This amendment enables the RBA to share information with the Minister or the Department, including for the purpose of ensuring financial system stability as it relates to derivative transactions.

1.290 A person who is or has been an officer of the RBA can only be required to disclose protected information or produce a protected document to a court if it is necessary to do so for the purpose of the RB Act, the Banking Act, Part 7.3 of the Corporations Act, the *Payment Systems (Regulations) Act 1998*, the Payment Systems and Netting Act or the repealed Banks (Shareholdings) Act. This section is amended so that an officer or former officer may also be required to disclose protected information or produce protected documents to a court if it is necessary for the purpose of Part 7.5A of the Corporations Act **[Schedule 1, item 64, subsection 79A(8)]**. This subsection ensures that documents or information held by the RBA can be disclosed to a court where it is necessary for the purpose of Part 7.5A of the Corporations Act.

Chapter 2

Statement of compatibility with Human Rights

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

Corporations Legislation Amendment (Derivative Transactions) Bill 2012

2.1 This Bill 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

2.2 The Bill amends the *Australian Prudential Regulation Authority Act 1998*, *Australian Securities and Investments Commission Act 2001*, the *Corporations Act 2001*, the *Mutual Assistance in Business Regulation Act 1992*, and the *Reserve Bank Act 1959*.

2.3 The Bill introduces new restrictions on the trading of over-the-counter derivatives (OTC derivatives). The Bill will allow the Minister for Financial Services to prescribe classes of derivatives in relation to certain mandatory obligations. Subject to a class of derivatives being prescribed for one or more mandatory obligations (trade reporting, central clearing or on platform execution), ASIC may make related derivatives transaction rules, with the Minister's consent. The Bill also introduces a licensing regime for trade repositories, a new type of financial market infrastructure.

2.4 The intention of the Bill is to improve transparency and risk management in the OTC derivatives market. This Bill is necessary for Australia to meet its G-20 commitments to strengthen the supervision of derivatives markets.

Human rights implications

Minimum guarantees in criminal proceedings

2.5 The requirement for trade repositories to report to ASIC any breaches they have committed of the requirements under their licence

does not engage Article 14 of the International Covenant on Civil and Political Rights (ICCPR). Article 14 states that ‘everyone shall be entitled ... not to be compelled to testify against himself or to confess guilt’.

2.6 The Bill requires a licensed trade repository to inform ASIC when it is unable to meet its obligations to comply with its licence obligations, be registered as a foreign body corporate under Division 2 of Part 5B.2 of the *Corporations Act 2001*, and take all reasonable steps to ensure that no disqualified individual (under Division 2 of Part 7.4 of the *Corporations Act 2001*) becomes, or remains, involved in the operator. However, these requirements are civil in nature and therefore Article 14 of the ICCPR is not engaged.

Privacy

2.7 The mandatory reporting of derivative transactions to a trade repository engages Article 17 of the ICCPR. Article 17 guarantees that ‘no one will be subject to arbitrary or unlawful interference with his privacy’. Legislation that involves the collection of personal information may have implications for individuals’ right to privacy.

2.8 The Bill allows the Minister to prescribe certain classes of derivatives as subject to ASIC rule-making powers. ASIC is then empowered to introduce a requirement that individuals trading in that class of derivatives must report information related to those trades to licensed trade repositories.

2.9 The Bill pursues a legitimate objective and the limitation on the right to privacy is not arbitrary. Effective regulation of the OTC derivatives market requires regulators to have detailed data on derivatives exposures where these will pose a systemic risk. A requirement to report transactions is the most effective method of achieving this goal.

2.10 The Bill does not impose a blanket requirement for reporting. Instead, ASIC will be required to assess the need for mandatory trade reporting for each class of derivatives once they have been prescribed by the Minister, and on an ongoing basis after that. Any mandate will require public consultation, and ministerial consent. As a legislative instrument the ASIC rules will also require the preparation of a regulation impact statement and a human rights compatibility statement. This ensures that the requirement will only apply to individuals where such a requirement has a clear public interest.

2.11 The Bill provides for the protection of trade data through imposing restrictions on the use and disclosure of reported data, including that trade repositories will be prohibited from using data other than for

purposes provided for under the Bill. The regulations and derivate trade repository rules that ASIC is required to make will also impose requirements in relation to the integrity and security of a trade repository's systems. These regulations and rules will also require a human rights compatibility statement.

2.12 Therefore, consistent with Article 17 of the ICCPR, limitations on the privacy of trading data is only interfered with as much as is strictly necessary to achieve the objective of risk management in the over-the-counter derivatives market and only where there is a clear public interest to do so. Where the collection of information is required, safeguards exist to protect that information.

Index

Schedule 1: Summary of the Corporations Legislation Amendment (Derivative Transactions) Bill 2012

<i>Bill reference</i>	<i>Paragraph number</i>
Items 1, 2 and 3, section 9	1.47
Item 4, section 760B	1.49
Item 5, section 761A	1.52
Item 6, section 761A	1.53
Item 7, section 761A	1.54
Item 8, section 761A	1.57
Item 9, section 761A	1.61
Item 10, section 761A	1.64
Item 11, section 761A	1.65
Item 12, section 761A	1.68
Item 13, section 761A	1.69
Item 14, section 761A	1.70
Item 15, section 761A	1.72
Item 16, section 761A	1.73
Item 17, section 761A	1.74
Item 18, subparagraph 765A(1)(I)(iv)	1.75
Item 19, subsection 793B(2)	1.76
Item 20, subsection 798H(3)	1.77
Items 21 and 22, subsection 822B(2)	1.78
Item 23, subsection 827D(2A)	1.79
Item 23, section 905A	1.200
Item 24 section 953B, Schedule 1, item 25 subsection 853C(1) and Schedule 1, item 26, subsection 853C(1)	1.82
Item 27 paragraphs 853D(2)(a) and (b)	1.83
Item 28, subsection 853F(1) and Schedule 1, item 29, subsection 853F(2)	1.84
Item 30, section 853G	1.85
Item 31, paragraph 854A(1)(b)	1.89
Item 32, Division 6 of Part 7.5A — Regulation of licensed derivative trade repositories: licensing	1.42

<i>Bill reference</i>	<i>Paragraph number</i>
Item 32, Section 905A	1.43
Item 32, Section 907A	1.44
Item 32, subsection 901E(2)	1.80
Item 32, section 900A	1.92
Item 32, section 901A	1.95, 1.101
Item 32, subsection 901A(3)	1.96
Item 32, subsection 901A(4)	1.102
Item 32, paragraph 901A(3)(b)	1.103, 1.104, 1.105
Item 32, subsections 901A(5) to (7)	1.106
Item 32, subsection 901A(8)	1.107
Item 32, section 901B	1.108
Item 32, section 901C	1.110
Item 32, section 901D	1.111
Item 32, section 901E	1.114
Item 32, subsection 901A(4)	1.114
Item 32, subsection 901E(2)	1.115
Item 32, section 901F	1.116
Item 32, section 901G	1.117
Item 32, section 901H	1.119
Item 32, section 901J	1.120
Item 32, section 901K	1.124
Item 32, section 901L	1.126
Item 32, section 901M	1.128
Item 32, section 902A	1.130
Item 32, section 903A	1.140
Item 32, section 903C	1.146
Item 32, section 903B	1.153
Item 32, section 903D	1.155
Item 32, section 903E	1.156
Item 32, section 903F	1.157
Item 32, section 903G	1.158
Item 32, section 903H	1.160
Item 32, section 903J	1.161
Item 32, section 903K	1.162
Item 32, section 904A	1.164
Item 32, section 904B	1.177, 1.180

<i>Bill reference</i>	<i>Paragraph number</i>
Item 32, section 904C	1.182
Item 32, section 904C	1.184
Item 32, section 904D	1.185
Item 32, section 904E	1.186
Item 32, section 904F	1.189
Item 32, 904G	1.190
Item 32, section 904H	1.191
Item 32, section 904J	1.192, 1.194, 1.196
Item 32, section 904K	1.198
Item 32, Division 2 of Part 7.5A — Regulation of derivative transactions: derivative transaction rules	1.41
Item 32, section 905B	1.205
Item 32, section 905C	1.206
Item 32, subsection 905C(3)	1.207
Item 32, section 905D	1.209
Item 32, section 905E	1.210
Item 32, subsection 905E(3)	1.211
Item 32, section 905F	1.213
Item 32, subsection 905F(4)	1.214
Item 32, section 905G	1.215
Item 32, section 905H	1.216
Item 32, section 905J	1.217
Item 32, section 905K	1.219
Item 32, section 905L	1.220
Item 32, section 905M	1.221
Item 32, section 905N	1.222
Item 32 section 905P	1.223
Item 32, section 906A	1.226
Item 32, section 906A(3)	1.228
Item 32, section 907A	1.229
Item 32, section 907B	1.230
Item 32, section 907C	1.232
Item 32, subsections 907D(1) and 907D(2)	1.233
Item 32, subsection 907D(3)	1.237
Item 32, subsection 907D(4)	1.238
Item 32, subsection 907D(5)	1.240

<i>Bill reference</i>	<i>Paragraph number</i>
Item 32, section 907E	1.242
Item 33, subparagraph 1101B(1)(a)(ii)	1.244
Item 34, subparagraph 1101B(4)(a)(iii)	1.245
Item 35, paragraph 1101B(4)(b)	1.246
Item 36, subparagraphs 1101B(4)(c)(i) and 1101B(4)(d)(i)	1.247
Item 37, section 1317C	1.109, 1.125, 1.127, 1.163
Item 37, paragraphs 1317C(gda), 1317C(gdb) and 1317C(gdc)	1.248
Item 38, paragraphs 1317E(1)(jaaca) and 1317E(1)(jaacb)	1.252
Item 39, subsections 1317G(IDA) and 1317G(IDB)	1.253
Item 40, subsection 1317J(3B)	1.254
Item 41, subsection 1324B(1)	1.256
Item 42, Schedule 3	1.257
Item 44, subsection 56(1)	1.265
Item 45, subsection 56(1)	1.266
Items 46, paragraph 12BAA(8)(g)	1.267
Item 47, paragraph 12BAB(1)(g)	1.268
Item 48, paragraph 14(2)(g)	1.270
Item 49, paragraphs 31(1)(a), (b) and (g)	1.271
Item 50, subsection 127(1)	1.273
Item 51, subsection 127(4C)	1.274
Item 52, paragraph 243D(ca)	1.275
Item 53, paragraph 243E(ca)	1.276
Item 57, subsection 79A(1)	1.282
Item 58, subsection 79A(1)	1.283
Item 59, subsection 79A(2)	1.284
Item 60, subsection 79A(3)	1.285
Item 61, subsection 79A(4)	1.286
Item 62, subsection 79A(6A)	1.287
Item 63, subsection 79A(6B)	1.289
Item 64, subsection 79A(8)	1.290