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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CORPORATIONS AND FINANCIAL SECTOR LEGISLATION AMENDMENT BILL 2013

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Parliamentary Secretary to the Treasurer, the Hon Bernie Ripoll MP)

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Glossary

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

Abbreviation	***Definition***
AML	Australian market licence
APRA	Australian Prudential Regulation Authority
APRA Act	*Australian Prudential Regulation Authority Act 1998*
ASIC	Australian Securities and Investments Commission
ASIC Act	*Australian Securities and Investments Commission Act 2001*
ASX	Australian Securities Exchange
Bill	Corporations and Financial Sector Legislation Amendment Bill 2013
CER Act	*Clean Energy Regulator Act 2011*
CFI Act	*Carbon Credits (Carbon Farming Initiative) Act 2011*
CFSL	Clearing and settlement facility licence
Corporations Act	*Corporations Act 2001*
DT Act	*Corporations Legislation Amendment (Derivative Transactions) Act 2012*
G-20	Group of Twenty (G-20) forum of 19 countries and the European Union
MABR Act	*Mutual Assistance in Business Regulation Act 1992*
OBPR	Office of Best Practice Regulation
OTC derivatives	Over-the-counter derivatives
PSN Act	*Payment Systems and Netting Act 1998*
RBA	Reserve Bank of Australia
RB Act	*Reserve Bank Act 1959*
RIS	Regulatory Impact Statement

General outline and financial impact

Outline

The Corporations and Financial Sector Legislation Amendment Bill 2013 (the Bill) amends the *Corporations Act 2001* (the Corporations Act), the *Payment Systems and Netting Act 1998* (the PSN Act), the *Mutual Assistance in Business Regulation Act 1992* (the MABR Act), the *Australian Securities and Investments Commission Act 2001* (the ASIC Act), the *Reserve Bank Act 1959* (the RB Act), the *Clean Energy Regulator Act 2011* (the CER Act) and the *Carbon Credits (Carbon Farming Initiative) Act 2011* (the CFI Act) to introduce a range of miscellaneous measures related to the regulation of over-the-counter derivatives (OTC derivatives) and other financial products. The key measures are intended to:

- assist central counterparties (CCPs) in managing defaults of clearing participants;
- improve the allocation of resources by the Australian Securities and Investments Commission (ASIC) and the Reserve Bank of Australia (RBA) in assessing the compliance of Australian market licence (AML) and clearing and settlement facility licence (CFSL) holders with their legal obligations;
- allow certain Australian regulators including the RBA to exchange protected information with other entities in Australia and overseas in the execution of their duties subject to appropriate safeguards; and
- allow ASIC to gather and share protected information with regulatory entities overseas for supervision and enforcement purposes; and require ASIC to report on the use of those powers.

Date of effect: All amendments take effect 28 days after Royal Assent.

Financial impact: Nil.

Human rights implications: This Bill does not raise any human rights issue. See Chapter 2 — *Statement of Compatibility with Human Rights*, paragraphs 2.1 to 2.6.

Compliance cost impact: The compliance costs related to the amendments in the Bill are expected to be low.

Summary of regulation impact statement

Regulation impact on business

Impact: The Office of Best Practice Regulation (OBPR) has confirmed that none of the amendments in the Bill require a regulation impact statement (RIS) as they have a minor impact on businesses. The following OBPR approvals have been obtained: portability amendments (OBPR ID 14373); the amendments relating to ASIC's annual compliance assessments (OBPR ID 13928); exchange of information between ASIC and pan-European regulators (OBPR ID 14661); and the measures facilitating the exchange of information by the RBA, the Clean Energy Regulator and the Carbon Credits Administrator (OBPR ID 14450).

Chapter 1
Summary of the Corporations and Financial Sector Legislation Amendment Bill 2013

Outline of chapter

1.1 The Bill amends the Corporations Act, the PSN Act, the MABR Act, the ASIC Act, the RB Act, the CER Act and the CFI Act to introduce a range of miscellaneous measures related to the regulation of over-the-counter derivatives (OTC derivatives) and other financial products. The key measures are intended to:

- assist CCPs in managing defaults of clearing participants;
- improve the allocation of resources by ASIC and the RBA in assessing the compliance of AML and CFSL holders with their legal obligations;
- allow certain Australian regulators including the RBA to exchange protected information with other entities in Australia and overseas in the execution of their duties subject to appropriate safeguards; and
- allow ASIC to gather and share protected information with regulatory entities overseas for supervision and enforcement purposes; and require ASIC to report on the use of those powers.

Context of amendments

Part 1 — Payment systems and netting

1.2 CCPs are entities providing clearing services for transactions in financial products. While ordinarily clearing occurs in relation to transactions concluded on a financial market between the members of the market, clearing of over-the-counter products may also occur. Clearing participants may be brokers that conclude transactions on behalf of their clients or on their own behalf; or may be another institution clearing transactions on the broker's behalf.

1.3 Clearing most commonly refers to the process known as novation whereby the CCP inserts itself as counterparty to each trade transacted on the market so that it becomes the buyer to each seller and the seller to each buyer. In this way, buyers and sellers are provided with assurance that exposures from trades they have entered into will be completed, regardless of what happens to the original counterparty to the trade.

1.4 By assuming all counterparty risks in a market CCPs provide a centralised risk management service. It is therefore crucial that CCPs have arrangements and processes in place to manage and contain the effects of default events. These events may include defaults of clearing participants affecting all the transactions between the participant and the CCP. An example of a default by a clearing participant is where the participant enters formal insolvency administration and ceases trading.

1.5 In the event of a default the CCP may terminate the transactions of the defaulting party. This exposes the CCP to market risk. CCPs guard against this risk by a number of methods. Firstly, participants are required to post collateral for their obligations to the CCP. This is calibrated to meet any exposure that may arise in normal market conditions. Secondly, each participant must contribute to a mutualised default fund which becomes available to the CCP to draw upon in case the collateral provided by the defaulting participant is insufficient to cover the CCP's exposure.

1.6 Rather than terminate all positions a CCP may protect itself against the consequences of a default by a participant, while preserving the defaulting participant's client transactions, by moving the client transactions of the failed participant to another, solvent participant. This process is known as 'porting', and avoids the need for the CCP to close out client transactions because a replacement participant agrees to become responsible for posting collateral in respect of those transactions. Portability arrangements are a key element in a CCP's defences against a default event by one of its participants.

1.7 Another reason for implementing portability arrangements is that in its absence a CCP may close out the client transactions of a defaulting participant so that any hedging arrangements put in place by the defaulting participant's clients would be lost. As some of these clients may be systemically important institutions such as banks, there are strong financial system stability reasons for ensuring that porting of these arrangements can occur. For these reasons portability is generally recommended or prescribed as best practice by relevant international principles established by the Financial Stability Board and other international agencies. An example is the 'Principles for financial market infrastructures' jointly issued in April 2012 by the Committee on Payment and Settlement Systems of the Bank for International Settlements and the

International Organisation of Security Commissions. Principle 14 prescribes for CCPs 'portability arrangements that effectively protect a participant's customers' positions and related collateral from the default or insolvency of that participant'.

1.8 Appropriate risk management by CCPs is becoming even more important as G-20 initiatives require more product classes to be centrally cleared by CCPs, and as other regulatory measures (such as Basel prudential requirements) and market incentives drive greater take-up of central clearing. For example, the clearing of OTC derivatives, which is the subject of the legislative framework established in the *Corporations Legislation Amendment (Derivative Transactions) Act 2012* (the DT Act). There are thus strong policy reasons associated with the preservation of financial system stability for assisting CCPs in establishing portability arrangements.

1.9 In order to establish a portability framework appropriate arrangements are required in a number of areas, including the operating rules of the clearing facility and contractual arrangements such as those between participants and their clients. Clients may also have to make prior arrangements with a replacement participant to whom their transactions will be ported in case of a default by the original participant.

1.10 Legal certainty is of the utmost importance in relation to portability arrangements, because they would have to be implemented in crisis situations and under extreme time pressure. Amendments to certain elements of the legislative framework are required to provide the necessary clarity and certainty with respect to the right of the CCP to port transactions including related collateral.

1.11 Particular issues arise in relation to the operation of insolvency law. The Corporations Act provides that where a company is in administration or liquidation, any disposition of or dealing affecting the company's property is void unless it is undertaken with the consent of the administrator or liquidator or leave of the Court. Certain aspects of a porting process are likely to constitute prohibited dispositions of or dealings affecting property of a defaulting clearing participant, and it is therefore necessary to provide a carve-out from these provisions to allow porting to occur.

1.12 Similarly, insolvency law may retrospectively affect the validity of transactions that have occurred prior to insolvency administration, and may therefore affect porting events in relation to a participant that is subsequently placed into administration.

1.13 The *Payment Systems and Netting Act 1998* (the PSN Act) provides a range of protections and carve-outs for certain retail payment

systems, the Real Time Gross Settlement (RTGS) system used in Australia to settle a number of important types of wholesale transactions, certain types of over-the-counter (OTC) transactions, and the contracts entered into by a CCP in clearing bilateral trades or trades conducted on a financial market (called 'market netting contracts' in the PSN Act). The objective underlying the framing of the PSN Act was to provide the utmost legal clarity and certainty that the netting arrangements established in relation to these systems, transactions and facilities were legally valid and protected, including in situations where one of the participants or parties entered external administration.

1.14 The PSN Act contains a range of powerful provisions which may override other laws (such as the insolvency laws) or contractual arrangements. In some instances the PSN Act states explicitly that certain provisions have effect despite any other law. The reason for providing this type of powerful authority to the provisions in the PSN Act is that the systems, activities and arrangements it covers are at the heart of the financial system. Ensuring that they have legal validity, including in situations where one of the parties enters insolvency, is considered fundamental to protecting the stability of the financial system.

1.15 One part of the PSN Act deals with netting arrangements covered by market netting contracts. These include contracts used by stock exchanges, derivatives exchanges and clearing facilities, including CCPs. Netting is a key risk management tool in financial markets and for this reason is protected by the PSN Act in a variety of systems, markets and transactions, including for CCPs. It allows participants in a set of transactions to meet their net, rather than their gross obligations, thereby significantly reducing the liquidity needs of all participants and of the system as a whole.

1.16 With respect to market netting contracts, the PSN Act currently ensures that the ability to net off obligations and pay out the resulting amount is protected despite the assignment of rights by a participant in contravention of the contract. It further clarifies that the assets of a party to the market netting contract only include the net assets owed to the party under the contract, rather than the gross assets that were netted off to arrive at the net amount, and that any net obligations terminated under the contract do not form part of the party's assets. This provides legal certainty that any netting and discharge of net obligations cannot be unwound.

1.17 The PSN Act further clarifies that in the event that a party to a market netting contract is placed into external administration obligations may still be netted and discharged. It also states that any such payments may not be clawed back by an external administrator. This protection

includes any netting and payments made in relation to collateral provided by a party to the contract.

1.18 The current provisions in the PSN Act would therefore allow a CCP in the event of a default or insolvency of a participant to net all obligations existing between itself and the participant and terminate them following payment of the net amount calculated without obtaining any consents from external administrators that might be required by the Corporations Act. In such a situation, the CCP would then have to replace the terminated contracts in the market.

1.19 An alternative method for dealing with a default or insolvency of a participant is, as described above, to port the open transactions (known as 'positions') to which the defaulting or insolvent participant is a counterparty to another, solvent participant. The current provisions in the PSN Act do not protect the actions required in this scenario, and the proposed amendments are designed to ensure that the portability arrangements put in place by CCPs benefit from certain protections under the PSN Act. This will provide the same legal certainty to porting arrangements as is currently provided for netting and discharge of net obligations.

1.20 In the event of a default or insolvency rapid action will be of the essence, and it is a particular concern to ensure that the CCP can act without having to obtain consents from external administrators that would otherwise be required under the insolvency provisions in the Corporations Act. It is therefore necessary to amend the PSN Act to clarify that porting of positions, including associated collateral, in the case of a default or insolvency of a participant is allowed, regardless of provisions in other legislation including the Corporations Act. Both the CCP and the clearing participants would in such a situation be subject to a number of requirements under the Corporations Act which are intended to address the risk of insolvency of a clearing participant.

1.21 In some situations CCPs might still resort to netting and close-out rather than porting. This would be the case for positions that cannot be ported for some reason. As a result a loss may crystallise for the CCP, and as mentioned in paragraph 1.5 CCPs have access to certain funding sources to cover such losses. One such source of funds is the collateral posted by participants with respect to their obligations to the CCP.

1.22 The Corporations Act currently allows an operator of a clearing and settlement facility (which includes CCPs) to enforce security it holds over a defaulting participant's property if the relevant property is cash, negotiable instruments, securities or derivatives and is subject to a 'possessory security interest' (s 440JA of the Corporations Act). There is

currently some ambiguity as to whether security held over certain types of frequently used collateral satisfies this definition. This mainly includes securities such as ASX 200 stocks which do not exist in tangible form but are registered in the ASX's electronic subregister known as CHESS (these are known as 'dematerialised securities').

1.23 It is proposed to make a further amendment to the PSN Act to ensure that CCPs can enforce security held over all types of assets, including dematerialised securities. The PSN Act is the preferred vehicle to make the proposed amendment because it covers the widest possible range of external administration proceedings conducted under Australian or foreign law and has the required authority to override provisions in any other legislation.

Part 2 — Review of licences

1.24 ASIC is required to conduct an assessment each year of all domestic and foreign AML holders, and domestic and foreign CSFL holders. These assessments must occur irrespective of the perceived risk posed by these licensees. It is proposed to remove this requirement, allowing ASIC to determine how frequently it will conduct assessments for each licensee.

1.25 There are only a small number of Australian market and clearing and settlement (CS) facility licensees. ASIC, through its initial licensing and ongoing supervisory activities, is able to form a clear view of each licensee's activities and the level of risk it poses to investors and the financial system. It is therefore reasonable to allow ASIC the freedom to decide which licensees merit particular attention.

1.26 This amendment would also enable ASIC to focus on reviewing some aspect of a licensee's operations each year, with the full review taking place over a number of years. Reviewing licensees in this way may allow for a more comprehensive examination of their operations.

1.27 This amendment will reduce the misallocation of resources that results from the requirement to conduct annual assessments on all licensees, allowing ASIC to allocate resources to assessments in which they will be more effective. ASIC may, for instance, if the requirement for annual assessments was removed, focus more resources and attention on markets and CS facilities with a significant level of participation by retail investors.

1.28 Similar reasoning applies to the requirement for the RBA to assess at least once a year each CSFL holder with respect to compliance with the financial stability standards (FSS) determined by the RBA.

1.29 A power to prescribe specific AML and CSFL holders by regulation will be included which will allow the Government to require ASIC and the RBA to assess these licensees on an annual basis with respect to designated key legal obligations. This will allow the Government to take appropriate action if it has concerns in relation to a particular licensee.

Part 3 — International business regulators

1.30 Information sharing with international business regulators is valuable to Australian business regulators, as it promotes better enforcement outcomes in Australia and abroad. Currently, ASIC is unable to share information with pan-European regulators (such as the European Securities Market Authority (ESMA) and the European Systemic Risk Board (ESRB)), as they do not fall within the definition of foreign regulator under the *Mutual Assistance in Business Regulation Act 1992* (the MABR Act) or the *Australian Securities and Investments Act 2001* (ASIC Act).

1.31 Australia's recent *Financial Sector Assessment Program* (or FSAP) report iterated the importance of information sharing in supervisory as well as enforcement matters, while noting ASIC's limited ability to use its powers to share protected information with foreign regulators in some circumstances. The ability of ASIC to share supervisory information with individual foreign regulators but not a group of multi-jurisdictional regulators, limits its ability to play a full part in international supervisory cooperation and coordination among the authorities responsible for and involved in the supervision of the different components of cross-border groups, specifically large groups. The amendments, along with recent amendments to the MABR Act regulations allowing ASIC to share information for general supervisory purposes, will allow ASIC to fulfil its commitments as a member of the international regulatory community.

1.32 The MABR Act enables Commonwealth business regulators to render assistance to foreign regulators in their administration or enforcement of foreign business laws. Pan-European regulators (such as ESMA and ESRB) are established under regulations of the European Parliament and Council, which confer on those bodies regulatory functions and related powers. There is doubt whether these pan-European regulators fall within the current definition of 'foreign regulator' under the MABR Act, as the current definition does not include regulators of multiple jurisdictions. The proposed amendments to the MABR Act and the ASIC Act will bring pan-European regulators such as ESMA and ESRB into the definition of foreign regulator and so put beyond doubt ASIC's ability to render assistance in their administration and enforcement of foreign business laws.

Part 4 — Reporting on ASIC's information gathering powers

1.33 In 2010, concerns were raised by the Senate Economics Committee during a Senate Estimates hearing about the lack of reporting by ASIC in relation to its use of information gathering powers. In response, ASIC undertook to conduct an internal review of its procedures and policies relating to its use of such powers. As a result of this review, ASIC undertook to report annually to Parliament on the number, general nature and use of its information gathering powers. From 2010-11, ASIC has reported the use of its information- gathering powers in its annual report.

1.34 The amendments formalise ASIC's reporting commitments by providing a statutory obligation on ASIC to report annually; and a provision for Treasury Ministers, with notice given to ASIC, to request that ASIC report additional information if required. This amendment will broadly align ASIC's reporting obligations with those of market regulators such as the Australian Competition and Consumer Commission in respect of similar information gathering powers.

Part 5 — Disclosure of information by the Reserve Bank

1.35 Section 79A of the *Reserve Bank Act 1959* (the RB Act) contains a number of provisions relating to sharing of information by RBA officers. Sharing of information for regulatory purposes has become an important part of the RBA's work, in particular in collaborating with other regulators, both domestically and internationally, especially for purposes of crisis prevention and management. A number of amendments have been identified that would assist the RBA in its work in this regard. It is noted that almost all of the amendments are modelled on powers and provisions available to the Australian Prudential Regulation Authority (APRA) in its legislation.

1.36 It is intended to provide permission for the RBA to share protected information and documents with a person approved by the Governor or prescribed delegates in writing. A similar provision was previously in the RB Act but was automatically repealed under a sunset provision, and it is proposed to now reinstate it. A similar power is provided to APRA in section 56 of the *Australian Prudential Regulation Authority Act 1998* (the APRA Act).

1.37 It is proposed to provide a power for the RBA to share protected information and documents on an ongoing basis with other persons or bodies (whether in or outside Australia) prescribed by regulation. It is intended that this would be used for entities with which the RBA exchanges information on an ongoing basis such as the Australian Treasury, New Zealand Treasury, the IMF and the Financial Stability

Board (the FSB). It is considered that this is a preferable and more transparent approach for disclosure which needs to occur on an ongoing or regular basis than using the approval power mentioned in the last paragraph. It also reflects a similar provision in the APRA Act.

1.38 A further amendment is proposed allowing the RBA to impose confidentiality restrictions on persons to whom protected information is provided. In the course of executing their official duties the financial regulators (that is the RBA, ASIC and APRA) are regularly given information by regulated entities in the private sector that is highly confidential and that could lead to serious damage if it was to become publicly available. At the same time, financial regulators are under increasing pressure and obligation to share information with other regulators and official bodies, in Australia or overseas, and with private entities. Reasons for this trend include the fact that many regulated entities in the financial sector have significant cross-border activities, and that they may be active in business areas that are subject to supervision by different regulators. In such circumstances effective supervision requires that information is shared among the various regulators overseeing a certain entity, and requirements for joint supervision and sharing of information are now standard among principles for regulatory frameworks issued by bodies such as the FSB. There is also a wide range of other circumstances where financial regulators need to provide protected information to private sector entities — examples could include external specialists providing data analysis services, or IT firms offering data storage facilities.

1.39 The financial regulators are therefore subject to strict confidentiality provisions, which can be found in their governing legislation (RB Act (s79A), ASIC Act (s127) and APRA Act (s56) respectively). These provisions apply mainly to their own staff and persons working for them, but because of the growing need for regulators to share information both the ASIC Act and the APRA Act include provisions allowing conditions to be imposed when information is shared with external entities. This power is used by regulators to ensure that confidential information entrusted to them by private entities is appropriately protected when it is provided to external entities. Staff and other persons working for the regulators are subject to a penalty of two years imprisonment if they breach the confidentiality provisions, and both the APRA Act and the ASIC Act apply the same penalty to external entities breaching confidentiality conditions imposed by ASIC and APRA when they share information. The provision and the penalty are important to reassure regulated entities that information given to regulators is treated with the appropriate level of care and confidentiality, given the sensitive nature of much of that information. In addition, because of the wide range of circumstances in which information may be shared, it is important that the regulators are able to tailor the conditions they need to impose on a

case-by-case basis. It is therefore not appropriate to include general provisions in the legislation that would place limits on the types of conditions or the manner in which they could be imposed.

1.40 The RB Act currently does not have such a provision allowing the RBA or persons working for it in an official capacity to impose conditions when they give information to external entities. There is no fundamental justification for this regulatory gap which is addressed by the draft amendment and is closely modelled on the corresponding provision in the APRA Act (subsections 56(9) and (10)). It ensures that the three financial regulators have the same key instruments they need for providing the appropriate protection to the confidential information provided to them in the course of executing their duties.

1.41 A minor amendment to the confidentiality provisions in the RB Act is proposed to ensure that staff members of contracted service provides are also covered by the confidentiality provisions.

Part 6 — Consequential amendments relating to derivative trade repositories

1.42 Following passage of the DT Act a number of consequential amendments to the *Carbon Credits (Carbon Farming Initiative) Act 2011* (the CFI Act) and the *Clean Energy Regulator Act 2011* (the CER Act) have become necessary.

1.43 As noted above, the DT Act provides a legislative framework implementing Australia's G-20 commitments in relation to over the counter (OTC) derivative reforms. One of these commitments is to ensure that all OTC derivative trades are reported to trade repositories, which are a special type of facility which collect and store information related to OTC derivatives. This requirement is designed to increase transparency in the market and give regulators as well as market participants access to valuable data with which to assess the risks associated with the OTC derivative market. Under the DT Act trade repositories wishing to offer their services in Australia are required to obtain a licence from ASIC or be prescribed by regulation.

1.44 The CER Act established the Clean Energy Regulator to administer the carbon pricing mechanism included in the Government's Clean Energy Future plan, the Carbon Farming Initiative (CFI), the Australian National Registry of Emissions Units, the National Greenhouse and Energy Reporting Scheme and the Renewable Energy Target.

1.45 The carbon pricing mechanism is the key element in the Government's Clean Energy Future plan: it will trigger a broad transformation of the economy. Carbon units, the domestic unit of

compliance for the carbon pricing mechanism, are financial products for the purposes of Chapter 7 of the Corporations Act 2001. Australian carbon credit units (ACCUs), generated under the CFI Act, can also be used for compliance purposes and, like carbon units, are financial products for Chapter 7 purposes. The carbon price will create a market for these units that is designed to ensure that reductions in greenhouse gas emissions are achieved at lowest cost to the economy. This will include the establishment of markets on which carbon units and ACCUs and related derivatives are traded.

1.46 To assist with the operation of these markets, and to promote transparency, section 50 of the CER Act allows the Clean Energy Regulator to disclose protected information to specified financial market or clearing and settlement facility operators — provided this information will enable these operators to supervise their facilities or enforce the relevant rules in relation to them. Similarly, section 277 of the CFI Act allows the Clean Energy Regulator to authorise CFI project auditors to disclose protected *audit* information to specified financial market or clearing and settlement facility operators in the same circumstances.

1.47 There may in future be trading of carbon unit or ACCU derivatives which may have to be reported to trade repositories. It may therefore be useful or necessary in certain situations for the Clean Energy Regulator to be able to provide protected information (or else to authorise CFI project auditors to disclose protected audit information) to licensed or prescribed trade repositories.

1.48 The Bill would add licensed and prescribed trade repositories to the list of entities in the CFI Act and the CER Act with whom the Clean Energy Regulator may share protected information (or to whom the Clean Energy Regulator may authorise CFI project auditors to disclose protected audit information) subject to the conditions set out in those Acts.

Part 7 — Other amendments

1.49 Subsection 1317E(1) of the Corporations Act lists those provisions in the Act which are subject to the civil penalty provisions in Part 9.4B. Over time additional provisions have been added to the list, and as a result the section has become unwieldy and difficult to read. It is proposed to rewrite the section and list the provisions in tabular form without making any changes to its substance.

Summary of new law

1.50 Amendments are made to the PSN Act allowing client positions and associated collateral of a defaulting participant in a clearing facility to be ported to another, solvent participant regardless of obstacles presented by other legislation, including the insolvency provisions in the Corporations Act. The amendments will also ensure that CCPs can enforce security they hold over all types of assets, including dematerialised securities.

1.51 ASIC and the RBA will be allowed flexibility in determining how often to assess compliance by AML and CSFL holders with their legal obligations.

1.52 ASIC will be able to share information with pan-European business regulators for supervisory and enforcement purposes. Amendments will also impose reporting requirements on ASIC in respect of its use of information gathering powers to ensure transparency and accountability.

1.53 Improvements are made to the confidentiality provisions in the RB Act, including to allow the RBA to disclose protected information to external persons and bodies in the execution of its duties if they are approved by the RBA Governor or prescribed delegates, or if they are prescribed in regulations.

1.54 Licensed and prescribed trade repositories are added to the list of entities in the CFI Act and the CER Act with whom the Clean Energy Regulator may share protected information subject to the conditions set out in those Acts.

Comparison of key features of new law and current law

New law	***Current law***
Clearing facilities are able to port client positions and associated collateral of defaulting participants.	Portability of client positions and associated collateral is not possible.
Clearing facilities are provided with explicit powers to enforce security held over all types of assets.	There is ambiguity whether clearing facilities can enforce security they hold over certain types of assets.

New law	*Current law*
ASIC and the RBA can determine on a case-by-case basis how often they need to assess compliance by particular AML and CSFL holders with their legal obligations.	ASIC and the RBA must assess compliance by all AML and CSFL holders with their legal obligations every year, regardless of whether circumstances justify and require such ongoing supervision.
ASIC shares information with foreign business regulators both in response to requests from individual business regulators or groups of multi-jurisdictional business regulators, such as pan-European regulators. ASIC will be required to report on its use of information gathering powers.	ASIC shares information with individual foreign business regulators for supervisory and enforcement purposes.
The RBA can share protected information with other persons in the execution of its duties in an appropriate manner and subject to adequate controls.	The RBA is restricted in its ability to share protected information with other persons in the execution of its duties, including with official bodies such as the IMF and the FSB.
The Clean Energy Regulator is able to share protected information with licensed and prescribed trade repositories, subject to conditions set out in its legislation.	The Clean Energy Regulator is unable to share protected information with licensed and prescribed trade repositories.

Detailed explanation of new law

Schedule 1 — Amendments

Part 1 — Payment systems and netting

Payment Systems and Netting Act 1998

1.55 Section 16 of the PSN Act sets out certain actions that may be done under the terms of market netting contracts. Market netting contracts are defined in section 5 of the PSN Act as contracts entered into in accordance with the operating rules of a netting market. A netting market is in turn defined in the same section as licensed markets or licensed CS facilities (as defined in section 761A of the Corporations Act) which are specifically approved by the Minister for the purposes of the PSN Act or other arrangements declared by regulation to be netting markets. The PSN Act in this manner provides certain protections to the contracts entered into between operators and participants of licensed financial markets and CS facilities.

1.56 Netting arrangements are mainly used by CCPs rather than by financial markets. A small number of entities have been approved by the Minister as netting markets and are all CCPs, being mainly subsidiaries of the Australian Stock Exchange (the ASX) that provide clearing services for the financial markets operated by the ASX. It is anticipated that in future there may be other CCPs entering the Australian market to provide clearing services, for example in relation to OTC derivatives, and it is highly likely these entities would also seek approval from the Minister as netting markets.

1.57 Existing subsection 16(1) allows obligations under market netting contracts to be terminated and all amounts owed under the contract to be netted and paid out. Subsection 16(2) allows the same thing to be done where one of the parties to the contract enters external administration, and makes explicit that the external administrator cannot interfere in this process. Subsection (3) provides that subsections (1) and (2) override any other law including a number of specified provisions which are defined in section 5 of the PSN Act. The ability to override other legislation makes these provisions in the PSN Act particularly powerful. As mentioned above the main policy rationale for the special powers provided under the PSN Act lies in the fact that the entities and transactions that benefit from them are at the heart of the financial system and are important in protecting the stability of the system.

1.58 It is noted that while the protection provided by the PSN Act is powerful, it is limited in all cases to actions that are allowed under the terms of the market netting contract. In the case of a CCP and its participants, each transaction entered into between the CCP and a participant occurs under a market netting contract. It is therefore clear that the scope of the actions permissible under this section of the PSN Act is significantly determined by the terms of the market netting contract. Under the PSN Act market netting contracts must be entered into in accordance with the operating rules of the market.

1.59 There is a significant degree of regulatory oversight and control of CCPs, some of which applies specifically to their status and activities as netting markets. The main channels for exercising such oversight and control are the following:

- the licensing application and approval process, as part of which ASIC and the RBA will consider relevant information in relation to the applicant as set out in the Corporations Act in formulating their advice to the Minister on whether to approve the application. This includes the operating rules of the entity, any other written procedures and any agreements material to the way in which the entity is to operate;

- ongoing regulatory oversight by ASIC and the RBA, including assessments of compliance by licensees with their legal obligations;

- the requirement for the Minister to approve a facility that wishes to benefit from the PSN Act as a netting market. As part of this process the applicant is required to provide relevant information with respect to its netting arrangements and requirements, including with respect to default situations, which is considered by ASIC and the RBA in formulating their advice to the Minister on whether to approve the application. The Minister accordingly may also revoke the approval;

- the power of the Minister to impose conditions and issue directions to licensees. The Minister may, for instance, issue directions to a licensed CS facility to do a specific thing to ensure that its services are provided in a fair and effective way;

- the Minister's power to disallow operating rule changes (for domestic licensees). As market netting contracts must be entered into in accordance with the operating rules, there is the power for the Minister to disallow any changes that are considered to be inappropriate. The operating rules may also be enforced by a range of persons, including ASIC, under section 822C; and

- the RBA's financial stability standards, which it may issue under the Corporations Act for the purpose of ensuring that CS facility licensees operate in a way that supports financial system stability in Australia.

1.60 These powers allow the government to take appropriate action in case of unintended consequences or inappropriate conduct by licensees. The specific type of action would have to be decided on a case-by-case basis.

1.61 Amendments are made to subsection 16(1) of the PSN Act that allow CCPs to take certain actions in situations where a market participant defaults on its obligations but has not entered external administration. Such defaults would be likely to occur in situations where the participant is experiencing financial difficulties, and it is important for the CCP to be able to take immediate action without having to wait for a formal external administration to commence.

1.62 Clarification is provided that any security which a market participant has given in accordance with the market netting contract may be enforced by the CCP. The wording of the amendment is sufficiently flexible to include arrangements where the security is provided by the participant itself, and other arrangements under which the security is provided by another party such as the client of a participant. ***[Schedule 1, item 1, after paragraph 16(1)(c), paragraph (ca)]***

1.63 It is further clarified that any rights and obligations relating to outstanding positions between the CCP and a participant may be transferred to another participant, in a manner allowed by the terms of the market netting contract. The transfer of all rights and obligations relating to one or more positions to another, non-defaulting participant allows the transactions to be completed regardless of the default of the participant who was the original party to the contract. The CCP's exposure with respect to the positions remains unchanged and therefore does not expose it to additional risk that it would otherwise have to cover. This is the essence of what portability is intended to achieve. ***[Schedule 1, item 1, after paragraph 16(1)(c), paragraph (cb)]***

1.64 Clarification is provided that any property provided as collateral may also be transferred or ported from the defaulting participant to another participant in accordance with the terms of the market netting contract. The amendment further specifies that this can occur with respect to actual assets, for example cash given by the participant to the CCP as collateral, but also where collateral is provided in the form of security over assets. The amendment further states that porting or transfer can occur with respect to collateral provided by a party to the market netting contract itself, and also where the collateral is not owned by the party to the contract but by another party, being the client of the participant, provided that the client has given prior written agreement to such transfers or other dealings as allowed under the market netting contract. This final amendment provides flexibility to accommodate different types of collateral holding arrangements that exist in the market. The main distinction made is between arrangements where collateral provided represents a debt owed by the CCP to the participant, and trust-based holding structures under which CCPs hold collateral on trust for the client. It is to be noted that in a trust-based structure beneficial ownership will always remain with the client, and only the original participant's rights or interests in the collateral would be transferred to the replacement participant. The interest of the client with respect to the collateral that client may have provided remains unchanged. ***[Schedule 1, item 1, after paragraph 16(1)(c), paragraph (cc)]***

1.65 Amendments to paragraph 16(1)(d) are made which are intended to ensure that certain actions by a defaulting participant in violation of the terms of the market netting contract such as disposals of rights or assets

cannot stop the CCP from enforcing security it holds or porting client positions from the defaulting participant to another, non-defaulting participant.

1.66 The effect of these provisions is that, subject to the commentary below regarding constitutionality, a third person acquiring title to rights or property in breach of a market netting contract may potentially be voidable in the event of enforcement or porting occurring.

1.67 It is clarified that paragraph 16(1)(d) applies to all of the matters contained in new paragraphs 16(1)(ca), (cb) and (cc). That is to say, it applies to the enforcement of any security held by the CCP and to any porting of client positions from the defaulting participant to another, non-defaulting participant, including any porting of collateral. ***[Schedule 1, item 2, paragraph 16(1)(d)]***

1.68 It is clarified that all of these actions remain valid despite any disposal of the client positions or collateral by the defaulting broker in violation of the terms of the market netting contract. It is noted that this provision may give rise to a possible breach of paragraph 51(xxxi) of the Constitution which prohibits the acquisition of property other than on just terms. This issue arises because the property may have been transferred to an innocent third party prior to the commencement of this amendment, whose interests may subsequently suffer because of the operation of this amendment. The issue is being addressed through an application provision confining the effect of this amendment to cases where the disposal of the rights or property occurs after the commencement of the amendment, and through a general provision stating that any amendment giving rise to an acquisition on unjust terms does not apply to the extent that it has this effect (see paragraphs 1.76 and 1.77). ***[Schedule 1, item 3, after subparagraph 16(1)(d)(i)]***

1.69 Amendments to subparagraphs 16(1)(d)(ii) and (iii) clarify that all of these actions remain valid despite any charge or other interest granted over the client positions or collateral by the defaulting broker to a third party in violation of the terms of the market netting contract. The same issue with respect to paragraph 51(xxxi) arises as discussed in the last paragraph, and a similar solution is adopted, that is the effect of this amendment is confined to cases where the interest is granted after the commencement of the amendment and no acquisition on unjust terms occurs (see paragraphs 1.76 and 1.77). ***[Schedule 1, item 4, subparagraphs 16(1)(d)(ii) and (iii)]***

1.70 The following amendments address issues arising when a participant enters external administration. The key issues relate to the enforcement of certain types of security held by CCPs in these situations, the ability of a CCP to port client positions of the participant without

obtaining the consent of the external administrator or the court, and ensuring that the external administrator cannot unwind the dealings of the CCP with respect to the assets of the participant in porting client positions.

1.71 It is clarified that in a situation where a participant in a CCP enters external administration the CCP can enforce any type of security it holds. As noted in paragraph 1.22 there is currently some ambiguity about the right of a CCP to do so with respect to certain types of assets, and this amendment is designed to remove this ambiguity. It is noted that this amendment is worded in a flexible manner intended to encompass more complex types of security arrangements, for example in cases where there are more than two parties to a market netting contract. ***[Schedule 1, item 5, after paragraph 16(2)(f), paragraph (fa)]***

1.72 Subsection 16(2) of the PSN Act allows certain actions to be taken when a party to a market netting contract goes into external administration. Amendments to this subsection clarify that porting of client positions can occur when a participant enters external administration by stating that the transfer of rights and obligations of a party to a market netting contract in external administration may take place. This removes the need to comply with sections 437D and 468 of the Corporations Act which provide that any dealings affecting the participant's property can only occur with the consent of the administrator or the leave of the court. ***[Schedule 1, item 5, after paragraph 16(2)(f), paragraph (fb)]***

1.73 A further amendment clarifies that the ability to port client positions of a participant in external administration includes assets provided as collateral by the participant or the participant's client (subject to the client having agreed in writing to the porting arrangements), as well as security given over assets. The wording of this amendment mirrors that of the amendment set out in paragraph 1.64, and the explanations provided in that paragraph apply to this amendment as well. ***[Schedule 1, item 5, after paragraph 16(2)(f), paragraph (fc)]***

1.74 Division 2 of Part 5.7B of the Corporations Act provides that certain transactions entered into before the commencement of an external administration may be unwound. This includes unreasonable payments to directors, transactions that are of an uncommercial nature, payments to a creditor that provide an unfair preference to that creditor and others. There may be some ambiguity as to whether porting of client positions including associated collateral or the enforcement of security may not fall under one of these headings, and could therefore be subject to being unwound or voided. Existing paragraph 16(2)(g) sets out a number of transactions that are not voidable in the external administration of a party to a market netting contract. Any porting of rights, obligations or property

of a participant in external administration that occurs in accordance with the terms of a market netting contract as well as enforcement of any security are added to this list of transactions, thereby removing the ambiguity referred to above. It is noted that there is a definition in section 5 of the PSN Act which clarifies the scope of the term 'voidable' and states that, among others, it includes transactions to which Division 2 of Part 5.7B of the Corporations Act applies. ***[Schedule 1, item 6, at the end of paragraph 16(2)(g)(before the note)]***

1.75 Clarification is provided that statements in relation to matters that are or may be done in accordance with the contract also include matters that are or may be done in accordance with any security given in accordance with the contract. This amendment is included to address situations where the detailed terms governing the provision of security are not included in the market netting contract itself, but rather in a separate security agreement. It ensures that the actions allowed under the relevant amendments in the Bill also extend to security given in such circumstances. ***[Schedule 1, item 7, at the end of section 16 (after the note)]***

1.76 Clarification is provided that in general the amendments in Part 1 of the Bill apply to existing and future market netting contracts and external administrations, enforcements of security regardless of when the security was given, and porting of client positions including collateral regardless of when the positions were established or the collateral was provided. An exception is made for the amendments to subparagraph 16(1)(d) in items 3 and 4 of the Bill, which only affect disposals of rights or property, or the creation or operation of encumbrances or interests occurring after the amendments take effect. This amendment is intended to avoid possible breaches of paragraph 51(xxxi) of the Constitution with respect to the acquisition of property on other than just terms (see paragraphs 1.68 and 1.69 for further explanation). ***[Schedule 1, item 8, application of amendments]***

1.77 A general provision is included which states that any of the amendments in this Bill leading to an acquisition of property other than on just terms does not apply to the extent that it will have this effect. It is noted that this amendment may not affect the entirety of a given amendment, but only applies to the extent that it results, in a particular case, in an acquisition of property of this kind. It also only applies to the amendments in this part of the Bill, rather than to the PSN Act in general. ***[Schedule 1, item 9, amended provisions do not have effect to extent they result in an acquisition of property]***

Part 2 — Review of licences

Corporations Act 2001

1.78 Subsection 794C(1) allows ASIC to do an assessment of an AML holder with respect to its compliance with its legal obligations. Subsection 794C(2) makes it mandatory for ASIC to do so at least once a year for all AML holders with respect to certain obligations set out in paragraph 792A(c) of the Corporations Act. These obligations are to have adequate arrangements for operating the market, and in particular to have arrangements in place for dealing with conflicts of interest as well as for monitoring and enforcing compliance with its operating rules.

1.79 The heading of section 794C is amended to reflect the fact that it is now no longer compulsory for ASIC to assess each market licensee's compliance with its legal obligations once a year. ***[Schedule 1, item 10, section 794C (heading)]***

1.80 Subsection 794C(2) is repealed thus removing the mandatory requirement to conduct such assessments every year for all licensees with respect to certain legal obligations. A new power is substituted allowing specific market licensees to be prescribed by regulation. For such licensees ASIC will have to conduct an annual assessment with respect to their compliance with the obligations in paragraph 792A(c). ***[Schedule 1, item 11, subsection 794C(2)]***

1.81 Similar amendments are made with respect to ASIC's assessments of CSFL holders. ***[Schedule 1, items 12 and 13, section 823C (heading) and subsection 823C(2)]***

1.82 Similar amendments are made with respect to the RBA's obligations to assess the compliance by CSFL holders with their obligations in paragraph 821A(aa) of the Corporations Act. This paragraph requires CFSL holders to comply with the RBA's financial stability standards and to do everything necessary to reduce systemic risk. The amendments will allow the RBA to decide when and how often to conduct such an assessment, except if a specific CFSL holder is prescribed by regulation. In such a case the RBA will have to conduct an annual assessment of its compliance with the obligations in paragraph 821A(aa). ***[Schedule 1, items 14 and 15, section 823CA (heading) and subsection 823CA(1)]***

Part 3 — International business regulators

Australian Securities and Investments Commission Act 2001

1.83 Section 127 of the ASIC Act obliges ASIC to protect confidential or protected information, and sets out the circumstances in

which the disclosure or use of such information is authorised. Subsection 127(4)(ca) provides that where the Chairperson is satisfied that particular information will enable or assist 'a foreign body' to perform a regulatory function, or to exercise a related power, conferred on the body 'by or under a law in force in that foreign country', the disclosure of the information to the foreign body by ASIC is taken to be authorised use and disclosure of the information. It is unclear whether groups of multi-jurisdictional regulators, for example pan-European regulators such as ESMA and the ESRB, have regulatory functions and related powers conferred on them 'by or under a law in force in a foreign country', for the purposes of subsection 127(4)(ca) of the ASIC Act.

1.84 While Article 188 of the Treaty on the Functioning of the European Union indicates that such regulations have general application and are binding in their entirety and directly applicable in all Member States of the European Union, it is unclear whether they are laws of the kind contemplated by subsection 127(4)(ca).

1.85 Amendments are made to subsection 127(4) to authorise the disclosure of protected information to an international business regulator to perform its functions or exercise its powers. The scope of this provision is clarified by the insertion of a defined term in subsection 5(1) to clarify that an 'international business regulator' includes a body that has regulatory business functions in two or more countries. It also makes it a requirement that the regulator's functions are conferred by a law of a country, a treaty or international agreement to which that country is party; or other body established by or under a treaty or international agreement, to which that country is party. By limiting the disclosure of protected information and documents to assist regulatory functions authorised by a foreign law or treaty, the intention is to safeguard against the disclosure and the potential misuse of protected information for private commercial ends. ***[Schedule 1, items 17 and 18, subsection 5(1) and after paragraph 127(4)(ca)]***

1.86 It is also clarified that the term 'foreign business law' includes a law or regulation that an international business regulator administers or enforces. ***[Schedule 1, item 16, subsection 5(1)]***

1.87 The effect of the amendments to subsection 127(4)(ca) and section 5(1) is to make clear that the disclosure of protected information to agencies under subsection 127(4) encompass foreign regulatory bodies including pan-European regulators such as ESMA and ESRB.

1.88 A number of minor changes are made to the wording of subsection 127(4)(d) to accommodate the new provision described in paragraph 1.85. ***[Schedule 1, item 19, subsection 127(4)]***

1.89 A number of minor amendments are made to the term 'business law of a foreign country' in subsections 127(4B)(a)(ia) and 127(4FA)(b)(iii) to reflect the broader definition that business law encompasses both individual laws in force in a foreign country as well as those in force across a number of countries provided through a treaty or international agreement. ***[Schedule 1, item 20, subparagraphs 127(4B)(a)(ia) and 127(4FA)(b)(iii)]***

1.90 An amendment to subsection 243(a)(ii) is made to ensure that the powers of the Parliamentary Joint Committee on Corporations and Financial Services to enquire into and report on activities of ASIC extend to inquiring into the operation of any foreign business law that may significantly affect the operation of the corporations law. ***[Schedule 1, item 21, subparagraph 243(a)(ii)]***

Mutual Assistance in Business Regulation Act 1992

1.91 To facilitate mutual recognition of Australia's international regulatory arrangements, minor amendments are also required to the MABR Act to ensure that ASIC is able to share protected information and documents with pan-European regulators (such ESMA and ESRB).

1.92 It is clarified that the term 'foreign business law' and 'international business regulator' under subsection 3(1) has the same meaning as in the ASIC Act. The term is defined in subsections 5(1) of the ASIC Act. ***[Schedule 1, items 22 to 24 inclusive, subsection 3(1)]***

Part 4 — Reporting on ASIC's information gathering powers

Australian Securities and Investments Commission Act 2001

1.93 As noted in paragraph 1.34, the amendments formalise an ASIC undertaking to report annually to Parliament on the use of its information gathering powers under the Corporations Law, the Crimes Act and the *National Consumer Credit Protection Act 2009*. They also provide a statutory basis for the future reporting by ASIC of the use of information gathering powers under the MABR Act. An amendment made to subsection 136(2) makes it a requirement that in preparing a report on ASIC's operations to the Minister during a financial year, the report must include information as required to be included as prescribed by regulations. ***[Schedule 1, item 25, at the end of subsection 136(2)]***

1.94 A further amendment clarifies the nature and type of information ASIC is required to report annually relating to its use of information gathering powers; and that ASIC's reporting of such powers are not to be limited to those powers conferred by the Corporations Law but encompass its use of information gathering powers conferred by other laws, where relevant. ***[Schedule 1, item 26, subsection 136(2)]***

1.95 The effect of the amendments is twofold: to provide a statutory basis to support ASIC's current reporting commitments in respect of its use of information gathering powers; and to provide a flexible legislative vehicle to mandate additional reporting of ASIC's use of these powers (as prescribed by the regulations from time to time) as appropriate for Parliamentary scrutiny and greater transparency.

Part 5 — Disclosure of information by the Reserve Bank

Reserve Bank Act 1959

1.96 Section 79A of the RB Act sets out rules relating to the disclosure of protected information by the RBA in the course of its duties. Subsection 79(1) contains a number of important definitions for the purposes of these provisions, including the definition of 'officer'. This is a key definition: for instance, the fundamental prohibition in subsection (2) on disclosing protected information applies to 'a person who is or has been an officer' of the RBA.

1.97 The definition makes repeated use of the term 'employment' in defining who is to be considered as an officer of the RBA. It is considered that this term may be construed narrowly to exclude persons working for the RBA or a service provider not as employees but in other capacities, for example as contractors. An amendment is therefore made clarifying that such persons are also captured by the definition. ***[Schedule 1, item 27, subsection 79A(1) (paragraph (e) of the definition of 'officer')]***

1.98 The DT Bill inserted subsection 79A(4) into the RB Act allowing disclosure of protected information to certain foreign supervisors and to central banks, provided the information would assist these entities in the fulfilment of their official duties. Some of the entities the RBA needs to exchange information with may not fit neatly into these categories. For example, government entities such as the Australian Treasury or the New Zealand Treasury are not captured. This is also true of certain international organisations such as the International Monetary Fund (the IMF) and the Financial Stability Board (the FSB). It is therefore proposed to provide a means for such special cases to be prescribed as organisations with which the RBA can exchange protected information.

1.99 Subsection 79A(4) is expanded to include a power to prescribe other persons or bodies by regulation to whom the RBA may disclose protected information. This power would be used for entities with which the RBA exchanges information on an ongoing basis such as the Australian Treasury, New Zealand Treasury, the IMF and the FSB. It is considered that this is a preferable and more transparent approach to addressing the need for ongoing disclosure than using the general

approval power provided to the Governor and specified delegates referred to in paragraph 1.101 below, and also reflects a similar provision in the APRA Act. ***[Schedule 1, item 29, after paragraph 79A(4)(b)]***

1.100 A number of minor changes are made to the wording of subsection 79A(4) to accommodate the new provision described in the last paragraph. ***[Schedule 1, items 28 and 30, at the end of paragraph 79A(4)(b) and subsection 79A(4)]***

1.101 Permission is provided to disclose protected information and documents to any person approved by the Governor or specified delegates in writing. A similar provision was previously in the legislation but was automatically repealed under a sunset provision, and it is now proposed to reinstate it. It is noted that a similar power is provided to APRA in section 56 of the APRA Act. New subsection 79A(5A) is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. ***[Schedule 1, item 31, after subsection 79A(4)]***

1.102 A power is provided for a person disclosing protected information or documents under section 79A to impose conditions in writing on the person receiving the information or documents. As explained in paragraphs 1.38 to 1.40 this power is provided in order to assist the RBA in ensuring that protected information provided to it by regulated entities is treated with the appropriate care and respect. Failure to comply with any such imposed conditions is made an offence with a penalty of imprisonment for two years. This is the same penalty that applies to RBA officials breaching the fundamental prohibition on disclosing protected information in subsection 79A(2). It is noted that new subsection 79A(7B) is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. ***[Schedule 1, item 32, after subsection 79A(7)]***

Part 6 — Consequential amendments relating to derivative trade repositories

Carbon Credits (Carbon Farming Initiative) Act 2011

1.103 Section 277 of the CFI Act allows the Clean Energy Regulator to authorise CFI project auditors to disclose protected audit information to a body corporate that conducts a financial market, or is involved in supervising a financial market, or is a body corporate holding a clearing and settlement facility licence — provided the body corporate in question is specified in regulations. The Clean Energy Regulator must also be satisfied that the protected audit information will enable or assist the body corporate to monitor compliance with, enforce, or perform functions or exercise powers under one of the following: the Corporations Act, other

business laws of a State, Territory or foreign country, or the operating rules of the body corporate. A holder of an Australian derivative trade repository licence and the operator of a prescribed derivative trade repository are added to the list of bodies corporate to which such information may be disclosed. ***[Schedule 1, item 33, subparagraph 277(1)(a)(ii)]***

1.104 It is clarified that the term 'Australian derivative trade repository licence' has the same meaning as in the Corporations Act. The term is defined in sections 9 and 761A of the Corporations Act. ***[Schedule 1, item 34, after paragraph 277(9)(a)]***

1.105 It is clarified that the term 'prescribed derivative trade repository' has the same meaning as in the Corporations Act. The term is defined in section 761A of the Corporations Act. ***[Schedule 1, item 35, at the end of subsection 277(9)]***

Clean Energy Regulator Act 2011

1.106 Section 50 of the CER Act allows the Clean Energy Regulator to disclose protected information to a body corporate that conducts a financial market, or is involved in supervising a financial market, or is a body corporate holding a clearing and settlement facility licence — provided the body corporate in question is specified in regulations. The Clean Energy Regulator must also be satisfied that the protected information will enable or assist the body corporate to monitor compliance with, enforce, or perform functions or exercise powers under one of the following: the Corporations Act, other business laws of a State, Territory or foreign country, or the operating rules of the body corporate. A holder of an Australian derivative trade repository licence and the operator of a prescribed derivative trade repository are added to the list of bodies corporate to which such information may be disclosed. ***[Schedule 1, item 36, subparagraph 50(1)(a)(ii)]***

1.107 It is clarified that the term 'Australian derivative trade repository licence' has the same meaning as in the Corporations Act. The term is defined in sections 9 and 761A of the Corporations Act. ***[Schedule 1, item 37, after paragraph 50(8)(a)]***

1.108 It is clarified that the term 'prescribed derivative trade repository' has the same meaning as in the Corporations Act. The term is defined in section 761A of the Corporations Act. ***[Schedule 1, item 38, at the end of subsection 50(8)]***

Corporations Act 2001

1.109 The above amendments assume that there are definitions of 'Australian derivative trade repository licence' and 'prescribed derivative trade repository' that apply for the purpose of the whole of the

Corporations Act. While this is true for 'Australian derivative trade repository licence' which is defined in this manner in section 9 of the Corporations Act, it is currently not true for 'prescribed derivative trade repository'. A definition of 'prescribed derivative trade repository' applying to the whole of the Corporations Act is therefore added to section 9 of the Corporations Act. ***[Schedule 1, item 39, section 9]***

Part 7 — Other amendments

Corporations Act 2001

1.110 Subsection 1317E(1) is rewritten in the form of a table, replacing the current list of items. There is no change to the contents of the subsection as the amendment is solely intended to make the provision easier to read and use. ***[Schedule 1, item 41, subsection 1317E(1)]***

1.111 A number of minor consequential amendments are made to the definitions in section 1317DA to reflect the changes to subsection 1317E(1) outlined in the previous paragraph. ***[Schedule 1, item 40, section 1317DA]***

Chapter 2
Statement of Compatibility with Human Rights

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

Corporations and Financial Sector Legislation Amendment Bill 2013

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 a range of legislation to introduce a range of miscellaneous measures related to the regulation of over-the-counter derivatives and other financial products. The key measures are intended to:

- assist clearing facilities in managing defaults of clearing participants;
- improve the allocation of resources by the Australian Securities and Investments Commission (ASIC) and the Reserve Bank of Australia (the RBA) in assessing the compliance of Australian market licensees and clearing and settlement facility licensees with their legal obligations;
- allow certain Australian regulators including the RBA to exchange protected information with other entities in Australia and overseas in the execution of their duties subject to appropriate safeguards; and
- allow ASIC to gather and share protected information with regulatory entities overseas for supervision and enforcement purposes; and require ASIC to report on the use of those powers.

Human rights implications

2.3 The amendments to Parts 3, 5 and 6 of the Bill may have an impact on the right to privacy, as they allow various regulators including ASIC and the RBA to share 'protected information' with other entities. 'Protected information' may include personal information as defined in section 6 of the *Privacy Act 1988*.

2.4 It is noted that the amendments pursue a legitimate objective and the limitations imposed on the right to privacy are not arbitrary. Effective regulation of financial markets and products in today's world is dependent on the exchange of information among regulators and with other entities, given the increasing complexity and globalisation of financial markets. Regulators generally have strict conditions imposed on them through their enabling legislation with respect to the use and disclosure of protected information, including appropriate penalties for breaches of those conditions.

2.5 Care has been taken to ensure that the provisions allowing for the use and disclosure of protected information in the Bill are drafted narrowly enough to ensure that personal information is not disclosed unnecessarily, and that its use and disclosure is necessary for, or directly related to, the powers and functions of the regulators.

Conclusion

2.6 The Bill is compatible with human rights because, to the extent that it may limit those rights, it does so only where justified by legitimate reasons and only to the extent required by those reasons.

The Hon Bernie Ripoll MP, Parliamentary Secretary to the Treasurer

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