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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FINANCIAL SECTOR REFORM (FINANCIAL MARKET INFRASTRUCTURE)
BILL 2022

EXPOSURE DRAFT EXPLANATORY MATERIALS

(Circulated by authority of the Treasurer, the Hon Jim Chalmers MP)

Consultation preamble

Treasury seeks feedback on the effectiveness of this exposure draft explanatory material in explaining the policy context and operation of the proposed new law, including, but not limited to:

- how the new law is intended to operate;
- whether the background and policy context is sufficiently comprehensive to support understanding of the policy intent and outcomes of the new law;
- the use of relevant examples, illustrations or diagrams as explanatory aids; and
- any other matters affecting the readability or presentation of the explanatory material.

Feedback on these matters will assist to ensure the Explanatory Memoranda for the Bill aids the Parliament’s consideration of the proposed new law and the needs of other users.

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Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

Abbreviation	Definition
AFCA	Australian Financial Complaints Authority
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
ASX	ASX Limited
CCA	<i>Competition and Consumer Act 2010</i>
CFR	Council of Financial Regulators
CFR Advice to Government	Council of Financial Regulators Advice to Government 2020
Corporations Act	<i>Corporations Act 2001</i>
Corporations Regulations	<i>Corporations Regulations 2001</i>
COVID-19	The coronavirus known as COVID-19
CS facility	A clearing and settlement facility as defined in section 768A of the <i>Corporations Act 2001</i>
CS service	A clearing and settlement service as defined in section 828 of the <i>Corporations Act 2001</i>
FMI	Financial Market Infrastructure

Glossary

FMI entity	An entity, typically a licensed entity, that forms part of Australia's financial market infrastructure.
PPSA	<i>Personal Property Securities Act 2009</i>
PPSA security interest	Personal Property Security Act security interest
PSN Act	<i>Payment Systems and Netting Act 2011</i>
RBA	Reserve Bank of Australia
RB Act	<i>Reserve Bank Act 1959</i>
The Treasury	The Department of the Treasury

Chapter 1: FMI Reform - Establishing a crisis management regime

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Outline of chapter

- 1.1 The Bill implements the recommendations of the CFR to reform Australia’s FMI regulatory regime. These reforms provide the RBA with powers to step in and resolve a crisis at a licensed CS facility. They also strengthen and streamline ASIC and the RBA’s licensing, supervisory and enforcement powers for FMI to reduce the likelihood of a crisis occurring and enhance supervisory oversight generally.
- 1.2 Schedule 1 to the Bill establishes the above-mentioned crisis management regime for domestic CS facilities. The amendments provide the RBA with powers to:
 - resolve crisis situations in CS facilities; and
 - reduce the risk of such crisis situations from occurring.
- 1.3 The amendments also establish a funding mechanism to assist in resolving crisis situations.

- 1.4 All legislative references in this chapter are to the Corporations Act unless otherwise stated. Further, all references to “domestic CS facility licensee” in this chapter are references to a body corporate registered under Chapter 2A who is granted an Australian CS facility licence unless the contrary intention is stated.

Context of amendments

Australia’s Financial Market Infrastructure

- 1.5 The entities that make up Australia’s FMI are critical in facilitating and supporting Australia’s capital markets. When these entities work well, they contribute to the financial stability, operational efficiency, and effective management of risk in Australian financial markets.
- 1.6 FMI entities are supervised either solely by ASIC, or, in respect of CS facilities, both ASIC and the RBA. They are typically large and intertwined with the broader financial system.
- 1.7 These are, by necessity, highly regulated entities, as failure in any of these entities could have severe consequences for the operation of markets, and in turn damage the Australian economy.
- 1.8 This Bill introduces a crisis management regime, granting powers to the RBA to provide for the management of a CS facility that has failed or is at risk of failing. New and enhanced regulatory powers are also provided to the RBA and ASIC to assist in mitigating and managing the risks FMI entities face and pose to the broader financial system. The amendments also transfer certain ministerial powers to regulators to streamline existing financial market regulation, and reflect their respective responsibilities.

Regulation of financial market infrastructure

- 1.9 Australia’s FMI is comprised of:
- financial markets (operated by financial market operators);
 - clearing and settlement facilities;
 - derivative trade repositories; and
 - benchmark administrators.
- 1.10 These entities support approximately \$16.5 trillion in securities transactions and \$160 trillion in derivatives transactions each year.
- 1.11 The systemic importance of these entities calls for a high degree of regulation and supervision. Each of the entities mentioned above has a specific regulatory regime contained in Chapter 7 of the Act.

Financial Market Operators

- 1.12 Financial market operators provide the listing and trading services that allow financial products to be issued and traded on a financial market. They also facilitate transparent and competitive pricing of listed securities and derivatives and ensure fair and orderly trading.
- 1.13 A financial market is defined in the Act to be a facility through which offers to acquire or dispose of financial products are regularly made or accepted, or where offers or invitations are regularly made to acquire or dispose of financial products that are intended to result in the making of offers to acquire or dispose of financial products (see section 767A of the Act).
- 1.14 Market licensees include ASX Limited, Cboe Australia Pty Ltd, National Stock Exchange of Australia Limited and Sydney Stock Exchange Limited. There are around 51 licensed market licensees in Australia of which 37 are foreign bodies corporate.
- 1.15 Financial market operators are regulated under Part 7.2 of the Act. A person that operates a financial market in this jurisdiction must hold an Australian market licence as an Australian market licensee unless the financial market is exempt from the operation of Part 7.2. The Minister has the power to, among other things, grant an Australian market licence and give directions to promote compliance with a licensee's obligations under Chapter 7 (including the obligation to comply with licence conditions). These powers are currently delegated to ASIC (see the *Ministerial Powers (ASIC) Delegations 2021*).
- 1.16 ASIC supervises licensed financial markets, issues market integrity rules, and monitors Australian market licensees' and participants' compliance with those rules. ASIC also monitors the compliance of Australian market licensees with the conditions of their licence and obligations set out in the Corporations Act. Market integrity rules made by ASIC can deal with the activities and conduct of licensed markets and of persons in relation to licensed markets and financial products traded on licensed markets (see paragraphs 798G(1)(a)-(c) of the Act).

CS facilities

- 1.17 CS facilities provide post-trade clearing and settlement of transactions. These facilities are integral to the functioning of financial markets.
- 1.18 CS facilities are defined in the Act as a facility that provides a regular mechanism for parties to transactions relating to financial products to meet obligations to each other that arise from entering transactions on financial markets or are of a kind prescribed in regulations (see section 768A(1) of the Act).
- 1.19 Clearing is a post-trade and pre-settlement risk management process which often involves novating (i.e substituting attached legal obligations of) trades to an entity known as a central counterparty which acts as the buyer to every seller and the seller to every buyer. Clearing provides transaction efficiency

and allows counterparty risk to be managed centrally, allowing investors to act confidently when trading on markets. Settlement involves the delivery of securities or cash from one party to another in accordance with the terms of the specific trade.

- 1.20 An operator of a CS facility is regulated under Part 7.3 of the Act. A person that operates a CS facility must hold an Australian CS facility licence unless the CS facility is exempt from the requirement to be licensed under Part 7.3. The Minister has the power to, among other things, grant an Australian CS facility licence, impose licence conditions and issue directions to promote compliance with a licensee's obligations. These powers are currently delegated to ASIC under the *Ministerial Powers (ASIC) Delegations 2021*.
- 1.21 A licensed CS facility must have operating rules. Those rules must deal with matters prescribed by regulations. These matters currently go to issues of the operation of the facility, management of risk, the requirements of participants with respect to the facility, and other matters (see section 822A of the Act and regulation 7.3.05(a) to (j) of the Corporations Regulations). However, the requirement for the content of rules to contain prescribed content does not apply if the licensee is also authorised to operate the facility in the foreign country in which its principal place of business is located, and the licence was granted in that location.
- 1.22 The operating rules of a CS facility have effect as a contract under seal between the licensee and issuers of financial products, between participants, and between participants and issuers of financial products. Effectively, each party agrees to observe the operating rules and carry out their obligations under the rules. If changes to operating rules are made, a notice of those changes must be lodged with ASIC. The Minister can disallow changes to a facility's domestic operating rules.
- 1.23 ASIC and the RBA have complementary supervisory responsibilities in relation to CS facility licensees. Broadly, ASIC has responsibility in relation to licensing and conduct of CS facility licensees and the RBA has responsibility in relation to financial stability and managing systemic risk.
- 1.24 The RBA does not have any enforcement powers but may make Financial Stability Standards under section 827D of the Act that applicable CS facilities must comply with. The RBA may assess how well a CS facility is complying with relevant standards and make reports to the Minister and ASIC.
- 1.25 There are currently four systemically important domestic CS facility licensees which are within the ASX Group. There are currently two overseas CS facility licensees operating in Australia that compete with facilities in the ASX Group in the clearing of over-the-counter interest rate derivatives.

Derivative trade repositories

- 1.26 A derivative trade repository is a facility to which information about over-the-counter derivative transactions, or about positions relating to over-the-counter

derivative transactions, can be reported. This information is provided to regulators to provide a picture of the activity and risks present in over-the-counter derivative markets. There is currently one derivative trade repository licensee operating in Australia.

- 1.27 Derivative trade repository licensees are regulated under Part 7.5A of the Act. ASIC can make derivative trade repository rules that deal with the way licensees may provide their services, handling of data, governance of licensees, reporting and other matters (see Division 2 of Part 7.5A of the Act).

Financial benchmark administrators

- 1.28 Financial benchmarks measure the price or performance of certain financial products or classes of financial products. They are used to determine the price of, or payments due under, many financial products. Financial market benchmarks are defined in sub-section 908AB(1) of the Act.
- 1.29 There are currently two benchmark administrator licensees operating in Australia. Benchmark administrator licensees are regulated under Part 7.5B of the Act. Administrators of significant financial benchmarks must be licensed by ASIC. ASIC may impose, vary or revoke conditions on a licence. ASIC declares certain financial benchmarks to be significant financial benchmarks by legislative instrument under section 908AC of the Act.
- 1.30 ASIC can make two kinds of rules with respect to financial benchmarks. Firstly, the financial benchmark rules prescribe detailed requirements relating to the operation of financial benchmarks specified in a licence. Secondly, the compelled financial benchmark rules confer powers for ASIC to compel certain activity relating to significant financial benchmarks. These sets of rules deal with the responsibilities of licensees, the design of the benchmarks, use of data, governance of licensees and other matters (see Division 3 of Part 7.5B of the Act).

Other regulatory aspects of FMI entities

- 1.31 Certain Australian market licensees, CS facility licensees, and the holding companies of such licensees can be subject to ownership limits. Division 1 of Part 7.4 of the Act ensures Australia's national interest is considered in the control of significant licensees through a 15% restriction on a person's voting power within certain bodies prescribed in regulations. These are known as widely held market bodies. Exceeding the 15% voting power Limit requires the approval of the Minister. Specific arrangements in this regard exist for ASX Limited, where a change in voting power above 15% currently requires a regulation to be made.
- 1.32 This limit is imposed to ensure that Australia's national interest, and financial market integrity and stability are not at risk from the ownership of such widely held market bodies.

- 1.33 Division 2 of Part 7.4 of the Act provides for a mechanism to prohibit disqualified individuals from being associated with the management, ownership, or control of Australian market licensees, CS facility licensees, derivative trade repository licensees and licensed financial benchmark administrators. This mechanism applies to all licensees, not just widely held market bodies.
- 1.34 Part 7.5 of the Act establishes a requirement for each financial market licensee to have a compensation regime.

Council of Financial Regulators Advice to Government

- 1.35 A failure of an FMI can cause fundamental and systemic disruption to financial markets.
- 1.36 The CFR is the coordinating body for Australia's main financial regulatory agencies. Its members are APRA, ASIC, the RBA and The Treasury. The CFR's objectives are to promote stability of the Australian financial system and support effective and efficient regulation by Australia's financial regulatory agencies.
- 1.37 The CFR provided advice to Government in 2020 on measures to mitigate and address risks related to Australia's FMI (see Financial Market Infrastructure Regulatory Reforms: Advice to Government from the Council of Financial Regulators, July 2020).
- 1.38 The advice to Government highlighted deficiencies in the current regulatory framework for Australia's FMI. The report identified the need for stronger powers to enable regulators to monitor and manage certain risks, before they materialise, and highlighted the lack of an appropriate regime to ensure the continuity and stability of CS facilities in the event of a crisis.
- 1.39 The advice to Government made 16 recommendations for regulatory reform focused on:
- Introducing a resolution regime for licensed CS facilities, supported by a standing special appropriation and the establishment of a Resolution Authority.
 - Strengthening the supervisory, licensing and enforcement powers of ASIC and the RBA in relation to FMI entities.
 - Redistributing existing regulatory powers in the Act between ASIC, the RBA and the Minister.
- 1.40 The CFR consulted on these proposals in November 2019. Operators of FMI, market participants and industry associations provided feedback into the final recommendations.
- 1.41 On 14 December 2022, the Government announced it would deliver an FMI regulatory reform package consistent with the CFR's recommendations. The amendments in this Bill implement that package.

- 1.42 The amendments also support recommendations of the Financial System Inquiry and International Monetary Fund's Financial Sector Assessment Program. The amendments are also consistent with the international principles established by the Committee on Payments and Market Infrastructure and the International Organisation of Securities Commissions.

Summary of new law

- 1.43 Significant events such as the Global Financial Crisis and COVID-19 have highlighted not only the importance of CS facilities, but also the heightened risk they pose as they can concentrate and transmit financial risk with the potential to adversely impact the Australian economy.
- 1.44 Schedule 1 to the Bill introduces an FMI crisis management regime in accordance with recommendation 1 of the 2020 CFR advice to Government.
- 1.45 The proposed resolution regime will provide resolution powers to the RBA to manage distressed CS facilities and support the continuity of CS facility services that are critical to the stability of the financial system.
- 1.46 In the event of a crisis, the RBA will be empowered to exercise certain powers to facilitate the resolution of a CS facility. A crisis is defined where certain conditions are met, broadly relating to:
- threats to CS facility viability or critical service continuity; or
 - financial instability.
- 1.47 The RBA's powers to facilitate crisis management in a distressed CS facility include:
- giving binding directions in relation to a crisis;
 - taking control of distressed domestic CS facility licensees and, in some circumstances, related bodies corporate; and
 - initiating the transfer of business or shares of a domestic CS facility licensee (and, in some circumstances, related bodies corporate) to a third party.
- 1.48 In exercising these powers, the RBA's primary objectives will be to maintain the overall stability of the financial system and provide for the continuity of CS facility services that are critical to the functioning of the financial system.

Detailed explanation of new law

Overview of crisis management regime

- 1.49 The crisis management regime empowers the RBA to access a suite of powers for the purpose of effectively managing and resolving threats to CS facility licensees' ability to continue providing CS facility services. This is necessary in circumstances where the provision of those services is critical to the function of Australia's financial system or where the failure of those services may jeopardise the stability of Australia's financial system.
[Schedule 1, item 14, section 830B of the Act]
- 1.50 To reflect the RBA's crisis resolution powers, the functions of the RBA are updated to refer to the crisis management regime under Part 7.3B of the Act, which provides authority for the RBA to exercise new resolution powers.
[Schedule 1, items 37, 38 and 39, paragraph 5(1)(c), subsection 10(2) and paragraph 10B(3)(c) of the RB Act]

What resolution powers are available?

- 1.51 The RBA may need to use tools to take control of a body corporate in cases where it does not have confidence that the board and management is capable of resolving a crisis satisfactorily, or where the board and management are mismanaging the entity, including where it is insolvent or near insolvent.
- 1.52 When a condition for resolution has been met, the RBA may access its resolution powers. The suite of powers to facilitate crisis resolution and resolve distressed body corporates include:
- appointing a statutory manager to the domestic CS facility licensee or a related body corporate;
 - initiating the transfer of business or shares of a domestic CS facility licensee (and related bodies corporate) to a third party;
 - issuing binding directions; and
 - automatic statutory protections including stays of contractual rights, and moratoriums on the commencement of certain enforcement and litigation actions.
- 1.53 The RBA may use certain resolution powers in respect of a overseas CS facility, as discussed in more detail from paragraph 1.69.
- 1.54 An exercise of any powers by the RBA would occur in the context of the objects of the provisions, which are to:
- maintain the overall stability of the financial system; and

- provide for the continuity of CS facility services that are critical to the functioning of the financial system.

1.55 The RBA also has ongoing general powers that can be enforced at any time and do not require a condition for resolution to be satisfied. These ongoing powers are further explained in Chapter 2 which are intended to assist in preventing crises at a CS facility.

Statutory management

1.56 The new statutory management power allows the RBA to appoint itself or a third party to take control of a CS facility and its related bodies corporate when a crisis condition is met. Where a statutory manager is appointed to an entity, it replaces the board of directors and takes control of the entity. The RBA may need to use these powers to take control of a body corporate to ensure that financial stability is prioritised.

[Schedule 1, item 14, Division 3 of Part 7.3B of the Act]

1.57 The appointment of a statutory manager can help stabilise a failing entity, so that steps can be taken to implement an orderly resolution in a way that protects the interests of participants and maintains financial system stability. Depending on the circumstances, this could include maintaining some or all of the entity as a going concern, recapitalising the entity, or facilitating the transfer of some or all of the business to another entity. Given the high level of intervention which it involves, statutory management would generally be used as a measure of last resort, however this is ultimately at the discretion of the RBA.

1.58 In recognition that the use of statutory management powers could affect third party rights, including those of creditors, there are corresponding moratorium, recapitalisation, and immunity provisions.

[Schedule 1, item 14, Divisions 3 and 5 of the Act]

Transfer

1.59 The compulsory transfer of shares and business powers are an important tool in the RBA's crisis resolution toolkit. The transfer powers enable some or all of the shares or business of a body corporate (including assets, liabilities, legal rights and obligations, data and systems) to be transferred to another consenting body corporate.

[Schedule 1, item 14, Division 4 of the Act]

Directions

1.60 Directions powers enable the RBA to compel a CS facility licensee and/or related body corporates to take, or refrain from taking, specific action to address issues of concern that have been identified. For example, directions powers may be used to limit further deterioration to the critical functioning of CS facility services in a period of emerging stress, and to facilitate the resolution of a distressed regulated entity.

- 1.61 Directions are intended to allow the RBA to respond in a timely and decisive way to emerging CS facility issues.
- 1.62 Introducing a specific immunity provision for a body corporate, its directors and other officers when complying with a RBA direction will mitigate the risk of potential conflicts in obligations that may give rise to delay, or impede the effectiveness of the direction, particularly in a crisis. The directions power:
- may require entities to take specified actions to facilitate resolution;
 - may be used despite external support being in place;
 - ensures that complying with an RBA direction will not be grounds for an entity, its directors or management to be held liable under any other law (subject to a good faith and reasonableness test); and
 - provides for the RBA to determine that the giving of a direction should be confidential in certain circumstances.

Stays and moratorium provisions

- 1.63 An important aspect of the resolution regime is the operation of the stay and moratorium provisions. These provisions prevent third parties, including creditors and counterparties of a failing body corporate from exercising contractual rights solely on the grounds that the RBA has exercised its powers (including directions, statutory management and transfer powers) in respect of the body corporate. This is important in ensuring that pre-emptive actions by counterparties do not impede the ability for the RBA to implement an orderly resolution.
- [Schedule 1, item 14, Divisions 5 and 8 of the Act]***
- 1.64 The extended scope of certain powers to group entities means corresponding stay provisions are required to ensure that the exercise of crisis powers by the RBA does not give rise to termination or other legal rights in contracts of entities within the same relevant group of bodies corporate (for example, a group comprising a CS facility and its subsidiaries) where the exercise of these rights against a related body corporate would undermine the resolution of, or continuity of services by, the CS facility licensee.
- 1.65 A further important element of the resolution regime is the interaction of the stay provisions with the PSN Act. The PSN Act overrides a range of laws in order to ensure the validity of certain provisions relating to netting and the payments systems covered by the PSN Act. In particular, to ensure consistency and alignment with existing laws, the definition for close-out netting contracts is included in section 9 of the Act which has the same meaning as in the PSN Act.
- [Schedule 1, item 1, section 9 of the Act]***

When can the resolution powers be used?

- 1.66 The RBA may only exercise its resolution powers in relation to a domestic CS facility licensee after at least one condition for resolution has been met. There are separate conditions to enact resolution powers for overseas licensees which is discussed in further detail at paragraph 1.691.69. In determining whether a condition of resolution has been met, the RBA must reasonably believe that there is a threat to the stability of the Australian financial system or the ability of the licensee to continue to provide one or more CS facility services that are critical to the functioning of the financial system in Australia which could occur when:
- a domestic CS facility licensee requests the RBA’s assistance;
 - a domestic CS facility licensee has contravened a direction from the RBA;
 - the licensee notifies the RBA that the licensee has ceased, intends to cease or is likely to cease providing CS facility services;
 - the licensee notifies the RBA its financial viability is or is likely to be at risk;
 - an external administrator is intended to be appointed or has been appointed; or
 - the RBA anticipates or identifies a threat to financial stability.
- 1.67 Upon determining that one of the conditions for resolution has been met, the RBA may access any power given to it by Schedule 1 (discussed in detail below).
- 1.68 It is ultimately at the discretion of the RBA to if it is reasonably believes that a condition is satisfied. Resolution powers are intended to be used where the circumstances pose a significant threat to the continuity of the CS facility or the stability of the financial system in Australia.
[Schedule 1, item 14, subsection 831A(1) of the Act]

Recognising an overseas CS facility crisis

- 1.69 A body corporate that is incorporated in a foreign jurisdiction but carries on a business in Australia or has assets and liabilities in Australia may be subject to the RBA’s powers in resolving a crisis.
- 1.70 The crisis regime is intended to operate differently for overseas CS facility licensees compared to domestic CS facility licenses. The distinction aligns with the framework under Part 7.3 of the Act that stipulates overseas CS facility licensees are primarily regulated by the overseas regulator. Consistent with this approach, the home regulator will primarily be responsible for resolving a distressed body corporate where the RBA supports the home regulators' actions when requested.
- 1.71 Where a foreign regulator requests assistance and the RBA reasonable believes that the foreign regulator is considering exercising similar resolution powers, the RBA may make a notifiable instrument that recognises the assistance

intended to be provided to overseas CS facility licensees. The RBA must exercise powers that are in support of the foreign regulator's powers
[Schedule 1, item 14, section 848A of the Act]

- 1.72 The RBA's ability to exercise crisis resolution powers does not limit cross-border crisis resolution.
[Schedule 1, item 14, subsection 831A(2) of the Act]

The facility requests resolution

- 1.73 The domestic CS facility licensee may request to the RBA to exercise its powers.
[Schedule 1, item 14, paragraph 831A(1)(a) of the Act]
- 1.74 The request for resolution is included as a condition to provide a mechanism for CS facility licensees and their directors to receive the same protection from personal liability that they would have received from appointing an external administrator, as they are not able to appoint an external administrator without giving notice to the RBA.
- 1.75 This condition is designed to encourage a CS facility licensee to inform the RBA as soon as it suspects financial trouble. The RBA does not have any obligation to commence resolution where a request is made, or to exercise a particular power in accordance with the request. In considering the request the RBA will have consideration to the two primary objectives underpinning any resolution action.

The facility contravenes a direction issued by the RBA

- 1.76 The RBA may exercise resolution powers where a domestic CS facility licensee contravenes a supervisory direction issued by the RBA. In deciding whether to exercise the power, the RBA will have consideration to the two primary objectives underpinning any resolution action.
[Schedule 1, item 14, paragraph 831A(1)(b) of the Act]
- 1.77 Only contraventions of supervisory directions issued by the RBA under sections 823E, 823F or 823FA of the Act may enable the RBA to use its powers. The provision does not extend to any directions issued by ASIC.

The facility faces a threat to service continuity or financial viability

- 1.78 The RBA may exercise resolution powers where there is a threat to the continuing provision of CS facility services in the absence of external support or the financial viability of a domestic CS facility is at risk. The RBA may determine that a domestic CS facility licensee requires external support due to the likelihood of critical services ceasing or the risk of becoming financially inviable.
[Schedule 1, item 14, paragraphs 831A(1)(c), (d), (e) and (f) of the Act]

- 1.79 The RBA may also access resolution powers if the domestic CS facility notifies the RBA that:
- the provision of critical CS facility services:
 - has ceased; or
 - is intended to cease or are likely to cease; or
 - is unable to be provided in the absence of external support;
 - financial viability of the CS facility:
 - is at risk; or
 - is likely to become at risk; or
 - in the absence of external support may become at risk.
- 1.80 A threat to financial viability arises where the licensee is no longer able to meet its obligations or is considered likely to be unable to meet its obligations in the near future. This could arise, for example, where there is a material risk to the security of the assets owned by the domestic CS facility licensee.

Appointment of external administrator

- 1.81 The appointment or likely appointment of an external administrator (for example, a liquidator or receiver) to a CS facility or a related body corporate, has the potential to trigger contagion impacts within the group that could lead to or exacerbate distress in the CS facility.
[Schedule 1, item 14, paragraphs 831A(g), (h), (i), (j), (k) and (l) of the Act]
- 1.82 The inclusion of the appointment of an external administrator to a related body corporate of a CS facility licensee is necessary as it has the potential to adversely affect the financial continuity or orderly resolution of the relevant CS facilities. This is because there are likely to be intragroup linkages, for example, service or financial support agreements that, if terminated in the course of the external administration could negatively impact the viability and continuity of CS facility services.
- 1.83 The circumstances relating to external administration that may allow the RBA to use resolution powers include:
- an external administrator being appointed to a domestic CS facility licensee or related body corporate;
 - the domestic CS facility licensee or a related body corporate notifies the RBA that it is considering appointing an external administrator; or
 - the RBA has reason to believe that a person will seek to appoint an external administrator to a domestic CS facility licensee or a related body corporate.

Financial stability

- 1.84 The RBA may access resolution powers if the RBA reasonably believes that the domestic CS facility licensee or related body corporate is doing or omitting to do anything related to the conduct or function of CS facility services that interferes with the stability of the Australian financial system, including:
- conducting affairs in a way that may cause or promote instability in the Australian financial system;
 - being unable to continue to provide critical CS facility services without external support; or
 - taking recovery actions that would likely compromise financial stability.
- [Schedule 1, item 14, paragraph 831A(1)(m) of the Act]*
- 1.85 These conditions are, in some cases defined relatively broadly. More specific conditions may limit the RBA's ability to take effective action due to the difficulty in forecasting what circumstances may arise.

Winding up a body corporate

- 1.86 If a condition for resolution is met and the RBA considers that the body corporate is insolvent and could not be restored to solvency within a reasonable period, then the RBA may apply to the Court for an order that a body corporate be wound up. The application to be wound up can only be made in respect of a body corporate that is:
- a CS facility;
 - a related body corporate of the CS facility that is incorporated in Australia; or
 - a related body corporate before a transfer of business or shares, and is still incorporated in Australia.
- 1.87 The RBA must inform the Minister as soon as practicable of the application for the body corporate to be wound up.
- [Schedule 1, items 5 and 14, subsection 459P(1) and section 849A of the Act]*

Support for the RBA's resolution powers

- 1.88 Where a crisis has materialised and the RBA must use specific resolution powers, funds are made available by the Commonwealth to support the RBA's activities in protecting the stability of the financial system in Australia.
- 1.89 The Treasurer, with the written approval of the Finance Minister, is permitted to activate a maximum appropriation of up to \$5 billion per event to maintain the vital functions of a domestic CS facility during a crisis. This authorisation must specify the amount of funds, that does not exceed \$5 billion per event, authorised to be drawn down from the appropriation. The initial appropriation may be less than the limit, with the Treasurer and Finance Minister being

permitted to amend the appropriation amount to provide additional funds up to the maximum amount.

[Schedule 1, item 14, subsections 846A(1), (2), (3) and (4) of the Act]

- 1.90 Prior to the release of funding, the Treasurer must seek the Finance Minister's written consent, to authorise the making of contracts and arrangements by the Commonwealth for the purpose of resolving a CS facility licensee or protecting financial system stability in Australia.

[Schedule 1, item 14, section 846B of the Act]

- 1.91 Funds designated for use in a CS facility resolution are limited to actions that are necessary to facilitate effective resolution. Public funds for CS facility resolution will be limited to situations where a CS facility's resources and recovery tools are insufficient to address losses, or the RBA considers the use of some recovery tools poses a threat to financial stability or otherwise compromises resolution objectives. It is expected that funds will be recovered after the crisis is resolved. The provision of public funds is intended to be a last resort option, as preliminary tools in Chapters 2 and 3 are expected to assist in crisis prevention. The funds will not be available for activities outside of the resolution.

- 1.92 The authorisation cannot be revoked. The authorisation or amendment commences from the time it is made rather than when it is registered or specified on the instrument. Retrospective application in subsection 12(2) of the *Legislation Act 2003* (Legislation Act) is not applicable to the authorisation as it will only be prospective.

[Schedule 1, item 14, subsections 846A(5) and (7) of the Act].

- 1.93 The authorisation is a legislative instrument but is not subject to disallowance under section 42 of the Legislation Act. The authorisation is not subject to sunseting as specified in Part 4 of Chapter 3 of the Legislation Act.
(Schedule 1, item 14, subsection 846A(6) of the Act]

Statutory management

- 1.94 The introduction of a statutory management regime ensures domestic licensed CS facilities and related bodies corporate continue to have effective operation in the event of a crisis at a distressed CS facility. Extending the appointment of the statutory management regime to related entities addresses the complex group structures of CS facilities. The RBA needs the ability to appoint a statutory manager to a CS facility on the basis that there is potential for the facility to be part of a large or complex financial group, or its distress poses a risk to the financial system or economy, so a more rapid resolution response may be needed.

- 1.95 In the absence of group resolution powers, it may be particularly difficult to resolve a distressed CS facility or group quickly and effectively. This is because it may not be explicit how the different members of a group are linked

by inter-dependencies, for example through the provision of critical intra-group services, or where the risks and control in a group ultimately lie.

Appointment of a statutory manager

- 1.96 The RBA has the power to appoint a statutory manager to a distressed CS facility or related bodies corporate to promote effective resolution. The RBA may only appoint a statutory manager if at least one of the conditions of resolution has been met ('crisis condition'). The statutory manager appointed would either be the RBA (where it is in control) or an independent appointment by the RBA to control a CS facility or related body corporate. *[Schedule 1, items 3 and 14, section 9 and subsections 832A(1) and (2) of the Act]*
- 1.97 If the RBA appoints a statutory manager to a related body corporate of a domestic CS facility licensee, a statutory manager must be, or about to be, simultaneously appointed to the domestic CS facility licensee. The RBA must consider that the appointment would facilitate resolution of the CS facility licensee. The statutory manager appointed to a related body corporate may be different to the one appointed to the domestic CS facility licensee. *[Schedule 1, item 14, subsection 832A(3) of the Act]*
- 1.98 The RBA must provide a body corporate with written notice of the intention to appoint a statutory manager. The body corporate is under statutory management at the time a statutory manager is in control of the body corporate's business which is either at future time specified on the notice or the time the notice is given. The appointment of a statutory manager cannot have a retrospective start date. *[Schedule 1, item 14, subsections 832A(5), 832B(1) and (5) of the Act]*
- 1.99 The RBA must consult with ASIC prior to appointing a statutory manager. However, a failure to consult with ASIC does not invalidate the appointment. *[Schedule 1, item 14, subsection 832A(6) of the Act]*
- 1.100 There is no specified duration for the term of statutory management. The appointment of a statutory manager will be terminated where the RBA considers it is no longer appropriate to continue the statutory appointment, such as, where there is no longer a threat to Australia's financial system stability or the continuity of CS facility services. The RBA must provide written notice to the statutory manager and body corporate that statutory management has ceased. *[Schedule 1, item 14, subsection 832A(9) 832B(2), (3) and (4) of the Act]*
- 1.101 More than one statutory manager may be appointed, which can either be the RBA itself or an independent person. Where two or more statutory managers are appointed, the functions and powers of the statutory manager may be performed by either or all statutory managers acting jointly and severally, except to the extent otherwise specified under a notice from the RBA. *[Schedule 1, item 14, section 836B of the Act]*

Limits may be specified

- 1.102 At the time of appointment, the RBA may provide notice to statutory managers specifying limits or conditions on any or all statutory managers' ability to perform functions and exercise powers jointly or individually.
[Schedule 1, item 14, subsections 832A(7) and (8) of the Act]

PGPA Act not applicable under statutory management

- 1.103 The *Public Governance, Performance and Accountability Act 2013* (PGPA Act) does not apply to a statutory manager in a crisis. Directors of a body corporate are not automatically removed at the time a statutory manager is appointed. Therefore, the RBA's influence or control in relation to the statutory management process does not result in the entity falling within the definition of Commonwealth company in the PGPA Act. Further, the PGPA Act does not apply as that Act imposes a variety of corporate governance and financial reporting obligations on Commonwealth companies, having regard to their public sector ownership or control.
[Schedule 1, item 14, subsection 832B(6) of the Act]

Reviewability

- 1.104 A notice to appoint, terminate or impose conditions on a statutory manager are not legislative instruments. The appointment of a statutory manager is not subject to merits review. This is justified on the basis that the decision to appoint a statutory manager is likely to be one with a strong public interest element and to occur where there is a need to take rapid action to restore or maintain confidence in the markets serviced by the CS facility. Merits review could cause substantial delay in resolution and could result in the original decision being varied, substituted with a new decision, or remitted back to the RBA for reconsideration. This delay in the ability for the statutory manager to take action has potential to significantly impact financial stability or the continuity of CS facility services.
[Schedule 1, item 32, paragraph 1317C(gi) of the Act]

Powers and functions of a statutory manager

- 1.105 When a statutory manager is appointed to a domestic CS facility licensee, it has the power to perform any function, and exercise any power, that the body corporate or any of its officers could perform or exercise if the body corporate were not under statutory management. In this capacity, when a statutory manager performs a function or exercises a power, it is taken to be acting as the body corporate's agent.
[Schedule 1, item 14, and section 833F of the Act]
- 1.106 The statutory manager may:
- exercise powers under the operating rules;
 - remove a director of the body corporate;

- appoint a person as a director of the body corporate (regardless of whether it is fulfilling a vacancy);
- execute a document, bring or defend proceedings;
- control the body corporate's business, property and affairs;
- alter the body corporate's constitution, operating rules or other arrangements for governance; or
- do anything else, in the name of the body corporate and on its behalf for the purposes of resolving a crisis.

[Schedule 1, item 14, subsection 833A(1) and sections 833B, 833C of the Act]

1.107 The statutory manager may only alter the body corporate's constitution or rules if it considers it is necessary or convenient for facilitating the performance of the statutory manager's functions and duties, or the exercise of powers. The alteration must either promote financial system stability in Australia or ensure the continuity of critical CS facility services. Altering the body's corporate constitution does not allow the statutory manager to initiate a transfer of the body corporate's shares or business other than in accordance with Division 4 of Part 7.3B.

[Schedule 1, item 14, subsections 833C(1) and (2) of the Act]

1.108 These powers are intended to override any restrictions that are present in the Act, the body corporate's constitution, any contracts, agreements or arrangements to which the body corporate is a party, and any listing or operating rules of a financial market on which the body corporate is listed.

[Schedule 1, item 14, subsection 833C(3) of the Act]

1.109 In addition to exercising functions that the body corporate would ordinarily do without being under statutory management, the statutory manager is afforded information gathering powers and the power to do recapitalisation acts.

Requests for information and assistance

1.110 In order to facilitate effective resolution, the RBA must have access to critical information about the operations of domestic CS facilities. The RBA may need information that relates to services provided by, and arrangements of, other group entities on which the operation of the CS facility services rely, or which could potentially affect the Domestic CS facility licensee.

1.111 At the request of a statutory manager, past and current officers of the domestic CS facility licensee, or related body corporate must provide any information relating to the business of the body corporate. A requirement to give information may include a requirement to produce books, accounts, documents or the location of information.

[Schedule 1, item 14, subsections 833E(1) and (2) of the Act]

- 1.112 Directors and other officers have additional obligations to assist during statutory management including the requirement to:
- provide any information relating to the body corporate’s business, property or affairs that is in their possession;
 - attend on the statutory manager as reasonably required; and
 - allow the statutory manager to inspect and take copies of the bodies corporate books.
- [Schedule 1, item 14, subsection 833E(1) of the Act]***
- 1.113 The statutory manager may pass on any information to the RBA that it receives under its power to request information. The secrecy provision in section 79A of the RBA Act applies to information and documents the RBA obtained as a statutory manager.
- [Schedule 1, item 14 and 40, 41, 42, 43, 44 and 45, subsection 833E(4) of the Act and subsection 79A(1)-(2) and (4) of the RB Act]***
- 1.114 A person that fails to deliver all information relevant to the body corporate to the statutory manager is liable to a criminal offence of 12 months imprisonment or 50 penalty units, or both.
- [Schedule 1, items 14, subsection 833E(3) of the Act]***

Recapitalisation

- 1.115 The recapitalisation of an institution is an internationally recognised method of addressing a distressed institution and restoring the institution’s financial health. The recapitalisation powers are intended to be strong and flexible to allow a statutory manager to respond quickly and decisively to a range of circumstances. Given the high level of intervention recapitalisation represents, the statutory manager’s powers to facilitate recapitalisation can only be enforced at the direction of the RBA or with the RBA’s consent.
- 1.116 Recapitalisation is when a statutory manager acts in accordance with the RBA’s direction or obtains consent from the RBA to:
- issue, cancel or sell shares, or rights to acquire shares;
 - reduce share capital by cancelling any paid-up share capital that is not represented by available assets; and
 - vary or cancel rights or restrictions attached to shares in a class of shares in the body corporate.
- [Schedule 1, item 14, subsection 833D(1) of the Act]***
- 1.117 Prior to undertaking an action to recapitalise the CS facility, the statutory manager or the RBA, must obtain an independent valuation report which sets out the expert’s opinion of the fair value for each of the shares and rights, or the fair value of the rights affected. The expert responsible for the report must not be an associate of the body corporate or the statutory manager. The statutory manager or the RBA are required to consider the report, and may draw on its

content, but is not compelled to follow the recommendations of the report when determining the terms of a recapitalisation action.

[Schedule 1, item 14, subsection 849D(1), (2) and (3) of the Act]

- 1.118 The RBA may determine in writing that a statutory manager is not required to obtain a report if it is satisfied that the delay in obtaining the report would detrimentally affect either financial system stability in Australia or the continuity of CS facility services.

[Schedule 1, item 14, subsection 849D(5) of the Act]

- 1.119 The RBA may publish details of the report on its website. Publication of the determination may occur when the RBA considers it is appropriate, such as after the relevant secrecy notices have ceased to apply.

[Schedule 1, item 14, subsection 849D(4) of the Act]

- 1.120 As soon as practicable after completing a recapitalisation act, the statutory manager must give written notice to the members of the body corporate that identifies the act and explains its effect on member interests.

[Schedule 1, item 14, subsection 833D(2) of the Act]

- 1.121 The validity of the power to facilitate recapitalisation is not affected by failing to acquire an expert report or providing notice to members.

[Schedule 1, item 14, subsections 833D(3) and 849D(6) of the Act]

- 1.122 As an example of a recapitalisation act, a statutory manager may facilitate a capital injection into a CS facility by issuing new shares and selling them to a new investor. Under this example the new investor would gain a stake in the company and pre-existing shareholders would have their stake in the company diluted but would retain their shares in the company.

- 1.123 A statutory manager may do one or more recapitalisation acts on terms they determine, despite the Act, the constitution, any contract or arrangement to which the body corporate is a party and any relevant listing or operating rules that apply to the body corporate. A statutory manager may only facilitate recapitalisation in accordance with the transfer provisions under Division 4 of Part 7.3B the Act.

[Schedule 1, item 14, subsections 833D(4) and (5) of the Act]

- 1.124 Any action that would result in an acquisition of property from a person otherwise than on just terms would remain valid, with the Commonwealth liable to pay compensation of a reasonable amount as agreed with the person. Many potential recapitalisation actions, however, are unlikely to result in an ‘acquisition of property’. An example would be where existing shareholders’ stakes in the company are diluted by the statutory manager issuing and selling new shares in the company to a non-Commonwealth entity.

[Schedule 1, item 14, section 849G of the Act]

Effects of statutory management on the body corporate

1.125 At the time a statutory manager is appointed to a body corporate, officers of that body corporate are not automatically removed from office. However, those officers are prohibited from performing or exercising their functions and powers and must not purport to perform or exercise a function or power as an officer of the body corporate.

[Schedule 1, item 14, subsections 834A(1), (7) and (8) of the Act]

1.126 A function or power may only be exercised by an officer of the body corporate if the RBA or statutory manager has provided written approval or to the extent the officer is expressly permitted under the Act. If the statutory manager provides approval, the statutory manager must immediately notify the RBA, and where the RBA has discretion to vary or revoke the approval. Any unapproved exercise of power is void.

[Schedule 1, item 14, subsections 834A(3), (4) and (5) of the Act]

1.127 Whilst under statutory management an officer is permitted to carry out any general obligations that do not conflict with the statutory manager's functions and that are not expressly disallowed by other provisions within Part 7.3B. For example, an officer may have code of conduct obligations under Part 7.12 of the Act. The officer is permitted to do these types of acts under the Act as these things do not conflict with the statutory manager's functions to resolve a body corporate.

1.128 Where an officer's actions conflict with a function or power of the statutory manager, the statutory manager's act prevails. Further, where an officer performs a function or power whilst under statutory management and without either having explicit consent or being permitted under the Act, that person commits an offence of up to 30 penalty units.

[Schedule 1, item 14, subsections 834A(2) and (6) of the Act]

1.129 Only the statutory manager may enter into transactions or dealings affecting the property of the body corporate. Transactions or dealings entered into by an officer or employee of the body corporate are only permitted with the consent of the statutory manager or the RBA, or by an order of the Court that is made after the purported transaction or dealing. Officers or employees who purport to enter into a transaction or are knowingly involved in the transaction that is otherwise void commits an offence of up to 30 penalty units.

[Schedule 1, item 14, subsections 834B(1), (2), (4) and (5) the Act]

1.130 A protection is included for payments made by an ADI out of a body corporate's account in good faith and in the ordinary course of business. Where such a payment is made after statutory management and before the ADI received written notice of the body corporate being under statutory management, that transaction will continue to have effect.

[Schedule 1, item 14, subsection 834B(3) of the Act]

- 1.131 In addition, secured creditors will continue to have rights to realise or otherwise deal with their security interest.
[Schedule 1, item 14, subsection 834A(9) of the Act]

Compensating payment

- 1.132 The Court may order a compensating payment for entering into an invalid transaction. A compensating payment may arise if the Court considers that the transaction has resulted in a loss or damage. Regardless of whether a penalty is payable, the person that entered into the transaction may be required to pay compensation to the person that suffered the loss or damage. This ensures that those who suffer losses are fairly compensated. The Court may also use the powers under section 1318 of the Act to relieve a person from being liable to pay compensation.
[Schedule 1, item 14, section 834C of the Act]

Body corporate under external administration

- 1.133 If a statutory manager is appointed to a body corporate that is under external administration, the external administrator's appointment is terminated at the time the statutory manager takes control of the body corporate. Any subsequent actions or purported actions by the external administrator in relation to the body corporate's business, property and affairs after the termination are invalid.
[Schedule 1, item 14, subsections 836A(1) and (4) of the Act]
- 1.134 The RBA must provide written notice of the statutory management appointment to the external administrator, however, a failure to provide notice does not invalidate the appointment of the statutory manager. Throughout the duration of statutory management, an external administrator can only be appointed if the RBA consents.
[Schedule 1, item 14, subsections 836A(2) and (3) of the Act]
- 1.135 The amendments use a modified definition of external administrator that covers receivers, managers and managing controllers. As a result, the external administrator definition in section 9 of the Act and subsequent references are repealed.
[Schedule 1, items 1, 4 and 8, sections 9, subsections 198G(9) and 600J(5) of the Act]

Annual general meeting

- 1.136 There is no obligation to continue to hold annual general meetings under section 250N or 601BR of the Act whilst the body corporate is under statutory management. The annual meetings may resume once statutory management concludes.
[Schedule 1, item 14, section 836E of the Act]

Time for doing an act

1.137 The time for doing an act does not run while prevented by Part 7.3B of the Act. This could be for any act under a law or other agreement. The period of time to do the act is extended or deferred according to how long it is prevented by the exercise of powers under Part 7.3B.

[Schedule 1, item 14, section 836D of the Act]

Transfer or alteration effect on members

1.138 Any transfer of shares or alteration in the status of members of a company is void except with either the consent of the RBA or statutory manager. Further, only the statutory manager is permitted to deal with a transfer or alteration in the status of the members. The statutory manager and the RBA must not give consent if the alteration would contravene Part 2F.2 of the Act that deals with class rights.

[Schedule 1, item 14, section 834E of the Act]

1.139 Any transfer or alteration of shares that effects members would be primarily concerned with the change in legal rights, and not with adverse commercial consequences. It operates as a statutory bar to rescission of the contract for the subscription of shares.

Dealing with interests in property

1.140 A statutory manager may deal with the secured property of a body corporate in any way the body corporate could deal with the secured property subject to certain conditions. The statutory manager may deal with the secured property as if it had the original character, where the secured property may be treated as:

- a circulating asset – if the PPSA security interest had stopped being a circulating asset; or
- a floating charge – if the security interest has become a fixed or specific charge.

[Schedule 1, item 14, section 836F of the Act]

1.141 To safeguard the interests of creditors whose rights have been suspended from the operation of stay provisions, limits are introduced to prevent the statutory manager from disposing of the property that provides the security. The safeguard will be extended to prevent disposal of property owned or leased by another and operated by the body corporate.

[Schedule 1, item 14, subsection 836G(1) of the Act]

1.142 There are three exceptions that allow for disposal of property that is subject to a security interest under statutory management which distinguishes the security interest, including:

- disposing of property where this is done in the ordinary course of the body corporate's business;
- the charge, owner or lessor consents to the disposal; or

- the RBA consents or directs the disposal of property.
[Schedule 1, item 14, subsections 836G(2) and (3) of the Act]

1.143 A disposal of property may be considered in the ordinary course of business despite the owner demanding the return of property, subject to the following conditions:

- the property is used or occupied, or in the possession of a body corporate; and
- another person is the owner of the property; and
- the property is either a PPSA retention of title property or subject to a retention of title clause under a contract.

[Schedule 1, item 14, subsection 836G(4) of the Act]

Proceeds of sale of property

1.144 The amendments include specific procedures for the net sale proceeds of a property a statutory manager disposes of by sale if a body corporate is under statutory management.

1.145 In the event there is excess proceeds from the sale of property, the statutory manager must set aside the net proceeds to pay any debts secured by the possessory security interest and any other security interest in the property with a priority interest.

[Schedule 1, item 14, paragraphs 836H(1)(a), (b), (c) and (d) of the Act]

1.146 Where there is a shortfall from the sale of property, debts must be paid in the order of priority, and where there are outstanding debts the amount of debt that remains unpaid can be recovered from the body corporate as an unsecured debt.

[Schedule 1, item 14, paragraph 836H(1)(e) of the Act]

1.147 The same process of determining excess or shortfall is used when a statutory manager sells property that is subject to a retention of title clause under the contract.

[Schedule 1, item 14, subsection 836H(3) of the Act]

1.148 Contrastingly, for the disposal of property that is a PPSA retention of title property, the statutory manager must instead apply the net proceeds of the sale in the same way as a secured party is required to under the PPSA. This involves applying an amount, personal property or proceeds of collateral received by the secured party as a result of enforcing a security interest in the property.

[Schedule 1, item 14, subsection 836H(2) of the Act]

Statutory manager obligations

1.149 The RBA will have oversight of any powers exercised by the statutory manager. To assist in this oversight, the statutory manager must:

- report to the RBA;
 - comply with any directions issued by the RBA; and
 - notify the RBA of any actions that may affect financial stability.
- 1.150 When the RBA requests, a statutory manager must give a written report to the RBA, within a reasonable time, showing how the control of the body corporate's business, property and affairs is being carried out. Similarly, where statutory management is terminated, a written report must be provided to the RBA within a reasonable time. This is to be provided without a request from the RBA and is part of the process when statutory management ends.
[Schedule 1, item 14, section 835A of the Act]
- 1.151 The RBA may direct a statutory manager to take a specified action relating to the business, property or affairs of the body corporate to which it is appointed.
[Schedule 1, item 14, subsection 835B(1) of the Act]
- 1.152 The statutory manager must comply with the direction or varied direction issued by the RBA. Alternatively, the statutory manager must immediately request the direction to be altered and provide supporting information justifying the request. It is at the discretion of the RBA to comply with the statutory manager's request. Where the RBA declines the statutory manager's request, the statutory manager must comply with the original direction.
[Schedule 1, item 14, subsections 835B(2) and (3) of the Act]
- 1.153 In general, the statutory manager may take actions to resolve a distressed body corporate. However, where an action may threaten Australia's financial system stability or the continuity of critical CS services, the statutory manager must notify the RBA and at a minimum obtain verbal approval to complete the action. The RBA may subsequently provide written notification of the consent. An action by the statutory manager is not invalidated by a failure to comply with this requirement.
[Schedule 1, item 14, section 835C of the Act]

Legal protections

- 1.154 Whilst a body corporate is under statutory management, qualified privilege is afforded to statutory managers when exercising any powers, functions, or duties, except where these actions or omissions are not in good faith.
[Schedule 1, item 14, section 836J of the Act]
- 1.155 However, consistent with section 1316A of the Act, the privilege against self-incrimination is not available to bodies corporate.
- 1.156 Where the statutory manager of a body corporate makes a payment, or enters into a transaction or does any other thing in good faith or with the consent of the RBA, that action is valid and is not liable to be set aside in a winding up of the body corporate.
[Schedule 1, item 14, section 834D of the Act]

- 1.157 Disclosing information to a statutory manager of a body corporate is an authorised use and disclosure of information. This has been introduced to facilitate the statutory manager's role in resolving a crisis.
[Schedule 1, item 34, paragraph 127(2A)(d) of the ASIC Act]

Protections for a person dealing with a statutory manager

- 1.158 Persons dealing with the statutory manager will be entitled to make the same kinds of assumptions about the authority of persons to act, as if the statutory manager was the officer of the company. This includes assumptions about compliance with the company's internal management procedures as such persons are entitled to make in dealing with other company officers.
[Schedule 1, item 14, section 836K of the Act]

Costs of statutory management

- 1.159 The costs incurred by the RBA in appointing statutory management to a body corporate are payable from the body corporate's funds and are a debt due to the RBA.
[Schedule 1, item 14, subsection 836C(1) of the Act]
- 1.160 These costs include remuneration and expenses of a statutory manager, regardless of whether the RBA and/or another person is the statutory manager. Debts due to the RBA as a result of the costs of statutory management have priority in a winding-up of the body corporate over all other unsecured debts.
[Schedule 1, item 14, subsection 836C(2) of the Act]

Transfer

- 1.161 Compulsory transfer of shares and business is an important tool in the package of resolution options available to the RBA. This power enables the RBA to transfer a failing or insolvent CS facility to a solvent body corporate to continue providing critical CS services.
- 1.162 Once a condition for resolution has been met, the RBA has discretion to issue a transfer determination for a transfer of shares or business of the domestic CS facility licensee, and related bodies corporate. Given the degree of intervention in transferring a business or shares, this power is exclusively available to the RBA. An appointed statutory manager cannot authorise a transfer, but may facilitate the transfer, at the direction of the RBA.

Compulsory transfer

- 1.163 The amendments enable some or all of the shares or business of a CS facility or a related body corporate (including assets, liabilities, legal rights and obligations, data and systems) to be transferred to another body corporate or a newly established bridge entity that is incorporated in Australia.

- 1.164 In general, the process for a transfer of shares or business from one entity to another is for the RBA to obtain consent from the appropriate parties, issue a determination outlining a transfer will take effect, and finally issue a certificate of transfer stating the transfer is to occur.

Transferring shares or business of a related body corporate

- 1.165 The RBA may determine that a transfer of shares, or part or all of the business of a related body corporate is reasonably appropriate when a domestic CS facility licensee is being, or has been, transferred. This includes a body corporate that was a related body corporate immediately prior to the transfer of the domestic CS facility licensee. *[Schedule 1, item 14, subsections 837A(2) and 837B(2) of the Act]*
- 1.166 For the transfer of shares or business of the related body corporate of a domestic CS facility licensee the target body must be incorporated in Australia. *[Schedule 1, item 14, paragraphs 837A(2)(d) and 837B(2)(d) of the Act]*
- 1.167 Discretion to transfer a related body corporate is based on the RBA's assessment that it is required to facilitate the CS facility's resolution, including to enable the conduct of default management actions, restore or maintain financial stability or anything else that the RBA considers is necessary for the CS facility's resolution. For example, the RBA may consider it necessary to transfer the business or shares of related bodies corporate of a domestic CS facility licensee, where a related body corporate:
- supplies services or funding that are necessary for the domestic CS facility licensee to operate its CS facility services, and access to those services could not be guaranteed unless the related body corporate is transferred with the domestic CS facility licensee; or
 - operates a market for which the domestic CS facility licensee provides CS facility services and the operation of this market is required to effectively conduct default management actions that are necessary for resolution.
- 1.168 Where a related body corporate has an Australian Market Licence under Part 7.2 of the Act, a Derivative Transaction Reporting Licence under Part 7.5A or a Benchmark Administrator Licence under Part 7.5B, the RBA must consult with ASIC as soon as possible. Failure to consult would not invalidate the transfer. *[Schedule 1, item 14, subsections 837A(6) and 837B(6) of the Act]*

Transfer determination

- 1.169 Regardless of whether the RBA makes a transfer of shares or a transfer of business, there are certain requirements that must be satisfied. The written transfer determination sets out how a transfer is to take effect for either a domestic CS facility licensee or a related body corporate. Prior to making the determination the RBA must:

- obtain the Minister's consent to the transfer or be provided with written confirmation that consent is not required in relation to the transfer;
- consider the transfer to the receiving body is reasonably appropriate to manage or respond to a condition being satisfied in relation to the licensee;
- be satisfied that the target body is incorporated in Australia;
- be satisfied that the board of directors of the receiving body has consented to the transfer (where the consent remains in force until it is withdrawn by the board of directors with the RBA's agreement); and
- consult with the ACCC and ASIC about the transfer - however, without consultation the transfer determination will continue to have effect.

[Schedule 1, item 14, subsections 837A(1) and (2), (6) and 837B(1) and (2), (6) of the Act]

1.170 A transfer determination must include the particulars of the transfer including:

- the names of the target body and the receiving body;
- a statement of reasons why the transfer is made;
- whether it will be a total transfer or a partial transfer; and
- in the case of a partial transfer, an identification of the part of the target body's business or shares to be transferred.

[Schedule 1, item 14, subsections 837A(3) and 837B(3) of the Act]

1.171 A copy of the transfer determination must be provided to the target body and receiving body. Given the time critical nature of the transfer, the determination is not a legislative instrument.

[Schedule 1, item 14, subsections 837A(4) and (5) and 837B(4) and (5) of the Act]

Consent conditions

1.172 The Minister may determine that consent is not required for a transfer or a class of transfers. The regulations may specify criteria that the Minister is to consider in whether to make a determination. If a determination applies in respect of a class of transfers, it is a legislative instrument. However, if the Minister's determination only applies to a particular transfer it is not a legislative instrument.

[Schedule 1, item 14, subsections 837D of the Act]

1.173 The regulation making power is necessary as the criteria for not providing consent may vary and needs to be flexible to accommodate changing parameters.

1.174 The consent of the board of directors of the receiving body to receive the transfer of shares or business continues to have effect until the consent is withdrawn and the RBA agrees to the withdrawal having regard to any of the following:

- circumstances that have arisen since the consent was given;
- circumstances that were in existence at or before the time when the consent was given but which were not known to the receiving body's board when it gave its consent; or
- any other relevant matter.

[Schedule 1, item 14, section 837C of the Act]

Transfer determination conditions

1.175 The determination may impose conditions that the target body or receiving body must comply with either before or after the certificate of transfer is issued.

[Schedule 1, item 14, subsection 837F(1) of the Act]

1.176 The RBA, either on its own volition or at the request of the target or receiving body, may vary or revoke a condition. The RBA is not obliged to comply with the request. However, where the RBA varies or revokes a condition, written notice must be provided to each affected entity so that all entities are aware of the conditions.

[Schedule 1, item 14, subsection 837F(2), (3) and (4) of the Act]

1.177 The body corporate must comply with the conditions imposed on the determination if there is no certificate of transfer in force and a subsequent determination that a transfer is not to take effect is not issued.

[Schedule 1, item 14, subsection 837F(5) of the Act]

1.178 If the body corporate fails to comply with conditions outlined in the determination, a penalty of 200 penalty units applies. This is consistent with existing transfer provisions, such as section 31 of the Transfer and Restructure Act and Part 5.6D of the Act.

[Schedule 1, items 14 and 17, subsection 837F(5) and Schedule 3 of the Act]

1.179 A protection is included for the body corporate that by complying with a condition of a transfer determination, that body corporate will not commit an offence under the Act. The body corporate would bear an evidential burden.

[Schedule 1, item 14, subsection 837F(6) of the Act]

1.180 Similar to obtaining an expert report for a recapitalisation act, the RBA should obtain an independent expert valuation of property prior to making a transfer determination. However, the RBA is not required to do this if obtaining the valuation would threaten the stability of Australia's financial system or continuity of clearing and settlement services. Obtaining the expert report is subject to the same conditions outlined from paragraph 1.117.

[Schedule 1, item 14, section 849D of the Act]

Transfer agreement

- 1.181 After a determination is made about a compulsory transfer of a business or body corporate or shares in a business or body corporate, the receiving or target body has the opportunity to write to the RBA to specify the mechanism for how the shares or assets and liabilities of the business are to be transferred. The RBA may approve this statement in writing before the certificate of transfer is issued if the mechanism is appropriate and both parties agree to the statement.

[Schedule 1, item 14, section 837E of the Act]

Determination that transfer is not to take effect

- 1.182 If after issuing a transfer determination, but prior to issuing a certificate of transfer, the board of the receiving body withdraws their consent or the RBA considers the transfer should not occur, then the RBA must issue a certificate stating that a transfer is not to take effect.

[Schedule 1, item 14, subsection 837G(1) of the Act]

- 1.183 The RBA may consider that a transfer is not required if it is no longer appropriate to facilitate resolution or the condition of resolution that was previously satisfied no longer poses a threat to the stability of the financial system in Australia.

[Schedule 1, item 14, subsection 837G(2) of the Act]

- 1.184 Copies of a certificate that a transfer is not to occur must be provided to all relevant bodies corporate. The certificate is not a legislative instrument.

[Schedule 1, item 14, subsection 837G(3) and (4) of the Act]

Information to the receiving body

- 1.185 The RBA may provide general and/or confidential information to a prospective receiving body about the business or shares that are or may be transferred in connection with a determination or possible determination of a transfer or proposed transfer. The RBA may impose conditions on the information that a body corporate must comply with. Disclosure of confidential or personal information to the receiving body is necessary and appropriate to fulfill the objective of stabilising Australia's financial system.

[Schedule 1, item 14, section 839B of the Act]

Certificate of transfer

- 1.186 Where it is still appropriate that a transfer of business or shares should proceed after a transfer determination being issued, then the RBA must issue a certificate of transfer stating that the transfer is to take effect provided that the consent of the receiving body has not been withdrawn.

[Schedule 1, item 14, subsection 838A(1) of the Act]

- 1.187 The certificate of transfer must include:

- the names of the target body and the receiving body; and
- the date the certificate of transfer is to come into force.
[Schedule 1, item 14, subsection 838A(2) of the Act]

1.188 For a transfer of business, the following additional details must be included in the certificate of transfer:

- whether the transfer is a total transfer or a partial transfer; and
- if it is a partial transfer, include or have attached to it:
 - a list of the assets and liabilities of the target body that are being transferred; and
 - any approved transfer agreement.
[Schedule 1, item 14, subsection 838A(2) of the Act]

1.189 For a transfer of shares, the RBA must identify the shares that are being transferred.

1.190 It is at the discretion of the RBA to specify the mechanism for determining the other things that are to happen in relation to the:

- assets and liabilities that are to be transferred; or
- shares that are to be transferred.

[Schedule 1, item 14, subsection 838A(5) of the Act]

Notice of certificate

1.191 The certificate of transfer has effect from the day specified on the notice. The RBA must give a copy of the certificate of transfer to the target body and the receiving body and publish the certificate on the RBA website. The certificate is not a legislative instrument.

[Schedule 1, item 14, subsections 838A(3), (4), and (6) of the Act]

1.192 Any document that purports to be a certificate under this Division is taken to be a certificate and properly given.

[Schedule 1, item 14, section 839E of the Act]

1.193 Land or assets may be lodged on a register and become the property of the receiving body subject to the RBA issuing an enabling certificate in relation to land, interests in land and other assets to be dealt with, and given effect to, in certain circumstances.

[Schedule 1, item 14, sections 839C and 839D of the Act]

Time and effect of compulsory transfer of shares or business

1.194 A compulsory transfer may take effect without the approval of licensees, their shareholders, market participants, or contract holders.

- 1.195 In relation to a transfer of business, when the certificate of transfer comes into force, the receiving body becomes the successor in law of the target body to the extent of transfer:
- for a total transfer – all assets and liabilities of the target body, wherever those assets and liabilities are located, become assets and liabilities of the receiving body without any transfer, conveyance or assignment; and
 - for a partial transfer – only the assets and liabilities of the target body listed in the certificate of transfer, wherever located, become assets and liabilities of the receiving body without any transfer, conveyance or assignment; and
 - to the extent of the transfer, the duties, obligations, immunities, rights and privileges applying to the target body apply to the receiving body.
[Schedule 1, item 14, subsections 838C(1) and (2) of the Act]
- 1.196 The effect of a transfer of shares is that all shares become shares held by the receiving body without any transfer, conveyance, or assignment. The shares become shares held by the receiving body free from any trust, liability, or other encumbrance.
[Schedule 1, item 14, subsections 838B(1) and (2) of the Act]
- 1.197 At the time of the transfer, the specified things that are included in a certificate of transfer for business or for shares (as appropriate) are taken to occur. Similarly, where a transfer agreement specifying the mechanism for certain things was approved by the RBA, then those things are taken to have happened at the time of the transfer.
[Schedule 1, item 14, subsections 838B(3) and (4) and 838C(3) of the Act]

Effect of transfer

- 1.198 At the time a certificate of transfer comes into force, the receiving body is substituted for the target body in any instrument in relation to:
- any asset or liability transferred; or
 - a share in the target body transferred.
[Schedule 1, item 14, section 839F of the Act]
- 1.199 Further, from when the certificate of transfer is in force the target body must:
- promptly account to the receiving body for any income or other distribution received if the income or distribution arises from assets transferred under the crisis Part; and
 - at the request of the receiving company, give the receiving body access to all of the books in its possession that relate to assets or liabilities transferred.
[Schedule 1, item 14, sections 839G and 839H of the Act]
- 1.200 Consistent with other provisions throughout the Act, failure to comply with the above requirements is an offence.

1.201 The operation of the trust will not be affected where a trustee or beneficiary of a trust is transferred.

Effect of partial transfer on contracts

1.202 A transfer of business of a body corporate is a partial transfer if it relates to some, but not all, of the target body's business. In CS facility resolution, this would be expected to be applied to separable business lines/financial products or to particular assets and liabilities, subject to the avoidance conditions below.

1.203 The partial transfer will be void where the following apply to a body corporate:

- just prior to the partial transfer the target body is a party to a close-out netting contract, market netting contract or approved netting arrangement with respect another party to the contract or arrangement (consistent with the PSN Act 1998); and
- the assets and liabilities covered by the transfer certificate includes some assets and liabilities the body has under the close-out netting contract, market netting contract, or approved netting arrangement, or assets that are property over which security is given in respect of an obligation of the target body under the close-out netting contract or market netting contract.

[Schedule 1, items 1 and 14, sections 9 and 839A(1) of the Act]

1.204 The partial transfer is void only:

- to the extent of the assets or liabilities of the target body under any of those contracts with respect to the counterparty; and
- if security is given over financial property in respect of an obligation of the target body under a close-out netting contract – to the extent that the assets are financial property in the possession or control of the counterparty (or another person on its behalf); and
- if security is given over property in respect of an obligation of the target body under a market netting contract – to the extent that the assets are that property.

[Schedule 1, item 14, section 839A(2) of the Act]

ASIC power to grant a CS licence to a receiving body

1.205 ASIC is granted the power to issue a domestic CS facility licence to the receiving body that is transferred all or some of the target body's business. A licence is not required for a transfer of shares, as the licence transfers with the licensed entity.

[Schedule 1, item 25, subsection 824B(5) of the Act].

1.206 The licensing power for ASIC to grant a CS facility licence on an expedited basis is integral to the functioning of Australia's financial system. The requirement to hold a domestic CS facility licence under 820C of the Act requires the services provided by the bridge entity to be subject to the licensing requirements under Part 7.3 of the Act.

Bridge entity

- 1.207 Where a receiving body does not consent or an alternative receiving body is unable to be found, the RBA may establish a temporary ‘bridge’ institution to take over and continue operating for a period for certain critical functions of the CS facility or related body corporate, without incurring liability for any legacy claims. Further legislative design work will be completed during consultation on provisions to establish the bridge entity.
- 1.208 Transfer to a bridge entity allows the Commonwealth to take ownership of the business or shares of a domestic CS facility licensee in resolution. A similar model exists under the crisis resolution powers afforded to APRA. The power to create a wholly-owned Commonwealth company is authorised by section 85 of the PGPA Act.

Function and purpose of a bridge entity

- 1.209 The use of a temporary bridge institution would support continuity of CS facility services and financial stability. While the RBA may seek to wind down the business of the bridge institution, this would only occur if a transfer or sale was not possible within a reasonable timeframe and if to do so would be consistent with the objectives of the RBA. Given that the bridge arrangement is temporary, the RBA must complete an exit arrangement as soon as reasonably possible.
- 1.210 The RBA will establish terms and conditions under which the bridge entity will operate, including:
- its ownership structure;
 - the source of its capital;
 - operational financing and liquidity support;
 - the applicable regulatory requirements, including compliance with licence conditions and the Financial Stability Standard;
 - the applicable corporate governance framework; and
 - the process for appointing the directors of the bridge institution and its mandate.
- 1.211 The RBA may also arrange the sale or wind-down of the bridge institution, or the sale or onward transfer of some or all of its assets and liabilities to a third-party, subject to the objectives of resolution.

Legal protections for transfer

- 1.212 Actions taken under the transfer provisions cannot cause the receiving body, the target body or any other person in breach of any contract, civil wrong or any law of the Commonwealth or a State or Territory or in any contract, deed,

undertaking, agreement or other instrument. These overrides are intended to ensure timely action to address financial stability risks.

[Schedule 1, item 14, subsection 839J(1) of the Act]

- 1.213 There are certain legislative exceptions that will need to apply to this immunity, such as not providing protection from a lack of compliance, including under the *Privacy Act 1988*, *CCA*, the *Fair Work Act 2009*, the *Fair Work (Registered Organisations) Act 2009*, and the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*. This is consistent with the exceptions in section 43 of the *Transfer Act*.

[Schedule 1, item 14, subsection 839J(2) of the Act]

Compensation

- 1.214 The regime includes arrangements for the acquisition of property so that it is not invalid under the Constitution. If the operation of the RBA's powers would result in unjustly acquiring property and would be invalid because of paragraph 51(xxxi) of the Constitution, then the person is entitled to reasonable compensation. If the Commonwealth and the person do not agree on the amount of compensation, the person may apply to the Court, where the Court will determine the amount.

[Schedule 1, item 14, section 839G of the Act]

- 1.215 The purpose of having explicit compensation arrangements built in is to facilitate the RBA effectively executing any powers involving the acquisition of property and avoid delays resulting from a challenge to the constitutional validity of the RBA's actions.

Power to make rules

- 1.216 The RBA may make rules in relation to transferring a body corporate which may include:

- the purchase price and payment of shares;
- dispute resolution;
- publication of information;
- freeing of shares from any trust or other encumbrance; or
- any other incidental matter to the transfer of shares or business.

[Schedule 1, item 14, section 839K of the Act]

- 1.217 The ability for the RBA to make rules in respect of a transfer of shares or business reflects the need for flexibility whilst in a crisis. Given the RBA will be dealing with the body corporates directly, the RBA will have the most relevant and timely information to make rules that supplement the transfer process.

Stays and moratorium provisions

- 1.218 An important feature to allow effective resolution is to prevent counterparties from denying an obligation, accelerating debt, closing a transaction or enforcing security under a contract with a licensee or body corporate when the RBA has exercised a resolution power.
- 1.219 An ‘ipso facto’ clause allows one party to terminate or modify the operation of a contract upon the occurrence of some specific event, regardless of otherwise continued performance of the counterparty. These ipso facto provisions have the effect of reducing the effectiveness of successful resolution. The stay provisions ensure that vital contracts remain in place and is intended to mitigate the risk of pre-emptive actions by counterparties impeding the ability of the RBA to implement an orderly resolution or the ability of the CS facility or related body corporate to continue to operate.
- 1.220 Similarly, the RBA exercising resolution powers could result in enforcement procedures that have the potential to interfere the orderly resolution of a body corporate. Therefore, moratorium provisions apply to suspend the enforcement of certain rights to facilitate timely assessment of the financial and operational position of the entity for administration purposes and any resolution action.

Moratorium provisions

- 1.221 The moratorium provisions will apply at the time a transfer is in effect or statutory manager or the RBA is in control. The moratorium operates to prevent a person from beginning or continuing certain litigation and enforcement actions against a body corporate to facilitate effective resolution.
- 1.222 The moratorium provisions do not apply to payments and property transfers to the CS facility which has the effect of protecting the enforcement of eligible netting and collateral arrangements provided by the PSN Act. This includes approved real-time gross settlement systems, approved netting arrangements, close-out netting contracts and market-netting contracts that will be unimpacted by the moratorium provisions, aside from the prohibition on beginning or continuing court or tribunal proceedings. This is intended to ensure that current protections under the PSN Act are retained and the rights of counterparties to close-out netting contracts are clear.

Application of moratorium provisions

- 1.223 The moratorium provisions will commence at the earlier of the time of a statutory manager being appointed or when a transfer determination is made. The moratorium provisions will end when one of the relevant events occurs:
- all statutory manager appointments are terminated by the RBA;

- the RBA issues a Certificate of Transfer or determines the transfer should not proceed; or
 - if at least one statutory manager has been appointed and a transfer determination has been made – the later of:
 - (i) the appointment of all statutory managers being terminated by the RBA; and
 - (ii) the RBA issuing a Certificate of Transfer or the RBA determining that the transfer should not proceed.
- [Schedule 1, item 14, section 840A of the Act]*

Effect of the moratorium provisions

1.224 The moratorium provisions apply to creditors and other third parties that have rights or property in relation to the body corporate in resolution. These third parties are prohibited from doing any of the following actions unless the RBA or statutory manager provides written consent or with leave of the Court:

- exercising third party rights including claiming, recovering or taking possession of any property that the body corporate uses, possesses or occupies by a secured party, lessor or owner;
- beginning or continuing a court or tribunal proceeding in relation to the body corporate or its property (including if the body corporate is in the process of being wound up or a referral of a dispute to an arbitrator); or
- enforcing or disposing any security that may be attached to any property that the body corporate owns, uses, possesses, occupies or otherwise has any interest in.

[Schedule 1, item 14, sections 842C of the Act]

Restricting third party property rights

1.225 In general, while the moratorium provisions apply to a body corporate a third party is restricted in exercising their rights in property of the body, or other property used or occupied by, or in the possession of, the body. This includes the restriction on a third party to be unable to enforce a security interest where the a third party, is either a secured party or a PPSA secured party in relation to the property of the body corporate.. A further restriction that is imposed on a third party that is a secured party in relation to a possessory security interest is that they cannot sell the property.

[Schedule 1, item 14, subsections 842B(1) of the Act]

1.226 The following additional restrictions apply to a third party that is a PPSA secured party:

- who is a lessor of property in relation to a PPSA security interest in goods arising out of a lease of the goods, then the distress for rent must not be carried

out against the property, and the third party cannot take possession of the property or otherwise recover it; or

- who is an owner (that is not a lessor) of property in relation to a PPSA security interest in the property, then the third party cannot take possession of the property or otherwise recover it.

[Schedule 1, item 14, subsections 842B(1) of the Act]

1.227 The secured party may continue to possess the property while the moratorium provisions apply to the body corporate only if the secured party has lawful possession of the property that is subject to a possessory security interest.

[Schedule 1, item 14, subsection 842B(3) of the Act]

1.228 The general restrictions will not apply in relation to the exercise of a third party's rights in property if the rights are exercised with the RBA or statutory manager's consent or with leave of the court.

[Schedule 1, item 14, subsection 842B(2) of the Act]

1.229 At the time the moratorium provisions begin to apply, any PPSA security interest which was perfected, registered or enforceable against a third party is vested if the collateral is not registered within time.

[Schedule 1, items 6 and 7, subparagraph 588FL(1)(a)(v) of the Act]

1.230 Similarly, upon a statutory manager being appointed to a body corporate an unperfected security interest is vested.

[Schedule 1, items 35-36, subparagraphs 267(1)(a)(iic) and (iib) of the Personal Property and Securities Act]

Enforcement processes suspended

1.231 Only the Court may grant leave or impose conditions to allow the enforcement process to begin or continue. A person who applies for leave of the Court must notify the RBA. The RBA is entitled to be heard on the application to the Court.

[Schedule 1, item 14, section 842E of the Act]

1.232 The RBA may apply to the court or tribunal to be joined as a party or to intervene in the proceedings for leave. If the RBA is joined as a party, the court or tribunal must have regard to the RBA's views in deciding whether to grant leave, and if so, whether to impose terms and the nature of those terms.

[Schedule 1, item 14, section 842E(3) of the Act]

Beginning or continuing a court proceeding

1.233 At the time the moratorium provisions come into effect, various processes occur with respect to a body corporate's property to protect the rights of other people involved in the enforcement process. Upon notification that the moratorium provisions apply to a body corporate, the court officer (who may be a sheriff, registrar or other appropriate officer) is restricted from certain actions so as not to interfere with resolution. At any time from receiving the

notification, the court officer is prevented from the following, unless the Court otherwise approves:

- taking action:
 - in relation to the attachment or a debt due by the body corporate; or
 - to sell the property of the body corporate; or
 - paying a person:
 - money in relation to money received because of the attachment of a debt due;
 - proceeds of selling a property;
 - money of the body corporate seized; or
 - money paid to avoid seizure or sale of property.
- [Schedule 1, item 14, subsections 842F(1), (2) and (6) of the Act]***

1.234 Any money or proceeds that are paid to the Court and in the court officer's possession must be provided to the statutory manager at the time of notification. If there is no statutory manager, the Court may direct the court officer to make the payment as appropriate. The position of the person who commissioned the enforcement action will be protected by providing that the court officer may retain, as a first charge on the proceeds or money given to the statutory manager, so much of the proceeds or money that the court officer thinks necessary to cover the costs of the enforcement action which has already taken place and costs which might otherwise be levied against the person who commissioned the enforcement action.

[Schedule 1, item 14, subsections 842F(3), (4) and (5) of the Act]

1.235 Finally, a person who buys property in good faith under a process of execution will be protected, by providing that person with good title to the property as against the company and the statutory manager. A person that acts in good faith has the sincere intention to be fair, open, and honest.

[Schedule 1, item 14, subsection 842F(7) of the Act]

1.236 The RBA or statutory manager of a body corporate is not liable to an action or other proceeding for damages in respect of a refusal to give an approval or consent for protecting the body corporate's property.

[Schedule 1, item 14, section 842D of the Act]

Voluntary winding up prohibited

1.237 Whilst under statutory management or if a transfer is in effect, a body corporate cannot be wound up voluntarily. Any applications the Court receives for an order to wind up a body corporate whilst the moratorium provisions apply are adjourned by the Court. The Court may not appoint a provisional liquidator of a body corporate during the statutory management or compulsory

transfer.

[Schedule 1, item 14 section 842A of the Act]

- 1.238 If a body corporate goes into liquidation after the moratorium provisions end, the liquidation provisions under sections 468, 471B, 471C and 500 of the Act will take effect. The CS facility licensee is required to meet any liabilities incurred and recommence legal proceedings after the moratorium provisions lapsed.

General power to make orders

- 1.239 The Court has the power to make orders in respect of any moratorium provisions to deal with property disputes over how the stay provisions apply. The inclusion of the general power is to mostly deal with how the RBA may operate in relation to a particular body corporate, subject to conditions. An order may be made on application of the body corporate, a creditor of the body corporate, a statutory manager of the body corporate, the RBA, or any other interested person.

[Schedule 1, item 14, subsection 843A of the Act]

Stays

- 1.240 The resolution regime includes three separate stay provisions that operate to:
- deny termination rights or other rights when the RBA exercises a resolution power;
 - suspend enforcement of rights; and
 - temporarily suspend rights when the RBA makes a notifiable instrument.

General stay provision

- 1.241 At the time the RBA exercises any resolution power in relation to a body corporate or related body corporate, stay provisions apply to prevent counterparties from terminating rights or any other rights under a contract with the body corporate or related body corporate that is being resolved by the RBA. That is, counterparties must not use the RBA's exercise of power as a reason to deny an obligation, accelerate a debt, terminate or close-out a transaction, or enforce a security under a contract with the body corporate or related body corporate that is the subject of resolution.

[Schedule 1, item 14, sections 849E of the Act]

- 1.242 The stay is intended to be in place from the time the RBA exercises a resolution power (including appointing a statutory manager, making a transfer or issuing a direction) and continue until the body corporate is resolved. This has the effect of preventing termination of any contracts between a counterparty and a domestic CS facility or related body corporate.

Stay on enforcement rights and temporary suspension of rights

- 1.243 The stay on enforcement rights applies when a statutory manager is appointed to a body corporate or the RBA determines that a transfer is to take effect.
- 1.244 The temporary suspension of rights operates by the RBA providing public notification that temporary stays are to apply if there is an intention to use either the statutory management or transfer powers.

Application of stay on enforcement rights

- 1.245 The stay intends to capture any of the following entities:
- a contractual counterparty of a domestic CS facility licensee;
 - a current or former related body corporate;
 - any participants of the CS facility;
 - intra-group service providers to the CS facility licensee;
 - third party service providers to the CS facility licensee; and
 - any related bodies corporate and lenders.
- 1.246 The stay on clauses in contracts is intended to apply to a contract entered into by any group entity, even if no resolution action has been taken by the RBA in respect of that particular entity. For example, if a statutory manager is appointed to only a domestic CS facility licensee, the exclusion of contractual terms will apply to contracts entered into by a related operations entity with a third-party service provider.
- 1.247 An express right in a contract, agreement or arrangement is not enforceable against a body corporate because of:
- the body corporate being under statutory management;
 - a transfer determination being made;
 - the financial position of the body corporate;
 - a reason prescribed in the regulations and relates to either the moratorium provisions possibly applying or the body corporate's financial position; or
 - any other reason that is in substance contrary to the aforementioned reasons.
[Schedule 1, item 14, subsections 841A(1), (2) and (3) of the Act]
- 1.248 The period that a right cannot be enforced begins at the time a statutory manager is appointed or a transfer determination is made. The right may only be enforced after the body corporate is no longer under statutory management, a transfer has been completed, a transfer is determined not to proceed or the Court orders an extension of the stay period.
[Schedule 1, item 14, subsections 841A(4) and (5) of the Act]

1.249 The Court may extend the period for which an applicable express right is not enforceable against a body corporate if the Court is satisfied that doing so is in interests of justice. An interim order may be made while the application is being considered but cannot require an undertaking relating to damages as a condition.

[Schedule 1, item 14, subsection 841A(6) of the Act]

1.250 To prevent the outcome of third-parties using the reason that a body corporate was under statutory management after a body corporate is no longer being statutorily managed, an indefinite stay period applies. The indefinite stay period only applies to the extent that the reason for seeking to enforce the right relates to:

- the body corporate’s financial position before or during the stay period;
- the body corporate being under statutory management;
- the RBA making a transfer determination; or
- a reason prescribed in the regulations relating to circumstances in existence before the end of the stay period.

[Schedule 1, item 14, subsection 841A(7) of the Act]

1.251 The stay on enforcement rights applies in relation to express rights that are triggered either because of a body corporate being under statutory management or owing to a company’s financial position while under statutory management, such as the ability of the body corporate to enforce a right under a contract for a new advance of money or credit.

[Schedule 1, item 14, subsections 841A(11) and (12) of the Act]

Application of temporary suspension of rights

1.252 If the RBA intends to place a body corporate under statutory management or issue a transfer determination, the RBA may make a notifiable instrument that a suspension of termination rights applies to a body corporate.

[Schedule 1, item 14, section 847A(2) of the Act]

1.253 The notifiable instrument ensures that pre-emptive actions by contractual counterparties do not impede the ability of the RBA to implement an orderly resolution or the ability of the domestic CS facility licensee or related body corporate to continue to operate. This is necessary to facilitate effective resolution without the risk of key contracts being terminated or discontinuation of services.

1.254 The suspension of termination rights applies to suspend any termination right, such as termination at call or on notice (but not termination due to non-payment). The performance of those substantive obligations are subject to the application of any contractual or statutory loss allocation rules (for example, where a central counterparty’s rulebook allows it to reduce mark-to-market payments following default of a participant). A temporary suspension of rights

cannot be used if an early termination right arose from a failure to perform payment and delivery obligations or the provision of collateral.

1.255 Where a notifiable instrument is in force, the temporary suspension applies to:

- a domestic CS facility licensee; or
- related body corporate, of a domestic CS facility licensee, that is incorporated in Australia.

[Schedule 1, item 14, section 847A(1) of the Act]

1.256 The notifiable instrument has the effect of temporarily suspending an entity's right to terminate a contract with the body corporate, provided that substantive obligations, such as payment and delivery obligations and the provision of collateral, continue to be performed. Specifically, where the temporary stay applies to a body corporate, it prevents a third party from exercising a right to terminate:

- a contract, agreement or arrangement; or
- an obligation arising under a contract, agreement or arrangement from an express provision or because of anything done in accordance with a direction to preserve financial stability under section 823F of the Act or a recapitalisation direction under section 823L of the Act.

[Schedule 1, item 14, section 847B(1) of the Act]

Rights not subject to the stay

1.257 There are some cases where it would not be appropriate for a stay against the enforcement of rights to apply because of the nature of the agreement or the parties to the agreement. The stay on enforcement rights and temporary suspension of rights does not apply to:

- rights that relate to a contract, agreement or arrangement that were entered into after either the statutory manager was appointed or the notifiable instrument is in force (as relevant);
- rights that are part of a type of contract, agreement or arrangement that are specified in the regulations or are declared by the Minister; or
- a right of a kind declared by the Minister; or
- the extent that the RBA or liquidator (appointed after the stay period) has provided written consent.

[Schedule 1, item 14, subsections 841A(8) and (10) and 847B(2) and (4) of the Act]

1.258 Notwithstanding the operation of the stay, a counterparty maintains the ability to enforce a right for reasons such as where the body corporate has failed to meet payment, performance or other obligations under the agreement such as a default management or recovery action.

[Schedule 1, item 14, subsections 841A(11) and (12) of the Act]

- 1.259 For the temporary suspension of rights, there are two additional rights that are not captured including:
- a right that is exercisable only in particular circumstances; or
 - right that arises from acting in accordance with a direction to preserve financial stability or a recapitalisation direction after the notifiable instrument is in force.
- [Schedule 1, item 14, paragraphs 847B(2)(a) and (b) of the Act]***
- 1.260 During the temporary stay, parties to a contract retain the ability to exercise contractual termination rights in particular circumstances, such as if substantive obligations under the contract are not complied with. Additionally, participants retain the ability to execute new transactions, which may have the same effect as the closing out of certain positions, or other market risk management transactions.
- 1.261 Any rights that are declared by the Minister is a legislative instrument. The Minister may declare contracts or agreements that are referred to in Commonwealth law or declare kinds of rights to which a stay on enforcement rights broadly doesn't apply, or doesn't apply in specific circumstances.
- [Schedule 1, item 14, subsections 841A(9) and 847B(3) of the Act]***
- 1.262 The regulation making powers are intended to ensure that reasons and clauses in agreements are appropriately captured or excluded. The regulation making power to extend the stay to apply to clauses in agreements is appropriately designed to ensure relevant reasons for not enforcing a right are adequately captured. The regulation making power to exclude certain types of contracts is necessary to ensure rights that may still be enforced are clear and that the stay effectively applies to contracts and agreements that interfere with resolution action. The stay provisions are consistent with the existing stay regime under Part 5.3A of the Act.

Automatic stay

- 1.263 An automatic stay on early termination and certain other rights operates so that resolution actions by the RBA are not undermined. The stay provisions are self-executing such that the provisions apply without any party to the contract, agreement or arrangement making a decision that the stay should begin to apply. The stay on the exclusion of contractual terms comes into operation automatically, at the time the RBA appoints a statutory manager or makes a transfer determination and ensures that a contract cannot be terminated.
- [Schedule 1, item 14, sections 841B and 847C of the Act]***

Temporary suspension of rights: revocation of notifiable instrument

- 1.264 The RBA must revoke the notifiable instrument that temporary suspension of rights applies if there is no intention to appoint a statutory manager or make a transfer determination.
- [Schedule 1, item 14, subsections 847A(3)-(4) of the Act]***

Stay interactions with other laws

- 1.265 Despite the explicit provision on the enforcement of rights, where there is an inconsistency between the PSN Act, the *International Interests in Mobile Equipment (Cape Town Convention) Act 2013* (Cape Town Convention Act), the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) and the *Autonomous Sanctions Act 2011* (ASA 2011), those Acts will take priority.
[Schedule 1, item 14, sections 841C and 888 of the Act]
- 1.266 The justification for this explicit hierarchy in relation to the Cape Town Convention Act and ASA 2011 is that these Acts outline Australia's approach to international coordination. In particular, the Cape Town Convention codifies the treaty to standardise transactions involving movable property. Its purpose is to protect the interest of the sellers, purchasers and creditors through the creation of an International Registry. It outlines internationally consistent remedies available to the lender in the event of default or insolvency.
- 1.267 Because of the nature of the offence in section 16 of the ASA 2011 (particularly the strict liability nature), a person could be theoretically acting in accordance with the Act, but would be in breach of the ASA 2011.
- 1.268 The PSN Act and the AML/CTF Act are important to take precedence. The AML/CTF Act regulates financial, gambling, remittance and bullion sectors that provide designated services and imposes key obligations on regulated businesses. Given the policy significance of these obligations, this provision has been included to ensure these amendments do not unintentionally affect the operation of the AML/CTF Act and PSN Act.
- 1.269 A transaction of a body corporate is not voidable merely because the transaction was entered into when the moratorium provisions apply to the body corporate, the transaction is uncommercial, an unfair preference was given by the body corporate to a creditor of the body corporate, an insolvent transaction occurred, or a creditor defeating disposition by the body corporate.
[Schedule 1, item 14, section 841D of the Act]

Directions during resolution

- 1.270 Resolution directions may be issued by the RBA after a condition for resolution has been met. A direction issued during a crisis may require domestic CS facility licensees, and, in certain circumstances, related bodies corporate to take specified action that must be complied with.
- 1.271 A resolution direction may be issued to a related body corporate of a domestic CS facility licensee provided that it is incorporated in Australia and:
- the body corporate is related at the time of issuing the direction, or was related immediately before a transfer of business; and

- the RBA considers it necessary to facilitate the resolution of the CS facility licensee.
[Schedule 1, item 14, subsection 844A(1) of the Act]

Resolution direction

1.272 The RBA may issue any direction it considers appropriate in facilitating resolution. A direction may be issued to a CS facility licensee or a related body corporate that is incorporated in Australia, including a body corporate that was related to the CS facility licensee prior to the transfer of business or shares:
[Schedule 1, item 14, subsection 844A(2) of the Act]

1.273 For example, the RBA may issue the following resolution directions:

- to do or refrain from doing anything under the CS facility operating rules or procedures (CS facility licensee only);
- to amend its operating rules without having to consult participants (CS facility licensee only);
- to provide specified information to the RBA, in connection with the performance of the RBA's functions and duties;
- not to appoint an external administrator;
- to remove, appoint or not appoint a director or senior manager of the body corporate;
- not to borrow any amount;
- not to pay a dividend or repay any amount paid on shares;
- not to pay or transfer any amount or asset to any person, or create an obligation (contingent or otherwise) to do so (unless pursuant to an order of a court or a process of execution);
- to acquire shares, issue, sell or cancel shares in a body corporate
- vary or cancel rights or restrictions attached to shares in a class of shares in the body;
- to stop, delay or restrict an acquisition or divestiture;
- to continue or take new actions to provide services or funding to the CS facility licensee in accordance with any existing agreement (related body corporate only);
- to continue to operate a business where the RBA considers that the business is necessary to facilitate the resolution of the CS facility licensee (related body corporate only); or

- to do, or refrain from doing, anything else the RBA considers relevant in relation to maintain the stability of the financial system or to continue to provide critical CS facility services.
- 1.274 Where the RBA directs a body corporate to amend the operating rules, the usual disallowance under section 822E of the Act does not apply, however the domestic CS facility licensee is still required to notify ASIC of the rule change.
[Schedule 1, item 13, section 822E of the Act]
- 1.275 Where the RBA issues a direction to continue to operate a business, this requires the recipient to continue to provide services or facilities that are necessary to enable the CS facility licensee to continue to operate effectively. The services and facilities must be provided on the same terms as they were under any pre-existing agreement for the duration of the agreement, or otherwise on reasonable commercial terms. The obligation to continue to provide services may include intra-group funding arrangements but cannot be extended to third party service providers.

Information gathering direction

- 1.276 After a condition to exercise a resolution power is satisfied, the RBA may issue a direction to a person to provide relevant information that relates to the business of a domestic CS facility licensee. The RBA must reasonably believe the person can give the information, and that the information is required for the RBA fulfil its functions in protecting the financial system in Australia or ensuring the continuity of critical CS services.
- 1.277 The direction to provide information may specify the particulars of the information or documents containing the information and the form and manner it is to be provided. It must specify a reasonable time or period by which it is to be complied with and the form and manner in which the information or documents must be given.
[Schedule 1, item 14, section 844B of the Act]
- 1.278 The required information may include a book, account or document from any person that relates to the operations of domestic CS facility licensees and related bodies corporate.

Directions may be issued to overseas CS facility licensees

- 1.279 In addition to direction powers for domestic bodies corporate, the RBA is empowered to issue resolution and information gathering directions to operators of overseas CS facilities. Where the overseas regulator has requested support, the RBA may direct an overseas CS facility to do or refrain from doing a thing provided it relates to the body corporate's Australian business or the assets and liabilities in Australia.
[Schedule 1, item 14, subsection 848A(2) of the Act]

Details of Directions

Compliance

- 1.280 A body corporate must comply with a resolution direction despite any other provision of the Act, its constitution, its operating rules or procedures, any contract or arrangement to which it is a party and any listing rules of a financial market in whose official list it is included.
[Schedule 1, item 14, subsection 844A(4) of the Act]
- 1.281 Failure to comply with a resolution direction or an information gathering direction is an offence. Failure to comply with a direction will differ for individuals and bodies corporate, where individuals will be subject to 100 penalty units for each day or part of a day of non-compliance, and bodies corporate will be subject to ten times this amount, being 1,000 penalty units.
- 1.282 Refusal or failure to give information (or documents containing information), relating to the business of a body corporate in resolution is a criminal offence of 12 months imprisonment or 60 penalty units.
[Schedule 1, item 14, subsections 844B(3) and (4) of the Act]
- 1.283 These penalties reflect the severity of the contravention which would likely have detrimental effects on the stability of the Australian financial system. It is imperative that directions issued during resolution are complied with in order to resolve distressed CS facilities. In addition, the penalty for contravention of a direction issued by the RBA is consistent with contravention of ASIC directions in non-crisis times.
- 1.284 Where a CS facility licensee fails to comply with a direction, the RBA may apply to the Court for orders enforcing the direction. The Court may make orders on the application of the RBA (alone or jointly with ASIC), if it appears to the Court that a person has contravened a direction. However, the Court can only make such an order if the Court is satisfied that the order would not unfairly prejudice any person.
[Schedule 1, item 14, section 844C of the Act]

Period of direction

- 1.285 All directions issued by the RBA may specify a time or period for the body corporate to comply with the direction.
[Schedule 1, item 14, subsections 844A(2) and, 844B(2) of the Act]
- 1.286 However, if no period is specified, the direction will continue to apply until the RBA revokes the direction. A direction continues to apply despite an external administrator or statutory manager being appointed.

Variation or revocation of a direction

- 1.287 The RBA may vary or revoke a direction if it is consistent with the resolution objectives but is required to provide written notice to the CS facility. Upon

revocation of a direction, the direction ceases to have effect.

[Schedule 1, item 14, section 844D of the Act]

Consulting ASIC

1.288 The RBA must consult ASIC before giving, varying or revoking a resolution or information gathering direction. However, if the RBA fails to consult with ASIC, the direction is not invalid and continues to have effect.

[Schedule 1, item 14, section 844E of the Act]

Reviewability of directions

1.289 Any decisions made by either the statutory manager or RBA whilst in a crisis are not subject to merits review. This includes any directions issued and is justified on the basis that it is not conducive to certainty in a regime designed to address a crisis. Furthermore, the crisis regime relates to financial decisions with a significant public interest, which is an allowable exemption from merits review.

[Schedule 1, item 32, paragraph 1317C(gj) of the Act]

Directions may be subject to secrecy

1.290 The RBA may issue a written determination that a resolution direction is covered by secrecy where the RBA considers that secrecy is necessary to protect financial system stability in Australia or ensure continuity of CS services. Specified information that may be covered by a secrecy determination is information that reveals a specific resolution direction was given to a body corporate or a document was given to a body corporate by the RBA that contains specific information.

[Schedule 1, item 14, subsection 845A(1) of the Act]

1.291 A body corporate is covered by a secrecy determination if it is:

- incorporated in Australia and it is a CS facility licensee;
- a related body corporate of a CS facility licensee or was a related body corporate of a CS facility licensee before a transfer of business or shares under this Part or;
- a body corporate to which information has been provided in relation to a transfer.

[Schedule 1, item 14, subsection 845A(2) of the Act]

1.292 A secrecy determination may be varied or revoked if the RBA considers it appropriate. A secrecy determination is valid and continues in force until it is revoked. As soon as practical after making, varying or revoking the determination, the RBA must give the body corporate a copy of the determination.

[Schedule 1, item 14, subsections 845A(3) of the Act]

Considerations

1.293 In making a secrecy determination, the RBA may consider if it is appropriate for specified individuals to disclose certain information or a class of information. It is also necessary to consider whether a class of individuals may disclose specified information, or any kind of information in that particular class. The RBA must provide a copy of the determination to both the body corporate to which the determination relates and each person specified in the determination.

[Schedule 1, item 14, subsection 845E(2) and (3) of the Act]

1.294 In general, secrecy determinations are not legislative instruments, however, where the RBA makes a determination that relates to more than one individual, (i.e. specifying a class of persons) that permits the disclosure of a class of information, that will be a legislative instrument.

[Schedule 1, item 14, subsections 845E(4) and (6) of the Act]

1.295 The determination that the RBA makes may specify conditions that relate to entities to which the disclosure may be made, the way the disclosure is to be made or any other matter that the RBA considers appropriate. Any conditions outlined by the RBA must be satisfied before disclosure can occur.

[Schedule 1, item 14, subsection 845E(5) of the Act]

Contravention of a secrecy determination

1.296 Where secrecy arrangements apply to a direction, a directed entity commits an offence for disclosing information revealing the fact that the direction was given. The maximum penalty for contravening the secrecy arrangements is two years imprisonment.

[Schedule 1, items 14 and 16, subsections 845C(1) and 1317E(3) of the Act]

1.297 The strong deterrent effect of a criminal sanction is necessary for failing to comply with a secrecy determination given the substantial impacts that it could have on the Australian financial system.

1.298 A person that is covered by a secrecy determination is prohibited from disclosing any information covered by secrecy determination. This includes:

- body corporates covered as mentioned in paragraph 1.291;
- a directed entity that is, at or after the time the direction was made, an officer, employee, contractor, or a statutory manager (other than the RBA) of the body corporate; or
- any other person who, because of, or in the course of, their employment or engagement, has acquired information that reveals the fact that the direction was made.

[Schedule 1, item 14 subsections 845C(2) of the Act]

Permissible disclosure of information covered by a secrecy determination

1.299 The secrecy arrangements do not apply where the information:

- has already been lawfully made available to the public;
- is disclosed to a legal representative to seek legal advice;
- is allowed to be disclosed by an RBA determination and the relevant conditions are satisfied;
- is within the RBA Act or ASIC Act and disclosed by a Commonwealth officer, RBA officer, ASIC member or staff member;
- is allowed by the Minister's determination;
- is disclosed to another person who is subject to the secrecy arrangement; or
- a court or tribunal orders or directs the entity to do so.

[Schedule 1, item 14, subsections 845E(1), 845C(3) and sections 845D, 845E, 845F, 845G, 845H, 845I, 845J and 845K of the Act]

1.300 Disclosure is only permitted if it is not prohibited under subsection 79A(2) of the RBA Act or subsection 127(9) of the ASIC Act and to the extent that:

- the information is publicly available (under section 845D);
- legal advice or review is sought (under section 845F);
- the Minister makes a determination (under section 845J); or
- it is to another person subject to the secrecy arrangement and is for the same purpose.

[Schedule 1, item 14, sections 845G and 845H of the Act]

1.301 The grounds allowing disclosure under the secrecy provision operate independently and do not limit each other.

[Schedule 1, item 14, section 845L of the Act]

Protection

1.302 Where the RBA has exercised a crisis power and a person has acted in accordance with fulfilling a function under the crisis regime, that person is broadly protected from criminal or civil proceedings. The protection from liability only applies if a person acts in good faith and it was reasonable for the person to act in a way that achieves the purpose of performing a function or power under the crisis regime. The protection is also extended to a person that acts in accordance with a direction to preserve financial stability Australia (under proposed section 823F) or a recapitalisation direction (issued under proposed section 823L).

[Schedule 2, item 115, subsections 84A(1) and (2) of the RB Act]

- 1.303 The protection also captures members and APS employees, employees of the RBA or an agency or authority of the Commonwealth (for example, ASIC) whose services are made available to the RBA in connection with the exercise of any of the RBA's functions or powers. This means that if any of those employees acquire protected information in the course of fulfilling their functions, they are protected from civil and criminal proceedings.
[Schedule 1, items 46, 47 and 48, subsections 79A(6A), (6B), (8) of the RB Act; Schedule 2, item 115, subsection 84A(3) of the RB Act]
- 1.304 This protection would extend to the directed entity related bodies corporate, their respective current and former directors, other officers and its employees and third parties engaged to provide advice or services to the directed entity.

Interactions between regulators in a crisis

- 1.305 During resolution, it is intended that the RBA's powers to resolve a crisis will have priority over any powers ASIC takes in respect of CS facilities, and, in certain circumstances, Australian market licensees. Accordingly, ASIC:
- must act in a way that supports resolution of a CS facility licensee;
 - must not exercise rulemaking or directions powers without receiving a non-objection from the RBA; and
 - may comply with the RBA's request to exercise certain powers (no other conditions need to be met to exercise the power).
- 1.306 The RBA may request ASIC to issue directions or make market integrity rules during a crisis. ASIC's compliance with the RBA's request to exercise powers do not require any other conditions to be met. That is, ordinary conditions to issue a supervisory direction or make market integrity rules do not need to be met if the RBA has requested ASIC's assistance.
[Schedule 1, items 9, 12 and 14, sections 794AA, 798JA, 849B and of the Act]
- 1.307 If ASIC makes market integrity rules in accordance with the RBA's request, the Minister does not need to provide consent. However, ASIC must provide a copy of the RBA's request to the Minister.
[Schedule 1, items 10 and 11, subsections 798G(5A) and (6) of the Act]
- 1.308 Whilst a body corporate is under resolution, ASIC must not exercise any powers in respect of an Australian Market licensee or CS facility licensee that have clearing or settlement arrangements with the CS facility licensee that is subject to the crisis powers. without receiving a request or written consent from the RBA to exercise those powers. This includes making rules, giving advice or a direction to the licensee, or an act under the regulations.
[Schedule 1, item 14, section 849C of the Act]

- 1.309 These provisions are intended to allow for control over CS facilities that is necessary for the success of resolving distressed body corporates. Further, the regulatory interaction ensures close coordination between ASIC and the RBA over any actions with respect to CS facilities.
- 1.310 In the unlikely event that ASIC continues to exercise a relevant power after the RBA has provided reasons with the objection, then ASIC may escalate the matter to the Treasurer, who will decide the most appropriate action.

Chapter 2: FMI Reform – Crisis prevention (RBA powers)

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Outline of chapter

- 2.1 Schedules 1 and 2 provide the RBA with enforcement powers with respect to its role in supervising CS facilities to mitigate the risk of a crisis occurring.
- 2.2 All legislative references in this chapter are to the Corporations Act unless otherwise stated. Further, all references to “domestic CS facility licensee” in this chapter are references to a body corporate registered under Chapter 2A who is granted an Australian CS facility licence unless the contrary intention appears.

Context of amendments

- 2.3 The regulation of CS facilities is shared between ASIC and the RBA, where:
 - ASIC is responsible for licensing and compliance obligations of licensees; and
 - the RBA is responsible for maintaining the stability of Australia’s financial system by determining the Financial Stability Standards and assessing whether

- licensees have complied with the Financial Stability Standards and taken other necessary steps to reduce systemic risk.
- 2.4 To achieve this the RBA has a role in mitigating the risk of financial disturbances with potentially systemic consequences, and in responding if such a disturbance does occur. This role involves monitoring CS facilities and providing advice on emerging stress in these facilities.
- 2.5 The RBA currently does not have any enforcement powers to require CS facilities to take actions to promote financial stability. The amendments equip the RBA with enforcement powers in line with their objective of promoting financial system stability.
- 2.6 ASIC will continue to supervise and oversee CS facility licensees and will have enhanced supervisory powers in line with their role in regulatory oversight. Given the co-regulatory nature of CS facilities, the amendments clarify and define the roles of the RBA and ASIC to provide certainty to the market.

Summary of new law

- 2.7 The RBA will have a suite of increased general powers that may be used at any time. These powers intend to enhance supervision so the RBA can effectively prevent a crisis, including:
- imposing notification requirements;
 - issuing directions, including the power to request information;
 - resolution planning; and
 - setting resolvability standards.

Notification requirements

- 2.8 The amendments impose notification obligations on CS facility licensees to advise the RBA of a material change in circumstances. This has the effect of increasing the RBA's awareness of potential distressed CS facilities and mitigating the risk of a crisis materialising.

Directions

- 2.9 The RBA will be equipped with pre-crisis direction powers that aims to prevent a crisis from crystalising. Given the co-regulatory nature of CS facilities between the RBA and ASIC, providing a directions power to the RBA clarifies the RBA's role in the oversight of CS facilities with respect to financial system stability. Further, transferring the Ministerial directions powers to ASIC (see Schedule 3) assists in clarifying regulator responsibilities.

- 2.10 In particular, the RBA will have the power to direct a licensee to preserve financial stability and issue recapitalisation directions which is accompanied by a request to provide information from CS facility licensees and related bodies corporate. The information gathering power enables the RBA to request information to fulfill any of its functions, including resolution planning.

Resolution planning and resolvability standards

- 2.11 In addition to having a wide and flexible set of powers to intervene in a crisis, it is important that the RBA has clear powers to undertake resolution planning set appropriate resolvability standards for resolution planning, and to address potential barriers to the orderly resolution of a CS facility.
- 2.12 The RBA will be empowered to set resolvability standards that stipulate compliance with requirements and activities for classes of domestic CS facility licensees. The standards ensure that body corporates take actions to address issues concerning their resolvability for resolution purposes.
- 2.13 In a cross-border context, specifically for overseas CS facility licensees, resolution planning will include working with authorities in other jurisdictions to enable resolution actions to be applied in a coordinated manner where appropriate. Without this, there is a risk that the RBA's resolution powers (and other related provisions throughout) may have reduced effectiveness on a cross-border basis or may conflict with the actions or requirements of authorities in other jurisdictions. Such coordination is consistent with the RBA's current approach of working closely with supervisors in other jurisdictions in the case of overseas CS facility licensees.

Detailed explanation of new law

Notification obligations

- 2.14 In order to prevent a crisis from materialising, the RBA must be notified of certain circumstances to assess whether intervention is required. CS facility licensees and related bodies corporate must notify the RBA of specified events.

Events the RBA must be notified of

- 2.15 CS facility licensees must notify the RBA immediately once they become aware of any changes in their circumstances, including:
- failure, or likely failure, to comply with either the Financial Stability Standards or resolvability standards;
 - breaching, or likely to no longer meet, the obligation to do all things necessary to reduce systemic risk;

- the ability to continue providing critical CS facility services (including where external support is needed or where the entity has ceased, is ceasing or is likely to cease to provide critical CS facility services);
- financial viability is at risk or likely to be at risk, including financial viability risk in the absence of external support (for example, financial obligations that can no longer be met or an intention to suspend payment); or
- where a participant has met one or more of the default conditions in the operating rules of the CS facility, or is declared to be in default under those rules.

[Schedule 1, item 19, section 821BA of the Act]

2.16 CS facility licensees and related bodies corporates that are incorporated in Australia, must notify the RBA immediately once they become aware of any material changes in their circumstances that affect:

- the solvency of the body corporate;
- the financial position of the body corporate;
- changes to ownership of greater than 15% in voting power (including body corporates that are listed entities);
- changes to corporate structure; or
- the provision of one or more CS facilities that are critical to the functioning of the financial system.

[Schedule 1, item 21, sections 821H and 821J of the Act]

2.17 A CS facility licensee or related body corporate that is incorporated in Australia must provide the RBA with immediate written notification if it intends to:

- enter into an agreement or arrangement for the sale or disposal of any of its shares or shares of a holding company (this does not prevent the normal trading of shares in a listed entity); or
- propose a scheme, develop a plan or enter into a transaction to restructure or reconstruct the CS facility licensee or related body corporate.

[Schedule 1, item 21, sections 821H and 821J of the Act]

2.18 If the body corporate proposes to do a recapitalisation act, or develop a scheme or plan to restructure or reconstruction and does not provide written notice, then the act is invalid. However, the body corporate has the opportunity to write to the RBA to have the contravention disregarded. It is at the discretion of the RBA if it is considered appropriate to agree to disregard the contravention. If the RBA agrees to disregard the contravention, the act will be valid and have effect.

[Schedule 1, item 21, subsections 821H(2), (3), (4) and (5) of the Act]

- 2.19 Domestic CS facility licensees and related bodies corporate provide the RBA at least seven days' notice that an external administrator is to be appointed. The appointment of an external administrator indicates a potential default event and could trigger a termination right which has the potential to jeopardise the continuity of critical CS facility services. The prior notification offers the RBA the opportunity to understand the circumstances and to take appropriate and timely action.
[Schedule 1, item 21, subsection 821K(1) of the Act]
- 2.20 The RBA must approve the appointment of the external administrator. If the RBA does not approve and the external administrator is appointed, all actions in relation to the body corporate business are invalid.
[Schedule 1, item 21, subsections 821K(3) and (4) of the Act]
- 2.21 The notice period provides the RBA with time to consider the circumstances and decide if the RBA should exercise any of its resolution powers, including the appointment of a statutory manager. After receiving notice, the RBA may request the person to provide details of the application.
- 2.22 Between the time that a person notifies the RBA and an external administrator is appointed, there is a risk that directors of the body corporate are exposed to liability for insolvent trading. Therefore, the protection under subsection 588G(2) of the Act applies so that the director of the body corporate that provides notification is not exposed to risk during the period of notice expiring or the RBA providing consent.
[Schedule 1, item 21, subsection 821K(5) of the Act]

Mechanism to provide notification

- 2.23 The initial notification may be communicated verbally to the RBA with written notification following that. The immediate notification is intended to assist the RBA in determining the best method to prevent a crisis from eventuating. This has the effect of providing the RBA with awareness of potential distressed CS facility and will mitigate the risk of a crisis materialising.
- 2.24 Where a body corporate has notified ASIC of material changes, additional notification is not required to be provided to the RBA.
[Schedule 1, item 21, subsection 821J(5) of the Act]

Consequences of failing to notify

- 2.25 Failure to notify the RBA of a material change of circumstances or intended actions is a criminal offence of imprisonment for 2 years.
[Schedule 1, items 19 and 21, subsections 821BA(1), 821H(1), 821J(1) and 821K(2) of the Act]
- 2.26 A strict liability offence is considered appropriate in this instance as failure to notify of material changes or intended appointments may have detrimental impacts on the stability of the financial system in Australia
If the RBA is not given prior notice it risks the RBA's ability to effectively

consider the circumstances and take appropriate and timely action to protect financial system stability.

- 2.27 The penalty for the offence complies with the requirements of the *Government's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

Liquidators subject to notification requirements

- 2.28 Liquidators or potential liquidators will be subject to notification requirements due to their actions having a potential impact on the continuity of CS services or the stability of Australia's financial system.

- 2.29 A liquidator must give written notice to the RBA at least 7 days prior to making a court application under Chapter 5 of the Act in relation to a matter arising under the winding up or proposed winding up of a domestic CS facility licensee or a related body corporate. The written notice must include the details of the proposed application and the RBA is entitled to be heard on an application.

[Schedule 1, item 21, subsections 821L(1), (2) and (3) of the Act]

- 2.30 The RBA may request the liquidator or potential liquidator to provide additional information within a reasonable time about the application, winding up (or proposed winding up) of the body corporate or any other affairs of the body corporate. The liquidator or provisional liquidator must comply with this request.

[Schedule 1, item 21, subsections 821L(4) and (5) of the Act]

- 2.31 The requirement to give one week's written notice does not apply if the RBA gives the person prior written consent to the person making the application or appointment. For example, the RBA may consent to the application commencing immediately, with or without consenting to the actual order sought (the RBA may oppose the application but would still be entitled to be heard on the application).

- 2.32 The rationale behind the current legislative provisions applies equally whether an external administrator is appointed via the Court process or outside the Court process.

- 2.33 The RBA may take action against a liquidator who fails to comply with a written request to provide specified information in writing about the winding-up (or proposed winding-up) of a domestic CS facility licensee or related body corporate and the other affairs of the entity.

Directions

- 2.34 The RBA will be afforded new powers to issue directions to CS facility licensees to:

- comply with its obligations;
- increase compliance or reduce systemic risk;
- preserve stability in the Australian financial system;
- provide information to assist the RBA in performing its functions; and
- recapitalise.

Direction to comply with CS facility licensee obligations, increase compliance, reduce systemic risk or ensure effective crisis resolution

2.35 The RBA is empowered to issue a direction to a CS facility licensee to do specified things that the RBA believes will promote compliance by the licensee with those obligations if it considers a CS facility licensee has not fulfilled the obligation to:

- comply with the Financial Stability Standards determined under section 827D of the Act;
- comply with the resolvability standards under section 827DA of the Act;
- do all things reasonably practicable to reduce systemic risk in the provision of the facility's services;
- comply with the notification obligations under section 821BA; or
- comply with the obligation to give the RBA assistance, including in a crisis, under section 821C(3).

[Schedule 1, items 18 and 20, subparagraph 821A(1)(aa)(i) and subsection 821C(3) of the Act; Schedule 2, item 95, subsections 823DB(1) and (2), 823E(1) and section 823FA of the Act]

2.36 This power is transferred from ASIC to the RBA, consistent with streamlining and clarifying regulator roles to produce the outcome of the RBA having oversight of CS facilities in relation to financial stability and the reduction of systemic risk.

2.37 The process of issuing a direction is broadly the same, with the main intention to simplify the ability for the RBA to issue a direction on the basis that it considers that a CS facility licensee is not complying with the Financial Stability Standards. Under the current law to issue a direction to reduce systemic risk, the RBA may request ASIC to issue a direction, however ASIC is ultimately the decider on whether to issue the direction or not.

Removing the qualifier to complying with the Financial Stability Standards

2.38 A CS facility licensee is currently required to comply with the Financial Stability Standards to the extent that it is reasonably practicable to do so. This qualifier has the potential to prevent the effective exercise of the RBA issuing directions as the issuance could be challenged on the basis that the measures to

achieve compliance with the Financial Stability Standards exceed what is reasonably practicable for the CS facility licensee.

- 2.39 The amendments remove the qualifier for complying with the Financial Stability Standards. This means CS facility licensees are required to comply with standards in force under section 827D and, to the extent that it is reasonably practicable to do so, continue to do all other things necessary to reduce systematic risk.

[Schedule 2, item 85, paragraphs 821A(1)(aa) and (ab) of the Act]

Direction to preserve stability in the Australian financial system

- 2.40 Where the RBA considers that a CS facility licensee is conducting, or likely to conduct, its affairs in a way that may cause or promote instability in the Australian financial system, the RBA may issue a direction outlining a specific course of action the CS facility licensee must take. The RBA may exercise these powers if:

- the licensee is likely to be unable to meet its obligations - either by the RBA being informed or the RBA evaluating the licensee;
- the RBA considers the licensee may become unable to meet its obligations, operate the facility consistently with the stability of the financial system without external support; or
- the RBA considers the licensee is conducting or is likely to conduct its affairs in a way that may cause or promote instability in the Australian financial system.

[Schedule 2, item 95, subsection 823F(2) of the Act]

- 2.41 The regulations may specify a particular form of support is not external support.

[Schedule 2, item 95, subsection 823F(3) of the Act]

- 2.42 The following are types of specific directions the RBA may issue to a CS facility licensee:

- to do, or refrain from doing, anything under the CS facility licensee's operating rules or procedures (including documents, determinations, practice notes or handbooks relating to the licensee's operation, conduct of participants in the facility, or the structure and operation of electronic communications);
- amend its operating rules or procedures;
- a recapitalisation direction (refer below);
- not to pay a dividend on any shares;
- not to repay any amount paid on shares; or
- exercise rights under a contract or agreement (including termination rights).

[Schedule 2, item 95, subsection 823F(1) of the Act]

- 2.43 Where a CS facility licensee is directed to change the operating rules, the licensee must provide notice to ASIC under section 822D(1) of the Act. However, the changes to the rules will continue to have effect regardless if notification is provided after 21 days under subsection 822D(2) of the Act. ASIC may not disallow changes under section 822E of the Act when a CS facility is directed to do so.

[Schedule 2, item 95, section 823S of the Act]

Recapitalisation direction

- 2.44 In accordance with an expert's report on the fair value of shares or after working out the fair value of other capital instruments, the RBA may issue a recapitalisation direction to a domestic CS facility licensee to deal with the following:

- increase the licensee's level of share capital to a specified level;
- issue one or more classes of shares or right to acquire shares in the licensee; or
- issue one or more capital instruments prescribed by the regulations.

[Schedule 2, item 95 and 102, paragraph 823F(1)(c) and section 9 of the Act]

Expert report

- 2.45 Prior to issuing a recapitalisation direction relating to shares, the RBA must obtain an expert report on the fair value of the shares or rights in the domestic CS facility licensee. The report cannot be completed by an associate (within the meaning of Division 2 of Part 1.2 of the Act) of the body corporate.

[Schedule 2, item 95, subsection 823M(1) of the Act]

- 2.46 The report must set out the fair value of each share or right, and the reasons for the expert forming that opinion. In addition, the report must specify any monetary or non-monetary interest that could affect the expert's judgment, including any connection between the expert, the licensee and persons associated with the licensee. The RBA must consider the report.

[Schedule 2, item 95, subsection 823M(2) of the Act]

- 2.47 In determining the fair value of each share in a CS facility licensee, the expert must:

- assess the licensee's value as a whole in accordance with any assumptions the Minister provides;
- allocate that value among the classes of shares that have been issued or that the RBA proposes to be issued in the direction (taking into account financial risk and voting distribution rights of the classes);
- then after that allocation, allocate the value of each class pro rata among the shares in the class that has been issued, or that the RBA proposes to be issued.

[Schedule 2, item 95, subsection 823N(1) of the Act]

- 2.48 The written assumptions the Minister may provide the expert include the valuation of the CS facility licensee and the valuation of rights to acquire shares in the CS facility licensee. The Minister may not amend the assumptions provided to the expert, but is permitted to revoke the assumptions in writing. The written assumptions or subsequent revocation is not a legislative instrument.
[Schedule 2, item 95, subsection 823N(3), (4) and (5) of the Act]
- 2.49 Where the RBA gives a direction to relating to capital instruments, the RBA must comply with any requirements prescribed in the Regulations for ascertaining the fair value of capital instruments or classes of capital instruments.
[Schedule 2, item 95, section 823P of the Act]

Exception

- 2.50 An expert report is not required to be obtained where the RBA considers that obtaining the expert report would detrimentally affect the continuity of critical CS facility services or financial stability. Similarly, failure for the RBA to obtain an expert report, determine the fair value of shares or comply with the requirements in the regulations relating to capital instruments does not affect the validity of a recapitalisation direction or anything done in complying with the direction.
[Schedule 2, item 95, subsection 823M(4) and section 823Q of the Act]
- 2.51 The RBA is may publish details of the report or details that relate to the report.
[Schedule 2, item 95, subsection 823M(3) of the Act]
- 2.52 As soon as practicable after complying with a recapitalisation direction, a domestic CS facility licensee or related body corporate must provide written notice to members of the body corporate (including those who were members of the licensee just before the issue), identifying the issue and explaining its effect on their interests as members.
[Schedule 2, item 95, subsection 823L(1) of the Act]
- 2.53 The acquisition of shares or other capital instruments as a result of compliance with a recapitalisation direction is specifically authorised and is disregarded in working out whether a person has contravened restrictive trade practices under subsection 51(1) of the CCA.
[Schedule 2, item 95, section 823R of the Act]

Direction to provide information

- 2.54 The RBA may give a written direction to a CS facility licensee to provide the RBA with specified information or documents containing specified information relating to the CS facility licensee’s business where:
- the RBA reasonably believes that the CS facility licensee has information or documents and can give that information or the documents; and

- that information or documents would assist the RBA to perform its functions under Part 7.3 of the Act.

[Schedule 2, item 95, subsection 823G(1) and (2) of the Act]

2.55 The direction may specify the form and manner that the information or documents are to be provided.

[Schedule 2, item 95, paragraph 823G(3)(b) of the Act]

Process of directions

Variation or revocation and publication

2.56 The RBA may vary or revoke a direction but is required to provide written notice to the CS facility. Upon revocation of a direction, the direction ceases to have effect. The RBA is permitted to publish the details of directions, variations or revocations to a direction as it considers appropriate.

[Schedule 2, item 95, section 823J and 823T of the Act]

Referral to the Minister

2.57 A licensee may refer a direction to comply with licensee obligations or to give information to the Minister, where the RBA must comply immediately. If the Minister considers it appropriate, the Minister may require the RBA to vary or revoke the direction, where the RBA must comply immediately.

[Schedule 2, item 95, subsections 823DB(4) and (5) of the Act]

Consultation

2.58 The RBA must consult ASIC before giving, varying or revoking a direction that relates to reduction of systemic risk under section 823E of the Act or a recapitalisation direction under section 823F of the Act. However, if the RBA fails to consult with ASIC, the direction is not invalidated and continues to have effect.

[Schedule 2, item 95, section 823K of the Act]

Reviewability

2.59 For any directions issued by the RBA under Part 7.3 of the Act, applications may be made to the tribunal for review.

[Schedule 1, item 31, subsection 1317B(1) of the Act]

Compliance with RBA direction

2.60 CS facility licensees must comply with all directions issued by the RBA.
[Schedule 2, item 95, subsections 823DB(3), 823E(3), 823F(5), 823FA(3), 823G(4), 823L(2) of the Act]

2.61 Directions issued by the RBA must specify a reasonable period for the CS facility licensee to comply with the direction. A direction concerned with preserving the stability of the financial system may deal with multiple matters.

[Schedule 2, item 95, subsections 823DB(2), 823E(2), 823F(4), 823FA(2), 823G(3) of the Act]

Contravention

- 2.62 Failure to comply with the RBA’s direction to provide information is 100 penalty units for each day or part of day the offence is committed, for an individual and 1,000 penalty units for a body corporate.
[Schedule 2, items 95 and 100, subsection 823G(4) and Schedule 3 of the Act]
- 2.63 Failure to comply with the RBA’s specific direction to preserve stability incurs a maximum penalty of 2 years imprisonment.
[Schedule 2, items 95 and 100, subsection 823F(5) and Schedule 3 of the Act]
- 2.64 A CS facility must comply with a recapitalisation direction despite the Act, its constitution, its operating rules or procedures, any contract or arrangement to which it is a party, and any listing rules of a financial market in whose official list it is included.
[Schedule 2, item 95, subsection 823L(4) of the Act]
- 2.65 CS facility licensee has additional compliance obligations under a recapitalisation direction to notify members of the body corporate of the result of a recapitalisation direction. Failure to notify members is a 100 penalty unit offence per day or part of each day the offence is committed for an individual and 1,000 penalty units for a body corporate.
[Schedule 2, items 95 and 100, subsection 823L(2) and (3) and Schedule 3 of the Act]

Orders

- 2.66 Where a CS facility licensee fails to comply with a direction, the RBA may apply to court. The Court may make orders on the application of the RBA (alone or jointly with ASIC), if it appears to the Court that a person has contravened a direction. However, the Court can only make such an order if the Court is satisfied that the order would not unfairly prejudice any person. In addition, in the event of non-compliance with a recapitalisation direction, the RBA may apply to the Court for an order that the licensee comply with the recapitalisation direction. The Court may order the CS facility licensee to comply with the direction
[Schedule 2, item 95, section 823H and subsection 823L(3) of the Act]
- 2.67 The RBA may apply itself or jointly with ASIC for an injunction in relation to a provision under Part 7.3.
[Schedule 2, item 95, section 823U of the Act]

Resolution planning

- 2.68 It is at the discretion of the RBA to make a resolution plan for any CS facility licensee. The RBA may subsequently review, vary or revoke the resolution plan.
[Schedule 1, item 30, section 827DB of the Act]
- 2.69 To facilitate this resolution planning, the RBA may direct a body corporate to provide information or documents to the RBA.
[Schedule 1, item 30 section 827DC of the Act]
- 2.70 Resolution planning is important to crisis prevention by addressing potential barriers to orderly resolution. It is at the RBA's discretion to determine the frequency, form and notification requirements for resolution planning.

Resolvability standards

- 2.71 The RBA has the power to set resolvability standards to ensure that domestic CS facility licensees and their related bodies corporate conduct their affairs in a way that would facilitate resolution of the domestic CS facility licensee if required. The RBA may assess domestic CS facility licensees and related bodies corporate against the standards.
[Schedule 1, item 30, subsection 827DA(1) of the Act]
- 2.72 The resolvability standards may stipulate different requirements and activities to be complied with in different situations.
[Schedule 1, item 30, subsection 827DA(4) of the Act]

Compliance by affected entities

- 2.73 The resolvability standards are to be complied with by all domestic CS facility licensees, related bodies corporate of a domestic CS facility licensee or a specified class of CS facility licensees. The RBA will have the power to exempt specific CS facility licensees or classes of CS facility licensees. These entities may be exempt from all or part of the resolvability standards.
[Schedule 1, item 30, subsection 827DA(2) of the Act]
- 2.74 Body corporates are to comply with the resolvability standards when it comes to force which is either the day the determination is made or when the determination specifies commencement. The standards cease to apply when it is revoked.
[Schedule 1, item 30, subsection 827DA(5) of the Act]
- 2.75 In the event of any conflict between the resolvability standards and any other rules, including the market integrity rules, the resolvability standards will prevail.
[Schedule 1, item 30, subsection 827DA(8) of the Act]

- 2.76 A CS facility licensee is required to provide immediate notification to the RBA that it is likely to fail to comply with the standards. This obligation is the same as for the Financial Stability Standards.
[Schedule 1, item 19, section 821BA of the Act]

Process of making standards

- 2.77 Prior to making the resolvability standards, the RBA must consult with affected bodies corporate and ASIC. The RBA may subsequently vary or revoke the standard where the RBA must follow a similar procedure to notify ASIC and affected licensees.
[Schedule 1, item 30, subsection 827DA(3), 6), (7) of the Act]

Assessing compliance with resolvability standards

- 2.78 In addition to assessing compliance with the Financial Stability Standards, the RBA may assess how well a domestic CS facility licensee and its related bodies corporate are complying with their respective obligations under any resolvability standards that apply. In making this assessment, the RBA may take account of any information and reports it considers appropriate.
[Schedule 1, items 22 and 23, subsection 823CA(1) of the Act]
- 2.79 Assessing compliance with resolvability standards is not intended to impose a recurring frequency, or to require a written report on the assessment to the Minister (noting this obligation will be removed under Outline of chapter Schedule 3) and ASIC (or other person) or to publish (all or part of) a written report on an assessment (as is consistent with sections 823CA(1A) to (5) of the Act).

Information gathering powers

- 2.80 In assessing compliance, the RBA is afforded specific information gathering powers to assess resolvability of a domestic CS facility licensee or related body corporate. If the RBA reasonably believes that a body corporate can provide documents or information, the RBA may direct an entity to provide specific information that will assist in assessing compliance with the resolvability standards. The direction to provide information must specify a reasonable time to comply with the direction and may specify the form or manner the information is to be provided.
[Schedule 1, item 24, section 823CB of the Act]

Resolvability standards to be a legislative instrument

- 2.81 The resolvability standards will be a legislative instrument for the purposes of the Legislation Act. The power of the RBA to set these standards will be similar to the existing provision for the RBA to set Financial Stability Standards in section 827D of the Act.
[Schedule 1, item 30, subsection 827DA(1) of the Act]

- 2.82 The RBA's Financial Stability Standards are currently available on the RBA's website. To reflect the introduction of the resolvability standards, amendments are made to clarify that the Financial Stability Standards are a legislative instrument
[Schedule 1, items 26, 27, 28 and 29, subsections 827D(1), (6), (7), (8), (9) and (10) of the Act; Schedule 3, items 136 and 137, subsections 827F(1), (6), (7) and (10) of the Act]
- 2.83 Subsections 56(2) and (3) of the Legislation Act requires legislative instruments to be published on the Gazette and will continue to apply. The amendment does not change the form of the Financial Stability Standards but is merely a technical amendment to provide clarity.

Consequences of failing to comply with the standards

- 2.84 Where the RBA has identified an impediment to comply with the resolvability standards or an impediment to resolution, the RBA may request the domestic CS facility licensee or a related body corporate to provide a proposed solution. Following the proposed solution provided by the entity, the RBA may issue a direction if it considers the proposed solution is ineffective or not implemented within a reasonable time. This is part of the resolvability direction specified under the RBA's general direction powers.
- 2.85 Where the RBA determines a CS facility licensee has failed to comply with the resolvability standards the RBA may direct the licensee to comply (under section 823FA of the Act).
- 2.86 The RBA may issue a resolvability direction as part of the power to set resolvability standards. The resolvability direction may be issued to either a domestic CS facility licensee or a related body corporate to:
- take a specified action to comply with the resolvability standards; or
 - take a specified action to address an impediment to the effective exercise of the resolution powers.
- [Schedule 2, item 95, section 823FA of the Act]***

Power to require an expert report

- 2.87 The RBA has the power to obtain an expert report. The power to obtain an expert report provides the RBA with timely and sufficient access to appropriate expertise from an independent source that will assist in fulfilling their oversight and supervision of CS facility licensees.
- 2.88 The RBA may appoint a person or require a CS facility licensee to appoint a person to provide an expert report on specified matters relating to the licensee and relevant to fulfilling the RBA's functions. The RBA must give notice of the appointment to the CS facility licensee.
[Schedule 2, item 94, subsection 823BB(1) and (2) of the Act]

- 2.89 Where the RBA appoints a person, written notice must be provided to the expert and a fee must be determined equal to the RBA's expenses in appointing and paying the expert to provide the report. The CS facility licensee will be responsible for the fee involved in appointing expert, which is payable to the RBA.
[Schedule 2, item 94, subsection 823BB(1) and (6) of the Act]
- 2.90 Where the CS facility licensee is directed to appoint a person to produce an expert report, the CS facility licensee is required to pay the expert directly. If the RBA has appointed an expert, the CS facility licensee must pay the RBA within 30 days of receiving the notice.
[Schedule 2, item 94, subsection 823BB(2) of the Act]
- 2.91 A person appointed to make an expert report must be a person that has the necessary skills to make a report on the specified matter and must be a person nominated or approved by the RBA (the RBA approves where an appointment is made by the CS facility licensee).
[Schedule 2, item 94, subsection 823BB(3) of the Act]
- 2.92 The CS facility licensee must give assistance to the appointed person preparing an expert report as reasonably required.
[Schedule 2, item 94, subsection 823BB(5) of the Act]

Contravention

- 2.93 Failure to comply with a requirement to provide an expert report or give assistance is a criminal offence with a maximum penalty of 2 years imprisonment.
[Schedule 2, items 94 and 99, subsections 823BB(4) and (5) and Schedule 3 of the Act]

Power to require a special report

- 2.94 To complement the RBA's power to require a special report, the RBA may also require an expert report. The existing power to require a special report on specified matters is formally transferred from the Minister to ASIC, as detailed in Schedule 3.
- 2.95 The RBA may give a CS facility licensee written notice requiring the licensee to give the RBA a special report on specified matters.
[Schedule 2, item 94, subsection 823BAA of the Act]
- 2.96 The licensee must give the special report to the RBA within the time required by the notice. Failure to do so incurs a maximum penalty of 2 years imprisonment.
[Schedule 2, items 94 and 99 subsection 823BAA(2) and Schedule 3 of the Act]

Other powers

- 2.97 The RBA is afforded additional powers that mirror ASIC’s existing powers, such as the power to compel a licensee to give the RBA access to a facility, and the ability to exempt licensees from certain obligations. These powers reflect the vital function the RBA has in oversight of CS facilities that contribute to financial system stability in Australia.

Obligation to give RBA access to the facility

- 2.98 The existing obligation to provide ASIC access to a CS facility under section 821D of the Act is extended to the RBA so that an authorised person of the RBA may also access the CS facility.
[Schedule 2, items 86, 87 and 88, section 821D of the Act]
- 2.99 Failure to provide access to the RBA attracts the existing penalty for failure to comply with the obligation to give ASIC access, being a maximum penalty of 2 years imprisonment.
[Schedule 2, item 99 Schedule 3 of the Act]

Exemptions

- 2.100 The RBA is empowered to exempt CS facilities from the obligation of a CS facility license to comply with the Financial Stability Standards.
- 2.101 The RBA may vary the exemption to impose additional conditions or revoke the exemption entirely.
[Schedule 3, item 78, section 820CA of the Act]

Consequential amendments

- 2.102 The ALRC’s recommendation to introduce a single definition has been adopted for updating the definition of the RBA. Amendments are made throughout Chapter 7 to accommodate this change.
[Schedule 2, items 102 to 114, Subsection 821C(3), Subsection 823C(3), Subsection 823CA(1), Paragraph 824B(2)(d), Paragraphs 827A(2)(h) and (3)(d), Section 827C, Subsection 827D(1), Subsections 901B(4) and (6), Subparagraph 901J(1)(b)(ii), Paragraph 904B(2)(c), Paragraph 904D(1)(c), Subsection 908BR(1) of the Act]

Commencement, application, and transitional provisions

Directions to reduce systemic risk

2.103 Given that the directions power to reduce systemic risk under section 823E of the Act is transferred from ASIC to the RBA, any directions that were issued by ASIC and in force before the commencement of Schedule 2 will continue in force as if the RBA had issued the direction.

[Schedule 2, item 143, section 1706AL of the Act]

Chapter 3: FMI Reform - Enhancing and streamlining ASIC's licensing and supervisory powers

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Outline of chapter

- 3.1 Schedule 2 of the Bill provides for new and enhanced regulatory powers for ASIC in relation to FMI entities. Schedule 3 transfers certain existing Ministerial powers relating to the licensing and supervision of CS facilities and financial markets to ASIC and the RBA.
- 3.2 All legislative references in this chapter are to the Corporations Act unless otherwise stated.

Context of amendments

- 3.3 The 2020 advice to Government concluded that regulators required additional supervisory and enforcement powers to most effectively monitor and manage the risks associated with FMI entities and promote the reliability and integrity of the markets that they support.
- 3.4 The 2020 advice to Government found that, currently, the Minister has operational powers that more appropriately sit with the regulators, while ASIC has powers that more appropriately sit with the RBA. Formally redistributing these powers will better distinguish the regulators' responsibilities from the strategic role of Government and align the regulators' powers with their respective mandates.
- 3.5 The amendments in Schedule 2 strengthen the regulators' supervisory powers and broaden the range of enforcement tools they have available. This will give the regulators significantly more capacity to monitor the ongoing conduct of FMI entities, identify risks as they emerge, and take appropriate action to prevent those risks from escalating.
- 3.6 The amendments in Schedule 3 redistribute various Ministerial powers that are currently delegated by the Minister to ASIC under the *Ministerial Powers (ASIC) Delegations 2021* in the primary law. CS facilities are co-regulated by ASIC and the RBA, and so the RBA has also received powers in relation to CS facility licensees.
- 3.7 The amendments introduced in this Bill ensure that the distribution of responsibilities is consistent with comparable regimes and international best practice.

Summary of new law

- 3.8 Schedules 2 and 3 to the Bill provide for the streamlining and enhancement of supervisory and licensing powers to promote financial stability and financial markets that are stable, fair, orderly and transparent.
- 3.9 The amendments in Schedule 2:
- Introduce a requirement for domestic CS facility licensees to be registered under Chapter 2A of the Act;
 - ensure Ministerial approval is required for changes in control in all widely held market bodies, with such bodies being declared by ASIC; and

- implement a fit, proper and competent standard for individuals performing certain roles or carrying out certain functions in licensed entities.

3.10 ASIC is provided with new powers to:

- determine that a particular overseas financial market or CS facility has a material connection with Australia in order to provide certainty for all stakeholders about the scope of the Australian licensing regime;
- request information about a financial market or CS facility operated by a body corporate related to considering if a connection with Australia is material;
- take licensing action in a broader set of circumstances to safeguard the integrity of the licensing regime;
- declare a financial market to be a declared financial market or a body to be a widely held market body;
- require an expert report in relation to licensed entities;
- make FMI banning orders against certain individuals who do not meet the fit, proper and competent standard;
- approve proposals to acquire more than 15% of the voting rights in a domestically incorporated licensee (other than a widely held market body); and
- make rules (including emergency rules) in respect of operators of licensed CS facilities and participants in licensed CS facilities.

3.11 In addition, the amendments in Schedule 2 streamline some of ASIC’s existing directions powers and remove the limit on the period during which certain directions issued by ASIC are effective.

3.12 The amendments in Schedule 3 transfer certain supervisory and licensing powers that previously sat with the Minister (and are delegated to ASIC under the *Ministerial Powers (ASIC) Delegations 2021*) to ASIC, and in some circumstances, the RBA. These powers are outlined in the table below.

Table 3.1 Transfer of the Minister’s powers under Chapter 7

Provisions of the Corporations Act 2001	Description of the function or power	Minister’s power is transferred to the following regulator(s)
Licensed markets		
section 791C	Issue/revoke/vary an exemption from all or	ASIC

	specified provisions of Part 7.2 of the Corporations Act	
section 792F	Direct audit of annual report	ASIC
section 792H	Approve change of country by foreign licensee	ASIC
section 793E	Disallow changes to operating rules	ASIC
section 794A	Issue/vary/revoke directions	ASIC
section 795B	Issue domestic and overseas licence	ASIC
section 795C	Gazette the licence	ASIC
section 796A	Impose/vary/revoke conditions on licence	ASIC
section 797A	Vary licence to take into account name change	ASIC
section 797B	Immediately suspend or cancel licence	ASIC
section 797C	Suspend or cancel licence following hearing and report	ASIC
section 797D	Effect of suspension	ASIC
section 797E	Vary or revoke suspension	ASIC
section 797F	Publication of notice of suspension or cancellation	ASIC
section 798M	Issue/revoke/vary exemption from all or specified provisions of Part 7.2A of the Corporations Act	ASIC
<i>Licensed CS facilities</i>		
section 820C	Issue/revoke/vary exemption from all or specified provisions of Part 7.3 of the Corporations Act	ASIC (and the RBA for certain exemptions in relation to CS facilities)
section 821E	Direct audit of annual report	ASIC
section 821F	Approve change of country by foreign licensee	ASIC
section 822E	Disallow changes to operating rules	ASIC

section 823A	Issue/vary/revoke directions	ASIC/RBA
section 824B	Issue domestic and overseas licence	ASIC
section 824C	Gazette the licence	ASIC
section 825A	Impose/vary/revoke conditions on licence	ASIC
section 826A	Vary licence	ASIC
section 826B	Immediately suspend or cancel licence	ASIC
section 826C	Suspend or cancel licence following hearing and report	ASIC
section 826D	Effect of suspension	ASIC
section 826E	Vary or revoke suspension	ASIC
section 826F	Publication of notice of licence suspension or cancellation	ASIC
<i>Compensation regimes for financial markets</i>		
section 881D	Consider whether market will be covered by Division 4 of Part 7.5 of the Corporations Act	ASIC
section 882A	Approve compensation arrangements with grant of licence	ASIC
section 882B	Approve compensation arrangements after licence is granted	ASIC
section 882C	Revoke an approval of compensation arrangements	ASIC
section 882D	Issue directions to licensee	ASIC
section 884B	Disallow changes to compensation rules	ASIC
section 884C	Approve changes to compensation arrangements	ASIC
section 885B	Requirements for compensation arrangements to be adequate	ASIC
section 885C	Adequacy of compensation arrangements – losses to be covered	ASIC

section 885J	Adequacy of compensation arrangements - other matters to be taken into account	ASIC
section 890H	Disallow changes to the operating rules of the Securities Exchanges Guarantee Corporation	ASIC
section 892K	Request a risk assessment report	ASIC
section 893B	Issue/revoke exemption from all or specified provisions of Part 7.5 (compensation regimes) and vary/revoke an exemption	ASIC

Comparison of key features of new law and current law

Table 3.2 Comparison of new law and current law

<i>New law</i> <i>(in relation to the application of Schedule 2)</i>	<i>Current law</i>
ASIC may grant an Australian CS facility licence to a body corporate registered under Chapter 2A, or a foreign body corporate operating overseas CS facilities	The Minister may grant an Australian CS facility licence to a body corporate, or a foreign body corporate operating overseas CS facilities.
ASIC may immediately suspend or cancel the licence of a market licensee, CS facility licensee, derivative trade repository licensee or benchmark administrator licensee for lack of use.	No equivalent.
ASIC may declare a financial market to be a declared financial market and a body corporate to be widely held market body.	Corporations Regulations specify prescribed financial markets and widely held market bodies for the purposes of the Act.
The Minister may grant an application for approval lodged with ASIC to have voting power of more than 15% in a particular widely held market body (including the ASX Limited).	The Minister may grant an application for approval lodged with ASIC to have voting power of more than 15% in a particular widely held market body (other than the ASX Limited).

<p>New law (in relation to the application of Schedule 2)</p>	<p>Current law</p>
	<p>The regulations may prescribe for a higher percentage than 15% of voting power in the ASX Limited.</p>
<p>ASIC may grant an application for approval to have voting power of more than 15% in a body corporate registered under Chapter 2A that is a market licensee, a CS facility licensee, a derivative trade repository licensee or a benchmark administrator licensee (other than a widely held market body).</p>	<p>No equivalent.</p>
<p>ASIC may impose conditions or additional conditions or vary or revoke conditions on an Australian market licence and a CS facility licence.</p> <p>The conditions may include limits on a licence.</p>	<p>The Minister may impose conditions or additional conditions or vary or revoke conditions on an Australian market licence and a CS facility licence.</p> <p>The Minister’s power is delegated to ASIC under the <i>Ministerial Powers (ASIC) Delegations 2021</i>.</p>
<p>ASIC may make rules for the purposes of promoting the provision of fair and effective services by licensed CS facilities.</p>	<p>No equivalent.</p>
<p>ASIC may give a direction to a market licensee, a CS facility licensee and derivative trade repository licensee.</p> <p>The period for which the direction has effect is not time limited.</p>	<p>ASIC may only give a direction to a market licensee, a CS facility licensee and derivative trade repository licensee if ASIC considers it appropriate after the licensee does not take actions after receiving ASIC’s advice (and reasons) that ASIC is of the opinion that it is necessary, or in the public interest, to give a direction.</p> <p>The direction has effect for a period of up to 21 days.</p>
<p>ASIC is given the power to require a CS facility licensee or market licensee to give ASIC a special report.</p> <p>ASIC is also given the power to require a CS facility licensee, market licensee,</p>	<p>The Minister’s power to require a CS facility licensee or market licensee to give ASIC a special report including an audited special report is delegated to ASIC under the <i>Ministerial Powers (ASIC) Delegations 2021</i>.</p>

<p>New law (in relation to the application of Schedule 2)</p>	<p>Current law</p>
<p>derivative trade repository licensee and benchmark administrator licensee to give ASIC an expert report.</p>	
<p>ASIC may declare an individual who is involved in a market licensee, a CS facility licensee, a derivative trade repository licensee or a benchmark administrator licensee is disqualified taking into account such matters as the individual's fame, character and integrity. ASIC only needs to be satisfied that the individual is unfit to be involved in the licensee.</p>	<p>ASIC may declare an individual who is involved in a market licensee, a CS facility licensee, a derivative trade repository licensee or a benchmark administrator licensee is disqualified taking into account such matters as the individual's fame, character and integrity. ASIC may make such a declaration only if ASIC is satisfied that, because the individual is unfit to be involved in the licensee, there is a risk that the licensee or applicant will breach its obligations under Chapter 7 of the Act if the declaration is not made.</p>
<p>A new general obligation on a market licensee, a CS facility licensee, a derivative trade repository licensee and a benchmark administrator licensee to ensure that individuals performing certain roles are fit, proper and competent for that role.</p> <p>ASIC may make FMI banning orders if ASIC has reason to believe that an individual is not fit, proper and competent.</p>	<p>No equivalent.</p>
<p>A financial market or CS facility is taken to be operated in this jurisdiction if it is operated by a body corporate that is registered under Chapter 2A or ASIC declares that it has a material connection with this jurisdiction.</p>	<p>A financial market or CS facility is taken to be operated in this jurisdiction if it is operated by a body corporate that is registered under Chapter 2A (but not limited to this circumstance).</p>
<p>ASIC is directly empowered to make decisions on the licensing of financial markets and CS facilities, overseeing licensee compliance, and disallowing operating rule changes.</p>	<p>Certain Ministerial powers under Chapter 7 of the Act are delegated to ASIC under the <i>Ministerial Powers (ASIC) Delegations 2021</i>. This includes powers over the licensing of financial markets and CS facilities, overseeing licensee compliance, disallowing operating rule changes.</p>

Detailed explanation of new law

Amendments relating only to CS facilities

Who may be granted an Australian CS facility licence

- 3.13 An Australian CS facility licence may be granted to either an Australian body corporate, or to a foreign body corporate operating an overseas CS facility. An Australian body corporate is a body corporate that is registered under Chapter 2A (that is, incorporated in this jurisdiction). Foreign bodies corporate incorporated outside of Australia will be registered under Division 2 of Part 5B.2.
- 3.14 Currently, the Minister may grant Australian CS facility licences. These amendments transfer the power to grant CS facility licenses to ASIC. The administrative process remains the same, where ASIC must be satisfied with the same criteria the Minister had to be satisfied under, and also have regard to the same matters in section 827A in deciding whether to grant a licence. Similarly, ASIC must not grant an Australian CS facility licence unless forty-two days have passed since the application was made for the licence and ASIC has not declared the applicant is disqualified within that period.
[Schedule 2, items 3 to 9, section 824B of the Act]
- 3.15 ASIC must consult the RBA before granting an applicant an Australian CS facility licence under section 842B. However a failure to consult does not invalidate the grant of the licence.
[Schedule 2, item 9, subsection 824B(4)]
- 3.16 The amendments create a general licence condition for CS facility licences that if the licence was granted under subsection 824B(1), the licensee must be a body corporate registered under Chapter 2A of the Act.
[Schedule 2, item 1, paragraph 821A(1)(ea) of the Act]
- 3.17 Subsection 824B(3), which contains the requirement that a foreign body corporate be registered under Division 2 of Part 5B.2, is repealed and instead the requirement is retained as a general obligation in subsection 821A(1)(e).
[Schedule 2, item 9, subsection 824B(3) of the Act]

CS facility rules

Power to make rules

- 3.18 The amendments provide ASIC with a power to make rules for the purposes of promoting the provision of fair and effective services by licensed CS facilities. Schedule @ defines such rules as *CS facility rules*.
[Schedule 2, items 69 and 72, sections 9 and 826H of the Act]

Application of the rules

- 3.19 The rules may impose obligations on both operators and participants of licensed CS facilities, as well as any other person prescribed in the Regulations. The application to participants reflects the key conduit for the provision of clearing and settlement to financial markets, and also of risk to the CS facility. However, the CS facility rules do not apply in relation to overseas CS facilities.
[Schedule 2, item 72, section 826J of the Act]

Difference between CS services rules

- 3.20 The CS facility rules differ from CS services rules. CS services rules cannot impose requirements dealing with the activities, conduct and governance arrangements of CS facility licensees and associated entities, in relation to CS services, unless those services are of a type covered by a determination made by the Minister. Such a determination is intended only to be made for classes of CS services that meet certain criteria, particularly regarding the state of competition in the market for those services. CS facility rules are not constrained to the provision of certain services.

Exemption

- 3.21 ASIC or the Regulations may exempt a person or class of persons from all or specified provisions in Division 3A (establishing the rules), regulations made pursuant to the Division, or all of specified provisions of the CS facility rules. If the exemption applies to a class of persons, the exemption is made by way of disallowable instrument. Where there is a conflict between an exemption by the regulations and an exemption prescribed by ASIC, the exemption in the regulations prevails.
[Schedule 2, item 72, sections 826S, 826T, 826U and 826V of the Act]
- 3.22 ASIC may only exempt a class of persons or facilities if a notice is published on ASIC's website allowing a reasonable period for relevant operators to make a submission and the submission period has ended.
[Schedule 2, item 72, subsection 826U(2)]
- 3.23 The ability to exempt or modify by Regulations a specific class from the rules is consistent with section 798L (relating to market integrity rules), section 907E (relating to derivative trade repository rules) and section 908EB (relating to the benchmark rules). Exemption by ASIC is consistent with the Minister and ASIC's power to provide exemptions with respect to financial markets under section 798M, derivative trade repositories under section 907D, and financial benchmark administrators under section 908EB of the Act.

Consultation and consent requirements

- 3.24 ASIC must not make a rule unless ASIC has:
- consulted the public about the proposed rule;

- consulted any other person or body as required by regulations; and
 - consulted the RBA.
[Schedule 2, item 72, subsection 826M(1) of the Act]
- 3.25 Without limiting the ways in which ASIC may comply with the obligation to consult the public about the proposed rule, ASIC is taken to comply with that obligation if ASIC, on its website:
- makes the proposed rule, or a description of the proposed rule, available; and
 - invites the public to comment on the proposed rule.
[Schedule 2, item 72, subsection 826M(2) of the Act]
- 3.26 A failure to consult with the public or any other person or body as required by regulations does not invalidate the rule. A failure to consult with the RBA also does not invalidate the rule.
[Schedule 2, item 72, subsection 826M(3) of the Act]
- 3.27 ASIC must not make a rule without the Minister’s consent, in writing, to the making of the rule. The RBA may provide advice to the Minister when ASIC seeks written consent from the Minister to make the rule. Schedule 2 clarifies that ministerial consent is not a legislative instrument within the meaning of subsection 8(1) of the *Legislation Act 2003* to assist readers.
[Schedule 2, item 72, section 826N of the Act]
- 3.28 ASIC may vary or revoke the rules in like manner and subject to like conditions (see subsections 33(3) and (3AA) of the *Acts Interpretation Act 1901*).
[Schedule 2, item 72, section 826Q of the Act]

Emergency CS facility rules

- 3.29 ASIC may make emergency rules without the consent of the Minister and without consulting the RBA, if ASIC is of the opinion that the rules are necessary, or in the public interest, to protect the Australian economy, the efficiency, integrity or stability of the Australian financial system, or the provision of fair and effective services by licensed CS facilities.
- 3.30 Where a rule is made in an emergency, consultation with the public or any other person or body as required by regulations is also not required.
[Schedule 2, item 72, subsection 826P(1) of the Act]
- 3.31 Where emergency rules are made, ASIC must provide the Minister a written explanation of the need for the emergency rules the following day and comply with any direction from the Minister to vary or revoke the rule. The amendments that a direction from the Minister is not a legislative instrument to assist readers.
[Schedule 2, item 72, subsections 826P(2), (3), (4) and (5) of the Act]

Regulations may limit the rules to deal with certain matters

- 3.32 Regulations may prescribe limits on the extent to which the CS facility rules may deal with certain matters and the extent to which the rules may impose requirements on certain classes of persons.
[Schedule 2, item 72, section 826R of the Act]

Inconsistency between rules

- 3.33 In the event of any inconsistencies between the operating rules of a licensed CS facility or the operating rules of a financial market and the CS facility rules, the CS facility rules prevail over the operating rules to the extent of that inconsistency.
[Schedule 2, items 70 and 71, paragraphs 793B(2)(aa) and 822B(2)(aa) of the Act]
- 3.34 In the event there is an inconsistency between the CS facility rules and the CS services rules, derivative transaction rules or the derivative trade repository rules, the CS facility rules prevail to the extent of the inconsistency.
[Schedule 2, item 72, subsection 826K(1) of the Act]
- 3.35 In the event there is an inconsistency between a CS facility rule and an Financial Stability Standard, the Financial Stability Standard prevails to the extent of any inconsistency.
[Schedule 2, item 73, subsection 827D(2A) of the Act]
- 3.36 However, if the RBA considers there is an inconsistency between a CS facility rule and an Financial Stability Standard, the RBA must refer the matter to the Minister. The Minister may, if appropriate, give ASIC a written direction to vary or revoke the CS facility rule. Schedule 2 clarifies that such a direction from the Minister is not a legislative instrument to assist readers.
[Schedule 2, item 72, subsection 826K(2) of the Act]
- 3.37 As the CS facility rules are a legislative instrument, they will be subject to disallowance.

Compliance with the rules

- 3.38 Contravening the rules is a civil penalty under section 1317E. Relief from liability is available under section 1317S.
[Schedule 2, items 72 and 75, the note to subsection 826J(1) and subsection 1317E(3) of the Act]
- 3.39 The regulations may allow for alternatives to civil proceedings for a person who is alleged to have failed to comply with the CS facility rules. The alternatives are limited to:
- paying a penalty to the Commonwealth that is not more than 3,000 penalty units for individuals and 15,000 penalty units for a body corporate;

- 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, which may include one or more of the following:
 - an undertaking to take specified action within a specified period;
 - an undertaking to refrain from taking specified action; or
 - an undertaking to pay a specified amount within a specified period to the Commonwealth or to some other specified person.

[Schedule 2, item 72, section 826L of the Act]

3.40 Enforcement of CS facility operating rules is governed by section 822C of the Act. Minor amendments are made to that section to reflect the RBA's expanded role and to highlight that one or more persons or entities can apply to the Court in the event of non-compliance with or failure to enforce operating rules. A minor and technical amendment removes an erroneous and repetitive use of 'or' in the list of persons and entities who can make an application to the Court to improve readability of the Act.

[Schedule 2, items 89, 90 and 91, subsection 822C(1) and paragraphs 822C(1)(a) to (c) of the Act]

3.41 The Guide to Framing Commonwealth Offences recommends maintaining consistency in the legislative framework with regards to penalties as much as is appropriate. Consistent with this principle, this compliance provision largely mirrors existing section 798K of the Act which applies to the enforcement of market integrity rules, section 901F of the Act which applies to enforcement of derivative transaction rules and section 903E of the Act which applies to enforcement of derivative trade repository rules.

Reviewability of decisions

3.42 The following decisions are not subject to AAT review:

- a decision by ASIC to make CS facility rules, or to vary or revoke CS facility rules;
- a decision by ASIC to do or not do anything under the regulations made for the purposes of allowing alternatives to civil proceedings;
- a decision by the Minister to consent to the making of a CS facility rule, or to direct ASIC to vary or revoke a CS facility rule;
- a decision by ASIC to grant an exemption for a class of persons or facilities from all or specified provisions of 'Division 3A CS facility rules'.

[Schedule 2, item 74, paragraphs 1317C(gccc), (gccd), (gcce) and (gccf) of the Act]

Amendments relating to financial markets and CS facilities

When is a financial market or CS facility taken to be operated in this jurisdiction

- 3.43 The amendments clarify the test in ASIC regulatory guidance that sets out the factors to consider when deciding whether an overseas market or CS facility falls within the Australian licensing regime, or in the words of the statute, is 'operated in this jurisdiction'. The intent of the amendments is to codify the current approach for determining whether an overseas financial market or CS facility falls within the Australian regulatory regime and therefore should be licensed as such.
- 3.44 Whether an overseas financial market or CS facility operates in Australia will be based on whether a body corporate is domestically incorporated under Chapter 2A of the Act or if ASIC declares that the financial market or CS facility has a material connection to Australia.
[Schedule 2, items 139 and 140, sections 791D and 820D of the Act]
- 3.45 The amendments introduce a new two-step test for ASIC to declare whether an overseas financial market or CS facility has a material connection with Australia. The first part of this test is an objective assessment of whether the market or CS facility has a connection to Australia. The second part of this test is consideration as to whether the connection to Australia is material.
[Schedule 2, items 139 and 140, sections 791E and 820E of the Act]
- 3.46 ASIC may, by a written notice to a body corporate, request the body to give ASIC information about the financial market or CS facility within a period specified in the notice.
[Schedule 2, items 139 and 140, subsections 791E(5) and 820D(6) of the Act]
- 3.47 ASIC can revoke a declaration if ASIC considers, having regard to the test, the financial market or CS facility does not have a connection to Australia, or if there is a connection, that the connection is not material.
[Schedule 2, items 139 and 140, sections 791F and 820F of the Act]

Step 1: connection to Australia

- 3.48 The current licensing framework requires a financial market operator or CS facility operator to be licensed or exempt if the market or facility operates in Australia.
- 3.49 While prospective financial market and CS facility licensees do not need to apply for a declaration to apply for a licence, operators can determine whether

they have a connection to Australia using the same respective test. In making a declaration, ASIC must consider whether the connection a market or CS facility has with Australia is a material connection, which is based on the entity:

- having operations in Australia;
- providing a market or services in respect of Australian financial products;
- having at least one current or expected Australian market or CS facility participant; or
- additional kinds of connections that one or more specified kinds of financial markets or CS facilities may have with Australia, as determined by ASIC.

[Schedule 2, items 139 and 140, subsections 791E(1) and (2) and 820E(1) and (2) and paragraphs 791E(4)(a) and 820E(4)(a) of the Act]

3.50 Where ASIC proposes to make a determination with respect to additional kinds of connections CS facilities may have with Australia, ASIC must have regard to any relevant advice received from the RBA.

[Schedule 2, item 140, subsection 820E(5) of the Act]

3.51 In addition to these common factors, there are certain kinds of connections that are specific to the type of entity. For overseas financial markets, this additional criterion is based on targeting Australian investors. For overseas CS facilities, this is based on whether there is a relevant connection with the Australian market infrastructure, which will arise if the overseas CS facility provides clearing or settlement arrangements for a domestic financial market, has established a link to a domestic CS facility, or is linked to a payments system (that has a connection with Australia).

[Schedule 2, items 139 and 140, paragraphs 791E(2)(d) and 820E(2)(d) of the Act]

Step 2: materiality of the connection

3.52 The second part of the test requires ASIC to consider whether the connection is material. This is a subjective test that follows the objective test of determining whether the overseas financial market or CS facility has a connection with Australia. Under the second limb of the test, ASIC must determine the materiality of the connection by reference to criteria. The criteria assist ASIC in determining if the operations of the overseas financial market or CS facility have or may have implications for the safe and effective functioning of the Australian financial system or the confident, fair and effective dealings in financial products by Australian investors.

3.53 For financial markets, ASIC may declare that an overseas financial market's connection with Australia is material if the size and extent of the current or

expected aggregate activity in the market of participants in the market, and users of the market, is material to:

- the risk management activities of those participants and users; or
- the efficient allocation of capital or liquidity to the Australian economy; or
- the provision of fair, orderly and transparent financial markets to those participants, and users, who have a connection with Australia; or
- confident and informed decision making by consumers of financial products or financial services who have a connection with Australia.
[Schedule 2, item 138, subsection 791E(3) of the Act]

3.54 For CS facilities ASIC may make a declaration that an overseas CS facility's connection is material if:

- there is a material number of current or expected Australian participants or users of the facility;
- the size and extent of current or expected aggregate activity of Australian participants or users of the facility is material to the risk management activities of those participants or users or to the efficient allocation of capital or liquidity to the Australian economy; or
- the overseas CS facility's connection with the Australian financial market infrastructure is material.
[Schedule 2, item 140, subsection 820E(3) of the Act]

3.55 ASIC may, by legislative instrument, determine additional kinds of matters that show when connections with Australia are material.
[Schedule 2, items 139 and 140, paragraphs 791E(4)(b) to (c) and 820E(4)(b) to (c) of the Act]

Declared financial markets and widely held market bodies

3.56 The current definition of *prescribed financial market* is repealed and replaced with a new definition of the expression *declared financial market* which has been added to the glossary in section 9 of the Act.
[Schedule 2, items 20 and 21, section 9 of the Act]

3.57 A *declared financial market* is a financial market that is specified in a declaration made by ASIC.
[Schedule 2, item 22, section 9D of the Act]

3.58 A declared financial market will attract the same statutory obligations as a formerly prescribed financial market. Formerly prescribed financial markets will be deemed to be declared financial markets on commencement of Schedule 2.
[Schedule 2, item 143, section 1706AF of the Act]

- 3.59 Empowering ASIC to declare that a market is a declared financial market, rather than having to prescribe through regulations, will enable ASIC to more readily and efficiently declare a financial market as a declared financial market, therefore reducing the potential for delay of related licence applications or variations.
- 3.60 Minor amendments have also been made to change references from prescribed financial market to declared financial market in the Act, the *Bankruptcy Act 1966* and the PPSA.
[Schedule 2, items 24, 25 and 26, subsection 5(1) of the Bankruptcy Act 1966 and section 49 of the PPSA]
- 3.61 The amendments also insert a definition for **widely held market body** in the glossary in section 9 of the Act.
[Schedule 2, item 27, section 9 of the Act]
- 3.62 A widely held market bodies are subject to certain requirements with respect to ownership and voting power, outlined further in paragraph 3.76 to 3.77.
- 3.63 A body corporate is a widely held market body if the body is a market licensee or the holding company of such a licensee, or a CS facility licensee or the holding company of such a licensee and is specified in an ASIC declaration.
[Schedule 2, item 32, subsection 850A(2) of the Act]
- 3.64 ASIC may declare a market licensee, CS facility licensee or a holding body corporate of such licensee to be a widely held market body provided there is consideration of the market or CS facility with regard to:
- the significance to the national economy of the functions performed by the financial market or clearing and settlement facility ;
 - the size and importance in the context of the Australian financial market or clearing and settlement facility within the Australian financial services industry and relative to other operations providing a similar service or function;
 - the degree of or potential for competition between the financial market or clearing and settlement facility and other already prescribed financial markets or clearing and settlement facilities; and
 - any other relevant matters.
[Schedule 2, item 32, subsection 850A(4) of the Act]
- 3.65 These declarations by ASIC are legislative instruments and are subject to disallowance by Parliament. In addition, the declaration in relation to widely held market bodies and declared financial markets may only be made if the Minister provides written approval. This ensures there is sufficient parliamentary oversight surrounding ASIC’s ability to declare ‘declared financial markets’ and ‘widely held market bodies’.
[Schedule 2, items 22 and 32, section 9D, subsections 850A(1), 850A(3) and 850A(5) of the Act]

- 3.66 ASIC must consult with the RBA on the matters relating to CS facilities, however a failure to consult does not invalidate the declaration.
[Schedule 2, item 30, subsections 850A(5) and (6) of the Act]
- 3.67 Further, Schedule 2 removes references to bodies 'specified in regulations' and replaces it with 'specified in a declaration' in relation to widely held market bodies to reflect that widely held market bodies are only specified in declarations by ASIC and make clear to readers that they do not need to look to the regulations. The language 'contravention of previous law' is also removed as the term is no longer in use. The provision is reframed to reflect the changes.
[Schedule 2, items 33, 34 and 35, section 851I of the Act]
- 3.68 Schedule 2 removes references to the term 'widely held market body' being 'within the meaning of Division 1 of Part 7.4'. These words are unnecessary as the terms defined in the glossary generally apply Act wide.
[Schedule 2, items 28, 29 and 30, paragraphs 792A(1)(h) and 821A(1)(g) of the Act]
- 3.69 Similarly, Schedule 2 updates references that rely on terms defined in Division 1 of Part 7.4 so they use more specific labels. It removes the words 'within the meaning of that Division' and replaces it with 'see section 850B' where an 'unacceptable control situation' is referenced.
[Schedule 2, items 29 and 31, paragraphs 792A(1)(h) and 821A(1)(g) of the Act]
- 3.70 A decision by ASIC to declare a body corporate as a widely held market body is not reviewable by the AAT.
[Schedule 2, item 36, paragraph 1317C(gd) of the Act]

New matters to be taken into account by ASIC in respect of an overseas CS facility licence

- 3.71 When deciding whether to grant, suspend or cancel a licence, or impose, vary or revoke conditions on an overseas CS facility licence, ASIC must consider the adequacy of the arrangements in place relating to the governance and operation of the CS facility. ASIC must consider the adequacy of these arrangements with respect to their impact on Australian financial system stability, the fair and effective provision of the CS facility licensee's services and public confidence and integrity in Australia.
[Schedule 2, item 68, subsection 827A(3)]

Broadening the existing exemptions power

- 3.72 The exemptions power is broadened to provide certainty that an exemption could be provided to particular operators. ASIC may exempt a financial market or class of financial market, a CS facility or class of CS facility, or a person or class of persons from all or specified provisions of Parts 7.2 and 7.3

respectively.

[Schedule 2, items 47 and 58, subsections 791C(1) and 820C(1) of the Act]

- 3.73 As it does currently, an exemption may apply unconditionally or subject to specified conditions. Schedule 2 introduces the term *exemption duration* to clarify that an exemption may apply for a specified period or indefinitely.
[Schedule 2, items 47 and 58, subsections 791C(1) and 820C(1) of the Act]
- 3.74 ASIC may extend or shorten the exemption duration.
[Schedule 2, items 48 and 59, subparagraphs 791C(2)(a)(iii) and 820C(2)(a)(iii) of the Act]
- 3.75 Consequently, the amendments update other references to the exemption to clarify that a person can be exempt from operation of Parts 7.2 and 7.3.
[Schedule 2, items 44, 45, 49, 50, 51, 52, 53, 55, 56, 60, 61, 62 and 64, paragraphs 791A(1)(c), 791C(3)(a), 791C(3)(b), 820A(1)(c), 820C(3)(a) and 820C(3)(b), and subsections 791B(ca), 791C(4), 820B(d) and 820C(4) of the Act]

Amendments relating to financial markets, CS facilities, derivative trade repositories and financial benchmark administrators

Increases in voting power

Ministerial approval – widely held market bodies

- 3.76 Currently, a bespoke provision applies in relation to voting power in ASX Limited. For a person to exceed 15 per cent voting power:
- in ASX Limited - does not need to apply for approval, rather the regulations may prescribe a higher percentage than the 15 per cent voting power limit in ASX Limited that a person can have; or
 - in a widely held market body other than the ASX Limited – must lodge an application with ASIC where the Minister may approve that application if the Minister is satisfied that it is in the national interest.
- 3.77 The bespoke ASX Limited provision has been repealed to ensure regulatory consistency aligned with the process for widely held market bodies. This means if a person seeks to exceed the 15 per cent voting power limit in any widely held market body including the ASX Limited, an application must be lodged with ASIC to increase the voting power and that application is subject to ministerial approval. Regulations may not prescribe a higher percentage in relation to the ASX.
[Schedule 2, items 37, 38, 39 and 40, subsections 850B(1) and (2) and 851A(1) of the Act]

ASIC approval – all other FMI domestic bodies corporate

- 3.78 ASIC approval is required prior to a person holding more than 15 per cent voting power in a body corporate registered under Chapter 2A that is a market licensee, a CS facility licensee, a derivative trade repository licensee or a benchmark administrator licensee (other than a widely held market body).
- 3.79 A number of terms are introduced to assist in approving an application to hold more than 15 per cent voting power, including a controlled Australian financial body, unacceptable control situation, and passes the legitimate control test:
- **'controlled Australian financial body'** is a body that is registered under Chapter 2A, is not a widely held market body, and is any of the following:
 - a market licensee;
 - a CS facility licensee;
 - a derivative trade repository licensee;
 - a benchmark administrator licensee; or
 - a holding company of the any of the above licensees.
 - **'passes the legitimate control test'** is where a person's possession of a particular percentage of voting power in a controlled Australian financial body is unlikely to adversely affect the relevant licensee's ability to meet one or more of its obligations.

[Schedule 2, items 41 and 42, sections 9, 852DA, 852DB and 852DC of the Act]

- 3.80 A person may apply for approval to have voting power of more than 15 per cent by lodging an application with ASIC that sets out:
- the percentage of voting power (if any) the person currently has in the body;
 - the percentage of voting power the person intends to have in the body;
 - the period the person is seeking the approval for (including whether indefinite or not); and
 - the person's reasons for making the application.

This application must be in the prescribed form.

[Schedule 2, item 42, section 852DG of the Act]

- 3.81 If information contained in an application is incorrect or ceases to be correct after the application is made, the applicant must, as soon as practicable after the applicant becomes aware of that fact, give ASIC the correct information in writing.

[Schedule 2, item 42, section 852DQ of the Act]

- 3.82 ASIC must give approval to an applicant if it has no reason to consider that the revised ownership structure will impede the ability of the licensee to meet its obligations under the Act. ASIC must also believe relevant information in the

application, or later provided by the applicant, to be correct. Written notice must be provided to both the applicant and the body corporate registered under Chapter 2A, notwithstanding whether ASIC approves or refuses to approve an application.

[Schedule 2, item 42, section 852DH of the Act]

- 3.83 A notice of approval is in force for the duration of the approval as specified in the notice, which may be indefinite. A person may apply to extend that approval by lodging an application with ASIC in the same manner as the initial application (or ASIC can extend on its own initiative).

[Schedule 2, item 42, sections 852DJ and 852DJA of the Act]

- 3.84 ASIC has 90 days to make a decision on an application and may, by written notice given to the applicant, extend this period by up to 30 days. Approval is deemed to have been granted outside of that period.

[Schedule 2, item 42, subsection 852DR(4) of the Act]

- 3.85 ASIC may request further information about an application and may refuse to consider an application until the applicant gives ASIC the information. The time limit for ASIC's decision does not apply whilst this occurs.

[Schedule 2, item 42, section 852DP and subsection 852DR(3) the Act]

- 3.86 ASIC may vary or revoke the notice of approval. In the case of a variation, ASIC may increase or decrease the percentage or duration. The variation or revocation is in force at the time specified in the notice, which must be at least 90 days after the notice is given.

[Schedule 2, item 42, section 852DL and 852DM of the Act]

- 3.87 The notice may also specify that the approval is subject to conditions. ASIC may impose, vary or revoke conditions after approval by written notice. The power is exercisable on ASIC's own initiative or by application.

[Schedule 2, item 42, section 852DK of the Act]

Contravention provisions

- 3.88 It is an offence for a person to acquire shares in a body corporate where acquisition would result in an unacceptable control situation. The penalty for the offence is 400 penalty units.

[Schedule 2, items 42 and 43, section 852DD and Schedule 3 of the Act]

- 3.89 A person who holds an approval to increase voting power must give written notice to ASIC if they become aware that they have breached a condition to which the approval is subject. Failure to do so is an offence of 200 penalty units.

[Schedule 2, items 42 and 43, subsection 852DK(6) and Schedule 3 of the Act]

- 3.90 The Court has the power to make remedial orders or grant injunctions where an unacceptable control situation exists. This power is intended to enforce the

voting control limits for licensed bodies.

[Schedule 2, item 42, sections 852DE and 852DF the Act]

- 3.91 To the extent that the Court order under 852DE would result in an acquisition of property from a person otherwise than on just terms within the meaning of section 51(xxxi) of the Constitution, the relevant provision will not have any effect.

[Schedule 2, item 42, section 852DS the Act]

- 3.92 ASIC's ability to give anti-avoidance directions mirrors the Minister's ability to give anti-avoidance directions in section 852B. Failure to comply with such a direction is an offence of 400 penalty units.

[Schedule 2, items 42 and 43, section 852DT and Schedule 3 of the Act]

FMI banning orders

Considerations in making a banning order

- 3.93 The defined terms of **FMI banning order** and **FMI licensee** are inserted into the dictionary for the purposes of the banning order provisions. An FMI Banning order is an order made under subsection 853H(1). An FMI licensee is a market licensee, CS facility licensee, derivative trade repository licensee, or a benchmark administrator licensee as defined in the Act.
- 3.94 A **core officer** is a person covered by paragraphs (a) and (b) of the definition of officer, that is a director or alternate director of a corporation or a person commonly known as a shadow director of a corporation.
[Schedule 2, items 122 and 135, section 9 of the Act]
- 3.95 The amendments authorise ASIC to making a banning order against an individual if:
- the individual becomes an insolvent under administration;
 - the individual is convicted of fraud
 - ASIC has reason to believe that the individual is not a fit and proper person, or that the individual is not adequately trained or is not competent to perform a function of a core officer of or control a licensee;
 - ASIC has reason to believe the individual is not adequately trained or not competent to perform as a core officer or control a licensee.
 - has not complied with financial services law or ASIC has reason to believe that they are likely to contravene financial services law;
 - has been involved in the contravention of a financial services law by another individual or ASIC has reason to believe that they are likely to become involved in such a contravention; or
 - has been a director, secretary or senior manager of 1 or more corporations unable to pay its debts within the last 7 years.

[Schedule 2, item 136, sections 853H, 853L and 853M of the Act]

- 3.96 In determining whether an individual is fit and proper, ASIC must have regard to certain matters including (but not limited to) whether the individual:
- has ever been a core officer of an Australian market licensee, Australian CS facility licensee, Australian derivative trade repository licensee or benchmark administrator licensee that has had its licence suspended or cancelled;
 - has ever had a banning order or a disqualification order been made against the person;
 - is disqualified from managing corporations;
 - has ever been a Chapter 5 body corporate or an insolvent under administration;
 - if the individual has been banned from engaging with a credit activity under a State or Territory law;
 - whether the individual has ever been linked to a refusal or failure to give effect to a determination made by AFCA
 - has been convicted of an offence within the last ten years (Part VIIC of the *Crimes Act 1914* applies so ASIC cannot consider spent convictions); or
 - Any other matters prescribed by regulation.

[Schedule 2, item 136, section 853K of the Act]

- 3.97 An individual contravenes financial services law if they fail to comply with a duty imposed under the law. It does not matter if the provision imposing a duty that has not been complied with is neither an offence nor a civil penalty provision.

[Schedule 2, item 136, section 853L of the Act]

Making a banning order

- 3.98 ASIC may make an FMI banning order that applies for a specified period or indefinitely. ASIC may specify the individual is prohibited from:
- controlling a licensee, either alone or in concert;
 - performing any function involved in a licensee including as a manager, employee, contractor or in some other capacity; or
 - performing specified functions involved in a licensee including as a, manager, employee, contractor or in some other capacity.

[Schedule 2, item 136, subsections 853N(1) and (2) of the Act]

- 3.99 However, ASIC may expressly allow individuals to do certain actions in certain circumstances by including this in the terms of the banning order.

[Schedule 2, item, 136, subsection 853N(3) of the Act]

- 3.100 ASIC may only make a banning order against an individual after giving the individual an opportunity to appear at a hearing before ASIC that takes place in

private and to make submissions to ASIC on the matter. If ASIC makes a banning order without giving the individual these opportunities, ASIC must rely on the following grounds:

- the person is not a fit and proper person because the person has been a core officer of the entity that has had a licence suspended or cancelled; or
- the individual has been convicted of serious fraud.
[Schedule 2, item 136, section 853J of the Act]

3.101 ASIC may vary or cancel a banning order on its own initiative or on application. A variation or cancellation may occur if ASIC is satisfied there has been a change in the circumstances since the original banning order.

[Schedule 2, item 136, section 853Q of the Act]

3.102 An FMI banning order, variation or cancellation takes effect when it is given to individual. ASIC must give the individual written notice of the banning order being made, varied, or cancelled, accompanied with a statement of reasons. The notice takes effect from when it is provided to the individual.

[Schedule 2, item 136, subsections 853H(2), 853R(1) and sections 853Q and 853S of the Act]

3.103 ASIC must publish a notice on its website as soon as practicable after making or varying the order, stating when the notice takes effect and attaching a copy of the FMI banning order. However, ASIC considers it appropriate, a summary of permissible specified acts may be published instead.

[Schedule 2, item 136, subsections 853R(2) and (3) of the Act]

Contravention of banning order

3.104 An individual who is subject to a banning order must not engage in conduct that would breach the banning order.

3.105 A person who breaches a banning order commits a fault-based offence of up to 5 years imprisonment. *[Schedule 2, items 136 and 137, section 853P and Schedule 3 of the Act]*

3.106 This is justified on the basis that involving disqualified individuals in market licensees may have detrimental effects on the stability of the financial system.

Relation to general licence obligations

3.107 It is a general licence obligation for a licensee to take all reasonable steps to ensure that no individual against whom an FMI banning order is made becomes or remains involved in a licence. Regulations may prescribe the steps domestic CS facility licensees, market licensees, derivative trade repository licensees, or benchmark administrator licensees must take for the purposes of ensuring that each individual performing the role of a core officer of the licensee is fit, proper, capable and competent for the role.

[Schedule 2, items 123, 124, 125, 126, 127, 128, 130, 131, 132, 133 and 134,

paragraphs 792(1)(ha) to (i), 821A(1)(ga) to (h), 904A(1)(ba) to (c) and 908BP(b) to (c) of the Act]

- 3.108 ASIC may make a declaration disqualifying individuals involved in a market licensee, CS facility licensee, derivative trade repository licensee or benchmark administrator licensee if ASIC is satisfied the individual is unfit to be involved in the licensee. ASIC must consider matters such as the individual's fame, character and integrity in deciding whether the individual is unfit.
[Schedule 2, item 129, subsections 853C(2) and (3) of the Act]

Dealing with licences that are not being used

Suspending or cancelling a licence

- 3.109 ASIC may suspend an Australian market licence, CS facility licence, derivative trade repository licence or a benchmark administrator licence for a specified period, or cancel it, if:
- the licensee has ceased carrying on the business to which the licence relates; or
 - the licensee ceases, for a period of at least 12 months, accepting bids or offers for the acquisition or disposal of financial products to which the licence relates, providing CS facility services to which the licence relates, or ceased providing benchmark or repository services to which the licence relates; or
 - the licensee has not engaged in any conduct or activity constituting operating that market, facility, benchmark or repository for a period of 12 months; or
 - the licensee is subject to a condition specifying that the licensee is authorised to engage in specified conduct or activity constituting operating a market, CS facility, benchmark or repository and the licensee has for at least 12 months ceased engaging in all such specified conduct.
- [Schedule 2, items 10, 13, 16 and 18, sections 797B, 826B, 905H and 908BI of the Act]**
- 3.110 ASIC is transferred the Minister's power to immediately suspend or cancel an Australian market licence or CS facility licence, currently delegated to ASIC under the *Ministerial Powers (ASIC) Delegations 2021*. This includes an overseas market licensee or CS facility operating in a jurisdiction where ASIC considers a change in regulatory regime is no longer equivalent.
[Schedule 2, 12 and 15, paragraphs 797B(d)(ii) and 826B(d)(ii) of the Act; Schedule 3, items 52, 53, 119 and 120, sections 797B and 826B of the Act]
- 3.111 A further condition is added for overseas financial markets and CS facilities, where ASIC may suspend the licence for a specified period or cancel it if the cooperation (including information sharing) between ASIC, the RBA and the authority or authorities responsible for supervising the operation of that facility in that country has materially deteriorated or is otherwise inadequate. ASIC must consult with the RBA prior to suspending or cancelling a CS facility licence, however a failure to consult does not affect the validity of the

decisions to suspend or cancel a licence.

[Schedule 2, items 12 and 15, paragraphs 797B(d)(iii) and 826B(d)(iii) of the Act]

- 3.112 Including this new ground for immediate suspension or cancellation is intended to ensure appropriate oversight over licensed entities. Adequate information sharing between domestic and overseas regulators is essential to the effective functioning of Australia's licensing regime for overseas financial markets and CS facilities. Cooperation between ASIC, the RBA and the authority or authorities responsible for supervising the operation of that facility overseas minimises the potential for regulatory gaps and duplication and allows ASIC and the RBA to monitor the regulatory equivalence of an entity's home regime.

Streamlining ASIC's direction powers

- 3.113 The amendments streamline ASIC's power to issue directions for Australian market licensees, CS facility licensees, and derivative trade repository licensees, so that a direction can be issued without advising the relevant licensee of an intention to issue a direction.
[Schedule 2, items 76, 77, and 78, subsections 794D(1), 823D(1) and 904G(1) of the Act]
- 3.114 The streamlined process for issuing directions enables ASIC to address issues in an efficient and timely manner. The direction may specify the licensee to undertake a particular action or direct them to refrain from undertaking a particular action.
- 3.115 The purposes for issuing a direction remain the same, however, the time limit to comply has been removed. This is justified on the basis that impedes ASIC's ability to use its directions power in circumstances that may take longer than 21 days to resolve. Instead, ASIC must specify a reasonable time period on the direction that the licensee must comply with the direction. The direction will either cease at the time specified on the direction, or when ASIC revokes the direction, whichever is earlier.
[Schedule 2, items 76, 77 and 78, subsections 794D(2), 823D(3) and 904G(2) of the Act]
- 3.116 Consistent with the current directions power, Australian market licensees, CS facility licensees and derivative trade repository licensees must comply with a direction issued by ASIC. The penalty for failing to comply is the same as currently listed in Schedule 3, being 100 penalty units for each day of non-compliance for an individual and ten times this amount for a body corporate. Where a licensee fails to comply with the direction, ASIC may apply to the Court for a Court order to compel the licensee to comply.
[Schedule 2, items 76, 77, 78, 83 and 84, subsections 794D(3) and (4), 823D(4) and (5) and 904G(3) and (4) and Schedule 3 of the Act]

Referrals to the Minister

- 3.117 Australian market licensee, CS facility licensee and derivative trade repository licensees retain the ability to refer a direction to the Minister after ASIC issues the direction. The Minister will continue to hold the power to require ASIC to revoke or vary a direction which ASIC must comply with. **[Schedule 2, items 76, 77 and 78, sections 794DA, 823DA and 904GA of the Act]**
- 3.118 The Minister's request is not a legislative instrument within the meaning of subsection 8(1) of the Legislation Act. The subsection is merely included to provide clarity and assist readers.
- 3.119 As soon as possible after a direction has been issued, varied or revoked as a result of the Minister's request, ASIC must give notice to:
- in the case of a market licensee: the operator of each CS facility with which the market licensee has clearing and settlement arrangements for transactions; or
 - in the case of a CS facility licensee: to the operator of each financial market with which the facility has arrangements to provide services, each issuer of financial products (if the direction relates to specified financial products) and the RBA;
 - in the case of a derivative trade repository licensee: the operator of each financial market and CS facility with which the licensed derivative trade repository licensee has arrangements to provide services relating to derivative trade data.
- [Schedule 2, items 76, 77 and 78, subsections 794DA(6), 823DA(6) and 904GA(6) of the Act]**
- 3.120 The ability for a licensee to refer a direction to the Minister does not affect a licensee's obligation to comply with the direction. The licensee must continue to comply with the direction whilst the matter is referred and the Minister is considering the request.

Merits review

- 3.121 A request from the Minister for ASIC to vary or revoke a direction is not a reviewable decision.
[Schedule 2, items 80, 81 and 82, paragraphs 1317C(gcaaa), (gccb) and (gdca) of the Act]

Transferred directions power

- 3.122 The Minister's power to issue directions to licensees not complying with the licensee obligations is transferred to ASIC. This is to equip ASIC with the necessary enforcement powers to ensure compliance with licence obligations. ASIC may issue directions to a market licensee or a CS facility licensee where ASIC considers the licensee is either unlikely to, or is not, complying with the licensee obligations.

- 3.123 ASIC is directly responsible for issuing the following directions to licensees to promote compliance with the licensee obligations under Chapter 7 of the Act, including:
- the power to issue, vary, or revoke directions with respect to financial markets under Part 7.2;
[Schedule 3, items 14 to 18, section 794A of the Act]
 - the power to issue, vary, or revoke directions based on CS facility licensees' obligations under Part 7.3; and
[Schedule 3, items 87 to 90, section 823A of the Act]
 - the power to issue directions with respect to compensation arrangements of licensed financial markets.
[Schedule 3, item 152 to 154, section 882D of the Act]
- 3.124 Consistent with the ability for licensees to refer directions to the Minister, a market licensee that has received a direction from ASIC may request ASIC to refer the matter to the Minister. ASIC must comply with this request and comply with any requirements the Minister may make, including not making, varying or revoking the direction.
[Schedule 3, items 91 and 155, subsections 823A(5) and 882D(5) of the Act]

Matters relating to ASIC and RBA directions issued to CS facility licensees

- 3.125 If a body corporate is subject to the exercise of a power under Part 7.3 by ASIC or the RBA or if the body corporate is a member of a group of bodies corporate subject to that exercise of power, a party to an agreement with this body corporate cannot:
- deny an obligation or accelerate any debt under the agreement;
 - terminate or close out the agreement or any transaction relating to the agreement; or
 - enforce any security under the agreement.
- 3.126 This applies whether the law under which the agreement was made is Australian law or foreign law, including the law of a part of a foreign country.
[Schedule 2 item 95 section 823V of the Act]
- 3.127 An action or proceeding does not lie against an officer, senior manager, employee, agent, body corporate or person engaged to provide services to the body corporate or related body corporate in relation to anything the person did in good faith if it was reasonable for the person to do the thing or to omit to do the thing for the purpose of:
- complying with a direction ASIC or the RBA gave under Part 7.3;
 - taking a measure or action specified in a direction from ASIC or the RBA under Part 7.3; or

- doing or refrain from doing anything in accordance with such a direction.
[Schedule 2, item 95, section 823X of the Act]
- 3.128 The Court may make orders as it sees fit if on application of ASIC or the RBA or both, it appears to the Court that a person has contravened a provision of the operating rules of a licensed CS facility.
[Schedule 2, item 97, paragraph 1101B(1)(aa) of the Act]

Power to obtain reports

- 3.129 ASIC is empowered to obtain an expert report on specified matters in relation to FMI licensees. The RBA has a corresponding power in relation to CS facility licensees. This is to ensure that there is mechanism for the regulators to obtain appropriate expert information from an independent source. ASIC's power to require an expert report follows the same process regardless of the type of financial licence. With respect to market licensees and CS facility licensees, ASIC's power to obtain an expert report replaces the Ministerial power to require a market licensee or CS facility licensee to provide an audit report on a special report. This is because the new power to obtain an expert report will replace the power to obtain an audit report on a special report.
[Schedule 2, items 94, 116, 117, sections 794BA, 823BAA and 904L of the Act; Schedule 3, items 19, 92, 177 and 178, sections 794B, 823B and Schedule 3 of the Act]

Derivative trade repository licensee and benchmark administrator report

- 3.130 Where ASIC directs a derivative trade repository licensee or a benchmark administrator licensee to provide a special report, ASIC is not required to provide a copy of the report to the Minister.
[Schedule 2, item 118, section 908BWA; Schedule 3, items 172 and 174, subsections 904H(1) and 908BV(3) of the Act]

Expert reports

- 3.131 ASIC may appoint, or direct a licensee to appoint, an expert to provide a report on specified matters relating to the licensee and relevant matters in fulfilling the licensee's obligations.
[Schedule 2, items 94, 116, 117 118, sections 823BA, 794BA, 904L and 908BWA of the Act]
- 3.132 Where an expert is appointed, ASIC must give the licensee notice that an expert is appointed and determine a fee equal to ASIC's expenses in appointing and paying the expert to provide the report. The licensee is liable to pay the costs associated in producing the report which must be paid to ASIC. Where ASIC directs a licensee to appoint an expert to produce a report, the licensee is required to pay the expert directly.

- 3.133 An expert must have the necessary skills and qualifications to make a report on the specified matter and must be a person nominated or approved by ASIC, in the case that a licensee is directed to appoint an expert.
- 3.134 The licensee required to provide the report must give assistance to the appointed person preparing an expert report as reasonably required. The obligation to comply includes providing all information, explanation and assistance reasonably necessary for the preparation and provision of the report.
Contravention
- 3.135 Failure to take reasonable steps to comply is a criminal offence of up to two years imprisonment.
[Schedule 2, items 99, 119, 120 and 121, subsections 823BA(4), 794BA(4), 904L(4) and 908BW(4) and Schedule 3 of the Act]

Additional transferred powers

Licensing of financial markets

- 3.136 ASIC has direct licensing powers relating to financial markets, including:
- granting a domestic or overseas market licence;
[Schedule 3, items 25 to 32, section 795B of the Act]
 - imposing, varying, and revoking licence conditions;
[Schedule 3, items 36, 38 to 49, section 796A of the Act]
 - issuing, revoking or varying an exemption from all or specified provisions of Part 7.2 and/or Part 7.2A of the Act;
[Schedule 3, items 1 to 3 and 69 to 72, sections 791C and 798M of the Act]
 - varying a licence to change the name of the licensee;
[Schedule 3, items 50 and 51, section 797A of the Act]
 - suspending or cancelling a licence;
[Schedule 3, items 52 to 57, sections 797B and 797C of the Act]
 - varying, revoking or detailing the effect of a suspension;
[Schedule 3, items 58 and 59, sections 797D and 797E of the Act]
 - approving an overseas market licensee's request to change a country of principal place of business;
[Schedule 3, item 5, paragraph 792A(1)(g)(ii) of the Act]
 - approving a change of country of an overseas licensee; and
[Schedule 3, item 9, section 792H of the Act]
 - requiring an audit report on the annual report of a market licensee
[Schedule 3, items 7 and 8, section 792F of Act]

- the requirement to consider the list of matters when deciding to grant, suspend or cancel an Australian market licence, impose, vary or revoke conditions on that licence, or disallow changes to market operating rules.
[Schedule 3, items 62 to 67, section 798A of the Act]

Exemptions

- 3.137 The amendment also expands the application of the provision to classes of persons alongside classes of financial markets.
[Schedule 2, items, 47 and 49-51, subsection 791C(1) and paragraphs 791C(3)(a)-(b) and subsection 791C(4) of the Act]

Licensing of CS facilities

- 3.138 ASIC and the RBA co-regulate CS facilities. The respective power of each regulator corresponds to their overall objectives and mandate. ASIC has licensing and enforcement powers to align with their objective to maintain, facilitate and improve the performance of the financial system. The RBA has powers aligning with the objective to maintain overall stability of the Australian financial system.
- 3.139 The following Ministerial powers with respect to CS facilities are transferred to ASIC:
- granting a domestic or overseas CS facility licence;
[Schedule 2, items 3 to 9, section 824B of the Act]
 - issuing, revoking or varying an exemption from all provisions of Part 7.3 of the Act (noting the exception for those that the RBA has the power to exempt);
[Schedule 3, items, 73 to 77 section 820C of the Act]
 - approving an overseas CS facility licensee’s request to change a country of principal place;
[Schedule 3, item 79, paragraph 821A(1)(f) of the Act]
 - approving a change of country by foreign licensee.
[Schedule 3, item 83, section 821F(1) of the Act]
 - imposing, varying, and revoking licence conditions;
[Schedule 3, items 104, 106 to 116, section 825A of the Act]
 - varying a licence to change the name of a licensee;
[Schedule 3, items 117 and 118, section 826A of the Act]
 - suspending or cancelling a licence; and
[Schedule 3, items 120 to 124, sections 826B and 826C of the Act]
 - varying, revoking or detailing the effect of a suspension.
[Schedule 3, items 125 and 126, sections 826E and 826D of the Act]

- the requirement to consider the list of matters when deciding to grant, suspend or cancel a CS facility licence, impose, vary or revoke conditions on that licence, or disallow changes to the CS operating rules.

[Schedule 3, items 129 to 134, section 827A of the Act]

- requiring an audit report on the annual report of a CS facility licensee

[Schedule 3, items 81 and 82, section 821E of the Act]

3.140 ASIC may extend or shorten the duration of an exemption. Amendments are made to the criteria for when ASIC may make an exemption by extending it to persons or classes of persons.

[Schedule 2, items 59 to 64, , subparagraph 820C(2)(a)(ii), paragraphs 820C(3)(a)-(b) and subsection 820C(4) of the Act]

Exemptions

3.141 In line with the RBA's additional supervisory powers for oversight of CS facilities, the RBA are empowered to exempt an individual or classes of CS facility licensees from:

- complying with the Financial Stability Standards (refer to section 827D of the Act) and/or reducing systemic risk under section 821A(1)(aa) of the Act;
- notifying the RBA of certain matters; and
- providing assistance to the RBA.

[Schedule 3, item 78, section 820CA of the Act]

Compensation arrangements and security exchanges

3.142 Operational decisions in relation to the approval of compensation arrangements and changes to the Securities Exchange Guarantee Corporation, have been transferred to ASIC. This transfer of power increases certainty for market operators, the Securities Exchange Guarantee Corporation, and other stakeholders, whilst ensuring the timeliness and efficiency of the operation of compensation arrangements

3.143 Compensation arrangements are provided by the National Guarantee Fund for members of the Securities Exchange Guarantee Corporation, or through other compensation schemes approved by the Minister for market operators that are not members of the Securities Exchange Guarantee Corporation and which are required to have compensation arrangements. ASIC will be permanently transferred any Ministerial powers that were delegated under the Ministerial delegation, and the Minister will retain power over compensation regimes that were not delegated to ASIC.

3.144 ASIC has the following direct powers in relation to compensation arrangements:

- considering whether a market is covered by Division 4 of Part 7.5 of the Act;
[Schedule 2, items 145 to 146, section 881D of the Act]
 - approving compensation arrangements with or after a grant of a licence;
[Schedule 3, items 147 to 150, section 882A and 882B of the Act]
 - revoking an approval of compensation arrangements;
[Schedule 3, item 151, section 882C of the Act]
 - treat the application as approval of the compensation arrangements and consider whether the arrangements are adequate if an application contains details about the proposed compensation arrangements;
[Schedule 3, item 144, section 881C of the Act]
 - approving changes to compensation arrangements;
[Schedule 3, items 159 to 161, subsections 884C of the Act]
 - requiring compensation arrangements to be adequate;
[Schedule 3, item 162, subsection 885B(1) and (2) of the Act]
 - determining the adequacy of compensation arrangements; and
[Schedule 3, item 163 to 165, subsections 885C(3) and 885J(1)-(2) of the Act]
 - issuing, varying or revoking an exemption from all or part of Part 7.5
[Schedule 3, items 168 to 170, section 893B of the Act]
- 3.145 ASIC may request a risk assessment report from the operator of a financial market.
[Schedule 3, item 167, section 892K of the Act]

Publication of licences

- 3.146 The former requirement to publish notifications of a licence on the Gazette is updated to ASIC's website to reflect ASIC's licensing powers in respect of financial markets and CS facilities.
- 3.147 The following licensing notifications must be published on ASIC's website:
- varying or revoking an exemption of a financial market (including exemptions to compensation regimes under Part 7.5);
[Schedule 3, items 4, 72 and 171, subsections 791C(5), 798M(5) and 893B(5) of the Act]
 - granting an Australian market licence;
[Schedule 3, item 33, section 795C of the Act]
 - imposing, varying or revoking conditions of an Australian market licence;
[Schedule 3, item 37, subsection 796A(1) of the Act]
 - publishing a notice of suspension or cancellation;
[Schedule 3, items 60 and 61, subsection 797F(1) of the Act]

- varying or revoking of an exemption of a CS facility;
[Schedule 3, item 77, subsection 820C(5) of the Act]
 - granting a CS facility licence;
[Schedule 3, item 101, section 824C of the Act]
 - imposing, varying or revoking conditions of a CS facility licence; and
[Schedule 3, item 105, subsection 825A(1) of the Act]
 - suspension or cancellation of a CS facility licence.
[Schedule 3, item 128, subsection 826F(1) of the Act]
- 3.148 The amendments provide further clarity by updating the language to provide certainty that of what is included in the publication, which may include when the licence takes effect.
[Schedule 2, items 54, 65 and 66, sections 795C and 824C, and paragraph 824C(b); Schedule 3, items 33 and 101, sections 795C and 824C of the Act]

Provision of multiple licences

- 3.149 ASIC may grant two or more licences in the same document provided that ASIC is satisfied the relevant licence conditions are met:
- for a market licence, the conditions under subsection 795B(1) or (2); or
 - for a CS facility, the conditions under subsections 824B(1), (1A) or (2).
[Schedule 3, items 34, 35, 102 and 103, sections 795D, 795E, 824D and 824E of the Act]

Consultation

- 3.150 As a result of the co-regulatory environment, consultation between ASIC and the RBA is necessary to ensure effective regulation of CS facilities.
- 3.151 ASIC must consult with the RBA prior to exercising powers relating to CS facilities including:
- granting, revoking, suspending, or cancelling a CS facility licence;
 - imposing, varying or revoking conditions on a CS facility licence; and
 - disallowing a rule change, or exercising its exemptions or directions powers.
[Schedule 3, item 138, subsection 827E(1) of the Act]
- 3.152 Where it relates to financial or systemic risk in the provision of the services of the CS facility, ASIC may only impose, vary or revoke a condition on that CS facility licence after obtaining consent from the RBA. However, a failure to obtain consent does not invalidate the action.
[Schedule 2, item 67, subsections 825A(5) and (6)]

- 3.153 Similarly, the RBA is required to consult or provide advice to ASIC prior to the exercise of any of their exemption or directions powers.
[Schedule 3, item 138, subsection 827E(2) of the Act]
- 3.154 For any requirement for the regulators to consult each other prior to acting, the action will continue to be valid and have effect in the event a regulator fails to engage in consultation prior to exercising their powers. This aims to provide certainty among the affected entities as the decision will continue to have effect regardless of whether consultation has occurred.

Providing advice to the Minister

- 3.155 Given the Minister's limited involvement in licensing and supervision of financial markets and CS facilities, there is no requirement for ASIC to continue to provide advice to the Minister with respect to:
- lodgement of an application for an Australian market licence;
[Schedule 3, items 23 and 24, subsection 795A(1)-(2) of the Act]
 - lodgement of an application for a CS facility licence;
[Schedule 3, items 99 and 100, subsection 824A(1)-(2) of the Act]
 - a market licensee advising it has breached a general licence obligation or is unable to meet its obligations; and
[Schedule 3, item 6, subsection 792B(1) of the Act]
 - a CS facility licensee advising ASIC it has breached a general licence obligation or is unable to meet its obligations.
[Schedule 3, item 80, section 821B(1) of the Act]
- 3.156 ASIC's ability to provide advice, information or documents to the Minister on any matter the Minister retains power over is unchanged. ASIC may continue to provide advice to the Minister on Australian market licences and CS facilities.
[Schedule 3, items 68 and 135, sections 798B and 827B of the Act]
- 3.157 The RBA may continue to provide advice to the Minister in relation to any matter concerning CS facilities.
[Schedule 3, item 135, section 827C of the Act]

Licensee compliance

- 3.158 ASIC may assess a licensee's compliance with their obligations under Chapter 7 of the Act. ASIC does not need to provide a copy of the assessment to the Minister for an:
- Australian market licensee;
[Schedule 3, items 20, 21 and 22 subsections 794C(3) and (6) of the Act]

- CS facility licensee (ASIC will still need to provide a copy of the assessment to the RBA);
[Schedule 3, items 93 and 94, subsections 823C(3) and (6) of the Act]
- derivative trade repository licensee; or
[Schedule 3, item 173 subsection 904J(2) of the Act]
- benchmark administrator licensee;
[Schedule 3, item 175, subsection 908BW(2) of the Act]

3.159 The RBA has similar powers to assess a CS facility licensee's compliance with the financial stability standards. The RBA is not required to provide a copy of their assessment to the Minister, however, must provide a copy of the assessment to ASIC.
[Schedule 3, items 96, 97 and 98, subsections 823CA(3) and (5) of the Act]

Disqualification

3.160 The procedure for ASIC to declare that an individual is disqualified from being involved in an Australian market licensee, CS facility licensee, derivative trade repository licensee or a benchmark administrator licensee no longer involves the Minister. Therefore, amendments are made to remove the Minister's involvement where ASIC is not required to provide the following to the Minister::

- a declaration notice;
[Schedule 3, items 139 to 141, subsection 853D(3) and subparagraph 853D(6)(b)(iii) of the Act]
- a revocation of a declaration; and
[Schedule 3, item 142, subsection 853E(2) of the Act]
- a notification of a disqualified individual being involved in a licensee.
[Schedule 3, item 143, section 853G of the Act]

Operating rules disallowance

3.161 ASIC is directly empowered to disallow changes to operating rules for:

- financial markets;
[Schedule 3, items 10 to 13, subsection 793E(2) to (4) of the Act]
- CS facilities, provided that ASIC consults with the RBA;
[Schedule 3, items 84 to 87, subsection 822E(2) to (4) of the Act]
- compensation rules; and
[Schedule 3, item 156 to 158, subsections 884B(5) to (7) of the Act]
- SEGC rules.
[Schedule 3, item 166, subsections 890H(1) and (2) of the Act]

- 3.162 All other aspects of disallowing operating rules remain the same including the timeframe, notification and affected entities.
- 3.163 ASIC has the power to approve proposed changes to compensation arrangements as set out by Division 3 of Part 7.5 of the Act, that are not required to be dealt with in the compensation rules.
[Schedule 3, items 159 and 161, section 884C of the Act]

Consequential and minor amendments

- 3.164 The Minister's general power of delegation to ASIC under Chapter 7 is amended to exclude powers in Parts 7.2, 7.2A, 7.3, 7.3A, 7.3B, 7.4, 7.5 and 7.5A.
[Schedule 3, item 176, subsection 1101J(1) of the Act]
- 3.165 As a result of updating the directions power to be given to a market licensee, a consequential amendment is made to update section 1042E that relates to Division 3 financial products.
[Schedule 2, item 79, section 1042E of the Act]
- 3.166 Appointed or directed experts under proposed section 823BA of the Act are protected from proceedings provided that the expert acted in good faith when fulfilling their function or power and complied with any other corporations legislation, or prescribed law of the Commonwealth, a State or a Territory.
[Schedule 3, item 101, paragraph 246(1)(n) of the ASIC Act]
- 3.167 As a result of updates to the declared financial market, corresponding amendments have been made to the Bankruptcy Act and the PPSA.
[Schedule 2, items 25 and 26, subsection 5(1) Bankruptcy Act and section 49 of the PPSA]
- 3.168 A definition for the new expression ***amending Act*** has been added to Chapter 10 of the Act.
[Schedule 2, item 143, section 1706A of the Act]
- 3.169 The amendments also make minor amendments to fix an error in the notes by replacing the term subsection with section and update the notice requirement for publishing notices in the Gazette to update language to reflect modern drafting practices.
[Schedule 2, items 46, 54, 57 and 66 notes to sections 791B and 820B, and section 795C and paragraph 824C(b) of the Act]
- 3.170 The amendments replace out of date references to the *Financial Management and Accountability Act 1997* with references to the *Public Governance, Performance and Accountability Act 2013* in both the Corporations Act and the Insurance Act 1973.
[Schedule 3, items 179 and 181, subsections 883D(6), 889J(7) and 889K(6) of the Act and subsection 3(1) of the Insurance Act 1973]

- 3.171 The amendments replace an out of date reference to Australian Stock exchange Limited with Australian Securities Exchange Limited in the Corporations Act.
[Schedule 3, item 180, paragraph 890(3)(a) of the Act`]

Commencement, application, and transitional provisions

Application and transitional provisions relating to Australian CS facility licences

- 3.172 The amendments insert definitions for the terms amending Act, commencement time, new law and old law. This clarifies impact of the transitional provisions and aid with interpretation.
[Schedule 2, item 143, subsection 1706A(1) of the Act]
- 3.173 If ASIC gave a CS facility licensee a direction that was in force before the commencement of Schedule 2 and was in force immediately before that commencement, the direction continues to be in force and may be dealt with on and after that commencement as if the direction were given by the RBA to the licensee under the amended Act.
[Schedule 2, item 143, section 1706AL of the Act]
- 3.174 Schedule 2 includes an application provision stating that, on or after the commencement of that Schedule, an application for an Australian CS facility licence made under section 824A may only be granted by ASIC to an Australian body corporate registered under Chapter 2A or a foreign body corporate registered under Division 2 of Part 5B.2.
[Schedule 2, item 143, section 1706AA of the Act]
- 3.175 Transitional provisions provide that an application for an Australian CS facility licence made under section 824A pre-commencement of Schedule 2 continues to be valid notwithstanding whether the body corporate is registered under either Chapter 2A or Division 2 of Part 5B.2 and, if the licence had been granted by the Minister pre-commencement or even on or after commencement for applications already made pre-commencement, dealt with as if the licence was granted by ASIC.
- 3.176 Transitional provisions also apply for Australian CS facility licences in force before commencement for operating overseas CS facilities. If an application was undecided before commencement, if the Minister decides the application by granting a licence under the old Act, the licence is taken to be granted under the old Act to a body corporate as if the licence had been granted under the amended Act. If the licence granted under the old Act to a body corporate as inserted by the Schedule, the licence is taken to have been granted to the body corporate as inserted by the Schedule.
[Schedule 2, item 143, sections 1706AB, 1706AC and 1706AD of the Act]

Application provisions relating to dealing with licences that are not being used

- 3.177 The amendments relating to dealing with licences that are not being used apply to an action taken or decision made by ASIC on or after the commencement of Schedule 2 (whether a related licence is granted, change happens, or period of lack of use starts before, on or after that commencement).
[Schedule 2, items 143, section 1706AE of the Act]

Transitional provisions relating to prescribed financial markets and widely held market bodies

- 3.178 Transitional provisions ensure that financial markets prescribed by regulations are taken to be (and may be dealt with as if they were) declared financial markets. Transitional provisions also ensure that widely held market bodies prescribed by regulations continue to be widely held market bodies after the commencement of the amendments.
[Schedule 2, items 143, sections 1706AF and 1706AH of the Act]
- 3.179 Schedule 2 contains a translation of references provision to update references to prescribed financial market(s) in instruments made under the Act to declared financial market(s).
[Schedule 2, items 143, section 1706AG of the Act]

Application and transitional provisions relating to preservation of voting power

- 3.180 The amendments relating to preservation of voting power apply to a person who holds a particular percentage of voting power in a widely held market body, that is declared by ASIC (not by virtue of the transitional provision in section 1706AH), at a particular time on or after the commencement of Schedule 2.
[Schedule 2, items 143, section 1706AI of the Act]
- 3.181 An approval to hold a particular percentage of voting power in a widely held market body that was taken to be granted by the Minister because of the operation of the preservation of voting power provisions as in force immediately before the commencement of Schedule 2 is, on or after commencement, taken to be approval granted because of the operation of the preservation of voting power provisions as amended by Schedule 2.
[Schedule 2, items 143, section 1706AJ of the Act]

Transitional provisions relating to approval for control of certain Australian licensees

- 3.182 If, at the commencement of Part 5 of Schedule 2, a person holds more than 15 per cent voting power in a controlled Australian financial body, the person is

taken to be granted an approval by ASIC to hold that percentage of voting power at that commencement. The approval comes into force at that commencement and remains in force indefinitely unless varied or revoked. ASIC is taken to have complied with its obligations under Part 7.4 for granting the approval.

[Schedule 2, item 143, section 1706AK of the Act]