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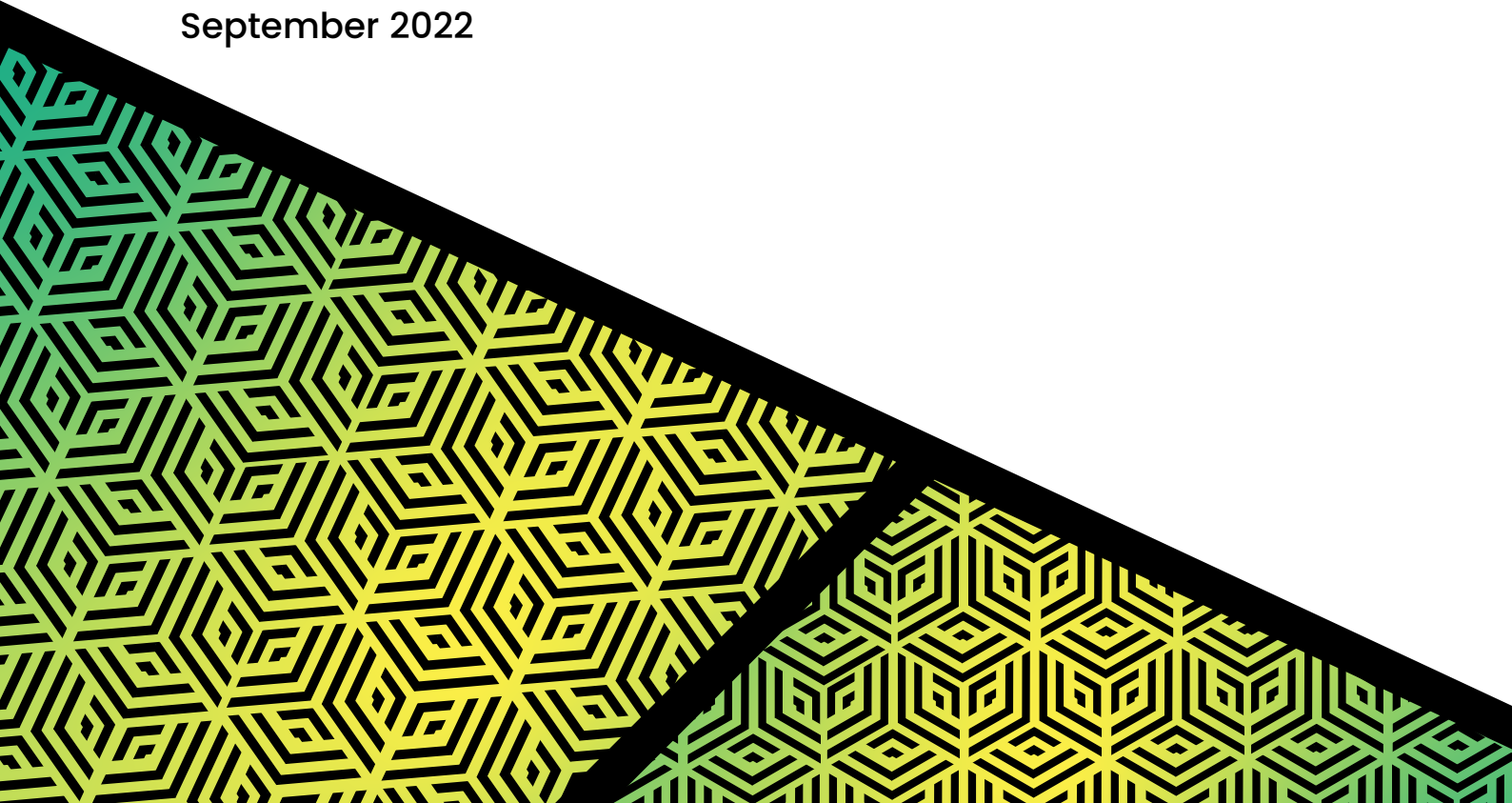
Australian Law Reform Commission

INTERIM REPORT B – ADDITIONAL RESOURCES

# LEGISLATIVE FRAMEWORK FOR CORPORATIONS AND FINANCIAL SERVICES REGULATION

**Prototype Legislation B**  
**Prototype Act**

September 2022



This document contains the **Prototype Act** for Prototype Legislation B. The ALRC has prepared Prototype Legislation B to illustrate the application of several key proposals in **Interim Report B** of the Review of the Legislative Framework for Corporations and Financial Services Regulation. These proposals relate to a **proposed legislative model** (Proposals B1–B9) and **simplified use of offences** (Proposal B15). Prototype Legislation B comprises:

- simplified Act provisions focused on fundamental norms, obligations, and the imposition of significant penalties (Prototype Act);
- a ‘Scoping Order’ consolidating exclusions and exemptions, as well as detail to adjust the scope of the Act and its provisions (Prototype Scoping Order); and
- a thematic set of rules containing matters necessary to give effect to the Act in different regulatory contexts (Prototype Rules).

The Explanatory Note to Prototype Legislation B, as well as the other documents comprising the prototype, can be found on the [ALRC Prototype Legislation webpage](#).

### **What is the Prototype Act?**

The Prototype Act contains selected redrafted provisions from Chapter 7 of the *Corporations Act 2001* (Cth) and delegated legislation made under the Act. The Prototype Act covers:

- key obligations and prohibitions, as well as the consequences of non-compliance — such as obligations to hold an Australian Financial Services Licence and to give disclosure in relation to financial products;
- significant offence provisions, civil penalty provisions, and coercive powers, such as in relation to defective disclosure;
- other (non-coercive) regulatory powers, such as to make exclusions and exemptions contained in a Scoping Order;
- powers to prescribe detail that supports the operation of the Act and its key obligations through the creation of rules; and
- key defined terms — for example, the definitions of ‘financial product’ and ‘financial service’.

**Interim Report B** is the second of three Interim Reports to be published as part of the ALRC’s Review of the Legislative Framework for Corporations and Financial Services Regulation.

[View Interim Report B and the Summary Report](#)

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 and operates in accordance with the *Australian Law Reform Commission Act 1996* (Cth).

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# Corporations Act 2001

## Chapter 1—Introductory

### Part 1.2—Interpretation

#### Division 1—General

##### 9 Dictionary

In this Act:

**acquire** a financial product: if a financial product is issued to a person, the person **acquires** the product from the issuer.

**arrangement** means a contract, agreement, understanding, scheme or other arrangement (as existing from time to time):

- (a) whether formal or informal, or partly formal and partly informal; and
- (b) whether written or oral, or partly written and partly oral; and
- (c) whether or not enforceable, or intended to be enforceable, by legal proceedings and whether or not based on legal or equitable rights.

**Australian financial services licence** means a licence under section 913B that authorises a person who carries on a financial services business to provide financial services.

**carry on** has a meaning affected by Division 3 of this Part and section 761C.

**carried on in this jurisdiction**, in relation to a financial services business, has a meaning affected by section 911D.

**credit** is provided by one person (the **credit provider**) to another (the **debtor**), and is obtained by the debtor from the credit provider, if under an arrangement:

- (a) payment of a debt owed by the debtor to the credit provider is deferred; or
- (b) the debtor incurs a deferred debt to the credit provider.

**CSF offer** has the meaning given by financial services rules in force for the purposes of a provision of Chapter 7A.

**dealing** in a financial product has the meaning given by section 766C.

**defective**: a disclosure document for a financial product is **defective** as provided by section 1135.

**disclosure document** for a financial product means a document that relates to the financial product and is prepared, or given to a person, in compliance or

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purported compliance with a provision of Part 7A.2 or of financial services rules in force for the purposes of a provision of that Part.

**facility** includes:

- (a) intangible property; or
- (b) an arrangement or a term of an arrangement (including a term that is implied by law or that is required by law to be included); or
- (c) a combination of 2 or more things each of which is covered by paragraph (a) or (b).

Note: For cases where 2 or more arrangements may be taken to constitute a single arrangement, see subsection 763A(2).

**financial product** has the meaning given by section 763A.

**financial service** has the meaning given by section 766A.

**financial services business** means a business of providing financial services.

**financial services licensee** means a person who holds an Australian financial services licence.

**financial services practitioner** means:

- (a) a financial services licensee; or
- (b) an authorised representative of a financial services licensee; or
- (c) a person who is not required to hold an Australian financial services licence because of a scoping order made for the purposes of paragraph 911A(2)(b); or
- (d) a person who is required to hold an Australian financial services licence but who does not hold such a licence.

**financial services rules** means rules made under section 1098.

**foreign passport fund product** means:

- (a) an interest in a notified foreign passport fund; or
- (b) a legal or equitable right or interest in an interest covered by paragraph (a); or
- (c) an option to acquire, by way of issue, an interest or right covered by paragraph (a) or (b).

**general insurance product** has the meaning given by section 71.

**government security** means a debenture or bond, or stock, issued or proposed to be issued by a government.

**investment life insurance product** has the meaning given by section 71.

**issue** a financial product: a financial product specified in an item of the table is **issued** to a person when the event specified in that item occurs.

| <b>When financial product is issued</b> |   |  |
|---|---|--|
| <b>Item</b>                             | <b>Financial product</b>                        | <b>Event</b>   |
| 1                                       | a financial product not covered by a later item | the financial product is first issued, granted or otherwise made available, if that first issue, grant or making available is to the person        |
| 2                                       | superannuation product                          | the person becomes a member of the fund concerned  |
| 3                                       | RSA product                                     | the account concerned is opened in the person's name   |
| 4                                       | derivative                                      | the person enters into the legal relationship that constitutes the derivative  |
| 5                                       | margin lending facility                         | the person enters into the legal relationship that constitutes the margin lending facility, if the person does so as the client under the facility |

However, none of the following results in a financial product being *issued* to a person:

- (a) the person making a further contribution to a superannuation fund of which the person is already a member;
- (b) an employer of the person making a further contribution, for the person's benefit, to a superannuation fund of which the person is already a member;
- (c) the person making a further deposit into an RSA maintained in the person's name;
- (d) the person making a further payment under an investment life insurance product;
- (e) the person making a further deposit into a deposit product.

*issuer* of a financial product: the *issuer* of a financial product specified in an item of the table is the person specified in that item.

| <b>Issuer of a financial product</b> |   |  |
|--------------------------------------|---|--|
| <b>Item</b>                          | <b>Financial product</b>                        | <b>Issuer</b>  |
| 1                                    | a financial product not covered by a later item | <p>the person responsible for the obligations owed, under the terms of the facility that constitutes the product, to:</p> <ol style="list-style-type: none"> <li>(a) if the product has not yet been issued to a person—the person to whom the product will be issued, or a person nominated by that person; or</li> <li>(b) if the product has been issued to a person and paragraph (c) does not apply—that person, or a person nominated by that person; or</li> <li>(c) if the product has been issued to a person from whom it has been transferred to another person, and is now held by the other person or a third person to whom it has later been transferred—the person by whom it is held, or a person nominated by that person</li> </ol> |

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| <b>Issuer of a financial product</b> |   |  |
|--------------------------------------|---|--|
| <b>Item</b>                          | <b>Financial product</b>  | <b>Issuer</b>  |
| 2                                    | an interest in a notified foreign passport fund   | the operator of the fund   |
| 3                                    | a financial product that:<br>(a) is a derivative; and<br>(b) is <i>not</i> entered into, or acquired, on a financial market | each person who is a party to a financial product  |
| 4                                    | a financial product that:<br>(a) is a derivative; and<br>(b) is entered into, or acquired, on a financial market            | (c) if the derivative is so entered into or acquired through an arrangement made by a financial services licensee acting on behalf of another person—the licensee; or<br>(d) if the product is so entered into or acquired through an arrangement made by an authorised representative, of a financial services licensee, acting on behalf of another person (who is not the licensee)—the licensee; or<br>(e) otherwise—the market operator |
| 5                                    | a financial product of a kind specified in a scoping order for the purposes of this item                                    | the person specified for that kind of financial product in the scoping order   |

**life insurance product** has the meaning given by section 71.

**professional investor:** a person is a **professional investor** if, and only if:

- (a) the person holds an Australian financial services licence that covers the provision of financial services that are not limited to claims handling and settling services; or
- (b) the person is a body regulated by APRA, other than a trustee of any of the following:
  - (i) a superannuation fund;
  - (ii) an approved deposit fund;
  - (iii) a pooled superannuation trust;
  - (iv) a public sector superannuation scheme;
within the meaning of the *Superannuation Industry (Supervision) Act 1993*; or
- (c) the person is a registered entity within the meaning of the *Financial Sector (Collection of Data) Act 2001*; or
- (d) the person is a trustee of any of the following:
  - (i) a superannuation fund;
  - (ii) an approved deposit fund;
  - (iii) a pooled superannuation trust;
  - (iv) a public sector superannuation scheme;
within the meaning of the *Superannuation Industry (Supervision) Act 1993*, and the fund, trust or scheme has net assets of at least \$10 million; or



- (e) the total of the gross values of the following is at least \$10 million:
  - (i) assets that the person has or controls;
  - (ii) assets held by an associate of the person;
  - (iii) assets held by the trustee of a trust that the person manages; or
- (f) the person is a listed entity, or a related body corporate of a listed entity; or
- (g) the person is an exempt public authority; or
- (h) the person is a body corporate, or an unincorporated body, that:
  - (i) carries on a business of investment in financial products, interests in land or other investments; and
  - (ii) for the purposes of that business, invests funds received (directly or indirectly) following an offer or invitation to the public, within the meaning of section 82, whose terms provided for the funds subscribed to be invested for those purposes; or
- (j) the person is a foreign entity that, had it instead been established or incorporated in Australia, would be a professional investor because of one or more of the preceding paragraphs.

**provide** a financial product: if a financial product is issued to a person, the issuer **provides** the product to the person.

**registered scheme product** means:

- (a) an interest in a registered scheme; or
- (b) a legal or equitable right or interest in an interest covered by paragraph (a); or
- (c) an option to acquire, by way of issue, an interest or right covered by paragraph (a) or (b).

**replacement disclosure document** for a financial product means a document that:

- (a) is of a kind that financial services rules prescribe for the purposes of paragraph 1129(1)(a); and
- (b) replaces a disclosure document for the financial product.

**RSA product** means an RSA (retirement savings account) within the meaning of the *Retirement Savings Accounts Act 1997*.

**scoped provisions** has the meaning given by subsections 765A(2) and 766J(3).

**scoping order** means an order made under section 1097 or a provision of such an order.

**simple corporate bonds** has the meaning given by financial services rules in force for the purposes of a provision of Chapter 7A.

**simple corporate bonds depository interest** means a beneficial interest in simple corporate bonds, where the interest is or was issued by a simple corporate bonds depository nominee (as a simple corporate bonds depository nominee).

**simple corporate bonds depository nominee** means a person who:

- (a) issues to someone else one or more beneficial interests in simple corporate bonds that the person:

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- (i) owns legally; or
  - (ii) would own beneficially, apart from the issue of those interests; or
  - (iii) has a beneficial interest in; and
- (b) does so with the agreement of the body that issued the bonds.

**superannuation product** means a superannuation interest within the meaning of the *Superannuation Industry (Supervision) Act 1993*.

**supplementary disclosure document** for a financial product means a document that:

- (a) is of a kind that financial services rules prescribe for the purposes of paragraph 1129(1)(a); and
- (b) relates to, but does not replace, a disclosure document for the financial product.

**unregistered scheme product** means:

- (a) an interest in a managed investment scheme that is neither a registered scheme nor a managed investment scheme (whether or not operated in this jurisdiction) in relation to which none of paragraphs 601ED(1)(a), (b) and (c) of the Act is satisfied; or
- (b) a legal or equitable right or interest in an interest covered by paragraph (a) of this definition; or
- (c) an option to acquire, by way of issue, an interest or right covered by paragraph (a) or (b) of this definition.

Note: Paragraphs 601ED(1)(a), (b) and (c) of the Act each set out a different threshold condition for when a managed investment scheme must be registered under section 601EB of the Act.

## 71 Definitions of *general insurance product*, *investment life insurance product* and *life insurance product*

- (1) Subject to this section:

**general insurance product** means a contract of insurance that is neither a life policy, nor a sinking fund policy, within the meaning of the *Life Insurance Act 1995*.

**investment life insurance product** means a life policy, or a sinking fund policy, within the meaning of the *Life Insurance Act 1995*, that is *not* a contract of insurance.

**life insurance product** means a life policy, or a sinking fund policy, within the meaning of the *Life Insurance Act 1995*, that is a contract of insurance.

- (2) None of the definitions in subsection (1) covers a contract or policy:
- (a) to the extent that it provides for a benefit to be provided, by an association of employees that is registered as an organisation, or recognised, under the *Fair Work (Registered Organisations) Act 2009*, for a member of the association or a dependant of a member; or
  - (b) to the extent that it provides for benefits, pensions or payments described in paragraph 11(3)(c) of the *Life Insurance Act 1995* (which excludes such

things from the scope of life insurance business for the purposes of that Act); or

- (c) to the extent that it provides for the provision of a funeral benefit; or
- (d) that is issued by an employer to an employee of the employer.

- (3) If a single contract of insurance provides 2 or more kinds of cover, this section applies separately in relation to that contract, in relation to each kind of cover, as if the contract only provided that kind of cover.

Note: Because of this subsection (including as it is affected by subsection (4)), a single contract of insurance may constitute 2 or more separate general insurance products.

- (4) If a contract of insurance provides a kind of cover in relation to 2 or more kinds of asset, subsection (3) applies to the contract, in relation to each kind of asset, as if the cover provided by the contract in relation to that kind of asset constituted a separate kind of cover.
- (5) For the purposes of this section:
- (a) a contract that would ordinarily be regarded as a contract of insurance is taken to be a contract of insurance, even if some of its provisions are not by way of insurance; and
  - (b) a contract that includes provisions of insurance is taken to be a contract of insurance in so far as those provisions are concerned, even if the contract as a whole would not ordinarily be regarded as a contract of insurance.

## Chapter 7—Financial services and markets

### Part 7.1—Preliminary

#### Division 3—Scope of this Chapter: financial products

##### 763A Definition of *financial product*

- (1) In this Act, ***financial product*** means a facility by means of which, or by the acquisition of which:
- (a) a person does one or more of the following:
    - (i) makes a financial investment;
    - (ii) manages financial risk;
    - (iii) makes non-cash payments;
    - (iv) obtains credit; or
  - (b) people commonly do one or more of the things mentioned in paragraph (a), even if a particular person acquires the facility for some other purpose.

Note 1: Examples of making a financial investment are:

- (a) a person paying money to a company for the issue to the person of shares in the company (the company uses the money to generate dividends for the person and the shares are a financial product); or
- (b) a person contributing money to acquire interests in a registered scheme from the responsible entity of the scheme (the scheme uses the money to generate financial or other benefits for the person and the interests in the scheme are a financial product).

Note 2: Examples of actions that do *not* constitute making a financial investment are:

- (a) a person purchasing real property or bullion (while the property or bullion may generate a return for the person, it is not a return generated by the use of the purchase money by another person); or
- (b) a person giving money to a financial services licensee who is to use it to purchase shares for the person (while the purchase of the shares will be a financial investment made by the person, the mere act of giving the money to the licensee will not of itself constitute making a financial investment).

Note 3: Examples of managing financial risk are:

- (a) taking out insurance; or
- (b) hedging a liability by acquiring a futures contract or entering into a currency swap.

Note 4: An example of an action that does *not* constitute managing a financial risk is employing a security firm (while that is a way of managing the risk that thefts will happen, it is not a way of managing the financial consequences if thefts do occur).

Note 5: Examples of making non-cash payments are:

- (a) making payments by means of a facility for direct debit of a deposit account; or
- (b) making payments by means of a facility for the use of cheques; or
- (c) making payments by means of a smart card or other purchased payment facility within the meaning of the *Payment Systems (Regulation) Act 1998*; or
- (d) making payments by means of traveller's cheques (whether denominated in Australian or foreign currency).

- (2) In determining what does or does not constitute a financial product, 2 or more arrangements may be treated as together constituting a single arrangement if it is

reasonable to assume that the parties to the arrangements regard them as constituting a single scheme.

- (3) A financial product does not cease to be a financial product merely because:
- (a) it is acquired by a person other than the one to whom it was originally issued; and
  - (b) that person, in acquiring it, is not making a financial investment or managing a financial risk.

### **763B How this Act applies to composite products**

If a facility (the *composite product*) has 2 or more components that, considered separately, include:

- (a) at least one financial product; and
- (b) at least one component that is not a financial product;

then this Act, in applying to a component that is a financial product, applies to the composite product only to the extent that it consists of such a component.

Note: So, for example, Part 7A.2 does not require disclosures to be made in relation to a component that is not a financial product.

### **765A Narrowing the scope of provisions applying to financial products**

- (1) Scoping orders may, to the extent they specify, exclude the application of provisions of this Chapter or Chapter 7A (Disclosure about financial products and financial services) to:
- (a) financial products; or
  - (b) in so far as the provisions refer to persons making non-cash payments—persons making non-cash payments.

Note 1: Subdivision 3-A of the *Corporations (Exclusions and Exemptions from Chapters 7 and 7A) Scoping Order 2022* excludes the application of this Chapter as mentioned in this subsection.

Note 2: Subdivision 30-A of the *Corporations (Exclusions and Exemptions from Chapters 7 and 7A) Scoping Order 2022* excludes the application of Chapter 7A as mentioned in this subsection.

- (2) Provisions whose application is affected by a scoping order in force under subsection (1) are *scoped provisions*. The scoping order has effect accordingly, except so far as the scoped provisions expressly provide.
- (3) In so far as the operation of scoped provisions is affected by, or affects, the operation of other provisions of this Act, a scoping order in force under subsection (1) in relation to those scoped provisions has a corresponding effect on those other provisions, except so far as those other provisions expressly provide.
- (4) In so far as an instrument is made under or for the purposes of a provision of this Act, this section affects the application of the instrument to the same extent, and in the same way, as it affects the application of the provision itself, except so far as the instrument expressly provides.

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## Division 4—Scope of this Chapter: financial services

### 766A Definition of *financial service*

- (1) For the purposes of this Act, a person provides *a financial service* if the person:
- (a) [provides financial product advice] (see section 766B); or
  - (b) deals in a financial product (see section 766C); or
  - (c) makes a market for a financial product (see section 766D); or
  - (d) operates a registered scheme; or
  - (e) provides a custodial or depository service (see section 766E); or
  - (f) provides a crowd-funding service (see section 766F); or
  - (g) provides a claims handling and settlement service (see section 766G); or
  - (h) provides a superannuation trustee service (see section 766H); or
  - (j) is a trustee company and provides a traditional trustee company service.

Note: See also subsection (4). Trustee companies may also provide other kinds of service mentioned in this subsection.

- (2) However, to avoid doubt, conduct done in the course of work of a kind ordinarily done by clerks or cashiers is not providing a financial service.
- (3) The same conduct may constitute providing 2 or more different financial services.

Note: For example, conduct may constitute providing a superannuation trustee service and also dealing in a financial product that is a superannuation product.

- (4) Scoping orders may, in relation to a traditional trustee company service of a particular class, specify the person or persons to whom a service of that class is taken for the purposes of this Act to be provided. This subsection does not limit (and is not limited by) subsection 766J(2).

### 766J Narrowing the scope of provisions applying to financial services

- (1) Scoping orders may, to the extent they specify, exclude the application of provisions of this Chapter or Chapter 7A (Disclosure about financial products and financial services) to:
- (a) financial services; or
  - (b) in so far as the provisions refer to a particular kind of financial service—financial services of that kind.

Note 1: The following are examples of specific kinds of financial services to which provisions refer:

- (a) financial product advice;
- (b) persons dealing in financial products;
- (c) persons making a market for financial products;
- (d) persons providing custodial or depository services;
- (e) persons providing superannuation trustee services.

Note 2: Subdivision 3-B of the *Corporations (Exclusions and Exemptions from Chapters 7 and 7A) Scoping Order 2022* excludes the application of this Chapter as mentioned in this subsection.

- (2) Scoping orders may set out, for the purposes of specified provisions of this Chapter or Chapter 7A (Disclosure about financial products and financial services):
  - (a) circumstances in which persons facilitating provision of a financial service (for example, by publishing information) are taken also to provide that service; or
  - (b) circumstances in which persons are taken to provide a financial service instead of the persons who would otherwise be taken to provide it.
- (3) Provisions whose application is affected by a scoping order in force under subsection (1) or (2) are **scoped provisions**. The scoping order has effect accordingly, except so far as the scoped provisions expressly provide.
- (4) In so far as the operation of scoped provisions is affected by, or affects, the operation of other provisions of this Act, a scoping order in force under subsection (1) or (2) in relation to those scoped provisions has a corresponding effect on those other provisions, except so far as those other provisions expressly provide.
- (5) In so far as an instrument is made under or for the purposes of a provision of this Act, this section affects the application of the instrument to the same extent, and in the same way, as it affects the application of the provision itself, except so far as the instrument expressly provides.

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## Part 7.6—Licensing financial service providers

### Division 2—Requirement to be licensed or authorised

#### 911A Requirement to hold an Australian financial services licence

- (1) A person who carries on a financial services business in this jurisdiction must hold an Australian financial services licence covering provision of the financial services.

Civil penalty: [5,000 penalty units].

Note 1: Also, a person must not provide a financial service contrary to a banning order or disqualification order under Division 8.

Note 2: Contravening this subsection is an offence (see subsection (5)).

- (2) However, a person is exempt from the requirement to hold an Australian financial services licence for a financial service the person provides if:
- (a) the person provides the service as representative of a second person, and the second person:
    - (i) carries on a financial services business; and
    - (ii) holds an Australian financial services licence that covers provision of the service, or is exempt under paragraph (b) from the requirement to hold an Australian financial services licence for the service; or

Note: A representative must still comply with section 911B.

- (b) the person is exempt from the requirement to hold an Australian financial services licence for the financial service because of a scoping order made for the purposes of this paragraph.

Note: Subdivision 10-A of the *Corporations (Exclusions and Exemptions from Chapters 7 and 7A) Scoping Order 2022* sets out exemptions as mentioned in this paragraph.

- (3) Subsection (2) does not exempt a person from the requirement to hold an Australian financial services licence for:
- (a) the operation of a registered scheme; or
  - (b) a traditional trustee company service.
- (4) Scoping orders made for the purposes of paragraph (2)(b) may exempt persons either unconditionally or subject to specified conditions.
- (5) A person commits an offence if the person contravenes subsection (1).

Penalty: [Imprisonment for 5 years].

#### 911B Providing financial services on behalf of a person who carries on a financial services business

- (1) A person (the *provider*) must not provide a financial service in this jurisdiction on behalf of another person (the *principal*) who carries on a financial services business unless:
- (a) the conditions in at least one of subsections (2), (3) and (4) are satisfied; or



- (b) an exemption prescribed by a scoping order made for the purposes of this paragraph applies to the provider providing the service on behalf of the principal; or
- (c) the principal would have been exempt from the requirement to hold an Australian financial services licence for the financial service if the principal (rather than the provider) had provided the service.

Civil penalty: [5,000 penalty units].

Note 1: Also, a person must not provide a financial service on behalf of another person contrary to a banning order or disqualification order under Division 8.

Note 2: Contravening this subsection is an offence (see subsection (7)).

Note 3: For exemptions from the requirement to hold an Australian financial services licence, see subsection 911A(2).

- (2) The principal must hold an Australian financial services licence covering provision of the financial service. The provider:
  - (a) must be an employee or director of the principal, or of a related body corporate of the principal; and
  - (b) must *not* be an employee or director, or an authorised representative, of:
    - (i) any other person who carries on a financial services business and is not a related body corporate of the principal; or
    - (ii) a related body corporate of a person covered by subparagraph (i); and
  - (c) unless the principal is an insurer, and the provider is acting under a binder given by the principal—must not hold an Australian financial services licence.
- (3) The principal must hold an Australian financial services licence covering provision of the financial service. The provider:
  - (a) must be an authorised representative of the principal under an authorisation that covers provision of the service by the provider; and
  - (b) if the provider is an employee or director of:
    - (i) any other person (a **second principal**) who carries on a financial services business; or
    - (ii) a related body corporate of a second principal;  
and provides financial services in this jurisdiction on behalf of the second principal—must do so as an authorised representative of the second principal under an authorisation that covers provision of those services by the provider; and
  - (c) unless the principal is an insurer, and the provider is acting under a binder given by the principal—must not hold an Australian financial services licence.
- (4) The provider must hold an Australian financial services licence covering provision of the financial service.

Note: However, in general a financial services licensee cannot be the authorised representative of another financial services licensee: see sections 916D and 916E.
- (5) If the condition in subsection (4) is satisfied, the other provisions of this Chapter apply as if the provider had provided the service on the provider's own account,

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and not on behalf of the principal, except so far as a scoping order made for the purposes of this subsection provides otherwise.

- (6) Scoping orders made for the purposes of paragraph (1)(b) may prescribe exemptions either unconditionally or subject to specified conditions.
- (7) A person commits an offence if the person contravenes subsection (1).

Penalty: [Imprisonment for 5 years].

## **Part 7.11A—Scoping orders, financial services rules and specific exemptions**

### **1097 Power to make scoping orders**

- (1) The Minister or ASIC may, by legislative instrument, make orders prescribing matters required or permitted by a provision of Chapter 1 (Introductory), this Chapter or Chapter 7A (Disclosure about financial products and financial services) to be prescribed by scoping orders.

Note: For example, subsection 765A(1) provides for scoping orders to exclude the application of this Chapter or Chapter 7A (Disclosure about financial products and financial services) to financial products.

- (2) An explanatory statement (as defined by section 15J of the *Legislation Act 2003*) for a legislative instrument made under subsection (1) of this section must include an explanation of how the effect of the instrument is consistent with the objects of this Chapter or Chapter 7A, as the case requires.
- (3) An explanation included under subsection (2) is not binding on any court or tribunal.
- (4) In relation to scoping orders made by the Minister, subsections 33(3) and (3AA) of the *Acts Interpretation Act 1901* apply to the power that subsection (1) of this section confers on ASIC in the same way as those subsections apply to that power in relation to scoping orders made by ASIC.
- (5) In relation to scoping orders made by ASIC, subsections 33(3) and (3AA) of the *Acts Interpretation Act 1901* apply to the power that subsection (1) of this section confers on the Minister in the same way as those subsections apply to that power in relation to scoping orders made by the Minister.

Note: Subsections 33(3) and (3AA) of the *Acts Interpretation Act 1901* deal with the power to amend or repeal instruments of a legislative or administrative character.

- (6) Scoping orders may amend:
  - (a) provisions of this Act; or
  - (b) an instrument made under or for the purposes of such provisions;by inserting, amending or repealing notes that refer to scoping orders and describe their effect.

### **1098 Power to make financial services rules**

- (1) The Minister or ASIC may, by legislative instrument, make rules prescribing matters required or permitted by a provision of this Chapter or Chapter 7A (Disclosure about financial products and financial services) to be prescribed by financial services rules.
- (2) An explanatory statement (as defined by section 15J of the *Legislation Act 2003*) for a legislative instrument made under subsection (1) of this section must include an explanation of how the effect of the instrument is consistent with the objects of this Chapter or Chapter 7A, as the case requires.

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- (3) An explanation included under subsection (2) is not binding on any court or tribunal.
- (4) In relation to financial services rules made by the Minister, subsections 33(3) and (3AA) of the *Acts Interpretation Act 1901* apply to the power that subsection (1) of this section confers on ASIC in the same way as those subsections apply to that power in relation to financial services rules made by ASIC.
- (5) In relation to financial services rules made by ASIC, subsections 33(3) and (3AA) of the *Acts Interpretation Act 1901* apply to the power that subsection (1) of this section confers on the Minister in the same way as those subsections apply to that power in relation to financial services rules made by the Minister.

Note: Subsections 33(3) and (3AA) of the *Acts Interpretation Act 1901* deal with the power to amend or repeal instruments of a legislative or administrative character.

### 1098A Extent of power to make financial services rules

- (1) Financial services rules may:
  - (a) create offences (including offences of strict liability) and civil penalties; and
  - (b) prescribe penalties, not exceeding 50 penalty units for an individual or 500 penalty units for a body corporate;for contraventions of the rules.
- (2) However, to avoid doubt, financial services rules may not do the following:
  - (a) provide powers of:
    - (i) arrest or detention; or
    - (ii) entry, search or seizure;
  - (b) impose a tax;
  - (c) set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;
  - (d) directly amend the text of this Act.

### 1098B Consultation on scoping orders and financial services rules

- (1) Before making an instrument under subsection 1097(1) or 1098(1), the Minister or ASIC (the *rule-maker*) must consult the Rules Advisory Committee and the public about the proposed instrument, unless section 1098C applies.
- (2) Without limiting how the requirement in subsection (1) to consult the public may be complied with, the rule-maker may comply with that requirement by doing the following on a publicly available website:
  - (a) making available the text of the proposed instrument or a description of its content;
  - (b) inviting the public to comment on the proposed instrument within a specified period that gives the public a reasonable opportunity to comment.
- (3) Section 17 of the *Legislation Act 2003* (Rule-makers should consult before making legislative instruments) does not apply to an instrument made under subsection 1097(1) or 1098(1) of this Act.

### **1098C Dispensing with consultation in an emergency**

- (1) The Minister or ASIC (the *rule-maker*) may make an instrument under subsection 1097(1) or 1098(1) without consulting as required by section 1098B if the rule-maker is of the opinion that it is necessary to do so in the public interest:
  - (a) to protect against a substantial risk of consumer detriment that cannot otherwise be addressed in a timely manner; or
  - (b) to respond in a timely manner to unforeseen events so as to support the functioning of financial markets and the provision of financial products and financial services.
- (2) If the rule-maker makes an instrument under subsection 1097(1) or 1098(1) without consulting the Rules Advisory Committee:
  - (a) the rule-maker must as soon as practicable, and in any event within 24 hours, give [each member of] the Rules Advisory Committee a notice in writing setting out the content of the instrument and the reasons for making it without consulting the Rules Advisory Committee; and
  - (b) the instrument, and each amendment it makes to another instrument, cease to have effect at the end of 12 months starting on the day the first-mentioned instrument commences.
- (3) Paragraph (2)(b) does not prevent a provision or an amendment from ceasing to have effect before the end of the 12 months referred to in that paragraph.

### **1098D Procedural requirements do not affect validity**

A failure to comply with subsection 1097(2), 1098(2) or 1098B(1) or paragraph 1098C(2)(a) does not affect the validity, operation or enforcement of the instrument or of any law of the Commonwealth.

### **1098E Establishment of Rules Advisory Committee**

[To be drafted.]

### **1099 Specific exemptions by ASIC**

- (1) ASIC may, by notifiable instrument, exempt a specified person:
  - (a) either generally or as otherwise specified in the instrument; and
  - (b) either unconditionally or subject to specified conditions;from a specified provision of:
  - (c) this Chapter; or
  - (d) Chapter 7A (Disclosure about financial products and financial services); or
  - (e) financial services rules.
- (2) A person to whom a condition specified in an exemption under subsection (1) applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for such an order.

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- (3) The power conferred by subsection (1) does not include the power to exempt a class or kind of person, or to exempt a person from a class or kind of provision.

Note: Other provisions of this Act confer powers to make legislative instruments (called scoping orders) that provide for exemptions: see, for example, paragraph 911B(1)(b) and subsection 911B(6). Those powers include the power to specify matters by class: see subsection 13(3) of the *Legislation Act 2003* and subsection 33(3A) of the *Acts Interpretation Act 1901*.

- (4) A notifiable instrument under subsection (1) must include an explanation of how the exemption is consistent with the objects of this Chapter or Chapter 7A, as the case requires.
- (5) An explanation included under subsection (4) is not binding on any court or tribunal.
- (6) A failure to comply with subsection (4) does not affect the validity or operation of the exemption or the enforcement of a condition to which it is subject.

## **Chapter 7A—Disclosure about financial products and financial services**

### **Part 7A.1—Introduction**

#### **1102 Objects of this Chapter**

[To be drafted.]

#### **1105 Application to financial products**

This Chapter applies to all financial products, except as provided in scoping orders in force for the purposes of subsection 765A(1) in relation to provisions of this Chapter.

Note: Subdivision 30-A of the *Corporations (Exclusions and Exemptions from Chapters 7 and 7A) Scoping Order 2022* excludes the application of this Chapter to various financial products.

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## Part 7A.2—Disclosure about financial products

### Division 1—Introduction

#### 1106 Simplified outline of this Part

[To be drafted.]

#### 1107 Application to offers and invitations

This Part applies as set out in the table.

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| <b>Invitations and offers</b> |  |  |
|-------------------------------|--|--|
| <b>Item</b>                   | <b>This Part applies in relation to:</b>                     | <b>in the same way as it applies to:</b>                                 |
| 1                             | inviting an application for the issue of a financial product | offering to issue the financial product                                  |
| 2                             | inviting an offer to issue a financial product               | offering to acquire the financial product by way of issue of the product |
| 3                             | inviting an offer to purchase a financial product            | offering to sell the financial product                                   |
| 4                             | inviting an offer to sell a financial product                | offering to purchase the financial product                               |

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#### 1108 Treatment of offers of options over financial products

For the purposes of this Chapter:

- (a) an offer of an option over a financial product is not to be taken to be an offer of the underlying financial product; and
- (b) the grant of an option without an offer of the option is taken to be an offer of the option; and
- (c) an offer to grant an option is taken to be an offer to issue the financial product constituted by the option.

#### 1109 Definitions

Expressions have the same meaning in this Chapter as in Chapter 7, except so far as this Chapter provides.

#### 1110 Effect of Division on instruments

In so far as an instrument is made under or for the purposes of a provision of this Part, this Division affects the application of the instrument to the same extent, and in the same way, as it affects the application of the provision itself, except so far as the instrument expressly provides.



## **Division 2—When disclosure document must be given**

### **1111 Issue of financial product**

- (1) The issuer of a financial product must:
- (a) prepare a disclosure document for the financial product that complies with this Part and the financial services rules; and
  - (b) give the document to another person (the *recipient*);
- if the issuer:
- (c) offers to issue the financial product to the recipient; or
  - (d) gives the recipient an application form for the issue of the financial product; or
  - (e) issues the financial product to the recipient.

- (2) The issuer must comply with subsection (1) at or before the time when the issuer does the act referred to in paragraph (1)(c), (d) or (e), as the case may be.

Civil penalty: [5,000 penalty units].

- (3) The issuer of a financial product must:
- (a) prepare a disclosure document for the financial product that complies with this Part and the financial services rules; and
  - (b) give the document to another person (the *recipient*);
- if the recipient makes an offer to the issuer to acquire the financial product by way of issue of the product to the recipient.

- (4) The issuer must comply with subsection (3) before the recipient becomes bound by a legal obligation to acquire the financial product by way of issue.

Civil penalty: [5,000 penalty units].

- (5) A person commits an offence if the person contravenes subsections (1) and (2) or subsections (3) and (4).<sup>1</sup>

Penalty: [Imprisonment for 5 years].

### **1112 Sale transaction analogous to issue of financial product**

- (1) A person (the *seller*) must:
- (a) prepare a disclosure document for a financial product that complies with this Part and the financial services rules; and
  - (b) give the document to another person (the *buyer*);
- if:
- (c) the seller offers to sell the financial product to the buyer; and
  - (d) subsection (6), (7) or (8) would apply to the sale.

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<sup>1</sup> Subsection 1021C(1) also provides for an offence of strict liability, with a maximum penalty of 50 penalty units, for failing to provide a disclosure document as required by Part 7.9. Chapter 6D has no equivalent.

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- (2) The seller must comply with subsection (1) at or before the time when the seller makes the offer.

Civil penalty: [5,000 penalty units].

- (3) A person (the **seller**) must:

(a) prepare a disclosure document for a financial product that complies with this Part and the financial services rules; and

(b) give the document to another person (the **buyer**);

if:

(c) the buyer makes an offer to the seller to acquire the financial product by way of transfer of the product to the buyer; and

(d) subsection (6), (7) or (8) would apply to the sale of the product by the seller to the buyer pursuant to the offer.

- (4) The seller must comply with subsection (3) before the buyer becomes bound by a legal obligation to acquire the financial product pursuant to the offer.

Civil penalty: [5,000 penalty units].

- (5) A person commits an offence if the person contravenes subsections (1) and (2) or subsections (3) and (4).

Penalty: [Imprisonment for 5 years].

*Sale amounting to indirect issue*

- (6) This subsection applies to a sale of a financial product if:

(a) the sale results from an offer that was made within 12 months after the issue of the financial product; and

(b) the product was issued to a person (the **first holder**) without a disclosure document for the product being required to be prepared and given; and

(c) at least one of the following applies:

(i) the issuer issued the product, or the first holder acquired the product, with the purpose of the first holder selling or transferring the product, or granting, issuing or transferring interests in it, or options or warrants over it;

(ii) there are reasonable grounds for concluding that the product was issued or acquired with that purpose (whether or not there were or may have been other purposes for the issue or acquisition);

(iii) the financial product, or any financial product of the same kind that was issued at the same time, is later sold, or offered for sale, within 12 months after issue, unless it is proved that the circumstances of the issue and the later sale or offer are not such as to give rise to reasonable grounds for concluding as mentioned in subparagraph (ii).

*Off-market sale by controller*

- (7) This subsection applies to a sale of a financial product if the seller controls the issuer of the financial product and:

(a) the product is not able to be traded on any licensed market; or

- (b) the product is able to be traded on a licensed market, but the sale is not made in the ordinary course of trading on a licensed market.

Note: See section 50AA for when a person controls a body.

*Sale amounting to indirect off-market sale by controller*

- (8) This subsection applies to a sale of a financial product if:
  - (a) the sale results from an offer that was made within 12 months after the sale (the **earlier sale**) of the financial product by a person (the **controller**) who controlled the issuer of the product at the time of the earlier sale; and
  - (b) either:
    - (i) at the time of the earlier sale, the product was not able to be traded on any licensed market; or
    - (ii) the product was able to be traded on a licensed market at that time, but the earlier sale did not occur in the ordinary course of trading on a licensed market; and
  - (c) a disclosure document was not required to be prepared and given by or on behalf of the controller before the earlier sale; and
  - (d) at least one of the following applies:
    - (i) the controller, or the person (the **earlier buyer**) to whom the product was sold, entered into the earlier sale with the purpose of the earlier buyer selling or transferring the product, or granting, issuing or transferring interests in it or options or warrants over it;
    - (ii) there are reasonable grounds for concluding that the controller or the earlier buyer entered into the earlier sale with that purpose (whether or not there were or may have been other purposes for the sale or acquisition);
    - (iii) the financial product, or any financial product of the same kind that was sold by the controller at the same time as the earlier sale, is later sold, or offered for sale, within 12 months after issue, unless it is proved that the circumstances of the earlier sale and the later sale or offer are not such as to give rise to reasonable grounds for concluding as mentioned in subparagraph (ii).

Note: See section 50AA for when a person controls a body.

### **1113 Person electing to be covered by group financial product**

- (1) If a financial product:
  - (a) is issued to a person; and
  - (b) covers, or is designed to cover, a group of persons; and
  - (c) may cover a person (the **new group member**) who elects to be covered by the financial product;

the issuer of the financial product must take reasonable steps to ensure that a disclosure document for the financial product is given to the new group member before the new group member makes an election to be covered by the financial product.
- (2) For the purposes of this section, a financial product covers a person if benefits are, or may be, provided under the financial product directly to:

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- (a) the person; or
- (b) a relative of the person; or
- (c) a person nominated by the person.

(3) A person commits an offence if the person contravenes subsection (1).

Penalty: [Imprisonment for 2 years].

### 1114 Superannuation product or RSA product

*Superannuation product to be provided to employee*

(1) At or before the time when a person (the **employer**) becomes a standard employer-sponsor (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) of a superannuation entity, the person who is to provide the superannuation products to the employer's employees (within the meaning of that Act) must give the employer a disclosure document for each of those superannuation products.

*RSA product to be issued to employee*

(2) At or before the time when a financial product that is an RSA product is issued to an employee (within the meaning of the *Retirement Savings Accounts Act 1997*) of a person, the issuer must give to the person a disclosure document for the RSA product if:

- (a) the person applied for the RSA product to be issued to the employee; and
- (b) the person has not previously applied for an RSA product of the same kind to be issued to an employee of the person.

*Interest in prescribed superannuation entity*

(3) If:

- (a) a trustee applies under:
  - (i) Part 24 of the *Superannuation Industry (Supervision) Act 1993*; or
  - (ii) Part 9 of the *Retirement Savings Accounts Act 1997*;on behalf of a person (the **beneficiary**) for the issue of a financial product that is an interest in a superannuation entity; and
- (b) the superannuation entity is of a kind prescribed by a scoping order for the purposes of this subsection; and
- (c) the trustee has not previously applied under that Part for the issue of an interest in that entity on behalf of any person;

then, at or before the time when the financial product is issued, the issuer of the financial product must give to the trustee a disclosure document for the financial product.

*Offence*

(4) A person commits an offence if the person contravenes any of subsections (1) to (3).

Penalty: [Imprisonment for 5 years].

### 1115 Acquisition of financial product under custodial arrangement

- (1) A person (the *provider*) must give a disclosure document for a financial product (the *relevant product*) to another person (the *client*) if:
- (a) an arrangement (the *custodial arrangement*) exists between the provider and the client (whether or not there are also other parties to the arrangement); and
  - (b) under the custodial arrangement, the client is to give, or is entitled to give, an instruction, direction or request that the relevant product, or a financial product of the same kind as the relevant product, is to be acquired; and
  - (c) the client gives such an instruction, direction or request under the custodial arrangement; and
  - (d) as a result, the custodial arrangement requires the provider, or a third person (an *agent*) with whom the provider has or will have an arrangement, to acquire the relevant product (subject to any discretion they have to refuse); and
  - (e) the provider or an agent acquires the relevant product as required by the custodial arrangement; and
  - (f) the acquisition is by way of issue or pursuant to a sale; and
  - (g) if the acquisition is by way of issue—section 1111 would have required a disclosure document for the relevant product to be given to the client if the issuer had issued the relevant product directly to the client for the same price, and in circumstances that in other respects were the same, as the issue to the provider or agent; and
  - (h) if the acquisition is pursuant to a sale—section 1112 would have required a disclosure document for the relevant product to be given to the client if the seller had sold the relevant product directly to the client for the same price, and in circumstances that in other respects were the same, as the sale to the provider or agent; and
  - (j) under the custodial arrangement:
    - (i) the relevant product is to be held on trust for the client or for another person nominated by the client; or
    - (ii) the client, or another person nominated by the client, is to have rights or benefits in relation to the relevant product, in relation to a beneficial interest in the relevant product, or in relation to, or calculated by reference to, dividends or other benefits derived from the relevant product.

The disclosure document must be given to the client before the provider or agent acquires the relevant product.

Civil penalty: [5,000 penalty units].

- (2) In determining whether paragraph (1)(g) or (h) is satisfied, disregard:
- (a) section 1117; and
  - (b) an exemption in a scoping order made for the purposes of subsection 1118(1) if the exemption is specified in a scoping order for the purposes of this paragraph.

Note: Section 1117 is disregarded for the purposes of paragraph (1)(g) or (h) of this section because the exemption for which it provides can apply directly to the provider.

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Similarly, if an exemption in a scoping order made for the purposes of subsection 1118(1) can apply directly to the provider, the scoping order will specify the exemption for the purposes of paragraph (b) of this subsection.

- (3) For the purposes of subsection (1), if a transaction covers other products as well as the relevant product, the price at which the relevant product is issued or sold is the appropriate proportion of the consideration for the transaction.
- (4) A person commits an offence if the person contravenes subsection (1).  
Penalty: [Imprisonment for 5 years].

### **1116 Exemption for issue or sale to professional investor or sophisticated investor**

#### *Professional investor*

- (1) Section 1111 or 1112 does not require the issuer or seller to give a disclosure document for the financial product to another person at a time when the other person is a professional investor, unless the financial product is:
  - (a) a general insurance product; or
  - (b) a superannuation product; or
  - (c) an RSA product.

#### *Sophisticated investor*

- <sup>2</sup>(2) Section 1111 or 1112 does not require the issuer or seller to give a disclosure document for the financial product to a person (the *investor*) if:
  - (a) the financial product is *none* of the following:
    - (i) a general insurance product;
    - (ii) a superannuation product;
    - (iii) an RSA product; and
  - (b) the issuer or seller offers the financial product to the investor; and
  - (c) the offer is made through a financial services licensee; and
  - (d) the licensee is satisfied on reasonable grounds that the investor has previous experience in investing in financial products that allows the investor to assess:
    - (i) the merits of the offer; and
    - (ii) the value of the financial product; and
    - (iii) the risks involved in accepting the offer; and
    - (iv) the investor's own information needs; and
    - (v) the adequacy of the information given by the issuer or seller; and
  - (e) before or at the time when the offer is made:
    - (i) the licensee gives the investor a written statement of the licensee's reasons for being satisfied as to those matters; and

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<sup>2</sup> This provision is based on subsection 708(10) and does not include counterparts to 761GA(c) and (f)(ii) and (iii). The differences between 708(1) and 761GA could be replicated by moving this exemption to the scoping order and tailoring it as needed.

- (ii) the investor signs a written acknowledgment that the licensee has not given the person a disclosure document under this Part in relation to the offer.

### **1117 Exemption if up to date disclosure document already received**

Section 1111, 1112, 1113, 1114 or 1115 does not require a person to give a disclosure document for a financial product to another person if:

- (a) the other person has already received a disclosure document for the financial product, and that disclosure document contains all the information that the first-mentioned disclosure document would be required to contain; or
- (b) the first-mentioned person believes on reasonable grounds that paragraph (a) applies.

Note: Subsection 1129(2) is relevant to determining whether paragraph (a) is satisfied, because it treats the disclosure document that the other person has already received as including material contained in a supplementary disclosure document that is given to the other person under the financial services rules.

As a consequence, a person who gives such a supplementary disclosure document to the other person can rely on the exemption in this section if the 2 documents between them contain everything that a new disclosure document for the financial product would need to contain.

### **1118 Exemptions in scoping orders**

- (1) A person need not comply with section 1111, 1112, 1113, 1114 or 1115 to the extent that a scoping order made for the purposes of this subsection provides that the person need not comply with that section.

Note: Division 35 of the *Corporations (Exclusions and Exemptions from Chapters 7 and 7A) Scoping Order 2022* sets out exemptions as mentioned in this subsection.

- (2) Without limiting subsection (1), if the scoping order has the effect that the person need not comply with that section by giving a disclosure document for a financial product, that section does not require the person to give the disclosure document.
- (3) Scoping orders made for the purposes of subsection (1) may provide as mentioned in that subsection either unconditionally or subject to specified conditions.
- (4) A person to whom a condition specified in a scoping order under subsection (1) applies must comply with the condition. The Court may order the person to comply with the condition in a specified way. Only ASIC may apply to the Court for such an order.

### **1119 Exemption from preparing disclosure document that need not be given**

If a provision of this Division has the effect that a disclosure document for a financial product need not be given to a person, then a disclosure document for the financial product need not be prepared for that purpose.

## Division 3—Form and content of disclosure document

### 1125 Core principles

- (1) A disclosure document for a financial product must be worded and presented in a clear, concise and effective manner.
- (2) A contravention of subsection (1) is not an offence.
- (3) A disclosure document for a financial product must include:
  - (a) all information, about each matter that the document is required by this Act or the financial services rules to set out or deal with, that:
    - (i) a reasonable person to whom the document is required to be given would reasonably require in order to decide whether to acquire the financial product; or
    - <sup>3</sup>(ii) a professional adviser to such a person would reasonably require in order to advise the person whether to acquire the financial product; and
  - (b) all information, about any other matters that the document deals with, that:
    - (i) such a person would reasonably require in order to so decide; or
    - (ii) a professional adviser to such a person would reasonably require in order to so advise the person; and
  - <sup>4</sup>(c) all other information that might reasonably be expected to have a material influence on such a person in so deciding.
- <sup>5</sup>(4) However, the disclosure document need not include material that it would not be reasonable for such a person, or a professional adviser to such a person, to expect to find in a disclosure document for the financial product. In applying this test, the matters that may be taken into account include, but are not limited to:
  - (a) the nature of the financial product (including its risk profile); and
  - (b) how well financial products of the same kind are understood by the kinds of persons who commonly acquire them in circumstances where disclosure documents for the financial products are required to be given; and
  - (c) what such persons or their professional advisers may reasonably be expected to know; and
  - (d) if the financial product is an ED security that is not a continuously quoted security—the effect of the following provisions of the Act:
    - (i) Chapter 2M as it applies to disclosing entities;
    - (ii) sections 674, 674A, 675 and 675A; and

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<sup>3</sup> The prototype requires that preparers of any disclosure document consider the needs of professional advisers in preparing the disclosure document. The current law applies this obligation only to disclosure documents under Chapter 6D. The distinction from disclosure documents under Part 7.9 could be maintained by including an exception in the financial services rules pursuant to subparagraph 1126(1)(d)(i) and subsection 1127(1) in the prototype.

<sup>4</sup> This has no counterpart in Chapter 6D. The distinction could be maintained by including an exception in the financial services rules pursuant to subparagraph 1126(1)(d)(i) and subsection 1127(1).

<sup>5</sup> This is based on subsection 1013F(2), which is in Part 7.9 and has no exact counterpart in Chapter 6D, although paragraph 710(1)(a) and subsection 710(2) are somewhat similar. The differences could be replicated by an exception in the rules, based on paragraph 1126(1)(d)(i) and subsection 1127(1).



- (e) how the financial product is promoted, sold or distributed.

*Sources of required information*

- (5) Information is required to be included only to the extent to which it is actually known to at least one of the following:
  - (a) a person who prepares the disclosure document;
  - (b) the issuer of the financial product;
  - (c) a person named in the document as an underwriter of the issue or sale of the financial product;
  - (d) a person who:
    - (i) is named in the document as a financial services licensee providing services in relation to the issue or sale of the financial product; and
    - (ii) has participated in any way in the preparation of the document;
  - (e) a person who has given, in relation to a statement included in the document, a consent required by the financial services rules;
  - (f) a person named in the document, with the person's consent, as having performed a particular professional or advisory function;
  - (g) a director of a body corporate that is a person covered by a previous paragraph.

*Information must be up to date*

- (6) The information in a disclosure document for a financial product must be up to date as at the time when the document is given to a person in order to comply with a requirement to give the document to the person.

Note: Subsection 1129(2) is relevant to determining whether a disclosure document given to a person is up to date, because it treats the document as including material contained in a supplementary disclosure document.

**1126 Financial services rules to prescribe form, content and other matters relating to disclosure documents**

- (1) Financial services rules may prescribe the following matters in relation to disclosure documents for financial products:
  - (a) how they are to be described;
  - (b) who must prepare them, and who must give them to the persons to whom they are required to be given;
  - (c) the manner and form in which they must be prepared;
  - (d) their content, including:
    - (i) material that need not be included in them; and
    - (ii) material that must not be included in them; and
    - (iii) material that is taken, for the purposes of this Act, to be included in them;
  - (e) without limiting paragraph (d), guidelines that must be complied with when a disclosure document makes a claim that labour standards or environmental, social or ethical considerations are taken into account in the selection, retention or realisation of an investment;

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- (f) dates that are taken, for the purposes of this Act, to be the dates of disclosure documents (even if the disclosure documents are otherwise dated);
  - (g) requirements for persons to give consents relating to them;
  - (h) whether and when copies of them must or may be lodged with ASIC;
  - (j) times that are taken, for the purposes of this Act, to be the times at which copies of them have been lodged with ASIC;
  - (k) how they are to be given (including by means that do not involve personal delivery);
  - (l) when they expire, and the effect of expiry on applications for the financial products;
  - (m) the times at or before which they are to be prepared and given (which may be earlier but not later than the times at or before which this Act requires them to be given);
  - (n) what information about events relating to them must be given to ASIC, and how that information is to be given;
  - (o) what documents relating to them, or to their preparation and giving, must be kept, in what form those documents must be kept, who must keep those documents and for how long, and what access to those documents must be given and to whom;
  - (p) any other matters that are necessary or convenient to ensure compliance with this Part and with scoping orders made for the purposes of this Part.
- (2) A person must comply with financial services rules in force for the purposes of this section, in so far as they apply to the person.
- (3) Financial services rules in force for the purposes of subparagraph (1)(d)(iii) or paragraph (1)(f) or (j) have effect according to their tenor for the purposes of this Act.

### **1127 Exceptions and safe harbours in financial services rules**

*Material that need not be included*

- (1) Financial services rules in force for the purposes of subparagraph 1126(1)(d)(i) have effect according to their tenor:
- (a) even if the material is required by section 1125, or by other financial services rules, to be included in a disclosure document; and
  - (b) whether or not the financial services rules provide for other material to be so included instead.
- (2) The financial services rules may:
- (a) require persons who rely on financial services rules in force for the purposes of subparagraph 1126(1)(d)(iii) to provide copies of the material; and
  - (b) prescribe the persons to whom, the dates and times when, and the terms on which, copies of the material must be provided.
- (3) Subsection (1) has effect despite section 1125.

*Oral communication of content followed by later delivery of the disclosure document*

- <sup>6</sup>(4) Financial services rules in force for the purposes of paragraph 1126(1)(k) may provide for situations in which disclosure documents may be given in the following manner:
- (a) specified matters in the disclosure documents are communicated orally, and in accordance with the financial services rules, at or before the time at or before which the disclosure documents would otherwise be required to be given; and
  - (b) the disclosure documents are given as soon as practicable, and in any event within 5 days after the issue or sale of the financial products.
- (5) Financial services rules in force for the purposes of subsection (4) of this section have effect despite paragraph 1126(1)(m).

**1128 Financial services rules may provide for alternative forms of disclosure document**

- (1) Financial services rules may prescribe:
- (a) kinds of disclosure documents (*alternative disclosure documents*) that may be given to persons instead of disclosure documents (*main disclosure documents*) that would otherwise be required to be given; and
  - (b) for each of those kinds of documents—the matters referred to in subsection 1126(1); and
  - (c) circumstances in which main disclosure documents must be given in addition to alternative disclosure documents; and
  - (d) the times at or before which main disclosure documents must be given in addition to alternative disclosure documents (which may be later than the times at or before which this Act requires them to be given).
- (2) This Part, and financial services rules in force for the purposes of a provision of this Part, apply in relation to alternative disclosure documents in the same way as they apply in relation to main disclosure documents, except so far as the financial services rules provide otherwise.

**1129 Financial services rules may provide for supplementary and replacement disclosure documents**

- (1) Financial services rules may prescribe:
- (a) kinds of documents that a person who has prepared or given a disclosure document (the *original document*) for a financial product may or must prepare or give:
    - (i) to correct a misleading or deceptive statement in the original document; or
    - (ii) to correct an omission of material the original document is required to contain; or

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<sup>6</sup> This enables the rules to replicate provisions like section 1012G, which has been notionally substituted by regulation 7.9.15H.

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- (iii) to update or add to the information contained in the original document; or
- (iv) to change a statement of a kind prescribed by financial services rules for the purposes of this subparagraph; and
- (b) for each of those kinds of documents:
  - (i) the persons to whom the documents may or must be given; and
  - (ii) the matters referred to in subsection 1126(1).
- (2) If:
  - (a) a disclosure document for a financial product is given to a person; and
  - (b) at the same time, or later, there is given to the person a document (the **supplementary document**) that is of a kind that financial services rules prescribe for the purposes of paragraph (1)(a) and relates to, but does not replace, the disclosure document;the disclosure document is taken, from the time when the supplementary document is given to the person, to include the information and statements contained in the supplementary document.
- (3) This Part, and financial services rules in force for the purposes of a provision of this Part, apply in relation to a document prepared or given in accordance with financial services rules in force for the purposes of subsection (1) in the same way as they apply in relation to the original document, except so far as the financial services rules provide otherwise.

**<sup>7</sup>1130 CHESSE depository interests**

- (1) Financial services rules may make provision for how this Chapter, and instruments made under or for the purposes of provisions of this Chapter, are to apply to:
  - (a) foreign companies; and
  - (b) ASX Settlement Pty Limited; and
  - (c) CHESSE Depository Nominees Pty Limited;in relation to:
  - (d) financial products issued by the foreign companies and held by CHESSE Depository Nominees Pty Limited in accordance with the operating rules of ASX Settlement Pty Limited; and
  - (e) units of beneficial ownership in those financial products that are issued for the purpose of enabling the financial products to be recorded and transferred in accordance with those operating rules.
- (2) Financial services rules in force for the purposes of subsection (1) have effect accordingly.

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<sup>7</sup> This enables the financial services rules to replicate the effect of *ASIC Class Order — Offers of CHESSE Depository Interests* (CO 14/287) F2014L01345 (latest F2014C01243).

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## **Division 4—Penalties and remedies for defective disclosure documents**

### **1135 Definition of *defective***

- (1) A disclosure document for a financial product is *defective* if, and only if:
- (a) the disclosure document:
    - (i) includes a misleading or deceptive statement; or
    - (ii) does not include particular material required by a provision of this Part or of the financial services rules; and
  - (b) the misleading or deceptive statement, or the failure to include that material, as the case may be, is or would be materially adverse from the point of view of a reasonable person considering whether to acquire the financial product.

Note: Subsection 1129(2) is relevant to determining whether a disclosure document given to a person is defective, because it treats the document as including material contained in a supplementary disclosure document.

- (2) Oral communication of information in a disclosure document for a financial product is *defective* if, and only if:
- (a) the communication:
    - (i) includes a misleading or deceptive statement; or
    - (ii) does not include particular material required by a provision of this Part or of the financial services rules; and
  - (b) the misleading or deceptive statement, or the failure to include that material, as the case may be, is or would be materially adverse from the point of view of a reasonable person considering whether to acquire the financial product.

### **<sup>8</sup>1136 Offence by preparer of disclosure document who knows it is defective**

- (1) A person commits an offence if:
- (a) a disclosure document for a financial product is prepared by or on behalf of the person; and
  - (b) the person knows that the disclosure document is defective; and
  - (c) the person:
    - (i) gives the disclosure document to another person in purported compliance with a provision of this Part; or
    - (ii) gives the disclosure document to another person, or makes it available to another person, and in doing so is reckless as to whether the other person, or someone else, will or may rely on the information in it or will or may give it to a person in purported compliance with a provision of this Part.

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<sup>8</sup> This is based on subsections 728(1) and (3) and section 1021D. It differs from subsections 728(1) and (3) in requiring knowledge that the disclosure document is defective. But see also footnote 9. In order to replicate the existing law exactly, a separate offence would be needed that would apply only if the financial product is covered by section 1145.

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Penalty: [Imprisonment for 15 years].

- (2) Subsection (1) applies to giving the disclosure document by any means (including oral communication), whether or not a means prescribed by the financial services rules.

**1137 Offence by person (other than the preparer) who knows disclosure document is defective**

- (1) A person commits an offence if:
- (a) a disclosure document for a financial product is prepared otherwise than by or on behalf of the person; and
  - (b) the person knows that the disclosure document is defective; and
  - (c) the person:
    - (i) is required to give the disclosure document to another person; or
    - (ii) is a financial services practitioner; and
  - (d) the person:
    - (i) gives the disclosure document to another person in purported compliance with a provision of this Part; or
    - (ii) gives the disclosure document to another person, or makes it available to another person, and in doing so is reckless as to whether the other person will or may rely on the information in it.

Penalty: [Imprisonment for 5 years].

- (2) Subsection (1) applies to giving the disclosure document by any means (including oral communication), whether or not a means prescribed by the financial services rules.

**<sup>9</sup>1138 Other criminal and civil penalties for preparer of defective disclosure document**

- (1) A person contravenes this subsection if:
- (a) a disclosure document for a financial product is prepared by or on behalf of the person; and
  - (b) the disclosure document is defective; and
  - (c) the person:
    - (i) gives the disclosure document to another person in purported compliance with a provision of this Part; or
    - (ii) gives the disclosure document to another person, or makes it available to another person, and in doing so is reckless as to whether the other person, or someone else, will or may rely on the information in it or will or may give it to a person in purported compliance with a provision of this Part.

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<sup>9</sup> This is based on subsections 728(1) and (3) and section 1021E. It differs from subsections 728(1) and (3) in providing for a lower penalty, but see also footnote 8.

- (2) Subsection (1) applies to giving the disclosure document by any means (including oral communication), whether or not a means prescribed by the financial services rules.
- (3) A person does not contravene subsection (1) if the person took reasonable steps to ensure that the disclosure document would not be defective.

Note: In criminal proceedings, a defendant bears an evidential burden in relation to the matters in subsection (3). See subsection 13.3(3) of the *Criminal Code*.

*Fault-based offence*

- (4) A person commits an offence if the person contravenes subsection (1).

Penalty: [Imprisonment for 2 years].

- (5) Strict liability applies to the physical element specified in paragraph (1)(b).

*Civil liability*

- (6) A person contravenes this subsection if the person contravenes subsection (1).

Civil penalty: [5,000 penalty units].

**1139 Offences for defective oral communication of information in disclosure document**

*Offence where information known to be defective*

- (1) A person commits an offence if:
- (a) the person orally communicates information in a disclosure document to another person; and
  - (b) the communication purports to be pursuant to financial services rules in force for the purposes of subsection 1127(4); and
  - (c) the person knows that the communication is defective.

Penalty: [Imprisonment for 5 years].

*Offence whether or not information known to be defective*

- (2) A person commits an offence if:
- (a) the person orally communicates information in a disclosure document to another person; and
  - (b) the communication purports to be pursuant to financial services rules in force for the purposes of subsection 1127(4); and
  - (c) the communication is defective.

Penalty: [Imprisonment for 2 years].

- (3) For the purposes of subsection (2), strict liability applies to the physical element specified in paragraph (2)(c).

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*Defences*

- (4) In a proceeding against a person for an offence against subsection (1) or (2), it is a defence if the person took reasonable steps to ensure that the information communicated would not be defective.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4). See subsection 13.3(3) of the *Criminal Code*.

- (5) In a proceeding against a person for an offence against subsection (2), it is a defence if the information communicated was defective because of information, or an omission from information, provided to the person (whether in a document or otherwise) by the issuer of the financial product.

Note: A defendant bears an evidential burden in relation to the matters in subsection (5). See subsection 13.3(3) of the *Criminal Code*.

**1140 Offences relating to information provided by product issuer for oral communication by another person**

[Provision based on section 1021FB.]



## **Division 5—Further obligations**

### **1143 Consent for disclosure document to contain statement made by a person**

A person commits an offence if:

- (a) the person gives a disclosure document in purported compliance with a provision of this Part; and
- (b) the disclosure document includes a statement made by a person, or a statement said in the disclosure document to be based on a statement made by a person; and
- (c) either:
  - (i) the financial services rules did not expressly permit the inclusion of the statement in the disclosure document; or
  - (ii) a requirement in the financial services rules relating to the inclusion of the statement in the disclosure document has not been complied with.

<sup>10</sup>Penalty: [Imprisonment for 2 years].

### **<sup>11</sup>1144 Altering disclosure document after its preparation**

A person commits an offence if:

- (a) the person gives a disclosure document in purported compliance with a provision of this Part; and
- (b) the disclosure document has been altered since the date that is, under the financial services rules, the date of the disclosure document; and
- (c) either:
  - (i) the financial services rules did not expressly permit the alteration; or
  - (ii) a requirement in the financial services rules relating to the alteration has not been complied with.

Penalty: [Imprisonment for 2 years].

### **1145 Lodgement with ASIC as required by the financial services rules**

*Disclosure document for shares, debentures and related rights, interests and options*

- (1) A person (the *preparer*) commits an offence if:
  - (a) section 1111 (issue) or 1112 (sale) of the Act requires the person to prepare a disclosure document for a financial product; and
  - (b) the financial product is:
    - (i) a share in a body; or
    - (ii) a debenture of a body; or

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<sup>10</sup> Penalties vary in the Corporations Act for failure to obtain consents. This provision standardises the penalty for all disclosure documents.

<sup>11</sup> This has no direct counterpart in Chapter 6D. If the current law unconditionally permits alteration of disclosure documents for financial products covered by Chapter 6D, the same result could be achieved by including a provision in the rules.

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- (iii) a legal or equitable right or interest in such a share or debenture; or
- (iv) an option to acquire, by way of issue, anything covered by subparagraph (i), (ii) or (iii); or
- (v) a simple corporate bonds depository interest; and
- (c) the financial product is not a foreign passport fund product; and
- (d) a provision of the financial services rules requires a copy of the disclosure document, or of a document forming part of it, to be lodged with ASIC; and
- (e) the preparer fails to lodge a copy of the document with ASIC in accordance with the financial services rules.

Penalty: [Imprisonment for 15 years].

*Other documents*

- (2) A person commits an offence if:
- (a) under this Part or the financial services rules, the person must or may prepare a document; and
  - (b) a provision of the financial services rules requires the document, or a copy of it, to be lodged with ASIC; and
  - (c) a provision of the financial services rules provides that this subsection applies to the provision referred to in paragraph (b); and
  - (d) the person fails to lodge the document or copy with ASIC in accordance with the financial services rules.

Penalty: [Imprisonment for 2 years].

**<sup>12</sup>1146 Use of application form for issue or sale of financial product covered by disclosure document**

- (1) If this Part provides for a disclosure document for a financial product to be given to a person (the *recipient*), a person must not issue or sell the financial product to the recipient except pursuant to an application made using:
- (a) an application form that:
    - (i) complies with the financial services rules; and
    - (ii) was included in, or accompanied by, a disclosure document for the financial product that was given to the recipient and is not defective when the application is made; or
  - (b) an application form that was copied, or directly derived, from an application form covered by paragraph (a).
- (2) A person need not comply with subsection (1) to the extent that a scoping order made for the purposes of this subsection provides, either unconditionally or

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<sup>12</sup> This is based on 1016A. The corresponding provision in Chapter 6D is subsection 723(1), which has a much lower penalty and also allows use of ‘an application form that the person issuing or transferring [the financial product] has reasonable grounds to believe’ would satisfy the requirements of the provision. These distinctions could be maintained by having a separate offence for financial products covered by section 1145.

subject to specified conditions, that the person need not comply with that subsection.

(3) Financial services rules may prescribe requirements for application forms for the purposes of this section.

(4) A person commits an offence of strict liability if the person contravenes subsection (1).

Penalty: [20 penalty units].

(5) A person commits an offence if the person contravenes subsection (1).

Penalty: [Imprisonment for 5 years].

### **<sup>13</sup>1147 Financial product not to be issued or sold for period after lodgment of disclosure document if financial services rules so provide**

If:

- (a) this Part provides for a disclosure document for a financial product to be given to a person; and
- (b) a provision of the financial services rules requires a copy of the disclosure document to be lodged with ASIC; and
- (c) a provision of the financial services rules prohibits the issue or sale of the financial product, pursuant to an application made in response to the disclosure document, before the end of:
  - (i) a specified period of at most 14 days starting on the day when a copy of the disclosure document is lodged with ASIC; or
  - (ii) such a period as extended by ASIC, but not so as to end after those 14 days;

a person commits an offence if the person contravenes the provision referred to in paragraph (c) of this section.

Penalty: [Imprisonment for 5 years].

### **<sup>14</sup>1148 Effect of minimum subscription condition**

(1) This section applies if:

- (a) section 1111 (issue) or 1112 (sale) of the Act requires a disclosure document for a financial product to be prepared, and given to a person; and
- (b) the disclosure document states (the **condition**) that the financial product will not be issued or sold unless:
  - (i) applications for a minimum number of financial products of the same kind are received; or

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<sup>13</sup> This section corresponds to subsections 727(3) (penalty of 5 years imprisonment) and 1016B(1) (penalty of 2 years imprisonment). Contravention of subsection 727(3) also gives rise to a civil penalty under s 727(6), which is not replicated here. Additional penalties can be added if necessary to preserve existing policy settings.

<sup>14</sup> This section corresponds to subsections 723(2) (penalty of 20 penalty units) and 724(1) (penalty of 60 penalty units), section 1016C (penalty of 2 years imprisonment) and subsection 1016E(2) (penalty of 2 years imprisonment).

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(ii) a minimum amount is raised.

Note: Subsection 1129(2) treats a disclosure document as including material contained in a supplementary disclosure document.

- (2) In working out whether the condition has been satisfied, a person who has agreed to take a financial product as underwriter is taken to have applied for the product.
- (3) A person must not issue or sell the financial product, pursuant to an application made in response to the disclosure document, if the condition has not been satisfied.

*Application outstanding when condition fails*

- (4) If at the end of 4 months starting on the date of the disclosure document:
  - (a) the condition has not been satisfied; and
  - (b) an application for the financial product has been made in response to the disclosure document but has not yet resulted in an issue or sale;the person (the **responsible person**) who would issue or sell the financial product to the applicant in response to the application must comply with one of subsections (5), (6), (7), (9) and (10).

*Refund of application money*

- (5) The responsible person must repay all money paid by the applicant for the financial product.

*Fresh or updated disclosure and opportunity to withdraw application*

- (6) The responsible person must:
  - (a) give to the applicant a new disclosure document for the financial product, and an additional statement identifying any material differences between it and the disclosure document referred to in subsection (1); and
  - (b) notify the applicant that the application can be withdrawn within one month after the notification is given, in which case all money paid by the applicant for the product will be repaid.

From the time when the responsible person does so, the application is taken to have been made in response to the new disclosure document.

- (7) The responsible person must:
  - (a) give to the applicant a supplementary disclosure document that changes the condition; and
  - (b) notify the applicant that the application can be withdrawn within one month after the notification is given, in which case all money paid by the applicant for the product will be repaid.
- (8) If in response to a notification under paragraph (6)(b) or (7)(b) the applicant informs the responsible person that the applicant wishes to proceed with the application, this Division applies, from the time when the applicant so informs the responsible person, to:
  - (a) the new disclosure document; or

(b) the disclosure document referred to in subsection (1) as modified by the supplementary disclosure document;

as the case may be, instead of to the disclosure document referred to in subsection (1).

*Issue or sale followed by fresh or updated disclosure and opportunity to return product and obtain a refund*

- (9) The responsible person must:
- (a) issue or sell the financial product to the applicant pursuant to the application; and
  - (b) give to the applicant a new disclosure document for the financial product, and an additional statement identifying any material differences between it and the disclosure document referred to in subsection (1); and
  - (c) notify the applicant that the financial product can be returned within one month after the notification is given, in which case all money paid for it by the applicant will be repaid.
- (10) The responsible person must:
- (a) issue or sell the financial product to the applicant pursuant to the application; and
  - (b) give to the applicant a supplementary disclosure document that changes the condition; and
  - (c) notify the applicant that the financial product can be returned within one month after the notification is given, in which case all money paid for it by the applicant will be repaid.
- (11) If in response to a notification under paragraph (6)(b), (7)(b), (9)(c) or (10)(c) the applicant withdraws the application or returns the financial product, as the case requires, the responsible person must repay to the applicant the money referred to in that paragraph.

*Offences*

- (12) A person commits an offence if the person contravenes subsection (3), (4) or (11).

Penalty: [Imprisonment for 2 years].

**<sup>15</sup>1149 Effect of condition about ability to trade on a market**

- (1) This section applies if:
- (a) section 1111 (issue) or 1112 (sale) of the Act requires a disclosure document for a financial product to be prepared, and given to a person; and
  - (b) the disclosure document states or implies that the financial product will be able to be traded on a financial market (whether in Australia or elsewhere).

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<sup>15</sup> This section corresponds to subsections 723(3) (penalty of 20 penalty units), 724(1) (penalty of 60 penalty units), 1016D(1) (penalty of 2 years imprisonment) and 1016E(2) (penalty of 2 years imprisonment).

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Note: Subsection 1129(2) treats a disclosure document as including material contained in a supplementary disclosure document.

- (2) A person must not issue or sell the financial product, pursuant to an application made in response to the disclosure document, unless:
- (a) the financial product is able to be traded on that financial market; or
  - (b) the following conditions are satisfied:
    - (i) within 7 days after the date of the disclosure document an application is made to the operator of that financial market to enable financial products of the same kind to be traded on that market; and
    - (ii) the issue or sale is made after the application is so made and before the end of 3 months starting on the date of the disclosure document.

*When an issue or transfer is void*

- (3) An issue or sale of the financial product is void if:
- (a) it is made in contravention of subsection (2); or
  - (b) the following conditions are satisfied:
    - (i) it is not made pursuant to an application made in response to a disclosure document because no disclosure document for the financial product was given to the person referred to in paragraph (1)(a); and
    - (ii) had it been made pursuant to an application made in response to such a disclosure document given to the person, the issue or sale would have been made in contravention of subsection (2).
- (4) A transfer of the financial product is void if it is made pursuant to a sale that is void because of subsection (3).
- (5) A person who received money from another person on account of an issue, sale or transfer that is void because of subsection (3) or (4) must return the money to the other person as soon as practicable.

*Application outstanding when condition fails*

- (6) If:
- (a) either:
    - (i) at the end of 7 days after the date of the disclosure document, no application has been made to the operator of that financial market to enable financial products of the same kind to be traded on that market; or
    - (ii) at the end of 3 months starting on that date, the product is not able to be traded on that market; and
  - (b) at the end of those 7 days or 3 months, as the case may be, an application for the financial product has been made in response to the disclosure document but has not yet resulted in an issue or sale;
- the person (the **responsible person**) who would issue or sell the financial product to the applicant in response to the application must comply with one of subsections (7), (8), (9), (11) and (12).

*Refund of application money*

- (7) The responsible person must repay all money paid by the applicant for the product.

*Fresh or updated disclosure and opportunity to withdraw application*

- (8) The responsible person must:
- (a) give to the applicant a new disclosure document for the financial product, and an additional statement identifying any material differences between it and the disclosure document referred to in subsection (1); and
  - (b) notify the applicant that the application can be withdrawn within one month after the notification is given, in which case all money paid by the applicant for the product will be repaid.

From the time when the responsible person does so, the application is taken to have been made in response to the new disclosure document.

- (9) The responsible person must:
- (a) give to the applicant a supplementary disclosure document that changes the statement or implication referred to in subsection (1); and
  - (b) notify the applicant that the application can be withdrawn within one month after the notification is given, in which case all money paid by the applicant for the product will be repaid.
- (10) If in response to a notification under paragraph (8)(b) or (9)(b) the applicant informs the responsible person that the applicant wishes to proceed with the application, this Division applies, from the time when the applicant so informs the responsible person, to:
- (a) the new disclosure document; or
  - (b) the disclosure document referred to in subsection (1) as modified by the supplementary disclosure document;
- as the case may be, instead of to the disclosure document referred to in subsection (1).

*Issue or sale followed by fresh or updated disclosure and opportunity to return product and obtain a refund*

- (11) The responsible person must:
- (a) issue or sell the financial product to the applicant pursuant to the application; and
  - (b) give to the applicant a new disclosure document for the financial product, and an additional statement identifying any material differences between it and the disclosure document referred to in subsection (1); and
  - (c) notify the applicant that the financial product can be returned within one month after the notification is given, in which case all money paid for it by the applicant will be repaid.
- (12) The responsible person must:
- (a) issue or sell the financial product to the applicant pursuant to the application; and

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- (b) give to the applicant a supplementary disclosure document that changes the statement or implication referred to in subsection (1); and
  - (c) notify the applicant that the financial product can be returned within one month after the notification is given, in which case all money paid for it by the applicant will be repaid.
- (13) If in response to a notification under paragraph (8)(b), (9)(b), (11)(c) or (12)(c) the applicant withdraws the application or returns the financial product, as the case requires, the responsible person must repay to the applicant the money referred to in that paragraph.

*Offences*

- (14) A person commits an offence if the person contravenes subsection (2), (5), (6) or (13).

Penalty: [Imprisonment for 2 years].

**1150 Effect on application for financial product if disclosure document is defective**

- (1) If:
- (a) section 1111 (issue) or 1112 (sale) of the Act requires a person (the *responsible person*) to prepare and give a disclosure document for a financial product; and
  - (b) the responsible person becomes aware that the disclosure document was defective when it was prepared or has become defective at some later time; and
  - (c) when the responsible person becomes aware of that, an application for the financial product has been made in response to the disclosure document but has not yet resulted in an issue or sale;
- the responsible person must comply with one of subsections (2), (3), (4), (6) and (7).

Note: Subsection 1129(2) is relevant to determining whether a disclosure document is defective, because it treats the document as including material contained in a supplementary disclosure document.

*Refund of application money*

- (2) The responsible person must repay all money paid by the applicant for the product.

*Fresh or updated disclosure and opportunity to withdraw application*

- (3) The responsible person must:
- (a) give to the applicant a new disclosure document for the financial product, and an additional statement identifying any material differences between it and the disclosure document referred to in subsection (1); and
  - (b) notify the applicant that the application can be withdrawn within one month after the notification is given, in which case all money paid by the applicant for the product will be repaid.



From the time when the responsible person does so, the application is taken to have been made in response to the new disclosure document.

- (4) The responsible person must:
- (a) give to the applicant a supplementary disclosure document that corrects the material because of which the disclosure document referred to in subsection (1) is defective; and
  - (b) notify the applicant that the application can be withdrawn within one month after the notification is given, in which case all money paid by the applicant for the product will be repaid.
- (5) If in response to a notification under paragraph (3)(b) or (4)(b) the applicant informs the responsible person that the applicant wishes to proceed with the application, this Division applies, from the time when the applicant so informs the responsible person, to:
- (a) the new disclosure document; or
  - (b) the disclosure document referred to in subsection (1) as modified by the supplementary disclosure document;
- as the case may be, instead of to the disclosure document referred to in subsection (1).

*Issue or sale followed by fresh or updated disclosure and opportunity to return product and obtain a refund*

- (6) The responsible person must:
- (a) issue or sell the financial product to the applicant pursuant to the application; and
  - (b) give to the applicant a new disclosure document for the financial product, and an additional statement identifying any material differences between it and the disclosure document referred to in subsection (1); and
  - (c) notify the applicant that the financial product can be returned within one month after the notification is given, in which case all money paid for it by the applicant will be repaid.
- (7) The responsible person must:
- (a) issue or sell the financial product to the applicant pursuant to the application; and
  - (b) give to the applicant a supplementary disclosure document that corrects the material because of which the disclosure document referred to in subsection (1) is defective; and
  - (c) notify the applicant that the financial product can be returned within one month after the notification is given, in which case all money paid for it by the applicant will be repaid.
- (8) If in response to a notification under paragraph (3)(b), (4)(b), (6)(c) or (7)(c) the applicant withdraws the application or returns the financial product, as the case requires, the responsible person must repay to the applicant the money referred to in that paragraph.

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*Offences*

- (9) A person commits an offence if the person contravenes subsection (1) or (8).

Penalty: [Imprisonment for 2 years].

**<sup>16</sup>1151 Disclosure about goods provided to use a financial product**

- (1) If this Part provides for a disclosure document for a financial product to be given to a person (the *recipient*), a person (the *supplier*) must not supply to the recipient goods whose sole or principal purpose is to enable a person to use the financial product, unless the supplier complies with financial services rules in force for the purposes of subsection (3) of this section.

Note: An example of such goods is a device that enables use of a non-cash payment facility.

Civil penalty: [To be determined].

- (2) A person commits an offence if the person contravenes subsection (1).

Penalty: [To be determined].

- (3) Financial services rules may prescribe the following matters in relation to goods whose sole or principal purpose is to enable a person to use a financial product:
- (a) what information about the goods must be displayed on the goods;
  - (b) how the information is to be so displayed.

**1152 Keeping records as required by the financial services rules**

A person commits an offence if:

- (a) a provision of the financial services rules requires the person to keep a document; and
- (b) a provision of the financial services rules provides that this section applies to the provision referred to in paragraph (a); and
- (c) the person fails to keep the document in accordance with the financial services rules.

Penalty: [Imprisonment for 2 years].

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<sup>16</sup> This section supports the financial services rules implementing the effect of the *ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211* F2016L00367 (latest F2018C00825).

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**Part 7A.3—Disclosure about financial services**

[To be drafted.]