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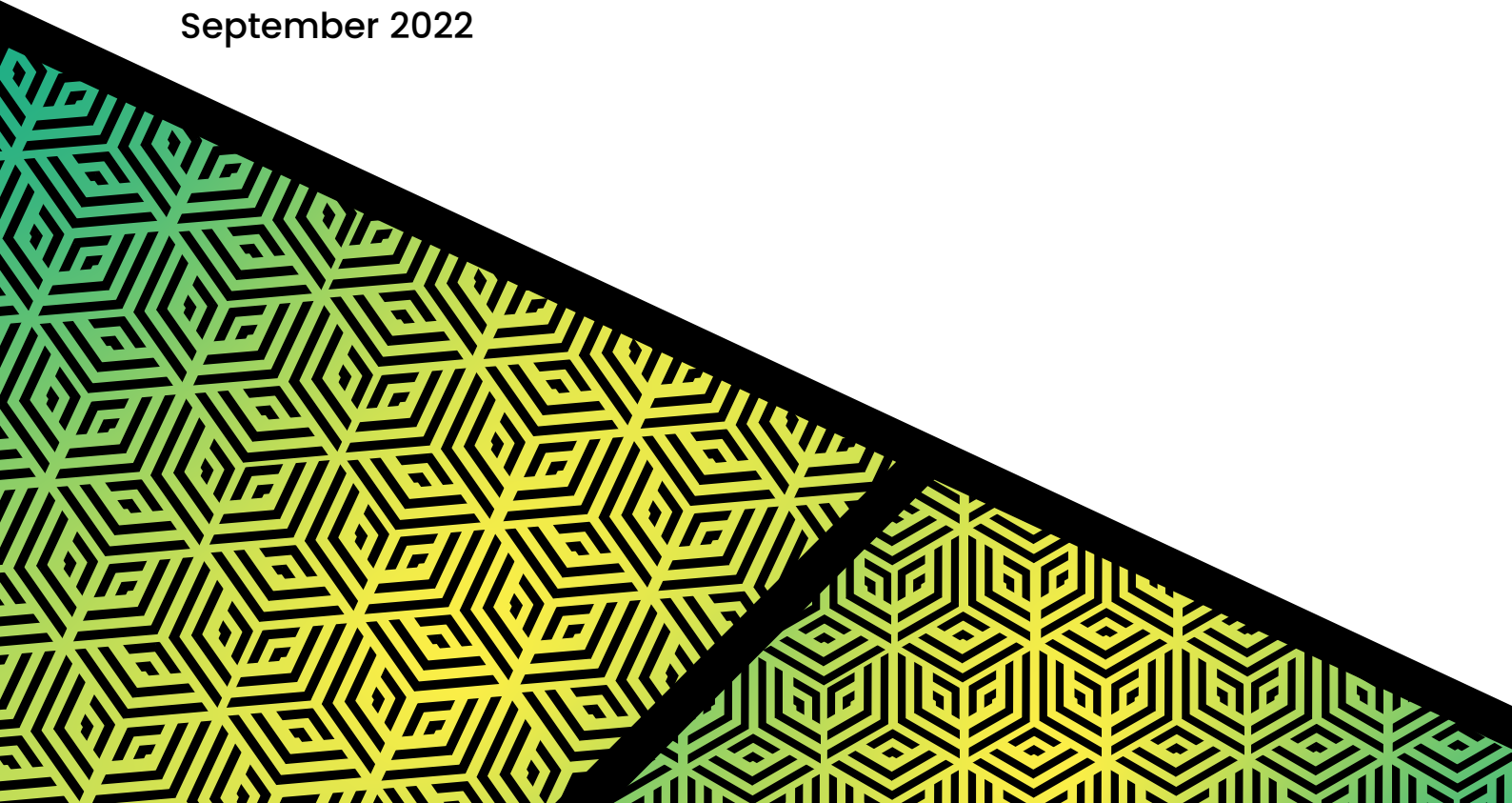
Australian Law Reform Commission

INTERIM REPORT B – ADDITIONAL RESOURCES

# LEGISLATIVE FRAMEWORK FOR CORPORATIONS AND FINANCIAL SERVICES REGULATION

**Prototype Legislation B**  
**Prototype Scoping Order**

September 2022



This document contains the **Prototype Scoping Order** 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 Scoping Order?**

The Prototype Scoping Order is a single, consolidated legislative instrument which contains exclusions and class exemptions from provisions of Chapter 7 and Chapter 7A (Disclosure about financial products and financial services) of the Prototype Act, as well as other detail used to adjust the scope of the regulatory regime. The Prototype Scoping Order currently includes general exclusions and exemptions from Chapter 7 of the Prototype Act, and placeholders for exclusions and exemptions from financial services licensing in Part 7.6 of the Prototype Act, relating to the obligation to hold an Australian Financial Services Licence. The Prototype Scoping Order includes selected exclusions and exemptions from Part 7A.2 of the Prototype Act (Disclosure about financial products).

**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](#)**

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# Corporations (Exclusions and Exemptions from Chapters 7 and 7A) Scoping Order 2022

## Part 1—Introduction

### Division 1—Preliminary

#### 1-1 Name

This instrument is the *Corporations (Exclusions and Exemptions from Chapters 7 and 7A) Scoping Order 2022*.

#### 1-2 Authority

This instrument is made under section 1097 of the *Corporations Act 2001*.

### Division 2—Definitions

#### 2-5 Dictionary

Note: A number of expressions used in this instrument are defined in section 9 of the Act.

In this instrument:

*Act* means the *Corporations Act 2001*.

*approved foreign market* means any of the following:

- (a) Borsa Italiana;
- (b) Bursa Malaysia (previously known as Bursa Malaysia Main Board and Bursa Malaysia Second Board);
- (c) Euronext Amsterdam;
- (d) Euronext Brussels;
- (e) Euronext Lisbon;
- (f) Euronext Paris;
- (g) Frankfurt Stock Exchange;
- (h) Hong Kong Stock Exchange;
- (i) JSE (also known as the Johannesburg Stock Exchange);
- (j) London Stock Exchange;
- (k) NASDAQ Global Market;
- (l) NASDAQ Global Select Market (together with NASDAQ Global Market, previously known as NASDAQ Stock Market);
- (m) New York Stock Exchange;
- (n) NSYE MKT (previously known as American Stock Exchange);
- (o) NZX (also known as New Zealand Stock Exchange);
- (oa) Oslo Bors (also known as Oslo Stock Exchange);
- (p) Singapore Exchange;

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- (q) SIX Swiss Exchange (previously known as SWX Swiss Exchange);
- (r) Tokyo Stock Exchange;
- (s) Toronto Stock Exchange.

**credit facility** means a facility by means of which, or by the acquisition of which:

- (a) a person obtains credit; or
- (b) people commonly obtain credit, even if a particular person acquires the facility for some other purpose.

**funeral services entity** means an entity of one of the following kinds:

- (a) a body corporate;
- (b) a partnership;
- (c) an unincorporated body;
- (d) an individual;
- (e) for a trust that has only one trustee—a trustee;
- (f) for a trust that has more than one trustee—the trustees together;

that carries on in this jurisdiction a business of supplying:

- (g) services for the care and preparation of human bodies for burial or cremation; and
- (h) services for the arrangement, supervision or conduct of a funeral, burial or cremation; and
- (i) products in connection with the services mentioned in paragraphs (g) and (h).

**information service** means:

- (a) a broadcasting service; or
- (b) an interactive or broadcast videotext or teletext service or a similar service; or
- (c) an online database service or a similar service; or
- (d) a broadcasting service within the meaning of the *Broadcasting Services Act 1992*; or
- (e) a datacasting service within the meaning of the *Broadcasting Services Act 1992*; or
- (f) a service provided by the Internet.

**investment-based financial product** means:

- (a) a financial product to the extent that it is a financial product because of subparagraph 763A(1)(a)(i) of the Act or because of that subparagraph in combination with other provisions of the Act; or
- (b) a share in a body; or
- (c) a debenture of a body; or
- (d) a legal or equitable right or interest in such a share or debenture; or
- (e) an option to acquire, by way of issue, anything covered by paragraph (b), (c) or (d); or
- (f) a simple corporate bonds depository interest; or
- (g) a registered scheme product; or
- (h) an unregistered scheme product; or

- (j) a foreign passport fund product; or
  - (k) a government security; or
  - (m) an investment life insurance product; or
  - (n) a deposit product; or
  - (o) a carbon unit; or
  - (p) an Australian carbon credit unit; or
  - (q) an eligible international emissions unit; or
- but does not include an income stream financial product.

***non-cash payment facility*** means a facility through which, or through the acquisition of which:

- (a) a person makes non-cash payments; or
- (b) people commonly make non-cash payments, even if a particular person acquires the facility for some other purpose.

***self managed superannuation fund*** has the meaning given by sections 17A and 17B of the *Superannuation Industry (Supervision) Act 1993*.

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## Part 2—Exclusions and exemptions from Chapter 7 of the Act

### Division 3—Exclusions from Chapter 7

#### Subdivision 3-A—Financial products

##### 3-1 Enabling provision

This Division is made for the purposes of subsection 765A(1) of the Act.

##### 3-5 Financial products to which Chapter 7 (except Parts 7.8A and 7.9A) does not apply

Note 1: See Division 12 of this instrument for exclusions from Part 7.8A (Design and distribution requirements relating to financial products for retail clients) of the Act.

Note 2: See Division 13 of this instrument for exclusions from Part 7.9A (Product intervention orders) of the Act.

- (1) Chapter 7 (except Parts 7.8A and 7.9A) of the Act does not apply to a financial product to the extent that it is any of the following:
  - (a) an excluded security;
  - (b) an undertaking by a body corporate to pay money to a related body corporate;
  - (c) health insurance provided as part of a health insurance business (as defined in Division 121 of the *Private Health Insurance Act 2007*);
  - (ca) insurance provided as part of a health-related business (as defined by section 131-15 of the *Private Health Insurance Act 2007*) that is conducted through a health benefits fund (as defined by section 131-10 of that Act);
  - (d) insurance provided by the Commonwealth;
  - (e) State insurance, Northern Territory insurance or Australian Capital Territory insurance, including insurance entered into by:
    - (i) a State, the Northern Territory or the Australian Capital Territory; and
    - (ii) some other insurer;as joint insurers;
  - (f) insurance entered into by the Export Finance and Insurance Corporation, other than a short-term insurance contract within the meaning of the *Export Finance and Insurance Corporation Act 1991*;
  - (g) reinsurance;
  - (ha) a credit facility (other than a margin lending facility);
  - (hb) any form of financial accommodation that is neither a credit facility nor a margin lending facility;
  - (hc) a hire purchase agreement;
  - (hd) a contract, arrangement or understanding for the hire, lease or rental of goods or services, other than one under which:
    - (i) full payment is made before or when the goods or services are provided; and



- (ii) in the case of the hire, lease or rental of goods—an amount at least equal to the value of the goods is paid as a deposit in relation to the return of the goods;
- (he) a facility under which any of the following is provided:
  - (i) an article known as a credit card or charge card;
  - (ii) an article, other than a credit card or a charge card, intended to be used to obtain cash, goods or services;
  - (iii) an article, other than a credit card or a charge card, commonly issued to customers or prospective customers for the purpose of their obtaining goods or services;
- (hf) a facility (other than a margin lending facility) under which a person incurs a liability in respect of redeemable preference shares;
- (hg) a facility under which:
  - (i) assistance in obtaining credit is provided; or
  - (ii) a person draws, accepts, indorses or otherwise deals in a negotiable instrument (including a bill of exchange or a promissory note); or
  - (iii) the trustee of the estate of a deceased person makes an advance to a beneficiary or prospective beneficiary of the estate;
- (hh) a lease over real or personal property;
- (hi) a letter of credit;
- (hj) a non-cash payment facility, if payments made using the facility will all be debited to a facility covered by any of paragraphs (ha) to (hi);
- (hk) a mortgage that is not a financial product covered by paragraph 763A(1)(a) of the Act;
- (hl) a guarantee;
  - (i) a facility:
    - (i) that is an approved RTGS system within the meaning of the *Payment Systems and Netting Act 1998*; or
    - (ii) that is for the transmission and reconciliation of non-cash payments, and the establishment of final positions, for settlement through an approved RTGS system within the meaning of the *Payment Systems and Netting Act 1998*;
  - (j) a facility that is a designated payment system for the purposes of the *Payment Systems (Regulation) Act 1998*;
  - (k) a facility for the exchange and settlement of non-cash payments between providers of non-cash payment facilities;
- (la) a financial market;
- (lb) a clearing and settlement facility;
- (lc) a facility that is a payment system operated as part of a clearing and settlement facility;
- (ld) a facility that is a derivative trade repository;
- (m) a contract to exchange one currency (whether Australian or not) for another that is to be settled immediately;
- (n) so much of an arrangement as is not a derivative because of paragraph 761D(3)(a) of the Act;

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- (p) an arrangement that is not a derivative because of subsection 761D(4) of the Act;
  - (q) an interest in an exempt public sector superannuation scheme within the meaning of the *Superannuation Industry (Supervision) Act 1993*;
  - (r) any of the following:
    - (i) an interest in something that is *not* a managed investment scheme because of paragraph (c), (e), (f), (k), (l) or (m) of the definition of ***managed investment scheme*** in section 9 of the Act;
    - (ii) a legal or equitable right or interest in an interest covered by subparagraph (i);
    - (iii) an option to acquire, by way of issue, an interest or right covered by subparagraph (i) or (ii);
  - (s) any of the following:
    - (i) an interest in a managed investment scheme (whether or not operated in this jurisdiction) for which none of paragraphs 601ED(1)(a), (b) and (c) of the Act is satisfied and that is neither a registered scheme nor a notified foreign passport fund;
    - (ii) a legal or equitable right or interest in an interest covered by subparagraph (i);
    - (iii) an option to acquire, by way of issue, an interest or right covered by subparagraph (i) or (ii);
  - (t) a deposit-taking facility that is, or is used for, State banking;
  - (u) a benefit 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;
  - (va) a contract of insurance issued by an employer to an employee of the employer;
  - (vb) a life policy or a sinking fund policy, within the meaning of the *Life Insurance Act 1995*, that is not a contract of insurance and is issued by an employer to an employee of the employer;
  - (w) a funeral benefit;
  - (x) physical equipment, or physical infrastructure, by which something else is provided that is a financial product to which Chapter 7 (except Parts 7.8A and 7.9A) of the Act applies.
- (2) Chapter 7 of the Act (except Parts 7.8A and 7.9A) does not apply to a financial product to the extent that it is any of the following:
- (a) an arrangement (a ***surety bond***):
    - (i) that a person (***person 1***) enters into with another person (***person 2***) in order to meet a requirement of another arrangement between person 1 and a person (***person 3***) other than person 2; and
    - (ii) under which person 2 undertakes to make a payment to, or perform an obligation for the benefit of, person 3 in specified circumstances; and
    - (iii) under which person 1 is liable to person 2 for any payments made, or liabilities, costs or expenses incurred, by person 2 in making the payment, or performing the obligation, referred to subparagraph (ii);

- (b) an arrangement between 2 persons (*person 1* and *person 2*) made in the following circumstances:
- (i) person 1 leases or rents something from person 2;
  - (ii) under the arrangement, person 1 makes a payment to person 2 to reduce the amount that person 1 would otherwise have to pay to person 2 under the leasing or rental agreement;
  - (iii) the payment relates to the event of an accident or other eventuality affecting the thing that is being leased or rented;

Example: Collision damage waiver insurance for a rental car.

- (c) a cheque drawn by a financial institution on itself or on another financial institution;
- (e) insurance under an overseas student health insurance contract within the meaning of Private Health Insurance Rules made for the purposes of Part 4-2 of the *Private Health Insurance Act 2007* (which is about health insurance business);

Note: In 2022, the meaning was given by rule 18 of the Private Health Insurance (Health Insurance Business) Rules 2018.

- (f) a facility that consists of the rights of the holder of a debenture against a trustee under a trust deed entered into under:
- (i) section 283AA of the Act; or
  - (ii) Chapter 2L or Division 4 of Part 7.12 of the old Corporations Law;
- (g) a money order issued as such by or for Australia Post;
- (h) a non-cash payment facility:
- (i) for which the issuer is both a body corporate and an ADI (within the meaning of the *Banking Act 1959*), or is an operator of a payment system; and
  - (ii) under which, as instructed by the client, the issuer makes money available (or causes it to be made available) to a person nominated by the client, and does so within 2 business days after receiving the client's instruction, or within the time reasonably required to complete the transaction subject to any constraints imposed by law; and
  - (iii) under which the funds are transferred by electronic means for collection by, or for the credit of, the payer or another person; and
  - (iv) in relation to which the issuer and the payer do not have a standing arrangement to transfer funds as mentioned in subparagraph (iii);

Note: Examples are telegraphic transfers and international money transfers offered by banks and remittance dealers.

- (j) a carbon abatement contract within the meaning of the *Carbon Credits (Carbon Farming Initiative) Act 2011*;
- (k) a non-cash payment facility that meets the following conditions:
- (i) the facility is issued as part of a scheme (a **loyalty program**) whose sole or dominant purpose is to promote the purchase of goods from, or the use of services of, the issuer of the facility or another person;
  - (ii) a person who uses or holds the facility is allocated credits (however described) as a result of the purchase of goods from, or the use of services of, the issuer or other person;

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- (iii) the credits allocated under the facility can be used to make payment or part payment for goods or services or to obtain some other benefit;
- (iv) the facility is not a component of another financial product;
- (1) a facility through which, or through the acquisition of which, a person can make a non-cash payment of a toll for the use of a road, but no other kind of non-cash payment.

### **3-25 Making non-cash payments**

- (1) Chapter 7 (except Parts 7.8A and 7.9A) of the Act does not apply to a financial product to the extent that it is a facility by means of which, or by the acquisition of which:
  - (a) a person makes non-cash payments as mentioned in subsection (2); or
  - (b) people commonly make non-cash payments as mentioned in subsection (2), even if a particular person acquires the facility for some other purpose.
- (2) Chapter 7 (except Parts 7.8A and 7.9A) of the Act does not apply to a person making non-cash payments by means of:
  - (a) a facility by means of which payments can be made to only one person; or
  - (b) a letter of credit from a financial institution; or
  - (c) a cheque drawn by a financial institution on itself; or
  - (d) a guarantee given by a financial institution.

### **Subdivision 3-B—Financial services**

#### **3-50 Enabling provision**

This Division is made for the purposes of subsection 766J(1) of the Act.

#### **3-55 Financial services to which Chapter 7 does not apply**

- (1) Chapter 7 of the Act does not apply to a financial service that consists of:
  - (a) a person operating a registered scheme, if the person is taken to operate the scheme only because of either or both of the following:
    - (i) the person acting as an agent or employee of another person;
    - (ii) the person taking steps to wind up the scheme; or
  - (b) a person providing:
    - (i) in the course of conducting a service (the *exempt service*) covered by subsection (2), (3), (4) or (5) of this section; and
    - (ii) as an integral part of the exempt service;a financial service that is reasonably necessary to provide in order to conduct the exempt service; or
  - (c) a person providing a financial service that consists only of advising another person in relation to the manner in which:

- (i) voting rights attaching to securities; or
- (ii) voting rights attaching to interests in managed investment schemes; may or should be exercised, if the advice:
- (iii) is not intended to influence, and could not reasonably be regarded as intended to influence, any decision in relation to financial products other than a decision about voting; and
- (iv) does not relate to a vote that relates to a dealing in financial products.

Note: A service that includes advice which is intended to influence the decision to acquire securities in another company would not be covered by this paragraph.

- (2) For the purposes of subparagraph (1)(b)(i), a person conducts a service covered by this subsection if the person:
- (a) provides advice in relation to the preparation or auditing of financial reports or audit reports; or
  - (b) provides advice on a risk that another person might be subject to and identifies (without reference to a particular brand or product issuer) financial products, or classes of financial product, that will mitigate that risk, other than advice for inclusion in an exempt document or statement; or
  - (c) provides advice on the acquisition or disposal, administration, due diligence, establishment, structuring or valuation of an incorporated or unincorporated entity, if the advice:
    - (i) is given to a person who is, or is likely to become, an officer or manager of the entity, a trustee of the entity, a director of a trustee of the entity, or an associate of the entity as defined by Division 2 of Part 1.2 of the Act; and
    - (ii) to the extent that it is financial product advice—is confined to advice on a decision about:
      - (A) securities of a body corporate, or related body corporate, that carries on or may carry on the business of the entity; or
      - (B) interests in a trust (other than a superannuation fund, a managed investment scheme that is registered or required to be registered under Part 5C.1 of the Act, or a notified foreign passport fund), the trustee of which carries on or may carry on the business of the entity in the capacity of trustee; and
    - (iii) does not relate to other financial products that the body corporate or the trustee of the trust may acquire or dispose of; and
    - (iv) is not advice for inclusion in anything covered by paragraph 3-75(1)(a) or (b) of this instrument; or
  - (d) provides advice on financial products that are:
    - (i) securities in a company (other than securities that are to be offered under a disclosure document under Chapter 7A of the Act); or
    - (ii) interests in a trust (other than a superannuation fund, a managed investment scheme that is registered or required to be registered under Part 5C.1 of the Act, or a notified foreign passport fund);if the company or trust is not carrying on a business and has not, at any time, carried on a business; or

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- (e) provides advice in relation to the transfer of financial products between associates; or
  - (f) arranges for another person to deal in interests in a self managed superannuation fund in the circumstances referred to in paragraphs (5)(b) and (c) of this section; or
  - (g) arranges for another person to deal in a financial product, by preparing a document of registration or transfer in order to complete administrative tasks on instructions from the person; or
  - (h) provides advice about the provision of financial products as security, other than where the security is provided for the acquisition of other financial products.
- (3) For the purposes of subparagraph (1)(b)(i), a person conducts a service covered by this subsection if the person:
- (a) is registered as an auditor under Part 9.2 of the Act; and
  - (b) performs any of the functions of a cover pool monitor mentioned in subsection 30(4) of the *Banking Act 1959*.
- (4) For the purposes of subparagraph (1)(b)(i), a person conducts a service covered by this subsection if:
- (a) the person provides advice to another person on taxation issues including advice in relation to the taxation implications of financial products; and
  - (b) the person will not receive a benefit (other than from the person advised or an associate of the person advised) as a result of the person advised acquiring a financial product mentioned in the advice, or a financial product that falls within a class of financial products mentioned in the advice; and
  - (c) either the advice does not constitute financial product advice to a retail client, or the advice includes, or is accompanied by, a written statement that:
    - (i) the person providing the advice is not licensed to provide financial product advice under the Act; and
    - (ii) taxation is only one of the matters that must be considered when making a decision on a financial product; and
    - (iii) the client should consider taking advice from the holder of an Australian Financial Services Licence before making a decision on a financial product.
- (5) For the purposes of subparagraph (1)(b)(i), a person conducts a service covered by this subsection if:
- (a) the person provides advice in relation to the establishment, operation, structuring or valuation of a superannuation fund, other than advice for inclusion in anything covered by paragraph 3-75(1)(a) or (b); and
  - (b) the person advised is, or is likely to become:
    - (i) a trustee; or
    - (ii) a director of a trustee; or
    - (iii) an employer sponsor as defined by subsection 16(1) the *Superannuation Industry (Supervision) Act 1993*; or

- (iv) a person who controls the management;  
of the superannuation fund; and
  - (c) except to the extent referred to in subsection (6), the advice:
    - (i) does not relate to the acquisition or disposal by the superannuation fund of specific financial products or classes of financial products; and
    - (ii) does not include a recommendation that a person acquire or dispose of a superannuation product; and
    - (iii) does not include a recommendation in relation to a person's existing holding in a superannuation product to modify an investment strategy or a contribution level; and
  - (d) if the advice constitutes financial product advice provided to a retail client—the advice includes, or is accompanied by, a written statement that:
    - (i) the person providing the advice is not licensed to provide financial product advice under the Act; and
    - (ii) the client should consider taking advice from the holder of an Australian Financial Services Licence before making a decision on a financial product.
- (6) Advice does not need to meet the condition in paragraph (5)(c) to the extent that it is given for the sole purpose, and only so far as reasonably necessary for the purpose, of ensuring compliance by the person advised with:
- (a) the *Superannuation Industry (Supervision) Act 1993*, except paragraph 52(2)(f) of that Act; or
  - (b) the *Superannuation Industry (Supervision) Regulations 1994*, except regulation 4.09 of those Regulations; or
  - (c) the *Superannuation Guarantee (Administration) Act 1992*.

### **3-75 Financial product advice: documents, information and statements required by law**

- (1) Chapter 7 of the Act does not apply to a financial service consisting of a person providing financial product advice by providing or giving:
  - (a) a document prepared, or a statement given, in accordance with requirements of that Chapter (except a document or statement covered by subsection (4) of this section); or
  - (b) a document, information, or a statement, covered by subsection (6) of this section.
- (2) In so far as provisions of Chapter 7 of the Act are expressed to apply to financial product advice, they do not apply to financial product advice that a person provides as mentioned in subsection (1) of this section.
- (3) However, to the extent that a document, information or a statement includes financial product advice provided by an expert who is neither:

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- (a) the person (the *originator*) by whom, or on whose behalf, the document, information or statement was prepared or given; nor
  - (b) an employee or director of the originator;
- subsections (1) and (2) do not apply to the expert providing that advice.
- (4) For the purposes of paragraph (1)(a) of this section, this subsection covers the following:
- (a) a Statement of Advice;
  - (b) a disclosure document that either contains personal advice, or contains general advice about a financial product (other than one to which the Statement relates or is taken to relate because of subsection (5) of this section);
  - (c) a Financial Services Guide that contains personal advice;
  - (d) a document or statement that, but for this paragraph, would be covered by this subsection only because it is prepared or given in accordance with [equivalent of section 1018A of the Act];
  - (e) a record of advice mentioned in subsection 946B(3A) of the Act.
- (5) For the purposes of paragraph (4)(b) of this section, if a person:
- (a) acquires a financial product (*product 1*); and
  - (b) will be able, by acquiring product 1, to give the product issuer an instruction to acquire a particular financial product, or a financial product of a particular kind, under a custodial arrangement;
- the disclosure document for product 1 is taken also to relate to the other financial product.
- (6) For the purposes of paragraph (1)(b) of this section, this subsection covers the following:
- (aa) a document, information, or a statement that:
    - (i) does not contain personal advice; and
    - (ii) is required by, and prepared as a result of, a requirement under an Australian law; and
    - (iii) is included in a class of documents, information or statements specified by ASIC in a notifiable instrument for the purposes of this paragraph;
  - (a) a CSF offer document that does not contain personal advice;
  - (b) a document or statement to the extent that it contains or draws information from a CSF offer document and attributes that information to the CSF offer document, if:
    - (i) the information is published on the platform on which the CSF offer document is published, and does not contain personal advice; or
    - (ii) the information is a statement made on the communication facility for the CSF offer, and does not contain personal advice;
  - (c) an advertisement or publication to the extent that the advertisement or publication:
    - (i) contains or draws information from a CSF offer document and attributes that information to the CSF offer document; and
    - (ii) does not contravene subsection 738ZG(1) of the Act; and



- (iii) does not contain personal advice;
- (d) an assessment under subsection 985E(1) of the Act that a margin lending facility will not be unsuitable for the person to whom the margin lending facility is to be issued;
- (e) an assessment under subsection 985E(1) of the Act that a margin lending facility whose limit is proposed to be increased will not be unsuitable for the person for whom the limit of the margin lending facility is to be increased.

### **3-80 Financial product advice: other exclusions**

- (1) Chapter 7 of the Act does not apply to a financial service consisting of financial product advice to the extent that it consists of anything covered by subsection (3) of this section.
- (2) In so far as provisions of Chapter 7 of the Act are expressed to apply to financial product advice, they do not apply to anything covered by subsection (3) of this section.
- (3) This subsection covers the following:
  - (a) advice given by a lawyer in his or her professional capacity about matters of law, legal interpretation or the application of the law to any facts;
  - (b) any other advice that is given by a lawyer in the ordinary course of activities as a lawyer and is reasonably regarded as a necessary part of those activities;
  - (c) advice that is given by a registered tax agent or BAS agent (within the meaning of the *Tax Agent Services Act 2009*), in the ordinary course of activities as such an agent, and is reasonably regarded as a necessary part of those activities;
  - (d) a person (the **adviser**), in response to a request made by another person (the **inquirer**):
    - (i) telling the inquirer the cost, or an estimate of the likely cost, of a financial product whose cost or estimated likely cost is worked out, or is said by the adviser to be worked out, by reference to a valuation of an item; and
    - (ii) suggesting or recommending the valuation to the inquirer;

Note: For example, the adviser tells the inquirer that the cost of an insurance policy is worked out by reference to a valuation of a house or car to which the policy would relate.

  - (e) a person (the **adviser**), in response to a request made by another person (the **inquirer**), telling the inquirer information about:
    - (i) the cost of a financial product; or
    - (ii) the rate of return on a financial product;in circumstances where the adviser could have complied (but did not comply) with the request by telling the inquirer corresponding information about one or more other financial products;
  - (f) giving a recommendation, a statement of opinion, or a report of either of those things, in circumstances where:

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- (i) giving it could reasonably be regarded as a necessary part of providing a claims handling and settling service; and
  - (ii) the opinion, statement or report is not covered by subsection (4).
- (4) For the purposes of subparagraph (3)(f)(ii), the opinion, statement or report is covered by this subsection if:
  - (a) it relates to how an amount to be paid to a person in settlement of a claim under an insurance product should be structured; or
  - (b) it relates to the management or use of an amount paid, or to be paid, to a person in settlement of a claim under an insurance product; or
  - (c) it is given in response to a claim, or potential claim, made under an insurance product and relates to other insurance products not held by the person making the claim or financial products.

### **3-85 Dealing in a financial product**

- (1) Chapter 7 of the Act does not apply to a financial service consisting of a person dealing in a financial product if the dealing is covered by subsection (3) of this section.
- (2) In so far as provisions of Chapter 7 of the Act are expressed to apply to dealing in a financial product, they do not apply to a person dealing in a financial product if the dealing is covered by subsection (3) of this section.
- (3) This subsection covers the dealing if:
  - (a) it consists of the person providing a crowd-funding service; or
  - (b) the person deals in the financial product on the person's own behalf (whether directly or through an agent or other representative), unless the person is the issuer of the product or subsection (4) of this section applies; or
  - (c) the dealing relates only to any of the following:
    - (i) securities of a government or local government authority;
    - (ii) debentures, stocks or bonds issued or proposed to be issued by a government;
    - (iii) securities of a public authority or instrumentality or agency of the Crown;
    - (iv) securities of a body corporate or an unincorporated body (except as provided by subsection (5) of this section);and the person is, or encompasses or constitutes in whole or in part, that government, local government authority, public authority, instrumentality, agency of body, as the case may be; or
  - (d) the dealing is entered into by the person as a sub-underwriter of an issue of securities and relates only to the sub-underwriting; or
  - (e) the person deals in the financial product (including under a power of attorney) in the course of enforcing rights under:
    - (i) a credit facility (except a margin lending facility); or
    - (ii) anything covered by any of paragraphs 3-5(1)(hb) to (hl); or

Note: For example, a mortgagee exercising a power of sale.

- (f) if the financial product is subject to a mortgage—the dealing consists of the person disposing of the financial product, or transferring it to the mortgagor, either:
    - (i) at the direction of the mortgagor; or
    - (ii) as a result of the mortgagor fulfilling all obligations under the mortgage; or
  - (g) the person (*person 1*) deals in the financial product and the following conditions are satisfied:
    - (i) person 1 holds the financial product on trust for, or on behalf of, another person (*person 2*);
    - (ii) the holding on trust constitutes providing a custodial or depository service to which Chapter 7 of the Act does not apply because of paragraph 3-95(6)(a), (b), (c), (d), (da), (g) or (i) of this instrument;
    - (iii) if the dealing is issuing a beneficial interest in a financial product—it arises from providing a custodial or depository service to which that Chapter would apply but for subsection 3-95(6) of this instrument;
    - (iv) if person 1 holds the financial product under a custodial arrangement—either person 2 is an associate of person 1, or the financial product is held as mentioned in paragraph 3-95(6)(d) or (da) of this instrument; or
  - (h) the dealing consists of issuing a carbon unit, an Australian carbon credit unit or an eligible international emissions unit, and the person is:
    - (i) the Clean Energy Regulator; or
    - (ii) the Clean Development Mechanism Executive Board; or
    - (iii) the government of a country other than Australia; or
    - (iv) an authority acting on behalf of the government of a country other than Australia; or
  - (j) the financial product is a carbon unit, an Australian carbon credit unit or an eligible international emissions unit, and the person deals in it on behalf of:
    - (i) a related body corporate of the person; or
    - (ii) an associated entity of the person;that is a liable entity entered in the information database under section 183 of the *Clean Energy Act 2011*.
- (4) Paragraph (3)(b) does not apply if the person (the *agent*) deals in the financial product as an agent or representative of another person (the *principal*), even if the dealing, when considered as a dealing by the principal, is a dealing by the principal on the principal's own behalf.
- (5) Subparagraph (3)(c)(iv) does not apply if the body:
- (a) carries on a business of investment in securities, interests in land or other investments; and
  - (b) in the course of carrying on that business, invests funds subscribed, whether directly or indirectly, after an offer or invitation to the public (within the meaning of section 82 of the Act) made on terms that the funds subscribed would be invested.

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**3-87 Dealing in a financial product: lawyer acting on instructions**

- (1) Chapter 7 of the Act does not apply to a financial service consisting of a lawyer dealing in a financial product if the dealing is covered by subsection (3) of this section.
- (2) In so far as provisions of Chapter 7 of the Act are expressed to apply to dealing in a financial product, they do not apply to a lawyer dealing in a financial product if the dealing is covered by subsection (3) of this section.
- (3) This subsection covers the dealing if:
  - (a) it consists of:
    - (i) arranging for a person to deal in the financial product; or
    - (ii) dealing as an agent or otherwise on behalf of a client, an associate of a client or a relative of a client; and
  - (b) the lawyer is acting:
    - (i) on the instructions of the client, an associate of the client or a relative of the client; and
    - (ii) in his or her professional capacity; and
    - (iii) in the ordinary course of his or her activities as a lawyer; and
  - (c) the financial service can reasonably be regarded as a necessary part of those activities; and
  - (d) the lawyer has not received, and will not receive, from the client or another person on behalf of the client, a benefit in connection with those activities other than:
    - (i) the payment of professional charges in relation to those activities; and
    - (ii) reimbursement for expenses incurred or payment on account of expenses to be incurred on behalf of the client, an associate of the client or a relative of the client.

**3-90 Making a market for a financial product**

- (1) Chapter 7 of the Act does not apply to a financial service consisting of a person making a market for financial products of a particular kind if subsection (3) of this section is satisfied.
- (2) In so far as provisions of Chapter 7 of the Act are expressed to apply to making a market for a financial product, they do not apply to a person making a market for financial products of a particular kind if subsection (3) of this section is satisfied.
- (3) This subsection is satisfied if:
  - (a) the person is the issuer of that kind of financial products; and
  - (b) the products are:
    - (i) superannuation products; or
    - (ii) registered scheme products; or
    - (iii) financial products covered by paragraph 3-5(1)(s) (which relates to certain managed investment schemes that are not registered schemes); or
    - (iv) foreign passport fund products.

### 3-95 Providing a custodial or depository service

- (1) Chapter 7 of the Act does not apply to a financial service consisting of providing a custodial or depository service to the extent that it consists of anything covered by subsection (3) of this section.
- (2) In so far as provisions of Chapter 7 of the Act are expressed to apply to providing a custodial or depository service, they do not apply to anything covered by subsection (3) of this section.
- (3) This subsection covers the following:
  - (a) operating a clearing and settlement facility;
  - (b) operating a registered scheme, or the holding of the assets of a registered scheme;
  - (ba) operating a notified foreign passport fund;
  - (bb) holding the assets of a notified foreign passport fund;
  - (c) the trustees of a regulated superannuation fund, approved deposit fund or pooled superannuation trust (within the meaning of the *Superannuation Industry (Supervision) Act 1993*) operating the fund or trust;
  - (ca) a life company (within the meaning of the *Life Insurance Act 1995*) operating a statutory fund;
  - (d) services provided to a related body corporate of the person.
- (4) Chapter 7 of the Act does not apply to a financial service consisting of a person (the **provider**) providing a custodial or depository service to another person (the **client**) if subsection (6) of this section applies.
- (5) In so far as provisions of Chapter 7 of the Act are expressed to apply to providing a custodial or depository service, they do not apply to a person (the **provider**) providing a custodial or depository service to another person (the **client**) if subsection (6) of this section applies.
- (6) This subsection applies if:
  - (a) the financial product held by the provider is a basic deposit product (as defined by section 761A of the Act) or is an account mentioned in subsection 981B(1) of the Act; or
  - (b) the client is an associate (within the meaning of Division 2 of Part 1.2 of the Act) of the provider; or
  - (c) the provider and its associates have no more than 20 clients in aggregate for all custodial or depository services that they provide; or
  - (d) the financial product is held as part of the arrangements for securing obligations under a credit facility; or
  - (da) the financial product is held as part of the arrangements for securing obligations under a debenture that is held as trustee under a trust deed:
    - (i) entered into under section 283AA of the Act or former section 260FA of the Corporations Law of a State or Territory; or
    - (ii) mentioned in former section 1052 of the Corporations Law of a State or Territory; or

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- (e) the provider is a participant in a licensed market, and the financial product held by the provider is a derivative acquired on the licensed market by the provider on behalf of the client; or
  - (f) the provider is a participant in a licensed clearing and settlement facility and the financial product held by the provider is a derivative registered on the licensed clearing and settlement facility by the provider on behalf of the client; or
  - (g) the financial product is held under:
    - (i) an order of a court; or
    - (ii) an order of a board or tribunal established under a law of a State or Territory; or
    - (iii) a direction by the holder of a statutory office established under a law of a State or Territory; or
  - (i) the financial product is held by a trustee appointed under:
    - (i) a law of a State or Territory to administer monies awarded to a person as compensation; or
    - (ii) a trust formed for a charitable purpose; or
  - (j) the financial product is an Australian carbon credit unit that has been issued to:
    - (i) a special native title account in accordance with section 49 of the *Carbon Credits (Carbon Farming Initiative) Act 2011*; or
    - (ii) a nominee account in accordance with section 141 of that Act.
- (7) Chapter 7 of the Act does not apply to a financial service consisting of a lawyer providing a custodial or depository service to another person (the *client*) if subsection (9) of this section applies.
- (8) In so far as provisions of Chapter 7 of the Act are expressed to apply to providing a custodial or depository service, they do not apply to a lawyer providing a custodial or depository service to another person (the *client*) if subsection (9) of this section applies.
- (9) This subsection applies if:
- (a) the lawyer is acting:
    - (i) on instructions from the client, an associate of the client or a relative of the client; and
    - (ii) in his or her professional capacity; and
    - (iii) in the ordinary course of his or her activities as a lawyer; and
  - (b) the custodial or depository service:
    - (i) can reasonably be regarded as a necessary part of those activities; and
    - (ii) is provided in the course of the lawyer providing financial services consisting of acquiring, holding or disposing of a cash management trust interest to which a law of a State or Territory relating to the audit of trust or controlled monies applies; and
  - (c) the lawyer has not received, and will not receive, a benefit in connection with the activities other than:
    - (i) the payment of professional charges related to those activities; and

- (ii) reimbursement for expenses incurred or payment on account of expenses to be incurred on behalf of the client, an associate of the client or a relative of the client;  
from the client or from another person on behalf of the client.

**3-100 Providing a superannuation trustee service**

- (1) Chapter 7 of the Act does not apply to a financial service consisting of providing a superannuation trustee service to the extent that the service consists of operating an exempt public sector superannuation scheme.
- (2) In so far as provisions of Chapter 7 of the Act are expressed to apply to providing a superannuation trustee service, they do not apply to the extent that the service consists of operating an exempt public sector superannuation scheme.

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**Division 10—Exemptions from Part 7.6 (Licensing of providers of financial services)**

**Subdivision 10-A—Exemptions from requirement to hold Australian financial services licence**

**10-1 General**

[For the content of these exemptions, see section 6-1 on page 41 of Prototype Legislation A.]

**10-5 Trustee of a superannuation entity**

[For the content of these exemptions, see section 6-5 on page 53 of Prototype Legislation A.]

**10-10 General financial product advice provided by the media**

[For the content of these exemptions, see section 6-10 on page 54 of Prototype Legislation A.]

**10-15 Claims handling and settling service in relation to an insurance product**

[For the content of these exemptions, see section 6-15 on page 56 of Prototype Legislation A.]

**Division 12—Exclusions from Part 7.8A (Design and distribution requirements relating to financial products)**

**Division 13—Exclusions from Part 7.9A (Product intervention orders)**



## **Part 3—Exclusions and exemptions from Chapter 7A of the Act**

### **Division 30—Exclusions from Chapter 7A**

#### **Subdivision 30-A—Financial products**

##### **30-1 Enabling provision**

This Division is made for the purposes of subsection 765A(1) of the Act.

##### **30-5 Financial products to which Chapter 7 (except Parts 7.8A and 7.9A) does not apply are also excluded from Chapter 7A**

- (1) Chapter 7A of the Act does not apply to a financial product to the extent that:
  - (a) it is covered by a paragraph of subsection 3-5(1) or (2) of this instrument;  
or
  - (b) it is a facility covered by subsection 3-25(1) of this instrument.
- (2) Chapter 7A of the Act does not apply to a person making non-cash payments as mentioned in subsection 3-25(2) of this instrument.

##### **30-10 Government securities**

Chapter 7A of the Act does not apply to a financial product that:

- (a) is a government security; or
- (b) is a CGS depository interest.

##### **30-15 Rights to acquire shares, debentures or other rights or interests under a rights issue**

Chapter 7A of the Act does not apply to a financial product to the extent that it is a right (whether existing or future and whether contingent or not) to acquire any of the following, by way of issue, under a rights issue:

- (a) a share in a body;
- (b) a debenture of a body;
- (c) a legal or equitable right or interest in such a share or debenture;
- (d) an option to acquire, by way of issue, anything covered by paragraph (a), (b) or (c).

##### **30-20 Financial products not issued in the course of a business of issuing financial products**

- (1) Chapter 7A of the Act does not apply to a financial product unless it is or was issued, or will be issued, in the course of a business of issuing financial products.
- (2) However, subsection (1) does not exclude the application of Chapter 7A of the Act to a financial product to the extent that is:

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- (a) a share in a body; or
- (b) a debenture of a body; or
- (c) a legal or equitable right or interest in such a share or debenture; or
- (d) an option to acquire such a share or debenture by way of issue; or
- (e) a simple corporate bonds depository interest; or
- (f) a registered scheme product; or
- (g) a foreign passport fund product; or
- (h) a superannuation product.

**30-25 Interests in a contribution plan**

Chapter 7A of the Act does not apply to a financial product to the extent that it is an interest in a contribution plan.

## **Division 35—Exemptions from Part 7A.2 (Disclosure about financial products)**

### **Subdivision 35-A—Introduction**

#### **35-1 Enabling provision**

This Division is made for the purposes of subsection 1118(1) of the Act.

#### **35-3 Determining when financial products are of the same kind**

For the purposes of this Division, a financial product is of the same kind as another financial product only if:

- (a) in the case of a registered scheme product, an unregistered scheme product or a foreign passport fund product—the other product is an interest in the same scheme or fund; or
- (b) in the case of a superannuation product—the other product is:
  - (i) an interest in the same sub-plan; or
  - (ii) if there is no sub-plan—an interest in the same fund; or
- (c) otherwise—they are both issued:
  - (i) by the same issuer; and
  - (ii) on the same terms and conditions (other than price).

### **Subdivision 35-D—Exemptions based on amount payable under current or earlier transactions**

#### **35-50 Shares, debentures and related rights, interests and options**

- (1) A person need not comply with section 1111 (issue) or 1112 (sale) of the Act if:
  - (a) the financial product is:
    - (i) a share in a body; or
    - (ii) a debenture of a body; or
    - (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
  - (b) the financial product is not a foreign passport fund product; and
  - (c) the total of the following is at least \$500,000:
    - (i) the amount payable for the financial product;
    - (ii) each amount that has become payable by the recipient or buyer at the same or an earlier time for shares, debentures, rights, interests or options that are of the same class as the financial product and are held by the recipient or buyer.
- (2) In calculating the total referred to in paragraph (1)(c), disregard an amount to the extent to which it was paid, or is payable, out of money lent by the issuer or seller or by an associate of the issuer or seller.

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**35-55 Price of other investment-based financial product**

- (1) A person need not comply with section 1111 (issue) or 1112 (sale) of the Act if:
  - (a) the financial product is an investment-based financial product; and
  - (b) unless the financial product is a foreign passport fund product—the financial product is not covered by a subparagraph of paragraph 35-50(1)(a); and
  - (c) the financial product is none of the following:
    - (i) a general insurance product;
    - (ii) a superannuation product;
    - (iii) an RSA product;
    - (iv) a risk-based financial product; and
  - (d) the price for the provision of the financial product is at least \$500,000.
- (2) For the purposes of paragraph (1)(d), the price for the provision of the financial product is [equivalent of subregulation 7.1.18(3)].
- (3) [Equivalent of subregulation 7.1.18(4)].

**35-60 Total price of managed investment scheme interests already held**

- (1) A person need not comply with section 1111 (issue) or 1112 (sale) of the Act if:
  - (a) the financial product is an interest in a managed investment scheme; and
  - (b) the recipient or buyer already holds interests in the same class for which the recipient or buyer has paid a total of at least \$500,000.
- (2) In calculating the amount paid for an interest, disregard an amount to the extent to which it was paid out of money lent by the issuer or seller or by an associate of the issuer or seller.

**35-65 Margin lending facility**

- (1) A person need not comply with section 1111 (issue) or 1112 (sale) of the Act if:
  - (a) the financial product is a margin lending facility; and
  - (b) the price for the provision of the financial product is at least \$500,000.
- (2) For the purposes of paragraph (1)(b), the price for the provision of the financial product [equivalent of subregulation 7.1.19A(3)].
- (3) [Equivalent of subregulation 7.1.19A(4)].
- (4) [Equivalent of subregulation 7.1.19A(5)].

**35-70 Income stream financial product**

- (1) A person need not comply with section 1111 (issue) or 1112 (sale) of the Act if:
  - (a) the financial product is an income stream financial product; and
  - (b) the price for the provision of the financial product is at least \$500,000.

- (2) For the purposes of paragraph (1)(b), the price for the provision of the financial product [equivalent of subregulation 7.1.20(3)].
- (3) [Equivalent of subregulation 7.1.20(4)].

### **35-75 Non-cash payment financial product**

- (1) A person need not comply with section 1111 (issue) or 1112 (sale) of the Act if:
  - (a) the financial product is a non-cash payment financial product; and
  - (b) the price for the provision of the financial product is at least \$500,000.
- (2) For the purposes of paragraph (1)(b), the price for the provision of the financial product [equivalent of subregulation 7.1.23(3)].
- (3) [Equivalent of subregulation 7.1.23(4)].

### **Subdivision 35-F—Exemptions for small scale offerings of some investment-based financial products**

#### **35-100 Small scale offerings of some financial products**

##### *Exemption from section 1111 (issue) of the Act*

- (1) The issuer of a financial product need not comply with subsection 1111(1) of the Act:
  - (a) in so far as it applies to offering to issue the financial product—if subsections (3) and (4) of this section are satisfied; or
  - (b) in so far as it applies to giving an application form for the issue of the financial product—if the issue would result from acceptance of an offer made by the issuer, and subsections (3) and (4) of this section would be satisfied; or
  - (c) in so far as it applies to issuing a financial product—if the issue results from acceptance of an offer made by the issuer, and subsections (3) and (4) of this section are satisfied.

##### *Exemption from section 1112 (sale) of the Act*

- (2) A person (the *seller*) need not comply with subsection 1112(1) of the Act if:
  - (a) subsection 1112(7) (off-market sale by controller) of the Act would apply to a sale of the financial product pursuant to the offer; and
  - (b) subsections (3) and (6) of this section are satisfied.

##### *Common conditions*

- (3) This subsection is satisfied if:
  - (a) the financial product is:
    - (i) a share in a body; or
    - (ii) a debenture of a body; or
    - (iii) a legal or equitable right or interest in such a share or debenture; or

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- (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; or
- (vi) a registered scheme product; or
- (vii) an unregistered scheme product; and
- (b) the offer is made to a person (the *recipient*) who is likely to be interested in the offer, having regard to:
  - (i) previous contact between the person making the offer and the recipient; or
  - (ii) some professional or other connection between the person making the offer and the recipient; or
  - (iii) statements or actions by the recipient that indicate that the recipient is interested in offers of that kind; and
- (c) the offer can only be accepted by the recipient.

*20 purchasers and \$2 million limits*

- (4) This subsection is satisfied if acceptance of the offer would result, or results, as the case requires, in neither of the following:
  - (a) the number of people to whom the issuer has issued financial products in the same category as the financial product exceeding 20 in any 12 month period;
  - (b) the amount raised by the issuer from issuing such financial products exceeding \$2 million in any 12 month period.
- (5) In working out the amount raised by the issuer from issuing a financial product, include:
  - (a) the amount payable for the product when issued; and
  - (b) if the product is issued partly-paid—each amount payable at a future time if a call is made; and
  - (c) if the financial product is an option—any amount payable on the exercise of the option; and
  - (d) if the financial product carries a right to convert it into another financial product—any amount payable on the exercise of that right.
- (6) This subsection is satisfied if acceptance of the offer would result in neither of the following:
  - (a) the number of people to whom the seller has sold financial products that are in the same category as the financial product, and are issued by the issuer of the financial product, exceeding 20 in any 12 month period;
  - (b) the amount raised by the seller from selling such financial products exceeding \$2 million in any 12 month period.
- (7) For the purposes of subsection (4) or (6):
  - (a) financial products of the kinds referred to in subparagraphs (3)(a)(i) to (v) are in one category; and
  - (b) financial products of the kinds referred to in subparagraphs (3)(a)(vi) and (vii) are in another category.

*Issues and sales not counted towards limits*

- (8) For the purposes of subsection (4) or (6), disregard an issue or sale of a financial product that results from an offer if the person making the offer:
- (a) is not required (otherwise than because of this section) to give a disclosure document for the financial product in relation to the offer; or
  - (b) gives such a disclosure document in relation to the offer as required by the Act.
- (9) For the purposes of subsection (4) or (6), disregard an issue or sale of a financial product if:
- (a) the issue or sale is made by a body that was a managed investment scheme (but not a registered scheme) when the offer was made that results in the issue or sale; and
  - (b) the financial product is an interest in the scheme; and
  - (c) the body becomes a registered scheme within 12 months after the offer was made; and
  - (d) had the body been a registered scheme when the offer was made, the body would not have been required (otherwise than because of this section) to give a disclosure document for the financial product in relation to the offer.

*Anti-avoidance determinations by ASIC*

- (10) ASIC may determine in writing that a number of different bodies are closely related and that their transactions should be aggregated for the purposes of this section. If ASIC does so:
- (a) an issue or sale of a financial product by any of the bodies is taken to be also an issue or sale of the financial product by each of the others; and
  - (b) any money raised from the issue or sale is taken to be also raised by each of the others.

ASIC must give written notice of the determination to each of the bodies.

- (11) ASIC may determine in writing that the transactions of a body and of a person who controls the body should be aggregated for the purposes of this section. If ASIC does so:
- (a) an issue of a financial product by the body is taken to be also a sale of the financial product by the controller; and
  - (b) any money raised from the issue is taken to be also raised by the controller from the sale; and
  - (c) a sale by the controller of a financial product issued by the body is taken to be also a further issue of the financial product by the body; and
  - (d) any money raised from the sale referred to in paragraph (c) is taken to be also received by the body from the issue referred to in that paragraph.

ASIC must give written notice of the determination to the body and to the controller.

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### *Exemptions*

- (12) The exemptions in this section are specified for the purposes of paragraph 1115(2)(b) of the Act.

Note: This means the exemptions are disregarded in determining whether paragraph 1115(1)(g) or (h) of the Act is satisfied. Subsection 1115(1) of the Act sets out conditions for when a disclosure document must be given for an acquisition under a custodial arrangement.

### **35-105 Small scale offerings of some financial products that are issued by a foreign company and traded on foreign markets**

- (1) The issuer of a financial product need not comply with section 1111 of the Act:
- (a) in so far as it applies to offering to issue the financial product—if subsection (2) of this section is satisfied; or
  - (b) in so far as it applies to giving an application form for the issue of the financial product—if the issue would result from acceptance of an offer made by the issuer, and subsection (2) of this section would be satisfied; or
  - (c) in so far as it applies to issuing a financial product—if the issue results from acceptance of an offer made by the issuer, and subsection (2) of this section is satisfied.
- (2) This subsection is satisfied if:
- (a) the issuer is a foreign company; and
  - (b) the financial product is:
    - (i) a share in the issuer; or
    - (ii) a debenture of the issuer; or
    - (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) an interest in a managed investment scheme; and
  - (c) the financial product is in a class that is quoted on, or able to be traded on, one or more approved foreign markets; and
  - (d) when the offer is made, trading in financial products in that class is not suspended on that market, or is suspended on none of those markets, as the case may be; and
  - (e) the foreign company believes on reasonable grounds that the offer is made in accordance with the laws and operating rules (however described) then in force in the place:
    - (i) if the financial product is in a class that is quoted on, or able to be traded on, only one approved foreign market—where that market is located; or
    - (ii) if the financial product is of a kind referred to in any of subparagraphs (b)(i) to (iv) and is in a class that is quoted on, or able to be traded on, each of 2 or more approved foreign markets—where that one of those markets is located on which that class was first quoted or able to be traded; or



- (iii) if the financial product is of the kind referred to in subparagraph (b)(v) and is in a class that is quoted on, or able to be traded on, each of 2 or more approved foreign markets—where that one of those markets is located on which it is reasonable to expect that most offers of financial products in that class will be received; and
  - (f) the offer is made to a person (the **recipient**) who is likely to be interested in the offer, having regard to:
    - (i) previous contact between the issuer and the recipient; or
    - (ii) some professional or other connection between the issuer and the recipient; or
    - (iii) statements or actions by the recipient that indicate that the recipient is interested in offers of that kind; and
  - (g) without limiting paragraph (e), the recipient is given, at or before the time when the offer is made:
    - (i) each document (if any) that the laws and operating rules referred to in paragraph (e) would have required to be given to the recipient in relation to the offer if it had been received in the place referred to in that paragraph; and
    - (ii) a certified English translation of each document covered by subparagraph (i) that is not in English; and
  - (h) the one or more documents covered by paragraph (g) contain, or are accompanied by, statements in writing to the following effect:
    - (i) the documents have been prepared for the purposes of compliance with foreign regulatory requirements; and
    - (ii) the documents may not contain all the information required to be contained in disclosure documents under the laws of Australia; and
    - (iii) the foreign company is, or is not, as the case requires, subject to the continuous disclosure requirements of the Act that apply in Australia; and
  - (j) the offer can only be accepted by the recipient; and
  - (k) acceptance of the offer would not result in the number of people to whom the issuer has issued financial products in the same category as the financial product exceeding 20 in any 12 month period.
- (3) For the purposes of paragraph (2)(k):
  - (a) financial products of the kinds referred to in subparagraphs (2)(b)(i) to (iv) are in one category; and
  - (b) financial products of the kind referred to in subparagraph (2)(b)(v) are in another category.
- (4) For the purposes of paragraph (2)(k), disregard an issue of a financial product that results from an offer if the person making the offer:
  - (a) is not required (otherwise than because of this section) to give a disclosure document for the financial product in relation to the offer; or
  - (b) gives such a disclosure document in relation to the offer as required by the Act.
- (5) For the purposes of paragraph (2)(k), disregard an issue of a financial product if:

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- (a) the issue is made by a body that was a managed investment scheme (but not a registered scheme) when the offer was made that results in the issue or sale; and
- (b) the financial product is an interest in the scheme; and
- (c) the body becomes a registered scheme within 12 months after the offer was made; and
- (d) had the body been a registered scheme when the offer was made, the body would not have been required (otherwise than because of this section) to give a disclosure document for the financial product in relation to the offer.

### **Subdivision 35-H—Other exemptions applying generally**

#### **35-150 Client has, or has access to, up to date information**

- (1) A person need not comply with section 1111 (issue) or 1112 (sale) of the Act by giving a disclosure document to another person if:
  - (a) the other person already holds a financial product of the same kind (see section 35-3) as the financial product; and
  - (b) the conditions in subsections (3) and (4) of this section are satisfied.
- (2) A person need not comply with section 1115 (acquisition under custodial arrangement) of the Act by giving a disclosure document to another person if:
  - (a) at the time of the acquisition:
    - (i) the other person already holds a financial product of the same kind (see section 35-3 of this instrument) as the financial product; or
    - (ii) the conditions in subsection 1115(1) of the Act have previously been met in relation to the other person in relation to a financial product of the same kind as the relevant product (whether or not that subsection required a disclosure document to be given to the other person in relation to the financial product of the same kind); and
  - (b) the conditions in subsections (3) and (4) of this section are satisfied.
- (3) The financial product must be:
  - (a) none of the following:
    - (i) a share in a body;
    - (ii) a debenture of a body;
    - (iii) a legal or equitable right or interest in such a share or debenture;
    - (iv) an option to acquire, by way of issue, anything covered by subparagraph (i), (ii) or (iii);
    - (v) a simple corporate bonds depository interest; or
  - (b) a foreign passport fund product.
- (4) The person must believe on reasonable grounds that the other person:
  - (a) has received:
    - (i) a disclosure document; and
    - (ii) information, whether provided under Part 7A.2 of the Act or under financial services rules in force for the purposes of that Part, or through continuous disclosure under Chapter 6CA of the Act;

that together set out all the information that would be required to be contained in the disclosure document referred to in subsection (1) or (2) of this section; or

(b) has access to the disclosure document and information referred to in paragraph (a) of this subsection, and knows that the person has access to that document and information.

(5) The exemption in subsection (2) of this section is specified for the purposes of paragraph 1115(2)(b) of the Act.

Note: This means the exemption is disregarded in determining whether paragraph 1115(1)(g) or (h) of the Act is satisfied.

### **35-160 Offer made under a compromise or arrangement**

#### *Exemption from section 1111 (issue) of the Act*

- (1) The issuer of a financial product need not comply with subsection 1111(1) of the Act:
- (a) in so far as it applies to offering to issue the financial product—if subsection (3) or (5) of this section is satisfied; or
  - (b) in so far as it applies to giving an application form for the issue of the financial product—subsection (3) or (5) of this section would be satisfied if the financial product were issued in response to the application; or
  - (c) in so far as it applies to issuing a financial product—subsection (3) or (5) of this section is satisfied.

#### *Exemption from section 1112 (sale) of the Act*

- (2) A person (the *seller*) need not comply with subsection 1112(1) (offer to sell) of the Act if subsection (3), (4), (5) or (6) of this section is satisfied.

#### *Compromise or arrangement under Part 5.1 of the Act*

- (3) This subsection is satisfied if the offer, issue or sale is made under a compromise or arrangement under Part 5.1 of the Act that is:
- (a) to be considered at a meeting that is to be held as a result of an order under subsection 411(1) or (1A) of the Act; or
  - (b) approved at a meeting that is held as a result of such an order.
- (4) This subsection is satisfied if:
- (a) the offer is made within 12 months after the issue of the financial product; and
  - (b) the financial product was issued or transferred under a compromise or arrangement covered by subsection (3).

#### *Compromise or arrangement under foreign law*

- (5) This subsection is satisfied if:
- (a) the offer, issue or sale is made under a compromise or arrangement that is made between the foreign company and its members or any class of them

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and is regulated by or under a law in force in, or in a part of, a foreign country that is any of the following:

- (i) Hong Kong;
- (ii) Malaysia;
- (iii) New Zealand;
- (iv) Singapore;
- (v) South Africa;
- (vi) United Kingdom; and

- (b) the person making the offer believes on reasonable grounds that the compromise or arrangement is made in accordance with the laws in force, when the offer is made, in that foreign country or that part of that foreign country.

- (6) This subsection is satisfied if:

- (a) the offer is made within 12 months after the issue of the financial product; and
- (b) the financial product was issued or transferred under a compromise or arrangement that is made between the foreign company and its members or any class of them and is regulated as mentioned in paragraph (5)(a).

**Subdivision 35-K—Other exemptions for some investment-based financial products**

**35-180 Subscriber or buyer of shares, debentures or related rights, interests or options has net wealth of at least \$2.5 million or annual gross income of at least \$250,000**

- (1) A person need not comply with section 1111 (issue) or 1112 (sale) of the Act if:

- (a) the financial product is:
  - (i) a share in a body; or
  - (ii) a debenture of a body; or
  - (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
- (b) the financial product is not a foreign passport fund product; and
- (c) subsection (2) or (3) of this section is satisfied.

- (2) This subsection is satisfied if:

- (a) it appears from a certificate given by a qualified accountant that the recipient or buyer:
  - (i) has net assets of at least \$2.5 million; or
  - (ii) had a gross income for each of the last 2 financial years of at least \$250,00; and
- (b) the certificate is given no more than 2 years before the latest time before which the issuer or seller would, apart from this section, be required to

prepare a disclosure document for the financial product and give it to the recipient or buyer.

- (3) This subsection is satisfied if:
- (a) the recipient or buyer is a company or trust controlled by a person (the *controller*); and
  - (b) it appears from a certificate given by a qualified accountant that the controller:
    - (i) has net assets of at least \$2.5 million; or
    - (ii) had a gross income for each of the last 2 financial years of at least \$250,00; and
  - (c) the certificate is given no more than 2 years before the latest time before which the issuer or seller would, apart from this section, be required to prepare a disclosure document for the financial product and give it to the recipient or buyer.
- (4) In determining a person's net assets at a particular time for the purposes of subparagraph (2)(a)(i) or (3)(b)(i), a qualified accountant may take into account the net assets of a company or trust controlled by the person at that time.
- (5) In determining a person's gross income for a period for the purposes of subparagraph (2)(a)(ii) or (3)(b)(ii), a qualified accountant may take into account the gross income of a company or trust for a period:
- (a) throughout which the person controlled the company and trust; and
  - (b) that is all or part of the first-mentioned period.

### **35-185 Offer or issue to existing holder of shares or debentures**

- (1) The issuer of a financial product need not comply with subsection 1111(1) (issue) of the Act if subsection (2) or (3) of this section is satisfied.
- (2) This subsection is satisfied if:
- (a) the financial product is a fully-paid share in a body; and
  - (b) the offer or issue is or would be made to an existing holder of shares in the body; and
  - (c) the offer or issue is or would be made under a dividend reinvestment plan or a bonus share plan.
- (3) This subsection is satisfied if:
- (a) the issuer is a disclosing entity; and
  - (b) the financial product is a debenture of the issuer that is not a simple corporate bond; and
  - (c) the offer or issue is or would be made to an existing holder of such debentures.

### **35-190 Offer or issue under reinvestment plan or switching facility to existing holder of financial product**

- (1) A person need not comply with section 1111 (issue) of the Act by giving a disclosure document to another person if:

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- (a) the financial product is none of the following:
    - (i) a share in a body;
    - (ii) a debenture of a body;
    - (iii) a legal or equitable right or interest in such a share or debenture;
    - (iv) an option to acquire, by way of issue, anything covered by subparagraph (i), (ii) or (iii);
    - (v) a simple corporate bonds depository interest; and
  - (b) the other person already holds a financial product of the same kind (see section 35-3) as the financial product; and
  - (c) the offer or issue is or would be made under a distribution reinvestment plan or switching facility.
- (2) A person need not comply with section 1115 (acquisition under custodial arrangement) of the Act by giving a disclosure document to another person if:
- (a) the financial product is none of the following:
    - (i) a share in a body;
    - (ii) a debenture of a body;
    - (iii) a legal or equitable right or interest in such a share or debenture;
    - (iv) an option to acquire, by way of issue, anything covered by subparagraph (i), (ii) or (iii);
    - (v) a simple corporate bonds depository interest; and
  - (b) at the time of the acquisition:
    - (i) the other person already holds a financial product of the same kind (see section 35-3 of this instrument) as the financial product; or
    - (ii) the conditions in subsection 1115(1) of the Act have previously been met in relation to the other person in relation to a financial product of the same kind as the financial product (whether or not that subsection required a disclosure document to be given to the other person in relation to the financial product of the same kind); and
  - (c) the acquisition is by way of issue made under a distribution reinvestment plan or switching facility.
- (3) The exemption in subsection (2) is specified for the purposes of paragraph 1115(2)(b) of the Act.

**35-195 Recognised offers under Chapter 8 (Mutual recognition of securities offers)**

- (1) A person need not comply with subsection 1112(1) (offer to sell) of the Act if:
  - (a) subsection 1112(6) (sale amounting to indirect issue) of the Act would apply to a sale of the financial product pursuant to the offer; and
  - (b) the issuer issued the financial product as part of a recognised offer under Chapter 8 of the Act.
- (2) A person need not comply with subsection 1112(1) (offer to sell) of the Act if:
  - (a) subsection 1112(6) (sale amounting to indirect issue) of the Act would apply to a sale of the financial product pursuant to the offer; and

- (b) the financial product was issued because of the exercise of an option or the conversion of another convertible or converting security; and
  - (c) the option or convertible or converting security was issued as part of a recognised offer under Chapter 8 of the Act; and
  - (d) the exercise of the option, or the conversion of the security, did not involve a further offer.
- (3) A person need not comply with subsection 1112(1) (offer to sell) of the Act if:
- (a) subsection 1112(8) (sale amounting to indirect off market sale by controller) of the Act would apply to a sale of the financial product pursuant to the offer; and
  - (b) the controller sold the financial product as part of a recognised offer under Chapter 8 of the Act.

### **Subdivision 35-M—Exemptions for superannuation products**

#### **35-220 Interests in self managed superannuation funds**

- (1) A person need not comply with section 1111 (issue) of the Act by giving a disclosure document to another person if the conditions in subsections (3) and (4) of this section are satisfied.
- (2) A person need not comply with section 1115 (acquisition under custodial arrangement) of the Act by giving a disclosure document to another person if:
  - (a) the acquisition referred to in paragraph 1115(1)(e) of the Act is by way of issue; and
  - (b) conditions in subsections (3) and (4) of this section are satisfied.
- (3) The financial product must be an interest in a self managed superannuation fund.
- (4) The person must believe on reasonable grounds that the other person:
  - (a) has received all the information that would be required to be contained in the disclosure document referred to in subsection (1) or (2) of this section; or
  - (b) has access to the information referred to in paragraph (a) of this subsection, and knows that the other person has access to that information.
- (5) The exemption in subsection (2) of this section is specified for the purposes of paragraph 1115(2)(b) of the Act.

Note: This means the exemption is disregarded in determining whether paragraph 1115(1)(g) or (h) of the Act is satisfied.

#### **35-225 Disclosure document for some superannuation products may be provided later**

- (1) A person (the *issuer*) need not comply with section 1111 (issue) of the Act by giving a disclosure document to another person if the financial product is:
  - (a) a superannuation interest that is issued by the trustee of a regulated superannuation fund (other than a public offer superannuation fund) and is none of the following:

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- (i) a financial product taken to be issued because of [equivalent of regulation 7.1.04E]; or
  - (ii) an annuity or pension taken to be issued because of [equivalent of subregulation 7.9.02(4)]; or
  - (iii) an interest in a self managed superannuation fund that is not acquired at the time that the fund is established; or
  - (b) a pension issued by a superannuation fund the rules of which do not allow a member to receive accumulated benefits from that fund in a form other than a pension; or
  - (c) a superannuation interest issued by the trustee of a successor fund in relation to the transfer of benefits in the fund; or
  - (d) a superannuation interest issued by the trustee of a regulated superannuation fund as a result of complying with a commutation authority issued to the trustee under Subdivision 136-B in Schedule 1 to the *Taxation Administration Act 1953*.
- (2) The exemption in subsection (1) is subject to the condition that the issuer must instead give the disclosure document to the other person as soon as is reasonably practicable, and in any event within 3 months after the product is issued to the other person, unless the other person has ceased to be a member of the fund.
- (3) The exemption in subsection (1) is specified for the purposes of paragraph 1115(2)(b) of the Act.

Note: This means the exemption is disregarded in determining whether paragraph 1115(1)(g) or (h) of the Act is satisfied. Subsection 1115(1) sets out conditions for when a disclosure document must be given for an acquisition under a custodial arrangement.

## **Subdivision 35-P—Exemptions for insurance products**

### **35-250 Offers of bundled contracts of insurance**

A person need not comply with sections 1111 (issue) or 1112 (sale) of the Act by giving a disclosure document to another person if:

- (a) the financial product is a general insurance product; and
- (b) the financial product would be provided as part of a contract of insurance that offers more than one kind of insurance cover; and
- (c) the person reasonably believes that the other person does not intend to acquire the financial product.