

# **Corporations Legislation Amendment (Financial Services Modernisation) Act 2009**

**No. 108, 2009**

***An Act to amend the Corporations Act 2001 and the  
Australian Securities and Investments Commission  
Act 2001, and for related purposes***

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**Corporations Legislation Amendment  
(Financial Services Modernisation) Act  
2009**

**No. 108, 2009**

**An Act to amend the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001*, and for related purposes**

[Assented to 6 November 2009]

The Parliament of Australia enacts:

**1 Short title**

This Act may be cited as the *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009*.

**2 Commencement**

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

<b>Commencement information</b>		
<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	6 November 2009

2. Schedule 1	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.	
3. Schedule 2	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.	
4. Schedule 3, item 1	The day on which this Act receives the Royal Assent.	6 November 2009
5. Schedule 3, items 2 and 3	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.	
6. Schedule 4	The day on which this Act receives the Royal Assent.	6 November 2009
7. Schedule 5	The day on which this Act receives the Royal Assent.	6 November 2009

Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

### 3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

## Schedule 1—Margin lending facilities

### *Corporations Act 2001*

#### 1 Section 760B (table item 8)

Repeal the item, substitute:

8	7.8	other conduct requirements for financial services licensees (e.g. dealing with client money and property; financial records, statements and audit) special provisions relating to insurance special provisions relating to margin lending facilities
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#### 2 Section 761A

Insert:

*current LVR:*

- (a) in relation to a standard margin lending facility—has the meaning given by subsection 761EA(3); and
- (b) in relation to a non-standard margin lending facility—has the meaning given by subsection 761EA(6).

#### 3 Section 761A

Insert:

*limit*, in relation to a margin lending facility, has the meaning given by subsection 761EA(11).

#### 4 Section 761A

Insert:

*margin call:*

- (a) in relation to a standard margin lending facility—has the meaning given by subsection 761EA(4); and
- (b) in relation to a non-standard margin lending facility—has the meaning given by subsection 761EA(7); and
- (c) in relation to a facility that ASIC has declared to be a margin lending facility under subsection 761EA(8)—has the meaning given in the declaration.

## 5 Section 761A

Insert:

*margin lending facility* has the meaning given by subsection 761EA(1).

## 6 Section 761A

Insert:

*non-standard margin lending facility* has the meaning given by subsection 761EA(5).

## 7 Section 761A

Insert:

*standard margin lending facility* has the meaning given by subsection 761EA(2).

## 8 Subsection 761E(3) (at the end of the table)

Add:

4	margin lending facility	the person enters into the legal relationship that constitutes the margin lending facility, as the client under the facility
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## 9 After section 761E

Insert:

### 761EA Meaning of *margin lending facility*, *margin call* and associated expressions

- (1) A *margin lending facility* is:
- (a) a standard margin lending facility; or
  - (b) a non-standard margin lending facility; or
  - (c) a facility of a kind that has been declared by ASIC to be a margin lending facility under subsection (8);
- unless the facility is of a kind that has been declared by ASIC not to be a margin lending facility under subsection (9).

#### *Standard margin lending facilities*

- (2) A *standard margin lending facility* is a facility under the terms of which:

- (a) credit is, or may be, provided by a person (the **provider**) to a natural person (the **client**); and
  - (b) the credit provided is, or must be, applied wholly or partly:
    - (i) to acquire one or more financial products, or a beneficial interest in one or more financial products; or
    - (ii) to repay, wholly or partly, another credit facility (within the meaning of subparagraph 765A(1)(h)(i)), the credit provided under which was applied, wholly or partly, to acquire one or more financial products, or a beneficial interest in one or more financial products; and
  - (c) the credit provided is, or must be, secured by property (the **secured property**); and
  - (d) the secured property consists, or must consist, wholly or partly of one or more marketable securities, or a beneficial interest in one or more marketable securities; and
  - (e) if the current LVR of the facility exceeds a ratio, percentage, proportion or level (however described) determined under the terms of the facility, then:
    - (i) the client becomes required to take action; or
    - (ii) the provider becomes entitled to take action; or
    - (iii) another person becomes required or entitled to take action;  
in accordance with the terms of the facility to reduce the current LVR of the facility.
- (3) The **current LVR** of a standard margin lending facility at a particular time is the ratio, percentage, proportion or level (however described) that:
- (a) is determined under the terms of the facility; and
  - (b) under the terms of the facility, represents a particular relationship between:
    - (i) the amount of the debt owing by the client, or credit provided by the provider, or both, under the facility at that time; and
    - (ii) the value of the secured property determined at that time under the terms of the facility.
- (4) A standard margin lending facility is in **margin call** when paragraph (2)(e) applies in relation to the facility.

*Non-standard margin lending facilities*

- (5) A **non-standard margin lending facility** is a facility under the terms of which:
- (a) a natural person (the **client**) transfers one or more marketable securities, or a beneficial interest in one or more marketable securities (the **transferred securities**) to another person (the **provider**); and
  - (b) the provider transfers property to the client (the **transferred property**) as consideration or security for the transferred securities; and
  - (c) the transferred property is, or must be, applied wholly or partly to acquire one or more financial products, or a beneficial interest in one or more financial products; and
  - (d) the client has a right, in the circumstances determined under the terms of the facility, to be given marketable securities equivalent to the transferred securities; and
  - (e) if the current LVR of the facility exceeds a ratio, percentage, proportion or level (however described) determined under the terms of the facility, then:
    - (i) the client becomes required to take action; or
    - (ii) the provider becomes entitled to take action; or
    - (iii) another person becomes required or entitled to take action;in accordance with the terms of the facility to reduce the current LVR of the facility.
- (6) The **current LVR** of a non-standard margin lending facility at a particular time is the ratio, percentage, proportion or level (however described) that:
- (a) is determined under the terms of the facility; and
  - (b) under the terms of the facility, represents a particular relationship between:
    - (i) an amount determined at that time under the terms of the facility by reference to the value of the transferred property and any amount owing by the client to the provider; and
    - (ii) the value of the transferred securities determined at that time under the terms of the facility.
- (7) A non-standard margin lending facility is in **margin call** when paragraph (5)(e) applies in relation to the facility.



*ASIC declarations in relation to margin lending facilities*

- (8) ASIC may declare that a particular kind of facility is a **margin lending facility**. The declaration must give the meanings of **margin call** and **limit** in relation to that kind of facility.
- (9) ASIC may declare that a particular kind of facility is not a **margin lending facility**.
- (10) A declaration made under subsection (8) or (9):
  - (a) must be in writing; and
  - (b) is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

*Meaning of **limit** of a margin lending facility*

- (11) The **limit** of a margin lending facility:
  - (a) in relation to a standard margin lending facility—means the maximum amount of credit that may be provided by the provider to the client under the facility; and
  - (b) in relation to a non-standard margin lending facility—means the maximum amount of property that may be transferred by the provider to the client under the facility; and
  - (c) in relation to a facility of a kind that ASIC has declared to be a margin lending facility under subsection (8)—has the meaning given in the declaration.

**10 After paragraph 764A(1)(k)**

Insert:

- (l) a margin lending facility;

**11 At the end of subparagraph 765A(1)(h)(i)**

Add “(other than a margin lending facility)”.

**11A After subsection 911A(5)**

Insert:

- (5A) Despite paragraph (2)(b), the regulations may provide that the exemption under that paragraph does not apply in relation to:
  - (a) a particular financial product or a particular kind of financial product; or
  - (b) a particular financial product or a particular kind of

financial product that is issued, varied or disposed of by a particular person, or a particular kind of person.

## **12 After Division 4 of Part 7.8**

Insert:

### **Division 4A—Special provisions relating to margin lending facilities**

#### **Subdivision A—Responsible lending conduct for margin lending facilities**

##### **985EA Application of this Subdivision**

This Subdivision applies to a financial services licensee (the *provider*) in relation to:

- (a) the issuing of a margin lending facility to a retail client; or
- (b) the increasing of the limit of a margin lending facility that was issued to a retail client.

##### **985E Requirements before issuing etc. margin lending facility**

*Requirement to make assessment of unsuitability*

- (1) The provider must not:
  - (a) issue the margin lending facility to the retail client; or
  - (b) increase the limit of the margin lending facility that was issued to the retail client;

on a day (the *critical day*) unless the provider has, within 90 days (or other period prescribed by the regulations) before the critical day:

- (c) made an assessment that:
  - (i) is in accordance with section 985F; and
  - (ii) covers a period in which the critical day occurs; and
- (d) made the inquiries and verification in accordance with section 985G.

Note: This subsection is a civil penalty provision (see section 1317E).

*Increase in limit of standard margin lending facility*

- (2) For the purposes of paragraph (1)(b), the limit of a standard margin lending facility is taken not to be increased if:
- (a) apart from this subsection, there would be an increase in the limit; and
  - (b) the increase in the limit would result from an increase in the value, determined under the terms of the facility, of the secured property under the facility (as referred to in paragraph 761EA(2)(c)); and
  - (c) the increase in the value of the secured property does not result from the client contributing additional property to the secured property.

*Regulations*

- (3) For the purposes of paragraph (1)(b), the regulations may prescribe particular situations in which the limit of a margin lending facility is taken:
- (a) to be increased, despite subsection (2); or
  - (b) not to be increased.

**985F Assessment of unsuitability of margin lending facility**

For the purposes of paragraph 985E(1)(c), the provider must make an assessment that:

- (a) specifies the period the assessment covers; and
- (b) assesses whether the margin lending facility will be unsuitable for the retail client if the facility is issued or the limit is increased in that period.

Note: The provider is not required to make the assessment if the margin lending facility is not issued or the limit is not increased.

**985G Reasonable inquiries etc. about the retail client**

*Requirement to make inquiries and take steps to verify*

- (1) For the purposes of paragraph 985E(1)(d), the provider must, before making the assessment:
- (a) make reasonable inquiries about the retail client's financial situation; and
  - (b) take reasonable steps to verify the retail client's financial situation; and
  - (c) make any inquiries prescribed by the regulations about any matter prescribed by the regulations; and
  - (d) take any steps prescribed by the regulations to verify

any matter prescribed by the regulations.

- (2) The regulations may prescribe particular inquiries or steps that must be made or taken, or do not need to be made or taken, for the purposes of paragraph (1)(a) or (b).

*When not required to take steps to verify*

- (3) Despite subsection (1), if:
- (a) a financial services licensee that is authorised to provide financial product advice in relation to margin lending facilities has prepared a statement of advice for the retail client; and
  - (b) the statement of advice was prepared no more than 90 days before the critical day; and
  - (c) the statement of advice recommends that:
    - (i) the retail client acquire the particular margin lending facility; or
    - (ii) the limit of the particular margin lending facility be increased; and
  - (d) the limit of the facility, or the increase in the limit of the facility, is not greater than the limit, or the increase in the limit, recommended in the statement of advice; and
  - (e) the statement of advice includes the information that was used for the purposes of preparing the statement of advice;

then the provider is not required, for the purposes of paragraph (1)(b) or (d), to verify that information.

## **985H When margin lending facility must be assessed as unsuitable**

*Requirement to assess the margin lending facility as unsuitable*

- (1) The provider must assess that the margin lending facility will be unsuitable for the retail client if the margin lending facility will be unsuitable for the retail client under subsection (2).

Note 1: This subsection is a civil penalty provision (see section 1317E).

Note 2: Even if the margin lending facility will not be unsuitable for the retail client under subsection (2), the provider may still assess that the margin lending facility will be unsuitable for the retail client for other reasons.

- (2) The margin lending facility will be unsuitable for the retail client if, at the time of the assessment, it is likely that:
- (a) if the facility is issued or the limit increased in the

period covered by the assessment, and the facility were to go into margin call, the retail client:

- (i) would be unable to comply with the retail client's financial obligations under the terms of the facility; or
  - (ii) could only comply with substantial hardship; or
- (b) if the regulations prescribe circumstances in which a margin lending facility is unsuitable—those circumstances will apply to the margin lending facility if the facility is issued or the limit increased in the period covered by the assessment.

*Information to be used to make the assessment*

- (3) For the purposes of determining under subsection (2) whether the margin lending facility will be unsuitable, only information that satisfies both of the following paragraphs is to be taken into account:
- (a) the information is about the retail client's financial situation, or any other matter prescribed by regulations under paragraph 985G(1)(c) or (d);
  - (b) at the time of the assessment:
    - (i) the provider had reason to believe that the information was true; or
    - (ii) the provider would have had reason to believe that the information was true if it had made the inquiries or verification under section 985G.

## **985J Giving the retail client the assessment**

*Requirement to give assessment if requested*

- (1) If, before the margin lending facility is issued or the limit is increased, the retail client requests a copy of the assessment from the provider, the provider must give the retail client a written copy of the assessment before issuing the facility or increasing the limit.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is a civil penalty provision (see section 1317E).

Note 3: The provider is not required to give the retail client a copy of the assessment if the margin lending facility is not issued or the limit is not increased.

- (2) If, during the period that:

- (a) starts on the critical day referred to in subsection 985E(1); and
  - (b) ends 7 years after that day;
- the retail client requests a copy of the assessment from the provider, the provider must give the retail client a written copy of the assessment:
- (c) if the request is made within 2 years of the critical day—before the end of 7 business days after the day the provider receives the request; and
  - (d) otherwise—before the end of 21 business days after the day the provider receives the request.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is a civil penalty provision (see section 1317E).

#### *Manner of giving assessment*

- (3) The provider must give the retail client the copy of the assessment in the manner (if any) prescribed by the regulations.

#### *No payment for assessment*

- (4) The provider must not request or demand payment of an amount for giving the retail client a copy of the assessment.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is a civil penalty provision (see section 1317E).

#### *Strict liability*

- (5) An offence based on subsection (1), (2) or (4) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

## **985K Unsuitable margin lending facilities**

#### *Requirement not to issue unsuitable margin lending facilities etc.*

- (1) The provider must not:
  - (a) issue the margin lending facility to the retail client;
  - or
  - (b) increase the limit of the margin lending facility that was issued to the retail client;

if the facility is unsuitable for the retail client under subsection (2).

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: This subsection is a civil penalty provision (see section 1317E).

*When a margin lending facility will be unsuitable*

- (2) The margin lending facility is unsuitable for the retail client if, at the time it is issued or the limit is increased:
- (a) it is likely that, if the facility were to go into margin call, the retail client:
    - (i) would be unable to comply with the retail client's financial obligations under the terms of the facility; or
    - (ii) could only comply with substantial hardship; or
  - (b) if the regulations prescribe circumstances in which a margin lending facility is unsuitable—those circumstances apply to the margin lending facility.

*Information to be used for the purposes of subsection (2)*

- (3) For the purposes of determining under subsection (2) whether the margin lending facility will be unsuitable, only information that satisfies both of the following paragraphs is to be taken into account:
- (a) the information is about the retail client's financial situation, or any other matter prescribed by regulations under paragraph 985G(1)(c) or (d);
  - (b) at the time the margin lending facility is issued or the limit is increased:
    - (i) the provider had reason to believe that the information was true; or
    - (ii) the provider would have had reason to believe that the information was true if it had made the inquiries or verification under section 985G.

*Regulations in relation to unsuitability of margin lending facility*

- (4) The regulations may prescribe particular situations in which a margin lending facility is taken not to be unsuitable for a retail client, despite subsection (2).

*Increase in limit of standard margin lending facility*

- (5) For the purposes of paragraph (1)(b), the limit of a standard margin lending facility is taken not to be increased if:
- (a) apart from this subsection, there would be an increase in the limit; and
  - (b) the increase in the limit would result from an increase in the value, determined under the terms of the facility, of the secured property under the facility (as referred to in paragraph 761EA(2)(c)); and
  - (c) the increase in the value of the secured property does not result from the client contributing additional property to the secured property.

*Regulations in relation to increase in limit*

- (6) For the purposes of paragraph (1)(b), the regulations may prescribe particular situations in which the limit of a margin lending facility is taken:
- (a) to be increased, despite subsection (5); or
  - (b) not to be increased.

**Subdivision B—Notice of margin calls under margin lending facilities**

**985L Issue of margin lending facility must not be conditional on agreement to receive communications through agent**

A financial services licensee must not require, as a condition of issuing a margin lending facility to a retail client, that the retail client enter into an agreement of the kind referred to in subsection 985M(2) (which deals with agreements about communications in relation to margin lending facilities).

Note: This section is a civil penalty provision (see section 1317E).

**985M Notification of margin calls**

*Provider must notify retail client of margin call*

- (1) A financial services licensee (the *provider*) that has issued a margin lending facility to a retail client must, when the facility goes into margin call, take reasonable steps to notify the retail client under the facility of the margin call in accordance with this section.

Note: This subsection is a civil penalty provision (see section 1317E).



*When provider must notify retail client's agent, and agent must notify retail client, of margin call*

- (2) However, if there is an agreement between the provider, the retail client, and another financial services licensee (the **agent**) that the agent will receive communications from the provider in relation to the margin lending facility on behalf of the retail client, then:
- (a) the provider must take reasonable steps to notify the agent (instead of the retail client) of the margin call in accordance with this section; and
  - (b) the agent must take reasonable steps to notify the retail client of the margin call in accordance with this section.

Note: This subsection is a civil penalty provision (see section 1317E).

*When and how notice must be given*

- (3) A notice under this section must be given:
- (a) at a time determined by ASIC; or
  - (b) if no time is determined by ASIC—as soon as practicable.
- (4) A notice under this section must be given:
- (a) if a manner in which the notice is to be given has been agreed between the person who is required to give the notice and the person to whom the notice is required to be given—in that manner; or
  - (b) if there is no agreement and ASIC has determined the manner in which the notice is to be given—in that manner; or
  - (c) otherwise—in a reasonable manner.

*ASIC may determine when and how notice must be given*

- (5) ASIC may determine:
- (a) the time by which, and manner in which, a provider must notify a client or agent of a margin call under this section; and
  - (b) the time by which, and manner in which, an agent must notify a client of a margin call under this section.
- (6) A determination made under subsection (5):
- (a) must be in writing; and
  - (b) is a legislative instrument for the purposes of the

*Legislative Instruments Act 2003.*

**13 Subsection 1016A(1) (after paragraph (da) of the definition of relevant financial product)**

Insert:

(db) a margin lending facility; or

**14 After subparagraph 1017D(1)(b)(v)**

Insert:

(va) a margin lending facility; or

**15 After paragraph 1317E(1)(ja)**

Insert:

- (jaa) subsection 985E(1) (issuing or increasing limit of margin lending facility without having made assessment etc.);
- (jab) subsection 985H(1) (failure to assess a margin lending facility as unsuitable);
- (jac) subsection 985J(1) (failure to give assessment to retail client if requested before issue of facility or increase in limit);
- (jad) subsection 985J(2) (failure to give assessment to retail client if requested after issue of facility or increase in limit);
- (jae) subsection 985J(4) (demanding payment to give assessment to retail client);
- (jaf) subsection 985K(1) (issuing or increasing limit of margin lending facility if unsuitable);
- (jag) section 985L (making issue of margin lending facility conditional on retail client agreeing to receive communications through agent);
- (jah) subsection 985M(1) (failure to notify of margin call where there is no agent);
- (jai) subsection 985M(2) (failure to notify of margin call where there is an agent);

**16 Schedule 3 (after table item 282BA)**

Insert:

282BB	Subsection 985J(1)	50 penalty units.
282BC	Subsection 985J(2)	50 penalty units.
282BD	Subsection 985J(4)	50 penalty units.

282BE	Subsection 985K(1)	100 penalty units, or imprisonment for 2 years, or both.
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## Schedule 2—Trustee companies

### *Australian Securities and Investments Commission Act 2001*

#### **1 Subsection 5(1)**

Insert:

*traditional trustee company services* has the same meaning as in Chapter 5D of the Corporations Act.

#### **2 Subsection 5(1)**

Insert:

*trustee company* has the same meaning as in Chapter 5D of the Corporations Act.

#### **2A Subsection 5(1)**

Insert:

*trust property*, in relation to a trustee company, means property that is or was held by the trustee company as trustee.

#### **3 After subsection 12BAB(1)**

Insert:

- (1A) Subject to paragraph (2)(b), the provision by a trustee company of a traditional trustee company service constitutes the provision, by the company, of a *financial service* for the purposes of this Division.

Note: Trustee companies may also provide other kinds of financial service mentioned in subsection (1).

- (1B) The regulations may, in relation to a traditional trustee company service of a particular class, prescribe the person or persons to whom a service of that class is taken to be provided or supplied for the purposes of this Division. This subsection does not limit (and is not limited by) subsection (2).

#### **3A Subsection 12CC(5)**

After “financial products”, insert “or financial services”.

#### **3B Division 4 of Part 3 (heading)**

Repeal the heading, substitute:

## **Division 4—Requirements to disclose information**

### **3C Section 40**

After “section 41”, insert “or 42”.

### **3D At the end of paragraph 40(c)**

Add:

- (iii) an alleged or suspected contravention, by a trustee company, of a law of the Commonwealth, or of a State or Territory, being a contravention that involves fraud or dishonesty and that relates to trust property; or

### **3E After section 41**

Insert:

## **42 Acquisitions and disposals of trust property by trustee companies**

- (1) ASIC may require a trustee company to disclose to it, in relation to an acquisition or disposal of trust property by the trustee company, all or any of the following:
  - (a) the name of:
    - (i) the person from or through whom the trust property was acquired; or
    - (ii) the person to or through whom the trust property was disposed;
  - (b) whether the acquisition or disposal was effected on the instructions of another person, and the nature of any such instructions;
  - (c) the names of the beneficiaries of the trust.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

- (2) Information required to be disclosed under this section need only be disclosed to the extent to which it is known to the person required to make the disclosure.

Note: In criminal proceedings, a defendant bears an evidential burden in relation to the matters in subsection (2).

- (3) An offence under subsection 63(2) relating to subsection (1) of this section is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

### **3F After section 43**

Insert:

#### **44 Exercise of certain powers of ASIC in relation to trust property acquired or disposed of by trustee company**

- (1) This section applies if ASIC considers that a contravention of a law of the Commonwealth, or of a State or Territory, may have been committed by a trustee company, being a contravention that involves fraud or dishonesty and that relates to trust property.
- (2) ASIC may require a director, secretary or senior manager of the trustee company to disclose to ASIC information of which he or she is aware and that may have affected an acquisition or disposal of trust property by the trustee company.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

- (3) If ASIC believes on reasonable grounds that a person can give information about particular matters, being any or all of the following:
  - (a) an acquisition or disposal of trust property by the trustee company;
  - (b) the financial position of the trustee company;
  - (c) an audit of, or a report of an auditor about, accounts or records of the trustee company;

ASIC may require the person to disclose to it the information that the person has about those particular matters.

Note: Failure to comply with a requirement made under this subsection is an offence (see section 63).

- (4) An offence under subsection 63(2) relating to subsection (2) or (3) of this section is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.

- (5) ASIC must not exercise a power conferred by subsection (2) or (3) except for the purpose of investigating the possible contravention referred to in subsection (1).

### **3G Subsection 63(2)**

Omit “section 41 or 43”, substitute “section 41, 42, 43 or 44”.

### **3H After paragraph 71(b)**

Insert:

- or (c) trust property acquired or disposed of by a trustee company;

### **3J After subsection 73(1)**

Insert:

- (1A) If paragraph 71(c) applies, ASIC may make one or more of the following:
- (a) an order restraining a specified person from disposing of any interest in specified trust property;
  - (b) an order restraining a specified person from acquiring any interest in specified trust property;
  - (c) an order directing a body corporate not to pay, except in the course of winding up, a sum due from the body corporate in respect of specified trust property;
  - (d) an order directing a body corporate not to register the transfer or transmission of specified trust property.

Note: The heading to section 73 is altered by inserting “**and trust property**” after “**financial products**”.

### **3K Subsections 73(2) and (3)**

After “subsection (1)”, insert “or (1A)”.

## ***Corporations Act 2001***

### **4 Subsection 5A(4)**

After “Chapter”, insert “5D,”.

### **5 At the end of subsection 5D(2)**

Add:

Note: This Part does not apply in relation to the trustee company provisions: see section 601RAE.

### **6 After paragraph 283AC(1)(a)**

Insert:

- (aa) a licensed trustee company (within the meaning of Chapter 5D); or

### **7 Section 490**

Before “Except”, insert “(1)”.

## **8 At the end of section 490**

Add:

; or (c) the company is a trustee company (within the meaning of Chapter 5D) that is in the course of administering or managing one or more estates.

- (2) A person with a proper interest (within the meaning of Chapter 5D) in the estate referred to in paragraph (1)(c), or who has any claim in respect of the estate, is entitled to be heard in a proceeding before the Court for leave under subsection (1).

## **9 After Chapter 5C**

Insert:

# **Chapter 5D—Licensed trustee companies**

## **Part 5D.1—Preliminary**

### **601RAA Definitions**

In this Chapter:

*client*, in relation to a trustee company, has the meaning given by subsection 601RAB(3).

*estate management functions* has the meaning given by subsection 601RAC(2).

*estate that is administered or managed*, in relation to a trustee company, means all or any of the estate of a person (whether living or dead) that is administered or managed by the trustee company in the course of performing estate management functions.

*fees* means fees in the nature of remuneration (including commission).

*law* means a law of the Commonwealth or of a State or Territory, and includes a rule of common law or equity.

*licensed trustee company* means a trustee company that holds an Australian financial services licence covering the provision of one or more traditional trustee company services.



Note: Traditional trustee company services are financial services for the purpose of Chapter 7: see subsection 766A(1A).

***person with a proper interest***, in relation to an estate, has the meaning given by section 601RAD.

***publish***: if the regulations prescribe requirements to be complied with in relation to an obligation in a provision of this Part to publish something, ***publish*** (in that provision) means publish in accordance with those requirements.

***traditional trustee company services*** has the meaning given by subsection 601RAC(1).

***trustee company*** has the meaning given by section 601RAB.

***will*** includes a codicil and any other testamentary writing.

### **601RAB Meaning of *trustee company* and *client* of trustee company**

- (1) A ***trustee company*** is a company:
  - (a) that is a corporation to which paragraph 51(xx) of the Constitution applies; and
  - (b) that is prescribed by the regulations as a trustee company for the purpose of this Act.
- (2) For the purpose of paragraph (1)(b), companies may (for example) be prescribed:
  - (a) by setting out a list of companies in the regulations;  
or
  - (b) by providing a mechanism in the regulations for the determination of a list of companies.
- (3) A ***client*** of a trustee company is a person to whom, within the meaning of Chapter 7, a financial service (being a traditional trustee company service) is provided by the trustee company.

Note: Regulations made for the purpose of subsection 766A(1B) may prescribe the person or persons to whom a class of traditional trustee company services is taken to be provided.

### **601RAC Meaning of *traditional trustee company services* and *estate management functions***

- (1) The following are ***traditional trustee company services***:
  - (a) performing estate management functions (see subsection (2));

- (b) preparing a will, a trust instrument, a power of attorney or an agency arrangement;
  - (c) applying for probate of a will, applying for grant of letters of administration, or electing to administer a deceased estate;
  - (d) establishing and operating common funds;
  - (e) any other services prescribed by the regulations for the purpose of this paragraph.
- (2) The following are ***estate management functions*** (whether provided alone or jointly with another person or persons):
- (a) acting as a trustee of any kind, or otherwise administering or managing a trust;
  - (b) acting as executor or administrator of a deceased estate;
  - (c) acting as agent, attorney or nominee;
  - (d) acting as receiver, controller or custodian of property;
  - (e) otherwise acting as manager or administrator (including in the capacity as guardian) of the estate of an individual;
  - (f) acting in any other capacity prescribed by the regulations for the purpose of this paragraph.
- (3) Subsections (1) and (2) do not apply to:
- (a) operating a registered scheme; or
  - (b) providing a custodial or depository service (within the meaning of section 766E); or
  - (c) acting as trustee for debenture holders under Chapter 2L; or
  - (d) acting as a receiver or other controller of property of a corporation under Part 5.2; or
  - (e) acting as trustee of a superannuation fund, an approved deposit fund or a pooled superannuation trust (within the meaning of the *Superannuation Industry (Supervision) Act 1993*); or
  - (f) acting in any other capacity prescribed by the regulations for the purpose of this paragraph.

**601RAD Meaning of *person with a proper interest***

- (1) A ***person with a proper interest***, in relation to an estate, includes (but is not limited to) the following:
- (a) ASIC;

- (b) in relation to a charitable trust:
    - (i) the settlor, or one of the settlors, of the trust; or
    - (ii) a person who, under the terms of the trust, has power to appoint or remove a trustee of the trust or to vary (or cause to be varied) any of the terms of the trust; or
    - (iii) a Minister of a State or Territory who has responsibilities relating to charitable trusts; or
    - (iv) a person who is named in the instrument establishing the trust as a person who may receive payments on behalf of the trust; or
    - (v) a person who is named in the instrument establishing the trust as a person who must, or may, be consulted by the trustee or trustees before distributing or applying money or other property for the purposes of the trust; or
    - (vi) a person of a class that the trust is intended to benefit;
  - (c) in the case of the estate of a deceased person:
    - (i) if the person died testate—a beneficiary under the person's will; or
    - (ii) if the person died intestate—a person who, under a law of a State or Territory, has, or is entitled to, an interest in the deceased's estate;
  - (d) in the case of any other trust:
    - (i) the settlor, or one of the settlors, of the trust; or
    - (ii) a person who, under the terms of the trust, has power to appoint or remove a trustee of the trust or to vary (or cause to be varied) any of the terms of the trust; or
    - (iii) a beneficiary of the trust;
  - (e) in relation to an application to a court relating to the estate—a person that the court considers, in the circumstances of the case, has a proper interest in the estate;
  - (f) a person prescribed by the regulations as having a proper interest in the estate;
  - (g) if a person covered by any of the above paragraphs is under a legal disability—an agent of the person.
- (2) None of the paragraphs or subparagraphs of subsection (1) limits, or is limited by, any of the other paragraphs or subparagraphs of that subsection.

## **601RAE Interaction between trustee company provisions and State and Territory laws**

- (1) The *trustee company provisions* are:
  - (a) the provisions of this Chapter, and regulations or other instruments made for the purposes of this Chapter; and
  - (b) the provisions of Chapter 7, and regulations or other instruments made for the purposes of Chapter 7, as they apply in relation to financial services that are traditional trustee company services.
- (2) Subject to subsections (3) and (4), the trustee company provisions are intended to apply to the exclusion of laws of a State or Territory of the following kinds:
  - (a) laws that authorise or license companies to provide traditional trustee company services generally (as opposed to laws that authorise or license companies to provide a particular traditional trustee company service);
  - (b) laws that regulate the fees that may be charged by companies for the provision of traditional trustee company services, and laws that require the disclosure of such fees;
  - (c) laws that deal with the provision of accounts by companies in relation to traditional trustee company services that they provide;
  - (d) laws that deal with the duties of officers or employees of companies that provide traditional trustee company services;
  - (e) laws that regulate the voting power that people may hold in companies that provide traditional trustee company services, or that otherwise impose restrictions on the ownership or control of companies that provide traditional trustee company services;
  - (f) laws (other than laws referred to in section 601WBC) that deal with what happens to assets and liabilities held by a company, in connection with the provision by the company of traditional trustee company services, if the company ceases to be licensed or authorised to provide such services.
- (3) Subject to subsection (4), the trustee company provisions are not intended to apply to the exclusion of laws of a State or Territory that require a company to have (or to have staff who have) particular qualifications or experience if the company is

to provide traditional trustee company services of a particular kind.

- (4) The regulations may provide:
  - (a) that the trustee company provisions are intended to apply to the exclusion of prescribed State or Territory laws, or prescribed provisions of State or Territory laws;  
or
  - (b) that the trustee company provisions are intended not to apply to the exclusion of prescribed State or Territory laws, or prescribed provisions of State or Territory laws.
- (5) The provisions of this Chapter have effect subject to this section.

Note: For example, section 601SAC (which provides that the powers etc. conferred by or under this Chapter are in addition to other powers etc.) is to be interpreted subject to this section.
- (6) Part 1.1A does not apply in relation to the trustee company provisions.

## **Part 5D.2—Powers etc. of licensed trustee companies**

### **Division 1—General provisions**

#### **601SAA Jurisdiction of courts not affected etc.**

- (1) Any inherent power or jurisdiction of courts in respect of the supervision of the performance of traditional trustee company services is not affected by anything in this Chapter.
- (2) A licensed trustee company that is performing traditional trustee company services of a particular kind is subject in all respects to the same control and to removal or restraint from acting, and generally to the jurisdiction of courts, in the same manner as any other person who performs traditional trustee company services of that kind.

#### **601SAB Regulations may prescribe other powers etc.**

A licensed trustee company also has, in relation to the provision of traditional trustee company services, such other powers, functions, liabilities and obligations, and such privileges and immunities, as are prescribed by the regulations.

**601SAC Powers etc. conferred by or under this Chapter are in addition to other powers etc.**

The powers, functions, liabilities and obligations, and the privileges and immunities, conferred or imposed on licensed trustee companies by or under this Chapter are in addition to, and not in derogation of, any powers, functions, liabilities and obligations, and any privileges and immunities, conferred or imposed by any other law:

- (a) on trustee companies; or
- (b) on persons who perform estate management functions or who provide other traditional trustee company services.

**Division 2—Accounts**

**601SBA Licensed trustee company not required to file accounts**

- (1) A licensed trustee company, when acting alone in relation to any estate of a deceased person, is not required to file, or file and pass, accounts relating to the estate unless the Court, of its own motion or on application by or on behalf of a person with a proper interest in the estate, so orders.
- (2) If a licensed trustee company is appointed and acts jointly with any other person in relation to any estate of a deceased person, the trustee company and that other person are not required to file, or file and pass, accounts relating to the estate unless:
  - (a) that other person intends to charge fees for acting in relation to the estate; or
  - (b) the Court, of its own motion or on application by or on behalf of a person with a proper interest in the estate, so orders.

**601SBB Licensed trustee company may be required to provide account in relation to estate**

- (1) On application by a person with a proper interest in an estate that is administered or managed by a licensed trustee company, the trustee company must provide the person with an account of:
  - (a) the assets and liabilities of the estate; and
  - (b) the trustee company's administration or management

of the estate; and

- (c) any investment made from the estate; and
- (d) any distribution made from the estate; and
- (e) any other expenditure (including fees and commissions) from the estate.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: Failure to comply with this subsection may also lead to the consequences set out in subsection (4) of this section.

(2) If:

- (a) a licensed trustee company has provided an account to a person under this section; and
- (b) the person applies for a further account within 3 months from the date on which the person was provided with the previous account;

the trustee company need not provide a further account in response to that application until the expiration of that period of 3 months.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2), see subsection 13.3(3) of the *Criminal Code*.

(3) A licensed trustee company may charge a reasonable fee for providing an account under this section.

(4) If a licensed trustee company fails to provide a proper account under this section, the Court may, on application by the person who sought the account or any other person with a proper interest in the estate, make any order that the Court considers appropriate, including an order requiring the preparation and delivery of proper accounts.

### **601SBC Court may order audit**

(1) The Court may, on any application under section 601SBB, in addition to or in substitution for any account to be provided by the licensed trustee company under that section, order that a person named in the order must examine the accounts of the trustee company relating to the estate in respect of which the order is made.

(2) On the making of any such order, the trustee company must:

- (a) give to the person named in the order a list of all the accounts kept by the company relating to the estate; and
- (b) produce to the person, at an office of the trustee

- company at all reasonable times when required, all books in the company's possession relating to the estate; and
- (c) provide the person with all necessary information and all other necessary facilities for enabling the person to make the examination.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

## **Division 3—Common funds**

### **601SCA Common funds of licensed trustee companies**

- (1) A licensed trustee company may, for the purposes of investment, pool together into a fund or funds money (*estate money*) from 2 or more estates that are administered or managed by the trustee company in the performance of estate management functions.

- (2) A fund into which money is pooled as mentioned in subsection (1) is a *common fund*.

Note: A common fund may also be regulated under Chapter 5C (if the fund constitutes a managed investment scheme).

- (3) A common fund may also include other money.

- (4) This section has effect subject to regulations made for the purpose of section 601SCC.

Note: For example, the regulations may limit the circumstances in which other money may be pooled together with estate money.

### **601SCB Obligations relating to common funds**

- (1) If a licensed trustee company establishes more than one common fund, each must be allocated an appropriate distinguishing number.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) For each common fund, the licensed trustee company must keep accounts showing at all times the current amount for the time being at credit in the fund on account of each estate.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (3) A licensed trustee company must not put estate money into a common fund if doing so is contrary to an express provision of



the conditions subject to which the estate money is held by the trustee company.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

### **601SCC Regulations relating to establishment or operation of common funds**

The regulations may include provisions relating to the establishment or operation of common funds.

## **Part 5D.3—Regulation of fees charged by licensed trustee companies**

### **Division 1—Disclosure of fees**

#### **601TAA Schedule of fees to be published and available**

A licensed trustee company must ensure that an up-to-date schedule of the fees that it generally charges for the provision of traditional trustee company services:

- (a) is published at all times on a website maintained by or on behalf of the trustee company; and
- (b) is available free of charge at offices of the trustee company during the usual opening hours of those offices.

Note 1: The schedule is of fees generally charged, and does not include fees that are agreed to etc. as mentioned in section 601TBB.

Note 2: Failure to comply with this section is an offence (see subsection 1311(1)).

#### **601TAB Disclosure to clients of changed fees**

- (1) If, while a licensed trustee company continues to provide a particular traditional trustee company service to a client or clients, the trustee company changes the fees that it will charge for the provision of the service, the trustee company must, within 21 days of the change of fees taking effect, comply with paragraph (a) or (b) in relation to the client or each client:
  - (a) if the client has requested to be sent copies of changed fees—send the client a copy of the changed fees in accordance with subsection (2); or
  - (b) in any other case—directly notify the client, in writing, that the changed fees are available on the internet

on a specified website maintained by or on behalf of the trustee company.

Note 1: Initial disclosure to a client of the fees that a trustee company will charge for the provision of a trustee company service will generally occur through the provision to the client of a Financial Services Guide under Part 7.7. However, this section is not limited just to situations where there has been an initial disclosure through a Financial Services Guide.

Note 2: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) A copy of changed fees that is sent to a client under paragraph (1)(a) must be:
  - (a) an electronic copy, if that is what the client has requested; or
  - (b) a hard copy, in any other case.
- (3) If a client to whom a traditional trustee company service is provided is under a legal disability, the following provisions have effect:
  - (a) a copy of changed fees required by paragraph (1)(a), or a notice required by paragraph (1)(b), must instead be given to an agent of the client;
  - (b) a request referred to in paragraph (1)(a) or (2)(a) may instead be made by an agent of the client.

## **Division 2—General provisions about charging fees**

### **601TBA Charging of fees for the provision of traditional trustee company services**

- (1) Subject to this Part, a licensed trustee company may charge fees for the provision of traditional trustee company services.
- (2) If a provision of this Part limits the fees that a licensed trustee company may charge for the provision of a particular traditional trustee company service, the trustee company must not charge fees for that service in excess of that limit.

Note 1: Failure to comply with this subsection is an offence (see subsection 1311(1)).

Note 2: Excess fees may also be recovered under section 601XAA.

### **601TBB Part does not prevent charging of fees as agreed etc.**

- (1) Nothing in this Part prevents a licensed trustee company

from charging:

- (a) any fees that a testator, in his or her will, has directed to be paid; or
  - (b) any fees that have been agreed on in accordance with subsection (2).
- (2) An agreement referred to in paragraph (1)(b) that relates to the fees that may be charged by a licensed trustee company for the provision of a particular traditional trustee company service must be between the trustee company and:
- (a) subject to paragraph (b) of this subsection—a person or persons who have authority to deal with the trustee company on matters relating to the provision of the service; or
  - (b) if the regulations prescribe the person or persons with whom the agreement must be made—that person or those persons.

#### **601TBC Part does not prevent charging fee for provision of account**

Nothing in the Part prevents a licensed trustee company from charging a fee permitted by subsection 601SBB(3) for the provision of an account.

#### **601TBD Part does not prevent reimbursement**

Nothing in this Part prevents the reimbursement to a licensed trustee company of all disbursements properly made by the trustee company in the provision of a traditional trustee company service.

#### **601TBE Estate management functions: payment of fees out of estate**

- (1) This section applies to the performance by a licensed trustee company of an estate management function relating to a particular estate.
- (2) Subject to subsection (3), fees charged by the trustee company, in accordance with this Part, for the performance of the function are payable to the trustee company out of the capital or income of the relevant estate.
- (3) However:
  - (a) a management fee referred to in section 601TDD can only come out of the income of the relevant estate; and

- (b) a common fund administration fee referred to in section 601TDE or 601TDI can only come out of the income received by the common fund on the assets of the charitable trust concerned that are included in the fund.

### **Division 3—Fees otherwise than for being trustee or manager of a charitable trust**

#### **601TCA Fees otherwise than for being the trustee or manager of a charitable trust**

- (1) This section applies to a particular provision of a traditional trustee company service by a licensed trustee company, unless:
  - (a) the service consists of being the trustee or manager of a charitable trust (see Division 4); or
  - (b) the provision of the service started before the commencement of this section.
- (2) The trustee company must not charge fees that are in excess of its schedule of fees that was most recently published as required by section 601TAA before the trustee company started to provide the service.
- (3) This section does not limit anything in Division 2.

### **Division 4—Fees for being trustee or manager of a charitable trust**

#### **Subdivision A—New client charitable trusts**

#### **601TDA Subdivision applies to new client charitable trusts**

This Subdivision applies to a particular provision of a traditional trustee company service by a licensed trustee company if:

- (a) the service consists of being the trustee or manager of a charitable trust; and
- (b) the provision of the service started on or after the commencement of this section.

#### **601TDB What the trustee company may charge**

- (1) For the provision of the service, the trustee company must only charge:

- (a) either:
    - (i) a capital commission, and an income commission, as provided for in section 601TDC; or
    - (ii) a management fee as provided for in section 601TDD; and
  - (b) if applicable, common fund administration fees under section 601TDE; and
  - (c) if applicable, fees permitted by section 601TDF in respect of the preparation of returns etc.
- (2) This section does not limit anything in Division 2.

### **601TDC Option 1: capital commission and income commission**

#### *One-off capital commission*

- (1) The trustee company may charge a capital commission (GST inclusive) at a rate not exceeding 5.5% of the gross value of the charitable trust's assets.
- (2) The capital commission must be charged only once during the period while the trustee company is trustee or manager of the charitable trust.
- (3) The regulations may make provision relating to the capital commission, including (but not limited to):
  - (a) the calculation of the commission or of the gross value of the charitable trust's assets; and
  - (b) when, during the period referred to in subsection (2), the commission may be charged.

#### *Annual income commission*

- (4) The trustee company may charge an annual income commission (GST inclusive) at a rate not exceeding 6.6% of the income received on account of the charitable trust's assets.
- (5) The regulations may make provision relating to the income commission, including (but not limited to):
  - (a) the calculation of the commission or of the income received on the charitable trust's assets; and
  - (b) when, during a year, the commission may be charged; and
  - (c) apportionment of the amount of the commission for part-years.

### **601TDD Option 2: annual management fee**

- (1) Instead of a capital commission and income commission under section 601TDC, the trustee company may charge an annual management fee (GST inclusive) at a rate not exceeding 1.056% of the gross value of the charitable trust's assets.
- (2) The regulations may make provision relating to the management fee, including (but not limited to):
  - (a) the calculation of the management fee or of the gross value of the charitable trust's assets; and
  - (b) when, during a year, the management fee may be charged; and
  - (c) apportionment of the amount of the management fee for part-years.

### **601TDE Additional amount if trust money is in a common fund**

- (1) If any of the charitable trust's assets are included in a common fund operated by the trustee company, the trustee company may charge an annual common fund administration fee (GST inclusive) not exceeding 1.1% of the gross value of the charitable trust's assets in the fund.
- (2) The regulations may make provision relating to the common fund administration fee, including (but not limited to):
  - (a) the calculation of the common fund administration fee or of the gross value of the charitable trust's assets in the fund; and
  - (b) when, during a year, the common fund administration fee may be charged; and
  - (c) the apportionment of the common fund administration fee for part-years.

### **601TDF Additional amount for preparation of returns etc.**

The trustee company may charge a reasonable fee for work involved in the preparation and lodging of returns for the purpose of, or in connection with, assessments of any duties or taxes (other than probate, death, succession or estate duties) related to the trust estate of the charitable trust.

### **Subdivision B—Existing client charitable trusts**

#### **601TDG Subdivision applies to existing client charitable trusts**

This Subdivision applies to a particular provision of a traditional trustee company service by a licensed trustee company if:

- (a) the service consists of being the trustee or manager of a charitable trust; and
- (b) the provision of the service started before the commencement of this section.

**601TDH Trustee company not to charge more than was being charged before section commenced**

Subject to section 601TDI and 601TDJ, the trustee company must not charge fees in excess of the fees than it could have charged in relation to the charitable trust immediately before the commencement of this section.

**601TDI Additional amount if trust money is in a common fund**

- (1) If any of the charitable trust's assets are included in a common fund operated by the trustee company, the trustee company may charge an annual common fund administration fee (GST inclusive) not exceeding 1.1% of the gross value of the charitable trust's assets in the fund.
- (2) The regulations may make provision relating to the common fund administration fee, including (but not limited to):
  - (a) the calculation of the common fund administration fee or of the gross value of the charitable trust's assets in the fund; and
  - (b) when, during a year, the common fund administration fee may be charged; and
  - (c) the apportionment of the common fund administration fee for part-years.

**601TDJ Additional amount for preparation of returns etc.**

The trustee company may charge a reasonable fee for work involved in the preparation and lodging of returns for the purpose of, or in connection with, assessments of any duties or taxes (other than probate, death, succession or estate duties) related to the trust estate of the charitable trust.

**Division 5—Miscellaneous**

### **601TEA Power of the Court with respect to excessive fees**

- (1) If the Court is of the opinion that fees charged by a licensed trustee company in respect of any estate are excessive, the Court may review the fees and may, on the review, reduce the fees.
- (2) Subsection (1) does not apply to fees:
  - (a) that are charged as permitted by section 601TBB; or
  - (b) that relate to a charitable trust and that are charged as permitted by Subdivision A of Division 4.
- (3) In considering whether fees are excessive, the Court may consider any or all of the following matters:
  - (a) the extent to which the work performed by the trustee company was reasonably necessary;
  - (b) the extent to which the work likely to be performed by the trustee company is likely to be reasonably necessary;
  - (c) the period during which the work was, or is likely to be, performed by the trustee company;
  - (d) the quality of the work performed, or likely to be performed, by the trustee company;
  - (e) the complexity (or otherwise) of the work performed, or likely to be performed, by the trustee company;
  - (f) the extent (if any) to which the trustee company was, or is likely to be, required to deal with extraordinary issues;
  - (g) the extent (if any) to which the trustee company was, or is likely to be, required to accept a higher level of risk or responsibility than is usually the case;
  - (h) the value and nature of any property dealt with, or likely to be dealt with, by the trustee company;
  - (i) if the fees are ascertained, in whole or in part, on a time basis—the time properly taken, or likely to be properly taken, by the trustee company in performing the work;
  - (j) any other relevant matters.
- (4) The Court may exercise its powers under subsection (1) either on its own motion or on the application by or on behalf of a person with a proper interest in the estate.
- (5) If the fees are reduced by more than 10%, the trustee company must, unless the Court in special circumstances



otherwise orders, pay the costs of the review.

- (6) Subject to subsection (5), all questions of costs of the review are in the discretion of the Court.

#### **601TEB Directors' fees**

- (1) This section applies if:
  - (a) an estate that is administered or managed by a licensed trustee company has an interest in a corporation; and
  - (b) an officer of the trustee company, in his or her capacity as such an officer, acts as a director of the corporation for purposes connected with the administration or management of the estate.
- (2) The trustee company is entitled to receive from the corporation (and to retain) any director's fees that would be payable to the officer had he or she so acted otherwise than in his or her capacity as such an officer.
- (3) Neither the officer nor the estate is entitled to receive the fees that the trustee company is entitled to receive under subsection (2).

### **Part 5D.4—Duties of officers and employees of licensed trustee companies**

#### **601UAA Duties of officers of licensed trustee company**

- (1) An officer of a licensed trustee company must:
  - (a) act honestly; and
  - (b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position; and
  - (c) not make use of information acquired through being an officer of the trustee company for the purpose (or for purposes including the purpose) of:
    - (i) gaining an improper advantage for the officer or another person; or
    - (ii) causing detriment to the clients of the trustee company; and
  - (d) not make improper use of their position as an officer

for the purpose (or for purposes including the purpose) of:

- (i) gaining, directly or indirectly, an advantage for the officer or for any other person; or
  - (ii) causing detriment to the clients of the trustee company; and
- (e) take all steps that a reasonable person would take, if they were in the officer's position, to ensure that the trustee company complies, in relation to the provision of traditional trustee company services, with:
- (i) this Act; and
  - (ii) any conditions imposed on the trustee company's Australian financial services licence.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) A person who contravenes, or is involved in a contravention of, subsection (1) contravenes this subsection.

Note 1: Section 79 defines involved.

Note 2: This subsection is a civil penalty provision (see section 1317E).

- (3) A duty of an officer of the trustee company under subsection (1) overrides any conflicting duty the officer has under Part 2D.1, but is subject to any conflicting duty the officer has under Part 5C.2.
- (4) A reference in this section to the clients of a licensed trustee company is a reference to the clients, when viewed as a group.

### **601UAB Duties of employees of licensed trustee company**

- (1) An employee of a licensed trustee company must not:
- (a) make use of information acquired through being an employee of the trustee company for the purpose (or for purposes including the purpose) of:
    - (i) gaining an improper advantage for the employee or another person; or
    - (ii) causing detriment to the clients of the trustee company; or
  - (b) make improper use of their position as an employee for the purpose (or for purposes including the purpose) of:
    - (i) gaining, directly or indirectly, an advantage for the employee or for any other person; or

- (ii) causing detriment to the clients of the trustee company.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) A person who contravenes, or is involved in a contravention of, subsection (1) contravenes this subsection.

Note 1: Section 79 defines involved.

Note 2: This subsection is a civil penalty provision (see section 1317E).

- (3) A duty of an employee of the trustee company under subsection (1) overrides any conflicting duty the employee has under Part 2D.1, but is subject to any conflicting duty the employee has under Part 5C.2.

- (4) A reference in this section to the clients of a licensed trustee company is a reference to the clients, when viewed as a group.

## **Part 5D.5—Limit on control of licensed trustee companies**

### **Division 1—15% voting power limit**

#### **601VAA Meaning of *unacceptable control situation***

For the purposes of this Part, an *unacceptable control situation* exists in relation to a licensed trustee company and in relation to a particular person if the person's voting power in the trustee company is more than:

- (a) 15%; or
- (b) if an approval of a higher percentage is in force under Division 2 in relation to the trustee company and in relation to the person—that higher percentage.

#### **601VAB Acquisitions of shares**

If:

- (a) a person, or 2 or more persons under an arrangement, acquire shares in a body corporate; and
- (b) the acquisition has the result, in relation to a licensed trustee company, that:
  - (i) an unacceptable control situation comes into existence in relation to the trustee company and in

relation to a person; or

- (ii) if an unacceptable control situation already exists in relation to the trustee company and in relation to a person—there is an increase in the voting power of the person in the trustee company;

the person or persons mentioned in paragraph (a) contravene this section.

Note: A contravention of this section is an offence (see subsection 1311(1)).

### **601VAC Remedial orders**

- (1) If an unacceptable control situation exists in relation to a licensed trustee company, the Court may make such orders as the Court considers appropriate for the purpose of ensuring that the unacceptable control situation ceases to exist.
- (2) However, the Court may only make orders under this section on application by:
  - (a) the Minister; or
  - (b) ASIC; or
  - (c) the trustee company; or
  - (d) a person who has any voting power in the trustee company; or
  - (e) a client of the trustee company.
- (3) The Court's orders may include:
  - (a) an order directing the disposal of shares; or
  - (b) an order restraining the exercise of any rights attached to shares; or
  - (c) an order prohibiting or deferring the payment of any sums due to a person in respect of shares held by the person; or
  - (d) an order that any exercise of rights attached to shares be disregarded; or
  - (e) an order directing any person to do or refrain from doing a specified act, for the purpose of securing compliance with any other order made under this section; or
  - (f) an order containing such ancillary or consequential provisions as the Court thinks just.
- (4) Subsection (3) does not, by implication, limit subsection (1).
- (5) Before making an order under this section, the Court may

direct that notice of the application be given to such persons as the Court thinks fit or be published in such manner as the Court thinks fit, or both.

- (6) The Court may, by order:
  - (a) rescind, vary or discharge an order made by the Court under this section; or
  - (b) suspend the operation of such an order.

### **601VAD Injunctions**

- (1) If any conduct (including a refusal or failure to act) amounts or would amount to a contravention of this Part in relation to a particular licensed trustee company, the trustee company is taken, for the purposes of section 1324, to be a person whose interests are affected by the conduct.
- (2) Subsection (1) does not, by implication, limit the class of persons whose interests are affected by the conduct.
- (3) The Minister has the same powers as ASIC to apply for an injunction under section 1324 in relation to a contravention of this Part.
- (4) The powers in sections 601VAC and 1324 do not, by implication, limit each other.

## **Division 2—Approval to exceed 15% voting power limit**

### **601VBA Application for approval to exceed 15% voting power limit**

- (1) A person may apply for approval to have voting power of more than 15% in a particular licensed trustee company by lodging with ASIC an application that:
  - (a) specifies the percentage of voting power (if any) the person currently has in the trustee company; and
  - (b) specifies the percentage of voting power the person is seeking approval to have in the trustee company; and
  - (c) sets out the person's reasons for making the application.

Note: For fees in respect of lodging applications, see Part 9.10.

- (2) ASIC must give the application to the Minister as soon as possible.

### **601VBB Approval of application**

- (1) The Minister may grant the application if the Minister is satisfied that it would be in the interests of the licensed trustee company and its clients for the application to be granted.
- (2) If the Minister grants the application, the Minister must:
  - (a) give written notice of the approval to the applicant; and
  - (b) specify the percentage of the voting power the Minister approves the applicant having in the licensed trustee company (which may or may not be the percentage the applicant applied for); and
  - (c) either:
    - (i) specify the period during which the approval remains in force; or
    - (ii) specify that the approval remains in force indefinitely.
- (3) If the Minister refuses the application, the Minister must give written notice of the refusal to the applicant.
- (4) As soon as practicable, the Minister must arrange for a copy of a notice of approval under this section to be:
  - (a) published in the *Gazette*; and
  - (b) given to the licensed trustee company concerned.

### **601VBC Duration of approval**

- (1) An approval under section 601VBB remains in force:
  - (a) if the notice of approval specifies a period during which the approval remains in force—until the end of that period, or if the Minister extends that period, until the end of that extended period; or
  - (b) otherwise—indefinitely.

#### *Extension of approval*

- (2) A person who holds an approval under section 601VBB that is in force for a specified period may apply to extend that period by lodging with ASIC an application that sets out the person's reasons for making the application.

Note: For fees in respect of lodging applications, see Part 9.10.

- (3) ASIC must give the application to the Minister as soon as

possible.

- (4) The Minister may grant the application if the Minister is satisfied that it would be in the interests of the licensed trustee company and its clients for the application to be granted.
- (5) If the Minister grants the application, the Minister must:
  - (a) give written notice of the extension to the applicant; and
  - (b) specify the extended period during which the approval remains in force (which may or may not be the period the applicant applied for).
- (6) If the Minister refuses the application, the Minister must give written notice of the refusal to the applicant.
- (7) As soon as practicable, the Minister must arrange for a copy of a notice of extension under this section to be:
  - (a) published in the *Gazette*; and
  - (b) given to the licensed trustee company concerned.

#### **601VBD Conditions of approval**

- (1) An approval under section 601VBB is subject to such conditions (if any) as are specified in the notice of approval.
- (2) The Minister may, by written notice given to a person who holds an approval under section 601VBB:
  - (a) impose one or more conditions or further conditions to which the approval is subject; or
  - (b) revoke or vary any condition:
    - (i) imposed under paragraph (a); or
    - (ii) specified in the notice of approval.
- (3) The Minister's power under subsection (2) may be exercised:
  - (a) on the Minister's own initiative; or
  - (b) on application by the person who holds the approval.
- (4) An application made by a person under paragraph (3)(b) must be lodged with ASIC and must set out the person's reasons for making the application.

Note: For fees in respect of lodging applications, see Part 9.10.

- (5) ASIC must give the application to the Minister as soon as

possible.

- (6) If the Minister refuses an application under paragraph (3) (b), the Minister must give written notice of the refusal to the applicant.
- (7) As soon as practicable, the Minister must arrange for a copy of a notice under subsection (2) to be:
  - (a) published in the *Gazette*; and
  - (b) given to the licensed trustee company concerned.
- (8) A person who holds an approval under section 601VBB must give written notice to ASIC as soon as practicable after they become aware that they have breached a condition to which the approval is subject.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

## **601VBE Varying percentage approved**

### *Application by holder of approval*

- (1) A person who holds an approval under section 601VBB may apply to vary the percentage specified in the approval by lodging with ASIC an application that:
    - (a) specifies the percentage of the voting power the person currently has in the licensed trustee company concerned; and
    - (b) specifies the percentage of the voting power the person is seeking approval to have in the trustee company; and
    - (c) sets out the person's reasons for making the application.
- Note: For fees in respect of lodging applications, see Part 9.10.
- (2) ASIC must give the application to the Minister as soon as possible.
  - (3) The Minister may grant the application if the Minister is satisfied that it would be in the interests of the licensed trustee company and its clients for the application to be granted.
  - (4) If the Minister grants the application, the Minister must:
    - (a) give written notice of the variation to the applicant; and
    - (b) specify the variation granted (which may or may not



be the variation the applicant applied for).

- (5) If the Minister refuses an application, the Minister must give written notice of the refusal to the applicant.

*Minister's own initiative*

- (6) The Minister may, by written notice given to a person who holds an approval under section 601VBB, vary the percentage specified in the approval if the Minister is satisfied that the variation would be in the interests of the licensed trustee company and its clients.

*Percentage varied upwards*

- (7) If the Minister varies a percentage upwards, the variation takes effect on the day the notice of variation is given.

*Percentage varied downwards*

- (8) If the Minister varies a percentage downwards, the variation takes effect on the day specified in the notice of variation. The specified day must be a day at least 90 days after the day on which the notice is given.

*Notification of variation*

- (9) As soon as practicable, the Minister must arrange for a copy of a notice of variation under this section to be:
- (a) published in the *Gazette*; and
  - (b) given to the licensed trustee company concerned.

### **601VBF Revoking an approval**

- (1) The Minister may, by written notice given to a person who holds an approval under section 601VBB in relation to a licensed trustee company, revoke the approval if:
- (a) the Minister is satisfied that it would be in the interests of the trustee company and its clients for the approval to be revoked; or
  - (b) the Minister is satisfied that an unacceptable control situation exists in relation to the trustee company and in relation to the person; or
  - (c) the Minister is satisfied that there has been a contravention of a condition to which the approval is subject.

- (2) The revocation takes effect on the day specified in the notice of revocation. The specified day must be a day at least 90 days after the day on which the notice is given.
- (3) If a person who holds an approval under section 601VBB applies to the Minister for revocation of the approval, the Minister must, by written notice given to the person, revoke the approval. The revocation takes effect on the day specified in the notice of revocation.
- (4) As soon as practicable, the Minister must arrange for a copy of a notice of revocation under this section to be:
  - (a) published in the *Gazette*; and
  - (b) given to the licensed trustee company concerned.

**601VBG Minister may require further information from applicants**

- (1) If a person has made an application under this Division, the Minister may, by written notice given to the person, require the person to give the Minister, within a specified period, further information about the application.
- (2) The Minister may refuse to consider the application until the person gives the Minister the information.

**601VBH Minister may seek views of licensed trustee company and its clients**

For the purpose of making a decision under this Division (whether or not in response to an application) in relation to a licensed trustee company, the Minister may seek the views of the trustee company and its clients.

**601VBI Time limit for Minister's decision**

- (1) The Minister must make a decision on an application under this Division within 30 days after receiving the application.
- (2) However, before the end of the 30 days, the Minister may decide to extend the period for considering the application until the end of 60 days after the application was received.
- (3) If the Minister has not made a decision within the 30 days (or the 60 days, if subsection (2) applies), the Minister is taken to have granted whatever was applied for. As soon as practicable after that happens, the Minister must arrange for a

notice to that effect to be:

- (a) published in the *Gazette*; and
  - (b) given to the licensed trustee company concerned.
- (4) The time for making the decision stops running if the Minister gives a notice under subsection 601VBG(1) in relation to the application, and does not start again until the notice is complied with.
- (5) The time limit in this section does not apply to an application under section 601VBB or 601VBE if an unacceptable control situation exists in relation to the applicant and in relation to the relevant licensed trustee company at any time before the Minister makes a decision.

### **Division 3—Other matters**

#### **601VCA Acquisition of property**

- (1) The Court must not make an order under section 601VAC if:
- (a) the order would result in the acquisition of property from a person otherwise than on just terms; and
  - (b) the order would be invalid because of paragraph 51 (xxxi) of the Constitution.
- (2) Section 1350 does not apply in relation to the making of an order under section 601VAC.
- (3) In this section:

*acquisition of property* has the same meaning as in paragraph 51(xxxi) of the Constitution.

*just terms* has the same meaning as in paragraph 51(xxxi) of the Constitution.

#### **601VCB Interests of clients to be viewed as a group**

A reference in this Part to the interests of the clients of a licensed trustee company is a reference to the interests of the clients, when viewed as a group.

#### **601VCC Anti-avoidance**

- (1) If:
- (a) one or more persons enter into, begin to carry out or

- carry out a scheme; and
- (b) it would be concluded that the person, or any of the persons, who entered into, began to carry out or carried out the scheme or any part of the scheme did so for the sole or dominant purpose of avoiding the application of any provision of Division 1 in relation to any person or persons (whether or not mentioned in paragraph (a)); and
- (c) as a result of the scheme or a part of the scheme, a person (the *controller*) increases the controller's voting power in a licensed trustee company;
- the Minister may give the controller a written direction to cease having that voting power within a specified time.
- (2) A person who is subject to a direction under subsection (1) must comply with the direction.
- Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).
- (3) A direction under subsection (1) is not a legislative instrument.
- (4) In this section:
- increase* voting power includes increasing it from a starting point of nil.

## **Part 5D.6—Consequences of cancellation of Australian financial services licence**

### **Division 1—Preliminary**

#### **601WAA Definitions**

- (1) In this Part:
- asset* means property, or a right, of any kind, and includes:
- (a) any legal or equitable estate or interest (whether present or future, vested or contingent, tangible or intangible, in real or personal property) of any kind; and
- (b) any chose in action; and
- (c) any right, interest or claim of any kind including rights, interests or claims in or in relation to property (whether arising under an instrument or otherwise, and whether liquidated or unliquidated, certain or contingent,

- accrued or accruing); and
- (d) any CGT asset within the meaning of the *Income Tax Assessment Act 1997*.

**authorised ASIC officer**, when used in a particular provision of this Part, means a person authorised under subsection (2) to perform or exercise the functions or powers of an authorised ASIC officer under that provision.

**cancel**, in relation to a licence, means:

- (a) cancel the licence under Part 7.6; or
- (b) vary the conditions of the licence under Part 7.6 so that the licence ceases to cover traditional trustee company services.

**certificate of transfer** has the meaning given by subsection 601WBG(1).

**compulsory transfer determination** has the meaning given by subsection 601WBA(1).

**estate assets and liabilities**, in relation to a trustee company that has had its licence cancelled, means assets (including assets in common funds) and liabilities:

- (a) of an estate, or incurred in relation to an estate, in relation to which the trustee company was (before cancellation of its licence) performing estate management functions; and
- (b) that, immediately before the cancellation:
- (i) were vested in the trustee company because it was performing those functions; or
- (ii) were otherwise assets and liabilities of the trustee company because of its performance of those functions.

Note: This Part does not apply to liabilities for breach of trust etc.: see section 601WBK.

**interest**, in relation to land, includes:

- (a) a legal or equitable estate or interest in the land; or
- (b) a right, power or privilege over, or in relation to, the land.

**liability** includes a duty or obligation of any kind (whether arising under an instrument or otherwise, and whether actual, contingent or prospective).

**licence** means an Australian financial services licence that is held by a trustee company and that covers the provision of one or more traditional trustee company services.

**receiving company** has the meaning given by subsection 601WBA(1).

**transferring company** has the meaning given by subsection 601WBA(1).

- (2) ASIC may, in writing, authorise a person who is a member of ASIC, or of its staff, to perform or exercise the functions or powers of an authorised ASIC officer under a particular provision of this Part.

## **Division 2—Transfer of estate assets and liabilities**

### **601WBA Compulsory transfer determinations**

- (1) If ASIC cancels the licence of a trustee company (the **transferring company**), ASIC may, in writing, make a determination (a **compulsory transfer determination**) that there is to be a transfer of estate assets and liabilities from the transferring company to another licensed trustee company (the **receiving company**).
- (2) ASIC may make a compulsory transfer determination only if:
- (a) either:
    - (i) the Minister has consented to the transfer; or
    - (ii) the Minister's consent to the transfer is not required (see section 601WBD); and
  - (b) ASIC is satisfied that:
    - (i) the transfer is in the interests of clients of the transferring company (when viewed as a group); and
    - (ii) the transfer is in the interests of clients of the receiving company (when viewed as a group); and
    - (iii) the board of the receiving company has consented to the transfer; and
    - (iv) legislation to facilitate the transfer that satisfies the requirements of section 601WBC has been enacted in the State or Territory in which the transferring company is registered and the State or Territory in which the receiving company is registered.

- (3) The determination must include particulars of the transfer, including:
  - (a) the names of the transferring company and the receiving company; and
  - (b) whether it will be a total transfer or a partial transfer of the transferring company's estate assets and liabilities; and
  - (c) if it will be a partial transfer—an indication of the part of the transferring company's estate assets and liabilities that is to be transferred.
- (4) The determination must include a statement of the reasons why the determination has been made.
- (5) The determination is not a legislative instrument.

#### **601WBB When consent of receiving company is in force**

- (1) The consent referred to in subparagraph 601WBA(2)(b)(iii) remains in force until it is withdrawn by the receiving company's board with the agreement of ASIC.
- (2) ASIC may agree to the consent being withdrawn if ASIC considers it appropriate to allow the consent to be withdrawn having regard to any of the following:
  - (a) circumstances that have arisen since the consent was given;
  - (b) circumstances that were in existence at or before the time when the consent was given but that were not known to the receiving company's board when it gave its consent;
  - (c) any other relevant matter.

#### **601WBC Complementary State or Territory legislation**

State or Territory legislation referred to in subparagraph 601WBA(2)(b)(iv) must include provision to ensure that, when a certificate of transfer comes into force under this Division, the receiving company is taken to be the successor in law in relation to estate assets and liabilities of the transferring company, to the extent of the transfer. In particular, the legislation must provide that:

- (a) assets of the transferring company become assets of the receiving company, to the extent of the transfer; and
- (b) liabilities of the transferring company become

liabilities of the receiving company, to the extent of the transfer; and

- (c) the duties, obligations, immunities, rights and privileges applying to the transferring company apply to the receiving company, to the extent of the transfer; and
- (d) if the certificate of transfer includes provisions of a kind referred to in subsection 601WBG(3) specifying:
  - (i) that particular things are to happen or are taken to be the case—those things are taken to happen, or to be the case, in accordance with those provisions; or
  - (ii) a mechanism for determining things that are to happen or are taken to be the case—things determined in accordance with that mechanism are taken to happen, or to be the case, as determined in accordance with that mechanism.

#### **601WBD Minister's power to decide that his or her consent is not required**

- (1) The Minister's consent to the transfer of estate assets and liabilities is not required if the Minister has, in writing, determined that his or her consent is not required in relation to:
  - (a) the transfer; or
  - (b) a class of transfers that includes the transfer.
- (2) The regulations may prescribe criteria to be taken into account by the Minister in deciding whether to make a determination.
- (3) A determination is a legislative instrument if it is expressed to apply in relation to a class of transfers (whether or not it is also expressed to apply in relation to one or more transfers identified otherwise than by reference to membership of a class).
- (4) If subsection (3) does not apply to a determination, the determination is not a legislative instrument.

#### **601WBE Determinations may impose conditions**

- (1) The compulsory transfer determination may impose conditions of either or both of the following kinds:
  - (a) conditions to be complied with by the transferring company or the receiving company before a certificate of transfer is issued in relation to the transfer of estate assets



and liabilities;

- (b) conditions to be complied with by the transferring company or the receiving company after a certificate of transfer has been issued or has come into force in relation to the transfer of estate assets and liabilities.
- (2) ASIC may, by notice in writing given to the transferring company or the receiving company, vary or revoke any condition of a determination if ASIC is satisfied that the variation or revocation is appropriate.
  - (3) The transferring company or the receiving company may apply in writing to ASIC to have a condition of a kind referred in paragraph (1)(b) that applies to it varied or revoked.
  - (4) ASIC may, by notice in writing given to the company that made the application, approve the variation or revocation if ASIC is satisfied that the variation or revocation is appropriate. A variation or revocation that is approved by ASIC has effect accordingly.
  - (5) The transferring company or the receiving company must comply with any conditions that are imposed under subsection (1) as conditions to be complied with by that company.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (6) The transferring company or the receiving company does not commit an offence against this Act merely because the company is complying with a condition imposed under subsection (1).

Note: A defendant bears an evidential burden in relation to the matter in subsection (6), see subsection 13.3(3) of the *Criminal Code*.

### **601WBF Notice of determination**

ASIC must give a copy of the compulsory transfer determination to the transferring company and the receiving company.

### **601WBG Certificate of transfer**

- (1) If:
  - (a) ASIC has made a compulsory transfer determination;and

- (b) ASIC considers that the transfer should go ahead; and
  - (c) the consent referred to in subparagraph 601WBA(2)(b)(iii) has not been withdrawn under section 601WBB;
- ASIC must, in writing, issue a certificate (a *certificate of transfer*) stating that the transfer is to take effect.
- (2) The certificate of transfer must:
    - (a) include the names of the transferring company and the receiving company; and
    - (b) state whether the transfer is a total transfer or a partial transfer; and
    - (c) if the transfer is a partial transfer—include, or have attached to it, a list of the estate assets and liabilities that are being transferred to the receiving company; and
    - (d) state when the certificate is to come into force (either by specifying a date as the date it comes into force, or by specifying that the date it comes into force is a date worked out in accordance with provisions of the certificate).
  - (3) The certificate may include provisions specifying, or specifying a mechanism for determining, other things that are to happen, or that are taken to be the case, in relation to assets and liabilities that are to be transferred, or in relation to the transfer of estate assets and liabilities that is to be effected, whether the transfer is total or partial.
  - (4) The certificate comes into force in accordance with the statement included in the certificate as required by paragraph (2)(d).
  - (5) The certificate is not a legislative instrument.

#### **601WBH Notice of certificate**

ASIC must:

- (a) give a copy of the certificate of transfer to the transferring company and the receiving company; and
- (b) publish notice of the issue of the certificate.

#### **601WBI Time and effect of compulsory transfer**

- (1) When a certificate of transfer comes into force, the receiving company becomes the successor in law of the transferring

company in relation to estate assets and liabilities of the transferring company, to the extent of the transfer. In particular:

- (a) if the transfer is a total transfer—all the estate assets and liabilities of the transferring company, wherever those assets and liabilities are located, become assets and liabilities of the receiving company (in the same capacity as they were assets and liabilities of the transferring company) without any transfer, conveyance or assignment; and
  - (b) if the transfer is a partial transfer—all the estate assets and liabilities included in the list referred to in paragraph 601WBG(2)(c), wherever those assets and liabilities are located, become assets and liabilities of the receiving company (in the same capacity as they were assets and liabilities of the transferring company) without any transfer, conveyance or assignment; and
  - (c) to the extent of the transfer, the duties, obligations, immunities, rights and privileges applying to the transferring company apply to the receiving company.
- (2) If the certificate includes provisions of a kind referred to in subsection 601WBG(3):
- (a) if the provisions specify that particular things are to happen or are taken to be the case—those things are, by force of this section, taken to happen, or to be the case, in accordance with those provisions; and
  - (b) if the provisions specify a mechanism for determining things that are to happen or are taken to be the case—things determined in accordance with the mechanism are, by force of this section, taken to happen, or to be the case, as determined in accordance with that mechanism.

### **601WBJ Substitution of trustee company**

When a certificate of transfer comes into force, any appointment or nomination of the transferring company to a particular capacity (for example, as trustee, executor or administrator) in relation to the transferred estate assets and liabilities is taken to be an appointment or nomination of the receiving company to that capacity in relation to those assets and liabilities.

### **601WBK Liabilities for breach of trust and other matters not affected by this Part**

- (1) Nothing in this Part applies to or affects liabilities of the transferring company, or of an officer or employee of the transferring company, for:
  - (a) any breach of trust; or
  - (b) any other misfeasance or nonfeasance; or
  - (c) any exercise of, or failure to exercise, any discretion.
- (2) Nothing in this Part affects any rights of the transferring company, or of an officer or employee of the transferring company, to indemnity in respect of such liabilities.

### **Division 3—Other matters related to the transfer of estate assets and liabilities**

#### **601WCA Certificates evidencing operation of Act etc.**

- (1) An authorised ASIC officer, by signed writing, may certify that a specified asset or liability has become an asset or liability of the receiving company under this Part.
- (2) For all purposes and in all proceedings, a certificate under subsection (1) is prima facie evidence of the matters certified.

#### **601WCB Certificates in relation to land and interests in land**

If:

- (a) the receiving company becomes, under this Part, the owner of land, or of an interest in land, that is situated in a State or Territory; and
- (b) there is lodged with the Registrar of Titles or other appropriate officer of the State or Territory in which the land is situated a certificate that:
  - (i) is signed by an authorised ASIC officer; and
  - (ii) identifies the land or interest; and
  - (iii) states that the receiving company has, under this Part, become the owner of that land or interest;the officer with whom the certificate is lodged may:
  - (c) register the matter in the same manner as dealings in land or interests in land of that kind are registered; and
  - (d) deal with, and give effect to, the certificate.

#### **601WCC Certificates in relation to other assets**

- (1) If:

- (a) an asset (other than land or an interest in land) becomes, under this Part, an asset of the receiving company; and
  - (b) there is lodged with the person or authority who has, under a law of the Commonwealth, a State or a Territory, responsibility for keeping a register in respect of assets of that kind a certificate that:
    - (i) is signed by an authorised ASIC officer; and
    - (ii) identifies the asset; and
    - (iii) states that the asset has, under this Part, become an asset of the receiving company;that person or authority may:
    - (c) register the matter in the same manner as transactions in relation to assets of that kind are registered; and
    - (d) deal with, and give effect to, the certificate.
- (2) This section does not affect the operation of:
- (a) other provisions of this Act; or
  - (b) if the regulations prescribe provisions of one or more other Acts—those provisions of those Acts.

#### **601WCD Documents purporting to be certificates**

A document purporting to be a certificate given under this Division is, unless the contrary is established, taken to be such a certificate and to have been properly given.

#### **601WCE Construction of references to transferring company**

From when a certificate of transfer comes into force, in any instrument of any kind, a reference to the transferring company, in relation to assets or liabilities transferred under this Part, is taken to be a reference to the receiving company.

#### **601WCF Income or other distribution received by transferring company**

The transferring company must promptly account to the receiving company for any income or other distribution received by the transferring company after a certificate of transfer comes into force, if the income or distribution arises from assets transferred to the receiving company under this Part.

Note: Failure to comply with this section is an offence (see subsection

1311(1)).

### **601WCG Access to books**

The transferring company must, at the request of the receiving company, give the receiving company access to all books in its possession that relate to assets or liabilities transferred under this Part.

Note: Failure to comply with this section is an offence (see subsection 1311(1)).

### **601WCH Minister or ASIC may seek views of trustee company and its clients**

For the purpose of deciding whether to exercise powers under this Part, the Minister or ASIC may seek the views of a trustee company or its clients in relation to the possible exercise of the powers.

## **Division 4—Miscellaneous**

### **601WDA Transferring company required to contact certain persons**

- (1) If the licence of a trustee company is cancelled, the trustee company must, as soon as practicable:
  - (a) take all reasonable steps to contact the following persons and advise them of the cancellation of the licence:
    - (i) all persons who the trustee company is aware have executed and lodged instruments, such as wills, that have not yet come into effect, but will potentially lead to estate assets and liabilities being held by the trustee company;
    - (ii) all persons who the trustee company is aware have appointed the trustee company as trustee or to some other capacity; and
  - (b) publish notice of the cancellation of the licence.

Note: Failure to comply with this subsection is an offence (see subsection 1311(1)).

- (2) If a certificate of transfer comes into force, the trustee company must, as soon as practicable, take all reasonable steps to contact the persons referred to in subsection (1) and advise them of the transfer of estate assets and liabilities.

Note: Failure to comply with this subsection is an offence (see

subsection 1311(1)).

## **Part 5D.7—Effect of contraventions**

### **601XAA Civil liability of licensed trustee companies**

- (1) A person who suffers loss or damage because of conduct of a licensed trustee company that contravenes a provision of this Chapter may recover the amount of the loss or damage by action against the trustee company, whether or not the trustee company has been convicted of an offence, or has had a civil penalty order made against it, in respect of the contravention.
- (2) Without limiting subsection (1), if:
  - (a) a licensed trustee company charges a person a fee in excess of fees permitted to be charged by this Chapter; and
  - (b) the person pays the fee;the amount of the excess is a loss that is recoverable by the person under subsection (1).
- (3) An action under subsection (1) must be begun within 6 years after the cause of action arises.
- (4) This section does not affect any liability that a person has under other provisions of this Act or under other laws.

## **Part 5D.8—Exemptions and modifications**

### **601YAA Exemptions and modifications by ASIC**

- (1) ASIC may:
  - (a) exempt a person or class of persons, or an estate or class of estates, from all or specified provisions of this Chapter; or
  - (b) declare that this Chapter applies to a person or class of persons, or an estate or class of estates, as if specified provisions were omitted, modified or varied as specified in the declaration.
- (2) An exemption may apply unconditionally or subject to specified conditions. A person to whom a condition specified in an exemption 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 the order.

- (3) An exemption or declaration is a legislative instrument if it is expressed to apply in relation to a class of persons or a class of estates (whether or not it is also expressed to apply in relation to one or more persons or estates identified otherwise than by reference to membership of a class).
- (4) If subsection (3) does not apply to an exemption or declaration, the exemption or declaration must be in writing and ASIC must publish notice of it in the *Gazette*. The exemption or determination is not a legislative instrument.
- (5) If conduct (including an omission) of a person would not have constituted an offence if a particular declaration under paragraph (1)(b) had not been made, that conduct does not constitute an offence unless, before the conduct occurred (in addition to complying with the requirements of the *Legislative Instruments Act 2003* (if the declaration is of a kind referred to in subsection (3)), or with the gazettal requirement of subsection (4), as the case may be):
  - (a) the text of the declaration was made available by ASIC on the internet; or
  - (b) ASIC gave written notice setting out the text of the declaration to the person.

In a prosecution for an offence to which this subsection applies, the prosecution must prove that paragraph (a) or (b) was complied with before the conduct occurred.

- (6) For the purpose of this section, the ***provisions of this Chapter*** include:
  - (a) regulations or other instruments made for the purposes of this Chapter; and
  - (b) definitions in this Act or the regulations, as they apply to references in:
    - (i) this Chapter; or
    - (ii) regulations or other instruments made for the purposes of this Chapter; and
  - (c) any provisions of Division 2 of Part 10.12 that relate to this Chapter.

### **601YAB Exemptions and modifications by regulations**

- (1) The regulations may:



- (a) exempt a person or class of persons, or an estate or class of estates, from all or specified provisions of this Chapter; or
  - (b) provide that this Chapter applies to a person or class of persons, or an estate or class of estates, as if specified provisions were omitted, modified or varied as specified in the declaration.
- (2) For the purpose of this section, the *provisions of this Chapter* include:
- (a) regulations or other instruments made for the purposes of this Chapter; and
  - (b) definitions in this Act or the regulations, as they apply to references in:
    - (i) this Chapter; or
    - (ii) regulations or other instruments made for the purposes of this Chapter; and
  - (c) any provisions of Division 2 of Part 10.12 that relate to this Chapter.

**10 Section 761A (paragraph (a) of the definition of *financial services law*)**

After “5C,” insert “5D,”.

**11 Section 761A (at the end of the definition of *financial services law*)**

Add:

- ; or (e) in relation to a financial services licensee that is a licensed trustee company (in addition to paragraphs (a) to (d))—any rule of common law or equity that covers conduct relating to the provision of financial services that are traditional trustee company services (whether or not it also covers other conduct), but only in so far as it covers conduct relating to the provision of such services.

**12 Section 761A**

Insert:

*licensed trustee company* has the same meaning as in Chapter 5D.

**13 Section 761A**

Insert:

*traditional trustee company services* has the same meaning as in Chapter 5D.

#### **14 Section 761A**

Insert:

*trustee company* has the same meaning as in Chapter 5D.

#### **15 Subsection 761G(1)**

After “(6)”, insert “, (6A)”.

#### **16 After subsection 761G(6)**

Insert:

*Traditional trustee company services*

- (6A) For the purpose of this Chapter, if a financial service provided to a person is a traditional trustee company service, the service is provided to the person as a retail client unless regulations made for the purpose of this subsection provide otherwise.

#### **17 Subsection 761G(7)**

After “a financial service”, insert “(other than a traditional trustee company service)”.

#### **18 Section 761GA**

After “a financial service”, insert “(other than a traditional trustee company service)”.

#### **19 After subsection 766A(1)**

Insert:

*Provision of traditional trustee company services by trustee company*

- (1A) Subject to paragraph (2)(b), the provision by a trustee company of a traditional trustee company service constitutes the provision, by the company, of a ***financial service***.

Note: Trustee companies may also provide other kinds of financial service mentioned in subsection (1).

- (1B) The regulations may, in relation to a traditional trustee company service of a particular class, prescribe the person or

persons to whom a service of that class is taken to be provided. This subsection does not limit (and is not limited by) subsection (2).

Note: A traditional trustee company service is provided to a person as a retail client unless regulations provide otherwise (see subsection 761G(6A)).

Note 1: The following heading to subsection 766A(1) is inserted “*General*”.

Note 2: The following heading to subsection 766A(2) is inserted “*Regulations may deal with various matters*”.

Note 3: The following heading to subsection 766A(3) is inserted “*Exception for work ordinarily done by clerks or cashiers*”.

Note 4: The following heading to subsection 766A(4) is inserted “*Meaning of operating a registered scheme*”.

## **20 Subsection 911A(4)**

Omit all the words from and including “if the service is”, substitute:

if the service is:

- (a) the operation of a registered scheme; or
- (b) a traditional trustee company service.

## **21 Subparagraph 912D(1)(a)(iii)**

Before “the obligation”, insert “in relation to financial services, other than traditional trustee company services provided by a licensed trustee company—”.

## **22 Subparagraph 912D(1)(a)(iii)**

Omit “and” (last occurring), substitute “or”.

## **23 At the end of paragraph 912D(1)(a)**

Add:

- (iv) in relation to traditional trustee company services provided by a licensed trustee company—the obligation under paragraph 912A(1)(c), so far as it relates to Commonwealth, State or Territory legislation, or a rule of common law or equity, that is covered by paragraph (d) or (e) of that definition; and

## **24 After paragraph 915B(3)(c)**

Insert:

- (ca) is a trustee company whose clients have suffered, or are likely to suffer, loss or damage because the company

has breached:

- (i) this Act; or
- (ii) a financial services law referred to in paragraph (e) of the definition of *financial services law* in section 761A; or

**25 After paragraph 981A(2)(c)**

Insert:

- (ca) the licensee is a licensed trustee company, and the money is paid to the licensee in connection with traditional trustee company services provided by the licensee; or

**26 After paragraph 1311(1A)(d)**

Insert:

- (daa) Chapter 5D;

**27 After paragraph 1317E(1)(j)**

Insert:

- (jaa) subsection 601UAA(2) (duties of officers of licensed trustee company);
- (jaab) subsection 601UAB(2) (duties of employees of licensed trustee company);

**28 Schedule 3 (after table item 173)**

Insert:

173A	Subsection 601SBB(1)	50 penalty units.
173B	Subsection 601SBC(2)	50 penalty units.
173C	Subsection 601SCB(1)	50 penalty units.
173D	Subsection 601SCB(2)	50 penalty units.
173E	Subsection 601SCB(3)	60 penalty units or imprisonment for 12 months, or both.
173F	Section 601TAA	60 penalty units or imprisonment for 12 months, or both.
173G	Subsection 601TAB(1)	60 penalty units or imprisonment for 12 months, or both.
173H	Subsection 601TBA(2)	60 penalty units or imprisonment for 12 months, or both.
173J	Subsection 601UAA (1)	300 penalty units or imprisonment for 5 years, or both.

173K	Subsection 601UAB (1)	300 penalty units or imprisonment for 5 years, or both.
173L	Section 601VAB	120 penalty units or imprisonment for 2 years, or both.
173M	Subsection 601VBD (8)	60 penalty units or imprisonment for 12 months, or both.
173N	Subsection 601VCC (2)	120 penalty units or imprisonment for 2 years, or both.
173P	Subsection 601WBE (5)	50 penalty units.
173Q	Section 601WCF	60 penalty units, or imprisonment for 12 months, or both.
173R	Section 601WCG	60 penalty units, or imprisonment for 12 months, or both.
173S	subsection 601WDA (1)	120 penalty units or imprisonment for 2 years, or both.
173T	subsection 601WDA (2)	120 penalty units or imprisonment for 2 years, or both.

## Schedule 3—Debentures

### *Corporations Act 2001*

#### **1 Section 9 (paragraph (d) of the definition of *debenture*)**

Repeal the paragraph.

#### **2 Section 283BC**

Repeal the section, substitute:

##### **283BC Duty to notify ASIC of information related to trustee**

- (1) Within 14 days after the trustee is appointed, the borrower must lodge with ASIC a notice containing the following information:
  - (a) the name of the trustee;
  - (b) any other information related to the trustee or the debentures that is prescribed by the regulations.
- (2) If there is any change to the information, the borrower must, within 14 days of the change, lodge with ASIC a notice containing the changed information.
- (3) A notice under subsection (1) or (2) must be in the prescribed form.

#### **3 After section 283BC**

Insert:

##### **283BCA Register relating to trustees for debenture holders**

###### *The register*

- (1) ASIC must establish and maintain a register relating to trustees for debenture holders.
- (2) The regulations may prescribe the way in which the register must be established or maintained, including the details that ASIC must enter in the register.

###### *Inspection of register*

- (3) A person may inspect the register, and may make copies of,

or take extracts from, the register.

- (4) The regulations may prescribe the fees that a person must pay ASIC to do the things mentioned in subsection (3).
- (5) Any disclosure necessary for the purposes of this section is authorised by this section.

## **Schedule 4—Technical amendment**

### *Corporations Act 2001*

#### **1 Subsection 1338B(8)**

After “of a State”, insert “, the Capital Territory”.



## **Schedule 5—Application and transitional provisions**

### *Corporations Act 2001*

#### **1 At the end of Chapter 10**

Add:

### **Part 10.12—Transitional provisions relating to the Corporations Legislation Amendment (Financial Services Modernisation) Act 2009**

#### **Division 1—Transitional provisions relating to Schedule 1 to the Corporations Legislation Amendment (Financial Services Modernisation) Act 2009**

##### **1487 Definitions**

- (1) In this Division:

*amended Corporations Act* means this Act as in force after commencement.

*amending Schedule* means Schedule 1 to the *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009*.

*commencement* means the day on which the amending Schedule commences.

*margin lending financial service* has the meaning given by subsection 1488(2).

- (2) Terms that are used in this Division and that are defined in Division 2 of Part 7.1 have the same meanings as they are given by that Division.

##### **1488 Application of amendments—general**

- (1) The amendments made by the amending Schedule apply in relation to a margin lending financial service that is provided on or after the day that is 12 months after commencement.
- (2) A *margin lending financial service* is:
  - (a) a dealing in a margin lending facility that was issued after commencement; or
  - (b) the provision of financial product advice in relation to a margin lending facility that was issued after commencement.

**1489 Applications of amendments—application for and grant of licences etc. authorising margin lending financial services**

- (1) Despite section 1488, during the period that:
  - (a) starts at the start of the day that is one month after commencement; and
  - (b) ends at the end of the day before the day that is 12 months after commencement;subsections (2) and (3) apply.
- (2) A person may:
  - (a) apply under section 913A of the amended Corporations Act for an Australian financial services licence that authorises the person to provide a margin lending financial service; and
  - (b) apply under section 914A of the amended Corporations Act for a variation of a condition of an Australian financial services licence to authorise the person to provide a margin lending financial service.
- (3) ASIC may:
  - (a) grant an Australian financial services licence to a person under section 913B of the amended Corporations Act that authorises the person to provide a margin lending financial service, and otherwise deal with that licence (for example, by suspending or cancelling it) under Chapter 7; and
  - (b) impose or vary conditions on an Australian financial services licence under section 914A of the amended Corporations Act to authorise a person to provide a margin lending financial service, and otherwise deal with those conditions (for example, by revoking or varying them) under Chapter 7;but the Australian financial services licence, condition, or

variation of a condition, does not take effect until the day that is 12 months after commencement.

#### **1490 Application of amendments—between 6 and 12 months after commencement**

- (1) Despite section 1488, the amendments made by the amending Schedule apply in relation to a margin lending financial service that is provided during the period that:
  - (a) starts at the start of the day that is 6 months after commencement; and
  - (b) ends at the end of the day before the day that is 12 months after commencement;but only if, at the time the margin lending financial service is provided, subsection (2) or (3) applies to:
  - (c) the person who provides the margin lending financial service; and
  - (d) if the margin lending financial service is provided on behalf of another person—the person on whose behalf the margin lending financial service is provided.
- (2) This subsection applies to a person if the person is an Australian financial services licensee and either:
  - (a) has not applied for a condition of the licence to be varied to authorise the person to provide the margin lending financial service; or
  - (b) has applied for a condition of the licence to be varied to authorise the person to provide the margin lending financial service, but has been notified by ASIC that the application has been refused.
- (3) This subsection applies to a person if the person is not an Australian financial services licensee and either:
  - (a) has not applied for an Australian financial services licence that authorises the person to provide the margin lending financial service; or
  - (b) has applied for an Australian financial services licence that authorises the person to provide the margin lending financial service, but has been notified by ASIC that the application has been refused.

#### **1491 Acquisition of property**

- (1) Despite section 1350, a provision of this Division does not

apply, and is taken never to have applied, to the extent that the operation of the provision would result in an acquisition of property from a person otherwise than on just terms.

- (2) In subsection (1), *acquisition of property* and *just terms* have the same meanings as in paragraph 51(xxxi) of the Constitution.

#### **1492 Regulations**

- (1) The regulations may make provisions of a transitional, application or saving nature relating to this Division and the amendments and repeals made by the amending Schedule.
- (2) Without limiting subsection (1), regulations made for the purpose of that subsection may modify provisions of this Act.

### **Division 2—Transitional provisions relating to Schedule 2 to the Corporations Legislation Amendment (Financial Services Modernisation) Act 2009**

#### **1493 Definitions**

In this Division:

*amending Schedule* means Schedule 2 to the *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009*.

*commencement* means the commencement of the amending Schedule.

*modify* includes make additions, omissions and substitutions.

#### **1494 Transitional provisions relating to limit on control of trustee companies**

- (1) This section applies in relation to a person and a trustee company if, immediately before the commencement of Part 5D.5, the percentage (the *pre-commencement percentage*) of the person's voting power in the trustee company exceeded 15%.
- (2) Subject to subsection (3), Part 5D.5 applies in relation to the person and the trustee company as if paragraph 601VAA(a) specified the pre-commencement percentage (rather than 15%).
- (3) If, after the commencement of Part 5D.5, the percentage of

the person's voting power in the trustee company is reduced, the following provisions have effect from the time of the reduction:

- (a) if the reduced percentage exceeds 15%—Part 5D.5 applies in relation to the person and the trustee company as if paragraph 601VAA(a) specified the reduced percentage (rather than 15%);
- (b) if the reduced percentage is 15% or less—this section ceases to apply, and never again applies, in relation to the person and the trustee company.

#### **1495 Transitional provisions relating to the amendments of Chapter 7**

- (1) This section applies to each company:
  - (a) that is a trustee company immediately after the commencement of the first regulations made for the purpose of paragraph 601RAB(1)(b); and
  - (b) that, at that time, holds an Australian financial services licence.
- (2) During the period of 6 months starting on the commencement of those regulations:
  - (a) the company's Australian financial services licence is taken to cover the provision by the company of traditional trustee company services; and
  - (b) section 601TAB does not apply in relation to the company; and
  - (c) Part 7.7 does not apply in relation to traditional trustee company services provided by the company.

Note: If the company wants to continue to provide traditional trustee company services after the end of the 6 month period, it will (before the end of that period) need to apply to ASIC to have the conditions of its licence varied to cover those services.

- (3) To avoid doubt, subsection (2) does not limit ASIC's powers under Part 7.6 (whether during or after the period of 6 months) in relation to the company's Australian financial services licence.

Note: For example, ASIC may (under Subdivision B of Division 4 of Part 7.6) impose or vary licence conditions, or may (under Subdivision C of Division 4 of Part 7.6) vary, cancel or suspend the licence.

#### **1496 General power for regulations to deal with transitional matters**

- (1) The regulations may make provisions of a transitional, application or saving nature in relation to any of the following:
  - (a) the transition from the regime provided for by laws of the States and Territories (as in force before commencement) relating to trustee companies to the regime provided for by this Act as amended by the amending Schedule;
  - (b) the amendments and repeals made to this Act by the amending Schedule.
- (2) Without limiting subsection (1), regulations made for the purpose of that subsection may modify provisions of this Act.

### **Division 3—Transitional provisions relating to Schedule 3 to the Corporations Legislation Amendment (Financial Services Modernisation) Act 2009**

#### **1497 Definitions**

In this Division:

*amending Schedule* means Schedule 3 to the *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009*.

#### **1498 Application of amendments**

- (1) The amendment made by item 1 of the amending Schedule applies to promissory notes made after the commencement of that item.
- (2) The amendment made by item 2 of the amending Schedule applies to trustees appointed on or after the commencement of that item.

[*Minister's second reading speech made in—  
House of Representatives on 25 June 2009  
Senate on 26 October 2009*]  
(145/09)