

2001-2002-2003

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**FINANCIAL SERVICES REFORM AMENDMENT BILL 2003**

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and New Clauses to be Moved on Behalf of the Government

(Circulated by authority of the Parliamentary Secretary to the Treasurer,  
the Hon Ross Cameron, MP)



## Table of Contents

Outline.....	1
Abbreviations.....	2
Notes on amendments.....	3
Schedule 1 — Amendment of the <i>Corporations Act 2001</i> relating to unsolicited offers to purchase financial products off-market .....	3
Schedule 2 — Other amendments of the <i>Corporations Act 2001</i> .....	5
Schedule 3 — Amendment of Other Acts .....	18
Schedule 4 — Transitional Provisions.....	19



# 1

## Outline

1.1 The Financial Services Reform Amendment Bill 2003 (FSR Amendment Bill) will clarify and amend various aspects of the regulatory framework governing the licensing, conduct and disclosure of providers of financial services, and the licensing of financial markets and clearing and settlement facilities introduced by the *Financial Services Reform Act 2001* (FSR Act).

1.2 The amendments proposed to be moved by the Government further refine certain provisions of the FSR Act and correct some minor technical errors.

### Financial impact statement

1.3 The proposed amendments have no financial impact.

## 2

### Abbreviations

2.1 The following abbreviations are used in this Supplementary Explanatory Memorandum:

APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
ASX	Australian Stock Exchange Limited
Corporations Act	<i>Corporations Act 2001</i>
FSG	Financial Services Guide
FSR Act	<i>Financial Services Reform Act 2001</i>
PDS	Product Disclosure Statement
SoA	Statement of Advice

# 3

## Notes on amendments

### **Schedule 1 — Amendment of the *Corporations Act 2001* relating to unsolicited offers to purchase financial products off-market**

#### *Items 1 to 24 - proposed replacement of Schedule 1*

3.1 It is proposed that Schedule 1 of the FSR Amendment Bill be replaced with an amended Schedule 1. The updated Schedule differs from the original in the following respects:

#### *Inviting a person to make an off-market offer*

3.2 Due to the current wording of Schedule 1 to the Bill, the potential buyer of a financial product (the buyer) could structure a document to invite someone to make them an offer, but at the price set by the buyer, and thereby avoid the off-market dealing provisions.

3.3 An amendment is proposed to ensure that inviting someone to sell his or her financial product off-market would be an offence unless an offer was made in the form required by Schedule 1. This proposed prohibition would only apply to invitations that, if structured as an offer, would be caught by the new provisions of Schedule 1.

3.4 People who accept an unlawful invitation (the seller) would be allowed certain rights of remedy (existing section 1019H) and have access to the civil liability provisions. That is, the seller would have the right to terminate the contract and as such, refuse to transfer the financial product to the buyer, or if that transfer has already taken place, the right to have the financial product

## **Notes on amendments**

---

returned. Such a right would be available for up to 30 days after the contract was entered into.

3.5 Civil recourse would also be available to the seller (through an amendment to Subdivision B, Division 7 of Part 7.9). That is, a person that received an unlawful invitation would be able to seek compensation for losses arising from an acceptance of that invitation.

3.6 It is proposed that non-compliance with the new provisions would constitute an offence and result in appropriate penalties.

### *Variation of the offer document*

3.7 It is proposed that the terms of an offer (as set out in the offer document), to which Schedule 1 applies, should not be able to be varied by either party.

3.8 This restriction would not affect the ability of an offeror to make a lawful withdrawal of the offer and make a new offer, nor would it stop an offeree making a separate counter offer.

### *Supplementary disclosure*

3.9 It is proposed that additional disclosure be required from off-market dealers, where the actual market value of the product under offer varies from the disclosed market value, by a percentage greater than that specified in the regulations. Pursuant to such a variation, off-market dealers would have to withdraw their offer (and subsequently make another offer) or send the offeree a supplementary offer document. The purpose of the supplementary offer document would be to disclose the market value variance only. That is, the terms of the original offer could not be varied through the issue of the supplementary offer document, and the document is to include a statement to this effect.

3.10 In that regard, if an offeror wished to amend the terms of the original offer document, the offer must be withdrawn and a new offer made.

3.11 It is proposed that non-compliance with the new provisions would constitute an offence and result in appropriate penalties.

3.12 Where the offeror is required to provide a supplementary offer document, but a sale takes place without such disclosure (or the disclosure is provided after the completion of the sale), the offeree would have the right to terminate the contract (as per existing section 1019H).

3.13 Such rights would also be available to the offeree where the supplementary offer document is defective, or contains a misleading or deceptive statement.

3.14 In the above instances, offerees would also have access to the civil liability provisions.

## **Schedule 2 — Other amendments of the *Corporations Act 2001***

### *Items 1A, 4A & 7A — definition of professional investor*

3.15 Item 4A amends the definition of *professional investor* in section 9 to make clear that it excludes trustees of superannuation funds, approved deposit funds, pooled superannuation trusts or public sector superannuation schemes with assets of less than \$10 million. It is arguable that a combined reading of paragraphs (b) and (d) of the definition as currently drafted includes such trustees, which is not intended.

3.16 Amendments are also made to move the definition of *body regulated by APRA* from the definition section (section 761A) in Chapter 7 of the Act to the general definition section (section 9) at the beginning of the Act. The definition itself will not change.

### *Items 9A-B, 45A-F & 46A-C — personal advice given in a 'live' market situation*

3.17 These items amend section 946B of the Act and related provisions. Section 946B provides certain concessions from the requirement to provide a SoA where personal advice is given and that advice is 'execution-related telephone advice' (ERTA). ERTA is defined as advice given by telephone which relates to financial products able to be traded on a licensed market, and which is given as an integral part of the execution of a transfer of, or order for, those financial products.

3.18 In order to come within the exception to the requirement to give a SoA for ERTA, the client must agree to a SoA not being provided for the advice, or advice of that kind. The advice provider must verbally disclose, at the time the ERTA is given, information relating to remuneration and conflicts of interest, and must also keep a record of the advice for 90 days from the date the ERTA is given (this last requirement is contained in the Corporations Regulations).

## Notes on amendments

---

3.19 The proposed amendments to section 946B in items 46A-C have the following features:

- The expression ‘execution-related telephone advice’ will be replaced with ‘further market-related advice’ (FMRA), which will necessitate consequential amendments to other provisions that refer to ERTA (sections 761A, 942B and 942C — see items 9A-B and 45A-F);
- In order to be excepted from the requirement to give a SoA for FMRA, it will be a prerequisite that the client has previously been given a SoA which sets out the client’s relevant personal circumstances in relation to the advice contained in that SoA (proposed paragraph 946B(1)(b));
  - It is also an existing requirement of paragraphs 947B(2)(b) and 947C(2)(b) that the SoA must include information about the basis on which the advice is or was given.
- So long as the client’s relevant personal circumstances set out in this ‘initial’ SoA, and the basis on which the advice contained in the SoA was given, are not significantly different from the personal circumstances and basis for the advice that exist when FMRA is provided, a further SoA will not be required at that time (proposed paragraph 946B(1)(d));
  - Consequently, where relevant personal circumstances or the basis on which the advice in the SoA was given do significantly change, it will be necessary for the providing entity to give the client a fresh SoA.
  - In this regard, it is a requirement of section 945A that providing entities have a reasonable basis for any personal advice given, which requires them to determine the client’s relevant personal circumstances. It will therefore be expected that providers of FMRA regularly make enquiries regarding clients’ personal circumstances, to ensure they are up to date.
- The means by which FMRA may be provided will be expanded from telephone only to include other forms of electronic communication such as fax and e-mail. There will also be provision for the regulations to specify additional forms of electronic communication (proposed paragraph 946B(1)(g));

- It will no longer be a requirement that the advice is given as an integral part of the execution of a transfer of, or an order for, financial products traded on a licensed market;
  - This change recognises that advice given in a ‘live’ market situation may not always result in a trade occurring (for example, advice may be to ‘hold’ a financial product, rather than to ‘buy’ or ‘sell’ — see proposed subparagraph 946B(1)(c)(i)).
- Nevertheless, it remains a critical element of the concessions provided by section 946B that the advice is given in the context of a ‘live’ financial market. To reinforce this, the following conditions will apply;
  - It will be a requirement that the FMRA is provided by a participant in a licensed market, or an authorised representative of such a participant (proposed paragraph 946B(1)(a)); and
  - The advice provider must have a reasonable belief that the client requires the FMRA promptly, or it is in the client’s interests that the FMRA be provided promptly (proposed paragraph 946B(1)(e)).
    - Promptly is not defined in the provision, but is intended to convey the need for advice to be provided with urgency and expedition. The provision does not remove the need for a SoA to be provided to a client when personal advice is given by a participant on a licensed market if that advice is not required in order for the client to make a ‘time critical’ decision.
- FMRA will include advice relating to offers or invitations which, if accepted, would result in the client acquiring or disposing of securities, managed investment products or derivatives that are able to be traded on a licensed market (proposed subparagraph 946B(1)(c)(ii)).
  - Thus it will cover, for example, advice on offers or invitations under which a client may acquire further securities in an entity in which the client already holds securities (for example, share purchase offers and takeover offers).
- FMRA must not contain advice of any other kind, other than *cash management facility advice* (proposed paragraph 946B(1)(f)).

## Notes on amendments

---

### *'Able to be traded on a licensed market'*

3.20 An important element of the amended section 946B is the range of financial products to which it relates. Rather than referring to *financial products* able to be traded on a licensed market as the current section 946B does, the new provision is expressed to apply in respect of *securities, managed investment products and derivatives* (all defined in section 761A) able to be traded on a licensed market.

3.21 A definition of *able to be traded on a licensed market* is included in the provision (proposed subsection 946B(2)) specifying, in relation to securities and managed investment products, that they must be admitted to quotation on a licensed market and that quotation is not suspended, or that they are further products of a kind that are already admitted to quotation and that quotation is not suspended.

- The definition will, for example, include further securities of an entity that already has some securities of the same kind admitted to quotation, but will not include securities of an entity that is yet to have any of its securities admitted to quotation.

3.22 In relation to derivatives, the concept of admission to quotation is not appropriate, so the criteria require that, in order for a derivative to be able to be traded, the standard terms of the arrangement that constitutes the derivative must be set out in a licensed market's operating rules, and those rules must also provide that the derivative is able to be dealt with on that market.

### *'Cash management facility' and 'cash management facility advice'*

3.23 New definitions of *cash management facility* and *cash management facility advice* are included (proposed subsection 946B(2)). FMRA may include advice about the use (but not the establishment) of cash management facilities (defined to include interests in cash common funds or cash management trusts, basic deposit products and bank accepted bills) which facilitate the acquisition or disposal of securities, managed investment products or derivatives to which the FMRA relates.

- *Cash management facility advice* does not include advice about the establishment of cash management facilities. Such advice, if it is personal advice, will require a SoA. It is anticipated that advice about the establishment of a cash management facility will normally form part of the 'initial' SoA provided to the client.

3.24 The current requirement in subsection 946B(3) regarding the verbal disclosure that must be provided to a client will be retained. However, the wording is amended to make it more appropriate to the additional means by which FMRA may be provided.

3.25 As with the requirements relating to SoAs generally, the amended section 946B will apply to a providing entity once it is issued with an Australian financial services licence (the amended section 946B will also apply to any providing entities who are authorised representatives of the licensee from that time).

#### *Items 12A & 12B — bundled insurance products*

3.26 These items amend section 764A of the Act to provide a consistent basis for determining when general insurance products are provided to retail clients, irrespective of whether the products are provided individually through separate contracts of insurance or are provided in a ‘bundled’ contract. The proposed amendments maintain the principle of promoting consumer protection through disclosure for retail clients.

3.27 A bundled contract of insurance is a single contract that includes a range of insurance covers, from which consumers are able to choose which of those various insurance covers they wish to acquire.

- A general insurance product is currently defined in paragraph 764A(1)(d) by reference to a ‘contract of insurance’.
- Subsection 761G(5) provides that certain types of general insurance (for example, home contents, consumer credit, sickness and accident) are taken to be provided to a retail client, where the client is an individual or the insurance product is or would be used in connection with a small business. Those types of general insurance are classified under subsection 761G(5) and associated Corporations Regulations 7.1.11 to 7.1.17.

3.28 The amendments utilise the kinds of insurance covers and underlying assets to distinguish between classes of general insurance products contained within a bundled contract. For example, insurance cover in respect of the destruction or damage to a home building can be distinguished from insurance cover in respect of the destruction or damage to commercial premises. This basis is consistent with that used in Corporations Regulation 10.2.74.

## Notes on amendments

---

3.29 By making these amendments, disclosure and other obligations under Part 7.9 of the Act will not apply to those individual general insurance covers provided within a bundled contract of insurance that are ordinarily considered to be provided to wholesale clients. This outcome is consistent with that for similar general insurance products when provided in separate contracts of insurance.

3.30 The amendments only apply for the purposes of determining what constitutes a general insurance product (and therein a financial product) and do not have a general effect on the meaning of ‘contract of insurance’ when used elsewhere in Chapter 7 of the Act.

### *Items 13, 13A & 13B — expert statements*

3.31 Under section 766B of the Act, giving an ‘exempt document or statement’ is not considered to be the provision of financial product advice. An ‘exempt document’ is defined under subsection 766B(9). Consequently, information contained in an exempt document that would otherwise be considered to be financial product advice, such as a valuation provided by a merchant bank, will not be classified as financial product advice if it is included in an exempt document.

3.32 The amendment to subsection 766B(1) is designed to achieve the same outcome as the original amendments to subsection 766B(1) introduced in this Bill. That is, the amendment will ensure that experts’ reports about financial products do not automatically lose their status as financial product advice merely through including that report in an exempt document. It was considered that a further amendment was required to ensure that this result was achieved satisfactorily.

### *Amendment (9) — omission of items 19 to 24 of Schedule 2*

3.33 It is proposed that items 19 to 24 of Schedule 2 to the Bill be omitted. These items would have amended sections 889J and 889K which provide for levies to support the National Guarantee Fund. They were drafted in the light of the first stage of the ASX’s restructuring of its market and clearing and settlement arrangements. However, they do not fit the details of the later stages which have now been developed. For this reason, it is proposed that they be omitted from the Bill.

*Item 47A — exemptions from the section 949A obligation to warn the client*

3.34 Where information that constitutes general advice is provided it must ordinarily be accompanied by the general advice warning found in section 949A (ie. that the advice has not taken the client's personal circumstances into account). However, there are situations where such material is provided but the requirement for it to be accompanied by the warning is not practical or of significant consumer protection value.

3.35 This item provides a regulation-making power in subsection 949A(1) to enable limited situations to be specified when the general advice warning will not be required. Such regulations will be made where the absence of the warning does not have a material detrimental impact on consumers. An example could be when the relevant material is contained in a radio advertisement broadcast to the public. However, such regulations are not envisaged to apply in situations where there is potential for a consumer to be significantly influenced, for example, in relation to investment seminars.

*Items 53A & 58A — defective Financial Services Guide (FSG)*

3.36 Amendments are proposed to provide greater certainty in relation to the interaction between section 941E, which provides that a FSG must be 'up to date' when given to a client, and the meaning of 'defective' within the criminal and civil liability provisions of Part 7.7 of the Act.

3.37 The items provide that the inclusion in a FSG of information that is not up to date is considered to constitute a misleading or deceptive statement for the purposes of determining whether a FSG is defective.

3.38 They also provide that, for the purposes of determining whether a FSG is defective, an 'omission' will include the absence of information relating to new circumstances that may influence a retail client's decision to acquire a financial service.

*Items 71A-B, 95C-D, 95G-U, 96A-F, 96H-I, 96L-U & 114 — section 1012G oral statement requirements*

3.39 Section 1012G provides a regulated person, such as a product provider, in time critical recommendation and issue situations, an alternate means to supply information to a client, rather than the ordinary requirement to provide a PDS. However, the regulated person must still provide a PDS as soon as

## **Notes on amendments**

---

practicable after that time (in any event by the time of any confirmation or not later than 5 days after issue).

3.40 As presently drafted these ‘verbal PDS’ provisions pose practical difficulties and impose undue costs because they may be interpreted as requiring a ‘block’ statement to be provided, for example through a recorded monologue which might take some minutes to deliver over the phone.

3.41 The items amend paragraph 1012G(3)(a) to permit a regulated person to provide the required information in an unscripted form. In doing so, the amendments facilitate the information being provided in a more tailored manner. For example, during the course of a telephone call the regulated person would be obliged to provide the required information and would also be able to respond to any queries a client may have in relation to that information as it was being conveyed.

3.42 The amendments also remove the requirement for the information to be given based on material prepared by the product issuer. This will remove practical difficulties and potential conflicts for those intermediaries that are not representatives of the product issuer. For example, the relevant person might not have access to, or wish to confine their comments to, information provided by the product issuer.

3.43 The removal of reliance on issuer-prepared information requires adjustment to the criminal and civil liability provisions within Part 7.9. Those provisions currently rely on the issuer-prepared information as a basis for determining what is a defective disclosure document or statement (and hence subject to criminal or civil liability). Amendments to the definition of ‘disclosure documents or statements’ and various other references within liability provisions are also required.

3.44 Items 95U and 114 amend the criminal liability provisions such that they apply to the actions of the persons actually giving or preparing the information (subject to the regulated person taking reasonable steps to ensure that information provided was not defective and reliance upon information provided by the issuer of the product). This involves the proposed insertion of new liability provisions and penalties within Part 7.9.

3.45 The proposed civil liability provisions distinguish between the product issuer/authorised representative relationship and other financial services providers in determining their application. As such, where the person giving the information is an authorised representative of the product issuer, the product issuer is subject to the operation of the civil liability provisions (see item 96T).

3.46 The new liability provisions and associated penalties are based on comparable criminal and civil liability provisions that operate for Part 7.7 of the Act, in relation to the oral provision of FSGs and SoAs. For example, proposed section 1021FA is based on existing subsections 952D(1) and 952E(1), (2), (5) and (6), and proposed section 1021FB is derived from sections 952F and 952G.

3.47 Further, it should be noted that the proposed amendments would permit the liability provisions to apply to information provided, including information purporting to be that required by paragraph 1012G(3)(a).

3.48 The proposed amendments to the Part 7.9 criminal and civil liability provisions are necessary to ensure those disclosure obligations remain effective, enforceable and attach appropriate liabilities for actions.

3.49 The existing section 1020E stop order provisions provide ASIC with the ability to prevent a person being able to utilise the verbal PDS provisions where they have provided defective information in relation to a financial product.

*Items 77A-B, 78A-T, 95A-B, 95E-F, 96G & 96J-K — interaction between provisions of Part 7.9 (sections 1012J, 1016A to 1016E and Division 7)*

3.50 These items address a range of issues related to the interaction of various provisions within Part 7.9 of the Act, in particular:

- how the requirement for PDSs to be ‘up to date’ operates in respect of enforcement provisions, and therein the definition of defective;
- whether a product can be issued following receipt of an application based on a PDS subject to non-materially adverse misstatements or omissions;
- the ability of a regulated person to rectify defects in a PDS by providing a new PDS, rather than providing a supplementary PDS; and
- the operation of the pre-requisite requirements for the issue or sale of a financial product in circumstances where the PDS does not contain material defects.

*Clarifying ‘up to date’ and ‘defective’ concepts*

3.51 Items 95F and 96K amend subsections 1021B(1) and 1022A(1) to improve the interaction between the concept of ‘up to date’ (section 1012J) and the meaning of ‘defective’ under the criminal and civil liability provisions for

## Notes on amendments

---

PDSs. The approach adopted is consistent with that which applies for FSGs (see also items 53A & 58A).

3.52 In addition, consistent terminology is to be applied across other provisions within section 1016E (that is, those provisions relating to ‘new circumstances’ already incorporate the up to date requirements but do not use a consistent terminology). In this regard, as paragraphs 1016E(1)(c) & (d) will be replaced and proposed subsection 1016E(5) inserted, direct reference will be made to the term defective, as opposed to outlining the respective sub-components.

### *Eligible applications & non-defective PDSs*

3.53 Section 1016A of the Act currently requires an ‘eligible application’ to be one that is taken from a PDS that contains all of the required information as at the time of the application.

3.54 Items 77A-B and 78C will amend the definition of eligible application in section 1016A. This will enable a restricted issue or sale, or a person to become a superannuation ‘standard employer-sponsor’, provided that at the time of the application the PDS from which it was derived was not defective.

- Defective (and in turn ‘not defective’) for these purposes is defined with reference to the criminal liability provisions of Part 7.9. Under those provisions a PDS is defective if the consumer would be subject to materially adverse effects as a result of misstatements it contains or omissions from it.

3.55 Section 1016E prescribes those circumstances in which issues or sales may occur where an application has been received based on a defective PDS. The current terms of sections 1016A or 1016E do not provide an avenue through which a person can proceed with an issue or sale where an application is derived from a PDS that is subject to non-materially adverse misstatements or omissions — that is, issues or sales in those instances are effectively prohibited.

3.56 Given the non-material nature of the defects in relation to the relevant investment decision, it is considered that allowing for issues or sales of financial products in such instances would not diminish the ability of the client to make an informed investment decision. To require specific rectification of each and every minor misstatement or omission through additional disclosure might result in undue disclosure obligations being imposed on the product issuer.

3.57 Under the amendments a person supplying a disclosure document that contains non-materially adverse misstatements or omissions would be open to the operation of the civil liability provisions. Accordingly, if a person suffers any loss through these non-material deficiencies it would be open to them to seek restitution through the existing civil liability provisions under Subdivision B, Division 7 of Part 7.9.

3.58 Action may be available to ASIC through the stop order provision in relation to PDSs, which will not be limited to a PDS which contained materially adverse misstatements or omissions under other proposed amendments (see items 91A and 91C-D).

3.59 When considered in conjunction with proposed clarification of the relationship between the defective and up to date concepts, the amendment also caters for circumstances involving a superseded PDS. The issue or sale of a financial product may be able to occur based on such a PDS provided that there was nothing materially adverse to the client's decision that was not disclosed.

*Choices related to applications received based on defective PDSs & revised PDSs*

3.60 The insertion of paragraphs 1016E(2)(aa) and 1016E(2)(ba) allows for the provision of a revised PDS (instead of a supplementary PDS — section 1014A) in circumstances related to the issue of products where an application is based on a defective PDS. This will provide an alternate practical means of addressing deficient PDSs.

3.61 Corporations Regulation 7.9.13A currently allows a revised PDS to be provided, however it is considered preferable for these provisions to be included within the Act.

*Choices related to applications received based on defective PDSs & pre-requisites for issues or sales of financial products under sections 1016A to 1016D*

3.62 Item 78S clarifies the interaction of section 1016E (relating to applications based on a defective PDS) and section 1016A (relating to eligible applications). There is currently no clear linkage between the operation of sections 1016A and 1016E.

3.63 The amendments permit the original application to constitute an eligible application for the purposes of section 1016A. New subsections 1016E(2A) and (2B) deem that an original application received by the responsible person (ie. an application derived from a defective PDS) is taken to have come from a

## Notes on amendments

---

revised PDS or supplementary PDS issued for the purposes of satisfying paragraph 1016E(2)(b). Further, amendments to section 1016E are required to align the provision of a replacement PDS or a supplementary PDS with the eligible application provisions.

3.64 Further, consequential amendments will also clarify the interaction of sections 1016B to D, which relate to pre-acquisition conditions for the issue or sale of a financial product, with the operation of section 1016E.

- Where a PDS is lodged with ASIC, section 1016B prohibits the issue or sale of the specified financial product for a specified period (this requirement does not apply to a supplementary PDS).
- Section 1016C restricts a responsible person's ability to issue or sell a financial product where minimum subscription conditions apply.
- Section 1016D restricts a responsible person's ability to issue or sell a financial product where conditions apply in relation to the trading of the subject product on a financial market.

3.65 Section 1016B is amended by item 78S such that it will not apply to a revised PDS provided in circumstances specified by section 1016E. This is consistent with the treatment of a supplementary PDS under the same circumstances.

3.66 Sections 1016C and 1016D will not have effect where the responsible person opts to proceed with an issue or sale under the circumstances outlined in paragraphs 1016E(2)(ba) and (c). This outcome is consistent with the current intent of section 1016E, which permits an issue or sale to proceed subject to the provision of a supplementary PDS that 'changes the statement' related to the pre-requisite conditions described in sections 1016C and 1016D.

3.67 Where the responsible person decides to retain the application but not proceed with the issue or sale at that time, section 1016B to D requirements will remain in effect for any subsequent issue or sale.

### *Technical amendments*

3.68 For consistency, item 78A will amend paragraph 1016A(2)(f) to allow the making of regulations in relation to restricted sales to augment the existing power in relation to restricted issues.

3.69 Items 95A and 95B address referencing errors.

3.70 Items 95E, 96G & 96J amend sections 1021B, 1021J and 1022A to provide for the term ‘regulated person’ to be defined on a consistent basis across the criminal and civil liability provisions of Part 7.9 of the Act.

*Items 91A-C and amendment (23) — stop orders by ASIC*

3.71 These items amend the ASIC stop order provisions (section 1020E) to ensure that they are consistent with the operation of similar provisions within the company fundraising provisions contained in Chapter 6D of the Act (sections 728 and 739). That is, the ASIC stop order provisions will be permitted to operate in relation to non-materially adverse circumstances subject to existing due process requirements.

- Currently section 1020E gives ASIC the power to prohibit sales or issues of products based on ‘defective’ disclosure documents. The definition of defective used in this context is that under the offence provisions of Part 7.9 and is subject to a materiality constraint.

3.72 The proposed new subparagraph 1020E(1)(a)(ia) relating to stop orders is being amended to also accommodate other changes to the Act that relate to a verbal PDS under paragraph 1012G(3)(a) and an offer document as specified in Division 5A.

*Items 103A, 104A & 104B — transitional period for sections 1414, 1426 & 1428*

3.73 These items amend sections 1414, 1426 and 1428 to provide that the transitional period ends when a market or clearing and settlement facility licence is varied. The current provisions (which provide for the end of the transition period upon the licensee lodging an application to vary its licence) do not accord with the desirable and efficient processing of applications to vary the licence and approval of compensation arrangements. This consequence was not envisaged when the provisions were originally drafted.

## **Schedule 3 — Amendment of Other Acts**

### *Items 1A to 1E — ASIC Act amendments*

#### *Items 1A & 1B — section 12AE — saving of State and Territory laws*

3.74 The proposed amendments contained in these items address a potential inconsistency that may exclude or limit the application of the unconscionable conduct provisions of State and Territory fair trading laws.

#### *Items 1C & 1D — subsection 12BAB(10)*

3.75 These items make amendments to subsection 12BAB(10) that are equivalent to the amendments to subsection 766C(7) of the Corporations Act made by items 14 and 15 of Schedule 2 to the FSR Amendment Bill.

#### *Item 1E — paragraph 127(4C)(a) — confidentiality*

3.76 Section 127 of the ASIC Act imposes confidentiality obligations in relation to information that is given to ASIC in confidence or in connection with the performance of its functions or the exercise of its powers under the corporations legislation. Subsection 127(4B) authorises disclosure of this information under certain circumstances to a body corporate specified in regulations under subsection 127(4C). Subsection 127(4C) allows the regulations to specify a body corporate for the purposes of subsection 127(4B) if, and only if, the body corporate conducts a financial market or holds an Australian clearing and settlement facility licence.

3.77 The proposed amendment to subsection 127(4C) in this item will expand the range of bodies corporate that can be prescribed under subsection 127(4C) to include bodies corporate that are involved in the supervision of a financial market (but which do not actually conduct a financial market themselves). This amendment is intended to ensure that ASIC is able to disclose information in accordance with subsection 127(4B) to companies that are involved in supervising financial markets (such as Regulation Services Inc, a company established jointly by the Toronto Stock Exchange and the Canadian Securities Dealers Association to regulate broker conduct in relation to Canadian financial markets), not just to market operators.

## **Schedule 4 — Transitional Provisions**

### *Amendments (44-46) — application provisions*

3.78 These amendments deal with the application of certain amendments described above and are self-explanatory.