

## **EXPLANATORY STATEMENT**

### *Corporations Act 2001*

#### *Corporations Amendment (Derivative Transactions) Regulation 2013*

Section 1364 of the Corporations Act 2001 (the Act) provides that the Governor General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 901D of the Act provides that regulations can limit the persons on whom derivative transaction rule requirements can be imposed.

Section 854A of the Act provides for regulations requiring a person to keep and retain records that are relevant to determining whether any disqualified individual is involved in a derivative trade repository licensee.

Sections 901F and 903E of the Act provides for regulations to be made allowing a person who is alleged to have contravened section 901E or 903D of the Act to enter into a legally enforceable undertaking as an alternative to civil proceedings.

Section 904B of the Act provides for regulations to exclude the use of disclosure of derivative trade data by a derivative trade repository licensee, or an officer or employee of a derivative trade repository licensee and removes the right of one licensed derivative trade repository to obtain trade data as of right from another licensed trade repository.

Section 904J of the Act provides that a person or body prescribed by the regulations are designated for the purpose of subsection 904J (4)(d).

Section 906A of the Act provides for regulations to specify the circumstances that information given to ASIC by the operator (or an officer of the operator) of a prescribed derivative trade repository is to be taken to be given to ASIC in confidence in connection with the performance of ASIC's functions under this Act.

The purpose of the *Corporations Amendment (Derivatives Transactions) Regulation 2013* (the Regulation) is to implement measures that temporarily restrict ASIC's rule making power in relation to end users, and operational measures to ensure the derivatives trade reporting regime has appropriate Regulations governing the enforcement of trade reporting rules and Regulations for confidential information.

The Corporations Legislation Amendment (Derivatives Transactions) Act 2012 introduced a legislative framework designed to implement Australia's G20 commitments by allowing the Minister to mandate trade reporting, central clearing or platform trading requirements for classes of over-the-counter derivatives transactions. To implement the trade reporting commitment, on 22 May 2013 the Hon Wayne Swan MP, made a Determination under paragraph 901B(2) of the Corporations Act 2001 empowering the Australian Securities and Investments Commission (ASIC) to make rules requiring transactions in five derivative classes: interest rate, foreign exchange, credit, equity and all commodities except electricity to be reported to a trade repository, where one is available. These Regulations support the Determination to ensure the necessary controls for an effective trade reporting regime are in place.

**Details**

Details of the Regulation are included in the Attachment.

**Description of Consultation**

The Exposure Draft Regulation was released for public consultation on 5 June 2013.

**Conditions**

The Act specifies no conditions that need to be met before the power to make the Regulation may be exercised.

The Regulation is a Legislative Instrument for the purposes of the *Legislative Instruments Act 2003*.

**Commencement**

The Regulation commences on the day after it is registered.

**Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

***Corporations Amendment (Derivatives Transactions) Regulation 2013***

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Overview of the Legislative Instrument**

This Legislative Instrument implement measures temporarily restricting ASIC's rule making power in relation to end users, and operational measures to ensure the derivatives trade reporting regime has appropriate Regulations governing the enforcement of derivatives trade reporting rules and Regulations for confidential information.

**Human rights implications**

This Legislative Instrument does not engage any of the applicable rights or freedoms.

A Statement of Compatibility with Human Rights in relation to the derivatives trade reporting regime generally is provided at page 55 of the Revised Explanatory Memorandum to the *Corporations Legislation Amendment (Derivatives Transactions) Act 2012*.

**Conclusion**

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

**ATTACHMENT****Details of the Corporations Amendment (Derivative Transactions) Regulation 2013****Regulation 1 – Name of Regulation**

This Regulation provides that the title of the Regulations is *Corporations Amendment (Derivative Transactions) Regulation 2013*

**Regulation 2 – Commencement**

This Regulation commences on the day after it is registered.

**Regulation 3 – Authority**

This Regulation is made under the Corporations Act 2001.

**Schedule 1—Amendments****Item [1] Power to make derivative transaction rules**

Item 1 to Schedule 1 specifies persons on whom requirements cannot be imposed under 901D(a) of the Act. The Regulation temporarily restricts ASIC's rule making power from imposing requirements on end users. An end user is defined as a person who is not an authorised deposit taking institution, an Australian financial services licensee (and certain foreign persons exempted from requiring a licence), and a clearing and settlement facility licensee. This Regulation ceases to have effect on 31 December 2014.

**Item [2] Enforceable undertakings**

Item 2 to Schedule 1 inserts an enforceable undertaking regime, modeled on Division 7.2A.1 of the Corporations Regulations 2001. ASIC may accept enforceable undertakings from persons alleged to have not complied with section 901E and 903D, as an alternative to civil proceedings.

Undertakings that could be made are: undertakings to perform or refrain from performing a specific action, or to pay a specified amount to a specified party. These undertakings are able to be altered with ASIC's agreement.

If a person breaches these undertakings, ASIC is able to apply to a court to make an order that the court considers appropriate, including orders directing the person to comply with the undertaking, to pay the benefit obtained by the breach to the Commonwealth, or to compensate a person who has suffered loss from the breach.

**Item [3] Infringement notices**

Item 3 to Schedule 1 inserts an infringement notice regime, modelled on Division 7.2A.02 of the Corporations Regulations 2001. This Regulation allows ASIC to request a person who is alleged to have contravened section 901E or 903D of the Act to pay a penalty to the Commonwealth, undertake remedial measures, enter into an undertaking or otherwise accept sanctions, as an alternative to civil proceedings. The offer of an infringement notice is at

ASIC's discretion. ASIC is not required to offer an infringement notice instead of pursuing civil proceedings; nor is the liability of a person to civil proceedings affected if a notice is not offered, withdrawn, or not complied with.

Regulation 7.2A.104 defines the circumstances under which an infringement notice can be given. ASIC is able to issue an infringement notice if it has reasonable grounds to believe that a person has contravened section 901E and 903D Act. ASIC is able to issue a notice in relation to more than one contravention.

Regulations 7.2A.105 describe what is required in the issuing of an infringement notice. Before a notice could be issued, ASIC is required to give to the recipient written reasons as to why ASIC believes a breach has occurred, and give the recipient an opportunity to give evidence and make submissions to ASIC, as well as appear at a private hearing with ASIC. It is envisaged that this would include an opportunity for intended recipients to bring outside evidence, including witnesses, before ASIC. Evidence presented to ASIC by an intended recipient or representative of a recipient would not be admissible in evidence in any proceedings against the recipient, except in circumstances where the evidence is false or misleading.

Regulation 7.2A.106 requires that the infringement notice include substantial details. These include identification details such as dates and the name and address details of recipients, as well as details regarding the conduct that is alleged to make up each contravention, the market integrity rule alleged to have been contravened, and the fact that the notice is being issued under new Regulation 7.2A.104.

The notice is also required to specify the maximum penalty that a Court could order with respect to each contravention in addition to the penalty ASIC is seeking under the infringement notice, what other conditions must be satisfied to comply with the notice, and how any penalty can be paid. The non-binding nature of the infringement notice will also be mentioned, requiring the notice to make clear that the recipient may choose not to comply, but also making it clear that this may result in ASIC pursuing civil proceedings instead.

Regulation 7.2A.107 specifies that the penalties payable for an alleged contravention of a derivative transaction rule is determined by ASIC. The Regulation also allows for cumulative penalties in instances where there are breaches of multiple rules.

Regulations 7.2A.108 to 7.2A.10 give details on compliance with the infringement notices. A recipient will be taken to have complied with the notice when they have paid any specified penalty, undertaken specified remedial measures, entered into relevant undertakings, or accepted any other sanctions specified in the notice. Recipients will be given 28 days to comply with the notice, which they could apply to have extended by ASIC. ASIC will have 14 days to respond to applications for extension, after which a rejection is deemed to occur.

If compliance occurs, the effect is that any liability for a contravention of section 901E or 903D of the Act would be discharged, no civil or criminal proceedings could be brought by the Commonwealth for the conduct specified in the notice, and the recipient is not be taken to have admitted guilt or to have contravened the section. These protections will not apply in situations of false or misleading information being provided to ASIC.

Regulations 7.2A.111 to 7.2A.114 concern the withdrawal of notices. A recipient is permitted to apply to ASIC to withdraw a notice, and ASIC would be permitted to withdraw a notice unilaterally. If a notice is withdrawn, ASIC is required to refund any penalties paid;

similarly, any other sanctions taken would be rendered unenforceable and unwound to the extent possible.

Regulation 7.2A.115 concerns the publication of notices. The Regulations specify the ways in which ASIC may publish details of notices. ASIC is required to include in any publication a statement that compliance with an infringement notice is not an admission of guilt and the recipient is not taken to have contravened the derivative transaction rules. Publication can occur in the Gazette alongside a copy of the notice, or in a written or oral statement that includes a detailed summary of the notice.

#### **Item [4] Obligations and powers – confidential information for licensed derivative trade repositories**

Item 4 to Schedule 1 inserts Regulation under subsection 903A(5) of the Act. It contains provisions on how information provided to ASIC under either: a provision of Part 7.5A of the Act, or the Regulations made for that Part, or the derivative transaction rules or derivative trade repository rules, will be treated under section 127 (confidentiality) of the ASIC Act.

#### **Item [5] Obligations relating to derivative trade data**

Item 5 to Schedule 1 inserts Regulations under 904B(5)(b)(i) of the Act, which remove the right of one licensed derivative trade repository to obtain trade data as of right from another licensed trade repository.

#### **Item [6] ASIC may assess licensee's compliance**

Item 6 to Schedule 1 prescribes the bodies to which ASIC may give a copy of a report on an assessment of a derivative trade repository licensee, if the assessment relates to a serious contravention of the law. The list of prescribed bodies is modelled in on section 7.2.09 and 7.3.07 of the Act.

#### **Item [7] Obligations and powers – confidential information for prescribed derivative trade repositories**

Item 7 to Schedule 1 inserts Regulation under subsection 906A(3) of the Act. It contains provisions on how information provided to ASIC under either: a provision of Part 7.5A of the Act, or the Regulations made for that Part, or the derivative transaction rules or derivative trade repository rules, will be treated under section 127 (confidentiality) of the ASIC Act.

#### **Item [8] Record keeping**

Item 8 to Schedule 1 inserts Regulations requiring records to be kept relevant to determining whether a person may be disqualified from being involved in a derivative trade repository licensee. The Regulations are modelled on sections 7.4.02 and 7.4.03 of the Act.