



Corporations Amendment (Financial Market Supervision) Bill 2010

Sharon Scully
Law and Bills Digest Section

Contents

Purpose	3
Background.....	3
Australia's financial markets.....	3
Current financial market supervision arrangements	4
Criticisms of these arrangements	4
Basis of policy commitment.....	5
Committee consideration.....	6
Stakeholder comments.....	6
Financial implications	7
Main provisions	7
Changed financial market supervision arrangements	8
Stakeholder comments	8
Making market integrity rules	8
Emergency rules	8
Consultation and market integrity rules.....	9
Stakeholder comments.....	9
Flexibility of market integrity rules	9
Stakeholder comments.....	10
Inconsistency between market integrity and market operating rules	10
Enforcing market integrity rules	10
Market integrity rules - who must comply?.....	10
Stakeholder comments.....	10
Overseas financial markets - compliance	11
Contravention of market integrity rules - court ordered penalties.....	11
Stakeholder comments.....	12

Contraventions of market integrity rules - alternative sanctions to civil proceedings.....	13
Contraventions of market integrity rules - compensation orders.....	14
Stakeholder comments.....	14
Market integrity rules - scrutiny of ministerial decisions	14
ASIC’s direction making powers	15
Other regulation making powers	16
ASIC supervision of financial markets - widening existing powers under the Corporations Act.....	17
Administrative review	17
Stakeholder comments	18
Concluding comments	18

Corporations Amendment (Financial Market Supervision) Bill 2010

Date introduced: 10 February 2010

House: House of Representatives

Portfolio: Treasury

Commencement: Sections 1–3: on Royal Assent

Schedule 1: a date to be fixed by Proclamation—however, if any provision does not commence within a period of 12 months from the day on which the Act itself receives Royal Assent, such provision is repealed on the day after that period of time ends.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The Corporations Amendment (Financial Market Supervision) Bill 2010 (the Bill) proposes to amend the *Corporations Act 2001* (the Corporations Act) to provide that the Australian Securities and Investment Commission (ASIC) would supervise trading on financial markets with a domestic Australian market licence.¹

Background

Australia's financial markets

There are 16 licensed financial markets in Australia, of which five are licensed overseas financial markets.² The largest domestic financial market is the Australian Securities Exchange (ASX).³

1. Explanatory Memorandum, Corporations Amendment (Financial Market Supervision) Bill 2010, p. 3. As to what is a 'financial market', see *Corporations Act 2001*, section 767A. See also ASIC, *ASIC's role in financial markets*, viewed 18 February 2010, <http://www.asic.gov.au/asic/asic.nsf/byheadline/Markets+and+the+role+of+ASIC?openDocument>
2. ASIC, *Licensed domestic financial markets operating in Australia*, viewed 18 February 2010, <http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Licensed%20domestic%20financial%20markets%20operating%20in%20Australia>; ASIC, *Licensed overseas financial markets*

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Current financial market supervision arrangements

Currently, the supervision of financial markets in Australia is co-regulatory. In other words, financial market operators, such as the ASX, are responsible for supervising market participants and listed entities, while ASIC, the corporate regulator, is responsible for ensuring that market operators meet their statutory obligations.⁴

In addition, market operators must co-operate with ASIC in relation to enforcing obligations under the Corporations Act. For example, market operators must notify ASIC of various matters, which include suspected contraventions of the market's operating rules or the Corporations Act, as well as any matter potentially affecting a market participant's ability to meet its obligations as a financial services licensee.⁵

Criticisms of these arrangements

There has been strong public criticism of market operators' inherent conflict of interest between their supervisory and operating functions.⁶

In addition, the Government argues that:

Issues also arise concerning the detecting of market misconduct when trading in the same securities takes place on multiple markets. If a person can trade the same securities on different markets which are supervised independently of each other, it is

operating in Australia, viewed 18 February 2010,
<http://www.asic.gov.au/asic/asic.nsf/byheadline/Licensed+overseas+financial+markets+operating+in+Australia?openDocument>

3. Explanatory Memorandum, op. cit., p. 17.
4. Treasury, *Reforms to the supervision of Australia's financial markets—Exposure Draft and Consultation Paper*, December 2009, p. 2, viewed 16 February 2010,
http://www.treasury.gov.au/documents/1673/PDF/consultation_paper_20091201.pdf

As to the meaning of market participants, see *Corporations Act 2001* section 761A.

For further information about existing financial market arrangements, see ASIC, *Markets – an overview*, viewed 18 February 2010,
<http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Markets%20homepage>

See also *Corporations Act 2001* sections 792A (general obligations on market licensees) and 795B (what the Minister must be satisfied about when considering whether to grant an Australian market licence); *Corporations Regulations 2001* regulation 7.2.07 (content of operating rules).

5. Explanatory Memorandum, op. cit., p. 17. See also *Corporations Act 2001* section 792B.
6. For a comprehensive discussion about such criticisms, see Explanatory Memorandum, op. cit., p. 18.

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easier to conceal market misconduct. Market misconduct may involve trading activities on more than one market.

...

For example, the offence of market manipulation can involve creating the false or misleading appearance of active trading of a financial product on a financial market. The 'false or misleading appearance' aspect arises where a person trades with themselves or an associate in an attempt to create a false impression of demand for a financial product, and consequently increase the price for the financial product. Where there are multiple markets trading in the one security this sort of misconduct would be more difficult to detect. It would be possible for an individual seeking to make a false or misleading impression of demand for a product to trade with themselves on multiple markets. As the conduct would be dispersed across different markets, the actions being performed on each of those individual markets may seem innocuous. It would require a whole-of-market view to pick up the offensive behaviour.⁷

Basis of policy commitment

Confidence in the integrity of the financial system is crucial to how it operates and the Government observed that:

The continued perception of the presence of conflicts of interests could result in decreased confidence in the integrity of the market by market participants, which in turn could lead to individuals being unwilling to invest in the market for fear of market misconduct, potentially affecting the liquidity and stability of the market.⁸

Consequently, to improve confidence in the integrity of Australia's financial markets, the Government decided to remove the possibility of conflict of interest and enable improved supervision of cross-market trading activities.

The proposed measures in the Bill were announced by the Government on 24 August 2009 and included in an Exposure Draft and Consultation Paper released on 2 December 2009.⁹

The Bill itself was introduced into Parliament on 10 February 2010.

7. Ibid., pp. 19–20.

8. Ibid., p. 20.

9. See Treasury, *Reforms to the supervision of Australia's financial markets—Exposure Draft and Consultation Paper*, Media release, 2 December 2009, viewed 16 February 2010, <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1673>

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Committee consideration

As at 18 February 2010, the Standing Committee on the Scrutiny of Bills had not yet released any comments on the Bill.

In addition, as at 18 February 2010, the Senate Standing Committee on the Selection of Bills had not yet resolved whether to refer the Bill to a parliamentary committee.

Stakeholder comments

Generally, stakeholders support the idea of ASIC supervising Australian financial markets. However, stakeholders have expressed several concerns about aspects of how this would actually be implemented, as set out in the Exposure Draft to the Bill.¹⁰ In summary, the major concerns of stakeholders in relation to the Exposure Draft include:

- the amount of penalties proposed for contraventions of market integrity rules being much higher than the current amount imposed for breaches of existing rules¹¹
- ASIC's proposed directions powers and the need for transparency and accountability¹²
- application of compensation orders to market operators and the dangers of indeterminate liability¹³
- appeal processes in relation to decisions made under the Bill,¹⁴ and
- the need for consultation with stakeholders in making the regulations.¹⁵

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10. For a copy of the Exposure Draft, see Treasury, *Reforms to the supervision of Australia's financial markets—Exposure Draft and Consultation Paper*, 2 December 2009, viewed 16 February 2010, http://www.treasury.gov.au/documents/1673/PDF/Exposure_draft_of_bill_20091201.pdf
 11. See, for example: Australian Securities Exchange (ASX), *Comments to Exposure Draft and Consultation Paper—Reform to the supervision of Australia's financial markets*, 22 December 2009, p. 9, viewed 17 February 2010, <http://www.treasury.gov.au/documents/1712/PDF/ASX.pdf>; Australian Bankers' Association (ABA), *Reforms to the supervision of Australia's financial markets*, 24 December 2009, p. 2, viewed 17 February 2010, <http://www.treasury.gov.au/documents/1712/PDF/ABA.pdf>; Stockbrokers Association of Australia (SAA), *Reforms to the supervision of Australia's financial markets—Treasury Consultation Paper and Exposure Draft Bill – Submission*, 23 December 2009, p. 4, viewed 17 February 2010, <http://www.treasury.gov.au/documents/1712/PDF/SAA.pdf>
 12. See, for example: ASX, op. cit., p. 22.
 13. See, for example: ASX, op. cit., p. 10.
 14. See, for example: ANZ, *Re: Reforms to the supervision of Australia's financial markets*, 23 December 2009, p. 2, viewed 17 February 2010, <http://www.treasury.gov.au/documents/1712/PDF/ANZ.pdf>

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These concerns will be discussed elsewhere in the relevant parts of the Main Provisions.

Financial implications

The Explanatory Memorandum states that the reforms proposed in the Bill will have no financial impact on the Government:

The Government will incur capital costs of approximately \$6 million associated with the acquisition of the relevant market supervision software and fitout requirements. The total operating costs associated with ASIC's new responsibility are expected to be \$53.5 million over the five years to 2013-14. The costs associated with preparing ASIC for the performance of the supervisory function and the ongoing performance of supervision by ASIC will be fully recoverable by ASIC over the forward estimates via a levy on market operators.¹⁶

Although the Government expects compliance costs would be incurred by market operators and participants to whom the Bill applies, the Explanatory Memorandum states that it is not possible to quantify such costs until the market integrity rules are made.¹⁷

It is noted, however, that the Government expects that the costs of levies relating to ASIC's proposed supervision of financial markets, imposed by the Corporations (Fees) Amendment Bill 2010 on market operators, would be off-set by market operators having lower operational costs as they would no longer be supervising trading on their markets.¹⁸

Main provisions

As the Explanatory Memorandum comprehensively deals with the proposed amendments in the Bill, this Digest will only focus on certain provisions in the Bill.

Item 14 proposes to insert **new Part 7.2A Supervision of financial markets (sections 798F–798L)** into the Corporations Act, which contains many of the core amendments relating to ASIC's proposed supervision of financial markets.

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15. See, for example: Investment and Financial Services Association Ltd. (IFSA), *Reforms to the supervision of Australia's financial markets*, 11 January 2010, p. 2, viewed 17 February 2010, <http://www.treasury.gov.au/documents/1712/PDF/IFSA.pdf>; ABA, op. cit., p. 5; ASX, op. cit., p. 9.
 16. Explanatory Memorandum, op. cit., pp. 3–4.
 17. Ibid., p. 4.
 18. Ibid.

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Changed financial market supervision arrangements

Under **proposed section 798F**, ASIC would supervise financial markets whose operators are licensed under existing subsection 795B(1). Subsection 795B(1) sets out the circumstances that must be satisfied for an Australian market licence to be granted.

Amendments are also proposed to existing provisions in the Corporations Act to reflect ASIC's new role, with market operators being required to have adequate resources for operating their market and being responsible for ensuring that market participants comply with operating rules (see, for example, **items 7–9; 12–13**).

Stakeholder comments

Some stakeholders have suggested that there be formal mechanisms in place to oversee ASIC's exercise of its new roles and functions.¹⁹ It is noted, however, that the Bill does not propose this.

Making market integrity rules

Proposed section 798G would enable ASIC, with the Minister's consent, to make (by legislative instrument) market integrity rules dealing with:

- activities or conduct of licensed markets
- activities or conduct of persons in relation to licensed markets, and
- activities or conduct of persons in relation to financial products traded on licensed markets.²⁰

Emergency rules

It is noted that **proposed subsections 798G(4) and (5)** provide for 'emergency rules'. If ASIC is of the opinion that it is necessary, or in the public interest, to protect people dealing in a financial product or a class thereof—ASIC would be able to make market integrity rules without the Minister's consent. However, in doing so, ASIC would have to provide the Minister with a written explanation justifying such rule on the day after

19. See, for example: ASX, op. cit., p. 6; National Institute of Accountants (NIA), *Reforms to the supervision of Australia's financial markets*, 22 December 2009, p. 2, viewed 17 February 2010, <http://www.treasury.gov.au/documents/1712/PDF/NIA.pdf>

20. Arguably, there appears to be some ambiguity in this proposed provision—does the Minister's consent merely mean that Minister consents to *idea* of making a particular market integrity rule, or does he/she have to consent to the actual *text* of the rule? Presumably, the latter is the legal intent, however, clarification of this would be useful. For the meaning of 'financial products' under the Corporations Act, see *Corporations Act 2001* Part 7.1 Division 3 Subdivision B (the general definition).

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making the rule; and would have to amend or revoke the rule in accordance with any written directions of the Minister. According to the Explanatory Memorandum:

These provisions are included to ensure that ASIC has the capacity to respond instantly to serious emerging market situations, while also ensuring that the role of the Minister is maintained. It is expected that ASIC will make rules without seeking the Minister's prior consent only in limited situations where ASIC needs to respond swiftly to a situation and there is insufficient time to get the prior written approval of the Minister.²¹

Consultation and market integrity rules

Although it is not expressly set out in the Bill, the Government assures that:

ASIC intends to consult with stakeholders regarding the introduction of the proposed market integrity rules. In cases where it is not possible to consult prior to the introduction of a market integrity rule, ASIC intends to subsequently review implementation arrangements relating to the rule.²²

Stakeholder comments

Stakeholders have stressed the importance of proper consultation during the process of making these rules.²³

Flexibility of market integrity rules

Again, although not expressly stated in the Bill, it is noted that the Government does intend that market integrity rules would be flexible and apply differently in relation to various types of licensed markets. The Explanatory Memorandum states that:

The Bill allows ASIC to make market integrity rules in a wide range of areas. The current law already allows markets to make operating rules, which also cover a wide range of areas ... The regime is designed to be flexible and to allow ASIC to make rules to cover new and emerging issues as the market adapts and innovates, while also recognising that every market is different and needs operating rules tailored to the specifics of that market.²⁴

21. Explanatory Memorandum, op. cit., p. 11.

22. Ibid., pp. 10–11.

23. See, for example: Investment and Financial Services Association Ltd. (IFSA), *Reforms to the supervision of Australia's financial markets*, 11 January 2010, p. 2, viewed 17 February 2010, <http://www.treasury.gov.au/documents/1712/PDF/IFSA.pdf>; ABA, op. cit., p. 5; ASX, op. cit., p. 9.

24. Explanatory Memorandum, op. cit., p. 11.

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Stakeholder comments

The Government's intention for the market integrity rules to be flexible is consistent with stakeholder opinion that the new arrangements be adaptable to a wide range of financial markets.²⁵

Inconsistency between market integrity and market operating rules

Under **proposed new subsection 793B(2)**, if the operating rules of an Australian financial market (made by the market operator) and the market integrity rules (made by ASIC) are inconsistent, the market integrity rules would prevail to the extent of the inconsistency (see **item 11**).

Enforcing market integrity rules

Market integrity rules - who must comply?

Proposed subsection 798H(1) provides that market integrity rules must be complied with by:

- operators of licensed markets
- participants of licensed markets, and
- entities prescribed by the regulations (yet to be made) for these purposes.

The Explanatory Memorandum states that:

The Bill also provides a regulation making power allowing for the regulations to specify other entities that the rules may be enforced against. This regulation making power is needed to allow the framework to develop to meet innovations and new players in the market. The financial market is by nature fluid and often involves complex and changing financial arrangements. It may be necessary to apply these rules to additional entities.²⁶

Stakeholder comments

It is noted, however, that some stakeholders are of the opinion that the market integrity rules should not apply to market operators. According to ASX, subjecting market operators to these rules would create 'a blurring of roles and responsibilities' and that 'ASIC and the Government already have a number of regulatory means by which

25. See, for example: Australian Financial Markets Association (AFMA), *Reforms to the supervision of Australia's financial markets*, 24 December 2009, p. 5, viewed 17 February 2010, <http://www.treasury.gov.au/documents/1712/PDF/AFMA.pdf>

26. Explanatory Memorandum, op. cit., p. 12.

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requirements can be imposed that may affect a market's integrity on trade facility operators'.²⁷ According to ASX:

It is important to promote role and regulatory clarity under the new arrangements. The best framework to achieve this aim is that trade facility operators are subject to the Corporations Act, associated regulations which can impose requirements on what must be included in operators' rules and licence obligations, while market Participants are subject to the Corporations Act and rules – either as imposed by ASIC or by the trade facility through which they choose to participate in the market (these being set by the operator of the relevant trade facility).²⁸

Overseas financial markets - compliance

In relation to overseas financial markets, **proposed subsection 798H(2)** provides that operators of such markets who are licensed under existing subsection 795B(2) would not have to comply with the market integrity rules. However, the Explanatory Memorandum explains that:

A decision was made not to require ASIC to directly supervise overseas financial markets which are licensed to operate in Australia as the Act allows such markets to operate in Australia on the basis of sufficiently equivalent regulation ...²⁹

These rules do not apply in relation to overseas markets with an Australian market licence. This is because operators of such markets are expected to be subject to the changes by implication. The Act provides that an operator of an overseas market can only be granted a licence where the Minister is satisfied that the regulatory regime the market is subject to is sufficiently equivalent to Australia's. In the future this would include taking into consideration the new regulatory framework applying to domestic Australian market licence holders.³⁰

Contravention of market integrity rules - court ordered penalties

Item 28 proposes to insert **new subsections 1317G(1C)** and **(1D)** into the Corporations Act.³¹

Proposed subsection 1317G(1C) provides that a Court may order a person to pay a pecuniary penalty to the Commonwealth where the Court is satisfied on the balance of

27. ASX, op. cit., p. 8.

28. Ibid., p. 9.

29. Explanatory Memorandum, op. cit., p. 10. For licensing criteria of operators of overseas financial markets, see in particular *Corporations Act 2001* paragraph 795B(2)(c).

30. Explanatory Memorandum, op. cit., p. 11.

31. Section 1317G of the Corporations Act provides for pecuniary penalty orders.

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probabilities that the person has contravened a market integrity rule (see also **item 27** below) and a declaration of the contravention has been made under section 1317E.³²

Proposed subsection 1317G(1D) provides that the maximum amount for such penalty is the amount specified in the market integrity rules for the rule in question.

To that effect, under **proposed subsection 798G(2)**, (see **item 14**) market integrity rules may include a penalty of an amount of up to \$1 million. According to the Explanatory Memorandum:

... the market integrity rules will cover a variety of areas, and the penalties will range in severity in line with the nature of the rule ...³³

Some rules will relate to minor and technical or procedural matters and it will be appropriate that a lower penalty level, or no penalty, attach to those rules.³⁴

Stakeholder comments

The amount of penalty that could potentially be imposed on corporations for a contravention of a market integrity rule has been a major concern for stakeholders.³⁵

Concerns were expressed that this penalty amount only relates to individuals and, consequently, the penalty amount for corporations could actually be an amount of up to \$5 million.

It is noted that for penalties relating to criminal offences, subsection 4B(3) of the *Crimes Act 1914*, provides that:

Where a body corporate is convicted of an offence against a law of the Commonwealth, the court may, if the contrary intention does not appear and the court thinks fit, impose a pecuniary penalty not exceeding an amount equal to 5 times the amount of the maximum pecuniary penalty that could be imposed by the court on a natural person convicted of the same offence.

However, the penalties in the Bill are civil penalties not criminal penalties. Therefore, one can rest assured that, as the proposed provision states, the market integrity rules may include a penalty of an amount of up to \$1 million only irrespective of whether the penalty is payable by an individual or a corporation.

32. As to the standard of proof relating to civil proceedings under the Corporations Act, see section 1332 of that Act.

33. Explanatory Memorandum, op. cit., p. 12.

34. Ibid., p. 11.

35. See, for example: ASX, op. cit., p. 9; ABA, op. cit., p. 2, SAA, op. cit., p. 4; ANZ, op. cit., p. 3.

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Contraventions of market integrity rules - alternative sanctions to civil proceedings

In addition to the above, **proposed section 798K** provides for alternatives to civil proceedings in relation to contraventions of market integrity rules, which may be provided by the regulations (yet to be made). These would include requiring a person to:

- pay a penalty to the Commonwealth (not exceeding three-fifths of the penalty amount set out in the market integrity rules for the rule in question)
- undertake or institute remedial measures
- accept sanctions other than penalty payments
- enter into legally enforceable undertakings to do one of the following:
 - take specified action within a specified time
 - refrain from taking specified action, or
 - pay a specified amount within a specified period to a specified person (**proposed subsections 798K(1)–(3)**).

According to the Explanatory Memorandum:

The alternatives to civil proceedings work on the basis that persons who are alleged to have contravened a market integrity rule, which in turn will be a breach of a civil penalty provision, can opt to enter into an infringement notice or enforceable undertaking with ASIC, as an alternative to ASIC pursuing the matter in Court. Such remedies are vital to the ongoing success of the market integrity rule framework as they provide ASIC with a fast and effective remedy, akin to the remedies available to markets under the current operating rule framework.³⁶

However, it is important to note that the proposed provisions only provide the framework within which the alternative sanctions would be established and that the detail of these proposals will actually be set out in the regulations. The Explanatory Memorandum states that:

The details of the alternatives to proceedings will be established in the regulations. The regulations will establish an infringement notice and enforceable undertaking framework under this provision ...

The regulations will also set out things such as the detailed requirements for the issue and service of a notice, matters to be included in the notice or undertaking, effect of the issue and compliance with a notice or undertaking, the effect of failure to comply with a notice or undertaking, the compliance period for a notice or undertaking, the withdrawal of a notice or undertaking, and the publication of the notice or

36. Explanatory Memorandum, op. cit., p. 13.

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undertaking. It is appropriate that such details are set out in the regulations as they are technical and procedural in nature.³⁷

Contraventions of market integrity rules - compensation orders

Item 29 proposes to insert **new section 1317HB** into the Corporations Act relating to compensation orders.

Proposed subsection 1317HB(1) provides that a Court may order a person to compensate another person (including a corporation) or registered scheme for damage suffered if:

- the first mentioned person has contravened **proposed subsection 798H(1)** in relation to complying with market integrity rules, and
- damage has resulted from that contravention.

The court order must specify an amount of compensation.

Importantly, **proposed subsection 1317HB(2)** provides that this would not apply to a contravention by an operator of a licensed market acting in that capacity.

The Explanatory Memorandum states that:

The Bill does not provide for compensation orders to be made against market operators. This is because market operators are at the centre of the financial system, and therefore are potentially open to claims from all participants in financial markets for a breach of a market integrity rule. There would be systemic risks in opening markets up to claims for compensation of an indeterminate liability. For this reason market operators have been excluded from the compensation provision.³⁸

Stakeholder comments

Proposed subsection 1317HB(2) of the Bill should allay concerns of some stakeholders about market operators potentially facing indeterminate liability if they were also subject to compensation orders.³⁹

Market integrity rules - scrutiny of ministerial decisions

Neither the Minister's consent to making the market integrity rules nor his or her direction to ASIC to vary or revoke the rule would be a legislative instrument (**item 14-proposed subsection 798G(6)**).

37. Ibid., p. 13.

38. Ibid., p. 12.

39. See, for example: ASX, op. cit., p. 10.

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However, the Explanatory Memorandum explains that:

This provision clarifies that these instruments are not legislative instruments as such documents are only interim steps in the rule making process. The market integrity rule, when made, will be a legislative instrument and subject to parliamentary scrutiny.⁴⁰

ASIC's direction making powers

Proposed section 798J enables ASIC to give certain directions if ASIC is of the opinion that it is necessary, or in the public interest, to protect people dealing in a financial product or class thereof. These directions are:

- directions given to entities to suspend dealings in a financial product or class thereof, and
- some other direction in relation to those dealings.

Under **proposed subsection 798J(1)**, in those circumstances, ASIC may give written advice to the entity of its opinion and the reasons for it, presumably before actually giving the direction itself, although the Bill does not expressly provide this.⁴¹

Under **proposed subsection 798J(2)**, if, after receiving ASIC's advice and reasons, the entity fails to take action:

- to prevent such dealings—in the case of a direction to suspend dealings in a financial product, or
- which, in ASIC's view, sufficiently addresses the concerns raised in the advice,

and ASIC is still of the opinion that it is appropriate to give the entity the proposed direction, ASIC may give the entity the written direction with a statement setting out its reasons for doing so. This direction is not a legislative instrument.

Proposed subsections 798J(3) and (4) provide that if the entity does not comply with the written direction within the period of time specified in the direction (not exceeding 21 days), ASIC may apply to the Court for an order requiring the entity to comply with the direction.⁴²

The Explanatory Memorandum explains that:

40. Explanatory Memorandum, op. cit., p. 12.

41. It is noted that this proposed provision is consistent with existing section 794D of the Corporations Act, which enables ASIC to give directions to entities that are market licensees.

42. For the meaning of 'Court', see *Corporations Act 2001* section 58AA.

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This directions power is necessary so ASIC can intervene to halt dealings in a financial product in order to protect people and thereby ensure the integrity of the market. For example, ASIC could direct a broker to stop trading in a product where the dealings would lead to contravention of the Act or a market integrity rule, or would impact on the integrity of the market.⁴³

Importantly, under **proposed subsection 798J(5)**, if the entity requests that ASIC refer the matter to the Minister, at any time after it receives ASIC's advice regarding the proposed direction, ASIC must do so immediately. In addition, where the Minister requires ASIC not to make, or revoke, the direction in question, ASIC must comply with that requirement.

This, in addition to the requirement that ASIC provide reasons for giving a direction, are important mechanisms to ensure transparency and accountability in relation to ASIC's direction making powers proposed in the Bill.⁴⁴

Other regulation making powers

Under **proposed section 798L**, the regulations may also:

- exempt a person, class of persons, a financial market or class of financial markets from all or specified provisions of **proposed Part 7.2A**, or
- modify the application of **proposed Part 7.2A** in relation to a person or financial market; or a class thereof.

The Explanatory Memorandum explains that:

Provisions which allow similar exemption and modification are spread throughout the Act. Including such a provision in this new Part is in line with the construction of the Act and similar provisions applying in respect of existing Parts. This regulation making power is needed to allow the framework to develop to meet innovations in the market. The financial market is by nature fluid and it may be necessary to apply the rules differently to different entities. If it becomes clear that this is necessary, the rules may need to be modified swiftly to ensure the integrity of the market is maintained. The regulation making power will allow the framework to adapt quickly to developments in the market.⁴⁵

43. Explanatory Memorandum, op. cit., p. 13.

44. For examples of stakeholder concerns about potentially unfettered use of the directions power, see: ASX, op. cit., 22.

45. Explanatory Memorandum, op. cit., p. 14.

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ASIC supervision of financial markets - widening existing powers under the Corporations Act

Other items in the Bill propose consequential provisions with the effect of widening the application of existing provisions in the Corporations Act in relation to ASIC's supervision of financial markets. These include:

- qualified privilege for information given to ASIC and market licensees (**items 16 and 18**), and
- power of the Court to make certain orders (**items 19–23; 30-33**).

In relation to qualified privilege, it is stated in the Explanatory Memorandum that:

The Bill extends the application of qualified privilege provisions to the giving of information to ASIC in relation to a contravention or suspected contravention of a market integrity rule. This is important to ensure concerns about breaching confidentiality do not prevent ASIC from being able to perform its functions.⁴⁶

In relation to widening the Court's powers, it is stated in the Explanatory Memorandum that:

This ensures that a Court has wide powers to issue orders which the Court deems necessary when hearing a case concerning the contravention of a market integrity rule.⁴⁷

Administrative review

In terms of administrative review, only the following would be specifically excluded from review by the Administrative Review Tribunal (AAT) under **proposed paragraphs 1317C(gca)–(gcc) (item 24)**:

- ASIC's decisions to make market integrity rules
- the Minister's decision to consent to making a market integrity rule; or to direct ASIC to vary or revoke such a rule, or
- ASIC's decision to do or not do anything under the regulations under **proposed section 798K** (alternatives to civil proceedings).

It is stated in the Explanatory Memorandum that:

This is done to remove any doubt and to confirm that such decisions are not subject to AAT review. It is appropriate that such decisions are not subject to review by the

46. Explanatory Memorandum, op. cit., p. 14.

47. Ibid.

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AAT, as the decisions excluded are more akin to policy and rule-making decisions and should not be subject to merit review.⁴⁸

Consequently, it is expected that other decisions under the Bill would continue to be subject to administrative review by the AAT under Part 9.4A of the Corporations Act. In particular, subsection 1317(1) of the Corporations Act provides that:

Subject to this Part, applications may be made to the Tribunal for review of a decision made under this Act by:

(a) the Minister; or

(b) ASIC; ...

Stakeholder comments

This should allay stakeholder concerns about the absence of appeal processes in relation to the Bill.⁴⁹

Concluding comments

The Bill largely sets out the framework within which ASIC would supervise domestic financial markets, with details to be finalised and included in regulations—stakeholders appear to be largely concerned about those details. Without knowing what those details are, it is outside the scope of this Digest to comment on them.

However, it has been noted that some of the Bill's provisions are different to provisions in the Exposure Draft, largely addressing some of the concerns expressed by stakeholders.

In conclusion, the importance of consulting with stakeholders when making those regulations cannot be sufficiently stressed.

48. Ibid., p. 15.

49. See, for example: ANZ, *op. cit.*, p. 2.

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