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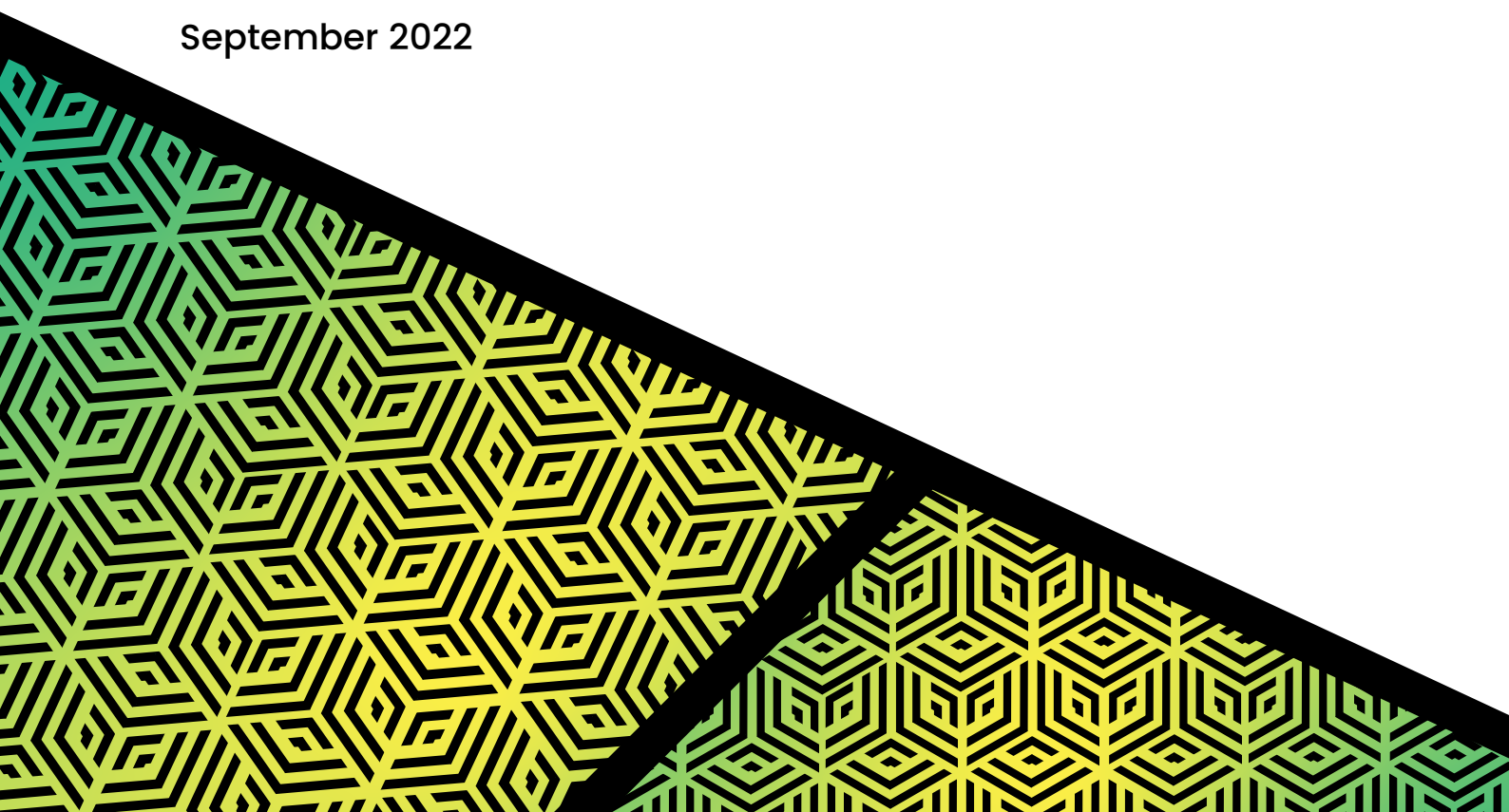
Australian Law Reform Commission

INTERIM REPORT B – ADDITIONAL RESOURCES

LEGISLATIVE FRAMEWORK FOR CORPORATIONS AND FINANCIAL SERVICES REGULATION

Recommendation 18 – Notional amendments note

September 2022



Interim Report B is the second of three Interim Reports to be published as part of the Australian Law Reform Commission's Review of the Legislative Framework for Corporations and Financial Services Regulation. This document is one of several additional resources, published on the ALRC's website, which provide further detail relevant to particular aspects of Interim Report B.

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RECOMMENDATION 18 — NOTIONAL AMENDMENTS NOTE

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Implementing Recommendation 18

1. This note provides additional detail to assist law-makers in considering how best to implement Recommendation 18 in Chapter 8 of Interim Report B.¹ This note is intended to be read alongside that Interim Report. Abbreviations used in this note are defined in the Glossary for Interim Report B.

Recommendation 18 Generally applicable notional amendments to corporations and financial services legislation should be replaced with textual amendments to the notionally amended legislation.

The ALRC's database of notional amendments

2. The ALRC has developed a database of all notional amendments contained in the *Corporations Regulations* and ASIC legislative instruments.² The database provides the first comprehensive picture of notional amendments to the *Corporations Act*. It is a single source listing over 1,200 individual notional amendments, which amend hundreds of provisions. The ALRC has classified the amendments according to who they affect and the priority with which they could be consolidated into the provisions they notionally amend. The database is current as at 30 June 2022. Appendix A to this note provides a summary of selected notional amendments, mostly in the *Corporations Act*, that should be prioritised for consolidation into the provisions they notionally amend. These notional amendments were selected from more than 500 generally applicable notional amendments identified in the notional amendments database. Appendix B to this note sets out the methodology used to create the database. The methodology could be

¹ Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022).

² Australian Law Reform Commission, Recommendation 18 — Notional Amendments Database <www.alrc.gov.au/wp-content/uploads/2022/08/ALRC-FSL-B-Notional-amendments-database.xlsx>. The amendments overwhelmingly relate to the *Corporations Act* and *Corporations Regulations*, though there are several notional amendments to other pieces of financial services legislation.

extended to other corporations and financial services legislation to identify generally applicable notional amendments that could be replaced with textual amendments.

3. The database of notional amendments assists implementation of Recommendation 18 by identifying generally applicable notional amendments to the *Corporations Act* and *Corporations Regulations* that could be replaced with textual amendments to the notionally amended legislation.

4. As part of its Law Improvement Program, Treasury has commenced a program of work that would go some way towards implementing Recommendation 18. The Rationalisation of Ending ASIC Instrument Measures will see a range of notional amendments in sunseting ASIC legislative instruments consolidated into the *Corporations Act*. However, this program could be extended to include notional amendments contained in the *Corporations Regulations* and notional amendments in ASIC legislative instruments that are not sunseting. The ALRC database and Appendix A to this note are intended to assist the Law Improvement Program in identifying notional amendments that can be replaced with textual amendments.

Notional amendments that could be immediately consolidated

5. Appendix A to this note contains a sample of 102 notional amendments that the ALRC suggests could, via textual amendments, be immediately consolidated into the provisions they notionally amend. Appendix A is based on the ALRC's notional amendments database, and comprises only a small subset of all notional amendments. The notional amendments listed in Appendix A have been selected on the basis that they apply generally (see Appendix B below), are long-standing or important, and could be relatively easily consolidated into the provisions they notionally amend.

6. In the longer term, if the ALRC's proposed legislative model were adopted, some provisions listed in Appendix A may be moved to delegated legislation. For example, exemptions from giving Product Disclosure Statements and Financial Services Guides would appear in the Scoping Order under the ALRC's proposed legislative model.³

7. Short-term consolidation of notional amendments should not be considered a substitute for long-term reforms to the legislative hierarchy. The problems that give rise to the creation of notional amendments will persist if the legislative hierarchy is left unreformed.⁴ Moreover, Appendix C to this note demonstrates that in some instances, consolidation may bring improved comprehensibility but no greater simplicity to the law. Appendix C contains a marked-up version of s 708A of the *Corporations Act* that incorporates all current notional amendments affecting that provision. Wholesale consolidation of all notional amendments may simply lead to the Act being filled with prescriptive provisions that may be more appropriately placed in delegated legislation. The existing inconsistency in use of the legislative hierarchy would be compounded, and the text of the Act would be made more complex. Instead, greater benefits would result from a more principled use of the legislative hierarchy in the form of the model proposed in Interim Report B.

Why not consolidate all notional amendments?

8. It is neither feasible nor desirable to consolidate all notional amendments into the provisions they amend. For example, approximately half of all notional amendments affect only a class of persons or circumstances (that is, they are not 'generally applicable'), which means significant redrafting would be required to consolidate the notional amendment into the amended provision. In addition, consolidating such notional amendments would likely have the effect of filling the Act with a large number of provisions of narrow application.

3 For further discussion of the ALRC's proposed legislative model, see Australian Law Reform Commission, *Interim Report B: Financial Services Legislation* (Report No 139, 2022) Chapter 2.

4 For further discussion of existing problems that give rise to notional amendments, see *ibid*.

Appendix A: Notional amendments that should be immediately consolidated⁵

Provision containing notional amendment	Modified provision	Notes	No. of notional amendments ⁶	Legislative history
Reg 5C.11.05A, CR 2001	Section 601ED(2), CA 2001		1	Introduced in the original <i>Corporations Regulations</i> , since SR 2000, No. 175 (C2004L02190), substituted SR 2003, No. 31
Reg 5C.11.06, CR 2001	Section 601FB, CA 2001		1	Introduced in the original <i>Corporations Regulations</i> , since SR 1998, No. 1861 (C2004L02080)
Reg 5D.3.01, CR 2001	Section 601TAB, CA 2001		3	Introduced SLI 2010, No. 88.
Reg 6D.5.02, CR 2001	Section 708(8)(c), CA 2001		1	Introduced SLI 2005, No. 324
Reg 6D.5.03, CR 2001	Section 738X(7), CA 2001		1	Introduced F2018L01379
Reg 7.6.01AB(1), CR 2001	Section 911A, CA 2001	Contains a regulation-making power	1	Introduced SLI 2012, No. 172, amended F2019L00392; F2020L00942; F2021L01608
Reg 7.6.02AG, CR 2001	Section 911A, CA 2001		6	Introduced SLI 2005, No. 324, amended No. 42, 2012; No. 59, 2013; F2018L01144; F2022L00469
Reg 7.6.02AH, CR 2001	Section 911B, CA 2001		1	Introduced SLI 2005, No. 324, amended 2013, No. 59
Reg 7.6.04AA(a), CR 2001	Section 916F(1), CA 2001		1	Introduced SLI 2015, No. 135
Reg 7.6.04AA(b), CR 2001	Section 916F(3), CA 2001		1	Introduced SLI 2015, No. 135
Reg 7.6.08C, CR 2001	Section 912CA, CA 2001	Substitutes s 923CA. Contains a regulation-making power	1	Introduced SLI 2009, No. 387
Reg 7.7.02A(1), CR 2001	Section 941C, CA 2001		1	Introduced SLI 2005, No. 324
Reg 7.7.02A(2), CR 2001	Section 941C, CA 2001		2	Introduced SLI 2005, No. 324
Reg 7.7.08B(1), CR 2001	Section 942DA, CA 2001		2	Introduced SLI 2010, No. 89

⁵ In this Appendix, 'CA 2001' refers to the *Corporations Act 2001* (Cth) and 'CR 2001' refers to the *Corporations Regulations 2001* (Cth).

⁶ This is based on how many distinct provisions are inserted, omitted, varied, or substituted as part of the notional amendment. For example, if three subsections are added, this is counted as three notional amendments. If two sections are added, this is counted as two notional amendments.

Provision containing notional amendment	Modified provision	Notes	No. of notional amendments ⁶	Legislative history
Reg 7.7.09AB(a), <i>CR 2001</i>	Section 947B(4), <i>CA 2001</i>	Contains a legislative instrument-making power	2	Introduced SLI 2010, No. 89
Reg 7.7.09BB(a), <i>CR 2001</i>	Section 947C(4), <i>CA 2001</i>	Contains a legislative instrument-making power	2	Introduced SLI 2010, No. 89
Reg 7.7.10AA, <i>CR 2001</i>	Section 941B(2), <i>CA 2001</i>		1	Introduced SLI 2005, No. 324
Reg 7.7.10AB, <i>CR 2001</i>	Sections 942B(2)(c), 942C(2)(c), (d), (e), <i>CA 2001</i>		2	Introduced SLI 2005, No. 324
Reg 7.7.10AC, <i>CR 2001</i>	Section 942B(2)(g), 942B(8), <i>CA 2001</i>		1	Introduced SLI 2005, No. 324
Reg 7.7.10AD, <i>CR 2001</i>	Section 942C(2)(h), 942C(8), <i>CA 2001</i>		2	Introduced SLI 2005, No. 324
Reg 7.7.10AE, <i>CR 2001</i>	Section 946B, <i>CA 2001</i>	Substitutes s 946B	6	Introduced SLI 2005, No. 324
Reg 7.7.10AF(1), <i>CR 2001</i>	Sections 952B(1), 952B(1), 952B(1), 952E(2)(a), 952F(1)(b), 952F(1)(c)(i), 952G(1)(b), 952G(1)(c)(i), 953A(1), 953A(1), 953A(1), <i>CA 2001</i>	Only necessary if notional amendments in reg 7.7.02A(2) are consolidated	11	Introduced SLI 2005, No. 324
Reg 7.7.10AF(2), <i>CR 2001</i>	Section 940C(1), <i>CA 2001</i>		1	Introduced SLI 2005, No. 324
Reg 7.7.10AF(3), <i>CR 2001</i>	Section 941D(4), <i>CA 2001</i>		1	Introduced SLI 2005, No. 324
Reg 7.7.10AF(4), <i>CR 2001</i>	Section 941F, <i>CA 2001</i>		1	Introduced SLI 2005, No. 324
Reg 7.7.10AG(1), <i>CR 2001</i>	Section 952B(1), <i>CA 2001</i>		1	Introduced SLI 2005, No. 324
Reg 7.7.10AG(1), <i>CR 2001</i>	Sections 952B(1), 952E(2)(a), 952F(1)(b), 952F(1)(c)(i), 952G(1)(b), 952G(1)(c)(i), 953A(1), <i>CA 2001</i>		7	Introduced SLI 2005, No. 324
Reg 7.8.14A, <i>CR 2001</i>	Section 989D(1)(b), <i>CA 2001</i>		1	Introduced SLI 2005, No. 31

Provision containing notional amendment	Modified provision	Notes	No. of notional amendments ⁶	Legislative history
Reg 7.9.07FA, CR 2001	Section 1012D, CA 2001		1	Introduced SLI 2005, No. 324, substituted SLI 2010, No. 55, amended F2021L01841
Reg 7.9.07FB, CR 2001	Section 1012D, CA 2001		1	Introduced SLI 2005, No. 324
Reg 7.9.08(4), CR 2001	Section 1017E(2) (b), CA 2001		1	Introduced SR 2002 No. 41.
Reg 7.9.61C, CR 2001	Section 1017E, CA 2001		1	Introduced SR 2002, No. 16, substituted 2003 No. 31.
Reg 7.9.07FC, CR 2001	Part 7.9, CA 2001		1	Introduced SLI 2005, No. 324
Reg 7.9.07J, CR 2001	Section 1013A, CA 2001		1	Introduced SLI 2003, No. 368
Reg 7.9.07K, CR 2001	Section 1022A, CA 2001		1	Introduced SLI 2005, No. 324, substituted 2007 No. 324
Reg 7.9.08A, CR 2001	Section 1017E, CA 2001		1	Introduced SR 2002, No. 41
Reg 7.9.08B(1)–(2), CR 2001	Section 1017E, CA 2001		2	Introduced SR 2002, No. 41
Reg 7.9.14A, CR 2001	Section 1012IA(1), CA 2001		1	Introduced SR 2002, No. 16
Reg 7.9.15A(1), CR 2001	Section 1013D(1) (m), CA 2001	Contains a legislative instrument-making power	1	Introduced SR 2004, No. 149
Section 6, ASIC Corporations (General Advice Warning) Instrument 2015/540 (Cth)	Section 949A(4), CA 2001	If the notional amendments in s 6 are consolidated the entire instrument could be repealed if s 5 of the instrument were replaced by a regulation made under s 949A(1)(c) of the Act	2	Introduced F2015L01307

Provision containing notional amendment	Modified provision	Notes	No. of notional amendments ⁶	Legislative history
Section 5, <i>ASIC Corporations (Facilitating Electronic Delivery of Financial Services Disclosure) Instrument 2015/647</i> (Cth)	Sections 761A, 940C(1)(a), 1015C(1)(a)(ii), 1015C(1), 1020AK(1)(a)(ii), 1020AK(1)(a), 1017A(4)(b), 1017A(4), 1015C, 1017B, 1017D, 1017DA, CA 2001 Regs 7.7.01, 7.9.02A, 7.9.75A(1), 7.9.75A(1)(b), 7.9.75A(2)(b), 7.9.75A(2), 7.9.75A(3)(d), 7.9.75A(3), CR 2001		26	Introduced F2015L01185, amended by F2016L00121

Appendix B: Methodology

1. This appendix summarises the methodology used to create the notional amendment database.
2. The ALRC computationally identified all references to 'modi*', 'omit*', 'varie*', 'insert*', and 'substitut*' in the *Corporations Regulations* and every principal in force ASIC legislative instrument. The selected search terms appear to be always used when creating notional amendments, reflecting the fact that notional amendment powers refer to omitting, modifying, and varying provisions. The ALRC then manually analysed each notional amendment contained in the *Corporations Regulations* and in ASIC instruments.
3. In the notional amendment database, the ALRC has classified each notional amendment by application and priority.

Application

4. Each notional amendment in the database has been classified as one of the following types:

- a. **General application:** The notional amendment affects all persons covered by the notionally amended provision, rather than affecting a specified subset of persons only. (That is, the provision applies as notionally amended in all instances.)

Example 1: Regulation 7.6.01AB(1), which notionally amends s 911A of the *Corporations Act*, applies to anyone affected by s 911A.

Example 2: Regulation 7.6.04AA(b), which notionally amends s 916F(3) of the *Corporations Act*, applies to anyone affected by s 916F(3).

- b. **Broad application:** The notional amendment potentially affects a large proportion of persons covered by the notionally amended provision. (That is, the provision applies as notionally amended to specified persons/circumstances/products/services, and the provision otherwise applies in its unamended form.)

Example 3: Regulation 7.6.02AA(1) notionally amends s 912B of the *Corporations Act*, but applies only to a person who, *inter alia*, has not complied with s 912B of the Act in its unmodified form. In contrast, s 912B of the Act applies without modification to persons who have complied with that section in its unmodified form.

Example 4: Section 17 of the *ASIC Corporations (Short Selling) Instrument 2018/745* (Cth) notionally amends reg 7.9.99 of the *Corporations Regulations* in relation to 'section 1020B products' only. 'Section 1020B products' constitute a broad range of products covered by Division 15 of Part 7.9 of the *Corporations Regulations* and the notional amendments therefore affect a wide cross-section of the relevant population.

- c. **Specific application:** Notional amendments that are of neither general nor broad application.

Example 5: Regulation 7.9.72 notionally amends s 1017D of the *Corporations Act* in relation to only those persons who issue a superannuation product or an RSA product and satisfy multiple other criteria. The persons to whom reg 7.9.72 applies constitute a much narrower category than the persons to whom s 1017D of the Act applies.

Priority

5. The notional amendments in the database have also been given a priority classification, which primarily reflects the ease with which consolidation could occur.

- d. **Green:** These notional amendments would be the easiest to consolidate, such that the ALRC suggests these notional amendments could be prioritised for consolidation. The ALRC does not anticipate any consequential amendments would be required when consolidating the notional amendment. No change in the location or drafting of the notionally amended provision would need to occur beyond consolidating the notional amendment.

Example 6: The notional amendments contained in reg 7.6.04AA(b) could be consolidated into s 916F(3) of the *Corporations Act* without necessitating any further changes to the legislation.

- e. **Yellow:** These notional amendments would require greater effort to consolidate, such that the ALRC suggests they could be given lesser priority for consolidation. For example, additional changes may be necessary in the location or drafting of the notionally amended provision when consolidating the notional amendment.

Example 7: Regulation 7.6.02AB notionally amends the definition of 'retail client' in relation to specified Parts only of the *Corporations Act*. If these notional amendments were to be consolidated into the Act, further consideration would need to be given to drafting the consolidated provision in light of the potential policy impacts.

- f. **Orange:** These notional amendments would require the greatest effort to consolidate, such that the ALRC suggests they could be given least priority for consolidation. Significant redrafting of the notionally amended provision would need to occur when consolidating the notional amendment, or the notional amendment may need to be redrafted as a new provision. Notional amendments to Acts that contain a number of cross-references to regulations or other legislative instruments have generally been classified as orange.

Example 8: The notional amendments in s 6(a) of the *ASIC Corporations (Removing Barriers to Electronic Disclosure) Instrument 2015/649* (Cth) would need significant redrafting to clearly indicate their application to only certain products if they were to be consolidated into s 1015C of the *Corporations Act*.

Other

6. Some rows in the notional amendments database are shaded **blue**. This indicates that the provision authorises notional amendments to be made by another provision but does not itself contain notional amendments.

Example 9: Regulation 7.9.04(2)(a) provides that s 1012B of the *Corporations Act* 'is modified in its application in relation to the specified superannuation product as set out in Part 17 of Schedule 10A'. Part 17 of Schedule 10A to the Regulations then sets out the substance of the notional amendments that are effectively authorised by reg 7.9.04(2)(a).

7. A small number of rows in the notional amendments database are shaded **red**. This indicates there is an issue with the provision, such as a mistaken cross-reference or the empowering provision has been repealed. The nature of each issue is described in the 'Notes' column of the database.

Appendix C: Section 708A as notionally amended

Text colour	Legislative instrument source
Green	ASIC Corporations (Non-Traditional Rights Issues) Instrument 2016/84 (Cth)
Red	ASIC Corporations (Sale Offers: Securities Issued on Conversion of Convertible Notes) Instrument 2016/82 (Cth)
Blue	ASIC Corporations (Sale Offers By Controllers) Instrument 2016/81 (Cth)
Orange	ASIC Corporations (Disregarding Technical Relief) Instrument 2016/73 (Cth)
Light blue	ASIC Corporations (Sale Offers That Do Not Need Disclosure) Instrument 2016/80 (Cth)
Purple	ASIC Corporations (Regulatory Capital Securities) Instrument 2016/71 (Cth)

708A Sale offers that do not need disclosure

Sale offers to which this section applies

- (1) This section applies to an offer (the **sale offer**) of a body's securities (the **relevant securities**) for sale by a person if:
 - (a) but for subsection (5), ~~(11) or (12), (11), (12) or (12A),~~ (11), (12), (12A) or (12C), disclosure to investors under this Part would be required by subsection 707(3) for the sale offer; and
 - ~~(b) the securities were not issued by the body with the purpose referred to in subparagraph 707(3)(b)(i); and~~
 - (b) except where the securities were issued under a related issue as defined in paragraph (12B)(c), the securities were not issued by the body with the purpose referred to in subparagraph 707(3)(b)(i); and
 - (c) a determination under subsection (2) was not in force in relation to the body at the time when the relevant securities were issued.

- (1A) This section also applies to an offer (the **sale offer**) of a body's securities (the **relevant securities**) for sale by a person if:
 - (a) but for subsection (5), disclosure to investors under this Part would be required by subsection 707(5) for the sale offer; and
 - (b) the securities were not sold by the controller with the purpose referred to in subparagraph 707(5)(c)(i); and
 - (c) a determination under subsection (2) was not in force in relation to the body at the time when the relevant securities were ~~issued~~ sold by the controller.

Determination by ASIC

- (2) ASIC may make a determination under this subsection if ASIC is satisfied that in the previous 12 months the body contravened any of the following provisions:
 - (a) subsection 283AA(1), 283AB(1) or 283AC(1);
 - (b) the provisions of Chapter 2M as they apply to the body;
 - (c) section 674, 674A, 675 or 675A;
 - (d) section 724 or 728;
 - (e) subsection (9) of this section; or
 - (f) section 1308 as that section applies to a notice under subsection (5) of this section.
- (3) The determination must be made in writing and a copy must be published in the *Gazette* as soon as practicable after the determination is made.

- (4) A failure to publish a copy of the determination does not affect the validity of the determination.

Sale offer of quoted securities—case 1

- (5) The sale offer does not need disclosure to investors under this Part if:
- ~~(a) the relevant securities are in a class of securities that were quoted securities at all times in the 3 months before the day on which the relevant securities were issued; and~~
 - (a) the relevant securities are in a class of securities that were quoted securities at all times in the following period
 - (i) if this section applies because of subsection (1)—3 months before the day on which the relevant securities were issued; or
 - (ii) if this section applies because of subsection (1A)—3 months before the day on which the relevant securities were sold by the controller; and
 - ~~(b) trading in that class of securities on a prescribed financial market on which they were quoted was not suspended for more than a total of 5 days during the shorter of the period during which the class of securities were quoted, and the period of 12 months before the day on which the relevant securities were issued; and~~
 - (b) trading in that class of securities on a prescribed financial market on which they were quoted was not suspended for more than a total of 5 days during:
 - (i) if this section applies because of subsection (1)—the shorter of the period during which the class of securities were quoted, and the period of 12 months before the day on which the relevant securities were issued; or
 - (ii) if this section applies because of subsection (1A)—the shorter of the period during which the class of securities were quoted, and the period of 12 months before the day on which the relevant securities were sold by the controller; and
 - (c) no exemption under section 111AS or 111AT covered the body, or any person as director or auditor of the body, at any time during the relevant period referred to in paragraph (b); and
 - (d) **other than a technical relief instrument**, no order under section 340 or 341 covered the body, or any person as director or auditor of the body, at any time during the relevant period referred to in paragraph (b); and
 - (e) either:
 - (i) if this section applies because of subsection (1)—the body gives the relevant market operator for the body a notice that complies with subsection (6) before the sale offer is made; or
 - (ii) if this section applies because of subsection (1A)—both the body, and the controller, give the relevant market operator for the body a notice that complies with subsection (6) before the sale offer is made.
- (6) A notice complies with this subsection if the notice:
- ~~(a) is given within 5 business days after the day on which the relevant securities were issued by the body; and~~
 - (a) is given:
 - (i) if this section applies because of subsection (1)—within 5 business days after the day on which the relevant securities were issued by the body; or
 - (ii) if this section applies because of subsection (1A)—within 5 business days after the day on which the relevant securities were sold by the controller; and
 - ~~(b) states that the body issued the relevant securities without disclosure to investors under this Part; and~~
 - (b) states that:

- (i) if this section applies because of subsection (1)—the body issued the relevant securities without disclosure to investors under this Part; or
- (ii) if this section applies because of subsection (1A)—the controller sold the securities without disclosure to investors under this Part; and
- (c) states that the notice is being given under paragraph (5)(e); and
- (d) states that, as at the date of the notice, the body has complied with:
 - (i) the provisions of Chapter 2M as they apply to the body; and
 - (ii) sections 674 and 674A; and
- (e) sets out any information that is excluded information as at the date of the notice (see subsections (7) and (8)).

Note 1: A person is taken not to contravene section 727 if a notice purports to comply with this subsection but does not actually comply with this subsection: see subsection 727(5).

Note 2: A notice must not be false or misleading in a material particular, or omit anything that would render it misleading in a material respect: see sections 1308 and 1309. The body has an obligation to correct a defective notice: see subsection (9) of this section.

- (7) For the purposes of subsection (6), excluded information is information:
 - (a) that has been excluded from a continuous disclosure notice in accordance with the listing rules of the relevant market operator to whom that notice is required to be given; and
 - (b) that investors and their professional advisers would reasonably require for the purpose of making an informed assessment of:
 - (i) the assets and liabilities, financial position and performance, profits and losses and prospects of the body; or
 - (ii) the rights and liabilities attaching to the relevant securities.
- (8) The notice given under subsection (5) must contain any excluded information only to the extent to which it is reasonable for investors and their professional advisers to expect to find the information in a disclosure document.

Obligation to correct defective notice

- ~~(9) The body contravenes this subsection if:~~
 - ~~(a) the notice given under subsection (5) is defective; and~~
 - ~~(b) the body becomes aware of the defect in the notice within 12 months after the relevant securities are issued; and~~
 - ~~(c) the body does not, within a reasonable time after becoming aware of the defect, give the relevant market operator a notice that sets out the information necessary to correct the defect.~~
- (9) A person contravenes this subsection if:
 - (a) where the person is the body:
 - (i) the notice given under paragraph (5)(e) is defective; and
 - (ii) the body becomes aware of the defect in the notice within the following period:
 - (A) if this section applies because of subsection (1) —12 months after the relevant securities are issued; or
 - (B) if this section applies because of subsection (1A)—12 months after the relevant securities are sold by the controller; and
 - (iii) the body does not, within a reasonable time after becoming aware of the defect, give the relevant market operator a notice that sets out the information necessary to correct the defect:

- (a) where the person is the controller:
 - (i) the notice given under subparagraph (5)(e)(ii) is defective; and
 - (ii) the controller becomes aware of the defect in the notice within 12 months after the relevant securities are sold by the controller; and
 - (iii) the controller does not, within a reasonable time after becoming aware of the defect, make the body aware of the defect.
- (10) For the purposes of subsection (9), the notice under subsection (5) is **defective** if the notice:
 - (a) does not comply with paragraph (6)(e); or
 - (b) is false or misleading in a material particular; or
 - (c) has omitted from it a matter or thing the omission of which renders the notice misleading in a material respect.

Sale offer of quoted securities—case 2

- (11) The sale offer does not need disclosure to investors under this Part if:
 - (a) the relevant securities are in a class of securities that are quoted securities of the body; and
 - (b) either:
 - (i) a prospectus is lodged with ASIC on or after the day on which the relevant securities were issued but before the day on which the sale offer is made; or
 - (ii) a prospectus is lodged with ASIC before the day on which the relevant securities are issued and offers of securities that have been made under the prospectus are still open for acceptance on the day on which the relevant securities were issued; and
 - (c) the prospectus is for an offer of securities issued by the body that are in the same class of securities as the relevant securities.

Sale offer of quoted securities—case 3

- (12) This subsection is satisfied if:
 - (a) the body offered to issue securities under a prospectus; and
 - (b) the body issued the relevant securities to:
 - (i) a person (the **underwriter**) named in that prospectus as an underwriter of the issue; or
 - (ii) a person nominated by the underwriter; and
 - (c) the relevant securities were issued to the underwriter, or the person nominated by the underwriter, at or about the time that persons who applied for securities under the prospectus were issued with those securities; and
 - (d) the relevant securities are in a class of securities that were quoted securities of the body.
- (12A) The sale offer does not need disclosure to investors under this Part if:
 - (a) the relevant securities were issued under a rights issue or a related issue; and
 - (b) the relevant securities are in a class of securities that were quoted securities at all times in the 3 months before the day on which the relevant securities were issued; and
 - (c) the rights issue or the related issue did not need disclosure to investors under this Part.

- (12B) For the purposes of subsection (12A), **related issue** means, in relation to a rights issue:

- (a) an offer relating to the rights issue which satisfies subparagraph 708AA(13)(a)(i) and (iii), whether or not the offer is made to persons to whom offers were made under the rights issue;
- (b) an offer relating to the rights issue made in the circumstance referred to in paragraph 708AA(13)(b);
- (c) an offer relating to the rights issue made:
 - (i) in accordance with the information given under paragraph 9A(3)(c); or
 - (ii) if the invitation to apply for, or the right to be issued with, the securities is not able to be assigned and the body gives the information specified in subparagraphs 9A(3)(c)(i) to (iii)—in accordance with that information.

(12C) The sale offer does not need disclosure to investors under this Part if:

- (a) the relevant securities were issued by a body by reason of the conversion of convertible notes issued by that body; and
- (b) on the day on which a notice in relation to the convertible notes was given under paragraph (e):
 - (i) securities in the same class as the relevant securities were continuously quoted securities; and
 - (ii) there was no determination under subsection 713(6) in force in respect of the body; and
- (c) trading in securities in the class of relevant securities on the prescribed financial market on which they are quoted was not suspended for more than a total of 5 days during the shorter of the period during which the class of relevant securities were quoted, and the period of 12 months before the first day on which the convertible notes were issued; and
- (d) the conversion of the convertible notes did not involve any further offer; and
- (e) the body that issued the convertible notes gave the relevant market operator for the body a notice that complied with subsection (12D) on the same day as, or within 2 business days before, the first day on which the convertible notes were issued.

(12D) A notice complies with this subsection if:

- (a) the notice contains the following information:
 - (i) for the convertible notes—the information required by subsection 713(2); and
 - (ii) for securities in the class of relevant securities—the information required by subsections 713(2) to (5),
as if the notice were a prospectus, and
- (b) the information in the notice is worded and presented in a clear, concise and effective manner; and
- (c) where the notice includes a statement by a person, or a statement said in the notice to be based on a statement by a person:
 - (i) the person has consented to the statement being included in the notice in the form and context in which it is included;
 - (ii) the notice states that the person has given this consent; and
 - (iii) the person has not withdrawn this consent before the notice is given to the relevant market operator.

(12E) If a body gives a notice under paragraph (12C)(e) in relation to convertible notes, each financial report or directors' report of the body required under section 298 in relation to a financial year of the body during which those convertible notes were on issue must contain the following information:

- (a) the number of convertible notes in that class that have not converted as at the end of the financial year;
- (b) the number of securities in the class of relevant securities into which the convertible notes will convert;

- (c) the price (if any) to be paid on conversion;
 - (d) the circumstances in which conversion may occur;
 - (e) the remaining liability of the body to make payments under convertible notes in that class as at the end of the financial year;
 - (f) the average conversion price (if any) paid for any convertible notes in that class that were converted during the financial year and the number of securities in the class of relevant securities into which they converted;
 - (g) any other matters relating to the convertible notes that holders of ED securities of the body would reasonably require to make an informed assessment of the financial position of the body and its prospects for future financial years.
- (12F) The financial report and directors' report may omit material that would otherwise be required to be included under paragraph (12E)(g) if it is likely to result in unreasonable prejudice to:
- (a) the body; or
 - (a) if consolidated financial statements are required—the consolidated entity or any entity (including the body) that is part of the consolidated entity.
- If material is omitted, the report must say so.
- (12G) The sale offer does not need disclosure to investors under this Part if:
- (a) the relevant securities were issued by reason of the conversion or exchange of regulatory capital securities in accordance with their terms of issue; and
 - (b) the regulatory capital securities were issued under a prospectus; and
 - (c) the conversion or exchange did not involve any further offer.
- (12GA) Subsection (12G) does not apply in relation to relevant securities that were issued by reason of the conversion or exchange of regulatory capital securities if, under the terms of the regulatory capital securities at the time they were issued, they must or may be converted into, or exchanged for, ordinary shares in an entity (including an entity that, at the time the regulatory capital securities were issued, does not exist) that, as a result of a restructure (however described) initiated by persons other than the directors of the issuer of the regulatory capital securities or the ultimate holding company of the issuer, will be, at the time of exchange or conversion, the ultimate holding company of the issuer.

*Sale offer of securities issued on conversion or exchange of regulatory capital securities—
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- (12H) The sale offer does not need disclosure to investors under this Part if:
- (a) the relevant securities were issued by reason of the conversion or exchange of regulatory capital securities in accordance with their terms of issue; and
 Note: The relevant securities are the underlying securities issued on conversion or exchange of the regulatory capital securities.
 - (b) on the day on which a notice in relation to the regulatory capital securities was given under paragraph (e), there was no determination under subsection 713(6) in force in respect of either:
 - (i) the issuer of the regulatory capital securities; or
 - (ii) if the issuer of the regulatory capital securities is not the issuer of the notional underlying securities—the issuer of the notional underlying securities; and
 - (c) trading in securities in the class of notional underlying securities on the prescribed financial market on which they are quoted was not suspended for more than a total of 5 days during the shorter of the period during which the class of notional underlying securities were quoted, and the period of 12 months before the first day on which the regulatory capital securities were issued; and
 - (d) the conversion or exchange of the regulatory capital securities did not involve any further offer; and

- (e) a notice that complies with subsection (12I) on the same day as, or within 2 business days before, the first day on which the regulatory capital securities were issued was given to the relevant market operator:
 - (i) if the body that issued the regulatory capital securities is also the issuer of the notional underlying securities—by the body;
 - (ii) if the body that issued the regulatory capital securities is not the issuer of the notional underlying securities—jointly by both the issuer of the regulatory capital securities and the issuer of the notional underlying securities.
- (12I) A notice complies with this subsection if:
- (a) the notice contains the following information:
 - (i) for the regulatory capital securities—the information required by subsection 713(2); and
 - (ii) for securities in the class of notional underlying securities—the information required by subsections 713(2) to (5), as if the notice were a prospectus; and
 - (b) the information in the notice is worded and presented in a clear, concise and effective manner; and
 - (c) the notice contains the following information:
 - (i) the person has consented to the statement being included in the notice in the form and context in which it is included;
 - (ii) the notice states that the person has given this consent; and
 - (iii) the person has not withdrawn this consent before the notice is given to the relevant market operator.
- (13) In this section, if under the terms on which a security (the component security) is traded on a prescribed financial market it can only be transferred together with one or more other securities or other financial products (together the stapled security) then:
- (a) the component security is taken to be in a class of quoted securities that is different from any other class of quoted securities it is in, or is taken to be in, when at any other time it is able to be transferred on that market by itself or as part of a different stapled security; and
 - (b) trading in the class of quoted securities that the component security is taken to be in on the market is taken to be suspended when trading in the class of stapled securities on the market is suspended.