CORPORATIONS AMENDMENT (FINANCIAL BENCHMARKS) BILL 2017 EXPOSURE DRAFT EXPLANATORY MATERIALS

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

Abbreviation	Definition
AAT	Administrative Appeals Tribunal
Acts Interpretation Act	Acts Interpretation Act 1901
APRA	Australian Prudential Regulation Authority
ARC	Administrative Review Council
ASIC	Australian Securities and Investments Commission
ASIC Act	Australian Securities and Investments Commission Act 2001
BAB	Bank accepted bill
Bill	Corporations Amendment (Financial Benchmarks) Bill 2017
BBSW	Bank bill swap rate
CFR	Council of Financial Regulators
Corporations Act	Corporations Act 2001
Criminal Code	The Criminal Code set out in the Schedule of the <i>Criminal Code Act 1995</i>
Guide	A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, issued by the Attorney General's Department
IOSCO	International Organization of Securities Commissions
IOSCO Principles	Principles for Financial Benchmarks, IOSCO
Legislation Act	Legislation Act 2003
LIBOR	London Interbank Offered Rate
NCD	Negotiable certificate of deposit
Regulatory Powers Act	Regulatory Powers (Standard Provisions) Act 2014

Chapter 1 Background

Outline of chapter

1.1 This chapter sets out the background and context for the reforms to the regulation of financial benchmarks contained in the Bill.

Context of amendments

- 1.2 Financial benchmarks are used to determine the pay-out or value of financial products or contracts, or to measure the performance of investment funds.
- 1.3 The ASX 200 equity index is an example of a financial benchmark used to measure the performance of funds, while the bank bill swap rate (BBSW) (which is used as a reference interest rate for a range of financial products) is an example of a financial benchmark used to determine the pay-out under financial contracts.
- 1.4 While some benchmarks are calculated by their administrator using regulated and publicly available data (such as equities indexes), others rely on submissions from banks or other market participants (for example, reference interest rates like the London Interbank Offered Rate (LIBOR)).
- 1.5 Globally there have in recent years been many cases of market misconduct regarding the determination of financial benchmarks (particularly interest rate reference benchmarks such as LIBOR). As of June 2015, penalties paid by financial institutions globally had reached around AUD22 billion.
- 1.6 In Australia, ASIC commenced formal court proceedings in 2016 against ANZ, NAB, and Westpac for alleged market manipulation and unconscionable conduct in relation to the BBSW. This court case is still ongoing.
- 1.7 In 2013, in response to these issues, IOSCO developed the *Principles for Financial Benchmarks* (the IOSCO Principles) which set out the desirable characteristics of a regulatory regime for financial benchmarks. A number of jurisdictions, including the UK, the EU, Japan,

Singapore and Canada, have since worked to align their regulatory regimes with the IOSCO Principles.

- 1.8 The amendments made by the Bill are based on recommendations made by the Council of Financial Regulators (CFR)¹ for reforming the regulation of financial benchmarks in Australia in line with the IOSCO Principles. The CFR's recommendations were formulated following extensive consultation with stakeholders.
- 1.9 Administration of financial benchmarks at present does not require a licence and is not a regulated activity under the current law. Consistent with overseas regulatory developments, manipulation of financial benchmarks will be made a specific offence.
- 1.10 The Government has therefore decided to implement a regulatory framework for financial benchmarks in Australia that is consistent with the IOSCO Principles. The amendments contained in the Bill are designed to achieve this objective.

¹ The members of CFR are Treasury, the Reserve Bank of Australia, ASIC and the Australian Prudential Regulation Authority (APRA).

Chapter 2 Licensing framework

Outline of chapter

2.1 A new licensing regime is established requiring administrators of designated significant financial benchmarks to obtain a new 'benchmark administrator licence' from ASIC. ASIC is given the power to designate significant financial benchmarks. Licensees are subject to a number of obligations. Failure to comply with these obligations can lead to licences being suspended or cancelled.

Summary of new law

- 2.2 ASIC is given the power to designate significant financial benchmarks, but only if it is satisfied that a number of specified criteria are satisfied. These include requirements that the designated benchmark is systemically important in Australia and that there would be a material impact on Australian retail or wholesale investors if there was a disruption to the operation or integrity of the benchmark.
- 2.3 A new licensing regime is established requiring administrators of designated significant financial benchmarks to obtain a new 'benchmark administrator licence' from ASIC. ASIC may impose conditions in granting a licence. Licensees are required to comply with any conditions on the licence as well as a range of general obligations imposed in the legislation.
- 2.4 Failure to comply with the licence conditions or the general obligations may lead to licences being suspended or cancelled. ASIC must give the licensee a hearing before it suspends or cancels a licence.

Comparison of key features of new law and current law

New law	Current law	
ASIC is given the power to designate significant financial benchmarks subject to a number of specified criteria.	Systemically important benchmarks are not subject to any specific regulation, and are covered by general requirements such as the	

A new licensing regime is established requiring administrators of designated significant financial benchmarks to obtain a new 'benchmark administrator licence' from ASIC.

ASIC may suspend or cancel benchmark administrator licences subject to holding a hearing with the licensee.

Detailed explanation of new law

Schedule 1 - Amendments

Part 1 – Main amendments

2.5 Part 1 of Schedule 1 inserts a new Part 7.5B after Part 7.5A in the Corporations Act. Part 2 makes consequential amendments to existing provisions in the Corporations Act. Part 3 makes two minor consequential amendments to another Act affected by certain amendments in this Bill. The new Part 7.5B carries the title 'Regulation of Financial Benchmarks' and contains the new licensing framework for designated significant financial benchmarks as well as a power for ASIC to make two new kinds of rules prescribing detailed requirements relating to the operation of financial benchmarks specified in a licence. A number of offences are created relating to the manipulation of financial benchmarks.

Division 1 - Preliminary

- 2.6 A simplified outline of new Part 7.5B is provided, summarising the key matters in the Part as follows:
 - Administrators of significant financial benchmarks must be licensed, while other administrators can opt in to the licensing regime. All licensees are subject to a number of obligations.
 - ASIC may make financial benchmark rules applying to licensees and their benchmarks. ASIC may also make compelled financial benchmark rules dealing with certain critical situations such as the possible failure of a significant financial benchmark.
 - A number of new offences relating to the manipulation of financial benchmarks are defined.

[Schedule 1, item 1, section 908AA]

- 2.7 A definition of *financial benchmark* is provided stating that it can be a price, estimate, rate, index or value. It must also be available to users and be calculated periodically from one or more of the following: transactions, currencies, rates, indices, bank accepted bills (BABs), negotiable certificates of deposits (NCDs) and others. Benchmarks that are calculated from other benchmarks are within the scope of this definition. A financial benchmark must be used for certain purposes which may include the calculation of interest or other amounts payable for a financial product, the calculation of the price or value of a financial product. This definition is aligned with that provided in the IOSCO Principles. *[Schedule 1, item 1, section 908AB]*
- 2.8 ASIC may declare a financial benchmark to be a *significant financial benchmark* if it is satisfied of the following matters:
 - the benchmark is systemically important in Australia; or
 - a disruption to the availability or integrity of the benchmark would cause a material risk of financial contagion or systemic instability in Australia; or
 - a disruption of that kind would have a material impact on Australian retail or wholesale investors. [Schedule 1, item 1, subsections 908AC(1) and (2)]
- 2.9 The power to make such a declaration includes a power to vary or revoke it, as provided in subsection 33(3) of the *Acts Interpretation Act* 1901 (the Acts Interpretation Act). [Schedule 1, item 1, note 2 to subsection 908AC(2)]
- 2.10 ASIC may not make such a declaration unless it has obtained the Minister's consent in writing. [Schedule 1, item 1, subsections 908AC(3) and (4)]
- 2.11 ASIC may, in an emergency, make a declaration without the consent of the Minister to protect the Australian economy or the Australian financial system. However, if it does so, ASIC must write to the Minister on the following day explaining the need for its action and amend or revoke the declaration if directed to do so by the Minister. This allows the Government to exercise ultimate oversight in case of any emergency declarations made by ASIC. [Schedule 1, item 1, subsections 908AC(5), (6) and (7)]
- 2.12 To assist readers an explanation is included that neither a consent by the Minister to a declaration made by ASIC under subsection 908AC(4) nor a direction given by the Minister under paragraph

- 908AC(7) is a legislative instrument. This clarification is merely declaratory of the law as such consents and directions are not legislative instruments within the meaning of subsection (8)(1) of the *Legislation Act* 2003 (the Legislation Act). [Schedule 1, item 1, subsection 908AC(8)]
- 2.13 ASIC is given the function of supervising financial benchmarks that are specified in benchmark administrator licences. If such a benchmark is generated or administered overseas, ASIC may, to the extent it considers appropriate, rely on a regulator in a foreign country in exercising its regulatory functions. However, ASIC may only do so if it is satisfied that there is an adequate level of supervision of the financial benchmark based on its assessment of the regulatory regime in the foreign jurisdiction. Alternatively, ASIC must be satisfied that there are adequate cooperation arrangements in place with the foreign regulator to ensure that the benchmark is adequately supervised. A significant number of prominent benchmark operators are based overseas, and may be interested in entering the Australian market. The ability of ASIC to rely on the foreign regulator in supervising such entities ensures that there is no unnecessary duplication of regulatory requirements and burdens. However, such reliance by ASIC is subject to conditions that are intended to guarantee that an adequate level of regulation and supervision is maintained. [Schedule 1, item 1, section 908AD]
- 2.14 The requirements in new Part 7.5B apply both within and outside Australia, subject to certain restrictions imposed in subsection 908BB(2) and section 908DE (paragraphs 2.18 and 4.13 provide details on those restrictions). [Schedule 1, item 1, section 908AE]

Division 2 – Licensing of financial benchmarks

Subdivision A – Requirement to be licensed

- 2.15 Administering a significant financial benchmark, or holding out to be doing so, requires a benchmark administrator licence covering that benchmark. [Schedule 1, item 1, paragraphs 908BA(1)(a) and (b)]
- 2.16 Breaching this requirement is an offence, punishable by a penalty of 500 penalty units, 5 years' imprisonment or both. This is a relatively severe penalty, which is proportionate in view of the extensive damage and harm that may be caused by the unsupervised operation of an important financial benchmark. [Schedule 1, item 1, subsection 908BA(1)]
- 2.17 Once ASIC declares a benchmark to be a significant financial benchmark the licensing requirement as well as the holding out prohibition apply after a period of 90 days. This is intended to allow time for the operator of the benchmark to apply for a licence. [Schedule 1, item 1, paragraph 908BA(1)(c) and subsection 908BA(2)]

2.18 Prohibitions also apply to making a number of related assertions if they are not true, such as that a person holds a benchmark administrator licence, or that a particular benchmark is or is not a significant financial benchmark. A similar penalty applies to breaches of these prohibitions as to the offence of operating a significant financial benchmark without a licence. The reason is that the potential harm and damage that could be caused by this kind of misconduct is extensive and similar in both cases, justifying the significant penalty attached to the offence. Holding out in this manner in relation to a significant financial benchmark is an offence anywhere within or outside Australia. The same conduct in relation to a non-significant benchmark is an offence only within Australia, as extending the offence to conduct outside Australia would not comply with Australian Government policy on extended geographical jurisdiction under domestic law. [Schedule 1, item 1, section 908BB].

Subdivision B – Granting licences

- 2.19 ASIC may grant a benchmark administrator licence if it is satisfied that an application has been made in accordance with the application requirements prescribed under section 908BD, that the licensee will comply with the applicable obligations and that no disqualified individual appears to be involved in the applicant. An individual may be a disqualified individual by being declared to be so by ASIC under the power provided in Division 2 of Part 7.4 of the Corporations Act, by being disqualified from managing corporations for the reasons set out in section 206B, or because they form part of the register of persons who have been disqualified from managing corporations kept by ASIC under section 1274AA. ASIC may impose conditions when it grants a licence. Note 1 to this subsection points the reader to certain other matters that ASIC must have regard to when considering whether to grant a licence (see paragraphs 2.38 and 2.39 for details). Note 2 clarifies that a licence is required in the case of a significant financial benchmark, but can be granted for other benchmarks. [Schedule 1, item 1, subsection 908BC(1)]
- 2.20 In the case of an overseas applicant ASIC must not grant a licence unless the applicant has registered as a foreign company as prescribed in Division 2 of Part 5B.2. Requiring overseas applicants to have a local presence in this way is important, for example in ensuring that service of documents can be executed in Australia. [Schedule 1, item 1, subsection 908BC(2)]
- 2.21 A licence may also not be granted before 42 days have passed since the application was submitted and no notice as set out in subsection 853D(2) has been given. If ASIC wishes to declare a person as disqualified under subsection 853D(2), ASIC must commence the process to do so within 42 days of receiving the application, or at any other time

- within 42 days of receiving other information that may be relevant to deciding whether to make a declaration of disqualification. [Schedule 1, item 1, subsection 908BC(3)]
- 2.22 ASIC must notify an applicant in writing about its decision to grant a licence or not, including about any conditions imposed if a licence is granted. [Schedule 1, item 1, subsection 908BC(4)]
- 2.23 An application must be lodged by a body corporate for a benchmark administrator licence in the form prescribed or approved by ASIC. ASIC may by written notice request further information to be provided, and may reject the application or refuse to take any further action in relation to the application if the request is not complied with. It is noted that the section does not restrict applications to licences covering significant financial benchmarks. A person granted a licence for a financial benchmark that is not a significant financial benchmark will have to comply with all the relevant requirements and obligations. [Schedule 1, item 1, section 908BD]
- 2.24 A benchmark administrator licence may specify more than one financial benchmark. The legislation applies as if each benchmark was covered under a separate licence, for example with regard to decisions to suspend or cancel a licence. [Schedule 1, item 1, section 908BE]
- 2.25 After ASIC grants a licence it must publish a notice setting out a number of prescribed details including the name of the licensee and of the financial benchmark specified in the licence, when the licence was granted and any conditions imposed. [Schedule 1, item 1, section 908BF]

Subdivision C – Conditions on licences

- 2.26 ASIC may at any time revoke or alter existing conditions on a licence, or impose additional conditions. In doing so it must give written notice to the licensee and publish a notice setting out the details of what it has done. ASIC must have regard to certain matters set out in section 908BO before imposing, varying or revoking conditions. [Schedule 1, item 1, subsection 908BG(1)]
- 2.27 ASIC may impose, revoke or vary conditions on its own initiative. However, ASIC may only do so if it considers it appropriate in view of the licensee's obligations under the legislation as well as under any rules imposed by ASIC (see Chapter 3 of this explanatory memorandum for details on ASIC's rule-making powers). ASIC may also take action if it considers it justified by a change in the way a benchmark is being administered. ASIC must in these circumstances give the licensee written notice of its proposed action and allow the licensee the opportunity to make a submission. This obligation does not apply when

ASIC imposes conditions when a licence is first granted. [Schedule 1, item 1, paragraph 908BG(2)(a) and subsection 908BG(3)]

2.28 ASIC may impose, revoke or vary conditions on a licence at the request of the licensee as set out in an application in the form required by ASIC. A fee may be payable for lodging an application. [Schedule 1, item 1, paragraph 908BG(2)(b)]

Subdivision D – When a licence can be varied, suspended or cancelled

- 2.29 ASIC may vary a license if a licensee lodges an application for the variation because of a change in the licensee's name or a change in the financial benchmark specified in the licence. ASIC may also vary an existing licence to add a further specified benchmark. For a variation based on a change in the financial benchmark or to add a further benchmark ASIC must have regard to the matters set out in section 908BO. A fee may be payable by the licensee for lodgement of the application. [Schedule 1, item 1, section 908BH]
- 2.30 ASIC may by written notice suspend a licence for a stated period or cancel it if the licensee stops operating the benchmark specified in its licence, becomes insolvent under Chapter 5 of the Corporations Act or an equivalent foreign law, or if the licensee asks ASIC to do so. Before doing so ASIC must first consider whether the licensee is or could become subject to any action under the compelled financial benchmark rules (see paragraph 3.9 for an explanation of those rules). Because those rules only apply to benchmark administrator licensees that operate significant financial benchmarks, ASIC needs to first consider whether there are any implications for actual or possible requirements it has imposed or may impose under the rules before it cancels or suspends a licence. [Schedule 1, item 1, section 908BI]
- 2.31 If ASIC considers that a licensee has breached a condition on its licence or any of its obligations under the legislation or under the rules made by ASIC (see Chapter 3 for details on ASIC's rule-making powers), ASIC may give a written notice to the licensee requiring it to explain at a hearing before a specified person why its licence should not be suspended or cancelled. The notice must state the grounds on which ASIC is proposing to act and a reasonable time and place for the hearing. A different time or place may be fixed by the person holding the hearing if the licensee consents. [Schedule 1, item 1, subsections 908BJ(1) and (2)]
- 2.32 To assist readers an explanation is included that such a notice is not a legislative instrument. This does not constitute an actual exemption from the relevant provisions in the Legislation Act but is merely declaratory of the law as such notices are not legislative instruments within the meaning of subsection (8)(1) of the Legislation Act. [Schedule 1, item 1, subsection 908BJ(5)]

- 2.33 The person conducting the hearing must, after hearing the licensee's explanation, give ASIC a report with a recommendation concerning the grounds on which ASIC is proposing to act. After considering the report ASIC must give a written notice to the licensee with its final decision, regardless of whether it decides to take no further action, suspend the licence for a specified period or cancel it. [Schedule 1, item 1, subsections 908BJ(3) and (4)]
- 2.34 A person is taken not to hold a suspended licence unless ASIC in its written notice (whether provided under section 908BI or paragraph 908BJ(4)(b)) states that this does not apply for specified purposes. [Schedule 1, item 1, section 908BK]
- 2.35 ASIC can at any time vary or revoke the suspension of a licence by written notice to the licensee. [Schedule 1, item 1, section 908BL]
- 2.36 ASIC must publish a notice if it suspends or cancels a benchmark administrator licence, or varies or revokes the suspension of such a licence. [Schedule 1, item 1, section 908BM]
- 2.37 A benchmark administrator licence can only be varied, suspended or cancelled as set out in this Subdivision. [Schedule 1, item 1, section 908BN]

Subdivision E - Matters to which ASIC must have regard

- 2.38 ASIC must take a prescribed list of matters into consideration when it decides to grant a benchmark administrator licence, impose, vary or revoke conditions on such a licence, vary a licence because of a change in the financial benchmark specified in the licence, or suspend or cancel a licence. [Schedule 1, item 1, subsection 908BO(1)]
- 2.39 ASIC must mainly have regard to the way the benchmark is administered, its nature, purpose and the manner in which it is used, the persons who may be reporting information to the licensee for purposes of calculating the benchmark, and the technology used for the operation of the benchmark. In the case of a foreign applicant, ASIC must consider the regulatory framework in the jurisdiction in which the applicant is authorised to operate the benchmark, what criteria and obligations it is under to obtain and maintain its authorisation, the level of supervision to which it is subject, and whether adequate cooperation arrangements exist with the supervisory authority of that jurisdiction. ASIC must also consider whether it is in the public interest to take any action as set out in subsection (1), for example to impose conditions on a licence or suspend or cancel a licence. Finally, ASIC may consider any other matter that it believes is important. [Schedule 1, item 1, subsections 908BO(2) and (3)]

Subdivision F – Other obligations of licensees

- 2.40 A benchmark administrator licensee must comply with a number of general obligations. These include complying with the licence conditions, being registered as a foreign company under Division 2 of Part 5B.2 if the licensee is a foreign body corporate, and taking all reasonable steps to ensure that no disqualified individual is involved in the operation of the benchmark covered by the licence. A breach of these conditions may lead to suspension or cancellation of the licence under section 908BJ. [Schedule 1, item 1, section 908BP]
- 2.41 A breach of a licensee's general obligations as set out in section 908BP under this legislation must be reported to ASIC, including any related information prescribed in regulations. ASIC may then consider whether further action is necessary, for example suspending or cancelling a licence. Failure to report a breach is an offence attracting a penalty of up to 100 penalty units. [Schedule 1, item 1, paragraphs 908BQ(1)(a) and (c) and subparagraphs 908BQ(1)(b)(i) and (ii)]
- 2.42 A benchmark administrator licensee must notify ASIC of any changes to directors, secretaries or senior managers, including with respect to its holding company. The regulations may prescribe other information that must be provided in such a notification. Failure to notify ASIC and include any prescribed information is an offence, and a maximum penalty of 100 penalty units applies. It is important that ASIC becomes aware of changes in the management of licensees, given its responsibility for enforcing the prohibition on involvement by disqualified individuals. [Schedule 1, item 1, paragraphs 908BQ(1)(a) and (c), subparagraphs 908BQ(1)(b)(iii) and (iv), and subsection 908BQ(2)]
- 2.43 A benchmark administrator licensee must give assistance to ASIC, APRA and the Reserve Bank of Australia if any of these regulators makes a reasonable request to inspect the licensee's books or obtain other assistance relating to the performance of the regulator's function. Failure to comply with this requirement is an offence attracting a penalty of up to 100 penalty units. [Schedule 1, item 1, section 908BR]
- 2.44 A financial benchmark licensee must comply with a reasonable request by ASIC to provide access to its facilities as they relate to the person's capacity as a licensee. Failure to comply with this requirement is an offence, attracting a penalty of up to 100 penalty units. [Schedule 1, item 1, section 908BS]

Subdivision G – Directions to licensees

2.45 ASIC may give a benchmark administrator licensee a written direction if it believes that the licensee is not complying with its obligations. The direction may specify certain things that ASIC believes

will promote compliance by the licensee with those obligations. The licensee must comply with the direction, and if the licensee fails to do so, ASIC may apply to the Court for an order that the licensee comply with the direction. ASIC may vary or revoke a direction at any time by giving written notice to the licensee. To assist readers an explanation is included that such a direction given by ASIC is not a legislative instrument. This does not constitute an actual exemption from the relevant provisions in the Legislation Act but is merely declaratory of the law as such directions are not legislative instruments within the meaning of subsection (8)(1) of the Legislation Act. [Schedule 1, item 1, section 908BT]

- 2.46 As soon as practicable after giving a direction or a notice of variation or revocation, ASIC must give a copy to the Minister who may then within 30 days disallow all or part of the direction or notice. In deciding whether to disallow a direction or notice the Minister must consider certain matters, such as the licensee's general obligations as set out in section 908BP and the matters set out in section 908BO. ASIC must then notify the licensee of the disallowance, which takes effect as soon as the licensee receives ASIC's notification. To assist readers, an explanation is included that a disallowance notice given by the Minister to ASIC under this provision is not a legislative instrument. This does not constitute an actual exemption from the relevant provisions in the Legislation Act but is merely declaratory of the law as such an advice or direction is not a legislative instrument within the meaning of subsection (8)(1) of the Legislation Act. [Schedule 1, item 1, section 908BU]
- 2.47 ASIC may give a benchmark administrator licensee a written direction to give ASIC a report on specified matters. ASIC may give a copy of that report to the Minister. ASIC may also require the licensee to give ASIC an audit statement on the report, and must nominate a particular person or body that is suitably qualified to prepare the statement. Failure to comply is an offence, with a penalty of 100 penalty units. To assist readers an explanation is included that a direction given by ASIC under this provision is not a legislative instrument. This does not constitute an actual exemption from the relevant provisions in the Legislation Act but is merely declaratory of the law as such a direction is not a legislative instrument within the meaning of subsection (8)(1) of the Legislation Act. [Schedule 1, item 1, section 908BV]

<u>Subdivision H – other matters</u>

2.48 ASIC may assess how well a benchmark administrator licensee is complying with its obligations, including obligations under rules made by ASIC (see Chapter 3 of this explanatory memorandum for details of ASIC's rule-making powers). In doing so ASIC may take account of any information that it thinks is appropriate. ASIC must give a written report on the assessment to the licensee as soon as practicable after completing

the assessment. ASIC may also give a copy to the Minister and any other person who appears to be materially affected by the assessment. If the assessment relates to a serious contravention of the law of the Commonwealth or a State or Territory, ASIC may also give a copy of the report, or the relevant part of the report to the Australian Federal Police, the Chief Executive Officer or staff of the Australian Crime Commissioner, the Commonwealth Director of Public Prosecutions or other persons or bodies prescribed by regulation. ASIC may also publish a report, or part of the report. [Schedule 1, item 1, section 908BW]

2.49 A benchmark administrator licence may be varied, suspended or cancelled, or made subject to conditions as allowed by this Bill or later legislation. Clarification is provided that variation, suspension or cancellation of licences, or the imposition of conditions or additional conditions, do not give rise to compensation. [Schedule 1, item 1, section 908BX]

Consequential amendments

- 2.50 A number of key definitions are inserted in section 761A of the Corporations Act. These include definitions of *benchmark administrator licence*, *financial benchmark* and *significant financial benchmark* which refer to the relevant sections in the Bill setting out what they designate. A *benchmark administrator licensee* is defined as a person who holds a *benchmark administrator licence*. The definition of *financial benchmark data* states that this term refers to information (including derived information) obtained to generate or administer a financial benchmark. *[Schedule 1, items 6 and 8, section 761A]*
- 2.51 A number of consequential changes are made to Division 2 of Part 7.4 allowing ASIC to declare a person who is involved in a benchmark administrator licensee to be a disqualified person. ASIC may only do so if it considers the person unfit to be so involved and giving rise to a risk that the licensee will breach its obligations. [Schedule 1, items 9 and 10, section 853B and subsection 853C(1)]
- 2.52 Section 853D sets out the procedure that ASIC must follow before declaring that a person involved in a relevant licensee is disqualified. Subsections 853D(2)(a) and (b) are amended so that ASIC must also follow that procedure when seeking to declare that a person involved in a benchmark administrator licensee to be a disqualified person. [Schedule 1, item 11, paragraphs 853D(2)(a) and (b)]
- 2.53 A disqualified person must not become involved in a benchmark administrator licensee. If they are already involved, the licensee must take

all reasonable steps to ensure that they cease to be involved. [Schedule 1, item 12, subsections 853F(1) and (2)]

- 2.54 If ASIC becomes aware that an individual involved in a benchmark administrator licensee is disqualified because they are disqualified from managing a corporation under section 206B or are included on the register of disqualified company directors and other officers that ASIC must keep under section 1274AA, then ASIC must notify the individual, the licensee and the Minister as soon as practicable. [Schedule 1, item 13, section 853G]
- 2.55 A decision by ASIC to declare a significant financial benchmark, including a decision to vary or revoke such a declaration, is made exempt from appeals to the Administrative Appeals Tribunal (AAT). The same exemption is applied to a consent by the Minister to ASIC making such a declaration, and to a direction by the Minister to ASIC to revoke or amend a declaration. These exemptions are appropriate because the decisions to which they relate are based on considerations that have a direct impact on the stability and efficient functioning of the Australian financial system. Appeals by persons affected by these decisions are unlikely to take account of these public interest considerations, and allowing appeals to be made would undermine the implementation of the Government's policy and the intended functioning of the regulatory framework established in the Bill. [Schedule 1, item 22, paragraphs 1317C(gdf) and (gdg)]
- 2.56 A decision by the Minister to give ASIC a disallowance notice under section 908BU (see paragraph 2.46 above) in relation to a compliance direction given to a licensee under section 908BT (see paragraph 2.45 above) is made exempt from appeals to the AAT. This exemption is sensible because ASIC's original decision is subject to merits review by the AAT. Thus, if a licensee is dissatisfied with the original direction, and remains dissatisfied after the Minister takes (or fails to take) action, they may then appeal to the AAT and obtain a merits review as to whether the direction should stand or not. [Schedule 1, item 22, paragraph 1317C(gdh)]

Application and transitional provisions

2.57 There are no application or transitional provisions for these Divisions.

Chapter 3 ASIC rule making powers

Outline of chapter

3.1 ASIC is given the power to make rules setting out in detail the requirements that apply to the financial benchmarks that are subject to the licensing regime.

Summary of new law

- 3.2 ASIC may make *financial benchmark rules* setting out in detail the requirements that apply to the financial benchmarks that are subject to the licensing regime. ASIC may also make *compelled financial benchmark rules* that can require an entity to provide information to a significant benchmark administrator licensee or ASIC, or require a benchmark administrator licensee to continue operating a significant financial benchmark specified in its licence.
- 3.3 Obligations are imposed on ASIC in making the rules, including an obligation to have regard to certain matters and to consult publicly.
- 3.4 A compliance and enforcement regime is established, including offences, civil penalties and alternatives to civil penalties such as enforceable undertakings and infringement notices.

Comparison of key features of new law and current law

New law	Current law
ASIC may make financial benchmark	No current law.
rules setting out in detail the	
requirements that apply to the	
financial benchmarks that are subject	
to the licensing regime. ASIC may	
also make compelled financial	
benchmark rules that can require an	
entity to provide information to a	
significant benchmark administrator	
licensee or ASIC, or require a	
benchmark administrator licensee to	

continue operating a significant
financial benchmark specified in its
licence.

Obligations are imposed on ASIC in
making the rules, including an
obligation to have regard to certain
matters and to consult.

A compliance and enforcement
regime is established, including
offences, civil penalties and

Detailed explanation of new law

Schedule 1 - Amendments

Part 1 – Main amendments

alternatives to civil penalties.

Division 3 – Financial benchmark rules and compelled financial benchmark rules

Subdivision A – Power to make financial benchmark rules

- 3.5 ASIC may make *financial benchmark rules* as permitted by the Bill. Such rules are legislative instruments and are therefore subject to parliamentary disallowance. [Schedule 1, item 1, section 908CA]
- 3.6 The main matters that the rules may deal with include the following:
 - the responsibilities of benchmark administrator licensees, and their governance, management and resources;
 - the generation and administration of financial benchmarks;
 - the manner in which licensees provide their services, and the conditions (including fees) on which they provide access to their benchmarks, which may include requirements to provide open and non-discriminatory access, including with regard to price;
 - business continuity planning for financial benchmarks, including the possible transition of such benchmarks to new licensees;

- the disclosure of the conditions (including fees) applying to the licensee's services;
- the handling and use of information held by the licensee;
- the responsibilities of entities that directly or indirectly provide data or information to licensed benchmark administrators for use in the generation or administration of their benchmarks:
- · reporting to ASIC and other regulators; and
- any matters prescribed by regulations. [Schedule 1, item 1, section 908CB]
- 3.7 The rules may also address matters that are incidental or related to the matters set out in section 980CB, including the following:
 - the persons who are required to comply with the rules, subject to any exemptions provided by regulations made under section 908CP:
 - the manner and form in which such persons must comply;
 - the circumstances in which relief may be provided from the rules;
 - · record-keeping requirements; and
 - any other matters prescribed in the Corporations Act. [Schedule 1, item 1, section 908CC]

Subdivision B – Power to make compelled financial benchmark rules

as set out in the Bill [Schedule 1, item 1, section 908CD]. Ordinarily, entities participating in the markets underlying a financial benchmark would be expected to voluntarily contribute to the benchmark setting process, for example by quoting prices on a trading venue, trading in certain products on a trading venue, and/or submitting prices to the benchmark administrator. Benchmark administrators would in the ordinary course of business be expected to continue operating their benchmarks. However, in rare and exceptional cases, a benchmark could cease to be published due to benchmark participants or the administrator being unwilling to perform their responsibilities. In these circumstances, to prevent the disruption that would result from the sudden cessation of the benchmark, it may be necessary for ASIC to compel participants to submit data or information to the administrator, or to compel the administrator to continue to generate

and administer the benchmark. This compulsion power would need to be implemented quickly, since the disruption resulting from the cessation of a benchmark such as BBSW would occur as soon as the benchmark is not published on its usual daily schedule. The compelled financial benchmark rules permitted in the Bill are intended to address these rare and exceptional circumstances.

- 3.9 The permitted ASIC powers and matters that may be dealt with in the compelled financial benchmark rules are:
 - a power for ASIC to give a written notice requiring an entity referred to in paragraph 908CB(h) to continue providing information to a benchmark administrator licensee relating to the generation and operation of a significant financial benchmark. Such information could include transaction data, quotes or opinions and views, including those based on expert judgement. The notice may also require the entity to provide that information to ASIC;
 - a power for ASIC to compel by written notice a benchmark administrator licensee to continue operating a significant financial benchmark specified in its licence, or to operate the benchmark in in a particular way; and
 - incidental powers and matters, including those prescribed in regulations.

ASIC may only impose a requirement as permitted under the powers set out above if it reasonably believes it to be in the public interest to do so. It is noted that any notice given by ASIC as permitted above is not a legislative instrument because the decision to give the notice will be reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (see paragraph (a) in table item 19 in subsection 6(1) of the *Legislation (Exemptions and Other Matters) Regulation 2015*). [Schedule 1, item 1, section 908CE]

Subdivision C – Compliance with each set of rules

3.10 Any entity, whether it is a benchmark administrator licensee or not, that is subject to the financial benchmark rules or the compelled financial benchmark rules must comply with them. A civil penalty applies to breaches of this provision. The primary objective of the civil penalty is to act as a deterrent, which is achieved by imposing a high maximum amount for the penalty, being 5,500 penalty units or approximately \$1 million dollars (for details see paragraphs 3.22 and 3.38 below). While this is a substantial penalty, it is justified in view of the potentially grave impact of misconduct in this area (see paragraph 3.22 below for more

comments in relation to the penalty amount). [Schedule 1, item 1, subsection 908CF(1)]

- 3.11 In case of an inconsistency the compelled financial benchmark rules prevail over the financial benchmark rules. Other rules made under Chapter 7 of the Corporations Act prevail over the financial benchmark rules and the compelled financial benchmark rules in the case of an inconsistency. These rules include the market integrity rules, the derivative transaction rules, the derivative trade repository rules and the client money reporting rules. [Schedule 1, item 1, subsections 908CF(2) and (3)]
- 3.12 The regulations may allow for alternatives to civil penalty proceedings for a person who is alleged to have breached the financial benchmark or the compelled financial benchmark rules. The potential alternatives that may be provided for are limited to: processes for paying a penalty to the Commonwealth (limited to one-fifth the penalty amount specified in the rules); undertaking or instituting remedial measures (including education programs); or accepting sanctions other than the payment of a penalty to the Commonwealth. The penalty payable under regulations made for this purpose in relation to the rules is capped at one-fifth of the maximum penalty payable under the rules (being 5,550 penalty units, which is approximately \$1 million). It is noted that a person would remain free to reject the proposed alternative and deal with the matter in civil proceedings before a court. [Schedule 1, item 1, section 908CG]
- 3.13 Breaches of the financial benchmark or the compelled financial benchmark rules are also subject to the infringement notice regime in Part 5 of the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act). Because the rules may prescribe detailed operational matters, minor breaches may be expected to occur with some frequency. For this reason the Regulatory Powers Act sets out a maximum penalty of 60 penalty units that can be imposed in an infringement notice, which is the amount set out in *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, issued by the Attorney General's Department (the Guide). Infringement notices are an efficient way of dealing with minor breaches, as they avoid the significant delays and costs associated with court action. *[Schedule 1, item 1, subsection 908CH(1)]*
- 3.14 Part 5 of the Regulatory Powers Act sets out a standard framework under which infringement notices can be issued. This includes important matters such as when an infringement notice may be issued and by whom, what matters must be set out in an infringement notice, how an extension of time for payment may be requested, how and under what circumstances an infringement notice may be withdrawn, and the effect and consequences if a person pays the amount stated in the notice. In order for the framework to operate as intended the Bill sets out who in

- ASIC can act as an *infringement officer* as defined in the Regulatory Powers Act (any ASIC officer with a position equivalent to that of a member of the Senior Executive Service in the Commonwealth public service) and as a *chief executive* (any member of the ASIC Commission, ASIC's governing body). [Schedule 1, item 1, subsections 908CH(2) and (3)]
- 3.15 Breaches of the financial benchmark or the compelled financial benchmark rules may also be addressed through enforceable undertakings, based on the general framework set out under Part 6 of the Regulatory Powers Act. This Part allows an *authorised person* in ASIC to accept a written undertaking to comply with a particular provision by taking or refraining from taking specified action. If an enforceable undertaking is breached the authorised person may apply to a *relevant court* for orders to comply with the undertaking, to pay an amount to the Commonwealth equivalent to any financial benefit that the person has obtained through the breach, to compensate any other person for damages suffered because of the breach, or for any other order the court considers appropriate. [Schedule 1, item 1, subsection 908CI(1)]
- 3.16 Any ASIC officer with a position equivalent to that of a member of the Senior Executive Service in the Commonwealth public service is permitted to act as an authorised officer, and the relevant courts may include the Federal Court, the Federal Circuit Court or any State or Territory court with the necessary jurisdiction. [Schedule 1, item 1, subsections 908CI(2) and (3)]
- 3.17 Protection from civil or criminal action is given to a person who is required under ASIC's compelled financial benchmark rules to provide financial benchmark data or other information, or to provide access to such information. [Schedule 1, item 1, section 908CJ]

<u>Subdivision D – Matters relating to the making of each set of rules</u>

- 3.18 Before making a financial benchmark or compelled financial benchmark rule, ASIC must consider a number of matters. These include the IOSCO Principles, as amended from time to time (see paragraph 5.3 for further explanation of the power to incorporate by reference), the likely effect of the rule on the Australian financial system, the regulatory burden imposed by the rule, and any other relevant matter. Information is provided in a note assisting the reader to locate the IOSCO Principles. Another note provides an example of other relevant matters including matters raised during consultation as required under section 908CL. [Schedule 1, item 1, section 908CK]
- 3.19 ASIC must conduct public consultation on any proposed rule. Regulations may prescribe other persons or bodies that ASIC must consult. Consultation may be held by exposing the proposed rule on ASIC's website, with an invitation to the public to comment. A failure to

consult does not invalidate a rule. While the Government fully expects ASIC to consult on every proposed rule, this provision is designed to promote certainty among regulated entities by ensuring that an alleged technical failure to comply with the consultation requirements does not affect the validity of the rule. It also provides ASIC with the flexibility to use targeted consultation with affected stakeholders in appropriate situations. Furthermore, there are additional safeguards to ensure that ASIC undertakes proper consultation, including that the financial benchmark or the compelled financial benchmark rules are disallowable by the Parliament. ASIC is also regularly called to appear before Parliamentary Committees to explain its actions. [Schedule 1, item 1, section 908CL]

- 3.20 The Minister must provide consent before ASIC makes a rule. Such consent provided by the Minister is not a legislative instrument because it is an 'approval' and as such falls within the exemption in table items 4 and 5 in regulation 6 of the *Legislation (Exemptions and Other Matters) Regulation 2015. [Schedule 1, item 1, section 908CM]*
- 3.21 ASIC may in emergency situations make a rule without obtaining the consent of the Minister. ASIC may only make a rule without the consent of the Minister when it is of the opinion that it is necessary or in the public interest to do so in order to protect the Australian economy or financial system, or the security or confidentiality of the information held by one or more financial benchmark administrators. ASIC must then write to the Minister on the following day explaining the need for the rule and, if directed to do so in writing by the Minister, amend or revoke the rule. To assist readers an explanation is included that such a direction given by the Minister under this provision is not a legislative instrument. This does not constitute an actual exemption from the relevant provisions in the Legislation Act but is merely declaratory of the law as such a direction is not a legislative instrument within the meaning of subsection (8)(1) of the Legislation Act. [Schedule 1, item 1, section 908CN]
- 3.22 The financial benchmark or the compelled financial benchmark rules may impose penalties up to an amount equivalent to 5,550 penalty units, which is roughly \$1 million. This is a substantial penalty which is, however, justified by the potentially significant impact that misconduct of a serious nature may have, given the widespread use of financial benchmarks in the financial system. It is noted that fines imposed in overseas jurisdictions for manipulation of benchmarks such as LIBOR have been far larger. This amount is similar to that imposed by other important rules such as the market integrity rules and the client money rules. [Schedule 1, item 1, section 908CO]
- 3.23 Regulations may limit the matters dealt with in the financial benchmark or the compelled financial benchmark rules, the classes of

persons captured by the rules, or the extent to which the rules may impose requirements on designated classes of persons. For example, regulations could limit the application of the rules in relation to public sector entities or index benchmarks, if doing so would harmonise the Australian regime with key overseas benchmarks regulatory regimes. [Schedule 1, item 1, section 908CP]

3.24 ASIC may vary or revoke a rule but only subject to the same conditions applying when it makes a rule, as set out in the *Acts Interpretation Act 1901*. However, these conditions (such as the requirement to consult and for ministerial consent) do not apply if ASIC revokes or amends a rule pursuant to a direction given by the Minister under section 908CN after ASIC makes an emergency rule. [Schedule 1, item 1, section 908CQ]

Consequential amendments

- 3.25 New section 1317HC (see paragraph 3.39 for an explanation of this new section) is added to the definition of *civil penalty order* in the Corporations Act. [Schedule 1, item 2, section 9 (paragraph (c) of the definition of *civil penalty order*)]
- 3.26 A definition of the *Regulatory Powers Act* being the *Regulatory Powers (Standard Provisions) Act 2014* is inserted in the main definitions section in the Corporations Act. [Schedule 1, item 3, section 9]
- 3.27 A company or related body corporate may not indemnify a person for a liability incurred as an officer or auditor of the company through a compensation order issued by a court under new section 1317HC. [Schedule 1, item 4, paragraph 199A(2)(b)]
- 3.28 A company or related body corporate may not indemnify a person for legal costs incurred in defending an action for a liability incurred as an officer or auditor of the company if the costs are incurred in defending proceedings brought by ASIC or a liquidator. Clarification is provided in a note that this includes proceedings by ASIC for a compensation order under new section 1317HC. [Schedule 1, item 5, subsection 199A(3)(note 1)]
- 3.29 Definitions of *financial benchmark rules* and *compelled financial benchmark rules* are inserted in Chapter 7 of the Corporations Act by reference to sections 908CA and 908CD. [Schedule 1, item 6, section 761A]
- 3.30 A person giving information to ASIC concerning a possible breach of the financial benchmark or the compelled financial benchmark

rules is given qualified privilege (which provides immunity from being sued for defamation). [Schedule 1, item 15, paragraph 1100A(1)(b)]

- 3.31 The Court may make such orders as it sees fit if it considers that a person has been wronged by another person breaching the financial benchmark or the compelled financial benchmark rules. [Schedule 1, item 16, paragraph 1101B(1)(d)]
- 3.32 Without limiting the Court's ability to make other orders, examples are given of the kind of orders the Court could make under subsection 1101B(1) for a breach of the financial benchmark or the compelled financial benchmark rules. These include orders giving directions about complying with a provision of these rules, requiring the disclosure of specified information or requiring a person to publish an advertisement in accordance with the order. [Schedule 1, items 17, 18 and 19, paragraph 1101B(4)(b) and subparagraphs 1101B(4)(c)(i) and 1101B(4)(d)(i)]
- 3.33 A decision by ASIC to make, vary or revoke financial benchmark or compelled financial benchmark rules, as well as a decision by the Minister to consent to their making, is made exempt from appeals to the AAT. These exemptions are justified because these decisions are financial decisions with a significant public interest element (as set out in the publication *What decisions should be subject to merits review?* released by the Administrative Review Council (ARC)) and are fundamental to the implementation of the policy decided by the Government. [Schedule 1, item 22, paragraph 1317C(gdi) and subparagraph 1317C(gdk)(i)]
- 3.34 A decision by the Minister to direct ASIC to revoke or amend a rule made in an emergency situation as set out in section 908CM is provided with a similar exemption. These decisions will be made on the basis of whether the rule is in the public interest or whether it is necessary to protect the Australian economy, the Australian financial system, or the security or confidentiality of information held by licensed benchmark administrators. Given the strong public interest element in such a decision by the Minister it is consistent with the guidance provided by ARC to provide a carve-out from AAT review. [Schedule 1, item 22, subparagraph 1317C(gdk)(ii)]
- 3.35 A decision by ASIC to propose or agree to an alternative to a civil penalty proceeding is excluded from AAT review. Such a decision is preliminary in nature and does not in itself have a conclusive effect on the person alleged to have committed a contravention, as set out in the ARC publication referred to above. The person remains free to reject the proposed alternative (if any) and deal with the matter in civil proceedings before a court. In addition to being preliminary, these decisions have a law enforcement nature. They are based on a judgment by ASIC regarding the most appropriate enforcement approach in response to an alleged breach

of the law. Making such decisions subject to AAT review could jeopardise the effective investigation of alleged breaches and the subsequent enforcement of the law. [Schedule 1, item 22, paragraph 1317C(gdj)]

- A decision by ASIC to apply its compulsion powers under the compelled financial benchmark rules is made exempt from appeals to the AAT. A decision to impose compulsion may need to be made very quickly and would need to be effective immediately to avoid disruption to financial contracts and markets. In the event that key participants in the benchmark were no longer willing to participate in the benchmark setting process, ASIC may only have very short notice ahead of the benchmark ceasing to be published. The actual length of notice would depend on each benchmark. For example under the current BBSW conventions, reliance on the fallback calculation methodology will not extend beyond 2 days. In this scenario, ASIC would need to assess the case for imposing compulsion, and take action to impose compulsion within the 2 days, to prevent the disruption that would occur if the benchmark was not published on its usual daily schedule. Providing the right to appeal ASIC's decision to compel submission would significantly raise the risk that the benchmark will cease to be published and trigger the disruption to financial contracts and markets discussed above. Disruption would occur even if there was only a short and temporary interruption in the publication of a benchmark, since investor confidence in the benchmark would be seriously eroded. It is therefore considered to be in the public interest for ASIC to have the ability to take prompt action to ensure the benchmark will be published without interruption. This public interest consideration provides justification for removing review rights for ASIC's decision to impose compulsion, as set out in the ARC guidance referred to above. [Schedule 1, item 22, subparagraph 1317C(gdl)]
- 3.37 Compliance with the financial benchmark or compelled financial benchmark rules is made a civil penalty provision by inserting a reference to subsection 908CF(1) in the table in the Corporations Act setting out the list of these provisions. A Court can make a declaration of contravention if it is satisfied that a breach of these rules has occurred, which may then lead to penalties and compensation orders being imposed. [Schedule 1, item 23, Subsection 1317E(1), table item 17A]
- 3.38 A Court may make a declaration of contravention if it is satisfied that a breach of the financial benchmark or compelled financial benchmark rules has occurred. A penalty payable to the Commonwealth may then be imposed up to the amount specified in the rules. The maximum amount the rules can specify (as set out in section 908CO) is 5,550 penalty units (approximately \$1 million). [Schedule 1, item 25, subsections 1317G(IDC) and (IDD)]

- 3.39 A Court may order a person to compensate another person for damages suffered due to a breach of the financial benchmark rules or compelled financial benchmark rules committed by the first person. In determining the amount of the damages profits made by the person as a result of the contravention and (in the case of a registered scheme) any diminution in the value of the scheme's property must be included. [Schedule 1, item 26, section 1317HC]
- 3.40 A court may provide whole or partial relief to a person who has breached a financial benchmark or compelled financial benchmark rule if it considers that the person has acted honestly and ought to be excused for the contravention having regard to all the circumstances of the case. *Schedule 1, item 27, subsection 1317S(1)]*
- 3.41 If the Court is satisfied that a person has breached a financial benchmark or compelled financial benchmark rule it may order the person to disclose information as specified in the order to the public or to particular persons. The Court may also require the person to publish at their own expense an advertisement in accordance with conditions set out in the order. [Schedule 1, item 28, section 1324B]
- 3.42 The Court may also make certain other orders against a person breaching a financial benchmark or compelled financial benchmark rule if it considers that the order will provide whole or partial compensation to the person suffering loss or damage because of the breach, or prevent or reduce such loss or damage. A person suffering such loss or damage may also apply to the Court and the Court may then make such orders as it considers fit against the person committing the breach (or against a person involved in the breach) for compensating the first person suffering the consequences of the breach. ASIC may make such an application on behalf of one or more persons suffering loss or damage because of a breach. The person or persons on whose behalf ASIC makes the application must first provide their consent in writing. [Schedule 1, item 29, subsections 1325(1), (2) and (3)]
- 3.43 The changes explained in the last two paragraphs above to sections 1324B and 1325 will have an impact on two items in Schedule 5 of the *Treasury Laws Amendment (2016 Measures No. 1) Act 2017* which has received Royal Assent but will likely only come into effect after this Bill commences. Two small consequential amendments are therefore made to items 27 and 28 in Schedule 5 of the *Treasury Laws Amendment (2016 Measures No. 1) Act 2017* to ensure that they continue to operate as originally intended once the Act comes into effect. [Schedule 1, item 31, section 1324B and subsections 1325(1), (2) and (3)]

Application and transitional provisions

3.44 The obligation to comply with the financial benchmark or compelled financial benchmark rules (regardless of when they are made by ASIC) applies from 1 January 2018 or any later day being the day after which the Bill receives the Royal Assent. [Schedule 1, item 30, subsections 1639 and 1640]

Chapter 4 Offences and civil penalties

Outline of chapter

4.1 Offences relating to the manipulation of financial benchmarks are created, including an appropriate penalty regime.

Summary of new law

- 4.2 Offences for manipulating financial benchmarks in a number of specified ways are created. Conduct resulting in these offences includes doing or not doing an act or acts resulting in a financial benchmark being administered at an artificial level; making a false or misleading statement or disseminating false or misleading information that could affect a financial benchmark; and engaging in dishonest conduct that could affect a financial benchmark.
- 4.3 Extended geographical scope Category B (as set out in section 15.2 of the Criminal Code) is applied to each offence under this Division. Applying an extended geographical scope for these offences is critical because of the potential for financial benchmarks to be manipulated across borders.
- 4.4 Penalties are imposed for these offences that are based on the penalties applying to the existing market manipulation and related offences. Category B of the extended geographical jurisdiction provisions in section 15.2 of the Criminal Code is applied to the civil penalty provisions attached to contraventions of the financial benchmark manipulation provisions.

Comparison of key features of new law and current law

New law	Current law	
Offences are created for manipulating	Manipulation of financial	
financial benchmarks in a number of	benchmarks is currently prosecuted	
specified ways.	under the general market	
Penalties based on those applying to the current market manipulation	manipulation and related provisions in Division 2 of Part 7.10 of the	

offences are imposed. The	Corporations Act.
international jurisdictional scope of	
the offences and related civil penalty	
provisions is defined by reference to	
Category B of the extended	
geographical jurisdiction provisions	
in the Criminal Code.	

Detailed explanation of new law

Schedule 1 - Amendments

Part 1 – Main amendments

Division 4 – Offences and civil penalties relating to manipulation of financial benchmarks

- 4.5 Doing or not doing something is made an offence if it has or is likely to have the effect of a financial benchmark being generated at an artificial level. Just as market misconduct provisions apply to all financial products, and consistent with overseas developments, the offence applies to all financial benchmarks. Under the geographical scope provision applied to this offence in section 908DE (see paragraph 4.13 below), this limb of the offence will apply to Australian citizens, residents and bodies corporate incorporated in Australia regardless of where the conduct giving rise to the offence occurs. It will also apply to other entities if the conduct giving rise to the offence takes place wholly or at least partly in Australia. [Schedule 1, item 1, subsections 908DA(1) and (3)]
- 4.6 A separate limb of the offence is created which will apply to foreign nationals and bodies, as set out in the geographical scope provision in section 908DE. In the case of these entities the offence will apply if the act or omission occurs in relation to a significant financial benchmark or, if the affected benchmark is not a significant one, an Australian entity (a defined term including both individuals and bodies corporate) suffers some financial or other disadvantage as a consequence. [Schedule 1, item 1, subsections 908DA(2) and (3]
- 4.7 An offence is committed by breaching either of the two limbs of the offence. The applicable penalty is determined in section 908DD, with an extended geographical scope as defined in section 908DE. Breaches also attract a civil penalty (see paragraphs 4.20 and following below), which have a similar extended geographical scope as explained in paragraph 4.14 below. [Schedule 1, item 1, subsection 908DA(3) and note]

- 4.8 A person commits an offence if they knowingly or recklessly make a statement or disseminate false or misleading information that could be used for the calculation of a financial benchmark. This offence provision is structured in the same way as the offence in section 908DA, with a separate limb applying to Australian citizens, residents and bodies corporate incorporated in Australia as well as conduct by any person occurring wholly or at least partly in Australia. A second limb will apply to foreign nationals and bodies provided their conduct relates to a benchmark which is a significant financial benchmark or, if that is not the case, an Australian entity suffers some financial or other disadvantage. The same penalty provision in section 908DD applies to this offence, as well as the extended geographical scope as set out in section 908DE. A breach of this provision will also attract a civil penalty. [Schedule 1, item 1, section 908DB]
- 4.9 Similarly, a person commits an offence if they engage in dishonest conduct in relation to the generation or administration of a financial benchmark. 'Dishonest' is defined to mean dishonest according to the standards of ordinary people and the person must be aware that the conduct is dishonest by this standard. This offence is again structured in the same way as the previous two offences. [Schedule 1, item 1, section 908DC]
- 4.10 Penalties for all of these offences are defined as follows:
 - For an individual, imprisonment of up to 10 years and/or a fine being the greater of 4,500 penalty units or three times the total value of the benefits that can reasonably be shown to have been derived from the commission of the offence [Schedule 1, item 1, subsection 908DD(1)]; and
 - For a body corporate, a fine being the greatest of 45,000 penalty units, three times the total value of the benefits that can reasonably be shown to have been derived from the commission of the offence, or 10% of the body corporate's annual turnover during the 12 month period ending at the time the offence was committed [Schedule 1, item 1, subsection 908DD(2)].
- 4.11 The maximum amounts specified both for the offence and for the civil penalty (see paragraph 4.22 below for more details on the civil penalty) are relatively high. However, these amounts are justified in view of the seriously damaging impact of misconduct of the kind specified in the offence, and the significant profits that may be achieved as a result. A high maximum penalty amount is accordingly required to achieve the desired punitive or deterrent effects. The penalty specified for the offence is modelled on the existing market manipulation and other similar offences and penalties in Part 7.10 of the Corporations Act. The civil

penalty amount is the same as applies to the existing civil penalties in Part 9.4B of the Act.

- 4.12 Applying an extended geographical scope to these offences is critically important given the ease with which financial transactions resulting in the manipulation of a benchmark can be conducted across borders in today's global financial markets. Failure to provide a wide geographical scope for these offences would represent a serious gap that would be highly likely to prevent the effective enforcement of the financial benchmark regulatory regime by Australian regulators.
- Extended geographical jurisdiction category B as set out in 4.13 section 15.2 of the Criminal Code is applied to each offence under this Division (see Table 16.1 below for a summary table explaining this provision). Under this category the offences apply to Australian citizens, residents and bodies corporate incorporated in Australia regardless of where the conduct giving rise to the offence occurs. The offences apply to foreign nationals and bodies corporate if the conduct giving rise to the offences occurs at least partly in Australia. They also apply if the conduct occurs abroad, provided that the affected benchmark is a significant financial benchmark. If that is not the case, there must be a result of the conduct that occurs in Australia by virtue of an Australian entity suffering financial or other disadvantage. However, under these circumstances there is a defence available if there is no corresponding offence in the domestic law of the jurisdiction where the conduct occurs. [Schedule 1, item 1, subsection 908DE(1)]
- 4.14 The same extended geographical jurisdiction is applied to the civil penalty provisions created under section 1317E in relation to the offences in this Division (see paragraph 4.20 and following below, as well as Table 16.1). It is also made clear that the Attorney-General's consent must be obtained before proceedings can be commenced against a foreign person or body corporate for conduct occurring wholly outside Australia. This provision is based on section 16.1 of the Criminal Code. Similarly, provisions explaining in further detail when an act is taken to have occurred in Australia are based on section 16.2 of the Criminal Code. Sections 16.1 and 16.2 of the Criminal Code also apply to the offences in this Division, by virtue of the application of the extended geographical jurisdiction category B. [Schedule 1, item 1, subsections 908DE(2) to (8)]

Significant benchmarks Non-significant benchmarks Entity/Location Outside Defence Outside Result Defence In Result In Australia Australia Australia Australia Australian NA NA NΑ NA person/body Australian NA NA NA NA resident Foreign NA Α person/body

Table 4.1 Geographical jurisdictional reach - Category B

Y = Within reach

C = Conditionally within reach (depending on result and defence elements)

Result = Australian entity suffers financial or other disadvantage. Only applies where conduct occurs wholly outside Australia.

Defence = Defence if no corresponding offence in the local jurisdiction. Only applies where conduct occurs wholly outside Australia.

A = Applicable

NA = Not applicable

Consequential amendments

- 4.15 A definition of *Australian entity* is inserted in the main definitions section in Chapter 7 of the Corporations Act. The definition states that the term includes Australian citizens, residents (as defined in the Criminal Code) and bodies corporate incorporated in Australia. *[Schedule 1, item 6, section 761A]*
- 4.16 A note to the definition of *financial product* in section 761A is amended to take account of the new inclusions in this term created by this Bill, for example through section 1040B with respect to BABs and NCDs (see paragraph 4.17 below). [Schedule 1, item 7, section 761A, Note to the definition of 'financial product']
- 4.17 A new section 1040B is inserted in Part 7.10 which makes BABs and NCDs financial products for purposes of that Part. This has the effect of applying the important offences in that Part, including those relating to market manipulation and artificially maintaining a trading price, to conduct relating to these two products. This section is inserted in order to remove any ambiguity as to whether conduct relating to BABs and NCDs is captured under Part 7.10. [Schedule 1, item 14, section 1040B]
- 4.18 Section 1312 of the Corporations Act allows a penalty of five times the maximum amount of the penalty applying to an offence committed by an individual to be imposed on a body corporate committing the offence, and exempts specified provisions from this rule.

The offences related to the manipulation of financial benchmarks in this Division are specified as exempt from this rule, because the penalties applying to them as set out in section 908DD already make provision for higher penalties for bodies corporate. [Schedule 1, item 20, paragraph 1312(2)(aa)]

- 4.19 An amendment is made to the note in subsection 1312(2) drawing the reader's attention to the fact that not all penalty amounts are set out in Schedule 3 to the Corporations Act. The penalty amounts for the three offences added to section 1312 (see previous paragraph) are, for instance, set out in section 908DD and not in Schedule 3. [Schedule 1, item 21, subsection 1312(2) (note)]
- 4.20 The provisions relating to the manipulation of financial benchmarks in this Division are made civil penalty provisions by inserting a reference to subsections 908DA(1) or (2), subsections 908DB(1) or (2), and subsections 908DC(1) or (2) in the table in the Corporations Act setting out the list of these provisions. A Court can make a declaration of contravention if it is satisfied that a breach of these provisions has occurred, which then allows penalties and orders for compensation to be imposed. [Schedule 1, item 23, Subsection 1317E(1)(after table item 17), table item 17B]
- 4.21 A note is inserted directing the reader's attention to section 908DE because it contains matters that may be relevant for making declarations of contravention for the new civil penalty provisions in table item 17B. Section 908DE clarifies the extended geographic jurisdiction of these provisions which may be important in determining whether a declaration of contravention can be made in certain circumstances (see paragraph 4.14 above for a detailed explanation). [Schedule 1, item 24, Note 3 at the end of subsection 1317E(1)]
- 4.22 A Court may make a declaration of contravention if it is satisfied that a breach of one of the offences in Division 4 of new Part 7.5B has occurred. A penalty payable to the Commonwealth may then be imposed up to the amount of \$200,000 for an individual and \$1 million for a body corporate. [Schedule 1, item 25, subsections 1317G(IDE) and (IDF)]

Application and transitional provisions

4.23 All the offences in Division 4 of new Part 7.5B apply from the start day of the Bill (which will be the later of 1 January 2018 and the day after which the Bill receives the Royal Assent). [Schedule 1, item 30, sections 1639 and 1641]

Chapter 5 Other provisions

Outline of chapter

5.1 A small number of miscellaneous provisions that support the new financial benchmarks licensing regime are included in this Division.

Summary of new law

5.2 A small number of miscellaneous provisions are grouped together within this Division, including a provision allowing references to be made to instruments as in force from time to time and a provision giving ASIC and the regulations exemption powers in relation to the provisions in the Bill.

Comparison of key features of new law and current law

New law	Current law
References may be made in certain ASIC declarations, the regulations and ASIC rules to instruments as in force from time to time.	No current law.
ASIC and the regulations are given exemption powers in relation to the provisions in the Bill.	

Detailed explanation of new law

Schedule 1 - Amendments

Part 1 – Main amendments

Division 5 – other provisions

5.3 Legislative instruments made by ASIC declaring a significant financial benchmark, regulations made under a provision in the Bill and

ASIC rules made under Division 3 of the Bill may refer to instruments as in force from time to time. This provision is justified because some of these declarations, regulations and the ASIC rules are likely to refer to relevant international standards, in particular the IOSCO Principles, as the regulatory framework established in this Bill is based on this instrument. It is likely that these instruments will be updated from time to time, with the participation of Australian authorities. Given that it is Australian Government policy for our regulatory framework to remain consistent with the IOSCO Principles, this provision will allow the updated instrument to continue to apply without the need to amend the reference to them in the ASIC declarations, regulations or ASIC rules. Interested stakeholders who wish to review any changes will have convenient access to the IOSCO Principles as they are set out in a publicly available document which can be accessed on the internet.² Any other international standards that may be incorporated by reference in future will be accessible in a similar way. [Schedule 1, item 1, section 908EA]

ASIC or the regulations may exempt persons or benchmarks from the provisions in this Bill, including from the regulations and the ASIC rules made under Division 3. Conditions may be imposed on an exemption given. An ASIC exemption must be a legislative instrument if it affects a class of persons or a class of benchmarks. This allows Parliament to review the exemption and disallow it if necessary. Otherwise an ASIC exemption must be in writing and must be published on ASIC's website. The regulations prevail over an ASIC exemption in case of an inconsistency. [Schedule 1, item 1, section 908EB]

Consequential amendments

5.5 There are no consequential amendments for this Division.

Application and transitional provisions

5.6 There are no application and transitional provisions for this Division.

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² Available at the following link: https://www.iosco.org/library/pubdocs/pdf/IOSCOPD415.pdf