

Corporations Amendment Regulations 2010 (No. 4)

Select Legislative Instrument 2010 No. 89

I, QUENTIN BRYCE, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following Regulations under the *Corporations Act 2001*.

Dated 6 May 2010

QUENTIN BRYCE
Governor-General

By Her Excellency's Command

CHRIS BOWEN
Minister for Financial Services, Superannuation and Corporate
Law

1 Name of Regulations

These Regulations are the *Corporations Amendment Regulations 2010 (No. 4)*.

2 Commencement

These Regulations commence on 1 January 2011.

3 Amendment of *Corporations Regulations 2001*

Schedule 1 amends the *Corporations Regulations 2001*.

Schedule 1 Amendments

(regulation 3)

[1] Subregulation 7.1.08 (3), note

omit

[2] After subregulation 7.1.08 (3)

insert

(4) For paragraph (b) of the definition of ***exempt document or statement*** in subsection 766B (9) of the Act:

- (a) an assessment under subsection 985E (1) of the Act that a margin lending facility will not be unsuitable for the person to whom the margin lending facility is to be issued is prescribed (and so excluded from the definition); and
- (b) an assessment under subsection 985E (1) of the Act that a margin lending facility whose limit is proposed to be increased will not be unsuitable for the person for whom the limit of the margin lending facility is to be increased is prescribed (and so excluded from the definition).

Note The effect of paragraph (b) of the definition of ***exempt document or statement*** in subsection 766B (9), is that a prescribed document or statement is an exempt document or statement.

[3] After regulation 7.1.19

insert

7.1.19A Retail clients and wholesale clients: price of margin lending facilities

- (1) This regulation makes arrangements about the price for the provision of a margin lending facility, or a margin lending facility whose limit is proposed to be increased, within the meaning of subsection 761EA (1) of the Act.

Note Under paragraph 761G (7) (a) of the Act, if a financial product is not, or a financial service provided to a person does not relate to, a general insurance product, a superannuation product or an RSA product, the financial product or financial service is provided to the person as a retail client unless the price for the provision of the financial product, or the value of the financial product to which the financial service relates, equals or exceeds the amount specified in regulations made for the purposes of that paragraph as being applicable in the circumstances.

Under paragraph 761G (10) (a) of the Act, the regulations may also deal with how a price or value referred to in that paragraph is to be calculated, either generally or in relation to a specified class of financial products.

In general, the ‘price’ of a product will be the amount that is paid to acquire or be issued with the financial product. The test for the price of the product in paragraph 761G (7) (a) of the Act will be determined at or before the time the client acquires, or is issued with, the financial product. If a client pays \$500 000 or more to acquire or be issued with the financial product, the client will be a wholesale client in respect of the product.

Price

- (2) For paragraph 761G (7) (a) of the Act, the amount applicable in relation to the margin lending facility is \$500 000.

Working out price

- (3) For paragraph 761G (10) (a) of the Act, the price of a margin lending facility is to be worked out so that it is the same as the value of the secured property or transferred securities contributed by the client for establishing the facility.

- (4) For paragraph 761G (10) (a) of the Act, the price of a margin lending facility whose limit is proposed to be increased is to be worked out so that it is the sum of:
- (a) the current value of any secured property or transferred securities previously contributed by a client for establishing the facility or increasing the limit; and
 - (b) the value of any additional secured property or transferred securities contributed by the client in relation to the latest increase of the limit of the facility.
- (5) For subregulations (3) and (4), any secured property or transferred securities contributed by the client that is funded by borrowings from a third party is not to be taken into consideration when working out the price of a margin lending facility.

[4] Regulation 7.1.34, after the heading

insert

- (1) This regulation does not apply in relation to a margin lending facility.

[5] Regulation 7.1.34

omit

For

insert

- (2) For

[6] After regulation 7.6.01

insert

7.6.01AAA Particular financial products not exempted

For subsection 911A (5A) of the Act, the exemption under paragraph 911A (2) (b) of the Act does not apply in relation to a margin lending facility.

[7] **Part 7.7, after Division 2A**

insert

**Division 2AA Combined Financial Services
Guide and credit guide**

7.7.08B Modification of section 942DA of the Act

- (1) For paragraph 951C (1) (c) of the Act, Part 7.7 of the Act applies as if section 942DA of the Act were modified by substituting the heading of the section with the following section heading and subsection heading:

‘942DA Combining a Financial Services Guide and another instrument

Financial Services Guide and a Product Disclosure Statement’.

- (2) Part 7.7 of the Act applies as if section 942DA of the Act were also modified by inserting after subsection (3) the following subsection heading and subsections:

‘Financial Services Guide and a credit guide

- (4) If:
- (a) a person:
 - (i) is:
 - (A) a financial services licensee; or
 - (B) an authorised representative of a financial services licensee; and
 - (ii) is required to give a Financial Services Guide to a client under this Act; and
 - (b) the person:
 - (i) either:
 - (A) holds an Australian credit licence under the *National Consumer Credit Protection Act 2009*; or
 - (B) is a credit representative (within the same meaning as in the *National Consumer Credit Protection Act 2009*); and

(ii) is required to give a credit guide to a consumer under that Act;

the person may combine the Financial Services Guide and credit guide in a single document.

- (5) If the person combines the Financial Services Guide and credit guide in a single document, any statements or information to be included in the credit guide that are identical to statements or information to be included in the Financial Services Guide need only be included once.’

[8] After regulation 7.7.09A

insert

7.7.09AA Statement of Advice from financial services licensee

- (1) For paragraph 947B (2) (g) of the Act, a Statement of Advice given by a financial services licensee in relation to a margin lending facility, or a margin lending facility whose limit is proposed to be increased, within the meaning of subsection 761EA (1) of the Act must include the following information:
- (a) whether the client has taken out a loan to fund the secured property or transferred securities contributed by the client for establishing the margin lending facility;
Note This is sometimes referred to as ‘double gearing’.
 - (b) if a loan to fund the secured property or transferred securities contributed by the client for establishing the margin lending facility has been taken out — whether the security for the loan includes the primary residential property of the client;
 - (c) whether there is a guarantor for the margin lending facility, and, if so:
 - (i) if the financial services licensee has the necessary information — a statement as to whether the guarantor has been appropriately informed of, and warned about, the risks and possible consequences of providing the guarantee; or

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- (ii) if the financial services licensee does not have the necessary information — a statement that the financial services licensee does not have the information;
 - (d) the amount of any other debt incurred by the client;
 - (e) any other matter that ASIC has specified in a legislative instrument for subregulation (2).
- (2) ASIC may specify in a legislative instrument any matter ASIC considers to be relevant for the purpose of establishing whether the margin lending facility, or the margin lending facility with the increased limit, is unsuitable for the client.

7.7.09AB Modification of subsection 947B (4) of the Act

For paragraph 951C (1) (c) of the Act, Part 7.7 of the Act applies as if subsection 947B (4) of the Act were modified by:

- (a) substituting the full stop at the end of paragraph (c) with a semi-colon; and
- (b) inserting after paragraph (c) the following paragraph:
 - ‘(d) that ASIC may specify in a legislative instrument matters ASIC considers to be relevant for the purposes of paragraph 947B (2) (g) of the Act.’

[9] After regulation 7.7.09B

insert

7.7.09BA Statement of Advice from authorised representative

- (1) For paragraph 947C (2) (h) of the Act, a Statement of Advice given by an authorised representative in relation to a margin lending facility, or a margin lending facility whose limit is proposed to be increased, within the meaning of subsection 761EA (1) of the Act must include the following information:
 - (a) whether the client has taken out a loan to fund the secured property or transferred securities contributed by the client for establishing the margin lending facility;

Note This is sometimes referred to as ‘double gearing’.

- (b) if a loan to fund the secured property or transferred securities contributed by the client for establishing the margin lending facility has been taken out — whether the security for the loan includes the primary residential property of the client;
 - (c) whether there is a guarantor for the margin lending facility, and, if so:
 - (i) if the authorised representative has the necessary information — a statement as to whether the guarantor has been appropriately informed of, and warned about, the risks and possible consequences of providing the guarantee; or
 - (ii) if the authorised representative does not have the necessary information — a statement that the authorised representative does not have the information;
 - (d) the amount of any other debt incurred by the client;
 - (e) any other matter that ASIC has specified in a legislative instrument for subregulation (2).
- (2) ASIC may specify in a legislative instrument any matter ASIC considers to be relevant for the purpose of establishing whether the margin lending facility, or the margin lending facility with the increased limit, is unsuitable for the client.

7.7.09BB Modification of subsection 947C (4) of the Act

For paragraph 951C (1) (c) of the Act, Part 7.7 of the Act applies as if subsection 947C (4) of the Act were modified by:

- (a) substituting the full stop at the end of paragraph (c) with a semi-colon; and
- (b) inserting after paragraph (c) the following paragraph:
 - ‘(d) that ASIC may specify in a legislative instrument matters ASIC considers to be relevant for the purposes of paragraph 947C (2) (h) of the Act.’

[10] After regulation 7.8.06

insert

7.8.06A Property exempt from Division 3 of Part 7.8 of the Act

For paragraph 984A (2) (a) of the Act, property given as security for a standard margin lending facility is exempt from Division 3 of Part 7.8 of the Act.

Note Paragraph 984A (2) (a) of the Act provides that the regulations may exempt property given in specified circumstances from some or all of the provisions of Division 3 of Part 7.8 of the Act.

[11] After regulation 7.8.08

insert

7.8.08A Limit of margin lending facility taken to be increased

- (1) For paragraph 985E (3) (a) of the Act, the limit of a margin lending facility is taken to be increased, despite subsection 985E (2) of the Act, if:
 - (a) the increase is a result of a contribution of further secured property or transferred securities that occurs without the prior knowledge or agreement of the provider; and
 - (b) the provider permits the increase to continue; and
 - (c) the increase is no more than 5% of the current limit of the margin lending facility (within the meaning given by subsection 761EA (11) of the Act).
- (2) If the limit of a margin lending facility is taken to be increased in the circumstances mentioned in subregulation (1), subsection 985E (1) of the Act is modified by omitting ‘before the critical day:’ and inserting ‘after the critical day:’.

Note Paragraph 992C (1) (c) of the Act provides that the regulations may provide that Part 7.8 of the Act applies as if specified provisions were omitted, modified or varied as specified in the regulations.

- (3) For subregulation (1), if:
 - (a) more than one contribution of further secured property or transferred securities under the margin lending facility occurs on a day; and

- (b) each of the contributions is taken to increase the limit of the facility; and
- (c) either:
 - (i) the cumulative increase is no more than 5% of the current limit of the margin lending facility; or
 - (ii) if the cumulative increase is more than 5% of the current limit of the margin lending facility, the provider ensures that the increases are reduced so that the cumulative increase becomes no more than 5% of the current limit of the margin lending facility;

the increases are taken to be one increase for this regulation.

Increase prior to assessment only to occur once

- (4) Subregulation (5) applies if:
 - (a) the limit of a margin lending facility is taken to be increased in the circumstances mentioned in subregulation (1); and
 - (b) an assessment has not yet been made in accordance with section 985F of the Act.
- (5) If the limit of the margin lending facility would be taken to increase further in accordance with subregulation (1):
 - (a) the limit is taken not to be further increased until:
 - (i) an assessment has been made in accordance with section 985F of the Act; and
 - (ii) it is assessed that the facility will not be unsuitable for the client if the limit is increased; and
 - (b) the provider must ensure that the increase does not continue unless paragraph (a) permits it.

If facility assessed as unsuitable

- (6) If:
 - (a) the limit of a margin lending facility is taken to be increased in the circumstances mentioned in subregulation (1); and

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- (b) the assessment made in accordance with section 985F of the Act assesses that the facility is unsuitable for the client because of the increased limit;

the limit is taken to be reduced to the limit of the margin lending facility before the increase, and the provider must ensure that the limit is reduced within 90 days of the day the assessment is made.

Facility not unsuitable for subsection 985K (4) of the Act

- (7) For subsection 985K (4) of the Act, a margin lending facility is taken not to be unsuitable if:
- (a) the limit of the margin lending facility is taken to be increased in the circumstances mentioned in subregulation (1); and
 - (b) the assessment made in accordance with section 985F of the Act assesses that the facility:
 - (i) is not unsuitable for the client; or
 - (ii) is unsuitable for the client because of the increased limit; and
 - (c) in the case of subparagraph (b) (ii), the provider ensures that the limit is reduced, within 90 days of the day the assessment is made, to the limit of the margin lending facility before the increase.

7.8.08B Exemption from requirement to make unsuitability assessment

- (1) For paragraph 992C (1) (a) of the Act, a person is exempt from the requirement in paragraph 985E (1) (c) of the Act to make an assessment if the margin lending facility mentioned in paragraph 985E (1) (a) or (b) of the Act is a facility mentioned in subregulation (2):
- (a) in respect of the full amount of the loan, including any interest, fees and charges; and
 - (b) in relation to which the client has not taken out a loan to fund the secured property contributed by the client for establishing the margin lending facility.

- (2) For subregulation (1), the facility is a standard margin lending facility (within the meaning given by subsection 761EA (2) of the Act) under the terms of which:
- (a) the credit provided must be applied wholly:
 - (i) to acquire one or more marketable securities, or a beneficial interest in one or more marketable securities; or
 - (ii) to repay another credit facility, under the terms of which the credit provided was applied wholly to acquire one or more marketable securities, or a beneficial interest in one or more marketable securities; and
 - (b) the secured property mentioned in paragraphs (c) and (d) of that subsection:
 - (i) consists wholly of one or more marketable securities, or a beneficial interest in one or more marketable securities; or
 - (ii) consists:
 - (A) partly of one or more marketable securities, or a beneficial interest in one or more marketable securities; and
 - (B) partly of cash given to the provider and held in trust for the client for the sole purpose of servicing obligations under the facility; and
 - (c) the liability of the client to the provider is limited to the rights relating to the secured property.

7.8.09 Reasonable inquiries etc about retail client: inquiries

- (1) For paragraph 985G (1) (c) of the Act, the following inquiries about a client are prescribed in relation to a margin lending facility, or a margin lending facility whose limit is proposed to be increased, within the meaning of subsection 761EA (1) of the Act:
- (a) reasonable inquiries as to whether the client has taken out a loan to fund the secured property or transferred securities contributed by the client for establishing the margin lending facility;

Note This is sometimes referred to as ‘double gearing’.

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- (b) if a loan to fund the secured property or transferred securities contributed by the client for establishing the margin lending facility has been taken out — reasonable inquiries as to whether the security for the loan includes the primary residential property of the client;
 - (c) if there is a guarantor for the margin lending facility — reasonable inquiries as to whether the guarantor has been appropriately informed of, and warned about, the risks and possible consequences of providing the guarantee;
 - (d) reasonable inquiries as to the amount of any other debt incurred by the client;
 - (e) any other matter that ASIC has specified in a legislative instrument for subregulation (2).
- (2) ASIC may specify in a legislative instrument any matter ASIC considers to be relevant for the purpose of establishing whether the margin lending facility, or the margin lending facility with the increased limit, is unsuitable for the client.

7.8.09A Modification of section 985G of the Act

For paragraph 992C (1) (c) of the Act, Part 7.8 of the Act applies as if section 985G of the Act were modified by inserting after subsection (2) the following subsection:

- ‘(2A) The regulations may provide that ASIC may specify in a legislative instrument matters ASIC considers to be relevant for the purposes of paragraph 985G (1) (c) of the Act.’

7.8.10 Circumstances in which margin lending facility is unsuitable

For paragraph 985H (2) (b) of the Act, a margin lending facility, or a margin lending facility whose limit is proposed to be increased, within the meaning of subsection 761EA (1) of the Act is unsuitable for a retail client if the client:

- (a) is, on an ongoing basis, unable to be contacted by any of the usual means of communication; and
- (b) has not appointed an agent to act on the client’s behalf.

7.8.10A Margin lending facility taken not to be unsuitable

For subsection 985K (4) of the Act, a margin lending facility is taken not to be unsuitable:

- (a) if:
 - (i) an assessment of unsuitability was undertaken in accordance with the Act; and
 - (ii) the assessment reasonably concluded that the margin lending facility is not unsuitable; or
- (b) if a person is exempt under regulation 7.8.08B from the requirement to make an assessment of unsuitability in relation to the margin lending facility.

[12] Chapter 7, Part 7.9, Division 5, after Subdivision 5.4

insert

Subdivision 5.4A Periodic statements for retail clients for financial products that have an investment component: additional information for margin lending facilities**7.9.30A Application of Subdivision 5.4A**

- (1) This Subdivision applies in relation to the provider of a margin lending facility within the meaning of subsection 761EA (1) of the Act.
- (2) For the purposes of this Subdivision, subsection 1017D (5) of the Act is modified to omit paragraphs (a) to (f).

Note Paragraph 1020G (1) (c) of the Act provides that the regulations may provide that Part 7.9 of the Act applies as if specified provisions were omitted, modified or varied as specified in the regulations.

7.9.30B Details to be included in periodic statements for margin lending facilities

For paragraph 1017D (5) (g) of the Act, a periodic statement for a holder of a financial product must include the following details about the margin lending facility:

- (a) the outstanding loan amount;
- (b) the loan credit limit;
- (c) the current interest rate, and any changes to the interest rate since the last statement was provided;
- (d) an itemised list of the property by which the credit is secured, including:
 - (i) the value of each item used for calculating the current LVR; and
 - (ii) the loan to value ratio (if any) of each property item listed;
- (e) a summary of the loan to security ratios, showing separately:
 - (i) the allowable loan to security ratio; and
 - (ii) the maximum loan to security ratio, including any buffer allowed under the terms of the facility; and
 - (iii) the current LVR;
- (f) a summary of all transactions affecting the margin lending facility during the reporting period.