



ANNO TRICESIMO QUINTO

**ELIZABETHAE II REGINAE**

**A.D. 1986**

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**No. 75 of 1986**

**An Act relating to the futures industry in South Australia.**

*[Assented to 27 November 1986]*

The Parliament of South Australia enacts as follows:

**PART I**

**PRELIMINARY**

- Short Title.** 1. This Act may be cited as the "Futures Industry (Application of Laws) Act, 1986".
- Commencement.** 2. This Act shall come into operation on a day to be fixed by proclamation.
- Interpretation.** 3. (1) In this Act, unless the contrary intention appears—
- "Agreement" means the agreement made on 22 December 1978 between the Commonwealth and the States in relation to a proposed scheme for the co-operative regulation of companies and the securities industry, as amended or affected by subsequent agreements:
- "Commission" or "National Commission" means the National Companies and Securities Commission established by the *National Companies and Securities Commission Act 1979* of the Commonwealth:
- "Ministerial Council" means the Ministerial Council for Companies and Securities established by the Agreement:
- "State Commission" means the Corporate Affairs Commission continued in existence by the *Companies (Administration) Act, 1982*:
- "the applied provisions" means the provisions applying by reason of sections 5 and 6:

“the Commonwealth Act” means the *Futures Industry Act 1986* of the Commonwealth.

(2) In this Act, a reference to a Commonwealth Act shall be construed as including a reference to that Act as amended and in force for the time being and to an Act passed in substitution for that Act.

4. The Companies and Securities (Interpretation and Miscellaneous Provisions) (Application of Laws) Act, 1981, applies to the *Futures Industry (South Australia) Code*.

Interpretation of  
*Futures Industry*  
(*South Australia*)  
Code.

## PART II

### APPLICATION OF LAWS

5. Subject to this Act, the provisions of the Commonwealth Act (other than sections 1, 2 and 3) apply—

Application of  
Commonwealth  
Act.

(a) as if amended as set out in Schedule 1;

and

(b) subject to and in accordance with the Companies and Securities (Interpretation and Miscellaneous Provisions) (Application of Laws) Act, 1981,

as laws of South Australia.

6. Subject to this Act, the provisions of regulations in force for the time being under the Commonwealth Act (other than provisions for providing for the citation or commencement of the regulations) apply—

Application of  
*Futures Industry*  
Regulations.

(a) as if amended as set out in Schedule 2;

and

(b) subject to and in accordance with the Companies and Securities (Interpretation and Miscellaneous Provisions) (Application of Laws) Act, 1981,

as regulations made under the provisions applying by reason of section 5.

7. (1) There shall be paid to the State Commission, for and on behalf of the State, for or in respect of—

Fees payable.

(a) the lodgment of documents with the National Commission under the applied provisions;

(b) the registration of documents under the applied provisions or the inspection or search of registers kept by, or documents in the custody of, the National Commission under the applied provisions;

(c) the production by the National Commission, pursuant to a subpoena, of any register kept by, or documents in the custody of, the National Commission under the applied provisions;

(d) the issuing of documents or copies of documents, the granting of licences, consents or approvals or the doing of other acts or things by the Ministerial Council or the National Commission under the applied provisions;

(e) the making of inquiries of, or applications to, the Ministerial Council or the National Commission in relation to matters arising under the applied provisions;

and

(f) the submission to the National Commission of documents for examination by the National Commission,

such fees (if any) as are prescribed by regulations in force for the time being under the *Futures Industry (Fees) Act 1986* of the Commonwealth and specified in the Schedule to those regulations as if amended as set out in Schedule 3 and as if, unless the contrary intention appears, the expressions used had the same respective meanings as in the applied provisions.

(2) Where a fee is payable to the State Commission for and on behalf of the State under subsection (1) for or in respect of the lodgment of a document with the National Commission and the document is submitted for lodgment without payment of the fee, the document shall be deemed not to have been lodged until the fee has been paid.

(3) Where a fee is payable to the State Commission for and on behalf of the State under subsection (1) for or in respect of any matter involving the doing of any act or thing by the Ministerial Council or the National Commission, the Ministerial Council or the National Commission shall not do that act or thing until the fee has been paid.

(4) This section has effect notwithstanding anything contained in the applied provisions.

(5) Nothing in this section prevents the State Commission for and on behalf of the State from—

(a) waiving or reducing, in a particular case or classes of cases, fees that would otherwise be payable pursuant to this section;

or

(b) refunding in whole or in part, in a particular case or classes of cases, fees paid pursuant to this section.

(6) In this section, unless the contrary intention appears, expressions used have the same respective meanings as in the applied provisions.

8. (1) Where, under the Agreement, the Ministerial Council approves a proposed amendment of the regulations in force for the time being under the Commonwealth Act or the *Futures Industry (Fees) Act 1986* of the Commonwealth and, on the expiration of 6 months after the date on which the Ministerial Council so approved, the amendment has not been made or has been made and is subject to disallowance or has ceased to be in force by disallowance or for any other reason, the Governor may make regulations in accordance with the proposed amendment approved by the Ministerial Council amending the provisions of regulations applying by reason of section 6 or the regulations referred to in section 7, as the case may be.

(2) Regulations made by the Governor under subsection (1) may amend Schedule 2 or 3, and that Schedule as so amended shall be Schedule 2 or 3, as the case may be, to this Act.

(3) In this Act—

(a) a reference to provisions of regulations applying by reason of section 6 includes a reference to provisions as so applying as amended in accordance with this section;

and

- (b) a reference to fees prescribed by regulations under the *Futures Industry (Fees) Act 1986* of the Commonwealth includes a reference to those regulations as amended in accordance with this section.

9. (1) The Minister may from time to time authorize the publication by the Government Printer of the provisions of the Commonwealth Act (other than sections 1, 2 and 3), amended as set out in Schedule 1 and in operation, or to come into operation, in South Australia.

Publication of  
*Futures Industry  
(South Australia)  
Code.*

(2) A document published under subsection (1)—

- (a) shall include the headings and sections set out in Schedule 4;
- (b) shall include a notification of the date, or dates, on which the several provisions set out in the document came, or come, into operation in South Australia;
- (c) shall include a statement of the date on which the Minister authorized the publication;

and

(d) may be cited as the "*Futures Industry (South Australia) Code*".

(3) A document that is, or purports to be, a copy of the *Futures Industry (South Australia) Code* that has been, or purports to have been, published in accordance with this section is *prima facie* evidence of the provisions of the Commonwealth Act applying by reason of section 5 as in operation, or to come into operation, in South Australia as notified in the document in accordance with subsection (2) (b).

10. (1) The Minister may from time to time authorize the publication by the Government Printer of the provisions of regulations under the Commonwealth Act (other than provisions providing for the citation or commencement of the regulations), amended as set out in Schedule 2 and in operation, or to come into operation, in South Australia.

Publication of  
*Futures Industry  
(South Australia)  
Regulations.*

(2) A document published under subsection (1)—

- (a) shall include the heading and provisions set out in Schedule 5;
- (b) shall include a notification of the date, or dates, on which the several provisions set out in the document came, or come, into operation in South Australia;
- (c) shall include a statement of the date on which the Minister authorized the publication;

and

(d) may be cited as the "*Futures Industry (South Australia) Regulations*".

(3) A document that is, or purports to be, a copy of the *Futures Industry (South Australia) Regulations* that has been, or purports to have been, published in accordance with this section is *prima facie* evidence of the provisions applying by reason of section 6 as in operation, or to come into operation, in South Australia as notified in the document in accordance with subsection (2) (b).

11. (1) The Minister may from time to time authorize the publication by the Government Printer of the Schedule to regulations prescribing fees under the *Futures Industry (Fees) Act 1986* of the Commonwealth amended as set out in Schedule 3 and in operation, or to come into operation, in South Australia.

Publication of  
*Futures Industry  
(Fees) (South  
Australia)  
Regulations.*

(2) A document published under subsection (1)—

- (a) shall include the heading and provisions set out in Schedule 6;
- (b) shall include a notification of the date, or dates, on which the several provisions set out in the document came, or come, into operation in South Australia;
- (c) shall include a statement of the date on which the Minister authorized the publication;

and

(d) may be cited as the "*Futures Industry (Fees) (South Australia) Regulations*".

(3) A document that is, or purports to be, a copy of the *Futures Industry (Fees) (South Australia) Regulations* that has been, or purports to have been, published in accordance with this section is *prima facie* evidence of the provisions of the Schedule to regulations referred to in section 7 as in operation, or to come into operation, in South Australia as notified in the document in accordance with subsection (2) (b).

12. (1) The Minister may from time to time authorize the publication by the Government Printer of a document setting out—

Publication of  
provisions of  
amended Code or  
regulations.

(a) provisions that by reason of—

(i) the enactment of an Act of the Commonwealth amending the Commonwealth Act;

and

(ii) the operation of section 5 (including the operation, if applicable, of Schedule 1),

apply, or will apply, as laws of South Australia;

(b) provisions that by reason of—

(i) regulations under the Commonwealth Act;

and

(ii) the operation of section 6 (including the operation, if applicable, of Schedule 2),

apply, or will apply, as regulations made under the provisions applying by reason of section 5;

or

(c) fees that by reason of—

(i) regulations under the *Futures Industry (Fees) Act 1986* of the Commonwealth;

and

(ii) the operation of section 7 (including the operation, if applicable, of Schedule 3),

are, or will be, payable under that section.

(2) A document published under subsection (1) shall include a notification of the date, or dates, on which the provisions or fees set out in the document came, or come, into operation in South Australia.

(3) A document that has been, or purports to have been, published in accordance with this section is *prima facie* evidence of provisions or fees referred to in subsection (1) set out in the document.

13. (1) Unless the contrary intention appears, in this or any other Act or in a regulation or other instrument made under this or any other Act or in any other document made by or under the authority of, or for the purposes of, a law of South Australia—

Interpretation of references to the applied provisions.

- (a) a reference to the *Futures Industry (South Australia) Code* is a reference to the provisions of the Commonwealth Act applying by reason of section 5;
- (b) a reference to a provision of that Code is a reference to the corresponding provisions of the Commonwealth Act as so applying;
- (c) a reference to the *Futures Industry (South Australia) Regulations* is a reference to the provisions of regulations in force under the Commonwealth Act applying by reason of section 6;
- (d) a reference to a provision of those regulations is a reference to the corresponding provision of the regulations in force under the Commonwealth Act as so applying;
- (e) a reference to the *Futures Industry (Fees) (South Australia) Regulations* is a reference to the Schedule to regulations prescribing fees in force under the *Futures Industry (Fees) Act 1986* of the Commonwealth as referred to in section 7;

and

- (f) a reference to a provision of that Schedule is a reference to the corresponding provision of the Schedule to regulations prescribing fees in force under that Act as referred to in section 7.

(2) In subsection (1), "provision" includes Part, Division, section, subsection, paragraph, subparagraph, Schedule, form, regulation, clause, subclause and other division.

14. Where, under the Agreement, the Ministerial Council—

(a) approves—

- (i) a proposed amendment of the Commonwealth Act;
- (ii) regulations proposed to be made under the Commonwealth Act (whether or not amending other regulations);
- (iii) a proposed amendment of the *Futures Industry (Fees) Act 1986* of the Commonwealth;

or

- (iv) regulations proposed to be made under the Act referred to in subparagraph (iii) (whether or not amending other regulations);

Amendment of certain provisions in accordance with approval of Ministerial Council.

and

*(b)* approves proposed regulations to be made under this Act in connection with the operation of the proposed amendment or regulations referred to in paragraph *(a)*,

the Governor may make regulations amending Schedule 1, 2 or 3 or section 7, as the case may be, in accordance with that approval, and that Schedule or section as so amended shall be Schedule 1, 2 or 3 or section 7, as the case may be, of this Act.

(Sec. 5)

## SCHEDULE 1

## MODIFICATIONS TO THE COMMONWEALTH ACT

The provisions of the Commonwealth Act apply as if—

1. Unless inconsistent with another provision of this Schedule—

- (a) for the words "this Act" in the Commonwealth Act (wherever occurring except where occurring in conjunction with words "commencement of") there were substituted the words "this Code";
- (b) for the words "the Territory" in the Commonwealth Act (wherever occurring) there were substituted the words "South Australia";
- (c) for the words "law of a participating State or participating Territory" in the Commonwealth Act (wherever occurring) there were substituted the words "law in force in a participating State or in a participating Territory";
- (d) for the words "law of a State or of another Territory" in the Commonwealth Act (wherever occurring) there were substituted the words "law in force in another State or in a Territory";
- (e) for the words "law of a State or Territory" in the Commonwealth Act (wherever occurring) there were substituted the words "law in force in a State or in a Territory";
- (f) for the words "law of that State or Territory" in the Commonwealth Act (wherever occurring) there were substituted the words "law in force in that State or Territory";
- (g) for the words "commencement of this Act" in the Commonwealth Act (wherever occurring) there were substituted the passage "commencement of the Futures Industry (Application of Laws) Act, 1986";
- (h) for the words "of a participating State or of" in the Commonwealth Act (wherever occurring) there were substituted the words "in force in a participating State or in";
- (i) for the words "relevant Act" in the Commonwealth Act (wherever occurring) there were substituted the words "relevant Code";
- (j) after the passage "*Banking Act 1959*" in the Commonwealth Act (wherever occurring) there were inserted the words "of the Commonwealth";
- (k) after the passage "*Bankruptcy Act 1966*" in the Commonwealth Act (wherever occurring) there were inserted the words "of the Commonwealth";
- (l) after the passage "*National Companies and Securities Commission Act 1979*" in the Commonwealth Act (wherever occurring) there were inserted the words "of the Commonwealth";
- (m) for the passage "*Securities Industry Act 1980*" in the Commonwealth Act (wherever occurring) there were substituted the passage "*Securities Industry (South Australia) Code*";
- (n) for the passage "*Companies Act 1981*" in the Commonwealth Act (wherever occurring) there were substituted the passage "*Companies (South Australia) Code*";

2. In section 4 (1) of the Commonwealth Act—

- (a) after the definition of "commodity agreement" there was inserted the following definition—  
"Commonwealth Minister" means the Minister of State for the Commonwealth for the time being administering the *Futures Industry Act 1986* of the Commonwealth;
- (b) after the definition of "futures exchange" there were inserted the following definition—  
"*Futures Industry (South Australia) Code*" or "Code" means the provisions applying by reason of section 5 of the *Futures Industry (Application of Laws) Act, 1986*;
- (c) after the definition of "local recognised futures exchange" there were inserted the following definition—  
"Minister" means the Minister of State for South Australia for the time being administering the *Futures Industry (Application of Laws) Act, 1986*;
- (d) after the definition of "registered company auditor" there were inserted the following definition—  
"regulations" means the provisions applying as regulations made under this Code by reason of section 6 of the *Futures Industry (Application of Laws) Act, 1986*;

3. In section 4 (6) of the Commonwealth Act after the passage "*Act 1974*" there were inserted the words "of the Commonwealth";

4. In section 4 (11) of the Commonwealth Act for the words "that Act" there were substituted the words "that Code";

5. After section 4 (11) of the Commonwealth Act there were inserted the following subsections—



(12) In this Code, a reference to a Commonwealth Act shall be construed as including a reference to that Act as amended and in force for the time being and to an Act passed in substitution for that Act.

(13) In this Code—

(a) a reference to a previous law, or provision of a previous law, or previous enactment, of South Australia corresponding to, or to a provision of, the *Companies (South Australia) Code* includes a reference to, or to a provision of, the Companies Act, 1962; and

(b) a reference to a previous law, or provision of a previous law, or previous enactment, of another State or of a Territory corresponding to, or to a provision of, the *Companies (South Australia) Code* includes a reference to, or to a provision of, the law in force in that State or Territory corresponding to the Companies Act, 1962.;

6. In sections 10 (3), 23, 41, 49 and 52 of the Commonwealth Act after the word "Gazette" (wherever occurring) there were inserted the words "and the *Government Gazette*";

7. In section 11 (3) of the Commonwealth Act for the words "this sub-section" there were substituted the passage "sub-section 11 (3) of the *Futures Industry Act 1986* of the Commonwealth";

8. In section 13 (1) (a) (i) of the Commonwealth Act there were omitted the passage "(other than the exercise of a power of the Commission under sub-section 6 (3) of the *National Companies and Securities Commission Act 1979*)";

9. In section 14 (1) of the Commonwealth Act for the words "Australian Federal Police" there were substituted the words "police force of South Australia";

10. In section 21 of the Commonwealth Act for paragraph (a) of the definition of "relevant authority" in subsection (1) there were substituted the following paragraphs—

(a) in the case of a direction given by the Commonwealth Minister other than a direction that has been approved by the Ministerial Council under sub-section 22 (6)—the Commonwealth Minister;

(aa) in the case of a direction given by the Minister other than a direction that has been approved by the Ministerial Council under sub-section 22 (6)—the Minister;

11. In section 22 of the Commonwealth Act—

(a) in subsection (2) for the words "the Minister" (where twice occurring) there were substituted the words "the Commonwealth Minister";

(b) in subsection (4) for the passage "request the Minister in writing to exercise the Minister's powers under sub-section (1) or (2)" there were substituted the passage ", in writing, request the Minister to exercise the Minister's powers under sub-section (1), or request the Commonwealth Minister to exercise that Minister's powers under sub-section (2),";

(c) in subsection (6) for the passage "or (2)" there were substituted the passage ", or by the Commonwealth Minister under sub-section (2)";

12. Section 25 (3) of the Commonwealth Act were repealed.

13. Section 26 of the Commonwealth Act were repealed.

14. In section 36 of the Commonwealth Act—

(a) in subsection (4) (a) the word "and" (where lastly occurring) were repealed;

(b) in subsection (4) (b) for the word "Commonwealth" there were substituted the word "State";

(c) after subsection (4) (b) there were inserted the following word and paragraph—

and

(c) the Commonwealth Minister may cause to be printed and published the whole or any part of a report under this Division that relates to an investigation the expenses of which are, under the Agreement, to be borne by the Commonwealth.;

(d) in subsection (5) for the words "Ministerial Council or the Minister" (wherever occurring) there were substituted the passage "Ministerial Council, the Minister or the Commonwealth Minister";

(e) after subsection (11) there were inserted the following subsection—

(12) Nothing in this section operates to diminish the protection afforded to witnesses by the Evidence Act, 1927.;

15. In section 60 of the Commonwealth Act for the words "this section" there were substituted the passage "section 60 of the *Futures Industry Act 1986* of the Commonwealth";

16. In section 66 (1) (b) of the Commonwealth Act for the passage “, of a State or of another Territory” (where twice occurring) there were substituted the passage “, in force in another State or in a Territory”;

17. After section 80 of the Commonwealth Act there were inserted the following section—

80a. (1) Where—

Transitional provision.

- (a) at the commencement of the Futures Industry (Application of Laws) Act, 1986, a person is the holder of a futures broker's licence, a futures adviser's licence, a futures broker's representative's licence or a futures adviser's representative's licence under the provisions of the law in force in a participating State or in a participating Territory that correspond with this Part;
- (b) at the time the person became the holder of the licence he or she was ordinarily resident in South Australia;
- (c) the person is now ordinarily resident in South Australia and has continued to be ordinarily resident in South Australia since the time at which the person became the holder of the licence; and
- (d) the person has requested the Commission to revoke the licence under that corresponding law,

the Commission shall grant to the person a licence under this Part being a licence of the same kind and subject to the same conditions as the licence which the person has requested the Commission to revoke.

(2) Where at the time a person requests the Commission to revoke a licence as referred to in sub-section (1) that licence is suspended for a period, a licence granted pursuant to that sub-section consequent upon that request having been made shall be deemed to be suspended for the balance of that period.

(3) No fee is payable in respect of a licence granted pursuant to sub-section (1).;

18. In section 86 (6) of the Commonwealth Act for the words “that Act” (where twice occurring) there were substituted the words “that Code”;

19. In section 89 (2) of the Commonwealth Act for the words “that Act” there were substituted the words “that Code”;

20. In section 92 of the Commonwealth Act—

- (a) in subsection (3) (e) for the passage “*Business Names Ordinance 1963*” there were substituted the passage “*Business Names Act, 1963*”;
- (b) in subsection (20) for the words “that Act” there were substituted the words “that Code”;

21. In section 93 (9) of the Commonwealth Act for the words “that Act” there were substituted the words “that Code”;

22. In section 119 (1) of the Commonwealth Act—

- (a) for the words “any State or other Territory” there were substituted the words “any State other than South Australia or in any Territory”;
- (b) for the words “that State or other Territory” there were substituted the words “that other State or that Territory”;

23. In section 149 of the Commonwealth Act—

- (a) in subsection (2) (b) for the passage “*Act 1980*” there were substituted the passage “(*South Australia*) *Code*”;
- (b) in subsection (6) for the words “any other Act” there were substituted the words “any other Code or any Act”;

24. In section 153 of the Commonwealth Act for the words “a State or in another Territory” there were substituted the words “a State other than South Australia or in a Territory”;

25. Section 159 of the Commonwealth Act were repealed.

26. Section 160 of the Commonwealth Act were repealed.

## SCHEDULE 2

(Sec. 6)

### MODIFICATIONS TO REGULATIONS IN FORCE UNDER THE COMMONWEALTH ACT

The provisions of regulations in force for the time being under the Commonwealth Act apply as if in those regulations—

1. For the passage “*Futures Industry Regulations 1986*” or the words “Futures Industry Regulations” (wherever respectively occurring) there were substituted the passage “*Futures Industry (South Australia) Regulations*”;

2. For the words "the Act" or "that Act" (wherever respectively occurring) there were substituted the words "the Code";
3. Except in clause 3 of Futures Industry Form 16 in Schedule 2, for the passage "*Futures Industry Act 1986*" (wherever occurring) there were substituted the passage "*Futures Industry (South Australia) Code*";
4. For the words "the Territory" (wherever occurring, Form 19 in Schedule 2 excepted) there were substituted the words "South Australia";
5. For the passage "*Bankruptcy Act 1966*" (wherever occurring) there were substituted the passage "*Bankruptcy Act 1966 of the Commonwealth*";
6. For the passage "*Companies Act 1981*" (wherever occurring) there were substituted the passage "*Companies (South Australia) Code*";
7. For the words "a State or another Territory" (wherever occurring) there were substituted the words "a State other than South Australia or in a Territory";
8. In regulation 2 (1) for the definition of "local authority" there were substituted the following definition—  
"local authority" means the Corporate Affairs Commission;;
9. For the words "this Act" wherever occurring in a notice of relevant statutory provision in Forms 6, 7, 8, 9 and 10 in Schedule 2 there were substituted the words "this Code";
10. In clause 3 of the Futures Industry Form 16 in Schedule 2 for the passage "regulations under the *Futures Industry Act 1986*" there were substituted the words "the *Futures Industry (South Australia) Regulations*";
11. In Form 19 in Schedule 2 for the words "Corporate Affairs Commission for the Territory" (wherever occurring) there were substituted the words "Corporate Affairs Commission".

(Sec. 7).

## SCHEDULE 3

MODIFICATIONS TO REGULATIONS IN FORCE UNDER THE *FUTURES INDUSTRY (FEES) ACT 1986 OF THE COMMONWEALTH*

The provisions of regulations in force under the *Futures Industry (Fees) Act 1986* of the Commonwealth apply as if in those regulations—

1. A reference in the Schedule to a section or subsection, without an enactment being cited, were to be taken as a reference to that section or subsection of the *Futures Industry (South Australia) Code*.

(Sec. 9).

## SCHEDULE 4

PUBLICATION OF *FUTURES INDUSTRY (SOUTH AUSTRALIA) CODE*

The following headings and sections shall be included in the publication of the provisions of the Commonwealth Act under section 9:

## FUTURES INDUSTRY (SOUTH AUSTRALIA) CODE

relating to the futures industry in South Australia.

## PART I—PRELIMINARY

1. This Code may be cited as the *Futures Industry (South Australia) Code*.
2. This Code comes into operation on the day on which the *Futures Industry (Application of Laws) Act, 1986*, comes into operation.
3. This Code shall be read and construed together with the agreement made on 22 December 1978 between the Commonwealth and the States in relation to a proposed scheme for the co-operative regulation of companies and the securities industry, as amended or affected by subsequent agreements, and has effect subject to and in accordance with—
  - (a) the *Futures Industry (Application of Laws) Act, 1986*; and
  - (b) the *Companies and Securities (Interpretation and Miscellaneous Provisions) (Application of Laws) Act, 1981*.

## SCHEDULE 5

(Sec. 10).

## PUBLICATION OF FUTURES INDUSTRY (SOUTH AUSTRALIA) REGULATIONS

The following heading and provisions shall be included in the publication under section 10 of the provisions of regulations in force for the time being under the Commonwealth Act:

## FUTURES INDUSTRY (SOUTH AUSTRALIA) REGULATIONS

1. (1) These regulations may be cited as the *Futures Industry (South Australia) Regulations*.
- (2) These regulations come into operation on the day on which the Futures Industry (Application of Laws) Act, 1986, comes into operation.

## SCHEDULE 6

(Sec. 11).

## PUBLICATION OF FUTURES INDUSTRY (FEES) (SOUTH AUSTRALIA) REGULATIONS

The following heading and provisions shall be included in the publication under section 11 of the Schedule to regulations in force for the time being prescribing fees under the *Futures Industry (Fees) Act 1986* of the Commonwealth:

## FUTURES INDUSTRY (FEES) (SOUTH AUSTRALIA) REGULATIONS

1. (1) These regulations may be cited as the *Futures Industry (Fees) (South Australia) Regulations*.
- (2) These regulations come into operation on the day on which the Futures Industry (Application of Laws) Act, 1986, comes into operation.
2. In Schedule 1, a reference to a section or sub-section, without an enactment being cited, shall be taken as a reference to that section or sub-section of the *Futures Industry (South Australia) Code*.
3. The fees payable for the purposes of section 7 of the Futures Industry (Application of Laws) Act, 1986, are the fees specified in Schedule 1 in relation to the respective matters so specified.

## SCHEDULE 1

(Reg. 3).

## FEES

In the name and on behalf of Her Majesty, I hereby assent to this Bill.

D. B. DUNSTAN, Governor

# FUTURES INDUSTRY (SOUTH AUSTRALIA) CODE

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**FUTURES INDUSTRY (SOUTH AUSTRALIA) CODE**

[As at 1 December 1986]

SOUTH AUSTRALIA

**FUTURES INDUSTRY (SOUTH AUSTRALIA) CODE**

relating to the futures industry in South Australia

**PART I—PRELIMINARY**

**Short title**

1. This Code may be cited as the *Futures Industry (South Australia) Code*.

**Commencement**

2. This Code comes into operation on the day on which the Futures Industry (Application of Laws) Act, 1986, comes into operation.

**Agreement, &c.**

3. This Code shall be read and construed together with the agreement made on 22 December 1978 between the Commonwealth and the States in relation to a proposed scheme for the co-operative regulation of companies and the securities industry, as amended or affected by subsequent agreements, and has effect subject to and in accordance with—

(a) the Futures Industry (Application of Laws) Act, 1986; and

(b) the Companies and Securities (Interpretation and Miscellaneous Provisions) (Application of Laws) Act, 1981.

**Interpretation**

4. (1) In this Code, unless the contrary intention appears—

“accounting records” includes invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes, vouchers and other documents of prime entry and also includes such working papers and other documents as are necessary to explain the methods and calculations by which accounts are made up;

“acquire”, in relation to a futures contract, means—



- (a) except in the case of a futures option or of a prescribed exchange-traded option—enter into, or take an assignment of, the futures contract; or
- (b) in the case of a futures option or of a prescribed exchange-traded option—take, or take an assignment of, the futures option or prescribed exchange-traded option,

whether or not on behalf of another person;

“adjustment agreement” means a standardised agreement the effect of which is that—

- (a) a particular person will either be under an obligation to pay, or will have a right to receive, an amount of money;
- (b) whether the person will be under an obligation to pay, or will have a right to receive, the amount of money will depend on a particular state of affairs existing at a particular future time, including, without limiting the generality of the foregoing, a state of affairs that relates to fluctuations in the value or price of a commodity or other property, or in an index or other factor; and
- (c) the amount of money will be calculated in a particular manner by reference to that state of affairs,

whether or not the agreement has any other effect or is capable of being varied or discharged before that future time;

“amount” includes a nil amount;

“banker’s books” means—

- (a) books of a banking corporation, including any documents used in the ordinary business of a banking corporation;
- (b) cheques, orders for the payment of money, bills of exchange and promissory notes in the possession or under the control of a banking corporation; and
- (c) documents that create or evidence futures contracts and are in the possession, or under the control, of a banking corporation;

“banking corporation” means—

- (a) a bank as defined in section 5 of the *Banking Act 1959* of the Commonwealth; or
- (b) a bank constituted under a law in force in a State or in a Territory;

“Board”, in relation to a body corporate, means the board of directors, committee of management, council or other governing body of the body corporate;

“books” includes any register or other record of information and any accounts or accounting records, however compiled, recorded or stored and also includes any document;

“bought position” means—

- (a) in relation to a commodity agreement, or in relation to a futures contract, being a commodity agreement—the position of a person who, by virtue of the agreement, is under an obligation to accept delivery in accordance with the agreement; or
- (b) in relation to a futures contract, being an adjustment agreement—the position of a person who, by virtue of the agreement—
  - (i) will, if the value or worth of the agreement (as determined in accordance with the agreement) as at a particular future time is less by a particular amount than the value or worth of the agreement (as so determined) as at a particular earlier time, be under an obligation to pay that amount; and
  - (ii) will, if the value or worth of the agreement (as so determined) as at a particular future time exceeds by a particular amount the value or worth of the agreement (as so determined) as at a particular earlier time, have a right to receive that amount;

“broker” means futures broker;

“business day” means a day that is not a Saturday, a Sunday or a public holiday or bank holiday in South Australia;

“business rules”, in relation to a body corporate, means—

- (a) in the case of a body corporate that provides, or proposes to provide, clearing house facilities for a futures market—rules, regulations and by-laws governing—
  - (i) the activities and conduct of the body corporate and its members; and
  - (ii) the activities and conduct of other persons in relation to the provision by the body corporate of clearing house facilities for a futures market,being rules, regulations and by-laws made by the body corporate or contained in its constituent documents;
- (b) in the case of a body corporate that operates, or proposes to operate, as a futures association—rules, regulations and by-laws governing the activities and conduct of the body corporate and its members in relation to the operation of the body corporate as a futures association, being rules, regulations and by-laws made by the body corporate or contained in its constituent documents; or
- (c) in the case of a body corporate that maintains or provides, or proposes to maintain or provide, a futures market—rules, regulations and by-laws governing—
  - (i) the activities and conduct of the body corporate and its members;
  - (ii) the activities and conduct of each clearing house for the body corporate; and

(iii) the activities and conduct of other persons in relation to each futures market maintained or provided by the body corporate,

being rules, regulations and by-laws made by the body corporate or contained in its constituent documents;

“clearing house”, except in Division 1 of Part II, means—

(a) in relation to a body corporate—

(i) in any case—a person who provides, or proposes to provide, clearing house facilities for a futures market maintained or provided by that body corporate; or

(ii) in the case of a futures exchange—a body corporate in relation to which an approval as a clearing house for that futures exchange is in force under sub-section 48 (1); and

(b) in relation to a futures market—

(i) in any case—a person who provides, or proposes to provide, clearing house facilities for that futures market; or

(ii) in the case of a futures market of a futures exchange—a body corporate in relation to which an approval as a clearing house for that futures exchange is in force under sub-section 48 (1);

“clearing house facilities”, in relation to a futures market, means facilities for the registration of futures contracts made on that futures market;

“client”, in relation to a futures broker, means a person on behalf of whom the broker deals, or from whom the broker accepts instructions to deal, in futures contracts;

“close out”, in relation to a futures contract, means—

(a) discharge the obligations of the person in the bought position, or sold position, under the futures contract as a result of the matching up of the futures contract with a futures contract of the same kind under which the person has assumed an offsetting sold position, or offsetting bought position, as the case may be; or

(b) otherwise discharge the obligations of a party to the futures contract;

“commodity” means—

(a) any thing that is capable of delivery pursuant to an agreement for its delivery; or

(b) without limiting the generality of paragraph (a), an instrument creating or evidencing a thing in action;

“commodity agreement” means a standardised agreement the effect of which is that—

(a) a person is under an obligation to make delivery; or

(b) a person is under an obligation to accept delivery, at a particular future time of a particular quantity of a particular commodity for a particular price or for a price to be calculated in a particular manner, whether or not—

(c) the subject matter of the agreement is in existence;

(d) the agreement has any other effect; or

(e) the agreement is capable of being varied or discharged before that future time;

“Commonwealth Minister” means the Minister of State for the Commonwealth for the time being administering the *Futures Industry Act 1986* of the Commonwealth;

“director”, in relation to a body corporate, includes—

(a) any person occupying or acting in the position of director of the body corporate, by whatever name called, and whether or not validly appointed to occupy, or duly authorised to act in, the position;

(b) any person in accordance with whose directions or instructions the directors of the body corporate are accustomed to act; and

(c) in the case of a body corporate incorporated or formed outside South Australia—

(i) a member of the committee of management, council or other governing body of the body corporate;

(ii) any person occupying or acting in the position of member of the committee of management, council or other governing body of the body corporate, by whatever name called and whether or not validly appointed to occupy or duly authorised to act in the position; and

(iii) any person in accordance with whose instructions the members of the committee of management, council or other governing body of the body corporate are accustomed to act;

“dispose of”, in relation to a futures contract, means—

(a) except in the case of a futures option or of a prescribed exchange-traded option—take, or cause to be taken, such action as closes out the futures contract; or

(b) in the case of a futures option or of a prescribed exchange-traded option—

(i) grant, assign or exercise the futures option or prescribed exchange-traded option;

(ii) take, or cause to be taken, such action as releases the futures option or prescribed exchange-traded option; or

(iii) allow the futures option or prescribed exchange-traded option to lapse,

whether or not on behalf of another person;

“eligible commodity agreement” means a commodity agreement (in this definition referred to as the “relevant agreement”), where, at the time when the relevant agreement—

- (a) unless paragraph (b) applies—is entered into; or
- (b) if the relevant agreement is not a commodity agreement at the time when it is entered into—becomes a commodity agreement,

it appears likely, having regard to all relevant circumstances (other than the respective intentions of the person in the sold position, and the person in the bought position, under the relevant agreement), including, without limiting the generality of the foregoing—

- (c) the provisions of any agreement;
- (d) the rules and practices of any market; and
- (e) the manner in which the respective obligations of persons in sold positions, and persons in bought positions, under agreements of the same kind as the first-mentioned agreement are generally discharged,

that—

- (f) the obligation of the person in the sold position under the relevant agreement to make delivery in accordance with the relevant agreement will be discharged otherwise than by the person so making delivery;
- (g) the obligation of the person in the bought position under the relevant agreement to accept delivery in accordance with the relevant agreement will be discharged otherwise than by the person so accepting delivery; or
- (h) the person in the sold position, or bought position, under the relevant agreement will assume an offsetting bought position, or offsetting sold position, as the case may be, under an agreement of the same kind as the relevant agreement;

“exchange member”, in relation to a futures exchange, means—

- (a) a person who is a member of the futures exchange;
- (b) a partnership that is a member of the futures exchange; or
- (c) a member of such a partnership;

“executive officer”, in relation to a body corporate, means any person, by whatever name called, and whether or not a director of the body corporate, who is concerned in, or takes part in, the management of the body corporate;

“exempt futures market” means a futures market in relation to which, or a futures market included in a class of futures markets, being a class in relation to which, a declaration under sub-section 45 (2) is in force;

“function” includes a duty;

“futures adviser” means—

- (a) a person who carries on, or 2 or more persons who together carry on, a business of advising other persons concerning futures contracts; or
- (b) a person who issues or publishes, or 2 or more persons who together issue or publish, in the course of carrying on a business, analyses or reports concerning futures contracts,

whether or not that business is part of, or is carried on in conjunction with, any other business but does not include a person who is the proprietor or publisher of a newspaper or periodical that is generally available to the public otherwise than only on subscription and who, only in such a newspaper or periodical of which the person is the proprietor or publisher, advises other persons concerning futures contracts or issues or publishes analyses or reports concerning futures contracts, not being the proprietor or publisher of a newspaper or periodical whose principal or only object is to advise other persons concerning futures contracts or to issue or publish analyses or reports concerning futures contracts;

“futures adviser’s licence” means a futures adviser’s licence granted under Part IV;

“futures adviser’s representative” means a person who is employed by, or acts for or by arrangement with, a futures adviser (other than a futures adviser who is the holder of a futures broker’s licence or is an exempt broker) in connection with a business that is carried on by the futures adviser of advising other persons, or in the course of which analyses or reports are issued or published, concerning futures contracts;

“futures adviser’s representative’s licence” means a futures adviser’s representative’s licence granted under Part IV;

“futures association” means a body corporate that is approved by the Ministerial Council under section 50;

“futures broker” means—

- (a) a person who carries on, or 2 or more persons who together carry on, a business of dealing in futures contracts on behalf of others, whether or not the person, or any of the persons, as the case may be, also deals in futures contracts on the person’s own account, and whether or not the business is part of, or is carried on in conjunction with, any other business; or
- (b) the holder of a futures broker’s licence;

“futures broker’s licence” means a futures broker’s licence granted under Part IV;

“futures broker’s representative” means a person who is employed by, or acts for or by arrangement with, a futures broker other than an exempt broker in connection with a business of dealing in futures contracts carried on by the futures broker;

“futures broker’s representative’s licence” means a futures broker’s representative’s licence granted under Part IV;

“futures contract” means—

- (a) an agreement that is, or has at any time been, an eligible commodity agreement or an adjustment agreement;

- (b) a futures option; or
- (c) a prescribed exchange-traded option,

but does not include—

- (d) an agreement—
  - (i) that is—
    - (A) a currency swap;
    - (B) an interest rate swap;
    - (C) a forward exchange rate contract; or
    - (D) a forward interest rate contract; and
  - (ii) to which a banking corporation or a merchant bank is a party; or
- (e) an agreement that, at the time when it is entered into, is included in a class of agreements prescribed for the purposes of this paragraph;

“futures exchange” means a body corporate that is approved by the Ministerial Council under section 46;

“*Futures Industry (South Australia) Code*” or “Code” means the provisions applying by reason of section 5 of the Futures Industry (Application of Laws) Act, 1986;

“futures market” means a market, exchange or other place at which, or a facility by means of which, futures contracts are regularly made;

“futures option” means an option or right to assume, at a specified price or value and within a specified period, a bought position, or a sold position, in relation to an eligible commodity agreement or in relation to an adjustment agreement;

“insolvent under administration” means a person who—

- (a) under the *Bankruptcy Act 1966* of the Commonwealth or the law of an external Territory, is a bankrupt under a bankruptcy from which he has not been discharged; or
- (b) under the law of a country other than Australia or the law of an external Territory, has the status of an undischarged bankrupt,

and includes—

- (c) a person who has executed a deed of arrangement under Part X of the *Bankruptcy Act 1966* of the Commonwealth or the corresponding provisions of the law of an external Territory or of the law of a country other than Australia where the terms of the deed have not been fully complied with; and
- (d) a person whose creditors have accepted a composition under Part X of the *Bankruptcy Act 1966* of the Commonwealth or the corresponding provisions of the law of an external Territory or of the law of a country other than Australia where a final payment has not been made under that composition;

**“licence” means—**

- (a) a futures broker’s licence;**
- (b) a futures broker’s representative’s licence;**
- (c) a futures adviser’s licence; or**
- (d) a futures adviser’s representative’s licence;**

**“liquidating trade” means a transaction whereby, for the purpose of closing out a futures contract, the person in the bought position, or sold position, under the futures contract assumes an offsetting sold position, or offsetting bought position, as the case may be, under another futures contract;**

**“local recognised futures exchange” means a body corporate that—**

- (a) is a futures exchange for the purposes of a corresponding law in force in a participating State or in a participating Territory; or**
- (b) is, by virtue of a law in force in a participating State or in a participating Territory, to be deemed to be a futures exchange for the purposes of the corresponding law in force in that State or Territory;**

**“Minister” means the Minister of State for South Australia for the time being administering the Futures Industry (Application of Laws) Act, 1986;**

**“obligation” includes an obligation enforceable neither at law nor in equity;**

**“officer”, in relation to a body corporate, includes—**

- (a) a director, secretary, executive officer or employee of the body corporate;**
- (b) a receiver and manager of property of the body corporate appointed under a power contained in an instrument;**
- (c) an official manager or deputy official manager of the body corporate;**
- (d) a liquidator of the body corporate appointed in a voluntary winding up of the body corporate; and**
- (e) a trustee or other person administering a compromise or arrangement made between the body corporate and another person or other persons,**

**but does not include—**

- (f) a receiver who is not also a manager;**
- (g) a receiver and manager appointed by a court; or**
- (h) a liquidator appointed by a court;**

**“on”, in relation to a futures market, means at or by means of;**

**“on behalf of” includes on the instructions of;**

**“prescribed exchange-traded option” means a contract entered into on a futures market of a futures exchange or of a local recognised futures exchange, being a contract under which a party to the contract acquires from another party to the contract an option or right, exercisable at or before a specified time—**



- (a) to purchase from, or to sell to, that other party a specified quantity of a specified commodity at a price specified in, or to be determined in accordance with, the contract; or
- (b) to be paid by that other party an amount of money to be determined by reference to the amount by which a specified number is greater or less than the number of a specified index, being the Australian Stock Exchanges All Ordinaries Price Index or a prescribed index, as at the time when the option or right is exercised;

“price” includes any amount payable for the delivery of a commodity under an agreement;

“recognised futures adviser” means, subject to sub-section 11 (1), a person who is the holder of a futures adviser’s licence under the provisions of a law in force in a participating State or in a participating Territory that correspond with Part IV;

“recognised futures adviser’s representative” means, subject to sub-section 11 (2), a person who is the holder of a futures adviser’s representative’s licence under the provisions of a law in force in a participating State or in a participating Territory that correspond with Part IV;

“recognised futures broker” means, subject to sub-section 11 (1), a person who is the holder of a futures broker’s licence under the provisions of a law in force in a participating State or in a participating Territory that correspond with Part IV;

“recognised futures broker’s representative” means, subject to sub-section 11 (2), a person who is the holder of a futures broker’s representative’s licence under the provisions of a law in force in a participating State or in a participating Territory that correspond with Part IV;

“recognised futures exchange” means—

(a) a local recognised futures exchange; or

(b) a body corporate that—

(i) maintains or provides a futures market elsewhere than in South Australia, in a participating State or in a participating Territory; and

(ii) is prescribed, or is included in a class of bodies corporate that is prescribed, for the purposes of this paragraph;

“recognised licensee” means, subject to sub-sections 11 (1) and (2), a person who is a recognised futures broker, recognised futures broker’s representative, recognised futures adviser or recognised futures adviser’s representative;

“registered company auditor” has the same meaning as that expression has in the *Companies (South Australia) Code*;

“regulations” means the provisions applying as regulations made under this Code by reason of section 6 of the Futures Industry (Application of Laws) Act, 1986;

“relevant organisation”, except in Part VII, means a futures exchange, a local recognised futures exchange or a futures association;

“representative’s licence” means a futures broker’s representative’s licence or a futures adviser’s representative’s licence;

“right” includes a right enforceable neither at law nor in equity;

“sold position” means—

(a) in relation to a commodity agreement, or in relation to a futures contract, being a commodity agreement—the position of a person who, by virtue of the agreement, is under an obligation to make delivery in accordance with the agreement; or

(b) in relation to a futures contract, being an adjustment agreement—the position of a person who, by virtue of the agreement—

(i) will, if the value or worth of the agreement (as determined in accordance with the agreement) as at a particular future time exceeds by a particular amount the value or worth of the agreement (as so determined) as at a particular earlier time, be under an obligation to pay that amount; and

(ii) will, if the value or worth of the agreement (as so determined) as at a particular future time is less by a particular amount than the value or worth of the agreement (as so determined) as at a particular earlier time, have a right to receive that amount;

“standardised agreement” means an agreement that is one of 2 or more agreements each of which is an agreement of the same kind as the other, or as each of the others, as the case may be;

“trading floor”, in relation to a futures market maintained or provided by a body corporate, or in relation to a body corporate, means a place or facility maintained or provided by the body corporate for the acquisition or disposal of futures contracts by members of the body corporate, or by such members and other persons.

(2) For the purposes of this Code, where a person acquires, or disposes of, a futures contract on behalf of another person, the other person shall also be deemed to acquire, or to dispose of, as the case may be, the futures contract.

(3) Where—

(a) because of instructions given, or any other act done, by a person (in this sub-section referred to as the “relevant person”), the relevant person is, by virtue of—

(i) an application of sub-section (2); or

(ii) an application of sub-section (2) and an application, or 2 or more applications, of this sub-section,

to be deemed to acquire, or to dispose of, a futures contract; and

- (b) the relevant person gave the instructions, or did that other act, as the case may be, on behalf of another person,

then, for the purposes of this Code (other than sub-section (2) of this section)—

- (c) the relevant person shall be deemed to acquire, or to dispose of, as the case may be, the futures contract on behalf of the other person; and
- (d) the other person shall also be deemed to acquire, or to dispose of, as the case may be, the futures contract.

(4) For the purposes of this Code, a person shall not be regarded as a person in accordance with whose directions or instructions the directors of a body corporate are accustomed to act by reason only that the directors act on advice given by that person in the proper performance of the functions attaching to the person's professional capacity or to the person's business relationship with the directors or the body corporate.

(5) For the purposes of sub-paragraph (d) (ii) of the definition of "futures contract" in sub-section (1), a body corporate is a merchant bank at a particular time if, and only if, it is at that time a registered corporation included in—

- (a) the category for authorised money market dealers or, if there is at that time no such category, a prescribed category; or
- (b) the category for money market corporations or, if there is at that time no such category, a prescribed category.

(6) An expression used in sub-section (5) of this section and in the *Financial Corporations Act 1974* of the Commonwealth has the same meaning in that sub-section as in that Act.

(7) For the purposes of this Code (other than this sub-section), where an agreement that was not a futures contract at the time when it was entered into becomes a futures contract at a later time—

- (a) the parties to the agreement shall be deemed to enter into a futures contract at the later time; and
- (b) the agreement shall be deemed to constitute the futures contract referred to in paragraph (a).

(8) Where there is a reference in this Code to a class of futures contracts, then, except so far as the contrary intention appears—

- (a) nothing in this Code limits the manner in which the class may be determined; and
- (b) the class may be determined according to any factors relevant to futures contracts.

(9) Except so far as the contrary intention appears, a reference in this Code to a member, in relation to a body corporate, is, in a case where the body corporate is, or proposes to become, a futures exchange, a futures association, or both, and any of the rules, regulations or by-laws made by the body corporate or contained in its constituent documents provide for—

- (a) a separate class of membership for persons to whom the operation of the body corporate otherwise than as a futures exchange,

otherwise than as a futures association, or otherwise than as a futures exchange or as a futures association, as the case may be, relates (whether or not such persons may be members within another class of membership); or

(b) 2 or more such separate classes of membership,

a reference to a person in the person's capacity as a member of the body corporate within a class of membership other than the class referred to in paragraph (a), or other than the classes referred to in paragraph (b), as the case may be.

(10) A reference in this Code to an obligation of a particular kind includes a reference to alternative obligations one of which is an obligation of that kind.

(11) For the purposes of this Code, the question whether bodies corporate are related to each other shall be determined in the same manner as the question whether corporations within the meaning of the *Companies (South Australia) Code* are related to each other would be determined under that Code.

(12) In this Code, a reference to a Commonwealth Act shall be construed as including a reference to that Act as amended and in force for the time being and to an Act passed in substitution for that Act.

(13) In this Code—

(a) a reference to a previous law, or provision of a previous law, or previous enactment, of South Australia corresponding to, or to a provision of, the *Companies (South Australia) Code* includes a reference to, or to a provision of, the Companies Act, 1962; and

(b) a reference to a previous law, or provision of a previous law, or previous enactment, of another State or of a Territory corresponding to, or to a provision of, the *Companies (South Australia) Code* includes a reference to, or to a provision of, the law in force in that State or Territory corresponding to the Companies Act, 1962.

### Agreements

5. (1) In this Code, unless the contrary intention appears, "agreement" means any agreement, arrangement or understanding—

- (a) whether formal or informal or partly formal and partly informal;
- (b) whether written or oral or partly written and partly oral; and
- (c) whether or not having legal or equitable force and whether or not based on legal or equitable rights.

(2) Except so far as the contrary intention appears—

- (a) a reference in this Code to an agreement includes a reference to—
  - (i) a proposed agreement;
  - (ii) an agreement as varied, or as proposed to be varied;
  - (iii) in a case where an agreement has been varied—the agreement as in force at any time before the variation; or

- (iv) in a case where an agreement has been discharged—the agreement as in force at any time before its discharge; and
- (b) a reference in this Code to a party to an agreement is, in the case of a proposed or discharged agreement, a reference to a person who would be a party to the agreement if the agreement were in effect.

(3) For the purposes of this Code, an agreement is of the same kind as another agreement if, and only if, the provisions of the first-mentioned agreement are the same as, or not materially different from, the provisions of the other agreement, disregarding—

- (a) the fact that the parties to the respective agreements are different; and
- (b) any differences in the amounts payable under corresponding provisions of the respective agreements.

#### **Associated persons**

6. (1) A reference in this Code to a person associated with another person is a reference to—

- (a) if the other person is a body corporate—
  - (i) a director or secretary of the body corporate;
  - (ii) a body corporate that is related to that other person; or
  - (iii) a director or secretary of such a related body corporate;
- (b) a person in concert with whom the other person is acting, or proposes to act, in relation to the matter to which the reference relates;
- (c) a person who carries on a business of dealing in futures contracts in partnership with the other person;
- (d) subject to sub-section (2), a person who is a partner of the other person otherwise than by reason that the first-mentioned person carries on a business of dealing in futures contracts in partnership with the other person;
- (e) a trustee of a trust in relation to which the other person benefits or is capable of benefiting otherwise than by reason of transactions entered into in the ordinary course of business in connection with the lending of money;
- (f) a person who is a director of a body corporate that carries on a business of dealing in futures contracts and of which the other person is also a director;
- (g) subject to sub-section (2), a person who is a director of a body corporate of which the other person is a director, not being a body corporate that carries on a business of dealing in futures contracts;
- (h) a person with whom the other person is, by virtue of the regulations, to be regarded as associated in respect of the matter to which the reference relates;

- (j) a person with whom the other person is, or proposes to become, associated, whether formally or informally, in any other way in respect of the matter to which the reference relates; or
- (k) if the other person has entered into, or proposes to enter into, a transaction, or has done, or proposes to do, any other act or thing, with a view to becoming associated with a person as mentioned in any of the preceding paragraphs—that last-mentioned person.

(2) Where, in proceedings under this Code, it is alleged that a person referred to in paragraph (1) (d) or (g) was associated with another person at a particular time, that person shall be deemed not to have been so associated in relation to a matter to which the proceedings relate unless the person alleging the association proves that the first-mentioned person at that time knew or ought reasonably to have known the material particulars of that matter.

(3) For the purposes of this Code, where 2 or more persons constitute a futures broker or futures adviser, a person is associated with the futures broker or with the futures adviser, as the case may be, if the person is associated with either or any of those persons.

(4) A person shall not be taken to be associated with another person by virtue of paragraph (1) (b), (h) or (j) by reason only that one of those persons furnishes advice to, or acts on behalf of, the other person, in the proper performance of the functions attaching to the person's professional capacity or to the person's business relationship with the other person.

#### **Dealing in futures contracts**

7. (1) Subject to sub-section (2), a person shall be taken, for the purposes of this Code, to deal in a futures contract if, and only if, the person—

- (a) acquires, or disposes of, the futures contract;
- (b) offers to acquire, or to dispose of, the futures contract; or
- (c) induces, or attempts to induce, another person to acquire, or to dispose of, the futures contract.

(2) A person shall be taken, for the purposes of this Code, to deal in a futures contract on behalf of another person if, and only if, the first-mentioned person acquires, or disposes of, the futures contract on behalf of the other person, or offers so to acquire, or so to dispose of, the futures contract.

(3) In determining for the purposes of this Code whether a person who is not a resident of Australia or of an external Territory deals in a futures contract on behalf of another person, regard shall not be had to an act done on behalf of the first-mentioned person by the holder of a futures broker's licence, by an exempt broker or by a recognised futures broker.

#### **Dealings and transactions on a person's own account**

8. (1) For the purposes of this Code—

- (a) a reference to a person dealing in a futures contract, or entering into a transaction, on the person's own account includes a ref-

erence to a person dealing in a futures contract, or entering into a transaction—

- (i) on behalf of a person associated with the first-mentioned person;
  - (ii) on behalf of a body corporate in which the person has a controlling interest; or
  - (iii) where the person carries on business as a futures broker in partnership—on behalf of a body corporate in which the person's interest and the interests of the other partners together constitute a controlling interest; and
- (b) a futures broker who is a member of a futures exchange or of a recognised futures exchange shall not be taken to be dealing in a futures contract, or entering into a transaction, on the broker's own account by reason only that the dealing is with, or the transaction is entered into with, another futures broker who is a member of a futures exchange or of a recognised futures exchange.

(2) Notwithstanding section 6, a person is not associated with another person for the purposes of sub-section (1) by reason only that the first-mentioned person is—

- (a) a partner of the other person otherwise than because the first-mentioned person carries on a business of dealing in futures contracts in partnership with the other person; or
- (b) a director of a body corporate of which the other person is also a director, whether or not the body corporate carries on a business of dealing in futures contracts.

#### **Discretionary accounts**

9. For the purposes of this Code, a reference to operation by a futures broker on a discretionary account is a reference to dealings by the broker in futures contracts on instructions of another person that authorise the broker to deal in futures contracts without the prior approval of that other person, whether—

- (a) the instructions are given by, and the money used for operating on the account is provided by, one person only; or
- (b) the instructions are given by, and the money used for operating on the account is contributed as a common fund by, each of a number of persons,

not being dealings on instructions that authorise dealings in futures contracts without the prior approval of that other person only as to the time when or the price at which the dealings are to be effected, or both.

#### **Exempt brokers**

10. (1) In this Code, unless the contrary intention appears, "exempt broker" means—

- (a) a body corporate, or a body corporate included in a class of bodies corporate, prescribed for the purposes of this paragraph;
- (b) a body corporate—

- (i) that is incorporated within Australia;
  - (ii) that is a public authority or an instrumentality or agency of the Crown in right of the Commonwealth, of a State or of a Territory; and
  - (iii) in relation to which, or in relation to a class of bodies corporate including which, a declaration by the Ministerial Council is in force under sub-section (2); or
- (c) subject to sub-section (4), a person who carries on a business of dealing in futures contracts on behalf of others, but does so only in one or more of the following capacities:
- (i) as an official receiver or trustee within the meaning of the *Bankruptcy Act 1966* of the Commonwealth;
  - (ii) as an official manager, receiver, receiver and manager or as a person appointed by a court to carry on the business concerned;
  - (iii) as the personal representative of a deceased futures broker;
  - (iv) such other capacity as is prescribed,
- or in such other circumstances as are prescribed.

(2) The Ministerial Council may, by instrument in writing, declare a specified body corporate, or a body corporate included in a specified class of bodies corporate, to be a body corporate in relation to which paragraph (1) (b) applies.

(3) The Commission shall cause a copy of an instrument executed under sub-section (2) to be published in the *Gazette* and the *Government Gazette*, but failure of the Commission to do so does not affect the validity of the instrument.

(4) A person who, but for this sub-section, would be an exempt broker because the person carries on business as a futures broker only in the capacity of personal representative of a deceased broker, ceases to be an exempt broker at the end of the period of 6 months after the date of the death of the broker or upon the person being discharged or removed as such a personal representative or upon the final distribution of the estate of the broker, whichever first occurs.

#### **Certain persons not to be taken to be recognised licensees**

11. (1) For the purposes of this Code, a person, being the holder of a futures broker's licence, or of a futures adviser's licence, under a corresponding law in force in a participating State or in a participating Territory, is not, after the proclaimed day, a recognised licensee unless—

- (a) in the case of a natural person, not being a partner in a firm dealing in futures contracts—the person is ordinarily resident in that State or Territory;
- (b) in the case of a natural person who is a partner in such a firm—the principal place of business of the firm is in that State or Territory; or
- (c) in the case of a body corporate—the body corporate was incorporated in that State or Territory.



(2) For the purposes of this Code, a person, being the holder of a representative's licence under a corresponding law in force in a participating State or in a participating Territory, is not, after the proclaimed day, a recognised licensee unless the futures broker or futures adviser by whom the person is employed, or for or by arrangement with whom the person acts, holds a licence as a futures broker or futures adviser, as the case may be, under that law.

(3) A reference in sub-section (1) or (2) to the proclaimed day is a reference to a day to be fixed for the purposes of sub-section 11 (3) of the *Futures Industry Act, 1986* of the Commonwealth by Proclamation made by the Governor-General and published in the *Gazette*.

## PART II—ADMINISTRATION

### *Division 1—General*

#### **Interpretation**

12. In this Division—

“books” includes banker's books;

“clearing house” means—

- (a) a person who provides clearing house facilities for a futures market; or
- (b) a body corporate in relation to which an approval as a clearing house for a futures exchange is in force under sub-section 48 (1).

#### **Power of Commission to require production of books**

13. (1) The powers of the Commission under sub-section (3), or the powers of an authorised person under sub-section (4), to make a requirement of a person shall not be exercised except—

- (a) for the purpose of—
  - (i) the performance of a function, or the exercise of a power, by the Commission under a relevant Code; or
  - (ii) ensuring compliance with the provisions of a relevant Code; or
- (b) where the requirement relates to a matter that constitutes or may constitute—
  - (i) a contravention of a provision of a relevant Code; or
  - (ii) an offence relating to futures contracts that involves fraud or dishonesty.

(2) A reference in sub-section (1) to a relevant Code includes a reference to the provisions of a law in force in a participating State or in a participating Territory that correspond with a relevant Code.

(3) The Commission may, at any time, by notice in writing—

- (a) give a direction to—
  - (i) a futures exchange, a clearing house or a futures association;

- (ii) a member of the Board of a futures exchange, a clearing house or a futures association;
- (iii) a person who is or has been (either alone or together with another person or other persons) a futures broker or a futures adviser or is or has been a futures broker's representative, a futures adviser's representative or a member of a futures association;
- (iv) a nominee controlled by a person referred to in sub-paragraph (iii) or jointly controlled by 2 or more persons at least one of whom is a person referred to in that sub-paragraph;
- (v) a person who is or has been an officer or employee of, or an agent, banker, solicitor, auditor or other person acting in any capacity for or on behalf of, a futures exchange, a clearing house, a member of a futures association or a person referred to in sub-paragraph (ii), (iii) or (iv); or
- (vi) any other person who, in the opinion of the Commission, has been a party to any dealing in futures contracts,

requiring the production, to a person authorised by the Commission to receive them, at such time and place as are specified in the direction, of such books as are so specified, being books relating to—

- (vii) the business or affairs of a futures exchange, a clearing house or a futures association;
  - (viii) any dealing in futures contracts;
  - (ix) any advice concerning futures contracts or the issuing or publication of a report or analysis concerning futures contracts;
  - (x) the character or financial position of, or any business carried on by, a person referred to in sub-paragraph (iii) or (iv); or
  - (xi) an audit of, or any report of an auditor concerning, a dealing in futures contracts or any accounts or records of a futures broker or a futures adviser; or
- (b) give a direction to any person requiring the production, to a person authorised by the Commission to receive them, at such time and place as are specified in the direction, of any books relating to matters mentioned in sub-paragraph (a) (vii), (viii), (ix), (x) or (xi) that are in the custody or under the control of the person.

(4) The Commission may from time to time authorise a person, on producing (if required to do so) such evidence of the person's authority as is prescribed—

- (a) to require by notice in writing a futures exchange, a clearing house, a futures association or a person referred to in sub-paragraph (3) (a) (ii), (iii), (iv), (v) or (vi) to produce to the authorised person forthwith or, if a time and place at which the books are to be produced are specified in the notice, at that time and place, such books relating to matters mentioned in sub-paragraph (3) (a) (vii), (viii), (ix), (x) or (xi) as are specified by the authorised person and as are in the custody or under the control of the

futures exchange, clearing house, futures association or person of whom the requirement is made; or

(b) to require by notice in writing a futures exchange, a clearing house, a futures association or any other person to produce to the authorised person forthwith or, if a time and place at which the books are to be produced are specified in the notice, at that time and place, any books relating to matters mentioned in subparagraphs (3) (a) (vii), (viii), (ix), (x) and (xi) that are in the custody or under the control of the futures exchange, clearing house, futures association or other person.

(5) A reference in sub-section (3) to a dealing in futures contracts or to a business carried on by a person includes a reference to a dealing in futures contracts by a person as a trustee or to a business carried on by a person as a trustee, as the case may be.

(6) An authorisation under sub-section (4) may be of general application or may be limited to making requirements of a particular futures exchange, clearing house, futures association or other person or particular futures exchanges, clearing houses, futures associations or other persons.

(7) Where the Commission, or a person authorised by the Commission, requires the production of any books under this section and a person has a lien on the books, the production of the books does not prejudice the lien.

(8) Where the Commission, or a person authorised by the Commission, exercises a power under this section to require another person to produce books—

(a) in a case where the books are produced—the person to whom the books are produced—

(i) may take possession of the books and make copies of, or take extracts from, the books;

(ii) may require the other person, or any person who was a party to the compilation of the books, to make a statement providing any explanation that the person concerned is able to provide as to a matter relating to the compilation of the books or as to any matter to which the books relate;

(iii) may retain possession of the books for such period as is necessary to enable the books to be inspected, and copies of, or extracts from, the books to be made or taken, by or on behalf of the Commission; and

(iv) during that period shall permit a person who would be entitled to inspect any one or more of the books if they were not in the possession of the person to whom the books were produced to inspect at all reasonable times such of the books as that person would be so entitled to inspect; or

(b) in any other case—the Commission or the authorised person may require the other person—

(i) to state, to the best of the other person's knowledge and belief, where the books may be found; and

- (ii) to identify the person who, to the best of the other person's knowledge and belief, last had custody of the books and to state, to the best of the other person's knowledge and belief, where that person may be found.

(9) A person who complies or proposes to comply with a direction given or purporting to have been given under sub-section (3) or a requirement made or purporting to have been made under sub-section (4) is not liable to any proceedings in respect of that compliance or proposed compliance.

(10) A power conferred by this section to make a requirement of a person extends, if the person is a body corporate, including a body corporate that is in the course of being wound up, or was a body corporate, being a body corporate that has been dissolved, to making that requirement of any person who is or has been an officer of the body corporate.

(11) In sub-section (10), "officer", in relation to a body corporate, includes—

- (a) a director, secretary, executive officer or employee of the body corporate;
- (b) a receiver, or a receiver and manager, of property of the body corporate;
- (c) an official manager or a deputy official manager of the body corporate;
- (d) a liquidator or provisional liquidator of the body corporate; or
- (e) a trustee or other person administering a compromise or arrangement made between the body corporate and another person or other persons.

#### **Power of magistrate to issue warrant to seize books**

**14.** (1) If a magistrate is satisfied on information on oath or affirmation laid by an employee of the Commission, or by another person authorised in writing by the Commission, that there are reasonable grounds for suspecting that there are on particular premises in South Australia any books the production of which has been required by virtue of section 13 or by virtue of a provision of a law in force in a participating State or in a participating Territory that corresponds with section 13 and which have not been produced in compliance with that requirement, the magistrate may issue a warrant authorising any member of the police force of South Australia, together with any other person named in the warrant—

- (a) to enter those premises (using such force as is necessary for the purpose);
- (b) to search the premises and to break open and search any cupboard, drawer, chest, trunk, box, package or other receptacle, whether a fixture or not, in the premises;
- (c) to take possession of, or secure against interference, any books that appear to be books the production of which was so required; and
- (d) to deliver any books possession of which is so taken into the possession of a person authorised by the Commission to receive them.

(2) The information laid for the purposes of sub-section (1) shall state that the person laying the information suspects that there are on particular premises in South Australia books the production of which has been required under section 13 or under a provision of a law in force in a participating State or in a participating Territory that corresponds with section 13 and which have not been produced in compliance with that requirement and shall specify the grounds on which the person so suspects.

(3) Where a magistrate issues a warrant under sub-section (1), the magistrate shall state on the information laid under that sub-section—

- (a) which of the grounds set out in the information as required by sub-section (2) the magistrate has relied on to justify the issue of the warrant; and
- (b) particulars of any other grounds relied on by the magistrate to justify the issue of the warrant.

(4) There shall be stated in a warrant issued under this section—

- (a) whether entry is authorised to be made at any time of the day or night or during specified hours of the day or night; and
- (b) a date, being a date not later than 7 days after the date of issue of the warrant, upon which the warrant ceases to have effect.

(5) Where, under this section, a person takes possession of, or secures against interference, any books and a person has a lien on the books, the taking of possession of the books or the securing of the books against interference does not prejudice the lien.

(6) Where, under this section, a person takes possession of, or secures against interference, any books, or has any books delivered to the person's possession under paragraph (1) (d), the person—

- (a) may make copies of, or take extracts from, the books;
- (b) may require any person who was a party to the compilation of the books to make a statement providing any explanation that that person is able to provide as to any matter relating to the compilation of the books or as to any matter to which the books relate;
- (c) may retain possession of the books for such period as is necessary to enable the books to be inspected, and copies of, or extracts from, the books to be made or taken, by or on behalf of the Commission; and
- (d) during that period shall permit a person who would be entitled to inspect any one or more of the books if they were not in the possession of the first-mentioned person to inspect at all reasonable times such of the books as that person would be so entitled to inspect.

(7) The powers conferred by this section are in addition to, and not in derogation of, any other powers conferred by law.

(8) In this section, "premises" includes any structure, building, aircraft, vehicle, vessel or place (whether built on or not) and any part of such a structure, building, aircraft, vehicle, vessel or place.

**Offences**

15. (1) A person shall not, without reasonable excuse, refuse or fail to comply with a requirement made under section 13 or 14.

Penalty: \$10,000 or imprisonment for 2 years, or both.

(2) A person shall not, in purported compliance with a requirement made under section 13 or 14, furnish information or make a statement that is false or misleading in a material particular.

Penalty: \$10,000 or imprisonment for 2 years, or both.

(3) It is a defence to a prosecution for an offence against sub-section (2) if it is established that the defendant believed on reasonable grounds that the information or statement was true and was not misleading.

(4) A person shall not, without reasonable excuse, obstruct or hinder—

(a) the Commission or another person in the exercise of any power under section 13; or

(b) a person executing a warrant under section 14.

Penalty: \$10,000 or imprisonment for 2 years, or both.

(5) The occupier or person in charge of any premises that a person enters pursuant to a warrant referred to in sub-section 14 (1) shall provide the last-mentioned person with all reasonable facilities and assistance for the effective exercise of the last-mentioned person's powers under the warrant.

Penalty: \$2,500 or imprisonment for 6 months, or both.

(6) A person is not excused from making a statement providing an explanation as to any matter relating to the compilation of any books or as to any matter to which any books relate pursuant to a requirement made of the person in accordance with section 13 or 14 on the ground that the statement might tend to incriminate the person but, where the person claims before making a statement that the statement might tend to incriminate the person, the statement is not admissible in evidence against the person in any criminal proceedings other than proceedings under this section.

(7) Subject to sub-section (6), a statement made by a person in compliance with a requirement made under section 13 or 14 may be used in evidence in any criminal or civil proceedings against the person.

**Copies or extracts to be admitted in evidence**

16. (1) Subject to this section, in any legal proceedings (whether proceedings under this Code or otherwise), a copy of or extract from a book relating to a matter mentioned in sub-paragraph 13 (3) (a) (vii), (viii), (ix), (x) or (xi) is admissible in evidence as if it were the original book or the relevant part of the original book.

(2) A copy of or extract from a book is not admissible in evidence under sub-section (1) unless it is proved that the copy or extract is a true copy of the book or the relevant part of the book.

(3) For the purposes of sub-section (2), evidence that a copy of or extract from a book is a true copy of the book or part of a book may be given by a person who has compared the copy or extract with the book or the relevant part of the book and may be given either orally or by an affidavit sworn, or by a declaration made, before a person authorised to take affidavits or statutory declarations.

### Privilege

#### 17. (1) Where—

- (a) the Commission, or a person authorised by the Commission, makes a requirement under section 13 or 14 of a duly qualified legal practitioner in respect of a book; and
- (b) the book contains a privileged communication made by, on behalf of or to the legal practitioner in his or her capacity as a legal practitioner,

the legal practitioner is entitled to refuse to comply with the requirement unless the person to whom or by or on behalf of whom the communication was made or, if the person is a body corporate that is under official management or is in the course of being wound up, the official manager or the liquidator, as the case may be, agrees to the legal practitioner complying with the requirements but, where the legal practitioner so refuses to comply with a requirement, he or she shall forthwith furnish, in writing, to the Commission or authorised person—

- (c) if the legal practitioner knows the name and address of the person to whom or by or on behalf of whom the communication was made—that name and address; and
- (d) sufficient particulars to identify the book, or part of the book, containing the communication.

#### (2) Where—

- (a) under section 13 or 14, the Commission, or a person authorised by the Commission, requires a duly qualified legal practitioner to make a statement providing an explanation as to any matter relating to the compilation of books or as to any matter to which books relate; and
- (b) the legal practitioner is not able to make that statement without disclosing a privileged communication made by or on behalf of or to the legal practitioner in his or her capacity as a legal practitioner,

the legal practitioner is entitled to refuse to comply with the requirement, except to the extent that he or she is able to comply with the requirement without disclosing any privileged communication referred to in paragraph (b), unless the person to whom or by or on behalf of whom the communication was made or, if the person is a body corporate that is under official management or is in the course of being wound up, the official manager or the liquidator, as the case may be, agrees to the legal practitioner complying with the requirement but, where the legal practitioner so refuses to comply with a requirement, he or she shall forthwith furnish, in writing, to the Commission or authorised person—

- (c) if the legal practitioner knows the name and address of the person to whom or by or on behalf of whom the communication was made—that name and address; and

- (d) if the communication was made in writing—sufficient particulars to identify the document containing the communication.

Penalty: \$1,000 or imprisonment for 3 months, or both.

**Disclosure to Commission**

18. (1) The Commission may, in relation to any dealing by a futures broker in a futures contract, require the broker to disclose to the Commission whether or not the dealing was effected on behalf of another person and, if it was so effected, the name of that person and the nature of the instructions given to the broker in respect of the dealing.

(2) The Commission may require a person who instructed a futures broker to deal in a futures contract to disclose to the Commission whether the person gave the instructions as trustee for, or for or on behalf of, another person and, if the person gave the instructions as trustee for, or for or on behalf of, another person, to disclose the name of that other person and the nature of the instructions.

(3) The Commission may require a futures exchange or a clearing house to disclose to the Commission, in relation to a dealing in a futures contract on a futures market of that futures exchange or in respect of which that clearing house operates, the names of the members of that futures exchange or clearing house who are concerned in any action, or in any failure to act, in relation to the dealing.

(4) Where the Commission considers that it may be necessary to give a direction under section 56 or that a person may have contravened section 129, 130, 131, 132, 133, 134, 135 or 139, the Commission may require a person whom the Commission believes on reasonable grounds to be capable of giving information concerning—

- (a) any dealing in futures contracts;
- (b) any advice given by a futures broker, a futures adviser, a futures broker's representative or a futures adviser's representative concerning futures contracts;
- (c) the issuing or publication of a report or analysis by a futures broker, a futures adviser, a futures broker's representative or a futures adviser's representative concerning futures contracts;
- (d) the financial position of any business carried on by a person who is or has been (either alone or together with another person or other persons) a futures broker or a futures adviser and has dealt in, or given advice concerning, as the case may be, futures contracts;
- (e) the financial position of any business carried on by a nominee controlled by a person referred to in paragraph (d) or jointly controlled by 2 or more persons at least one of whom is a person referred to in that paragraph; or
- (f) an audit of, or any report of an auditor concerning, any accounts or records of a futures broker or of a futures adviser, being accounts or records relating to dealings in futures contracts,

to disclose to the Commission the information that the person has in relation to the matters concerning which the Commission believes that the person is capable of giving information.



(5) A person is not excused from disclosing information to the Commission pursuant to a requirement made of the person under sub-section (4) on the ground that the disclosure of the information might tend to incriminate the person.

(6) Where a person claims, before making an oral statement disclosing information that the person is required to disclose by a requirement made of the person under sub-section (4), that the statement might tend to incriminate the person, evidence of that statement is not admissible in evidence against the person in criminal proceedings other than proceedings under this section.

(7) Where, pursuant to sub-section (4), the Commission requires a person to disclose information to the Commission, the Commission shall give, or cause to be given, to the person, at the time when the requirement is made, a notice in the prescribed form.

(8) A person shall not, without reasonable excuse, fail to comply with a requirement of the Commission under sub-section (1), (2), (3) or (4).

Penalty: \$5,000 or imprisonment for 1 year, or both.

(9) A person shall not, in purported compliance with a requirement of the Commission under sub-section (1), (2), (3) or (4), disclose information, or make a statement, that is false or misleading in a material particular.

Penalty: \$10,000 or imprisonment for 2 years, or both.

(10) It is a defence to a prosecution for an offence against sub-section (9) if it is established that the defendant believed on reasonable grounds that the information or statement was true and was not misleading.

(11) In this section, a reference to disclosing information includes, in relation to information that is contained in a document, a reference to furnishing the document.

(12) A person who complies or proposes to comply with a requirement made or purporting to have been made under this section is not liable to any proceedings in respect of that compliance or proposed compliance.

#### **Investigation of certain matters**

**19.** Where the Commission has reason to suspect that—

- (a) an offence under a provision of a relevant Code or against any other law with respect to dealing in futures contracts; or
- (b) an offence relating to futures contracts that involves fraud or dishonesty,

may have been committed, the Commission may make such investigation as the Commission thinks expedient for the due administration of a relevant Code.

#### **Power of Court to make certain orders**

**20.** (1) Where—

- (a) on the application of the Commission, it appears to the Court that a person has contravened this Code, or any other law in force in South Australia relating to dealing in futures contracts, or has contravened the conditions or restrictions of a licence, the business rules of a futures exchange, a clearing house or a futures association or is about to do an act with respect to dealing in futures contracts that, if done, would be such a contravention; or
- (b) on the application of a futures exchange, clearing house or futures association, it appears to the Court that a person has contravened the business rules of the futures exchange, clearing house or futures association, as the case may be,

the Court may make such order or orders as it thinks fit including, but without limiting the generality of the foregoing, one or more of the following orders:

- (c) in the case of persistent or continuing breaches of this Code, or of any other law in force in South Australia relating to dealing in futures contracts, or the conditions or restrictions of a licence, or of the business rules of a futures exchange, clearing house or futures association—an order restraining a person from carrying on a business of dealing in futures contracts, acting as a futures adviser or as a futures broker's representative or futures adviser's representative, or from holding himself, herself or itself out as so carrying on business or so acting;
- (d) an order restraining a person from acquiring, disposing of or otherwise dealing in any class of futures contracts that is specified in the order;
- (e) an order appointing a receiver of property of a futures broker or of property that is held by a futures broker for or on behalf of another person, whether as trustee or otherwise;
- (f) an order declaring a futures contract to be void or voidable;
- (g) for the purpose of securing compliance with any other order under this section, an order directing a person to do or refrain from doing a specified act;
- (h) any ancillary order deemed to be desirable in consequence of the making of an order under any of the preceding paragraphs.

(2) Where an application is made to the Court for an order under sub-section (1), the Court may, if in the opinion of the Court it is desirable to do so, before considering the application, grant an interim order, being an order of the kind applied for that is expressed to have effect pending the determination of the application.

(3) Where the Commission makes an application to the Court for the making of an order under sub-section (1), the Court shall not require the Commission or any other person, as a condition of granting an interim order under sub-section (2), to give any undertaking as to damages.

(4) The Court shall not make an order under sub-section (1) if it is satisfied that the order would unfairly prejudice a person.

(5) The Court may, before making an order under sub-section (1), direct that notice of the application be given to such persons as it thinks fit or direct that notice of the application be published in such manner as it thinks fit, or both.

(6) A person appointed by order of the Court under sub-section (1) as a receiver of property of a futures broker—

- (a) may require the broker to deliver to the person any property of which the person has been appointed receiver or to give to the person all information concerning that property that may reasonably be required;
- (b) may acquire and take possession of any property of which the person has been appointed receiver;
- (c) may deal with any property that the person has acquired or of which the person has taken possession in any manner in which the broker might lawfully have dealt with the property; and
- (d) has such other powers in respect of the property as the Court specifies in the order.

(7) In paragraph (1) (e) and sub-section (6), “property”, in relation to a futures broker, includes money or other property entrusted to or received on behalf of any other person by the broker or another person in the course of or in connection with a business of dealing in futures contracts carried on by the futures broker.

(8) A person shall not, without reasonable excuse, contravene—

- (a) an order under this section that is applicable to the person; or
- (b) a requirement of a receiver appointed by order of the Court under sub-section (1).

Penalty: \$10,000 or imprisonment for 2 years, or both.

(9) The Court may rescind, vary or discharge an order made by it under this section or suspend the operation of such an order.

### *Division 2—Investigations*

#### **Interpretation**

21. (1) In this Division, unless the contrary intention appears—

“direction” means a direction given to the Commission in the exercise of a power under sub-section 22 (1), (2) or (3) in relation to the carrying out of an investigation relating to dealing in futures contracts;

“inspector” means an inspector appointed under this Division;

“prescribed direction” means a direction given in the exercise of a power under sub-section 22 (1) or (2) otherwise than in response to a request made by the Commission under sub-section 22 (4), not being a direction that has been approved by the Ministerial Council under sub-section 22 (6);

“prescribed person” means a person suspected or believed by an inspector, on reasonable grounds, to be capable of giving information concerning any matter being, or to be, investigated by the inspector pursuant to this Division;

“relevant authority”, in relation to a direction or in relation to an investigation that is carried out, or is to be carried out, pursuant to a direction means—

- (a) in the case of a direction given by the Commonwealth Minister other than a direction that has been approved by the Ministerial Council under sub-section 22 (6)—the Commonwealth Minister;
- (aa) in the case of a direction given by the Minister other than a direction that has been approved by the Ministerial Council under sub-section 22 (6)—the Minister; or
- (b) in the case of a direction given by the Ministerial Council or approved by the Ministerial Council under sub-section 22 (6)—the Ministerial Council.

(2) In this Division, a reference to a statement made at an examination includes a reference to a question asked, an answer given, or any other comment or remark made, at the examination.

(3) Where 2 or more inspectors have been appointed under this Division to investigate particular matters relating to dealing in futures contracts, each of those inspectors may exercise the powers, or perform the functions, of an inspector under this Division independently of the other inspector or inspectors.

(4) In relation to an investigation carried out by the Commission into matters relating to dealing in futures contracts—

- (a) a reference in section 25, 27, 38 or 41 to an inspector shall be read as a reference to a member of the Commission or to an authorised agent of the Commission; and
- (b) the reference in section 40 to an inspector shall be read as a reference to the Commission.

(5) The reference in sub-section (4) to an authorised agent of the Commission shall be read as a reference to—

- (a) an employee of the Commission;
- (b) a person whose services are available to the Commission by virtue of arrangements made under sub-section 24 (1) or (2) of the *National Companies and Securities Commission Act 1979* of the Commonwealth; or
- (c) a person engaged under sub-section 25 (1) of that Act,

who is authorised by the Commission to act on behalf of the Commission in connection with the investigation concerned.

(6) In relation to an investigation carried out pursuant to a prescribed direction into matters relating to dealing in futures contracts, a reference in section 27, 36 (other than sub-section 36 (4)) or 41 to the Commission shall be read as a reference to the relevant authority.

### Investigations

22. (1) Where it appears to the Minister that it is in the public interest in respect of South Australia that an investigation be carried out into any matters relating to dealing in futures contracts, the Minister may, by instrument in writing, direct the Commission to arrange for an investigation into those matters.

(2) Where it appears to the Commonwealth Minister that it is in the national interest that an investigation be carried out into any matters relating to dealing in futures contracts, the Commonwealth Minister may, by instrument in writing, direct the Commission to arrange for an investigation into those matters.

(3) The Ministerial Council may, by instrument in writing, direct the Commission to arrange for an investigation into any matters relating to dealing in futures contracts.

(4) The Commission may, in writing, request the Minister to exercise the Minister's powers under sub-section (1), or request the Commonwealth Minister to exercise that Minister's powers under sub-section (2), to direct the Commission to arrange for an investigation into any matters relating to dealing in futures contracts.

(5) The Commission may request the Ministerial Council in writing to exercise its powers under sub-section (3) to direct the Commission to arrange for an investigation into any matters relating to dealing in futures contracts.

(6) Where a direction is given by the Minister under sub-section (1), or by the Commonwealth Minister under sub-section (2), the Ministerial Council may approve the direction.

#### **Conduct of investigations**

23. (1) An instrument containing a prescribed direction—

- (a) shall specify the matters that are to be investigated;
- (b) may require the investigation to be carried out by the Commission or require it to be carried out by an inspector to be appointed by the Commission; and
- (c) in the case of an investigation that is to be carried out by an inspector appointed by the Commission—may require a specified person to be appointed as the inspector and may require the person to be appointed on specified terms and conditions.

(2) An instrument containing a direction other than a prescribed direction—

- (a) shall specify the matters that are to be investigated; and
- (b) may be accompanied by a statement in writing setting out the views of the relevant authority as to—
  - (i) whether the investigation should be carried out by the Commission or by an inspector appointed by the Commission; and
  - (ii) if the Commission decides to appoint an inspector to carry out the investigation—the person who should be appointed and the terms and conditions of the person's appointment.

(3) Where the Commission receives a direction, the Commission shall—

- (a) in the case of a prescribed direction—comply with any requirements specified in the direction; and

- (b) in the case of any other direction—
- (i) take into account any views expressed by the relevant authority accompanying the direction;
  - (ii) if the Commission decides to arrange for the investigation to which the direction relates to be carried out contrary to the wishes of the relevant authority—notify the relevant authority accordingly; and
  - (iii) if, after the Commission so notifies the relevant authority, the Ministerial Council gives any instructions to the Commission in relation to the investigation, comply with those instructions.
- (4) Where the Commission receives a direction, the Commission shall—
- (a) arrange for an investigation to be carried out into the matters specified in the instrument containing the direction; and
  - (b) subject to sub-section (3)—
    - (i) decide whether the investigation is to be carried out by the Commission or by an inspector to be appointed by the Commission; and
    - (ii) if it decides that the investigation should be carried out by an inspector—appoint the inspector on such terms and conditions as the Commission determines.
- (5) Where, pursuant to a direction, an investigation is being carried out by the Commission or by an inspector appointed by the Commission, the Commission shall, if, and only if, it is so directed by the relevant authority—
- (a) arrange for the investigation to be extended to additional matters;
  - (b) terminate the investigation, or terminate the investigation in so far as it relates to particular matters; or
  - (c) in the case of an investigation that is being carried out by an inspector—terminate, or vary the terms and conditions of, the appointment of the inspector,
- before the completion of the investigation.
- (6) Where the Commission is directed under sub-section 22 (1), (2) or (3) to arrange for an investigation into matters relating to futures contracts, the Commission shall cause to be published in the *Gazette* and the *Government Gazette* a notice stating that the direction has been given and specifying the matters concerned.
- (7) A notice referred to in sub-section (6) shall—
- (a) if the investigation is being or is to be carried out by the Commission—state that fact; or
  - (b) if the investigation is being or is to be carried out by an inspector—state that fact and specify the name of the inspector.
- (8) Where the Commission ceases to carry out an investigation or the appointment of an inspector to carry out an investigation is terminated, the Commission shall cause notice of the cessation or termination to be published in the *Gazette* and the *Government Gazette*.

- (9) A certificate by the Commission stating that—
- (a) an investigation into a matter specified in the certificate, being a matter relating to dealing in futures contracts, is being or is to be carried out by the Commission; or
  - (b) an investigation into a matter specified in the certificate, being a matter relating to dealing in futures contracts, is being or is to be carried out by an inspector named in the certificate,

is *prima facie* evidence of the matters stated in the certificate and, in the case of an investigation by an inspector, that the inspector has been duly appointed.

#### **Powers of Commission and inspectors appointed under corresponding laws**

24. (1) Where, pursuant to a direction given to the Commission under the provisions of a law in force in a participating State or in a participating Territory that correspond with this Division, the Commission is carrying out an investigation into any matters, the Commission may exercise, in relation to those matters, the powers that it would have if it were carrying out an investigation into those matters under this Division.

(2) Where, pursuant to a direction given to the Commission under the provisions of a law in force in a participating State or in a participating Territory that correspond with this Division, a person has been appointed as an inspector to carry out an investigation into any matters, that person may exercise, in relation to those matters, the powers of an inspector under this Division that the person would have if the person had been appointed as an inspector under this Division to investigate those matters.

#### **Powers of inspectors**

25. (1) An inspector carrying out an investigation may, by notice containing the prescribed matters given in the prescribed manner, require a prescribed person—

- (a) to produce to the inspector such books relating to a matter to which the investigation relates as are in the custody or under the control of that person;
- (b) to give to the inspector all reasonable assistance in connection with the investigation; and
- (c) to appear before the inspector for examination on oath or affirmation and to answer questions put to that person,

and may administer an oath or affirmation to that person.

(2) A notice given pursuant to paragraph (1) (c) shall set out the provisions of sub-sections (9) and (10).

(3) \* \* \* \* \*

(4) Where books are produced to an inspector under this section, the inspector may take possession of the books for such period as the inspector considers necessary for the purposes of the inspector's investigation and, during that period, the inspector shall permit a person who would be entitled to inspect any of those books if they were not in the possession of the inspector to inspect at all reasonable times such of those books as that person would be so entitled to inspect.

(5) A prescribed person shall not, without reasonable excuse, refuse or fail to comply with a requirement made under sub-section (1).

Penalty: \$10,000 or imprisonment for 2 years, or both.

(6) A prescribed person shall not, in purported compliance with a requirement made under sub-section (1), furnish information that is false or misleading in a material particular.

Penalty: \$10,000 or imprisonment for 2 years, or both.

(7) A prescribed person shall not, when appearing before an inspector for examination pursuant to a requirement made under sub-section (1), furnish information that is false or misleading in a material particular.

Penalty: \$10,000 or imprisonment for 2 years, or both.

(8) A prescribed person shall not, when appearing before an inspector for examination pursuant to a requirement made under sub-section (1), refuse or fail to take an oath or make an affirmation.

Penalty: \$1,000 or imprisonment for 3 months, or both.

(9) A duly qualified legal practitioner acting for a prescribed person—

(a) may attend an examination of that person; and

(b) may, at such times during the examination as the inspector determines—

(i) address the inspector; and

(ii) examine that person,

in relation to matters in respect of which the inspector has questioned that person.

(10) A prescribed person is not excused from answering a question put to the person by an inspector on the ground that the answer might tend to incriminate the person but, where the person claims, before answering the question, that the answer might tend to incriminate the person, the answer is not admissible in evidence against the person in criminal proceedings other than proceedings under this section or other proceedings in respect of the falsity of the answer.

(11) A person who complies or proposes to comply with a requirement made or purporting to have been made by an inspector under sub-section (1) is not liable to any proceedings in respect of that compliance or proposed compliance.

(12) A person who is required to attend for examination under this section is entitled to such allowances and expenses as are prescribed.

(13) The Commission may, in its discretion, pay, on account of the costs and expenses incurred by a person in complying with a requirement under sub-section (1), such amount as it thinks reasonable.

(14) Where, in the opinion of an inspector, a legal practitioner acting for a prescribed person is attempting to obstruct the examination of the



prescribed person by the exercise of the rights conferred on the legal practitioner under sub-section (9) to address the inspector or to examine the prescribed person, the inspector may require the legal practitioner to cease to address the inspector or to cease to examine the prescribed person, as the case may be.

(15) Where an inspector makes a requirement of a legal practitioner under sub-section (14), the legal practitioner shall not refuse or fail to comply with the requirement.

(16) Where an inspector is satisfied that a prescribed person has failed, without reasonable excuse, to comply with a requirement of the inspector, the inspector may, by writing signed by the inspector, certify the failure to the Court.

(17) Where an inspector gives a certificate under sub-section (16), the Court may inquire into the case and—

- (a) order the prescribed person to comply with the requirement of the inspector within such period as is fixed by the Court; or
- (b) if the Court is satisfied that the prescribed person failed, without reasonable excuse, to comply with the requirement of the inspector, punish the prescribed person in like manner as if the prescribed person had been guilty of contempt of the Court and, if it sees fit, also make an order pursuant to paragraph (a).

(18) The powers of the Court under this section may be exercised in relation to a person notwithstanding that the person has been convicted of an offence in relation to the matter in respect of which the powers are to be exercised.

26. \* \* \* \* \*

#### Record of examination

27. (1) An inspector may cause to be made a record of the statements made at an examination under this Division.

(2) Where a record of the statements made at an examination of a person under this Division is in writing or is reduced to writing—

- (a) the inspector may require the person examined to read the written record or have the written record read to the person and may require the person to sign the written record; and
- (b) if the person examined requests the inspector in writing to furnish the person with a copy of the written record, the inspector shall furnish the copy to the person without charge but subject to such conditions (if any) as the inspector imposes.

(3) A written record of the examination of a person under this Division that is signed by the person as mentioned in sub-section (2) or is authenticated in any other prescribed manner is *prima facie* evidence of the statements made at the examination.

(4) A person to whom a copy of a written record of an examination is given under paragraph (2) (b) and any person who comes into possession of

the copy or a copy of the copy shall comply with any conditions imposed by the inspector under that paragraph.

(5) Nothing in this section affects or limits the admissibility in any criminal or civil proceedings of other evidence of the statements made at an examination under this Division.

(6) The Commission may give a copy of a written record made of an examination under this Division and a copy of any related book to a duly qualified legal practitioner who satisfies the Commission that he or she is acting for a person who is conducting, or is in good faith contemplating, criminal or civil proceedings in respect of any matters into which an investigation has been or is being made by an inspector under this Division.

(7) A duly qualified legal practitioner to whom a copy of a written record of an examination or of a related book is given under sub-section (6) or any other person who comes into possession of the copy shall not use the copy otherwise than in connection with the institution or preparation of, or in the course of, criminal or civil proceedings and shall not publish or communicate for any other purpose the copy or any part of the contents of the copy to any other person.

(8) The Commission may if it thinks fit give a copy of a written record made of an examination under this Division and of any related book to any other person subject to such conditions as the Commission imposes.

(9) A person to whom a copy of a written record of an examination or of a related book is given under sub-section (8) and any person who comes into possession of the copy or a copy of the copy shall comply with any conditions imposed by the Commission under that sub-section.

Penalty: \$1,000 or imprisonment for 3 months, or both.

**Record to accompany report**

28. When a final report is made in respect of an investigation under this Division, any record made of statements made at an examination relating to the investigation shall be furnished with the report.

**Admissibility of record of examination in evidence in proceedings against person examined**

29. (1) Except as provided by sub-section (2), any statements made at an examination of a person under this Division are admissible in evidence in any criminal or civil proceedings against the person.

(2) Evidence of a statement made by a person at an examination under this Division shall not be admitted in evidence in criminal or civil proceedings against a person if—

- (a) where the statement is an answer given by the person to a question—the proceedings are criminal proceedings (other than proceedings for an offence against sub-section 25 (7) or other proceedings in respect of the falsity of the answer) and, before answering the question, the person claimed that the answer might tend to incriminate the person;
- (b) the statement is not relevant to the proceedings and the person objects to the admission of the evidence;

- (c) the statement is qualified or explained by some other statement made at the examination, evidence of the other statement is not tendered in the proceedings and the person objects to the admission of the evidence of the first-mentioned statement; or
- (d) the statement discloses matter in respect of which a claim of legal professional privilege could be made by the person in the proceedings if the provisions of this Division did not apply in relation to that evidence, and the person objects to the admission of the evidence.

(3) This section applies whether the proceedings against the person examined are heard alone or together with proceedings against another person.

#### **Admissibility in other proceedings of statements made at an examination**

**30.** Where, in any criminal or civil proceedings, direct evidence by a person of a matter would be admissible, a statement made by the person at an examination under this Division that tends to establish that matter is admissible in those proceedings as evidence of that matter—

- (a) if it appears to the court in which the proceedings are instituted—
  - (i) that the person examined is dead or is unfit, by reason of any physical or mental incapacity, to attend as a witness;
  - (ii) that the person is outside South Australia and it is not reasonably practicable to secure the person's attendance; or
  - (iii) that all reasonable steps have been taken to find the person and the person cannot be found; or
- (b) in a case to which paragraph (a) does not apply—unless a party to the proceedings, other than the party tendering evidence of the statement, requires the tendering party to call a person as a witness in the proceedings and the tendering party does not call the person as a witness in the proceedings.

#### **Weight of evidence**

**31.** In ascertaining the weight (if any) to be attached to statements admitted under section 30 in any proceedings, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the evidence, including—

- (a) the recency or otherwise at the time when the examination concerned took place of any relevant matter dealt with at the examination; and
- (b) the presence and nature, or the absence, of any incentive for the person examined to conceal or misrepresent any relevant matter in the person's statements.

#### **Credibility of person who made statements**

**32.** (1) Where evidence of statements is admitted under section 30 in any proceedings and the person examined is not called as a witness in the proceedings, evidence is admissible where, if the person examined had been called as a witness, the evidence would have been admissible for the purpose of destroying or supporting the person's credibility.

(2) Evidence is admissible to show that a statement made by a person referred to in sub-section (1) is inconsistent with another statement made by the person at any time.

(3) Notwithstanding sub-sections (1) and (2), evidence is not admissible of any matter of which, if the person referred to in sub-section (1) had been called as a witness and denied the matter in cross-examination, evidence would not be admissible if adduced by the cross-examining party.

#### **Determination of objection to admissibility of statements**

33. (1) A party to any criminal or civil proceedings may, not later than 14 days before the commencement of the hearing of the proceedings, serve upon another party notice that the first-mentioned party proposes to tender as evidence in the proceedings the written record of an examination under this Division or a specified part of the written record of such an examination.

(2) Where a notice is served under sub-section (1), the other party may, within 14 days after the service of the notice or within such longer period as is agreed by the parties or allowed by the court or tribunal in which the proceedings are brought, give notice to the tendering party objecting to the admission in evidence of all or any of the statements contained in the written record or the part of the written record proposed to be tendered and, if the other party objects to the admission of some only of the statements, specifying the statements concerned.

(3) A notice under sub-section (2) shall, in relation to each statement objected to, specify the grounds on which the objection is taken.

(4) Upon receipt of a notice under sub-section (2), the tendering party shall send a copy of the notice to the court or tribunal in which the proceedings are brought.

(5) Upon receipt of the copy of a notice, the court or tribunal in which the proceedings are brought may, in its discretion, either determine the objections specified in the notice as a preliminary point of law before the commencement of the hearing of the proceedings or defer the determination of the objections until the hearing of the proceedings.

(6) At the hearing of the proceedings, a party is not entitled, without the leave of the court or tribunal hearing the proceedings, to take any objection to the admission in evidence of the written record, or a part of the written record, of an examination under this Division in respect of which a notice was given to the party under sub-section (1) if the party could have objected to the tender of the written record or of that part of the written record by a notice under sub-section (2) but did not so object.

(7) Nothing in this section renders inadmissible in any criminal or civil proceedings any evidence that would have been admissible if this section had not been enacted.

#### **Delegation by inspector**

34. (1) An inspector may, either generally or as otherwise provided by the instrument of delegation, by writing signed by the inspector, delegate to a person any of the inspector's powers or functions under this Division other than this power of delegation.

(2) The power of delegation conferred on an inspector under sub-section (1) does not, except in the case of an inspector being a body corporate that is an authority of a State or Territory, extend to delegating the power to administer oaths or affirmations or the power to examine on oath or affirmation.

(3) Any act or thing done in the exercise of a power or the performance of a function by a person to whom that power or function has been delegated by an inspector under sub-section (1) has the same force and effect as if it had been done by the inspector.

(4) A delegate shall, at the request of a prescribed person, produce the instrument of delegation for inspection.

(5) A delegation under this section by an inspector does not prevent the exercise or performance of a power or function by the inspector.

### **Reports of investigations**

**35.** (1) Where an investigation is being carried out by an inspector appointed pursuant to a direction other than a prescribed direction, the inspector may, and if so directed by the Commission shall, make interim reports to the Commission and, on the completion or termination of the investigation, the inspector shall report to the Commission the inspector's opinion on or in relation to the matters that the inspector has investigated, together with the facts on which that opinion is based.

(2) Where an investigation is being carried out by an inspector appointed pursuant to a prescribed direction, the inspector may, and if so directed by the relevant authority shall, make interim reports to the relevant authority and, on the completion or termination of the investigation, the inspector shall report to the relevant authority the inspector's opinion on or in relation to the matters that the inspector has investigated, together with the facts on which that opinion is based.

(3) Where an investigation is being carried out by the Commission, the Commission may, and if so directed by the relevant authority shall, make interim reports to the relevant authority and, on the completion or termination of the investigation, the Commission shall report to the relevant authority its opinion on or in relation to the matters that it has investigated, together with the facts on which its opinion is based.

### **Report of inspector**

**36.** (1) Subject to sub-section (2), where, in the opinion of the Commission, the whole or any part of a report made under this Division ought to be given to a person by reason that it relates to the affairs of the person to a material extent, the Commission shall, unless in its opinion there is good reason for not divulging the contents of the report or of that part of the report, give to that person a copy of the report or of that part of the report, as the case requires.

(2) Subject to sub-section (3), the Commission shall not give a copy of a report or of a part of a report under this Division to a person if the Commission believes that legal proceedings that have been, or that in its opinion might be, instituted might be unduly prejudiced by giving the copy of the report or of that part of the report to that person.

(3) A court before which legal proceedings are brought against a person for or in respect of matters dealt with in a report under this Division may order that a copy of the report or of a part of the report be given to that person.

(4) Subject to sub-section (5)—

- (a) the Ministerial Council may cause to be printed and published the whole or any part of a report under this Division that relates to an investigation the expenses of which are, under the Agreement, to be borne by the Commission;
- (b) the Minister may cause to be printed and published the whole or any part of a report under this Division that relates to an investigation the expenses of which are, under the Agreement, to be borne by the State; and
- (c) the Commonwealth Minister may cause to be printed and published the whole or any part of a report under this Division that relates to an investigation the expenses of which are, under the Agreement, to be borne by the Commonwealth.

(5) Where—

- (a) the Ministerial Council, the Minister or the Commonwealth Minister would, but for this sub-section, have power to publish a report;
- (b) the Ministerial Council, the Minister or the Commonwealth Minister, as the case may be, receives—
  - (i) a certificate of the Attorney-General of a State stating that the publication of the report would be prejudicial to the administration of justice in that State;
  - (ii) a certificate of the Attorney-General of the Commonwealth stating that the publication of the report would be prejudicial to the administration of justice in a Territory (other than the Northern Territory) specified in the certificate; or
  - (iii) a certificate of the Attorney-General of the Northern Territory stating that the publication of the report would be prejudicial to the administration of justice in that Territory; and
- (c) the Ministerial Council, the Minister or the Commonwealth Minister, as the case may be, has not received a further certificate of that Attorney-General stating that the publication of the report would no longer be prejudicial to the administration of justice in the relevant State or Territory,

the Ministerial Council, the Minister or the Commonwealth Minister, as the case may be, shall not cause or permit that report to be published wholly or in part.

(6) If from a report under this Division or from the record of an examination under this Division it appears to the Commission that an offence may have been committed by a person and that a prosecution ought to be instituted, the Commission shall cause a prosecution to be instituted and prosecuted.

(7) Where it appears to the Commission that a prosecution ought to be instituted, it may, by notice in writing given before or after the institution of a prosecution in accordance with sub-section (6), require a person whom it suspects or believes on reasonable grounds to be capable of giving information concerning any matter to which the prosecution relates (not being a person who is or, in the opinion of that Commission, is likely to be a defendant in the proceedings or is or has been a duly qualified legal practitioner acting for such a person) to give all assistance in connection with the prosecution or proposed prosecution that the person is reasonably able to give.

(8) Where a person to whom a notice has been given under sub-section (7) fails to comply with a requirement specified in the notice, the Court may, on the application of the Commission, direct that person to comply with the requirement.

(9) If from a report under this Division, or from the record of an examination under this Division, the Commission is of the opinion that proceedings ought in the public interest to be brought by a person for the recovery of damages in respect of fraud, negligence, default, breach of duty, breach of trust or other misconduct in connection with the matters to which the investigation relates or for the recovery of property of that person, the Commission may cause proceedings to be brought accordingly in the name of that person.

(10) A copy of a report of an inspector under this Division purporting to be certified as such a report by the Commission is admissible in civil proceedings as evidence of any facts or matters stated in the report to have been found to exist by the inspector.

(11) A copy of a report of the Commission under this Division purporting to be certified as such a report by the Commission is admissible in civil proceedings as evidence of any facts or matters stated in the report to have been found to exist by the Commission.

(12) Nothing in this section operates to diminish the protection afforded to witnesses by the Evidence Act, 1927.

#### **Commission's powers in respect of books**

37. (1) An inspector may, when making a report under this Division, give to the Commission books of which the inspector has taken possession under section 25 and the Commission—

- (a) may retain the books for such period as it considers to be necessary to enable a decision to be made as to whether or not legal proceedings ought to be instituted as a result of the investigation carried out by the inspector;
- (b) may retain the books for such further period as it considers to be necessary to enable any such proceedings to be instituted and prosecuted;
- (c) may permit other persons to inspect the books while they are in its possession;
- (d) may permit the use of the books for the purposes of legal proceedings instituted as a result of the investigation; and

- (e) shall permit a person who would be entitled to inspect any one or more of the books if they were not in the possession of the Commission to inspect at all reasonable times such of the books as that person would be so entitled to inspect.

(2) Where the Commission takes possession of books under section 25, the Commission has such powers and obligations with respect to those books as it would have if it had been given the books by an inspector pursuant to sub-section (1).

#### **Privileged communications**

38. Where in the exercise of powers under section 25 an inspector requires a duly qualified legal practitioner to disclose a privileged communication made by or on behalf of or to that legal practitioner in his or her capacity as a legal practitioner, the legal practitioner is entitled to refuse to comply with the requirement unless the person to whom or by or on behalf of whom the communication was made or, if the person is a body corporate that is under official management or in the course of being wound up, the official manager or the liquidator, as the case may be, agrees to the legal practitioner complying with the requirement but, where the legal practitioner so refuses to comply with the requirement, the legal practitioner shall, if he or she knows the name and address of the person to whom or by or on behalf of whom the communication was made, forthwith furnish that name and address in writing to the inspector.

Penalty: \$1,000 or imprisonment for 3 months, or both.

#### **Expenses of investigation**

39. (1) Subject to this section and to clause 18 of the Agreement, the expenses of and incidental to an investigation under this Division shall be paid by the Commission.

(2) For the purposes of this section, the expenses of and incidental to an investigation under this Division include—

- (a) the expenses incurred in any proceedings brought in the name of a person under sub-section 36 (9); and
- (b) in the case of an investigation carried out pursuant to a direction that is approved by the Ministerial Council pursuant to sub-section 22 (6)—the expenses (if any) incurred before the direction is so approved.

(3) Where an investigation has been carried out under this Division and proceedings are instituted under sub-section 36 (9) or otherwise as a result of that investigation, the Commission may make one or more of the following orders:

- (a) that a specified person pay, within the time and in the manner specified in the order, the whole, or a specified part, of the expenses of and incidental to the investigation;
- (b) in a case where expenses have been paid by the Commission—that a specified person reimburse the Commission, within the time and in the manner specified in the order, to the extent of the payment;



(c) that a specified person, within the time and in the manner specified in the order, pay, or reimburse the Commission in respect of, the whole, or a specified part, of the cost to the Commission of carrying out the investigation, including the remuneration of any employee of the Commission concerned with the investigation.

(4) Where the Commission is of the opinion that the whole or any part of the expenses of and incidental to an investigation under this Division should be paid by a person to whose affairs the investigation relates, the Commission may by order in writing direct that person to pay a specified amount, being the whole or a part of the expenses, within the time and in the manner specified.

(5) Where a person has failed to comply with an order of the Commission under sub-section (3) or (4), proceedings may be taken in a court of competent jurisdiction to recover the amount in question as a debt due to the Commission.

(6) The report of an inspector may include a recommendation whether an order under sub-section (3) or (4) should be made or whether orders under both those sub-sections should be made.

(7) Where, in a case where the expenses of and incidental to an investigation or part of those expenses have been or are to be borne by a party to the Agreement, the expenses or part of the expenses borne or to be borne by that party are recovered by the Commission pursuant to this section, the Commission shall, to the extent of the amount recovered, reimburse or credit that party.

#### **Concealing, &c., of books relating to futures contracts**

**40.** (1) A person who—

- (a) conceals, destroys, mutilates or alters a book relating to a matter that is the subject of investigation by an inspector under this Division;
- (b) where such a book is in South Australia—sends or takes, or causes the sending or taking of, the book out of South Australia; or
- (c) where such a book is outside South Australia but within Australia—sends or takes, or causes the sending or taking of, the book out of Australia,

contravenes this sub-section.

Penalty: \$20,000 or imprisonment for 5 years, or both.

(2) It is a defence to a prosecution for an offence against sub-section (1) if it is established that the defendant did not act with intent to defeat the purposes of this Division or to delay or obstruct the carrying out of an investigation under this Division.

#### **Power of Commission to make certain orders**

**41.** (1) Where an investigation is being made under this Division and it appears to the Commission that facts concerning futures contracts to which the investigation relates cannot be ascertained because a prescribed person has refused or failed to comply with a requirement of an inspector,

the Commission may, by instrument in writing published in the *Gazette* and the *Government Gazette* make one or more of the following orders:

- (a) an order restraining a particular person from disposing of futures contracts;
- (b) an order restraining a particular person from acquiring futures contracts;
- (c) an order restraining a particular person from exercising rights under futures contracts;
- (d) an order requiring a particular person to dispose of futures contracts, or to dispose of futures contracts in a particular manner.

(2) An order made under sub-section (1) does not operate to prejudice or affect a right of a futures exchange, or of a clearing house for a futures exchange—

- (a) to cause a futures contract to be closed out, or to close out a futures contract, because of a failure to meet a call for a deposit or margin;
- (b) to enter into a liquidating trade for the purpose of so causing a futures contract to be closed out, or for the purpose of so closing out a futures contract; or
- (c) to cause to be registered in the name of a person, or to register in the name of a person, a futures contract that was previously registered in the name of another person.

(3) The Commission may, by instrument in writing published in the *Gazette* and the *Government Gazette*, vary or revoke an order made under sub-section (1).

(4) A copy of an order under sub-section (1) and of any order by which it is revoked or varied shall be served on the person to whom it is directed.

(5) Where an order made under sub-section (1) is in force, a person aggrieved by the order may apply to the Court for variation or revocation of the order and the Court may, if it is satisfied that it is reasonable to do so, vary the order or revoke the order and any order by which it has been varied.

(6) A person shall not contravene an order under sub-section (1).

Penalty: \$2,500 or imprisonment for 6 months, or both.

#### **Certain powers not to be delegated**

42. The Commission shall not delegate to a person its power under this Division to appoint an inspector to carry out an investigation, to determine the terms and conditions of, or to terminate, such an appointment or to make orders under section 41.

### **Division 3—Futures Consultative Committee**

#### **Constitution and functions of Futures Consultative Committee**

43. (1) The Ministerial Council may establish a Futures Consultative Committee, consisting of a Chairman and such other members as the Ministerial Council thinks fit, to advise the Ministerial Council and the Commission on such matters relating to the futures industry as are referred to it by the Ministerial Council or the Commission.

(2) During the absence of the Chairman, or during a vacancy in the office of Chairman, the Commission shall appoint a temporary Chairman from amongst the members of the Committee to act in the place of the Chairman.

(3) A member of the Committee—

- (a) holds office during the pleasure of the Ministerial Council;
- (b) may resign from office by writing signed by the member; and
- (c) is not entitled to remuneration as such a member except to the extent of such reasonable expenses for attending a meeting of the Committee and otherwise transacting the business of the Committee as are determined by the Ministerial Council.

(4) In this section—

“Chairman” means the Chairman of the Committee;

“Committee” means the Futures Consultative Committee established under sub-section (1);

“member”, in relation to the Committee, includes the Chairman.

#### **Meetings of Futures Consultative Committee**

44. (1) The Chairman—

- (a) may convene a meeting of the Futures Consultative Committee as occasion requires; and
- (b) shall convene such a meeting if the Ministerial Council or the Commission so directs.

(2) The Chairman shall preside at a meeting of the Futures Consultative Committee.

(3) The procedure at a meeting of the Futures Consultative Committee shall be determined by the members present at the meeting.

### **PART III—FUTURES EXCHANGES, CLEARING HOUSES AND FUTURES ASSOCIATIONS**

#### **Establishment of futures markets**

45. (1) A person shall not establish, maintain or provide, or assist in establishing, maintaining or providing, or hold himself, herself or itself out as maintaining or providing, a futures market that is neither a futures market of a futures exchange nor an exempt futures market.

Penalty—

- (a) in the case of an offence committed by a natural person—\$20,000 or imprisonment for 5 years, or both; or
- (b) in any other case—\$50,000.

(2) The Ministerial Council may, by instrument in writing, declare that a specified futures market, or a futures market included in a specified class of futures markets, is, subject to any specified conditions, an exempt futures market.

(3) Without limiting the matters to which the Ministerial Council may have regard in considering whether to vary or revoke a declaration in force under sub-section (2), the Ministerial Council may, in so considering, have regard to a breach of a condition specified in the declaration.

#### **Power of Ministerial Council to approve futures exchange**

**46.** (1) A body corporate that proposes to establish, maintain or provide a futures market may lodge with the Commission an application in writing for approval by the Ministerial Council as a futures exchange.

(2) The Ministerial Council may, by instrument in writing, approve as a futures exchange a body corporate that makes an application under subsection (1) if it is satisfied—

- (a) that the business rules of the body corporate make satisfactory provision—
- (i) for the admission as members of persons licensed, or proposing to apply to be licensed, under Part IV or under the provisions of a law in force in a participating State or in a participating Territory that correspond with that Part, or a specified class of such persons;
  - (ii) for the standards of training and experience, and other qualifications, for membership;
  - (iii) for the manner in which members are to conduct their business of dealing in futures contracts so as to ensure efficiency, honesty and fair practice in relation to such dealing;
  - (iv) for the exclusion of a body corporate from membership where a director of the body corporate, a person concerned in the management of the body corporate or a person who has control, or substantial control, of the body corporate would be excluded from membership;
  - (v) for the exclusion from membership of a person who is not of good character and high business integrity;
  - (vi) for the expulsion, suspension or disciplining of members for conduct inconsistent with just and equitable principles in the transaction of business, for a contravention of the business rules of the body corporate or for a contravention of this Code or a corresponding law in force in a participating State or in a participating Territory;
  - (vii) for an appropriate mechanism whereby a person whose application for membership of the body corporate is refused, or whose membership of the body corporate is cancelled or suspended, in circumstances where the person does not have a right to appeal to the Court under sub-section 53 (1) against the decision to refuse the application, or to cancel or suspend the membership, as the case may be, may appeal against the decision;
  - (viii) for an appropriate mechanism whereby a person who has been disciplined by the body corporate otherwise than by way of cancellation or suspension of the person's mem-

bership of the body corporate may appeal against the decision to discipline the person;

- (ix) for the inspection and audit of the accounting records of members, being accounting records required to be kept by this Code or by the corresponding law in force in a participating State or in a participating Territory;
- (x) with respect to the classes of futures contracts that may be dealt in by members;
- (xi) prohibiting a member from accepting or executing, otherwise than in accordance with the business rules, instructions from another person to deal in futures contracts;
- (xii) prohibiting a member from dealing in futures contracts on behalf of another person otherwise than in accordance with instructions accepted by the member from the person;
- (xiii) prohibiting a member from dealing in futures contracts, on behalf of another person, on a futures market of a futures exchange or of a recognised futures exchange, otherwise than in accordance with the business rules of the futures exchange or recognised futures exchange, as the case may be;
- (xiv) prohibiting a member, except as permitted by the business rules, from executing the instructions of another person to deal in futures contracts unless the instructions are executed in such a manner that the dealing is effected on a futures market of a futures exchange or of a recognised futures exchange or on an exempt futures market;
- (xv) with respect to the conditions under which members may deal in futures contracts;
- (xvi) for the equitable and expeditious settlement of claims and grievances between members, being claims and grievances relating to the transaction of business by members in their capacity as members;
- (xvii) for appropriate mechanisms for the conciliation and settlement of disputes between members and their clients, being disputes concerning dealings in futures contracts by members on behalf of their clients or concerning transactions between members and their clients in connection with such dealings; and
- (xviii) generally for carrying on the business of the proposed futures exchange with due regard for the interests and protection of the public; and

(b) that the interests of the public will be served by granting the application.

#### **Provision of clearing house facilities**

47. A person shall not provide, or hold himself, herself or itself out as providing, clearing house facilities for a futures market (other than an exempt futures market) unless—

- (a) the futures market is a futures market of a futures exchange;

- (b) the person is a body corporate; and
- (c) an approval of the person as a clearing house for that futures exchange is in force under sub-section 48 (1).

Penalty: \$5,000 or imprisonment for 1 year, or both.

#### **Power of Ministerial Council to approve clearing house**

**48.** (1) A body corporate that proposes to provide clearing house facilities for a futures market of a futures exchange may lodge with the Commission an application in writing for approval by the Ministerial Council as a clearing house for that futures exchange.

(2) The Ministerial Council may, by instrument in writing, approve as a clearing house for a futures exchange a body corporate that makes an application under sub-section (1) if it is satisfied—

- (a) that the business rules of the body corporate are satisfactory, in particular such of those business rules as relate to the registration of futures contracts made on a futures market of the futures exchange;
- (b) that the business rules of the body corporate make satisfactory provision for the expulsion, suspension or disciplining of members for a contravention of the business rules of the body corporate or for a contravention of this Code or a corresponding law in force in a participating State or in a participating Territory; and
- (c) that the interests of the public will be served by granting the application.

(3) Without limiting the matters to which the Ministerial Council may have regard in considering an application under sub-section (1) for approval as a clearing house for a futures exchange, the Ministerial Council may, in considering the application, have regard to any business rules of the applicant that relate to the guaranteeing, to members of the applicant, of the performance of futures contracts made on a futures market of the futures exchange.

#### **Publication of instruments executed under section 45, 46 or 48**

**49.** The Commission shall cause a copy of an instrument executed by the Ministerial Council under sub-section 45 (2), 46 (2) or 48 (2) to be published in the *Gazette* and the *Government Gazette*, but failure of the Commission to do so does not affect the validity of the instrument.

#### **Power of Ministerial Council to approve futures association**

**50.** (1) A body corporate that proposes to operate as a futures association may lodge with the Commission an application in writing to be approved by the Ministerial Council as a futures association.

(2) The Ministerial Council may approve as a futures association a body corporate that makes an application under sub-section (1) if it is satisfied—

- (a) that the nature of the body corporate is such that it may properly exercise its functions as a futures association, being the functions

of regulating the affairs of the association in the interests of the public and of administering and enforcing the business rules of the association;

- (b) that its business rules make satisfactory provision—
- (i) for the admission as members of persons licensed or proposing to apply to be licensed under Part IV, or a specified class of such persons;
  - (ii) for the standards of training and experience, and other qualifications, for membership;
  - (iii) for the manner in which members are to conduct their business of dealing in futures contracts so as to ensure efficient, honest and fair practices in relation to such dealing;
  - (iv) for the exclusion of a body corporate from membership where a director of the body corporate, a person concerned in the management of the body corporate or a person who has control, or substantial control, of the body corporate would be excluded from membership;
  - (v) for the exclusion from membership of a person who is not of good character and high business integrity;
  - (vi) for the expulsion, suspension or disciplining of members for conduct inconsistent with just and equitable principles in the transaction of business, for a contravention of the business rules of the body corporate, or for a contravention of this Code or a corresponding law in force in a participating State or in a participating Territory;
  - (vii) for an appropriate mechanism whereby a person whose application for membership of the body corporate is refused, or whose membership of the body corporate is cancelled or suspended, in circumstances where the person does not have a right to appeal to the Court under sub-section 53 (1) against the decision to refuse the application, or to cancel or suspend the membership, as the case may be, may appeal against the decision;
  - (viii) for an appropriate mechanism whereby a person who has been disciplined by the body corporate otherwise than by way of cancellation or suspension of the person's membership of the body corporate may appeal against the decision to discipline the person;
  - (ix) for the inspection and audit of the accounting records of members, being accounting records required to be kept by this Code or by a corresponding law in force in a participating State or in a participating Territory;
  - (x) prohibiting a member from accepting or executing, otherwise than in accordance with the business rules, instructions from another person to deal in futures contracts;
  - (xi) prohibiting a member from dealing in futures contracts on behalf of another person otherwise than in accordance with instructions accepted by the member from the person;

- (xii) prohibiting a member from dealing in futures contracts, on behalf of another person, on a futures market of a futures exchange or of a recognised futures exchange, otherwise than in accordance with the business rules of the futures exchange or recognised futures exchange, as the case may be;
  - (xiii) prohibiting a member, except as permitted by the business rules, from executing the instructions of another person to deal in futures contracts unless the instructions are executed in such a manner that the dealing is effected on a futures market of a futures exchange or on a recognised futures exchange or on an exempt futures market.
  - (xiv) for the equitable and expeditious settlement of claims and grievances between members, being claims and grievances relating to the transaction of business by members in their capacity as members; and
  - (xv) for appropriate mechanisms for the conciliation and settlement of disputes between members and their clients, being disputes concerning dealings in futures contracts by members on behalf of their clients or concerning transactions between members and their clients in connection with such dealings; and
- (c) that the interests of the public will be served by granting the application.

#### **Suspension or cancellation of approval**

**51.** (1) The Ministerial Council may cause to be served on a body corporate notice in writing calling on the body corporate to show cause at a hearing before a person designated in the notice why its approval as a futures association should not be suspended or cancelled on grounds specified in the notice.

(2) A notice served on a body corporate under sub-section (1) shall specify, and give reasonable notice of, the time and place at which the hearing referred to in the notice will take place but the person designated in the notice may, by agreement with the body corporate, fix a different time, or a different place, or both, for the hearing.

(3) After giving a body corporate served with a notice under sub-section (1) an opportunity to be heard in accordance with sub-section (2), the person designated in the notice shall submit to the Ministerial Council a report in relation to the hearing (if any) and a recommendation in relation to the matter and, after considering the report and recommendation, the Ministerial Council may—

- (a) decide to take no further action in relation to the matters to which the notice related;
- (b) suspend until a specified date the approval of the body corporate as a futures association; or
- (c) cancel the approval of the body corporate as a futures association.

(4) Where the approval of a body corporate as a futures association is suspended under paragraph (3) (b), the body corporate shall, during the period of the suspension, be deemed not to be a futures association.



**Notification of approval, &c., of futures association**

52. (1) The Ministerial Council shall cause to be published in the *Gazette* and the *Government Gazette* notice of—

- (a) the approval of a body corporate as a futures association;
- (b) the suspension of any such approval, specifying the date of expiration of the suspension; and 5
- (c) the cancellation of any such approval.

(2) A failure to publish a notice under sub-section (1) does not affect the validity of the approval, suspension or cancellation in respect of which the notice is required to be published. 10

**Appeal to the Court against certain decisions of futures exchanges and futures associations**

53. (1) Where a body corporate, being a futures exchange or futures association—

- (a) decides, at a time when a person is a member of no relevant organisation, to refuse an application by the person for membership of the body corporate; or 15
- (b) decides, at a time when a person is a member of no other relevant organisation, to suspend or cancel the person's membership of the body corporate, 20

the body corporate shall, within 14 days after so deciding, give to the person, and to the Commission, a notice in writing setting out the decision and the reasons for the decision, and the person may, before the end of the period of 21 days (or such longer period as the Court allows) commencing when the notice is so given, appeal to the Court against the decision by lodging a written notice of appeal. 25

(2) A person whose membership of a relevant organisation is suspended for a period—

- (a) shall be deemed, for the purposes of paragraph (1) (a), to be a member of that relevant organisation throughout that period; and 30
- (b) shall be deemed, for the purposes of paragraph (1) (b), not to be a member of that relevant organisation at any time during that period.

(3) A person shall, on the day on which the person lodges a notice of appeal with the Court under sub-section (1), lodge a copy of the notice with the Commission. 35

(4) Where a body corporate decides as mentioned in paragraph (1) (b), then—

- (a) subject to paragraph (c) of this sub-section and to sub-section (6), the decision takes effect at the end of the day on which a notice relating to the decision is given by the body corporate in accordance with sub-section (1); 40
- (b) if the person to whom the decision relates appeals to the Court under sub-section (1) against the decision—the Court may, at 45

any time before it determines the appeal, make such order as it thinks fit concerning the effect, pending determination of the appeal, of the decision, including, without limiting the generality of the foregoing, an order that is subject to conditions specified in the order; and

(c) an order made by the Court under paragraph (b) has effect accordingly.

(5) The Court may, after hearing an appeal under sub-section (1), dismiss the appeal or—

(a) in the case of an appeal against a decision to refuse an application for membership—decide that the application should be granted, or should be granted subject to specified conditions;

(b) in the case of an appeal against a decision to suspend for a period a person's membership—decide that the person's membership—

(i) should not be suspended; or

(ii) should be suspended for a specified lesser period; or

(c) in the case of an appeal against a decision to cancel a person's membership—decide that the person's membership—

(i) should not be cancelled; or

(ii) should not be cancelled, but should be suspended for a specified period.

(6) Where, on an appeal against a decision of a body corporate, the Court decides as mentioned in paragraph (5) (a), (b) or (c), then, as from the day on which the appeal is decided—

(a) the first-mentioned decision ceases to have effect; and

(b) the decision of the Court has effect, except for the purposes of subsection (1), as a decision of the body corporate and shall take effect accordingly.

#### **Commission to be notified of amendments of business rules**

**54.** (1) Where an amendment is made by way of rescission or alteration of, or addition to, the business rules of a futures exchange, of a clearing house for a futures exchange, or of a futures association, the futures exchange, clearing house or futures association, as the case may be, shall, forthwith after the making of the amendment, give written notice of the amendment to the Commission.

(2) A notice under sub-section (1) shall—

(a) set out the text of the amendment to which it relates;

(b) specify the date on which the amendment was made; and

(c) contain an explanation of the purpose of the amendment.

(3) If a notice required by sub-section (1) to be given in relation to an amendment is not given within 21 days after the making of the amendment, the amendment ceases to have effect.

(4) Where the Commission receives a notice under this section, the Commission shall forthwith send a copy of the notice to each member of the Ministerial Council.

(5) The Ministerial Council may, within 28 days after the receipt by the Commission of a notice under this section, disallow the whole or a specified part of the amendment to which the notice relates.

(6) Where the Ministerial Council disallows under this section the whole or a part of an amendment of the business rules of a body corporate, the Commission shall forthwith give notice of the disallowance to the body corporate and, upon receipt by the body corporate of the notice of disallowance, the amendment ceases, to the extent of the disallowance, to have effect.

#### **Orderly markets in futures contracts—functions and powers of futures exchanges and clearing houses**

**55.** (1) A futures exchange, and a clearing house for a futures exchange, shall, to the extent that it is reasonably practicable to do so, take all steps, and do all things, necessary to ensure an orderly and fair market for dealings in futures contracts on a futures market of the futures exchange.

(2) A futures exchange may, for the purpose of performing its functions under sub-section (1), give to a person who is not a member of the futures exchange but in whose name a futures contract entered into on a futures market of the futures exchange is registered a direction—

- (a) to do a particular act or thing; or
- (b) to refrain from doing a particular act or thing.

(3) A person shall comply with a direction given to the person in accordance with sub-section (2), but a person who contravenes this sub-section is not guilty of an offence by virtue of this section or section 148.

#### **Orderly markets in futures contracts—powers of Commission**

**56.** (1) Subject to sub-sections (2) and (6), the Commission may, in relation to a futures market of a futures exchange, give a direction in writing to the futures exchange—

- (a) to close the futures market;
- (b) to suspend dealing on the futures market in a specified class of futures contracts;
- (c) to limit transactions on the futures market to the closing out of futures contracts;
- (d) to defer for a specified period the completion date for all futures contracts, or for a specified class of futures contracts, made on the futures market;
- (e) to cause a specified futures contract made on the futures market, or each futures contract included in a specified class of futures contracts so made, to be—
  - (i) closed out forthwith as the result of the matching up of the futures contract with a futures contract of the same kind

whose price or value is equal to a price or value determined by the futures exchange; or

(ii) invoiced back to a specified date at a price or value determined by the futures exchange;

(f) to require a futures contract made on the futures market, or each futures contract included in a specified class of futures contracts so made, to be discharged by—

(i) the tendering of a merchantable lot of a commodity determined by the futures exchange, being a commodity of a quality or standard that is—

(A) different from the quality or standard of the commodity specified in the futures contract; and

(B) determined by the futures exchange; and

(ii) the tendering of a price adjusted by an amount that is—

(A) appropriate having regard to the quality or standard of the commodity referred to in sub-paragraph (i); and

(B) determined by the futures exchange; or

(g) to require a member of the futures exchange to act in a specified manner in relation to dealings in futures contracts on the futures market, or in relation to a specified class of such dealings.

(2) The Commission shall not give a direction under sub-section (1) in relation to a futures market of a futures exchange unless—

(a) it has determined that a direction should be so given because it is of the opinion that—

(i) sub-section 55 (1) has not been complied with in relation to that futures market;

(ii) it is necessary to protect the interests of persons on behalf of whom futures contracts are or may be dealt with on that futures market; or

(iii) it would be in the public interest for a direction to be so given;

(b) it has given to the futures exchange a notice in writing stating that it has formed that opinion and specifying—

(i) its reasons for forming that opinion;

(ii) the direction that it considers should be so given; and

(iii) a time, or a date and time, before which it will not so give the direction;

(c) it has given a copy of the notice to each clearing house for that futures market; and

(d) the direction is so given after the time, or date and time, as the case may be, specified pursuant to sub-paragraph (b) (iii).

(3) The Commission shall, before determining in relation to a futures market of a futures exchange as mentioned in paragraph (2) (a), consult the futures exchange and each clearing house for that futures market.

(4) A failure by the Commission to comply with sub-section (3) does not affect the validity of—

- (a) a determination under paragraph (2) (a); or
- (b) a direction given under sub-section (1) pursuant to such a determination.

(5) The Commission shall, as soon as practicable after giving a notice under paragraph (2) (b) in relation to a futures market of a futures exchange—

- (a) give to the Ministerial Council a copy of the notice and a written report setting out the reasons for the giving of the notice;
- (b) give a copy of the report to the futures exchange; and
- (c) give a copy of the report to each clearing house for that futures market.

(6) The Commission shall not give a direction under sub-section (1) in relation to a futures market of a futures exchange if—

- (a) the Ministerial Council has directed the Commission not give the direction; or
- (b) the futures exchange has acted as if the direction had been given.

(7) The Commission shall, as soon as practicable after giving a direction under sub-section (1) in relation to a futures market of a futures exchange—

- (a) give to the Ministerial Council a copy of the direction; and
- (b) give to each clearing house for that futures market—
  - (i) a copy of the direction; and
  - (ii) a direction in writing prohibiting the clearing house from acting in a manner inconsistent with, and requiring the clearing house to do all that it is reasonably capable of doing to give effect to, the direction under sub-section (1) while the last-mentioned direction remains in force.

(8) The Ministerial Council may determine in writing the period throughout which a particular direction under sub-section (1) is to remain in force.

(9) A direction given under sub-section (1) remains in force—

- (a) in a case where a determination under sub-section (8) is in force—  
throughout the period specified in the determination; or
- (b) in any other case—unless sooner revoked, until the end of the period of 21 days, or such shorter period (if any) as is specified in the direction, commencing when the direction is given.

(10) A futures exchange shall not, while a direction given under sub-section (1) in relation to a futures market of the futures exchange remains in force, fail to comply with the direction.

Penalty: \$1,000 for each day on which the futures exchange contravenes this sub-section.

(11) A clearing house for a futures exchange shall not fail to comply with a direction given to the clearing house under sub-paragraph (7) (b) (ii).

Penalty: \$1,000 for each day on which the clearing house contravenes this sub-section.

(12) A document may be given to a person under this section by sending to the person, by telegraph, telex, facsimile service or other similar means of communication, a message to the effect of the document.

#### **Futures exchanges and others to assist Commission**

57. (1) A futures exchange, a clearing house for a futures exchange, and a futures association, shall each provide such assistance to the Commission, or to a person acting on behalf of, or with the authority of, the Commission, as the Commission reasonably requires for the performance of its functions under this Code.

(2) Where—

(a) a body corporate, being a futures exchange, a clearing house for a futures exchange, or a futures association, decides to reprimand, fine, suspend, expel or otherwise take disciplinary action against, a member of the body corporate; and

(b) sub-section 53 (1) does not require the body corporate to give to the Commission a notice relating to the decision,

the body corporate shall, within 14 days after so deciding, give to the Commission a notice in writing setting out particulars of the name of the member, the decision, the reasons for the decision and, in the case of a decision to fine a member, the amount of the fine.

(3) Where a clearing house for a futures exchange—

(a) refuses to register a dealing in a futures contract; or

(b) closes out a futures contract because of a failure to meet a call for deposit or margin,

it shall forthwith furnish the Commission with particulars of its action.

(4) A person authorised by the Commission is entitled at all reasonable times to full and free access for any of the purposes of this Code to the trading floor of a futures market of a futures exchange.

(5) A person who refuses or fails, without lawful excuse, to allow a person authorised by the Commission access in accordance with sub-section (4) to the trading floor of a futures market of a futures exchange contravenes this sub-section.

(6) The penalty applicable to an offence constituted by a contravention of sub-section (5) is a fine of \$2,500 or imprisonment for 6 months, or both.

#### **Power of Court to order observance or enforcement of business rules of futures exchange, clearing house or futures association**

58. Where a person who is under an obligation to comply with, observe, enforce or give effect to the business rules of a futures exchange, of a clearing house for a futures exchange, or of a futures association, fails to comply with, observe, enforce or give effect to those rules, the Court may, on the

application of the futures exchange, clearing house or futures association, as the case may be, of the Commission, or of a person aggrieved by the failure, and after giving to the person against whom the order is sought an opportunity of being heard, make an order giving directions to the last-mentioned person concerning compliance with, observance or enforcement of, or giving effect to, those rules.

#### Effect of certain laws on certain agreements

**59.** (1) A contravention of this Code affects neither the validity nor the enforceability of an agreement.

(2) For the purposes of any Act or law, a futures contract is not a contract by way of gaming or wagering if it is made—

- (a) on an exempt futures market or on a futures market of a future exchange or of a recognised futures exchange; or
- (b) as permitted by the business rules of a futures association, of a futures exchange or of a recognised futures exchange.

### PART IV—LICENCES

#### Proclaimed day

**60.** A reference in this Part to the proclaimed day is a reference to a day to be fixed for the purposes of section 60 of the *Futures Industry Act, 1986* of the Commonwealth by Proclamation made by the Governor-General and published in the *Gazette*.

#### Futures broker's licence

**61.** A person shall not, after the end of the period of 6 months commencing at the commencement of the Futures Industry (Application of Laws) Act, 1986—

- (a) deal in a futures contract on behalf of another person; or
- (b) hold himself, herself or itself out as carrying on (whether or not as part of, or in conjunction with, any other business) a business of dealing in futures contracts on behalf of others,

unless the first-mentioned person is an exempt broker, the holder of a futures broker's licence or a recognised futures broker.

Penalty: \$10,000 or imprisonment for 2 years, or both.

#### Futures broker's representatives

**62.** A person who is employed by, or acts for or by arrangement with, a futures broker other than an exempt broker shall not, after the end of the period of 6 months commencing on the proclaimed day, do an act on behalf of the broker in relation to a business of dealing in futures contracts carried on by the broker or in connection with a business carried on by the broker of advising other persons concerning futures contracts or a business carried on by the broker in the course of which the broker issues or publishes analyses or reports concerning futures contracts (other than an act in the course of work of a kind ordinarily performed by accountants, clerks or cashiers) unless the first-mentioned person—

- (a) is the holder of a futures broker's licence;

- (b) is a recognised futures broker;
- (c) is the holder of a futures broker's representative's licence in which the broker is named as a broker on whose behalf the first-mentioned person may act; or
- (d) is a recognised futures broker's representative by virtue of being the holder of a licence under the provisions of the law in force in a participating State or in a participating Territory that correspond with this Part, being a licence in which the broker is named as a broker on whose behalf the first-mentioned person may act.

Penalty: \$2,500 or imprisonment for 6 months, or both.

#### **Futures advisers**

**63.** (1) A person shall not, after the end of the period of 6 months commencing at the commencement of the Futures Industry (Application of Laws) Act, 1986, act as, or hold himself, herself or itself out to be, a futures adviser unless the person is the holder of a futures adviser's licence or is a recognised futures adviser.

Penalty: \$5,000 or imprisonment for 1 year, or both.

(2) Sub-section (1) does not apply to or in relation to the holder of a futures broker's licence, an exempt broker or a recognised futures broker.

#### **Futures adviser's representatives**

**64.** A person who is employed by, or acts for or by arrangement with, a futures adviser other than an exempt broker in connection with a business carried on by the futures adviser of advising other persons concerning futures contracts, or a business carried on by the futures adviser whether alone or together with another person or other persons in the course of which the futures adviser issues or publishes analyses or reports concerning futures contracts, shall not, after the end of the period of 6 months commencing on the proclaimed day, do an act on behalf of the futures adviser in connection with that business (other than an act in the course of work of a kind ordinarily performed by accountants, clerks or cashiers) unless the first-mentioned person—

- (a) is the holder of a futures broker's licence or a futures adviser's licence;
- (b) is a recognised futures broker or recognised futures adviser;
- (c) where the futures adviser is a futures broker—is the holder of a futures broker's representative's licence in which the futures adviser is named as a futures broker on whose behalf the first-mentioned person may act;
- (d) is the holder of a futures adviser's representative's licence in which the futures adviser is named as a futures adviser on whose behalf the first-mentioned person may act;
- (e) where the futures adviser is a recognised futures broker—is a recognised futures broker's representative by virtue of being the holder of a licence under the provisions of the law in force in a participating State or in a participating Territory that correspond



with this Part, being a licence in which the futures adviser is named as a futures broker on whose behalf the first-mentioned person may act; or

- (f) is a recognised futures adviser's representative by virtue of being the holder of a licence under the provisions of the law in force in a participating State or in a participating Territory that correspond with this Part, being a licence in which the futures adviser is named as a futures adviser on whose behalf the first-mentioned person may act.

Penalty: \$2,500 or imprisonment for 6 months, or both.

#### **Application for grant of licence**

**65.** (1) A person may apply to the Commission for a futures broker's licence or a futures adviser's licence.

(2) A natural person may apply to the Commission for a futures broker's representative's licence in which the holder of a futures broker's licence is, or 2 or more such holders are, named as a broker or as brokers on whose behalf the person may act.

(3) A natural person may apply to the Commission for a futures adviser's representative's licence in which the holder of a futures adviser's licence is, or 2 or more such holders are, named as a futures adviser or as futures advisers on whose behalf the person may act.

(4) An application for the grant of a licence shall be made in the prescribed form and manner.

(5) The Commission may require an applicant to supply the Commission with such further information as the Commission considers necessary in relation to the application.

#### **Grant of futures broker's licence or futures adviser's licence**

**66.** (1) Where an application is duly made for a grant of a futures broker's licence or a futures adviser's licence, the Commission shall grant the application if—

(a) in the case of an applicant who is a natural person—

- (i) the applicant is not an insolvent under administration;
- (ii) the applicant has not been convicted, either within South Australia or elsewhere, within the period of 10 years immediately preceding the date on which the application was made, of an offence involving fraud or dishonesty punishable, upon conviction, by imprisonment for 3 months or more;
- (iii) the applicant is not disqualified or deemed to be disqualified from holding a licence under this Code of the kind applied for;
- (iv) in the case of an applicant for a futures broker's licence— the applicant is a member of a relevant organisation;

- (v) the Commission is satisfied as to the educational qualifications or experience of the applicant having regard to the nature of the duties of the holder of a futures broker's licence or a futures adviser's licence, as the case may be;
  - (vi) the Commission does not have any reason to believe that the applicant is not of good fame and character; and
  - (vii) the Commission does not have any reason to believe that the applicant will not perform the duties of a holder of a futures broker's licence or of a futures adviser's licence, as the case may be, efficiently, honestly and fairly; or
- (b) in the case of an applicant that is a body corporate—
- (i) the body corporate is not under official management, or in the course of being wound up, under the *Companies (South Australia) Code* or a previous corresponding law of South Australia or under a corresponding law, or a previous corresponding law, in force in another State or in a Territory;
  - (ii) the body corporate is not a body corporate in respect of property of which a receiver, or a receiver and manager, has been appointed under the *Companies (South Australia) Code* or a previous corresponding law of South Australia or under a corresponding law, or a previous corresponding law, in force in another State or in a Territory;
  - (iii) the applicant is not disqualified or deemed to be disqualified from holding a licence under this Code of the kind applied for;
  - (iv) in the case of an applicant for a futures broker's licence—the applicant is a member of a relevant organisation;
  - (v) the body corporate has not, whether within or outside South Australia, entered into a compromise or scheme of arrangement with its creditors, being a compromise or scheme of arrangement that is still in operation;
  - (vi) the Commission is satisfied as to the educational qualifications or experience of the officers of the applicant who are to perform duties in connection with the holding of the futures broker's licence or futures adviser's licence, as the case may be; and
  - (vii) the Commission does not have any reason to believe that the applicant will not perform the duties of a holder of a futures broker's licence or a futures adviser's licence, as the case may be, efficiently, honestly and fairly,

but otherwise the Commission shall, subject to sub-section (2), refuse the application.

(2) Where an application is duly made for a grant of a futures broker's licence or a futures adviser's licence, the Commission shall not, unless it has afforded the applicant an opportunity to appear at a hearing before the Commission (being a hearing that takes place in private) and make

submissions and give evidence in relation to the matter, refuse the application on the ground, or on grounds including the ground, that sub-paragraph (1) (a) (v), (vi) or (vii) or (1) (b) (vi) or (vii) does not apply in relation to the applicant.

#### **Grant of representative's licence**

67. (1) Where an application is duly made for the grant of a futures broker's representative's licence or a futures adviser's representative's licence, the Commission shall grant the application if it does not have any reason to believe that the applicant will not perform the duties of the holder of a futures broker's representative's licence or of a futures adviser's representative's licence, as the case may be, efficiently, honestly and fairly, but otherwise the Commission shall, subject to sub-section (2), refuse the application.

(2) The Commission shall not refuse an application unless the Commission has afforded the applicant an opportunity to appear at a hearing before the Commission (being a hearing that takes place in private) and make submissions and give evidence in relation to the matter.

(3) A futures broker's representative's licence shall specify the person, being the holder of a futures broker's licence, or 2 or more such persons, on whose behalf the holder of the futures broker's representative's licence may act.

(4) A futures adviser's representative's licence shall specify the person, being the holder of a futures adviser's licence, or 2 or more such persons, on whose behalf the holder of the futures adviser's representative's licence may act.

(5) Where—

(a) an applicant for a futures broker's representative's licence proposes to act on behalf of 2 or more persons who together constitute a future's broker, being persons each of whom is the holder of a futures broker's licence; or

(b) an applicant for a futures adviser's representative's licence proposes to act on behalf of 2 or more persons who together constitute a futures adviser, being persons each of whom is the holder of a futures adviser's licence,

the application may specify those persons by reference to the name or style under which the business of those persons is carried on and, where those persons are so specified in the application, they shall be specified by reference to that name or style in a futures broker's representative's licence or a futures adviser's representative's licence, as the case may be, granted to the applicant.

#### **Change of principals of representative**

68. (1) The holder of a representative's licence may apply to the Commission in the prescribed form and manner for the licence to be varied by the inclusion of a name or names in, or the deletion of a name or names from, or both the inclusion of a name or names in and the deletion of a name or names from, the name or names specified in the licence as the name of the holder of a futures broker's licence or futures adviser's licence

or the names of the holders of the futures broker's licences or futures adviser's licences, as the case may be, on whose behalf the holder of the representative's licence may act.

(2) Where an application is duly made under sub-section (1)—

- (a) if the applicant seeks the inclusion of a name or names in the licence as the name of the holder of a futures broker's licence or futures adviser's licence or the names of the holders of the futures broker's licences or futures adviser's licences, as the case may be, on whose behalf the applicant may act (whether or not the applicant also seeks the deletion of a name or names from the licence)—
  - (i) if the Commission does not have any reason to believe that the applicant will not perform efficiently, honestly and fairly the duties of a holder of a representative's licence on behalf of the holder of that futures broker's licence or futures adviser's licence or the holders of those futures broker's licences or futures adviser's licences—the Commission shall vary the licence by including that name or those names; or
  - (ii) if the Commission is not of that opinion—the Commission shall refuse so to vary the licence; and
- (b) if the applicant seeks the deletion from the licence of a name or names specified in the licence as the name of the holder of a futures broker's licence or futures adviser's licence or the names of the holders of the futures broker's licences or futures adviser's licences, as the case may be, on whose behalf the applicant may act (whether or not the applicant also seeks the inclusion of a name or names in the licence)—the Commission shall vary the licence by deleting that name or those names.

**Conditions to which licence is subject**

69. (1) A licence is subject to—

- (a) such conditions and restrictions as are prescribed; and
- (b) subject to section 80, such conditions and restrictions as the Commission imposes when granting the licence or at any time while the licence is in force.

(2) A futures broker's licence is subject to a condition—

- (a) that the holder of the licence be, during the currency of the licence, a member of a relevant organisation; and
- (b) that the licence is suspended throughout a period throughout which the holder of the licence—
  - (i) is a member of no relevant organisation; and
  - (ii) would, but for the suspension of the holder's membership of a relevant organisation, be a member of the last-mentioned relevant organisation.

(3) A person whose membership of a relevant organisation is suspended for a period—

- (a) shall be deemed, for the purposes of paragraph (2) (a), to be a member of that relevant organisation throughout that period; and
  - (b) shall be deemed, for the purposes of paragraph (2) (b), not to be a member of that relevant organisation at any time during that period.
  
- (4) Without limiting the generality of sub-section (1), conditions and restrictions referred to in paragraph (1) (a) or (b)—
  - (a) may include conditions and restrictions relating to the limitation of the liability that may be incurred by the holder of a futures broker's licence in connection with a business of dealing in futures contracts;
  - (b) may include conditions and restrictions relating to the incurring, and conditions relating to the disclosure, of liabilities arising otherwise than in connection with a business of dealing in futures contracts; and
  - (c) may include conditions and restrictions relating to the financial position of the holder of a futures broker's licence, whether in relation to the business of dealing in futures contracts carried on by the holder of the licence or otherwise.
  
- (5) Without limiting the generality of paragraph (4) (c), a condition of the kind referred to in that paragraph—
  - (a) may include a condition that the assets of the holder of a futures broker's licence include, or do not include, assets of a particular kind or kinds; and
  - (b) may include a condition that the sum of the values of the assets of a particular kind or kinds included in the assets of the holder of a futures broker's licence be not less than, or not greater than, an amount ascertained in accordance with the condition.
  
- (6) A condition of the kind referred to in paragraph (5) (b) may provide for the values of assets of the holder of a futures broker's licence for the purposes of the application of that condition to be ascertained in a manner specified in, or determined in accordance with, the condition.
  
- (7) The provision that may be made in a condition referred to in paragraph (5) (b) for ascertaining the amount referred to in that paragraph may be, but is not limited to, a provision that that amount shall be—
  - (a) a specified percentage of the sum of the values of all the assets of the holder of the futures broker's licence;
  - (b) a specified percentage of the sum of the values of all the assets of the holder of the futures broker's licence that are included in a specified class or classes of those assets;
  - (c) a specified percentage of the sum of the amounts of all the liabilities of the holder of the futures broker's licence; or
  - (d) a specified percentage of the sum of the amounts of all the liabilities of the holder of the futures broker's licence that are included in a specified class or classes of those liabilities.

(8) A reference in this section to the assets of the holder of a futures broker's licence shall be construed as a reference to all the assets of the holder of the licence, whether or not the assets are used in, or in connection with, the business of dealing in futures contracts carried on by the holder of the licence.

(9) Subject to section 80, the Commission may, at any time, revoke or vary conditions or restrictions imposed by the Commission under paragraph (1) (b).

(10) Where the Commission imposes, varies or revokes conditions or restrictions under this section in relation to a licence granted to a futures broker, the Commission shall inform in writing—

- (a) each relevant organisation of which the broker is a member; and
- (b) each body corporate that is a clearing house for a futures exchange, or for a local recognised futures exchange, of which the broker is a member,

but failure of the Commission to do so does not affect the validity of the conditions or restrictions.

**Holder of licence to notify prescribed bodies of breach of condition or restriction applicable to licence**

70. (1) If an event occurs that constitutes a contravention of a condition or restriction applicable in respect of a licence, the holder of the licence shall, not later than the business day next following the day on which the event occurred, give notice in writing to each prescribed body setting out particulars of the event.

Penalty—

- (a) in the case of the holder of a futures broker's licence or a futures adviser's licence—\$5,000 or imprisonment for 1 year, or both; or
- (b) in the case of the holder of a representative's licence—\$2,500 or imprisonment for 6 months, or both.

(2) In a prosecution of a person for failing to give a notice to a prescribed body under this section, it is a defence if it is established that—

- (a) at the time when the requirement to give the notice arose, the person was unaware of the fact or occurrence that gave rise to the requirement; and
- (b) the person—
  - (i) did not become aware of the fact or occurrence before the date of the information; or
  - (ii) did become so aware before that date but gave the notice as soon as reasonably practicable after the day on which the person became so aware.

(3) In this section—

“event” includes a happening, circumstance or state of affairs;

“prescribed body”, in relation to a person who is the holder of a licence, means—

- (a) the Commission; or
- (b) a relevant organisation of which the person is a member.

**Furnishing of information and statements to Commission**

71. (1) The holder of a futures broker's licence shall furnish to the Commission such information in writing or statements in respect of the business of dealing in futures contracts carried on by the holder of the licence as the Commission from time to time directs.

Penalty: \$1,000.

(2) A direction under this section may require the holder of a futures broker's licence to cause a statement referred to in the direction to be audited by a registered company auditor before it is furnished to the Commission.

(3) Where the Commission has, under this section, directed the holder of a futures broker's licence to furnish information or a statement within a particular period, the Commission may extend, or further extend, the period for the furnishing of the information or statement.

**Register of Licence Holders**

72. (1) The Commission shall keep a Register of Licence Holders for the purposes of this Code.

(2) The Commission shall enter in the Register of Licence Holders—

(a) in relation to the holder of a futures broker's licence or a futures adviser's licence—

- (i) the name of the holder of the licence;
- (ii) where the holder is a body corporate—the name of each person who is a director, and the name of each person who is a secretary, of the body corporate;
- (iii) the date on which the licence was granted;
- (iv) the address of the principal place of business at which the holder of the licence carries on the business to which the licence relates and the address of each other place (if any) at which that business is carried on; and
- (v) where such a business is carried on under a name or style other than the name of the holder of the licence—the name or style under which the business is carried on;

(b) in relation to the holder of a representative's licence—

- (i) the name of the holder of the licence;
- (ii) the date on which the licence was granted;
- (iii) the name of, and the address of the principal place of business of, each futures broker or futures adviser specified in the licence as a person on whose behalf the holder of the licence may act; and
- (iv) where the business of any such futures broker or futures adviser is carried on under a name or style other than

the name of the futures broker or futures adviser—the name or style under which the business is carried on; and

(c) in relation to the holder of any licence—

- (i) if it is a condition of the licence that the holder be a member of a relevant organisation—the name, and the address of the principal place of business, of each relevant organisation of which the holder is a member;
- (ii) particulars of any suspension of the licence; and
- (iii) such other matters as are prescribed.

(3) Where a person ceases to be the holder of a licence, the Commission shall remove from the Register of Licence Holders the name of the person and the other particulars entered in the Register in relation to the person.

(4) A person may inspect, and may make copies of, or take extracts from, the Register of Licence Holders.

(5) The Commission may enter in the Register of Licence Holders particulars of recognised licensees, being—

- (a) the name of the recognised licensee;
- (b) the date (if known) on which the recognised licensee became a recognised licensee; and
- (c) such other matters as are prescribed.

(6) Where the Commission becomes aware that a person whose name is entered in the Register of Licence Holders as a recognised licensee has ceased to be a recognised licensee, the Commission shall remove from the Register the name of the person and the other particulars entered in the Register in relation to the person.

#### **Notification of change in particulars**

73. Where—

- (a) the holder of a futures broker's licence ceases to carry on the business to which the licence relates;
- (b) the holder of a futures adviser's licence ceases to act as, or hold himself, herself or itself out to be, a futures adviser;
- (c) the holder of a representative's licence ceases to be employed or act in connection with the business carried on by a futures broker or a futures adviser specified in the licence as a person on whose behalf the holder of the licence may act and the licence has not been varied in the relevant respects under section 61; or
- (d) a change occurs in any matter particulars of which are required by virtue of paragraph 72 (2) (a) or (b) or sub-paragraph 72 (2) (c)
  - (i) to be entered in the Register of Licence Holders in relation to the holder of a licence,

the holder of the licence shall, not later than 21 days after the occurrence of the event concerned, give to the Commission, in the prescribed form, particulars of the event.



### Annual statement to be lodged with Commission

74. (1) A person who is or has been the holder of a futures broker's licence or a futures adviser's licence shall lodge with the Commission, in respect of each year or part of a year during which the licence is or was in force, a statement in the prescribed form containing such information as is prescribed.

(2) A person who is the holder of a representative's licence on the prescribed date in a year shall lodge with the Commission in respect of the period of 12 months that ended on that date, or the part of that period of 12 months during which the licence was in force, a statement in the prescribed form containing such information as is prescribed.

### Time for lodging annual statement

75. A person required by section 74 to lodge a statement shall lodge the statement—

- (a) if the licence is a futures broker's licence—during the period within which a profit and loss account and balance sheet referred to in section 95 are required to be lodged with the Commission by the person;
- (b) if the licence is a futures adviser's licence—within the period of one month immediately before the anniversary of the date on which the licence was granted; and
- (c) if the licence is a representative's licence—within the prescribed period after the date prescribed for the purposes of sub-section 74 (2).

### Commission may extend period for lodging statement

76. (1) The Commission may, in its discretion, extend, or further extend, the period for lodging a statement under section 74.

(2) An application for an extension under sub-section (1) may be made, and the power of the Commission under that sub-section may be exercised, notwithstanding that the period referred to in that sub-section has expired.

### Revocation and suspension of licences

77. (1) Where—

- (a) the holder of a licence, being a natural person—
  - (i) becomes an insolvent under administration;
  - (ii) is convicted of an offence involving fraud or dishonesty punishable, upon conviction, by imprisonment for 3 months or more; or
  - (iii) becomes incapable, through mental or physical incapacity, of managing his or her affairs;
- (b) the holder of a licence, being a body corporate—
  - (i) is commenced to be wound up, is under official management or has ceased to carry on business;
  - (ii) is a body corporate in respect of property of which a receiver, or a receiver and manager, has been appointed, whether by the Court or otherwise; or

(iii) has entered into a compromise or scheme of arrangement with its creditors;

(c) the holder of a licence contravenes section 74, 75 or 95; or

(d) the holder of a licence requests the Commission to revoke the licence,

the Commission may revoke the licence.

(2) Where a person who is a director, secretary or executive officer of a body corporate that is the holder of a futures broker's licence or a futures adviser's licence contravenes this Code because the person does not hold a licence, or because a licence held by the person is suspended, the Commission may revoke the licence held by the body corporate.

(3) If, in a case to which paragraph (1) (a) or (b) or sub-section (2) applies, the Commission considers it desirable to do so, the Commission may, instead of revoking a licence, suspend the licence for a specified period and may at any time remove such a suspension.

(4) Where a futures broker's licence or a futures adviser's licence is revoked or suspended, the holder of a representative's licence in which a person who is or was the holder of the futures broker's licence or futures adviser's licence is specified as a person on whose behalf the holder of the representative's licence may act shall not, where the first-mentioned licence is revoked, act on behalf of that person or, where the first-mentioned licence is suspended, shall not so act during the period of the suspension.

Penalty: \$2,500 or imprisonment for 6 months, or both.

#### **Further provisions relating to revocation and suspension of licences**

78. (1) Subject to section 80, where—

(a) the holder of a licence contravenes a condition or restriction applicable in respect of the licence;

(b) the Commission has reason to believe that the holder of a futures broker's licence, a futures adviser's licence or a representative's licence has not performed the duties of the holder of such a licence efficiently, honestly and fairly; or

(c) the application for a licence contained matter that was false in a material particular or materially misleading in the form or context in which it appeared, or there was an omission of material matter from the application for a licence,

the Commission may revoke the licence.

(2) If in a case to which paragraph (1) (a) applies the Commission considers it desirable to do so, the Commission may, instead of revoking a licence, suspend the licence for a specified period and may at any time remove such a suspension.

(3) Where the Commission revokes a licence under sub-section (1), it may make an application to the Court for an order disqualifying the person who was the holder of the licence from holding a licence either permanently or during such period as the Court specifies in the order.

(4) Where an application is made under sub-section (3), the Court may make such order as it thinks fit or refuse to make an order and, where it makes an order, may at any time revoke or vary the order.

(5) A person who is disqualified or deemed to be disqualified, either permanently or for a particular period, from holding a licence under the corresponding law in force in another State or in a Territory by reason of an order of a court under that corresponding law or by reason of the operation of a provision of that corresponding law is, while the person is so disqualified, deemed to be disqualified from holding a licence under this Code of the kind to which the disqualification relates.

**Holder of licence to be deemed not to be holder while licence suspended**

79. The holder of a licence shall, for the purposes of sections 61, 62, 63 and 64, be deemed not to be the holder of the licence at any time during a period for which the licence is suspended.

**Opportunity for hearing**

80. The Commission shall not—

(a) revoke or suspend a licence otherwise than under section 77; or

(b) impose conditions or restrictions in respect of a licence or vary conditions or restrictions applicable in respect of a licence,

unless the Commission has afforded the applicant or holder of the licence an opportunity to appear at a hearing before the Commission (being a hearing that takes place in private) and make submissions and give evidence to the Commission in relation to the matter.

**Transitional provision**

80a. (1) Where—

(a) at the commencement of the Futures Industry (Application of Laws) Act, 1986, a person is the holder of a futures broker's licence, a futures adviser's licence, a futures broker's representative's licence or a futures adviser's representative's licence under the provisions of the law in force in a participating State or in a participating Territory that correspond with this Part;

(b) at the time the person became the holder of the licence he or she was ordinarily resident in South Australia;

(c) the person is now ordinarily resident in South Australia and has continued to be ordinarily resident in South Australia since the time at which the person became the holder of the licence; and

(d) the person has requested the Commission to revoke the licence under that corresponding law,

the Commission shall grant to the person a licence under this part being a licence of the same kind and subject to the same conditions as the licence which the person has requested the Commission to revoke.

(2) Where at the time a person requests the Commission to revoke a licence as referred to in sub-section (1) that licence is suspended for a period, a licence granted pursuant to that sub-section consequent upon that request having been made shall be deemed to be suspended for the balance of that period.

(3) No fee is payable in respect of a licence granted pursuant to sub-section (1).

**PART V—CONDUCT OF FUTURES BUSINESS****Certain representations prohibited**

**81.** (1) A person who is the holder of a licence shall not represent or imply, or knowingly permit to be represented or implied, in any manner to a person that the abilities or qualifications of the holder of the licence have in any respect been approved by the Commission.

(2) A statement that a person is the holder of a licence is not a contravention of this section.

**Undesirable advertising**

**82.** (1) In this section, “publish”, in relation to a statement, means—

- (a) insert the statement in a newspaper or periodical or cause it to be so inserted;
- (b) publicly exhibit the statement or cause it to be publicly exhibited;
- (c) include the statement, or cause it to be included, in a document that, whether or not in response to a request, is sent or delivered to a person, or thrown or left upon premises in the occupation of a person; or
- (d) broadcast the statement by wireless transmission or television or cause it to be so broadcast.

(2) Where the Commission considers that, having regard to conduct that a person has engaged in, is engaging in, or proposes to engage in, it is in the public interest to do so, the Commission may, by order in writing served on the person, prohibit the person from publishing statements relating to futures contracts or to the carrying on or proposed carrying on of businesses involving dealing in futures contracts on behalf of other persons, unless the form and content of the statements have first been approved by the Commission.

(3) An order under sub-section (2) shall not be made unless the Commission has first given the person in relation to whom it proposes to make the order an opportunity to appear at a hearing before the Commission (being a hearing that takes place in private) and make submissions and give evidence to the Commission in relation to the matter.

(4) A person the subject of an order under sub-section (2) shall comply with the order.

Penalty: \$10,000 or imprisonment for 2 years, or both.

(5) For the purposes of this section, where a statement is published and there is also published in relation to the statement—

- (a) the name or address of a person;
- (b) the telephone or telex number of a person; or
- (c) the post office or other delivery box number of a person,

it shall be presumed, unless the contrary is proved, that the statement was published by that person.

**Issue of contract notes**

**83.** (1) In this section, “broker” means—

- (a) a futures broker other than an exempt broker; or
- (b) an exempt broker who, in the capacity of personal representative of a deceased futures broker, carries on a business of dealing in futures contracts on behalf of others.

(2) A broker shall, in respect of a transaction, being the acquisition or disposal of a futures contract, that is entered into by the broker on behalf of another person, forthwith give—

- (a) in a case where the transaction is not an operation by the broker on a discretionary account—to that other person; or
- (b) in a case where the transaction is an operation by the broker on a discretionary account—to the person, or to each person, as the case requires, who gave instructions to the broker authorising the broker to operate on the discretionary account, other than a person who agrees in the prescribed manner to waive the operation of this paragraph,

a contract note that complies with sub-section (4), (5) or (6), as the case requires.

(3) Sub-section (2) does not require a broker to give a contract note to a person in respect of a transaction if the person was at the time of the transaction the holder of a futures broker’s licence or a recognised futures broker.

(4) A contract note given by a broker under sub-section (2) in respect of a transaction, being the acquisition or disposal of a futures contract (other than a futures option or a prescribed exchange-traded option), shall include—

- (a) the name or style under which the broker carries on business as a futures broker and the address of the principal place at which the broker so carries on business;
- (b) the name of the person to whom the broker gives the contract note;
- (c) the day on which the transaction took place;
- (d) a description of the futures contract sufficient to identify the nature of the transaction, including—
  - (i) in a case where the futures contract is a commodity agreement—a description of the commodity and a statement of the contract price;
  - (ii) in a case where the futures contract is an adjustment agreement—
    - (A) a description of the class of adjustment agreements in which the futures contract is included;
    - (B) a statement of the contract price; and
    - (C) if the transaction is the completion of the futures contract—the value or worth (as determined in accordance with the futures contract) of the futures contract at the time of that completion; and

(iii) in a case where the transaction is a liquidating trade—  
details of the liquidating trade and of the futures contract  
that is intended to be closed out following the entering  
into of the liquidating trade;

- (e) the deposit paid or payable in respect of the transaction;
- (f) the month and year for the performance or settlement of the contract;
- (g) in a case where the transaction took place on a futures market of a futures exchange or of a recognised futures exchange, or on an exempt futures market—a name or abbreviation by which the futures exchange, recognised futures exchange or exempt futures market, as the case may be, is generally known;
- (h) a statement of the amount of commission charged or the rate (if any) at which the commission was charged; and
- (j) a statement of the amounts (if any) of all stamp duties and other duties and taxes payable in connection with the transaction.

(5) A contract note given by a broker under sub-section (2) in respect of a transaction, being the acquisition or disposal of a futures option, shall include—

- (a) the matters specified in paragraphs (4) (a), (b), (c), (g), (h) and (j);
- (b) a description of the class of futures contracts in which is included the futures contract to which the futures option relates;
- (c) the month and year for performance or settlement of the futures contract to which the futures option relates;
- (d) the date by which the purchaser of the futures option, in order to exercise the futures option, must declare an intention to exercise the futures option;
- (e) a statement of the amount of the premium; and
- (f) details of the price at which the purchaser of the futures option has, by virtue of the futures option, an option or right to assume a bought position, or sold position, as the case requires, in relation to the futures contract to which the futures option relates.

(6) A contract note given by a broker under sub-section (2) in respect of a transaction, being the acquisition or disposal of a prescribed exchange-traded option (in this sub-section referred to as the “option”), shall include—

- (a) the matters specified in paragraphs (4) (a), (b), (c), (g), (h) and (j);
- (b) a description of the commodity or index to which the option relates;
- (c) the date by which the purchaser of the option, in order to exercise the option, must declare an intention to exercise the option;
- (d) a statement of the amount of the premium; and
- (e) details of—
  - (i) in a case where the option relates to a commodity—the price at which the purchaser of the option has, by virtue

of the option, an option or right to purchase, or sell, as the case requires, that commodity; or

- (ii) in a case where the purchaser of the option has, by virtue of the option, an option or right to be paid an amount of money to be determined by reference to the amount by which a specified number is greater or less than the number of a specified index—the specified number and the manner in which that amount of money is to be determined.

(7) A broker shall not include in a contract note given under sub-section (2), as the name of a person with or on behalf of whom the broker has entered into the transaction, a name that the broker knows, or could reasonably be expected to know, is not a name by which that person is ordinarily known.

(8) For the purposes of this section, a futures contract is included in the same class of futures contracts as another futures contract if, and only if, the first-mentioned futures contract is of the same kind as the other futures contract.

#### **Futures broker to furnish monthly statement to client**

**84. (1)** In this section, “broker” means—

- (a) a futures broker other than an exempt broker; or
- (b) an exempt broker who, in the capacity of personal representative of a deceased futures broker, carries on a business of dealing in futures contracts on behalf of others.

(2) Where—

- (a) a broker has, at any time during a particular month, held money or property on account of a client; or
- (b) a broker has, before or during a particular month, acquired a futures contract on behalf of a client, and, as at the end of that month, the futures contract has not been disposed of,

the broker shall, within 7 days after the end of that month, send to the client a written statement setting out—

- (c) the name or style under which the broker carries on business as a futures broker and the address of the principal place at which the broker so carries on business;
- (d) the opening cash balance for that month in the client’s account;
- (e) all deposits, credits, withdrawals and debits affecting the account during that month;
- (f) the cash balance in the account at the end of that month;
- (g) in relation to each futures contract that the broker has, before or during that month, acquired on behalf of the client and that, as at the end of that month, has not been disposed of, particulars of the futures contract, including the particulars required by virtue of paragraph 83 (4) (d), or paragraphs 83 (5) (b), (e) and (f) or (6) (b), (d) and (e), as the case requires, to be included in

a contract note relating to the acquisition of the futures contract;  
and

- (h) details of each outstanding call for a deposit or margin in respect of a futures contract that the broker has acquired on behalf of the client.

(3) Where a broker has, during a particular month, authority to operate on a discretionary account, the broker shall, within 7 days after the end of that month, send to the person, or to each person, as the case requires, who gave instructions to the broker authorising the broker to operate on the discretionary account a written statement setting out—

- (a) the name or style under which the broker carries on business as a futures broker and the address of the principal place at which the broker so carries on business;
- (b) the opening cash balance for that month in the account (in this sub-section referred to as the “account”) maintained by the broker in respect of the discretionary account;
- (c) all deposits, credits, withdrawals and debits affecting the account during that month;
- (d) the cash balance in the account at the end of that month;
- (e) in relation to each futures contract—
- (i) that the broker has acquired before or during that month;
  - (ii) the acquisition of which was an operation by the broker on the discretionary account; and
  - (iii) that, as at the end of that month, has not been disposed of,

particulars of the futures contract, including the particulars required by virtue of paragraph 83 (4) (d), or paragraphs 83 (5) (b), (e) and (f) or (6) (b), (d) and (e), as the case requires, to be included in a contract note relating to the acquisition of the futures contract; and

- (f) details of each outstanding call for a deposit or margin in respect of a futures contract that the broker has acquired on behalf of the client and the acquisition of which was an operation by the broker on the discretionary account.

#### **Dealings by futures broker on own account**

85. (1) A futures broker shall maintain separately from other records such records as correctly record and explain dealings in futures contracts by the broker on the broker’s own account including, without limiting the generality of the foregoing, records specifying—

- (a) a description of each of those dealings together with the date on which and the time at which—
- (i) the instructions (if any) for each of those dealings were received by the futures broker;
  - (ii) the instructions (if any) for each of those dealings were transmitted to the futures market on which the dealing was effected; and
  - (iii) the dealing was effected; and



(b) the source of the funds used for effecting those dealings.

(2) A futures broker shall be deemed not to have maintained records in compliance with sub-section (1) unless the entries in the records are made in writing in the English language or are made in such a manner as will enable them to be readily accessible and to be readily converted into writing in the English language.

(3) A futures broker shall not knowingly take the other side of an order of a client of the broker in relation to a futures contract unless—

(a) the client has consented to the broker taking the other side of the order in relation to that futures contract; or

(b) in dealing in that futures contract on behalf of the client, the broker is to be taken, for the purposes of this Code, to be dealing in that futures contract on the broker's own account.

(4) For the purposes of sub-section (3), a futures broker takes the other side of an order of a client of the broker in relation to a futures contract where the broker—

(a) when dealing on the broker's own account, assumes a bought position or sold position in relation to the contract; and

(b) when dealing on the instructions of the client, assumes the opposite sold position or bought position in relation to the contract.

Penalty: \$2,500 or imprisonment for 6 months, or both.

#### **Segregation of client money and property**

**86. (1)** In this section—

“client”, in relation to a futures broker, means a person on behalf of whom the broker deals, or from whom the broker accepts instructions to deal, in futures contracts, but does not include—

(a) the broker;

(b) a person who is associated with, or who is a partner of, the broker;

(c) a body corporate in which the broker has, or the broker and partners of the broker together have, a controlling interest;

(d) an employee of the broker; or

(e) in a case where the broker is a body corporate—

(i) a director, or an officer, of the broker; or

(ii) a body corporate that is related to the broker;

“clients' segregated account”, in relation to a futures broker, means an account that—

(a) is maintained by the broker with a banking corporation;

(b) is designated as a clients' segregated account; and

(c) does not contain money other than money deposited by the broker in the account pursuant to this section;

“credit facility” means a document evidencing the right of a person to obtain money on credit from another person, and, without limiting the generality of the foregoing, includes a letter of credit and a bank guarantee;

“futures broker” means the holder of a futures broker’s licence;

“property” includes credit facilities and securities;

“relevant credit balance”, in relation to a client of a futures broker, means the total of—

(a) the amounts deposited by the broker in respect of the client in a clients’ segregated account, or clients’ segregated accounts, of the broker, less so much of those amounts as has been withdrawn from the account or accounts; and

(b) the values of the items of property that—

(i) have, in respect of the client, been deposited by the broker in safe custody pursuant to sub-section (3);

(ii) have not been withdrawn from safe custody; and

(iii) under the terms and conditions on which they were deposited with, or received by, the broker, are available to meet, or to provide security in connection with the meeting of, relevant liabilities of the client;

“relevant liabilities”, in relation to a client of a futures broker, means debts and liabilities of the client arising out of dealings in futures contracts effected by the broker on behalf of the client;

“securities” has the same meaning as that expression has in the *Securities Industry (South Australia) Code*;

“settling”, in relation to a dealing in a futures contract, includes making delivery, or taking delivery, of a commodity to which the futures contract relates.

(2) For the purposes of the definition of “relevant credit balance” in sub-section (1), the value of an item of property at a particular time is—

(a) in the case of a credit facility—the amount of money that the person entitled to the right evidenced by the credit facility can, at that time or within a reasonable period after that time, obtain by virtue of that right; or

(b) in any other case—the market value of the property as at the end of the last business day before that time.

(3) Where, in connection with—

(a) dealings in futures contracts effected, or proposed to be effected, whether in South Australia or elsewhere, by a futures broker on behalf of a client of the broker; or

(b) instructions by a client of a futures broker to deal in futures contracts, whether in South Australia or elsewhere,

money or property (other than property to which section 91 applies) is deposited with the broker by the client, or is received by the broker for, or on behalf of, the client, the broker shall—

(c) in the case of money—deposit the money in a clients' segregated account of the broker maintained in South Australia or in the place where the money was deposited with, or received by, the broker; or

(d) in the case of property—deposit the property in safe custody, in South Australia or in the place where the property was deposited with, or received by, the broker, in such a manner that the property is segregated from property other than property deposited by the broker in safe custody pursuant to this sub-section,

on or before the next day after the money or property is deposited with, or received by, the broker that is a day on which the money or property can be deposited as first mentioned in paragraph (c) or (d).

Penalty: \$5,000 or imprisonment for 1 year, or both.

(4) Without limiting the generality of sub-section (3), where, in connection with dealings in futures contracts effected, whether in South Australia or elsewhere, by a futures broker, the broker receives from a person an amount of money some or all of which is attributable to dealings in futures contracts so effected on behalf of clients of the broker, the broker shall, on the next day on which the amount can be so deposited, deposit the amount in a clients' segregated account of the broker maintained in South Australia or in the place where the broker receives the amount.

Penalty: \$5,000 or imprisonment for 1 year, or both.

(5) Where, pursuant to this section, a futures broker deposits money in respect of a client in a clients' segregated account of the broker, the broker shall not withdraw any of the money except for the purpose of—

(a) making a payment to, or in accordance with the written direction of, a person entitled to the money;

(b) making a payment for, or in connection with, the entering into, margining, guaranteeing, securing, transferring, adjusting or settling of dealings in futures contracts effected, whether in South Australia or elsewhere, by the broker on behalf of the client;

(c) defraying brokerage and other proper charges incurred in respect of dealings in futures contracts effected, whether in South Australia or elsewhere, by the broker on behalf of the client;

(d) investing it—

(i) in any manner in which trustees are for the time being authorised by law to invest trust funds;

(ii) on deposit with a corporation that is declared, pursuant to paragraph 97 (7) (b) of the *Companies (South Australia) Code*, to be an authorised dealer in the short term money market;

(iii) on deposit at interest with a banking corporation;

(iv) on deposit with a clearing house for a futures exchange; or

(v) in the purchase of eligible prescribed interests;

(e) paying to the broker the amount of a fee that the broker may charge, or an amount to which the broker is entitled, under an agreement with the client made under sub-section (8); or

(f) making a payment that is otherwise authorised by law, or as permitted by sub-section (11).

Penalty: \$5,000 or imprisonment for 1 year, or both.

(6) In sub-paragraph (5) (d) (v), “eligible prescribed interest” means a prescribed interest, within the meaning of the *Companies (South Australia) Code* or the provisions of a law in force in a participating State or in a participating Territory that correspond with that Code—

- (a) in relation to which there is in force a deed that, for the purposes of Division 6 of Part IV of that Code, or of the provisions of a law in force in that State or Territory that correspond with that Division, as the case may be, is an approved deed; and
- (b) that relates to an undertaking, scheme, enterprise, contract or arrangement of the kind commonly known as a cash management trust.

(7) A futures broker shall not deal with property deposited by the broker in safe custody pursuant to sub-section (3) otherwise than in accordance with the terms and conditions on which the property was deposited with, or received by, the broker.

Penalty: \$5,000 or imprisonment for 1 year, or both.

(8) A futures broker who invests as mentioned in paragraph (5) (d) money that was, in respect of a client of the broker, deposited by the broker under sub-section (3)—

- (a) may charge such fee (if any) for so investing the money; and
- (b) is entitled to so much (if any) of the return on the money so invested,

as the broker and the client agree in writing.

(9) A futures broker shall not invest an amount pursuant to paragraph (5) (d) by depositing it with a person for that person to invest, unless the broker—

- (a) has informed the person that the amount has been withdrawn from a clients’ segregated account of the broker and is money to which clients of the broker are entitled; and
- (b) has obtained from the person a written statement that is signed by the person, sets out the amount and acknowledges that the broker has informed the person as mentioned in paragraph (a).

(10) Where, at a particular time, the total amount of the relevant liabilities of a client of a futures broker exceeds the relevant credit balance of the client, the broker may, in respect of the client, deposit in a clients’ segregated account of the broker an amount of money not greater than the amount of the excess, and, if the broker does so, the amount so deposited shall, subject to sub-section (11), be deemed to be money to which the client is entitled.

(11) Where—

- (a) a futures broker has, in respect of a client of the broker, deposited an amount pursuant to sub-section (10) in a clients' segregated account of the broker; and
  - (b) the relevant credit balance of the client exceeds by a particular amount the total amount of the relevant liabilities of the client,
- the broker may withdraw from the account so much of the amount referred to in paragraph (a) as does not exceed the amount first referred to in paragraph (b).

(12) A futures broker shall keep in relation to the clients' segregated account, or clients' segregated accounts, of the broker accounting records that—

- (a) are separate from any other accounting records of the broker;
- (b) record separately in respect of each client of the broker particulars of the amounts deposited in, and the amounts withdrawn from, the account or accounts in respect of the client; and
- (c) record separately from the particulars referred to in paragraph (b)—
  - (i) particulars (including particulars of withdrawals) of so much of the amounts deposited as required by sub-section (4) in the account or accounts as was not attributable to dealings in futures contracts effected by the broker on behalf of clients of the broker;
  - (ii) particulars of all amounts deposited in the account or accounts pursuant to sub-section (10); and
  - (iii) particulars of all amounts withdrawn from the account or accounts pursuant to sub-section (11).

Penalty: \$2,500 or imprisonment for 6 months, or both.

(13) A futures broker shall keep records that—

- (a) relate to deposits of property in safe custody by the broker pursuant to sub-section (3); and
- (b) record separately in respect of each client of the broker particulars of the property deposited in respect of the client.

Penalty: \$2,500 or imprisonment for 6 months, or both.

(14) Section 90 applies, so far as it is capable of application, in relation to accounting records, and other records, that are required by sub-sections (12) and (13), respectively, of this section to be kept by a futures broker, and so applies as if those accounting records and other records were accounting records required by that section to be kept by the broker.

(15) Subject to sub-sections (16) and (17), none of the following:

- (a) money deposited by a futures broker pursuant to this section in a clients' segregated account of the broker;
- (b) property in which money deposited by a futures broker as mentioned in paragraph (a) of this sub-section has been invested pursuant to paragraph (5) (d);

- (c) property deposited by a futures broker in safe custody pursuant to sub-section (3),

is available for the payment of a debt or liability of the broker or is liable to be attached, or taken in execution, under the order or process of a court at the instance of a person suing in respect of such a debt or liability.

(16) Nothing in sub-section (15) affects the right of a client of a futures broker to recover money or property to which the client is entitled.

(17) Where a futures broker is entitled to withdraw money from a clients' segregated account of the broker for the purpose of making a payment to the broker, sub-section (15) does not apply in relation to that money.

(18) Where a futures broker invests money pursuant to paragraph (5) (d) by depositing it with a person for the person to invest, neither that money, nor any property in which the person invests any of that money, is available for the payment of a debt or liability of the person or is liable to be attached, or taken in execution, under the order or process of a court at the instance of a person suing in respect of such a debt or liability.

(19) Nothing in this section affects a claim or lien that a futures broker has against or on—

- (a) money deposited by the broker pursuant to this section in a clients' segregated account of the broker;
- (b) property in which such money has been invested pursuant to paragraph (5) (d); or
- (c) property deposited by the broker in safe custody pursuant to sub-section (3).

#### **Futures broker to give certain information to prospective clients**

87. A futures broker shall, before accepting a person as a client of the broker, give to the person—

- (a) a document that—
  - (i) explains the nature of futures contracts;
  - (ii) explains the nature of the obligations assumed by a person who instructs a futures broker to enter into a futures contract;
  - (iii) sets out a risk disclosure statement in the prescribed form; and
  - (iv) sets out the specifications, and details of the essential terms, of each kind of futures contract in which the broker deals on behalf of clients; and
- (b) a copy of each agreement into which the broker proposes, if the broker agrees to accept instructions from the person in relation to dealings in futures contracts, to require the person to enter.

### **PART VI—ACCOUNTS AND AUDIT**

#### **Interpretation**

88. In this Part, unless the contrary intention appears, a reference to a book, futures contract or business of or in relation to a futures broker who carries on business in partnership is a reference to such a book, futures contract or business of or in relation to the partnership.

**Application of Part**

89. (1) This Part applies to and in relation to the holder of a futures broker's licence and to the business of dealing in futures contracts carried on by the holder of a futures broker's licence, whether in South Australia or elsewhere, but does not apply to or in relation to a recognised futures broker or to the business carried on by a recognised futures broker.

(2) This Part does not affect the operation of Part VI of the *Companies (South Australia) Code* in relation to a company within the meaning of that Code that is the holder of a futures broker's licence or in relation to a business of dealing in futures contracts carried on by such a company.

**Accounts to be kept by futures brokers**

90. (1) A futures broker shall—

- (a) keep such accounting records as correctly record and explain the transactions and financial position of the business of dealing in futures contracts carried on by the broker;
- (b) keep accounting records in such a manner as will enable true and fair profit and loss accounts and balance sheets to be prepared from time to time; and
- (c) keep accounting records in such a manner as will enable profit and loss accounts and balance sheets of the business of dealing in futures contracts carried on by the broker to be conveniently and properly audited.

(2) Without limiting the generality of sub-section (1), a futures broker shall be deemed not to have complied with that sub-section in relation to records if those records—

- (a) are not kept in writing in the English language or in such a manner as will enable them to be readily accessible and readily converted into writing in the English language;
- (b) are not kept in sufficient detail to show particulars of—
  - (i) all money received or paid by the broker, including money paid to, or disbursed from, an account of the kind referred to in paragraph 86 (3) (c);
  - (ii) all dealings in futures contracts made by the broker, the charges and credits arising from them, and the name of the person on whose behalf each dealing was effected;
  - (iii) all income received from commissions, interest and other sources, and all expenses, commissions and interest paid, by the broker;
  - (iv) all the assets and liabilities (including contingent liabilities) of the broker;
  - (v) all futures contracts to which the broker has become a party as a result of trading on the broker's own account;
  - (vi) all futures contracts dealt with by the broker pursuant to instructions given by another person, showing who gave the instructions;
  - (vii) all property that is property of the broker and in respect of which the business rules of a futures exchange authorise

the making of a futures contract in the futures market of the futures exchange, showing by whom the property is held and, if held by some other person, whether or not the property is so held as security against loans or advances; and

- (viii) all such property that is not property of the broker and for which the broker or any nominee controlled by the broker is accountable, showing by whom, and for whom, the property is held and the extent to which the property is either held for safe custody or deposited with a third party as security for loans or advances made to the broker;
- (c) are not kept in sufficient detail to show separately particulars of every transaction by the broker;
- (d) do not specify the day on which or the period during which each transaction by the broker took place; or
- (e) do not contain copies of acknowledgements of the receipts of property received by the broker from clients.

(3) Without affecting the operation of sub-sections (1) and (2), a futures broker shall be deemed not to have complied with sub-section (1) in relation to records if, in respect of a discretionary account on which the broker operates, those records are not kept in sufficient detail to show the particulars that the broker is required to furnish to clients in order to comply with sub-section 84 (3).

(4) Without affecting the operation of sub-section (2) or (3), a futures broker shall keep records in sufficient detail to show separately particulars of all transactions by the broker—

- (a) with, on behalf of, or on the account of, clients of the broker, excluding, in a case where the broker carries on business in partnership, the partners in the firm;
- (b) in a case where the broker carries on business in partnership—on the broker's own account or with, on behalf of, or on the account of, the partners in the firm;
- (c) in a case where the broker does not carry on business in partnership—on the broker's own account;
- (d) with, on behalf of, or on the account of, other futures brokers carrying on business within or outside South Australia;
- (e) with, on behalf of, or on the account of, futures broker's representatives employed by, or acting for or by arrangement with, the broker; and
- (f) with, on behalf of, or on the account of, employees of the broker.

(5) An entry in the accounting and other records of a futures broker required to be kept in accordance with this section, and any matter recorded by a futures exchange in relation to a member pursuant to sub-section 143 (3) shall be deemed to have been made by, or with the authority of, the broker or member.

(6) Where a record required by this section to be kept is not kept in writing in the English language, the futures broker shall, if required to



convert the record into writing in the English language by a person who is entitled to examine the record, comply with the requirement within a reasonable time.

(7) Notwithstanding any other provision of this section, a futures broker shall not be deemed to have failed to keep a record referred to in sub-section (1) by reason only that the record is kept as a part of, or in conjunction with, the records relating to any business other than dealing in futures contracts that is carried on by the broker.

(8) If accounting or other records are kept by a futures broker at a place outside South Australia, the broker shall cause to be sent to and kept at a place in South Australia such particulars with respect to the business dealt with in those records as will enable true and fair profit and loss accounts and balance sheets to be prepared.

(9) If any accounting records of a futures broker are kept at a place outside South Australia, the broker shall, if required by the Commission to produce those records at a place in South Australia, comply with the requirement not later than 14 days after the requirement is made.

Penalty: \$2,500 or imprisonment for 6 months, or both.

#### **Property in custody of futures broker**

**91.** (1) Where a futures broker receives for safe custody property—

- (a) that is the property of another person (in this section referred to as the “client”);
- (b) that is, or is to be, delivered in accordance with a futures contract; and
- (c) for which the broker or a nominee of the broker is accountable,

the broker shall forthwith—

- (d) if the client requests that the property be deposited in safe custody with the broker’s bankers—cause it to be so deposited or notify the client of any failure to comply with the request, whether or not caused by a refusal by the bankers to comply with the request; or
- (e) if the client does not make, or the bankers refuse to comply with, such a request and the business rules of the futures exchange that maintained or provided the futures market on which the contract was made enable the property to be deposited in safe custody—cause the property to be so deposited in accordance with those rules.

(2) A futures broker shall not deposit as security for a loan or advance made to the broker property of a kind referred to in sub-section (1) unless an amount is owed to the broker by the client in connection with a transaction entered into on the instructions of the client and the broker—

- (a) gives a written notice to the client identifying the property and stating that the broker intends to deposit the property as security for a loan or advance to the broker; and
- (b) deposits the property as security for a loan or advance to the broker, being a loan or advance of an amount that does not

exceed the amount owed to the broker by the client on the day of the receipt by the broker of the property.

(3) Where—

(a) a futures broker has given a notice to a person as mentioned in sub-section (2) and has deposited the property referred to in the notice as security for a loan or advance; and

(b) the person—

(i) has paid to the broker the amount owed by the person to the broker at the time the property was so deposited; and

(ii) requests the broker to withdraw the property from deposit,

the broker shall, as soon as practicable after the request, withdraw the property from deposit, but nothing in this sub-section prevents the broker from redepositing the property, as permitted by sub-section (2), as a security for a loan or advance.

(4) Where a futures broker deposits as security for a loan or advance made to the broker property of a kind referred to in sub-section (1), the broker shall, at the end of the period of 3 months after the day on which the property is deposited, and at the end of each subsequent period of 3 months if the property is still on deposit, send to the person whose property it is written notice to that effect.

Penalty: \$10,000 or imprisonment for 2 years, or both.

**Appointment of auditor by futures broker**

92. (1) Within one month after becoming the holder of a futures broker's licence, a futures broker (other than a banking corporation) shall appoint a person or persons, a firm or firms, or a person or persons and a firm or firms, as auditor or auditors to audit the broker's accounts.

(2) Subject to this section, a person shall not—

(a) consent to be appointed as auditor of a futures broker;

(b) act as auditor of a futures broker; or

(c) prepare a report required by this Code to be prepared by an auditor of a futures broker,

if—

(d) the person is not a registered company auditor;

(e) the person, or a body corporate in which the person is a substantial shareholder within the meaning of Division 4 of Part IV of the *Companies (South Australia) Code*, or the provisions of a law in force in a participating State or in a participating Territory that correspond with that Division, is indebted in an amount exceeding \$5,000 to the futures broker or, if the futures broker is a body corporate, to a related body corporate; or

(f) the person is—

(i) in the case of a futures broker who is a natural person—a partner or employee of the broker; or

- (ii) in the case of a futures broker that is a body corporate—
  - (A) an officer of the body corporate;
  - (B) a partner, employer or employee of an officer of the body corporate; or
  - (C) a partner or employee of an employee of an officer of the body corporate.

(3) Subject to this section, a firm shall not—

- (a) consent to be appointed as an auditor of a futures broker;
- (b) act as auditor of a futures broker; or
- (c) prepare a report required by this Code to be prepared by an auditor of a futures broker,

unless—

- (d) at least one member of the firm is a registered company auditor who is ordinarily resident in a State or Territory;
- (e) where the business name under which the firm is carrying on business is not registered under the Business Names Act, 1963—there has been lodged with the Commission a return in the prescribed form showing, in relation to each member of the firm, the member's full name and address as at the time when the firm so consents, acts or prepares a report;
- (f) no member of the firm, and no body corporate in which any member of the firm is a substantial shareholder within the meaning of Division 4 of Part IV of the *Companies (South Australia) Code*, or the provisions of a law in force in a participating State or in a participating Territory that correspond with that Division, is indebted in an amount exceeding \$5,000 to the futures broker or, where the futures broker is a body corporate, to a related body corporate;
- (g) no member of the firm is—
  - (i) in the case of a futures broker who is a natural person—a partner or employee of the broker; or
  - (ii) in the case of a futures broker that is a body corporate—
    - (A) an officer of the body corporate;
    - (B) a partner, employer or employee of an officer of the body corporate; or
    - (C) a partner or employee of an employee of an officer of the body corporate; and
- (h) in the case of a futures broker that is a body corporate, no officer of the body corporate receives any remuneration from the firm for acting as a consultant to it on accounting or auditing matters.

(4) A reference in sub-section (2) or (3) to indebtedness to a body corporate does not, in relation to indebtedness of a natural person, include a reference to indebtedness of that person to a body corporate that is a prescribed corporation for the purposes of Division 4 of Part VI of the *Companies (South Australia) Code* where—

- (a) the indebtedness arose as a result of a loan made to that person by the body corporate in the ordinary course of its ordinary business; and
- (b) the amount of that loan was used by that person to pay the whole or part of the purchase price of premises that are used by that person as the person's principal place of residence.

(5) For the purposes of sub-sections (2) and (3), a person shall be deemed to be an officer of a body corporate if—

- (a) the person is an officer of a related body corporate; or
- (b) except where the Commission, if it thinks fit in the circumstances of the case, directs that this paragraph shall not apply in relation to the person—the person has, at any time within the immediately preceding period of 12 months, been an officer or promoter of the body corporate or of a related body corporate.

(6) For the purposes of this section, a person shall not be taken to be an officer of a body corporate by reason only of being or having been the liquidator of the body corporate or of a related body corporate.

(7) For the purposes of this section, a person shall not be taken to be an officer of a body corporate by reason only of having been appointed as an auditor of that body corporate or of a related body corporate or, for any purpose relating to taxation, a public officer of a body corporate or by reason only of being or having been authorised to accept on behalf of the body corporate or a related body corporate service of process or any notices required to be served on the body corporate or related body corporate.

(8) The appointment of a firm as auditor of a futures broker shall be deemed to be an appointment of all persons who are members of the firm and are registered company auditors, whether resident in a State or Territory or not, at the date of the appointment.

(9) Where a firm that has been appointed as auditor of a futures broker is reconstituted by reason of the death, retirement or withdrawal of a member or members or by reason of the admission of a new member or new members, or both—

- (a) a person who was deemed under sub-section (8) to be an auditor of the broker and who has so retired or withdrawn from the firm as previously constituted shall be deemed to have resigned as auditor of the company as from the day of the person's retirement or withdrawal but, unless that person was the only member of the firm who was a registered company auditor and, after the retirement or withdrawal of that person, there is no member of the firm who is a registered company auditor, section 93 does not apply to that resignation;
- (b) a person who is a registered company auditor and who is so admitted to the firm shall be deemed to have been appointed as an auditor of the broker as from the day of admission; and
- (c) the reconstitution of the firm does not affect the appointment of the continuing members of the firm who are registered company auditors as auditors of the broker,

but nothing in this sub-section affects the operation of sub-section (3).

(10) Except as provided by sub-section (9), the appointment of the members of a firm as auditors of a futures broker that is deemed by sub-section (8) to have been made by reason of the appointment of the firm as auditor of the broker is not affected by the dissolution of the firm.

(11) A report or notice that purports to be made or given by a firm appointed as auditor of a futures broker shall not be taken to be duly made or given unless it is signed, in the firm name and in the name of the member concerned, by a member of the firm who is a registered company auditor.

(12) Where a person or firm is appointed as an auditor under sub-section (1) (not being an appointment that is deemed to be made by virtue of sub-section (9)) or under sub-section (16), the futures broker shall, within 14 days after the appointment, lodge with the Commission a notice in writing stating that the broker has made the appointment and specifying the name of the person or firm.

(13) Without limiting the generality of section 148, if, in contravention of this section, a firm consents to be appointed, or acts as, an auditor of a futures broker or prepares a report required by this Code to be prepared by an auditor of a futures broker, each member of the firm is guilty of an offence.

(14) A person shall not—

(a) if the person has been appointed auditor of a futures broker—knowingly disqualify himself or herself while the appointment continues from acting as auditor of the broker; or

(b) if the person is a member of a firm that has been appointed auditor of a futures broker—knowingly disqualify the firm while the appointment continues from acting as auditor of the broker.

(15) An auditor of a futures broker holds office until death, until removal or resignation from office in accordance with section 93 or until becoming prohibited from acting as auditor by reason of sub-section (2) or (3).

(16) Within 14 days after a vacancy occurs in the office of an auditor of a futures broker, if there is no surviving or continuing auditor of the broker, the broker shall appoint a person or persons, a firm or firms or a person or persons and a firm or firms to fill the vacancy.

(17) While a vacancy in the office of an auditor continues, the surviving or continuing auditor or auditors (if any) may act.

(18) A futures broker shall not appoint a person or firm as auditor of the broker unless that person or firm has, before the appointment, consented by notice in writing given to the broker to act as auditor and has not withdrawn the consent by notice in writing given to the broker.

(19) This section does not apply in relation to a body corporate (other than an exempt proprietary company) in relation to which section 280 of the *Companies (South Australia) Code*, or a provision of a law in force in a participating State or in a participating Territory that corresponds with that section, applies.

(20) In sub-section (19), “exempt proprietary company” means a body corporate that is an exempt proprietary company within the meaning of the *Companies (South Australia) Code* or of the provisions of a law in force in a participating State or in a participating Territory that correspond with that Code.

#### **Removal and resignation of auditors**

93. (1) A futures broker may, with the consent of the Commission, remove an auditor of the broker from office.

(2) An auditor of a futures broker may, by notice in writing given to the broker, resign as auditor of the broker if—

- (a) the auditor has, by notice in writing given to the Commission, applied for consent to the resignation and, at or about the same time as the notice was given to the Commission, notified the broker in writing of the application to the Commission; and
- (b) the auditor has received the consent of the Commission.

(3) The Commission shall, as soon as practicable after receiving a notice from an auditor under sub-section (2), notify the auditor and the futures broker whether it consents to the resignation of the auditor.

(4) A statement made by an auditor in an application to the Commission under sub-section (2) or in answer to an inquiry by the Commission relating to the reasons for the application—

- (a) is not admissible in evidence in any civil or criminal proceedings against the auditor other than proceedings for an offence against section 142; and
- (b) may not be made the ground of a prosecution (other than a prosecution for an offence against section 142), action or suit against the auditor,

and a certificate by the Commission that the statement was made in the application or in answer to an inquiry by the Commission is conclusive evidence that the statement was so made.

(5) Subject to sub-section (6) and to any order of the Court under subsection (7), the resignation of an auditor takes effect—

- (a) on the date (if any) specified for the purpose in the notice of resignation;
- (b) on the date on which the Commission gives its consent to the resignation; or
- (c) on the date (if any) fixed by the Commission for the purpose,

whichever last occurs.

(6) Where, on the retirement or withdrawal from a firm of a member, the firm will no longer be capable, by reason of the provisions of paragraph 92 (3) (d), of acting as auditor of a futures broker, the member so retiring or withdrawing shall, if not disqualified from acting as auditor of the broker, be deemed to be the auditor of the broker until the member obtains the consent of the Commission to the retirement or withdrawal.

(7) A person aggrieved by the refusal of consent by the Commission to the removal or resignation of an auditor of a futures broker may, within one month after the date of refusal, appeal to the Court from the refusal and thereupon the Court may confirm or reverse the refusal and may make such further order in the matter as to it seems proper.

(8) This section does not apply in relation to a body corporate (other than an exempt proprietary company) in relation to which section 282 of the *Companies (South Australia) Code*, or a provision of a law in force in a participating State or in a participating Territory that corresponds with that section, applies.

(9) In sub-section (8), "exempt proprietary company" means a body corporate that is an exempt proprietary company within the meaning of the *Companies (South Australia) Code* or of the provisions of a law in force in a participating State or in a participating Territory that correspond with that Code.

#### **Fees and expenses of auditors**

94. The reasonable fees and expenses of an auditor of a futures broker are payable by the broker.

#### **Futures brokers' accounts**

95. (1) In this section—

"financial year", in relation to a futures broker, means—

- (a) where the broker is not a body corporate—the year ending on 30 June; and
- (b) where the broker is a body corporate—the financial year of the body corporate within the meaning of the *Companies (South Australia) Code*;

"prescribed day", in relation to a financial year of a futures broker, means—

- (a) where the broker is not a body corporate—the day that is 2 months after the end of that financial year; or
- (b) where the broker is a body corporate—the day that is 3 months after the end of that financial year,

or where, in either case, an extension of time is approved pursuant to sub-section (3), the day on which the extended time expires.

(2) A futures broker (other than a banking corporation) shall, in respect of each financial year, other than a financial year that ended before the date of commencement of the Futures Industry (Application of Laws) Act, 1986 or ended on or after that date but before the date on which the broker commenced to carry on business as a futures broker, prepare a true and fair profit and loss account and balance sheet on the basis of such accounting principles (if any) and containing such information and matters as are prescribed for the purposes of this sub-section and lodge them with the Commission before the prescribed day for that financial year, together with an auditor's report containing such information and matters as are prescribed for the purposes of this sub-section and such other information and matters as the auditor thinks fit to include in the report.

(3) The Commission may, on application made by a futures broker and the auditor of the broker before the expiration of the period of 2 months or, as the case requires, the period of 3 months referred to in the definition of "prescribed day" in sub-section (1) or, if that period has been extended pursuant to an approval or approvals previously given under this sub-section, before the expiration of the period as so extended, approve an extension or further extension of the period, and such an approval may be given subject to such conditions (if any) as the Commission imposes.

(4) Where an approval under sub-section (3) in relation to a futures broker is given subject to conditions, the broker shall comply with those conditions.

**Auditor's right of access to records, information, &c.**

96. (1) An auditor of a futures broker has a right of access at all reasonable times to the accounting records and other records, including any register, of the broker, and is entitled to require from the broker or, in the case of a broker that is a body corporate, from any executive officer of the body corporate, such information and explanations as the auditor desires for the purposes of audit.

(2) A futures broker, or an executive officer of a futures broker that is a body corporate, who, without lawful excuse—

- (a) refuses or fails to allow an auditor of the broker access, in accordance with sub-section (1), to accounting records or other records, including any register, of the broker;
- (b) refuses or fails to give information, or an explanation, as and when required under sub-section (1); or
- (c) otherwise hinders, obstructs or delays an auditor of the broker in the performance or exercise of the auditor's duties or powers,

is guilty of an offence.

Penalty: \$10,000 or imprisonment for 2 years, or both.

**Auditor to report to Commission in certain cases**

97. (1) Where an auditor, in the performance of the duties of auditor of a futures broker, becomes aware of a prescribed matter, the auditor shall, within 7 days after becoming aware of that matter, lodge with the Commission a written report on the matter and send a copy of the report to—

- (a) the broker;
- (b) each futures exchange of which the broker is a member and to each clearing house (if any) for that futures exchange; and
- (c) each futures association of which the broker is a member, unless the futures association is also a futures exchange of which the broker is a member.

(2) In this section, "prescribed matter" means a matter that, in the opinion of the auditor—

- (a) has adversely affected, is adversely affecting, or may adversely affect, the ability of the futures broker to meet the broker's obligations as a broker;



- (b) constitutes or may constitute a contravention of section 86, 90 or 91; or
- (c) constitutes or may constitute a breach of a condition of a licence issued to the futures broker under this Code.

#### **Certain matters to be reported to Commission**

98. (1) Where, in relation to a futures broker who is a member of the futures exchange, the futures exchange becomes aware of a prescribed matter, the futures exchange shall, as soon as practicable after becoming aware of the matter, lodge with the Commission a written report on the matter and send a copy of the report to the broker.

(2) Sub-section (1) applies—

- (a) in relation to a clearing house for a futures exchange and a member of the clearing house; and
- (b) in relation to a futures association and a member of the futures association (unless the futures association is also a futures exchange),

in the same manner as it applies in relation to a futures exchange and a member of the futures exchange.

(3) In this section, “prescribed matter”, in relation to a futures broker, means a matter that, in the opinion of the futures exchange, clearing house or futures association concerned—

- (a) has adversely affected, is adversely affecting, or may adversely affect, the ability of the broker to meet the broker’s obligations as a broker;
- (b) constitutes or may constitute a contravention of section 86, 90 or 91;
- (c) constitutes or may constitute a breach of a condition of a licence issued to the broker under this Code; or
- (d) constitutes a failure to make, in accordance with Part VII, contributions to a fidelity fund.

#### **Defamation**

99. (1) In the absence of malice, an auditor is not liable to an action for defamation in respect of—

- (a) any statement made, orally or in writing, in the course of performing the duties of an auditor; or
- (b) the lodging of any report with the Commission, or the sending of any report under section 97 to a futures broker, a futures exchange, a clearing house for a futures exchange, or a futures association.

(2) In the absence of malice, a futures exchange, a clearing house for a futures exchange, a futures association, or an officer of a futures exchange, of a clearing house for a futures exchange, or of a futures association, is not liable to an action for defamation in respect of—

- (a) any statement made, orally or in writing, in the course of performing the duties imposed by section 98; or

(b) the lodging of any report with the Commission, or the sending of any report to a futures broker, under section 98.

(3) A person is not liable to an action for defamation in respect of the publishing without malice of—

- (a) a statement made by an auditor as mentioned in paragraph (1) (a), or by a futures exchange, a clearing house for a futures exchange, a futures association, or an officer, as mentioned in paragraph (2) (a);
- (b) a document prepared by an auditor in the course of performing the duties of an auditor;
- (c) a document prepared by a futures exchange, a clearing house for a futures exchange, a futures association, or an officer of a futures exchange, of a clearing house for a futures exchange, or of a futures association, in the course of performing the duties imposed by section 98; or
- (d) a document required by or under this Code or the corresponding law in force in a participating State or in a participating Territory to be lodged with the Commission, whether or not the document has been so lodged.

(4) This section does not limit or affect any right, privilege or immunity that any person has, apart from this section, as defendant in an action for defamation.

**This Part not to affect right of futures exchange or futures association to impose obligations, &c., on members**

100. Nothing in this Part prevents a futures exchange or futures association imposing on members of that futures exchange or futures association any obligations or requirements (not being obligations or requirements inconsistent with this Code) that the futures exchange or futures association thinks fit with respect to—

- (a) the audit of accounts (including the audit of accounts by an auditor appointed by the futures exchange or futures association);
- (b) the information to be furnished in reports from auditors; or
- (c) the keeping of books.

**Power of Court to restrain dealings with futures broker's accounts**

101. (1) Where the Court is satisfied, on application by the Commission, or by a body corporate that is a relevant organisation—

- (a) that there are reasonable grounds for believing that there is a deficiency in a client's segregated account of a futures broker, or of a member of the body corporate, as the case may be;
- (b) that there has been undue delay, or unreasonable refusal, on the part of a futures broker, or on the part of a member of the body corporate, as the case may be, in paying, applying or accounting for money as required by this Code or by the corresponding law in force in a participating State or in a participating Territory;
- (c) that a futures broker, or a member of the body corporate, as the case may be, has not paid money into a client's segregated

account of the broker or member as required by this Code or by the corresponding law in force in a participating State or in a participating Territory; or

- (d) in a case where a business of dealing in futures contracts on behalf of others is carried on, was carried on, or was last carried on, as the case requires, by a person, or by a member of the body corporate, as the case may be, otherwise than in partnership—
- (i) in any case—that the futures broker's licence of that person or member under Part IV or under the provisions of a law in force in a participating State or in a participating Territory that correspond with that Part has been revoked or suspended;
  - (ii) in a case where that person or member is a natural person—that that person or member is incapable, by reason of physical or mental incapacity, of managing his or her affairs;
  - (iii) in any case—that that person or member has ceased to carry on a business of dealing in futures contracts; or
  - (iv) in a case where that person or member is a natural person—that that person or member has died,

the Court may make an order restraining dealings in respect of all or any of the accounts of that broker, person or member, as the case may be, including a clients' segregated account of the broker, person or member, subject to such terms and conditions as the Court imposes.

(2) In sub-section (1)—

“clients' segregated account”, in relation to a person, means an account (whether kept within or outside South Australia) that is, for the purposes of section 86, or of a provision of a law in force in a participating State or in a participating Territory that corresponds with that section, a clients' segregated account of the person;

“futures broker” means a person who is or has been a futures broker as defined in sub-section 4 (1).

(3) Where an application is made to the Court for an order under sub-section (1), the Court may, if in the opinion of the Court it is desirable to do so, before considering the application, grant an interim order, being an order of the kind applied for that is expressed to have effect pending the determination of the application.

(4) Where the Commission makes an application to the Court for the making of an order under sub-section (1), the Court shall not require the Commission, as a condition of granting an interim order under sub-section (3), to give any undertaking as to damages.

**Duty of banker or body corporate to make full disclosure**

**102.** Where an order made under section 101 is directed to a banker or body corporate, the banker or body corporate shall—

- (a) disclose to the applicant for the order every account kept by the bank or body corporate in the name of the person to whom the

order relates, and any account that the banker or body corporate reasonably suspects is held or kept by the bank or body corporate for the benefit of that person; and

- (b) permit the applicant for the order to make a copy of, or to take an extract from, any account of the person to whom the order relates or any of the banker's books relating to that person or the like books in the possession of the body corporate.

#### **Power of Court to make further orders and give directions**

**103.** Where an order is made under section 101, the Court may, on the application of the Commission, a relevant organisation or a person affected by the order, make further orders—

- (a) dealing with such ancillary matters as the Court considers necessary or desirable;
- (b) directing that all or any of the money in an account affected by an order so made be paid by the bank or body corporate to the Commission or a person nominated by the Commission, on such terms and conditions as the Court thinks fit; and
- (c) discharging or varying the order.

#### **Power of Court to make order relating to payment of money**

**104.** (1) An order made under section 103 may include directions to the person to whom the money is paid directing that that person—

- (a) shall cause the money to be paid into a trust account;
- (b) is authorised to prepare a scheme for distributing the money to persons who claim, during a period of 6 months after the Commission or that other person receives the money, to be entitled to the money and satisfy the Commission or that other person that they are so entitled; or
- (c) where the money received is insufficient to pay all proved claims, may, notwithstanding any rule of law or equity to the contrary, apportion the money among the claimants in proportion to their proved claims and show in the scheme how the money is so apportioned.

(2) Where a person prepares a scheme for distribution of money pursuant to sub-section (1), the person shall apply to the Court for approval of the scheme and for directions with respect to it.

(3) The Court may give such directions as to the money held in a trust account pursuant to sub-section (1), as to the persons to whom and in what amounts the whole or any portion of that money shall be paid, and as to the payment of the balance of the money (if any) remaining in the account, as the Court thinks fit.

### **PART VII—FIDELITY FUNDS**

#### **Interpretation**

**105.** In this Part—

“contributing member”, in relation to a relevant organisation, means—

- (a) in the case of a futures exchange—an exchange member of the futures exchange; or

(b) in the case of a futures association—

- (i) a person who is a member of the futures association and who is neither a member of a futures exchange nor a member of a partnership that is a member of a futures exchange;
- (ii) a partnership that is a member of the futures association and that is not a member of a futures exchange; or
- (iii) a member of a partnership that is a partnership of the kind referred to in sub-paragraph (ii);

“relevant organisation” means—

- (a) a futures exchange; or
- (b) a futures association, other than a futures association all the members of which are members of a futures exchange.

#### **Establishment of fidelity funds**

**106.** (1) A relevant organisation shall establish and keep a fidelity fund, and the Board of the relevant organisation shall administer the fidelity fund.

(2) The assets of a fidelity fund of a relevant organisation are the property of the relevant organisation, but shall be kept separately from all other property of the relevant organisation and shall be held in trust for the purposes set out in this Part.

#### **Money constituting fidelity fund**

**107.** (1) The fidelity fund of a relevant organisation shall consist of—

- (a) an amount of not less than the basic amount in relation to the relevant organisation, to be paid by the relevant organisation to the credit of the fund on the establishment of the fund;
- (b) money paid to the relevant organisation, in accordance with this Part or the business rules of the relevant organisation, by contributing members of the relevant organisation;
- (c) the interests and profits from time to time accruing from the investment of the fidelity fund;
- (d) money paid into the fidelity fund by the relevant organisation;
- (e) money recovered by or on behalf of the relevant organisation in the exercise of a right of action conferred by this Part;
- (f) money paid by an insurer pursuant to a contract of insurance or indemnity entered into by the relevant organisation under section 126; and
- (g) all other money lawfully paid into the fund.

(2) The Ministerial Council may exempt a relevant organisation from compliance with paragraph (1) (a) if it is satisfied that the relevant organisation has entered into a contract in a form approved by the Ministerial Council with an insurer approved by the Ministerial Council under which the insurer undertakes to supplement the fund in the event of a claim being made on the fund so that the total amount available to satisfy the claim will be not less than the basic amount in relation to the relevant organisation.

(3) An exemption of a relevant organisation under sub-section (2) ceases to have effect upon the lapsing of the insurance upon which the exemption was based.

(4) Where, in accordance with section 103a of the *Securities Industry (South Australia) Code*, or with a provision of a law in force in a participating State or in a participating Territory that corresponds with that section, an amount is paid to the credit of a fidelity fund of a relevant organisation—

(a) the liability of the relevant organisation to pay an amount to the credit of the fidelity fund in accordance with paragraph (1) (a) of this section is, to the extent of the first-mentioned amount, discharged; and

(b) the first-mentioned amount shall be deemed to have been paid to the credit of the fidelity fund in accordance with that paragraph.

(5) Where a relevant organisation has, in accordance with paragraph (1) (a), paid an amount to the credit of its fidelity fund—

(a) the Ministerial Council may approve in writing, on such conditions (if any) as are specified in the approval, the repayment of the whole, or a specified part, of the amount from the fidelity fund to the general funds of the relevant organisation; and

(b) if the Ministerial Council does so, the whole, or the specified part, as the case may be, of the amount may, in accordance with the conditions (if any) so specified, be so repaid.

(6) In this section, “basic amount”, in relation to a relevant organisation, means—

(a) except where paragraph (b) applies—\$500,000; or

(b) in a case where the Ministerial Council determines in writing that, for the purposes of this section, the basic amount in relation to the relevant organisation is to be a specified amount that is less than \$500,000—that specified amount.

#### **Fund to be kept in separate bank account**

**108.** The money in a fidelity fund shall, until it is invested or applied in accordance with this Part, be kept in a separate account in a bank in South Australia.

#### **Payments out of fund**

**109.** Subject to this Part, there shall be paid out of the fidelity fund of a relevant organisation in such order as the Board of the relevant organisation deems proper—

(a) the amount of all claims, including costs, allowed by the Board or established against the relevant organisation under this Part;

(b) all legal and other expenses incurred in investigating or defending claims made under this Part or incurred in relation to the fund or in the exercise by the relevant organisation or the Board of the rights, powers and authorities vested in it by this Part in relation to the fund;

- (c) all premiums payable in respect of contracts of insurance or indemnity entered into by the relevant organisation under section 126;
- (d) the expenses incurred in the administration of the fund, including the salaries and wages of persons employed by the relevant organisation or the Board in relation to the fund; and
- (e) all other money payable out of the fund in accordance with the provisions of this Code.

#### **Accounts of fund**

**110.** (1) A relevant organisation shall establish and keep proper accounts of its fidelity fund and shall, within the period of 3 months that next succeeds the end of its financial year within the meaning of the *Companies (South Australia) Code*, cause a balance sheet in respect of those accounts to be made out as at the end of that financial year.

(2) A relevant organisation shall appoint a registered company auditor to audit the accounts of the fidelity fund.

(3) The auditor appointed by a relevant organisation shall audit the accounts of the fidelity fund and shall audit each balance sheet and cause a report on the accounts and balance sheet to be laid before the Board of the relevant organisation not later than one month after the balance sheet is made out.

(4) A relevant organisation shall give to the Commission a copy of each report laid before the Board of the relevant organisation under this section and of the balance sheet to which the report relates within 14 days after the report was so laid before the Board.

#### **Management sub-committee**

**111.** (1) The Board of a relevant organisation may, by resolution, appoint a management sub-committee of not less than 3 and not more than 5 persons, at least one of whom is also a member of the Board.

(2) The Board of a relevant organisation may, by resolution, delegate to a sub-committee appointed by it under this section all or any of its powers, authorities and discretions under a provision of this Part (other than this section).

(3) A power, authority or discretion delegated under sub-section (2) may be exercised by members forming a majority of the sub-committee as if that power, authority or discretion had been conferred by this Part on a majority of the members of the sub-committee.

(4) A delegation by the Board of a relevant organisation under this section may at any time, by resolution of the Board, be varied or revoked.

(5) The Board of a relevant organisation may at any time, by resolution, remove a member of a sub-committee appointed by it under this section and may, by resolution, fill a vacancy arising in the membership of the sub-committee.

(6) A delegation by the Board of a relevant organisation under this section does not prevent the exercise of a power, authority or discretion by that Board.

### **Contribution to fund**

**112.** (1) A person shall not be admitted to membership of a relevant organisation unless—

(a) except where paragraph (b) applies—the person has paid to the relevant organisation, as a contribution to its fidelity fund, such part of the annual membership fee of the relevant organisation as is determined by the relevant organisation in relation to that person or in relation to a class of persons in which that person is included; or

(b) in a case where the relevant organisation is not a futures exchange—the person is already an exchange member of a futures exchange,

but a failure to comply with this sub-section does not affect the validity of a person's membership of a relevant organisation.

(2) In sub-section (1), "person" includes a partnership.

(3) A contributing member of a relevant organisation shall, on or before 31 March in each year, pay to the relevant organisation, as a contribution to its fidelity fund, such part of the annual membership fee of the relevant organisation as is determined by the relevant organisation in relation to that contributing member or in relation to a class of contributing members in which that contributing member is included.

### **Levy in addition to annual contributions**

**113.** (1) If at any time the amount of a fidelity fund is insufficient to pay all amounts that, at that time, are required to be paid under section 109, the relevant organisation may impose on each person who is liable to contribute to the fund a levy of such amount as it thinks fit for payment into the fund.

(2) The amount of such a levy shall be paid within the time and in the manner specified by the relevant organisation either generally or in relation to a particular case.

(3) A person is not required to pay by way of levy under this section more than \$5,000, or such other amount as may be prescribed, in the aggregate or more than \$1,000, or such other amount as may be prescribed, in any period of 12 months.

### **Power of relevant organisation to make advances to fund**

**114.** (1) A relevant organisation may, from its general funds, give or advance, on such terms as the Board of the relevant organisation thinks fit, any sums of money to its fidelity fund.

(2) Money that is advanced under sub-section (1) may at any time be repaid from the fidelity fund to the general funds of the relevant organisation.



**Investment of fund**

**115.** Money in a fidelity fund of a relevant organisation that is not immediately required for the purposes of the fund may be invested by the relevant organisation in any manner in which trustees are for the time being authorised by law to invest trust funds or on deposit with a corporation in respect of which a declaration under paragraph 97 (7) (b) of the *Companies (South Australia) Code* is in force.

**Application of fund**

**116.** (1) Subject to this Part, where—

- (a) a person (in this sub-section referred to as the “relevant person”) suffers pecuniary loss at a particular time because of a defalcation, or because of fraudulent misuse of money or other property, by—
- (i) a person who is at that time a contributing member of a relevant organisation;
  - (ii) a director, partner, officer or employee of a person who is at that time a contributing member of a relevant organisation; or
  - (iii) a partner in, or employee of, a partnership that is at that time a contributing member of a relevant organisation; and
- (b) the loss is suffered in respect of money or other property that was, in connection with the contributing member’s dealings in futures contracts (whether or not any of those dealings was effected on a futures market), entrusted to or received by the contributing member, or a director, partner, officer or employee of the contributing member (whether before or after the commencement of the Futures Industry (Application of Laws) Act, 1986)—
- (i) for or on behalf of the relevant person or another person; or
  - (ii) because the contributing member was trustee of the money or other property,

the fidelity fund of the relevant organisation shall be applied for the purpose of compensating the relevant person.

(2) The reference in paragraph (1) (b) to a partner of a contributing member of a relevant organisation is, in a case where the contributing member is a partnership, a reference to a partner in the partnership.

(3) Subject to this Part, where a right to compensation does not arise under sub-section (1), a fidelity fund of a relevant organisation may, if the Board of the relevant organisation thinks fit, be applied for the purpose of paying to an official receiver or trustee within the meaning of the *Bankruptcy Act 1966* of the Commonwealth an amount not greater than the amount that the official receiver or trustee, as the case may be, certifies is required in order to make up or reduce the total deficiency arising because the available assets of a bankrupt who is a contributing member of the relevant organisation are insufficient to satisfy the debts arising from dealings in futures contracts that have been proved in the bankruptcy by creditors of the bankrupt.

(4) Sub-section (3) applies in the case of a contributing member of a relevant organisation who has made a composition with the member's creditors, or has executed a deed of assignment or a deed of arrangement, under Part X of the *Bankruptcy Act 1966* of the Commonwealth in like manner as that sub-section applies in the case of a contributing member of a relevant organisation who has become bankrupt and, for the purposes of that sub-section as so applying by virtue of this sub-section—

- (a) the reference in that sub-section to a trustee shall be deemed to be a reference to a controlling trustee within the meaning of that Part;
- (b) the reference to debts proved in the bankruptcy shall be deemed to be a reference to provable debts in relation to the composition or deed within the meaning of that Part; and
- (c) a reference to the bankrupt shall be deemed to be a reference to the person who made the composition or executed the deed.

(5) Subject to this Part, where a right to compensation does not arise under sub-section (1), a fidelity fund of a relevant organisation may, if the Board of the relevant organisation thinks fit, be applied for the purpose of paying to the liquidator of a body corporate that is a contributing member of the relevant organisation and that has commenced to be wound up, an amount not greater than the amount that the liquidator certifies is required to make up or reduce the total deficiency arising because the available assets of the body corporate are insufficient to satisfy the debts of the body corporate arising from dealings in futures contracts that have been proved in the winding up by creditors of the body corporate.

(6) Money paid pursuant to sub-section (3) or (5) is so paid only on condition that it is applied by the official receiver, trustee or liquidator towards satisfaction of debts arising from dealings in futures contracts and for no other purpose.

(7) Subject to sub-section (9), the amount, or the sum of the amounts, paid under this Part out of a fidelity fund of a relevant organisation—

- (a) for the purpose of compensating pecuniary loss as mentioned in sub-section (1); or
- (b) for the purpose of making payments under sub-section (3) or (5), shall not exceed, in respect of a particular contributing member of the relevant organisation—
  - (c) unless paragraph (d) applies—\$500,000; or
  - (d) if some other amount is prescribed, for the purposes of this sub-section, in relation to the relevant organisation, a class of relevant organisations that includes the relevant organisation, or relevant organisations generally—that amount.

(8) For the purposes of calculating the sum referred to in sub-section (7), an amount that is paid from a fidelity fund shall, to the extent to which that amount is repaid to the fund, be disregarded.

(9) If a relevant organisation considers, having regard to the ascertained or contingent liabilities of its fidelity fund, that the assets of the fund so permit, the relevant organisation may apply out of the fund such sums in

excess of the amount limited by or under this section as the relevant organisation, in its discretion, thinks fit in or towards the compensation of persons who have suffered pecuniary loss as mentioned in sub-section (1) or making a payment under sub-section (3) or (5).

(10) Where—

(a) money or other property—

(i) has been entrusted to, or received by; or

(ii) has been entrusted to, or received by, a director, partner, officer or employee of,

a person (in this sub-section referred to as the “former member”) who has at any time been but is no longer a contributing member of a relevant organisation;

(b) immediately before the former member last ceased to be a member of that relevant organisation, the former member was a contributing member of that relevant organisation;

(c) by reason of a defalcation, or the fraudulent misuse of money or other property, by the former member, director, partner, officer or employee of the former member, the person by or from whom the money or other property was so entrusted or received suffered pecuniary loss; and

(d) at the time when the money or other property was so entrusted or received, the person suffering the pecuniary loss had reasonable grounds for believing, and did believe, that the former member was at that time a member of that relevant organisation,

the former member shall, for the purposes of this section (other than this sub-section and sub-section (11)), be deemed to have been, at the time when the pecuniary loss was suffered, a contributing member of that relevant organisation.

(11) Where—

(a) a person who has at any time been, but is no longer, a contributing member (in this sub-section referred to as the “former member”) of a relevant organisation has incurred a debt arising from dealings in futures contracts; and

(b) at the time when the debt was incurred, the creditor, or one or more of the creditors, in relation to the debt had reasonable grounds for believing and did believe that the former member was at that time a member of the relevant organisation,

a reference in this section (other than sub-section (10) and this sub-section) to a contributing member of the relevant organisation shall, for the purpose of determining the application of sub-section (3) or (5) in relation to that creditor or those creditors, as the case may be, in relation to that debt, be deemed to include a reference to that former member.

(12) A reference in this section to a defalcation, or to a fraudulent misuse of money or other property, is a reference to a defalcation, or to such a fraudulent misuse, wherever and whenever occurring.

**Claims against fund**

117. (1) Subject to this Part, a person who suffers pecuniary loss as mentioned in sub-section 116 (1) is entitled to claim compensation from the fidelity fund of a relevant organisation whose fidelity fund is, pursuant to that sub-section, required to be applied to compensate the person, and to take proceedings in the Court as provided in this Part against the relevant organisation to establish that claim.

(2) A person does not have a claim against a fidelity fund of a relevant organisation in respect of—

- (a) pecuniary loss suffered before the commencement of the Futures Industry (Application of Laws) Act, 1986; or
- (b) pecuniary loss in respect of money or other property suffered after the money or property had, in due course of the administration of a trust, ceased to be under the sole control of a person who is a member of the relevant organisation or of a partner or partners in a partnership that is such a member.

(3) Subject to this Part, the amount that a claimant is entitled to claim as compensation from a fidelity fund of a relevant organisation is the amount of the actual pecuniary loss suffered by the claimant (including the reasonable costs of, and disbursements incidental to, the making and proof of the claim) less the total amount or value of all amounts or other benefits received or receivable by the claimant from a source other than the fund in reduction of the loss.

(4) In addition to any compensation that is payable under this Part, interest is payable out of the fidelity fund on the amount of the compensation, less any amount attributable to costs and disbursements, at the prescribed rate calculated from and including the day on which the pecuniary loss was suffered until the day on which the claim is satisfied.

**Rights of innocent partner in relation to fund**

118. (1) Where all persons who have submitted claims pursuant to section 117 have been fully compensated in accordance with the provisions of this Part for pecuniary loss in relation to a contributing member of a relevant organisation, being pecuniary loss as mentioned in sub-section 116 (1) suffered in relation to money or other property, any partner of the contributing member who has made payment to a person in compensation for loss suffered by the person in relation to that money or property shall be deemed to be subrogated to the extent of that payment to all the rights and remedies of that person against the fidelity fund of the relevant organisation if the Board of the relevant organisation, having regard to all the circumstances, determines that the partner was in no way a party to the loss and acted honestly and reasonably in the matter.

(2) If a partner of a contributing member of a relevant organisation feels aggrieved by the determination of a Board under sub-section (1), the partner may, within 28 days after receipt of notice of the determination, appeal to the Court against the determination by lodging a notice of appeal in the prescribed form.

(3) The appellant shall, on the day on which the appellant lodges notice of appeal with the Court, lodge a copy of the notice with the relevant organisation concerned.

(4) The Court shall inquire into and decide upon the appeal and, for that purpose, may do all such matters and things, and may do those matters and things in the same manner and to the same extent, as it is empowered to do in the exercise of its ordinary jurisdiction and if the Court is of the opinion having regard to all the circumstances that the appellant was not a party to the defalcation or fraudulent misuse of money or other property from which the pecuniary loss arose and that the appellant acted honestly and reasonably in the matter, it may order that the appellant shall, to the extent of any payment made by the appellant, be subrogated to the rights and remedies, in relation to the fidelity fund of the relevant organisation concerned, of the person to whom the appellant made such a payment.

#### **Notice calling for claims against fund**

**119.** (1) A relevant organisation may cause to be published in a daily newspaper circulating generally in South Australia (and if, in any State other than South Australia or in any Territory, that newspaper does not circulate generally, in a newspaper that does so circulate in that other State or that Territory), a notice in the prescribed form specifying a date, not being earlier than 3 months after the publication of the notice, on or before which claims for compensation from the fidelity fund, in relation to the person specified in the notice, may be made.

(2) A claim for compensation from a fidelity fund of a relevant organisation in respect of a pecuniary loss shall be made in writing to the relevant organisation—

(a) where a notice under sub-section (1) has been published, on or before the date specified in the notice; or

(b) where no such notice has been published, within 6 months after the claimant became aware of the pecuniary loss,

and a claim that is not so made is barred unless the relevant organisation otherwise determines.

(3) It is a defence to an action for damages against a relevant organisation, a member of a Board of a relevant organisation or a member or employee of a relevant organisation in respect of the publication of a notice under sub-section (1) if the defendant establishes that the notice was published in good faith for the purposes of this section.

#### **Power of Board to settle claims**

**120.** (1) Subject to this Part, the Board of a relevant organisation may allow and settle a proper claim for compensation from a fidelity fund of the relevant organisation at any time after the occurrence of the pecuniary loss in respect of which the claim arose.

(2) Subject to sub-section (3), a person shall not commence proceedings under this Part against a relevant organisation without leave of the Board unless—

(a) the Board has disallowed the person's claim; and

(b) the claimant has exhausted all relevant rights of action and other legal remedies for the recovery of the money or other property in respect of which the pecuniary loss occurred, being rights and remedies that are available against the member of the relevant

organisation in relation to whom the claim arose and all other persons who are liable in respect of the loss suffered by the claimant, other than any right or remedy that the claimant may have—

- (i) under section 117, against another relevant organisation; or
- (ii) under the provision of a law in force in a participating State or in a participating Territory that corresponds with section 117, against a body that is a relevant organisation under the corresponding law in force in that State or Territory.

(3) A person who has been refused leave by the Board of a relevant organisation under sub-section (2) may apply to the Court for leave to commence proceedings against the relevant organisation and the Court may make such order in the matter as it thinks fit.

(4) The Board of a relevant organisation, after disallowing, whether wholly or partly, a claim for compensation from the fidelity fund of the relevant organisation, shall serve notice of the disallowance in the prescribed form on the claimant or on the claimant's solicitor.

(5) Proceedings against a relevant organisation in respect of a claim that has been disallowed by the Board of the relevant organisation shall not be commenced after the expiration of 3 months after the service of the notice of disallowance referred to in sub-section (4).

(6) In proceedings brought to establish a claim, evidence of an admission or confession by, or other evidence that would be admissible against, the person against whom a defalcation or fraudulent misuse of property is alleged is admissible to prove the defalcation or fraudulent misuse notwithstanding that the person is not the defendant in or a party to those proceedings, and all defences that would have been available to that person are available to the relevant organisation.

(7) The Board or, where proceedings are brought to establish a claim, the Court, if satisfied that there was a defalcation or fraudulent misuse of property on which to found the claim, may allow the claim and act accordingly notwithstanding that the person against whom the defalcation or fraudulent misuse of property is alleged has not been convicted or prosecuted or that the evidence on which the Board or the Court, as the case may be, acts would not be sufficient to establish the guilt of that person on a criminal trial in respect of the defalcation or fraudulent misuse of property.

#### **Form of order of Court establishing claim**

**121.** (1) Where, in proceedings brought to establish a claim, the Court is satisfied that there was a defalcation or fraudulent misuse of property on which to found the claim and that otherwise the claimant has a valid claim, the Court shall, by order—

- (a) declare the fact and the date of the defalcation or fraudulent misuse of property and the amount of the claim; and
- (b) direct the Board to allow the claim as so declared and deal with it in accordance with the provisions of this Part.

(2) In any such proceedings all questions of costs are in the discretion of the Court.

**Power of Board to require production of documents, &c.**

122. The Board of a relevant organisation may at any time require a person to produce and deliver any documents or statements of evidence necessary to support a claim made or necessary for the purpose either of exercising its rights against a contributing member of the relevant organisation or a partner or the partners in a partnership that is a contributing member of the relevant organisation or any other person or of enabling criminal proceedings to be taken against a person in respect of a defalcation or fraudulent misuse of property, and in default of delivery of such documents or statements of evidence by the first-mentioned person, the Board may disallow any claim by the first-mentioned person under this Part.

**Subrogation of relevant organisation to rights, &c., of claimant on payment from fund**

123. On payment out of a fidelity fund of a relevant organisation of any money in respect of a claim under this Part, the relevant organisation is subrogated to the extent of that payment to all the rights and remedies of the claimant in relation to the loss suffered by the claimant from the defalcation or fraudulent misuse of property.

**Payment of claims only from fund**

124. Money or other property belonging to a relevant organisation, other than its fidelity fund, is not available for the payment of a claim under this Part, whether the claim is allowed by the Board of the relevant organisation or is made the subject of an order of the Court.

**Provisions where fund insufficient to meet claims or where claims exceed total amount payable**

125. (1) Where the amount in a fidelity fund of a relevant organisation is insufficient to pay the whole of the amount of all claims against it that have been allowed or in respect of which orders of the Court have been made, the amount in the fund shall, subject to sub-section (2), be apportioned among the claimants in such manner as the Board of the relevant organisation thinks equitable, and such a claim so far as it then remains unpaid shall be deemed to be charged against future receipts of the fund and paid out of the fund when money is available in the fund.

(2) Where the aggregate of all claims that have been allowed or in respect of which orders of the Court have been made in relation to defalcations or fraudulent misuses of property by or in connection with a contributing member of a relevant organisation exceeds the total amount that may, pursuant to section 116, be paid under this Part in respect of that contributing member, the total amount shall be apportioned among the claimants in such manner as the Board thinks equitable, and on payment out of the fund of that total amount in accordance with that apportionment all such claims and any orders relating to those claims and all other claims against the fund that may thereafter arise or be made in respect of defalcations or fraudulent misuses of property by or in connection with that contributing member are discharged.

**Power of relevant organisation to enter into contracts of insurance or indemnity**

126. (1) A relevant organisation may, in its discretion, enter into a contract with a person carrying on fidelity insurance business whereby the relevant organisation will be insured or indemnified, to the extent and in the manner provided by the contract, against liability in respect of claims under this Part.

(2) Such a contract may be entered into in relation to contributing members of the relevant organisation generally, or in relation to particular contributing members named in the contract, or in relation to contributing members generally with the exclusion of particular contributing members named in the contract.

(3) No action lies against a relevant organisation, against a member or employee of a relevant organisation or of the Board of a relevant organisation, or against a member of the management sub-committee of the Board of a relevant organisation, for damage alleged to have been suffered by a member of the relevant organisation because of the publication in good faith of a statement that a contract entered into under this section does, or does not, as the case may be, apply in relation to that member.

**Application of insurance money**

127. A claimant against a fidelity fund of a relevant organisation does not have a right of action against a person with whom a contract of insurance or indemnity is made under this Part in respect of such a contract or a right or claim with respect to any money paid by the insurer in accordance with such a contract.

**PART VIII—OFFENCES****Dealings by futures broker on behalf of others**

128. A futures broker shall not deal in a futures contract on behalf of another person unless the dealing is effected—

- (a) on a futures market of a futures exchange or recognised futures exchange;
- (b) on an exempt futures market; or
- (c) as permitted by the business rules of a relevant organisation of which the broker is a member.

Penalty: \$10,000 or imprisonment for 2 years, or both.

**Prohibition of dealings by insiders in futures contracts relating to securities**

129. (1) A person shall not deal in a futures contract concerning a body corporate if the person—

- (a) is, or at any time during the 6 months preceding the dealing has been, connected with the body corporate; and
- (b) is, by virtue of being, or having so been, connected with the body corporate, in possession of information that is not generally available but, if it were generally available, would be likely materially to affect the price for dealing in a futures contract of the same kind as that futures contract.



(2) A person shall not deal in a futures contract concerning a body corporate if the person—

- (a) is, or at any time during the 6 months preceding the dealing has been, connected with another body corporate; and
- (b) is, by virtue of being, or having so been, connected with the other body corporate, in possession of information that—
  - (i) is not generally available but, if it were generally available, would be likely materially to affect the price for dealing in a futures contract of the same kind as that futures contract; and
  - (ii) relates to any transaction (actual or expected) involving both those bodies corporate or involving one of them and securities of the other.

(3) A person who—

- (a) is in possession of information of a kind referred to in sub-section (1) or (2), being information that, if it were generally available, would be likely materially to affect the price for dealing in a futures contract concerning a body corporate; and
- (b) is precluded by neither of those sub-sections from dealing in a futures contract (in this sub-section referred to as a “relevant futures contract”) of the same kind as the futures contract referred to in paragraph (a),

shall not deal in a relevant futures contract if the person—

- (c) has obtained the information, directly or indirectly, from another person and is aware, or ought reasonably to be aware, of facts or circumstances by virtue of which that other person is then precluded by sub-section (1) or (2) from dealing in a relevant futures contract; and
- (d) was, when the information was so obtained, associated with that other person or had with that other person an arrangement for the communication of information of a kind referred to in sub-section (1) or (2) with a view to a dealing in a relevant futures contract by the first-mentioned person, by that other person or by both of them together.

(4) A person shall not, when precluded by sub-section (1), (2) or (3) from dealing in a futures contract, cause or procure another person to deal in a futures contract of the same kind as that futures contract.

(5) A person who, by reason of being in possession of particular information, is precluded by sub-section (1), (2) or (3) from dealing in a futures contract shall not, when so precluded, communicate that information to another person if the first-mentioned person knows, or ought reasonably to know, that the other person will make use of the information for the purpose of dealing, or causing or procuring another person to deal, in a futures contract of the same kind as that futures contract.

(6) Without prejudice to sub-section (3), but subject to sub-sections (7) and (8), where an officer of a body corporate is precluded by sub-section (1), (2) or (3) from dealing in a futures contract, the body corporate shall

not, when the officer is so precluded, deal in a futures contract of the same kind as that futures contract.

(7) A body corporate is not, by reason only of information in the possession of an officer of the body corporate, precluded by sub-section (6) from entering into a transaction at a particular time if—

- (a) the decision to enter into the transaction was taken on its behalf by a person other than the officer;
- (b) it had in operation at that time arrangements to ensure that the information was not communicated to that person and that no advice with respect to the transaction was given to that person by a person in possession of the information; and
- (c) the information was not so communicated and no such advice was so given.

(8) A body corporate is not, by reason only of information in the possession of an officer of the body corporate, precluded by sub-section (6) from dealing in a futures contract concerning another body corporate if the information—

- (a) was obtained by the officer in the course of the performance of duties as an officer of the first-mentioned body corporate; and
- (b) relates only to a proposed dealing by the first-mentioned body corporate in securities of, or a futures contract concerning, the other body corporate.

(9) Nothing in this section precludes the holder of a futures broker's licence from dealing in a futures contract concerning a body corporate if—

- (a) the holder of the licence enters into the dealing as agent for another person pursuant to a specific instruction by that other person to enter into that dealing;
- (b) the holder of the licence has not given any advice to the other person in relation to dealing in a futures contract concerning the body corporate; and
- (c) the other person is not associated, in relation to the dealing, with the holder of the licence.

(10) Where a prosecution is instituted against a person for an offence because the person was in possession of particular information and dealt in a futures contract in contravention of this section, it is a defence if it is established that the other party to the dealing knew, or ought reasonably to have known, the information before entering into the dealing.

(11) For the purposes of this section, a futures contract concerns a body corporate if, and only if—

- (a) in a case where the futures contract is a commodity agreement—  
a commodity to which the futures contract relates is securities of the body corporate; or
- (b) in a case where the futures contract is an adjustment agreement—  
a state of affairs to which the futures contract relates concerns the price of securities of the body corporate, or the prices of a

class of securities that includes securities of the body corporate, at a particular time.

(12) For the purposes of this section, a person is connected with a body corporate (in this sub-section referred to as the “relevant body corporate”) if the person is a natural person and—

- (a) is an officer of the relevant body corporate or of a related body corporate;
- (b) is a substantial shareholder within the meaning of Division 4 of Part IV of the *Companies (South Australia) Code* in the relevant body corporate or in a related body corporate; or
- (c) occupies a position that may reasonably be expected to give the person access to information of a kind referred to in sub-section (1) or (2) by virtue of—
  - (i) any professional or business relationship existing between the person (or the person’s employer or a body corporate of which the person is an officer) and the relevant body corporate or a related body corporate; or
  - (ii) the person being an officer of a substantial shareholder within the meaning of Division 4 of Part IV of the *Companies (South Australia) Code* in the relevant body corporate or in a related body corporate.

(13) For the purposes of sub-section (12), “officer”, in relation to a body corporate, includes—

- (a) a director, secretary, executive officer or employee of the body corporate;
- (b) a receiver, or a receiver and manager, of property of the body corporate;
- (c) an official manager or a deputy official manager of the body corporate;
- (d) a liquidator of the body corporate; and
- (e) a trustee or other person administering a compromise or arrangement made between the body corporate and another person or other persons.

(14) A reference in this section to a futures contract of the same kind as a particular futures contract includes a reference to the particular futures contract.

(15) In this section, “securities” has the same meaning as that expression has in the *Securities Industry (South Australia) Code*.

#### **Futures market manipulation**

**130.** A person shall not, whether within or outside South Australia, take part in, be concerned in or carry out, whether directly or indirectly—

- (a) a transaction (whether or not the transaction is a dealing in a futures contract) that has, is intended to have or is likely to have; or

- (b) 2 or more transactions (whether or not any of the transactions is a dealing in a futures contract) that have, are intended to have or are likely to have,  
the effect of—
- (c) creating an artificial price for dealing in futures contracts on a futures market within South Australia; or
  - (d) maintaining at a level that is artificial (whether or not that level was previously artificial) a price for dealing in futures contracts on a futures market within South Australia.

#### **False trading and market rigging**

**131.** (1) A person shall not, whether within or outside South Australia, create, or cause to be created, or do anything that is calculated to create, a false or misleading appearance of active dealing in futures contracts on a futures market within South Australia or a false or misleading appearance with respect to the market for, or the price of dealing in, futures contracts on a futures market within South Australia.

(2) A person shall not, by any fictitious or artificial transactions or devices, maintain, inflate, depress or cause fluctuations in, the price for dealing in futures contracts on a futures market within South Australia.

(3) For the purpose of determining whether a transaction is fictitious or artificial within the meaning of sub-section (2), the fact that the transaction is, or was at any time, intended by the parties who entered into the transaction to have effect according to its terms shall not be conclusive.

#### **False or misleading statements, &c.**

**132.** Where—

- (a) a person makes a statement, or disseminates information, that is false or misleading in a material particular and is likely—
  - (i) to induce other persons to deal in futures contracts on a futures market within South Australia; or
  - (ii) to have the effect of raising, lowering, maintaining or stabilising the price for dealing in futures contracts, or in a class of futures contracts, on a futures market within South Australia; and
- (b) at the time when the person makes the statement, or disseminates the information—
  - (i) the person is recklessly indifferent as to whether or not the statement or information is true or false; or
  - (ii) the person knows, or ought reasonably to know, that the statement or information is false or misleading in a material particular,

the person contravenes this section.

#### **Fraudulently inducing person to deal in futures contracts**

**133.** (1) A person shall not—

- (a) by making or publishing any statement, promise or forecast that the person knows to be misleading, false or deceptive;

- (b) by any dishonest concealment of material facts;
- (c) by the reckless making or publishing (dishonestly or otherwise) of any statement, promise or forecast that is misleading, false or deceptive; or
- (d) by recording or storing in, or by means of, any mechanical, electronic or other device information that the person knows to be false or misleading in a material particular,

induce or attempt to induce another person to deal in a futures contract or a class of futures contracts.

(2) It is a defence to a prosecution for an offence under sub-section (1) constituted by recording or storing information as mentioned in paragraph (1) (d) if it is established that, at the time when the defendant so recorded or stored the information, the defendant had no reasonable grounds for expecting that the information would be available to any person.

#### **Dissemination of information about illegal transactions**

##### **134. Where—**

- (a) a person circulates or disseminates, or authorises or is concerned in the circulation or dissemination of, any statement or information to the effect that the price for dealing in futures contracts, or in a class of futures contracts, on a futures market within South Australia will, or is likely to, rise or fall or be maintained because of a transaction, or other act or thing done, in relation to such futures contracts or futures contracts included in that class, being a transaction, or other act or thing, that constitutes a contravention of section 130, 131, 132 or 133; and
- (b) the person, or a person associated with the person—
  - (i) has entered into such a transaction or done such an act or thing; or
  - (ii) has received, or expects to receive, directly or indirectly, a consideration or benefit for circulating or disseminating, or authorising or being concerned in the circulation or dissemination of, the statement or information,

the first-mentioned person contravenes this section.

#### **Fraud in connection with dealings in futures contracts**

**135. (1)** In this section, “relevant person”, in relation to a dealing or proposed dealing in a futures contract by a futures broker, means—

- (a) the broker;
- (b) an employee or agent of the broker; or
- (c) a person who has an interest, or is otherwise concerned in, the dealing or proposed dealing.

(2) Where, in connection with a dealing or proposed dealing in a futures contract by a futures broker on behalf of a client of the broker, a relevant person in relation to the dealing or proposed dealing—

- (a) defrauds the client;

- (b) does an act, or omits to do an act, knowing that the client will be deceived or misled, or with reckless indifference as to whether or not the client will be deceived or misled, as a result of the act or omission; or
- (c) (without limiting the generality of paragraph (b)) makes a statement, promise or forecast to the client, or makes an entry in a record relating to the client or persons including the client—
  - (i) knowing that the statement, promise, forecast or entry is false, misleading or deceptive in a material particular; or
  - (ii) with reckless indifference as to whether or not the statement, promise, forecast or entry is false, misleading or deceptive in a material particular,

the relevant person contravenes this section.

### Penalties

136. A person who contravenes any of sections 129 to 135 (inclusive) is guilty of an offence.

Penalty—

- (a) in the case of a natural person—\$20,000 or imprisonment for 5 years, or both; or
- (b) in any other case—\$50,000.

### Compensation for loss, &c.

137. (1) Where—

- (a) a person who, by reason of being in possession of particular information, is precluded by sub-section 129 (1), (2) or (3) from dealing in a futures contract—
  - (i) deals, in contravention of that sub-section, in that futures contract; or
  - (ii) causes or procures, in contravention of sub-section 129 (4), another person to deal in that futures contract or in a futures contract of the same kind as that futures contract; or
- (b) a person, being a body corporate, deals, in contravention of sub-section 129 (6), in a futures contract at a time when an officer of the body corporate is, by reason of being in possession of particular information, precluded by sub-section 129 (1), (2) or (3) from dealing in that futures contract or in a futures contract of the same kind as that futures contract,

the person is liable (whether or not the person has been convicted of an offence in respect of the contravention) to compensate any other party to the dealing who was not in possession of that information for any loss sustained by that party by reason of any difference between the price at which the dealing took place and the price at which it would be likely to have taken place if that information had been generally available.

(2) A person who contravenes any of sections 130 to 135 (inclusive) (whether or not the person has been convicted of an offence in respect of

the contravention) is liable to pay compensation to any other person who, in dealing in futures contracts, suffers loss by reason of the difference between the price at which the dealing takes place and the price at which it would be likely to have taken place if the contravention had not occurred.

(3) The amount of compensation for which a person is liable under subsection (1) or (2) is—

- (a) in a case to which paragraph (b) does not apply—the amount of the loss sustained by the person claiming the compensation; or
- (b) if the first-mentioned person has been found by a court to be liable, or has been ordered by a court, to pay an amount or amounts to any other person or persons under this Part or under sub-section 229 (6) of the *Companies (South Australia) Code* or under a corresponding provision of a previous law of South Australia by reason of the same act or transaction—the amount of that loss less the amount or the sum of the amounts that the first-mentioned person has been so found to be liable, or has been so ordered, to pay.

(4) For the purposes of sub-section (3), the onus of proving that the liability of a person to pay an amount to another person arose from the same act or transaction from which another liability arose lies on the person liable to pay the amount.

(5) An action under this section for recovery of compensation for a loss is not maintainable after the end of the period of 2 years commencing on the day of completion of the dealing in which the loss occurred.

(6) The Commission may, if it considers it to be in the public interest to do so, bring an action in the name of, and for the benefit of, a person for recovery of compensation for a loss referred to in sub-section (1) and suffered by that person.

(7) Nothing in sub-section (1) affects any liability that a person may incur under any other law.

#### Sequence of transmission and execution of orders

**138.** (1) In this section, a reference to the transmission by a futures broker of instructions to deal in a class of futures contracts is a reference—

- (a) where the broker has direct access to the futures market on which the instructions are to be executed—to the transmission of the instructions to that futures market; or
- (b) where the broker has access to the futures market on which the instructions are to be executed only through another futures broker—to the transmission of the instructions to that other futures broker.

(2) Subject to sub-section (3), a futures broker shall transmit in the sequence in which they are received by the broker all instructions to deal in a class of futures contracts at or near the market price for a futures contract of that class prevailing immediately before execution of the instructions.

(3) Where a futures broker proposes to deal in a class of futures contracts on the broker's own account and the person by whom or on whose instructions the instructions for the dealing are to be transmitted is aware of instructions of a client of the broker to deal in that class of futures contracts at or near the market price for a futures contract of that class prevailing at that time (being instructions that have not been transmitted), that person shall not transmit, and shall not give instructions to any other person to transmit, the instructions to give effect to the proposal of the broker to deal in that class of futures contracts before the instructions of the client are transmitted.

(4) A futures broker, or a director, partner, officer or employee of a futures broker, shall not, except—

- (a) to the extent necessary to execute the instructions concerned;
- (b) as required by this Code or any other law; or
- (c) as required by the business rules of a relevant organisation of which the broker is a member,

disclose to any other futures broker, or to a person engaged or employed in the business of the first-mentioned broker or of any other futures broker, instructions of a client to deal in a class of futures contracts.

(5) A member of a futures exchange who is concerned in the execution, on a trading floor of the futures exchange, of instructions to deal in futures contracts shall execute in the order in which they are received by the member all instructions to deal in a class of futures contracts at or near the market price for a futures contract of that class prevailing immediately before execution of the instructions.

(6) Where—

- (a) during a particular period, a futures broker transmits instructions (whether or not those instructions consist of, or include, instructions giving effect to a proposal of the broker to deal in the class of contracts concerned on the broker's own account) to deal in a class of futures contracts at or near the market price for a futures contract of that class prevailing immediately before execution of the instructions; and
- (b) dealings in that class of futures contracts are effected pursuant to those instructions,

the broker shall, except so far as the business rules of a relevant organisation of which the broker is a member otherwise provide, allocate the dealings to those instructions—

- (c) in the sequence in which the dealings were effected; and
- (d) in the sequence in which the broker transmitted those instructions.

(7) A futures broker shall maintain, in accordance with the regulations, records that set out the prescribed particulars of—

- (a) instructions by a client to deal in futures contracts;
- (b) the date and time of receipt, transmission and execution of those instructions;
- (c) the person by whom those instructions are received, the person by whom they are transmitted and the person by whom they are executed;



- (d) the date and time of receipt, transmission and execution of instructions to deal in futures contracts on the broker's own account; and
- (e) the person by whom instructions of the kind referred to in paragraph (d) are received, the person by whom they are transmitted and the person by whom they are executed,

and shall retain those records for the prescribed period.

(8) Where—

- (a) a futures broker transmits for execution on a futures market outside Australia and the external Territories instructions to deal in futures contracts; and
- (b) it is not reasonably practicable for the broker to set out in the records maintained by the broker pursuant to sub-section (7) the prescribed particulars of the date and time of execution of those instructions,

the broker shall so set out those particulars as precisely as is reasonably practicable.

Penalty: \$2,500 or imprisonment for 6 months, or both.

#### Dealings by employees of licence holders

**139.** (1) A person who is a futures broker or a futures adviser and an employee of that person shall not, as principals, jointly deal in, or agree to deal in, futures contracts.

(2) A person who is a partner in a partnership that carries on a business of dealing in futures contracts and an employee of the partnership shall not, as principals, jointly deal in, or agree to deal in, futures contracts.

(3) A person who is a partner in a partnership that carries on a business in the course of which advice is given, or analyses or reports are issued or published, concerning futures contracts and an employee of the partnership shall not, as principals, jointly deal in, or agree to deal in, futures contracts.

(4) A person who is a futures broker or a futures adviser shall not give credit to an employee of that person or to a person who, to the knowledge of the first-mentioned person, is associated with such an employee if—

- (a) the credit is given for the purpose of enabling or assisting the person to whom the credit is given to deal in futures contracts; or
- (b) the person giving the credit knows or has reason to believe that the credit will be used for the purpose of dealing in futures contracts.

(5) A person who is a partner in a partnership that carries on a business of dealing in futures contracts shall not give credit to an employee of the partnership or to a person who, to the knowledge of the first-mentioned person, is associated with such an employee if—

- (a) the credit is given for the purpose of enabling or assisting the person to whom the credit is given to deal in futures contracts; or

(b) the person giving the credit knows or has reason to believe that the credit will be used for the purpose of dealing in futures contracts.

(6) A person who is a partner in a partnership that carries on a business in the course of which advice is given, or analyses or reports are issued or published, concerning futures contracts shall not give credit to an employee of the partnership or to a person who, to the knowledge of the first-mentioned person, is associated with such an employee if—

(a) the credit is given for the purpose of enabling or assisting the person to whom the credit is given to deal in futures contracts; or

(b) the person giving the credit knows or has reason to believe that the credit will be used for the purpose of dealing in futures contracts.

(7) A person who is an employee of a member of a futures exchange in connection with a business of dealing in futures contracts carried on by the member shall not, as principal, deal, or agree to deal, in futures contracts unless the member acts as the agent of the person in respect of the transaction.

(8) A reference in sub-section (1) or (4) to an employee of a person who is a futures broker or a futures adviser includes, in the case of a body corporate that is a futures broker or a futures adviser, a reference to an officer of the body corporate.

(9) The reference in sub-section (7) to an employee of a member of a futures exchange includes—

(a) in the case of a member that is a body corporate; and

(b) in the case of a member that is a partnership in which a partner is a body corporate,

a reference to an officer of the body corporate.

(10) A reference in this section to an employee of a futures broker, futures adviser, partnership or member of a futures exchange includes a reference to a person who, pursuant to a subsisting agreement, performs services for the futures broker, futures adviser, partnership or member in connection with dealings in futures contracts by the futures broker, futures adviser, partnership or member.

Penalty: \$2,500 or imprisonment for 6 months, or both.

#### PART IX—MISCELLANEOUS

##### Restrictions on use of titles “futures broker”, “futures exchange”, &c.

140. (1) A person who is not—

(a) the holder of a futures broker’s licence; or

(b) the holder of a futures broker’s licence within the meaning of the corresponding law in force in a participating State or in a participating Territory,

shall not take or use, or by inference adopt, the name or title of futures broker, or take or use, or have attached to, or exhibited at, any place, a

name, title or description implying, or tending to create the belief, that the person is a futures broker.

(2) A body corporate that is not—

- (a) a futures exchange; or
- (b) a recognised futures exchange,

shall not take or use, or by inference adopt, the name or title of futures exchange, or take or use, or have attached to, or exhibited at, any place, a name, title or description implying, or tending to create the belief, that the body corporate is—

- (c) a futures exchange; or
- (d) a recognised futures exchange.

Penalty: \$2,500 or imprisonment for 6 months, or both.

(3) A body corporate that is not—

- (a) a futures association; or
- (b) a futures association for the purposes of a corresponding law in force in a participating State or in a participating Territory,

shall not take or use, or by inference adopt, the name or title of futures association, or take or use, or have attached to, or exhibited at, any place, a name, title or description implying, or tending to create the belief, that the body corporate is—

- (c) a futures association; or
- (d) a futures association for the purposes of a corresponding law in force in a participating State or in a participating Territory.

### Appeal

**141.** (1) A person aggrieved by the refusal of the Commission to grant a licence or by the revocation of a licence under section 78 or by any other act or decision of the Commission may appeal to the Court, which may confirm the refusal, revocation, act or decision or give such directions in the matter as seem proper or otherwise determine the matter.

(2) This section does not apply to an act or decision of the Commission—

- (a) in respect of which a provision in the nature of an appeal or review is expressly provided in this Code; or
- (b) which is declared by this Code to be conclusive or final or is embodied in a document declared by this Code to be conclusive evidence of an act, matter or thing.

### False or misleading statements

**142.** (1) A person shall not, in, or in connection with, an application for a licence—

- (a) make a statement that is false or misleading in a material particular knowing it to be false or misleading; or
- (b) omit to state any matter or thing knowing that by reason of that omission the application is misleading in a material respect.

(2) A person shall not, for the purposes of this Code, lodge with the Commission, a futures exchange, a clearing house for a futures exchange, or a futures association, a document that contains a statement that to the person's knowledge is false or misleading.

Penalty: \$2,500 or imprisonment for 6 months, or both.

**Preservation and disposal of records, &c.**

143. (1) A person who is required by a provision of this Code to maintain, make or keep a register or any accounting or other record in relation to a business carried on by the person shall preserve that register or record for the prescribed period, whether or not the person ceases to carry on that business before the end of that period.

(2) The prescribed period for the purposes of sub-section (1) is—

(a) in relation to a register or a record other than an accounting record, the period of 5 years next after the day on which the last entry was made in the register or record; or

(b) in relation to an accounting record, the period of 7 years next after the last day of the accounting period to which the record relates.

(3) Sub-sections (1) and (2) do not apply in relation to a contract note or copy of a contract note received or issued by a futures broker who is a member of a futures exchange if the matters required by sub-section 83 (4), (5) or (6), as the case requires, to be included in the contract note are recorded—

(a) by the futures exchange; or

(b) subject to such conditions (if any) as the Commission imposes, by the broker,

in a manner approved by the Commission and the record of those matters is retained for not less than 5 years.

(4) The Commission may, if of the opinion that it is no longer necessary or desirable to retain it, destroy or otherwise dispose of any document that is given to or lodged with the Commission under or for the purposes of this Code and that has been in the possession of the Commission for such period as is prescribed for the purposes of this sub-section, either generally or in relation to a particular document or class of documents.

**Concealing, &c., books relating to futures contracts**

144. (1) A person who—

(a) conceals, destroys, mutilates or alters a book relating to the business carried on by a futures broker or required under this Code to be kept by the holder of a licence;

(b) where such a book is in South Australia—sends or takes, or causes the sending or taking of, the book out of South Australia; or

(c) where such a book is outside South Australia but is within Australia—sends or takes, or causes the sending or taking of, the book out of Australia,

contravenes this sub-section.

Penalty: \$5,000 or imprisonment for 1 year, or both.

(2) In a prosecution of a person for an offence under sub-section (1), it is a defence if it is established that the person did not act with intent to defraud, to defeat the purposes of this Code or to prevent, delay or obstruct the carrying out of an examination, investigation or audit, or the exercise of a power or authority, under this Code.

#### **Falsification of records**

**145.** (1) Where matter that is used or intended to be used in connection with the keeping of a book required to be kept under this Code or a register or any accounting or other record referred to in section 143 is recorded or stored in an illegible form by means of a mechanical device, an electronic device or any other device, a person who—

- (a) records or stores by means of that device matter that the person knows to be false or misleading in a material particular;
- (b) destroys, removes or falsifies matter that is recorded or stored by means of that device, or has been prepared for the purpose of being recorded or stored, or for use in compiling other matter to be recorded or stored, by means of that device; or
- (c) fails to record or store matter by means of that device with intent to falsify any entry made or intended to be compiled, wholly or in part, from that matter,

contravenes this sub-section.

Penalty: \$5,000 or imprisonment for 1 year, or both.

(2) In a prosecution of a person for an offence under sub-section (1), it is a defence if it is established that the person acted honestly and that in all the circumstances the act or omission constituting the offence should be excused.

#### **Precautions against falsification of records**

**146.** A person required by this Code to keep a book or record shall take reasonable precautions for guarding against falsification of the book or record and for facilitating discovery of any falsification.

#### **Obstructing or hindering Commission, &c.**

**147.** A person shall not, without lawful excuse, obstruct or hinder the Commission or another person in the exercise or performance of a function, power or authority under this Code.

#### **General penalty provisions**

**148.** (1) A person who—

- (a) does an act or thing that the person is forbidden to do by or under a provision of this Code;
- (b) does not do an act or thing that the person is required or directed to do by or under a provision of this Code; or
- (c) otherwise contravenes a provision of this Code,

is, unless that provision or another provision of this Code provides that the person is guilty of an offence, guilty of an offence by virtue of this sub-section.

(2) A person who is guilty of an offence against this Code, whether by virtue of sub-section (1) or otherwise, is punishable, upon conviction, by a penalty not exceeding the penalty applicable to the offence.

(3) Where—

- (a) a section that does not consist of 2 or more sub-sections provides that a person is in circumstances referred to in the section guilty of an offence; or
- (b) sub-section (1) operates in relation to a provision of this Code that is contained in a section that does not consist of 2 or more sub-sections so as to make a person guilty of an offence,

and a penalty, pecuniary or otherwise, is set out at the foot of the section, the penalty applicable to the offence is the penalty so set out.

(4) Where—

- (a) a sub-section of a section that consists of 2 or more sub-sections provides that a person is in circumstances referred to in the sub-section guilty of an offence; or
- (b) sub-section (1) operates in relation to a provision of this Code that is contained in the sub-section of a section that consists of 2 or more sub-sections so as to make a person guilty of an offence,

then—

- (c) if a penalty, pecuniary or otherwise, is set out at the foot of the sub-section—the penalty applicable to the offence is the penalty set out at the foot of the sub-section; or
- (d) if a penalty, pecuniary or otherwise, is set out at the foot of the section and no penalty is set out at the foot of the sub-section—the penalty applicable to the offence is the penalty set out at the foot of the section.

(5) Where each of 2 or more sub-sections of a section contains one of the following provisions:

- (a) a provision that a person is in circumstances referred to in the sub-section guilty of an offence;
- (b) a provision in relation to which sub-section (1) operates so as to make a person guilty of an offence,

and a penalty, pecuniary or otherwise, is set out at the foot of each of those sub-sections, the penalty applicable in relation to an offence created by either or any of those sub-sections, or in relation to an offence created by sub-section (1) in relation to a provision contained in either or any of those sub-sections, is the penalty set out at the foot of the sub-section concerned.

(6) Except as provided by sub-sections (3), (4) and (5), the penalty applicable in relation to an offence against this Code is a fine of \$500.

### Penalty notices

**149.** (1) Where the Commission has reason to believe that a person has committed a prescribed offence, the Commission may, subject to sub-section (2), serve on the person a notice in the prescribed form—

- (a) alleging that the person has committed the prescribed offence and giving the prescribed particulars in relation to the prescribed offence;
  - (b) setting out the prescribed penalty in respect of the prescribed offence; and
  - (c) stating—
    - (i) in the case of a prescribed offence constituted by a failure to do a particular act or thing—
      - (A) that the obligation to do the act or thing continues notwithstanding the service of the notice or the payment of the prescribed penalty;
      - (B) that if, within the period specified in the notice (being a period that is not less than 21 days), the person pays the prescribed penalty to the authority specified in the notice and does the act or thing, no further action will be taken against the person in relation to the prescribed offence; and
      - (C) that if, at the end of the period specified in the notice, the person has not paid the prescribed penalty to the authority specified in the notice or has not done the act or thing, proceedings may be instituted against the person; or
    - (ii) in the case of a prescribed offence, not being an offence constituted by a failure to do a particular act or thing—
      - (A) that if, within the period specified in the notice (being a period that is not less than 21 days), the person pays the prescribed penalty to the authority specified in the notice, no further action will be taken against the person in relation to the prescribed offence; and
      - (B) that if, at the end of the period specified in the notice, the person has not paid the prescribed penalty to the authority specified in the notice, proceedings may be instituted against the person.
- (2) Sub-section (1) does not empower the Commission—
- (a) to serve on a person more than one notice under that sub-section in relation to an alleged commission by that person of a particular prescribed offence; or
  - (b) to serve on a person a notice under that sub-section in relation to a prescribed offence unless proceedings could be instituted against that person for that offence in accordance with section 34 of the *Companies and Securities (Interpretation and Miscellaneous Provisions) (South Australia) Code*.
- (3) Where a notice under sub-section (1) is served on a person in relation to a prescribed offence constituted by a failure to do a particular act or thing—
- (a) if, within the period specified in the notice, the person pays the prescribed penalty to the authority specified in the notice and

does the act or thing—no proceedings may be instituted against the person in respect of the prescribed offence;

- (b) if, at the end of the period specified in the notice, the person has paid the prescribed penalty to the authority specified in the notice but has not done the act or thing—no proceedings may be instituted against the person in respect of the prescribed offence, but the obligation to do that act or thing continues, and section 150 applies in relation to the continued failure to do that act or thing as if, on the day on which the person so paid the prescribed penalty, the person had been convicted of an offence constituted by a failure to do that act or thing;
- (c) if, at the end of the period specified in the notice, the person has not paid the prescribed penalty to the authority specified in the notice but has done the act or thing—proceedings may be instituted against the person in respect of the prescribed offence; or
- (d) if, at the end of the period specified in the notice, the person has not paid the prescribed penalty to the authority specified in the notice and has not done the act or thing—the obligation to do that act or thing continues, and proceedings may be instituted against the person in respect of the prescribed offence.

(4) Where a notice under sub-section (1) is served on a person in relation to a prescribed offence, not being an offence constituted by a failure to do a particular act or thing—

- (a) if, within the period specified in the notice, the person pays the prescribed penalty to the authority specified in the notice—no proceedings may be instituted against the person in respect of the prescribed offence; or
- (b) if, at the end of the period specified in the notice, the person has not paid the prescribed penalty to the authority specified in the notice—proceedings may be instituted against the person in respect of the prescribed offence.

(5) The payment of an amount by a person pursuant to a notice served on the person under this section in relation to a prescribed offence shall not be taken for any purpose to be an admission by that person of any liability in connection with the alleged commission of the prescribed offence.

(6) Except as provided by paragraphs (3) (a) and (b) and (4) (a), this section does not affect the operation of any provision of this Code, of the regulations, of the rules or of any other Code or any Act in relation to the institution of proceedings in respect of offences that are prescribed offences for the purposes of this section.

(7) In this section—

“authority” includes a person;

“prescribed offence” means an offence prescribed for the purposes of this section.

### Continuing offences

150. (1) Where—



- (a) by or under a provision, an act is required to be done within a particular period or before a particular time;
- (b) failure to do the act within that period or before that time constitutes an offence; and
- (c) the act is not done within that period or before that time,

then—

- (d) the obligation to do the act continues, notwithstanding that that period has expired or that time has passed, and whether or not a person is convicted of a primary substantive offence in relation to failure to do the act, until the act is done; and
- (e) sub-sections (3) and (4) apply.

(2) Where—

- (a) by or under a provision, an act is required to be done but neither a period within which, nor a time before which, the act is to be done is specified;
- (b) failure to do the act constitutes an offence; and
- (c) a person is convicted of a primary substantive offence in relation to failure to do the act,

then—

- (d) the obligation to do the act continues, notwithstanding the conviction, until the act is done; and
- (e) sub-sections (3) and (4) apply.

(3) Where—

- (a) at a particular time, a person is first convicted of a substantive offence, or is convicted of a second or subsequent substantive offence, in relation to failure to do the act; and
- (b) the failure to do the act continues after that time,

the person is, in relation to failure to do the act, guilty of a further offence in respect of so much of the period throughout which the failure to do the act continues as elapses after that time and before the relevant day in relation to the further offence.

(4) Where—

- (a) a body corporate is guilty of a primary substantive offence in relation to failure to do the act; and
- (b) throughout a particular period (in this sub-section referred to as the “relevant period”)—
  - (i) the failure to do the act continues;
  - (ii) a person (in this sub-section referred to as the “derivative offender”) is in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the failure to do the act; and
  - (iii) the derivative offender is an officer of the body corporate,

then—

(c) in a case where either or both of the following events occurs or occur:

- (i) the body corporate is convicted, before or during the relevant period, of the primary substantive offence;
- (ii) the derivative offender is convicted, before or during the relevant period, of a primary derivative offence in relation to failure to do the act,

the derivative offender is, in relation to failure to do the act, guilty of an offence (in this paragraph referred to as the "relevant offence") in respect of so much (if any) of the relevant period as elapses—

- (iii) after the conviction referred to in sub-paragraph (i) or (ii), or after the earlier of the convictions referred to in sub-paragraphs (i) and (ii), as the case may be; and
- (iv) before the relevant day in relation to the relevant offence; and

(d) in a case where, at a particular time during the relevant period, the derivative offender is first convicted of a secondary derivative offence, or is convicted of a second or subsequent secondary derivative offence, in relation to failure to do the act—the derivative offender is, in relation to failure to do the act, guilty of a further offence in respect of so much of the relevant period as elapses after that time and before the relevant day in relation to the further offence.

(5) Notwithstanding sub-section 148 (6), where a person is guilty, by virtue of sub-section (3) or (4) of this section, of an offence in respect of the whole or a part of a particular period, the penalty applicable to the offence is a fine of the amount obtained by multiplying \$50 by the number of days in that period, or in that part of that period, as the case may be.

(6) In this section—

"act" includes thing;

"primary derivative offence", in relation to failure to do an act, means an offence (other than an offence of which a person is guilty by virtue of this section) of which a person is guilty by virtue of being an officer of a body corporate who is in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the commission by the body corporate of a primary substantive offence in relation to failure to do the act;

"primary substantive offence", in relation to failure to do an act, means an offence (other than an offence of which a person is guilty by virtue of this section) constituted by failure to do the act, or by failure to do the act within a particular period or before a particular time;

"provision" means a section, or a sub-section of a section, of this Code;

"relevant day", in relation to an offence of which a person is guilty by virtue of this section, means—

- (a) in a case where the information relating to the offence specifies a day in relation to the offence for the purposes

of this section, being a day not later than the day on which the information is laid—the day the information so specifies; or

(b) in any other case—the day on which the information relating to the offence is laid;

“required” includes directed;

“secondary derivative offence”, in relation to failure to do an act, means an offence or further offence of which a person is, in relation to failure to do the act, guilty by virtue of paragraph (4) (c) or (d);

“substantive offence”, in relation to failure to do an act, means—

(a) a primary substantive offence in relation to failure to do the act; or

(b) a further offence of which a person is, in relation to failure to do the act, guilty by virtue of sub-section (3).

#### **Offences by bodies corporate**

**151.** (1) Where a body corporate is guilty of an offence against this Code (other than an offence of which the body corporate is guilty by virtue of section 150)—

(a) any officer of the body corporate (including a person who has subsequently ceased to be an officer of the body corporate) who was in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the commission of the offence is guilty of an offence; and

(b) notwithstanding sub-section 148 (6), the penalty applicable to an offence of which such an officer is guilty by virtue of paragraph (a) of this sub-section is the penalty applicable to the offence of which the body corporate is guilty.

(2) For the purposes of this section, “officer”, in relation to a body corporate, includes—

(a) a director, secretary, executive officer or employee of the body corporate;

(b) a receiver, or a receiver and manager, of property of the body corporate;

(c) an official manager or a deputy official manager of the body corporate;

(d) a liquidator of the body corporate; and

(e) a trustee or other person administering a compromise or arrangement made between the body corporate and another person or persons.

#### **Certain persons to assist in prosecutions**

**152.** (1) Where a prosecution in respect of an offence against this Code has been instituted, or the Commission is of the opinion that a prosecution in respect of an offence against this Code ought to be instituted, against a person (in this section referred to as the “defendant”), the Commission may—

- (a) if the defendant is a natural person—require any person who is or was a partner, employee or agent of the defendant; or
- (b) if the defendant is a body corporate—require any person who is or was an officer, employee or agent of the defendant,

to assist in the prosecution, and the person who is so required shall give all assistance in connection with the prosecution that that person is reasonably able to give.

(2) The Commission shall not make such a requirement as is mentioned in sub-section (1) of a person who, in the opinion of the Commission, is or is likely to be a defendant in the proceedings or is or has been a duly qualified legal practitioner acting for such a person.

(3) If a person to whom paragraph (1) (a) or (b) relates fails to give assistance as required by sub-section (1), the person is guilty of an offence and, without affecting any penalty to which the person may be liable for the offence, the Court may, on the application of the Commission, order the person to comply with the requirement within such time, and in such manner, as the Court orders.

(4) In this section, “agent”, in relation to the defendant, includes a banker of the defendant and a person engaged as an auditor by the defendant, whether that person is an employee or an officer of the defendant or not.

#### **Reciprocity in relation to offences**

153. If a person does or omits to do an act or thing in South Australia and the person would, if the person had done or had omitted to do that act or thing in a State other than South Australia or in a Territory, have been guilty of an offence against the provision of a law in force in that State or Territory that corresponds with a provision of this Code, the person is guilty of an offence against that provision of this Code.

#### **Offences committed partly in and partly out of South Australia**

154. If a person does or omits to do an act or thing outside South Australia and the person, if the person had done or omitted to do that act or thing in South Australia, would, by reason of also having done or omitted to do an act or thing in South Australia, have been guilty of an offence against this Code, the person is guilty of that offence.

#### **Power of Court to prohibit payment or transfer of money, futures contracts or other property**

155. (1) Where—

- (a) an investigation is being carried out under this Code in relation to any act or omission by a person, being an act or omission that constitutes or may constitute an offence against this Code;
- (b) a prosecution has been instituted against a person for an offence against this Code; or
- (c) a civil proceeding has been instituted against a person under this Code,

and the Court considers it necessary or desirable to do so for the purpose of protecting the interests of any persons to whom the person (in this section

referred to as the “relevant person”) referred to in paragraph (a), (b) or (c), as the case may be, is liable or may be or become liable to pay any moneys, whether in respect of a debt, or by way of damages or compensation or otherwise, or to account for any futures contracts or other property, the Court may, on application by the Commission, make any one or more of the following orders:

- (d) an order prohibiting, either absolutely or subject to conditions, a person who is indebted to the relevant person or to any person associated with the relevant person from making a payment in total or partial discharge of the debt to, or to another person at the direction or request of, the person to whom the debt is owed;
- (e) an order prohibiting, either absolutely or subject to conditions, a person holding money, or futures contracts or other property, on behalf of the relevant person or on behalf of any person associated with the relevant person from paying all or any of the money, or transferring, or otherwise parting with possession of, the futures contracts or other property, to, or to another person at the direction or request of, the person on whose behalf the money, or the futures contracts or other property, is or are held;
- (f) an order prohibiting, either absolutely or subject to conditions, the taking or sending out of South Australia, or out of Australia, of money of the relevant person or of any person associated with the relevant person;
- (g) an order prohibiting, either absolutely or subject to conditions, the taking, sending or transfer of futures contracts or other property of the relevant person or of any person who is associated with the relevant person from a place in South Australia to a place outside South Australia or from a place in Australia to a place outside Australia;
- (h) an order appointing—
  - (i) where the relevant person is a natural person—a receiver or trustee, having such powers as the Court orders, of property of that person; or
  - (ii) where the relevant person is a body corporate—a receiver or receiver and manager, having such powers as the Court orders, of property of that person;
- (j) where the relevant person is a natural person—an order requiring that person to deliver up to the Court his or her passport and such other documents as the Court thinks fit;
- (k) where the relevant person is a natural person—an order prohibiting that person from leaving Australia without the consent of the Court.

(2) Where an application is made to the Court for an order under sub-section (1), the Court may, if in the opinion of the Court it is desirable to do so, before considering the application, grant an interim order, being an order of the kind applied for that is expressed to have effect pending the determination of the application.

(3) Where the Commission makes an application to the Court for the making of an order under sub-section (1), the Court shall not require the

Commission or any other person, as a condition of granting an interim order under sub-section (2), to give any undertaking as to damages.

(4) Where the Court has made an order under this section, the Court may, on application by the Commission or by any person affected by the order, make a further order rescinding or varying the first-mentioned order.

(5) An order made under sub-section (1) or (4) may be expressed to operate for a period specified in the order or until the order is rescinded by a further order under sub-section (1) or (4).

(6) A person shall not contravene an order by the Court under this section that is applicable to the person.

Penalty: \$2,500 or imprisonment for 6 months, or both.

#### **Power of Commission to intervene in proceedings**

**156.** (1) The Commission may intervene in any proceeding relating to a matter arising under this Code.

(2) Where the Commission intervenes in any proceeding referred to in sub-section (1), the Commission shall be deemed to be a party to the proceeding and, subject to this Code, has all the rights, duties and liabilities of such a party.

(3) Without limiting the generality of sub-section (2), the Commission may appear and be represented in any proceeding in which it wishes to intervene pursuant to sub-section (1)—

- (a) by an employee of the Commission;
- (b) by a natural person to whom, or by an officer or employee of a person to whom or to which, the Commission has delegated its functions and powers under this Code or such of those functions and powers as relate to a matter to which the proceeding relates; or
- (c) by solicitor or counsel.

#### **Injunctions**

**157.** (1) Where a person has engaged, is engaging or is proposing to engage in any conduct that constitutes or would constitute a contravention of this Code, the Court may, on the application of—

- (a) the Commission; or
- (b) any person whose interests have been, are or would be affected by the conduct,

grant an injunction restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.

(2) Where a person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do an act or thing that the person is required by this Code to do, the Court may, on the application of—

- (a) the Commission; or

- (b) any person whose interests have been, are or would be affected by the refusal or failure to do that act or thing,

grant an injunction requiring the first-mentioned person to do that act or thing.

(3) Where an application is made to the Court for an injunction under sub-section (1), the Court may, if in the opinion of the Court it is desirable to do so, before considering the application, grant an interim injunction restraining a person from engaging in conduct of the kind referred to in sub-section (1) pending the determination of the application.

(4) The Court may rescind or vary an injunction granted under sub-section (1), (2) or (3).

(5) Where an application is made to the Court for the grant of an injunction restraining a person from engaging in conduct of a particular kind, the power of the Court to grant the injunction may be exercised—

(a) if the Court is satisfied that the person has engaged in conduct of that kind—whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; or

(b) if it appears to the Court that, in the event that an injunction is not granted, it is likely that the person will engage in conduct of that kind—whether or not the person has previously engaged in conduct of that kind and whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.

(6) Where an application is made to the Court for the grant of an injunction requiring a person to do a particular act or thing, the power of the Court to grant the injunction may be exercised—

(a) if the Court is satisfied that the person has refused or failed to do that act or thing—whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing; or

(b) if it appears to the Court that, in the event that an injunction is not granted, it is likely that the person will refuse or fail to do that act or thing—whether or not the person has previously refused or failed to do that act or thing and whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that act or thing.

(7) Where the Commission makes an application to the Court for the grant of an injunction under this section, the Court shall not require the Commission or any other person, as a condition of granting an interim injunction, to give any undertaking as to damages.

(8) Where the Court has power under this section to grant an injunction restraining a person from engaging in particular conduct, or requiring a person to do a particular act or thing, the Court may, either in addition to or in substitution for the grant of the injunction, order that person to pay damages to any other person.

**Power of Court to punish for contempt of Court**

158. Nothing in a provision of this Code that provides—

- (a) that a person shall not contravene an order of the Court; or
- (b) that a person who contravenes an order of the Court is guilty of an offence,

affects the powers of the Court in relation to the punishment of contempts of the Court.

159. \* \* \* \* \*

160. \* \* \* \* \*

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**NOTE**

1. Section 5 of the Futures Industry (Application of Laws) Act 1986 of South Australia provides that the provisions of the Futures Industry Act 1986 of the Commonwealth apply, subject to certain amendments, as laws of South Australia.
2. The Futures Industry (Application of Laws) Act, 1986, came into operation on 1 December, 1986.
3. The Publication of this document was authorized by the Attorney-General on 1 December, 1986.