

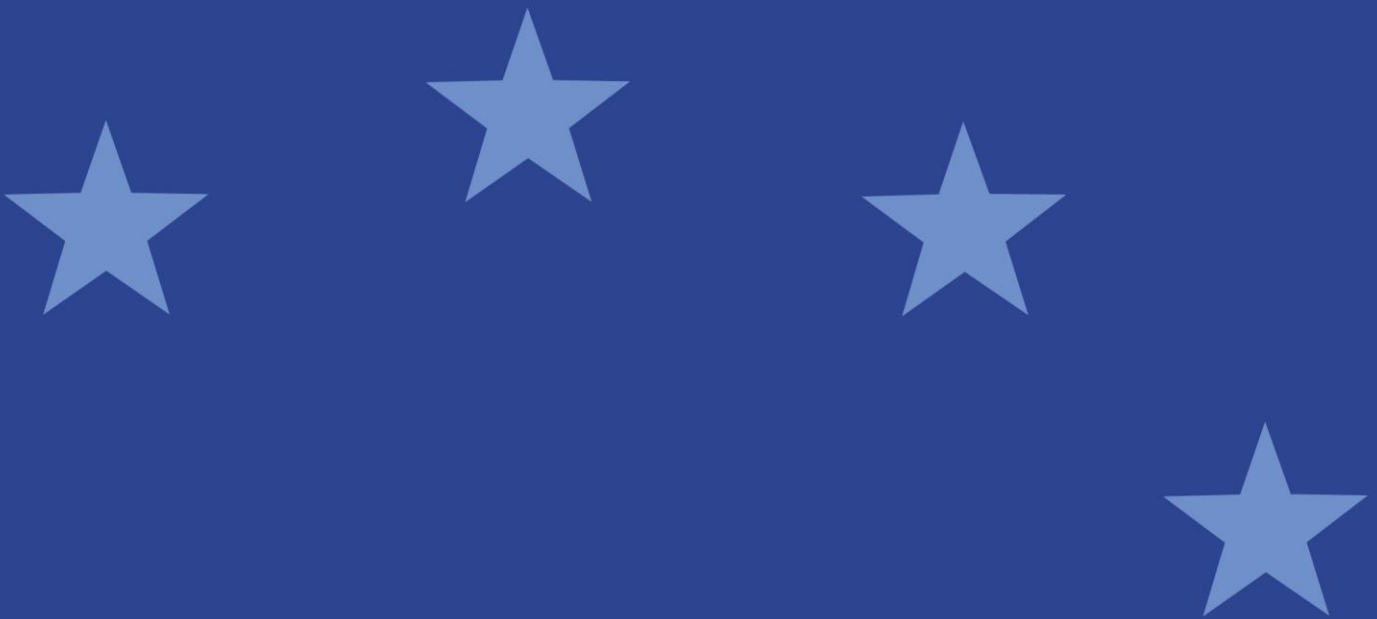


European Securities and  
Markets Authority

## **Supplement to the Final report**

**Technical advice on third country regulatory equivalence under EMIR**

**Australia**



## Table of Contents

Table of contents	2
<b>Section I.</b>	
Executive summary	4
Introduction	5
Purpose and use of the European Commission’s equivalence decision	5
<b>Section II. Technical advice on mechanism to avoid duplicative or conflicting rules</b>	
<b>Part I – Legal, supervisory and enforcement arrangements equivalent to those of EMIR</b>	
Introduction	7
Clearing obligation	8
Scope of application to persons	9
Risk mitigation techniques	10
Conclusions on Mechanism to avoid duplicative or conflicting rules	10
<b>Section III. Technical advice on trade repositories</b>	
<b>Part I – Legal, supervisory and enforcement arrangements equivalent to those of EMIR</b>	
Legally binding requirements	11
Guarantees of professional secrecy	11
Effective ongoing supervision and enforcement	12
Conclusion on TRs	12
<b>Annex I</b>	
Legally binding requirements which are equivalent to those in Article 4, 10 and 11 of EMIR	13
<b>Annex II</b>	
Legally binding requirements which are equivalent to those in Article 9, Title VII and Article 81 of EMIR	43



## **Key to the references and terms used in this technical advice**

ASIC: Australian Securities and Investments Commission

APRA: Australian Prudential Regulatory Authority

Corporations Act: Australian Corporations Act 2001

EMIR: Regulation (EU) No. 648/2012 of the European Parliament and of the Council on OTC derivatives, central counterparties and trade repositories

ESAs: European Supervisory Authorities, i.e. ESMA, EBA and EIOPA

ESMA: European Securities and Markets Authority

FSS: Reserve Bank of Australia Financial Stability Standards for Central Counterparties

ITS: Implementing Technical Standards

Minister: The relevant Australian Minister administering Part 7.3 of the Corporations Act relating to Clearing and Settlement Facility Licensees and Part 7.5A of the Corporations Act relating to the regulation of derivative transactions

NCA: National Competent Authority from the European Union

RBA: Reserve Bank of Australia

Regulators: APRA, ASIC and RBA

Regulatory Guide: ASIC Regulatory Guide

RTS: Regulatory Technical Standards

## Section I

### Executive summary

1. The European Commission mandated ESMA on 11 October 2012 to provide it with technical advice on the equivalence between the Australian regulatory regime and different aspects of the EU regulatory regime under Regulation (EC) No. 648/2012 of the European Parliament and the Council on OTC derivatives, central counterparties (CCPs) and trade repositories (TRs)<sup>1</sup>.
  2. These specific areas concern: 1) the recognition of third country CCPs; and 2) the identification of potentially duplicative or conflicting requirements regarding the clearing obligation, reporting obligation, non-financial counterparties and risk-mitigation techniques for OTC derivative contracts not cleared by a CCP. On 13 June 2012 the European Commission mandated ESMA to provide it with technical advice on the equivalence between the Australian regulatory regime and a third aspect of the EU regulatory regime under EMIR, namely the recognition of third country TRs.
  3. **The Technical Advice related to a comparison of the two CCP regimes was delivered in the Final report (ESMA/2013/1159 of 1 September 2013). This supplement to the Final report sets out ESMA's advice to the European Commission in respect of the equivalence between the Australian regulatory regime and the EU regulatory regime under EMIR related to TRs and potentially duplicative or conflicting requirements regarding the clearing obligation, reporting obligation, non-financial counterparties and risk-mitigation techniques for OTC derivative contracts not cleared by a CCP.**
  4. The equivalence assessment conducted by ESMA follows an objective-based approach, where the capability of the regime in the third country to meet the objectives of the EU Regulation is assessed from a holistic perspective. The analysis of the differences and similarities has been conducted as factually as possible. The advice to the Commission has been based on that factual assessment but has also taken into account the analysis of the consequences for the stability and protection of EU entities and investors that an equivalence decision would have in those specific areas where the legally binding requirements are not considered equivalent.
  5. The European Commission is expected to use ESMA's technical advice to prepare possible implementing acts concerning the equivalence between the legal and supervisory framework of Australia under EMIR. Where the European Commission adopts such an implementing act then ESMA may recognise a TR authorised in that third country. ESMA's conclusions in respect of this technical advice should not be seen to prejudice any final decision of the European Commission or of ESMA.
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<sup>1</sup> Hereafter the Regulation or EMIR.

## Introduction

1. The European Commission mandated ESMA on 11 October 2012 to provide it with technical advice on the equivalence between the Australian regulatory regime and two specific aspects of the EU regulatory regime under EMIR. On 27 February 2013, the Commission amended the original mandate to postpone the deadlines for the delivery of the technical advice by ESMA. For Australia the original deadline of 15 June 2013 was changed to 15 July 2013. On 13 June 2012, the European Commission amended the mandate further to postpone the deadlines for the delivery of technical advice by ESMA. For Australia the revised deadline of 15 July 2013 was further changed to 1 October 2013. The European Commission also extended the scope of the mandate to request that ESMA provide it with technical advice on the equivalence between the Australian regulatory regime and the EU regulatory regime under EMIR regarding the recognition of third country TRs.
2. The mandate on equivalence for Australia covers three specific areas: 1) the recognition of third country CCPs; 2) the recognition of third country TRs; and 3) the identification of potentially duplicative or conflicting requirements regarding the clearing obligation, reporting obligation, non-financial counterparties and risk-mitigation techniques for OTC derivative contracts not cleared by a CCP. The Technical Advice related to CCP was delivered in the Final report (ESMA/2013/1159 of 1 September 2013).
3. This supplement to the final report sets out ESMA's advice to the European Commission in respect of the equivalence between the Australian regulatory regime and the EU regulatory regime under EMIR in respect of the second and third area listed above.
4. ESMA has liaised with its counterparts (ASIC, APRA and the RBA) in Australia and has exchanged materials and views on the key areas of the analysis. However, the views expressed in this report are those of ESMA and ESMA alone is responsible for the accuracy of this advice. ESMA has decided not to launch a public consultation on this advice. Besides the much reduced timeframe for ESMA to produce it, the advice is not about a policy option or a legislative measure that could be subject to improvement or reconsideration due to market participants' views or comments. It is a factual comparison of the respective rules of two foreign jurisdictions with the EU regime and an advice on how to incorporate these differences in a possible equivalence decision. ESMA is aware about the effects that such a decision by the Commission could have on market participants, but considers that the key element of this advice is of a factual nature, not a policy one.

## Purpose and use of the European Commission's equivalence decision

5. According to Article 75(1) of EMIR, the European Commission may adopt an implementing act determining that the legal and supervisory arrangements of a third country ensure that TRs, which are established or authorised in a specific third country, comply with legally binding requirements which are equivalent to the requirements laid down in EMIR. Furthermore, according to Article 13(2) of the legislative act, the Commission may also adopt implementing acts declaring that the legal, supervisory and enforcement arrangements of a third country are equivalent to the clearing and reporting requirements laid down in EMIR (Articles 4, 9, 10 and 11) to avoid duplicative or conflicting rules.

### *Trade repositories*

6. TRs authorised in a third country that intend to provide services and activities to entities established in the EU for the purpose of the reporting obligation, must be recognised by ESMA. Such recognition also requires an implementing act of the Commission under Article 75(1) of EMIR determining that the legal and supervisory regime in the country in which the TR is authorised ensure that TRs authorised there comply with legally binding requirements which are equivalent to those of EMIR, that those

TRs are subject to effective on-going supervision and enforcement in the third country, and guarantees of professional secrecy exist that are at least equivalent to those of EMIR.

*Potential duplicative or conflicting requirements on market participants*

7. In accordance with Article 13(1) of EMIR, the Commission, assisted by ESMA, must monitor, prepare reports and recommend possible action to the European Parliament and the Council on the international application of the clearing and reporting obligations, the treatment of non-financial undertakings and the risk mitigation techniques for OTC trades that are not cleared by a CCP, in particular with regard to potential duplicative or conflicting requirements on market participants.
8. The Commission may adopt implementing acts declaring that the legal, supervisory and enforcement arrangements of a third country are equivalent to the respective requirements in EMIR, ensure an equivalent protection of professional secrecy, and are being applied in an equitable and non-distortive manner so as to ensure effective supervision and enforcement in that third country. An implementing act adopted by the Commission declaring that the abovementioned conditions have been fulfilled for a third country shall imply, according to Article 13(3), that if at least one of the counterparties entering into an OTC derivatives transaction is established in that third country and the contract is subject to EMIR, the counterparties will be deemed to have fulfilled the requirements of EMIR by disapplying EMIR provisions and applying the provisions of the equivalent third country regime.

*Determination of equivalence is one of a number of criteria that have to be met*

9. The adoption of an implementing act by the European Commission is required to enable a third country TRs to apply to ESMA for recognition. However ESMA reiterates that this technical advice should not be seen to prejudice the European Commission's final decision on equivalence. Furthermore, a determination of equivalence by the European Commission is just one of a number of criteria that have to be met in order for ESMA to recognise a third country TR so that they may operate in the EU for regulatory purposes. Positive technical advice or a positive equivalence determination by the European Commission should not be understood as meaning that a third country TR will automatically be granted recognition by ESMA. Only if all the other conditions set out in Articles 75 of EMIR are met, can a third country TR be granted recognition<sup>2</sup>.

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<sup>2</sup> One of these requirements is that ESMA has established cooperation arrangements with the relevant competent authorities of the third country. ESMA is currently in discussions with the jurisdictions subject to this technical advice regarding such cooperation arrangements.



## **Section II. Technical advice on potential duplicative or conflicting requirements**

### **Part I – Legal, supervisory and enforcement arrangements equivalent to those in EMIR**

#### Introduction

1. In November 2012, Australia adopted an Act of Parliament in order to implement the principles of the G20 commitments. The legislation grants the power to the relevant Minister to prescribe certain classes of derivatives as subject to mandatory reporting to a trade repository, mandatory clearing by a central counterparty and mandatory execution on a trading platform. The Act does not detail the requirements and grants certain powers to the Australian Government, the Minister and ASIC with regard to a mandatory clearing obligation.
2. ASIC will be in charge of developing related rules that will clarify matters such as the institutional and product scope of the obligations as well as how the obligation can be met.
3. With regard to the clearing obligation, the Act adopted by Australia sets high level provisions and does not provide for detailed requirements. In that sense, it is different from EMIR which not only provides the main principles but also the detailed requirements in the form of technical standards. However, the regulators that are responsible for providing advice the Minister on whether to adopt provisions requiring central clearing of some products have clarified the process<sup>3</sup> including criteria used for the assessment and the conduct of such assessments.
4. Although to date in Australia, the Minister has not determined any derivative contracts for the clearing obligation, in their July 2013 report<sup>4</sup>, APRA, ASIC and the RBA recommended to the Government that it considers a central clearing mandate for some products. The process is therefore initiated and is considered in this technical advice.
5. Australia's regime allows regulators to supervise licensed market participants' conduct and activities on OTC derivatives markets, but rules have a different scope and do not go to the same level of detail as EMIR.
6. Some of the EMIR requirements, or some aspects of EMIR requirements, with respect to risk mitigation techniques, have related aspects in Australian regulatory guidance or market standards. However, the scope and level of details of the guidance are different from EMIR and the market standards have no legal force and cannot be considered as legally binding equivalent rules for the purpose of this technical advice.
7. With regard to bilateral collateralisation of non-cleared OTC derivatives, Australia will consider the work of the BCBS-IOSCO and any cross border impact of regulation adopted by other countries before setting its framework.

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<sup>3</sup> See the Australian Regulators' Statement on Assessing the Case for Mandatory Clearing Obligations.

<http://www.cfr.gov.au/publications/cfr-publications/australian-auth-statmnt-mandatory-clearing-obligations.html>

<sup>4</sup> [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep359-published-17-July-2013.pdf/\\$file/rep359-published-17-July-2013.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rep359-published-17-July-2013.pdf/$file/rep359-published-17-July-2013.pdf)

## Clearing obligation

8. In Europe, EMIR defines the general principles for the clearing obligation which are detailed in the delegated regulation (RTS on OTC derivatives). In particular, EMIR sets the principle that financial and non-financial counterparties above the clearing thresholds shall clear their OTC derivatives subject to the clearing obligation. It defines the process for establishing the clearing obligation and the criteria that classes of derivatives should meet to be subject to it.
9. In Australia, the legislation allows the Minister, after consultation with the regulators, to determine the class of derivatives subject to the clearing obligation. The rules currently do not provide for a general obligation and framework to clear OTC derivatives. They do not clearly specify the entities subject to it and the process and the criteria for establishing the classes of derivatives. This is considered a substantial difference compared to EMIR, given the absence of comparable rules in the Australian regime.
10. Although the legislation does not set the criteria for establishing the classes of derivatives, the APRA, ASIC and the RBA have published a Statement<sup>5</sup> providing clarity on how they will assess the case for introducing mandatory clearing for some products, the means they will use to monitor development of the Australian OTC derivatives market and the criteria they will consider when providing advice to the Minister. The statement refers to criteria that are used in the scope of EMIR and clarify that Australian regulators intend to consider the benefit of international consistency. The statement reflects the willingness of Australian regulators to consider rules adopted by other jurisdictions when preparing their advice to the Minister.
11. In order to prepare advice to the Minister, the regulators perform periodic surveys of the Australian OTC derivatives market and produce an assessment report on the basis of the surveys. Reports were published in October 2012<sup>6</sup> and July 2013<sup>7</sup>. Regulators may also provide advice to the Minister on their own initiative.
12. The Australian regime allows, but does not require, the regulators to adopt a top-down and a bottom-up approach when performing their analysis. The Statement indicates that regulators will assess the case for imposing central clearing mandates using both the top-down and bottom-up approaches. They will consider the systemic importance of the products, whether they are subject to mandatory clearing in other jurisdictions and risks of circumventions, when prioritising their considerations. Their consideration will also include as preconditions, the robustness of the valuation methodology, the liquidity in the market, the number of transactions and the standardisation. For each product, regulators will take into account (1) whether the product is already cleared, (2) the availability and accessibility of central clearing, (3) the existence of appropriate commercial and operational arrangements, (4) commercial pressure or regulatory incentives to centrally clear.

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<sup>5</sup> <http://www.cfr.gov.au/media-releases/2013/mr-13-02.html>

<sup>6</sup> Report on the Australian OTC derivatives market – October 2012 -

[https://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/REP309-Report-on-the-Australian-OTC-Derivatives-Market--October-2012.pdf/\\$file/REP309-Report-on-the-Australian-OTC-Derivatives-Market--October-2012.pdf](https://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/REP309-Report-on-the-Australian-OTC-Derivatives-Market--October-2012.pdf/$file/REP309-Report-on-the-Australian-OTC-Derivatives-Market--October-2012.pdf)

<sup>7</sup> Report on the Australian OTC derivatives market – July 2013 -

[https://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/rep359-published-17-July-2013.pdf/\\$file/rep359-published-17-July-2013.pdf](https://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/rep359-published-17-July-2013.pdf/$file/rep359-published-17-July-2013.pdf)



13. In their statement, Australian regulators stress that “international consistency is an important consideration in assessing the case for mandatory clearing” and conclude that, as a result, products covered by mandatory clearing could “extend beyond those prioritised purely on the basis of product characteristics and activity”. This is an important statement when it comes to recommendations that regulators would make to the Minister.
14. After the Minister has made a determination, ASIC may develop and make rules applicable to the determined products and specifying the requirement i.e. by setting the institutional scope, the product scope, transitional arrangements and the manner and form in which requirements shall be complied with. These Rules would be legally binding and enforceable under the Act.

#### Scope of application to persons

15. In Europe, EMIR sets a well-defined framework in terms of persons to whom EMIR applies. There is a distinction made between financials and non-financials (exceeding or not the clearing threshold) and exceptions for sovereigns and pension funds.
16. In Australia, the Act adopted in November 2012 does not provide for a scope of application to persons. It potentially allows mandatory obligations to apply to all parties to derivatives transactions. It will be up to the Government through Regulations and ASIC through Rules, in consultation with APRA and RBA, to determine the scope of application of the Regulation and rules when determining application of mandatory clearing. As of September 2013, the Minister and ASIC have not restricted the product or institutional scope of a mandatory clearing requirement. Equivalence will therefore depend on the actual determinations by the Minister, Regulations by the Government and ASIC Rules.
17. Although, currently the legally binding requirements of the Australian regime do not include provisions that are equivalent to those of EMIR for the clearing obligation, in view of the regulators statement and reports and depending on the legally binding determination the Minister and ASIC will perform and its scope, the outcome of the Australian regime may be equivalent to that of EMIR.
18. **ESMA therefore advises the European Commission to consider the Australian regime as equivalent with respect to the clearing obligation only if in application of Article 13 of EMIR the following conditions are met:**
  - 1) **the product subject to the clearing obligation in the EU is also subject to the clearing obligation in Australia, and**
  - 2) **the counterparty in Australia is a non-exempted entity, or if exempted it would benefit from an equivalent exemption if established in the EU.**
19. These conditions would allow avoiding loopholes or evasions through the disapplication of EMIR and application of an equivalent regime. Indeed, the strictest rule principle, reflecting the common understanding of regulators in international fora including ODRG, would require that both the products and the persons subject to the clearing obligation coincide in the two regimes. If the Australian regime does not require that a product or a person subject to the clearing obligation in the EU is also subject to the clearing obligation in Australia, then EMIR cannot be disapplied and substituted with the Australian rule, as the latter would not be equivalent. Therefore, these conditions would implement the strictest rule principle for the clearing obligation under Article 13 of EMIR.

### Risk mitigation techniques

20. In Europe, the delegated regulation on EMIR (RTS on OTC derivatives) provides for detailed requirements related to confirmation, portfolio reconciliation, portfolio compression and dispute resolution. In Australia, the regulatory regimes administered by ASIC and APRA are principles-based. The scope of existing guidance is different e.g. the Prudential Practice Guide APG 113 related to internal-ratings based approach to credit risks applies to authorised deposit-taking institutions. Regulators' supervision covers licensed entities' conduct and activities on the OTC derivatives markets and ASIC takes market practices into account when it considers whether licensed entities are meeting their regulatory obligations. However, there are no equivalent rules under the legal regime as the ones developed in the EU.
21. On the exchange of collateral, EMIR sets the principle that segregated collateral shall be exchanged for non-cleared OTC derivatives and technical standards are being developed in consideration of the work of BCBS-IOSCO. On its side, Australia has implemented Basle III rules related to collateralisation and Australia has been participating in the work performed by BCBS-IOSCO. The regulators and government will consider adopting margin rules now that the international principles have been agreed.
22. At this stage, the regime for risk mitigation techniques in Australia does not include requirements equivalent to those of EMIR. Against this background, ESMA advises the Commission not to grant equivalence for the purpose of Article 11 of EMIR. It is important to note that regulators have indicated that the regime would evolve and that they would consider regulatory requirements or regulatory guidance related to risk mitigation techniques that would converge with the EU relevant rules. It would therefore be advisable to review this part of the technical advice at a later stage. In this respect, ESMA stands ready to assist the Commission upon receipt of a mandate.

### **Conclusions on Mechanism to avoid duplicative or conflicting rules**

23. **In view of the framework and regulators statement and reports related to the clearing obligation, ESMA advises the European Commission to consider the Australian regime as equivalent with respect to the clearing obligation only if in application of Article 13 of EMIR the conditions set up in paragraph 18 are respected.**
24. **Due to the absence of legally binding requirements equivalent to the risk mitigation techniques foreseen in Article 11 of EMIR in the Australian regime, ESMA considers that at this stage the necessary conditions to adopt an implementing act under Article 13(3) of EMIR on equivalence of the Australian regime that would allow for the disapplication of Article 11 of EMIR are not yet in place.**

## **Section III. Technical advice on TRs**

### **Part I – Legal, supervisory and enforcement arrangements**

25. In its mandate, the Commission requested ESMA to provide technical advice on the legal and supervisory regime in Australia and to advise whether the legal, supervisory and enforcement arrangements in Australia are equivalent to the reporting obligation as laid down in EMIR and ensure that (i) trade repositories authorised in Australia comply with legally binding requirements equivalent to the relevant requirements laid down in EMIR, (ii) Australian trade repositories are subject to effective ongoing supervision and enforcement; and (iii) guarantees of professional secrecy exist at least equivalent to those set out in EMIR.
26. Australia legislated on TRs and reporting in 2013. This was made via amendments to the Corporations Act, notably the Corporations Amendment (Derivative Trade Repositories) Regulation 2013 of 25 June 2013 and the Corporations Amendment (Derivatives Transactions) Regulation 2013 of 25 July 2013.
27. ASIC issued rules on TR (ASIC Derivative Trade Repository Rules 2013, of 9 July 2013, which set out requirements for derivative trade repositories that hold an Australian derivative trade repository licence). On the latter ASIC also issued a Regulatory Guide on Derivative trade repositories (RG 249), on 29 August 2013). The rules issued by ASIC are binding, following a determination by the Treasurer that under Pt 7.5A of the Corporations Act also mandates reporting.

#### Legally binding requirements

28. Having assessed the several matters pertaining to reporting to trade repositories registration and supervision of trade repositories, and to access to trade repositories' data and professional secrecy, ESMA finds that the Australian rules are equivalent or broadly equivalent to the EU rules on a number of issues, as identified in Annex II. In particular, the general requirements for the provision of TR services, the TR organisational requirements, the general reporting requirements and the requirements related to the confidentiality and the protection of data are considered equivalent or broadly equivalent.
29. Overall, ESMA finds the provisions related to legally binding requirements compatible with the objectives and results regarding EMIR provisions and advises the Commission to consider equivalence in this respect.

#### Guarantees of professional secrecy

30. ASIC is subject to Section 127 of the ASIC Act which requires it to take all reasonable measures to ensure the professional secrecy of information given to it in connection with the performance of its functions, as well as certain other categories of protected information. ASIC can provide information to agencies prescribed in section 127 if specified preconditions are satisfied.
31. Trade repositories in Australia are subject to professional secrecy provisions under s904B of the Corporations Act and Rule 2.3.3 of the Derivative Trade Repository Rules.
32. There are exceptions for reporting to Australian and foreign regulators as well as disclosures with counterparty consent.

### Effective ongoing supervision and enforcement

33. ASIC has the function of supervising licensed derivative trade repositories under s902A of the Corporations Act. That provision also provides that, for licensed trade repositories wholly or partly operated overseas, ASIC may perform that function by satisfying itself that the regulatory regime that applies in relation to the TR in that country provides for adequate supervision of the repository; and that adequate cooperative arrangements are in place with an appropriate authority of that country to ensure that the repository will be adequately supervised by that authority.
34. ASIC's discharge of its functions is in turn governed by the provisions of the ASIC Act. This statute sets out the governance of ASIC and provides for investigation powers.
35. Breaches of substantive provisions of the Derivative Transaction Rules and Derivative Trade Repository Rules carry maximum penalties of 1000 penalty units under Australian law. As of September 2013 these penalties were equivalent to AUD 170,000.
36. As well as these fines, which are enforceable through court proceedings, ASIC has the power to seek enforceable undertakings and to issue infringement notices. These powers were conferred by the Corporations Amendment (Derivatives Transactions) Regulation 2013.

### **Conclusion on TRs**

37. **ESMA advises the Commission to consider that TRs authorised in Australia do comply with legally binding requirements which are equivalent to the requirements laid down in EMIR.**
38. **ESMA advises the Commission to consider the Australian legal, supervisory and enforcement arrangements equivalent to the TR and reporting requirements.**
39. **ESMA advises the Commission to consider the guarantees of professional secrecy in Australia equivalent to the EU regime.**

**ANNEX I– Legally binding requirements which are equivalent to those in Article 4, 10 and 11 of EMIR**

Description of the EMIR provisions on OTC derivatives	Description of the corresponding Australian provisions	Assessment of Equivalence
<b>A. Clearing obligation (Article 4)</b>		

<p><b><i>Clearing obligation</i></b></p> <p><u>Principle:</u> Financial and non-financial counterparties above the clearing threshold must clear all OTC derivative contracts pertaining to a class of OTC derivatives that has been declared subject to the clearing obligation, if they meet certain conditions (the “Clearing Obligation”).</p>	<p>Clearing Obligation</p> <p>The Minister has the power to prescribe certain classes of derivatives as being subject to an ASIC rule-making power in relation to mandatory clearing by a central counterparty (CCP) (See new Pt 7.5A of the Corporations Act 2001 (Corporations Act)). The legislation does not provide for criteria to be used for the determination.</p> <p>The regulators will provide advice to the Minister for the purpose of its determination. The Reserve Bank of Australia, the Australian Prudential Regulation Authority and the</p>	<p><i>The Australian legislation does not include requirements that are equivalent to those of EMIR. However, in view of regulators statement and reports, under some conditions, the outcome of the regime could be considered equivalent for the clearing obligation.</i></p>
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	<p>Australian Securities and Investment Commission have published a Statement<sup>8</sup> including clarity on how they will assess the case for introducing mandatory clearing for some products, means they will use to monitor development of the Australian OTC derivatives market, criteria they will consider when providing advice to the Minister. The statement refers to criteria that are also used in the scope of EMIR and to the benefit of international consistency.</p> <p>.</p>	
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<sup>8</sup> <http://www.cfr.gov.au/media-releases/2013/mr-13-02.html>

<p><b>Parties subject to the clearing obligation</b></p> <p>The Clearing Obligation applies to OTC derivative contracts entered into between:</p> <ul style="list-style-type: none"> <li>(i) two financial counterparties;</li> <li>(ii) a financial counterparty and a non-financial counterparty above the clearing threshold;</li> <li>(iii) two Non-Financial Counterparties above the clearing threshold;</li> <li>(iv) a financial counterparty or a Non-Financial Counterparty above the clearing threshold and an entity established in a third country that would be subject to the Clearing Obligation if it were established in the Union; or</li> <li>(v) two entities established in one or more third countries that would be subject to the Clearing Obligation if they were established in the Union, provided that the contract has a direct, substantial and foreseeable effect within the Union or where such an obligation is necessary or appropriate to prevent the evasion of any provisions of EMIR.</li> </ul>	<p><b>No corresponding rule</b></p> <p>It is worth noting that the Act adopted in November 2012 does not provide for a scope of application to persons. It allows mandatory clearing and does not provide for or limit the scope of application to persons.</p> <p>The Minister and ASIC, in consultation with APRA and RBA, will determine the scope of application of the Regulation and rules when determining application of mandatory clearing. As of May 2013, the Minister and ASIC have not restricted the product or institutional scope of mandatory requirement. Equivalence will therefore depend on the actual determinations the Minister and ASIC will adopt.</p> <p>The regulators recommended to the Government that the initial focus for clearing of US dollar-, euro-, British pound- and yen-denominated interest rate derivatives should be dealers with significant cross-border activity in these products.</p>	<p><i>The Australian legislation does not include requirements that are equivalent to those of EMIR. However, in view of regulators statement and reports, under some conditions, the outcome of the regime could be considered equivalent for the clearing obligation</i></p>
<p><b>Contracts subject to the clearing obligation</b></p> <p>The Clearing Obligation applies to all OTC derivative contracts pertaining to a class of OTC derivatives that has been declared subject to the Clearing Obligation.</p> <p>No determinations have been taken so far.</p>	<p>No determinations have been taken so far.</p> <p>It is worth noting that the Regulators (ASIC, RBA and APRA) have recommended to Government in their July 2013 OTC derivatives market report that it considers a central clearing mandate for US dollar-, euro-, British pound- and yen-denominated</p>	<p><i>In both regimes, no determinations have taken place to date.</i></p>

	<p>interest rate derivatives and that the initial focus of such a mandate be dealers with significant cross-border activity in these products.</p> <p>In the same report, the regulators also committed to monitor for a further period Australian banks' progress in implementing appropriate clearing arrangements for Australian dollar-denominated interest rate derivatives, before recommending mandatory central clearing.</p> <p>The regulators did not see a case for mandating North American- and European-referenced credit derivatives at this time. However, in the lead up to the regulators' next market assessment, further information will be sought about Australian market participants' counterparty exposures in these products and the breadth of central clearing of these products.</p>	
<p><b><i>Date of effect of the clearing obligation</i></b></p> <p>EMIR entered into force on 16 August 2012. However the Clearing Obligation requires technical standards to be developed by ESMA on specific classes of derivatives and the actual date of application of the Clearing Obligation will depend on the date of entry into force of the technical standards.</p> <p>Before the Clearing Obligation can take effect, CCPs must be authorised for the purposes of EMIR.</p>	<p>The Act adopted in November 2012 allows mandatory clearing to apply to a derivative transaction. It does not provide for the principle of a clearing obligation as EMIR does.</p> <p>The Minister must issue a mandate and ASIC make rules before a clearing obligation can enter into force obligation is applied, therefore the actual date of application of any clearing obligation will depend on the date a determination and rules are made.</p>	<p><i>In both regimes, no determinations have taken place to date.</i></p>
<p><b><i>Public Register</i></b></p> <p>ESMA shall establish, maintain and keep up to date a</p>	<p>The Ministerial determinations enlivening ASIC's rulemaking power, and ASIC derivative transaction rules that impose a clearing requirement, are</p>	<p><i>Equivalent</i></p>



<p>public register in order to identify the classes of OTC derivatives subject to the Clearing Obligation correctly and unequivocally. The public register shall be available on ESMA's website.</p> <p>1. The public register shall include for each class of OTC derivative contracts subject to the clearing obligation:</p> <ul style="list-style-type: none"> <li>(a) the asset class of OTC derivative contracts;</li> <li>(b) the type of OTC derivative contracts within the class;</li> <li>(c) the underlying(s) of OTC derivative contracts within the class;</li> <li>(d) for underlyings which are financial instruments, an indication of whether the underlying is a single financial instrument or issuer or an index or portfolio;</li> <li>(e) for other underlyings an indication of the category of the underlying;</li> <li>(f) the notional and settlement currencies of OTC derivative contracts within the class;</li> <li>(g) the range of maturities of OTC derivative contracts within the class;</li> <li>(h) the settlement conditions of OTC derivative contracts within the class;</li> </ul>	<p>legislative instruments and will be published on the Federal Register of Legislative Instruments (FRLI)<sup>1</sup>.</p> <p>The register will contain full details of all Ministerial determinations and ASIC derivative transaction rules imposing a clearing requirement, including notably the classes of instruments concerned<sup>2</sup>.</p> <p>Additionally, through its OTC Derivatives Reform web-page, ASIC publishes a range of detailed information relevant to OTC derivatives reforms including explanatory materials and frequently asked questions.</p>	
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<ul style="list-style-type: none"> <li>(i) the range of payment frequency of OTC derivative contracts within the class;</li> <li>(j) the product identifier of the relevant class of OTC derivative contracts;</li> <li>(k) any other characteristic required to distinguish one contract in the relevant class of OTC derivative contracts from another.</li> </ul> <ul style="list-style-type: none"> <li>• In relation to CCPs that are authorised or recognised for the purpose of the clearing obligation, the public register</li> </ul> <p>2. shall include for each CCP:</p> <ul style="list-style-type: none"> <li>(a) the identification code, in accordance with Article 3 of Regulation (EC) No xx/2012 [Commission Regulation endorsing draft implementing technical standards on format of reporting to trade repositories];</li> <li>(b) the full name;</li> <li>(c) the country of establishment;</li> <li>(d) the competent authority designated in accordance with Article 22 of Regulation (EU) No 648/2012.</li> </ul> <p>3. In relation to the dates from which the clearing obligation takes effect, including any phased-in implementation, the public register shall include:</p> <ul style="list-style-type: none"> <li>(a) the identification of the categories of</li> </ul>		
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<p>counterparties to which each phase-in period applies;</p> <p>(b) any other condition required pursuant to the regulatory technical standards adopted under Article 5(2) of Regulation (EU) No 648/2012, in order for the phase-in period to apply.</p> <p>4. The public register shall include the reference of the regulatory technical standards adopted under Article 5(2) of Regulation (EU) No 648/2012, according to which each clearing obligation was established.</p> <p>5. In relation to the CCP that has been notified to ESMA by the competent authority, the public register shall include at least:</p> <p>(a) the identification of the CCP;</p> <p>(b) the asset class of OTC derivative contracts that are notified;</p> <p>(c) the type of OTC derivative contracts;</p> <p>(d) the date of the notification;</p> <p>(e) the identification of the notifying competent authority.</p>		
<p><b><i>Intragroup transaction exemption.</i></b></p> <p>OTC derivative contracts that are Intragroup Transactions (as defined below) are not subject to the Clearing Obligation (the “Clearing Obligation</p>	<p><b><i>No corresponding rule</i></b></p> <p>It is worth noting that the Act adopted in November 2012 allows mandatory clearing to apply to a derivative transaction. It does not specify the scope</p>	<p><i>Possible difference in personal scope. Condition on persons to apply</i></p>

<p>Intragroup Transaction Exemption”), without prejudice to the Risk-Mitigation Techniques Obligations.</p>	<p>of application to specific derivatives or exclude any class of transactions from mandatory obligations.</p> <p>Therefore, the precise scope of any clearing requirements would be determined by ASIC rulemaking if a Ministerial determination were forthcoming.</p> <p>Additionally, Government could through Regulations restrict the scope of clearing requirements by way of limitations on the ASIC rulemaking as to transactions or entities under s901C or 901D.</p>	

<p><i>Definition of intragroup transactions (the “Intragroup Transactions”).</i></p> <p><i>In relation to a non-financial counterparty:</i> an Intragroup Transaction is an OTC derivative contract entered into with another counterparty which is part of the same group provided that (i) both counterparties are included in the same consolidation on a full basis and they are subject to appropriate centralized risk evaluation, measurement and control procedures; and (ii) that counterparty is established in the Union or in a third country that the Commission declared equivalent for the purposes of the Clearing Obligation, the Reporting Obligation and the Risk-Mitigation techniques obligations (a “Recognized Third Country”).</p> <p><i>In relation to a financial counterparty:</i> an Intragroup Transaction is:</p> <ul style="list-style-type: none"> <li>(a) an OTC derivative contract entered into with another counterparty which is part of the same group, provided that: (i) the financial counterparty is established in the Union or in a Recognized Third Country; (ii) the other counterparty is a financial counterparty, a financial holding company, a financial institution or an ancillary services undertaking subject to appropriate prudential requirements; (iii) both counterparties are included in the same consolidation on a full basis; and (iv) both counterparties are subject to appropriate centralized risk evaluation, measurement and control procedures; or</li> <li>(b) an OTC derivative contract entered into with</li> </ul>		<p><i>Possible difference in personal scope. Condition on persons to apply</i></p>
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<p>another counterparty where both counterparties are part of the same institutional protection scheme (as referred to in Directive 2006/48, Art. 80(8)) and the other counterparty is a financial counterparty, a financial holding company, a financial institution or an ancillary services undertaking subject to appropriate prudential requirements; or</p> <p>(c) an OTC derivative contract entered into between credit institutions affiliated to the same central body or between such credit institution and the central body (as referred to in Directive 2006/48, Art. 3(1)); or</p> <p>(d) an OTC derivative contract entered into with a non-financial counterparty which is part of the same group provided that (i) both counterparties are included in the same consolidation on a full basis, (ii) they are subject to appropriate centralized risk evaluation, measurement and control procedures and (iii) that counterparty is established in the Union or in a Recognized Third Country.</p>		
<p><i>Scope of the Clearing Obligation Intragroup Transaction Exemption.</i></p> <p>The Clearing Obligation Intragroup Transaction Exemption applies only:</p> <p>(a) where two counterparties established in the Union belonging to the same group have first notified their respective Competent Authorities in writing that they intend to make use of the Clearing Obligation</p>		<p><i>Possible difference in personal scope. Condition on persons to apply</i></p>



<p>Intragroup Transaction Exemption for the OTC derivative contracts concluded between each other. Such notification must be made not less than 30 calendar days before the use of the Clearing Obligation Intragroup Transaction Exemption. Within 30 calendar days after receipt of that notification, the Competent Authorities may object to the use of the Clearing Obligation Intragroup Transaction Exemption if the relevant transactions do not qualify as Intragroup Transactions. The relevant Competent Authorities may also object to the use of the Clearing Obligation Intragroup Transaction Exemption after the aforementioned 30-day period has expired if the relevant transactions no longer qualify as Intragroup Transactions; and</p> <p>to OTC derivative contracts between two counterparties belonging to the same group which are established in a Member State and in a third country, where the counterparty established in the Union has been authorized to apply the Clearing Obligation Intragroup Transaction Exemption by its Competent Authority in accordance with the procedure set forth in (a) above, provided that the relevant transactions qualify as Intragroup Transactions. The Competent Authority must notify ESMA of that decision.</p>		
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<p><b><i>Pension funds Exemption</i></b></p> <ul style="list-style-type: none"> <li>For three years after the entry into force of EMIR the clearing obligation shall not apply to OTC derivatives that are objectively measurable as reducing investment risks directly relating to the financial solvency of pension scheme arrangements</li> </ul>	<p><b><i>No corresponding rule</i></b></p> <p>It is worth noting that the Act adopted in November 2012 allows mandatory clearing to apply to a derivative transaction. It does not specify the scope of application to specific derivatives or exclude any class of transactions from mandatory obligations.</p> <p>Therefore, the precise scope of any clearing requirements would be determined by ASIC rulemaking if a Minsiterial determination were forthcoming.</p> <p>Additionally, Government could through Regulations restrict the scope of clearing requirements by way of limitations on the ASIC rulemaking as to transtions or entities under s901C or 901D</p>	<p><i>Possible difference in personal scope. Condition on persons to apply.</i></p>
<p><b><i>Exception for Sovereigns</i></b></p> <ul style="list-style-type: none"> <li>EMIR does not apply to EU central banks or public debt management bodies or the Bank of International Settlements.</li> <li>EMIR does not apply (with the exception of the reporting obligation) to multilateral development banks, public sector entities owned and guaranteed by central governments and the EU stability mechanism (EFSF and ESM).</li> </ul>	<p><b><i>No corresponding rule</i></b></p> <p>It is worth noting that the Act adopted in November 2012 allows mandatory clearing to apply to a derivative transaction, but does not specify the scope of application to specific derivatives or exclude any class of transactions from mandatory obligations.</p> <p>Therefore, the precise scope of any clearing requirements would be determined by ASIC rulemaking if a Minsiterial determination were forthcoming.</p> <p>Additionally, Government could through Regu-</p>	<p><i>Possible difference in personal scope. Condition on persons to apply.</i></p>



	<p>lations restrict the scope of clearing requirements by way of limitations on the ASIC rule-making as to transactions or entities under s901C or 901D</p>	
<p><b>Procedure for applying the clearing obligation</b></p> <p><u>Bottom-up approach</u>: the competent authority authorising a CCP to clear a class of OTC derivatives shall immediately notify ESMA. The notification shall include:</p> <p>(a) the identification of the class of OTC derivative contracts;</p> <p>(b) the identification of the OTC derivative contracts within the class of OTC derivative contracts;</p> <p>(c) the other information to be included in the public register in accordance with Article 7;</p> <p>(d) any further characteristics necessary to distinguish OTC derivative contracts within the class of OTC derivative contracts from OTC derivative contracts outside that class;</p> <p>(e) evidence of the degree of standardisation of the contractual terms and operational processes for the relevant class of OTC derivative contracts;</p> <p>(f) data on the volume and liquidity of the class of OTC derivative contracts such data must contain, for the class of OTC derivative contracts and for each derivative contract within the class, the relevant market information, including historical data, current data as well as any change that is expected to arise if the class of OTC derivative contracts becomes subject to the Clearing Obligation,</p>	<p><b>No corresponding rule</b></p> <p>It is worth noting that in their public Statement on Mandatory Clearing, the regulators have indicated that they will use a bottom-up and a top-down approach when advising the Minister. Furthermore, they can provide advice to the Minister on their own initiative.</p> <p>Under the Corporations Act, the The Minister must not make a clearing determination unless the Minister has consulted the regulators about the proposed determination (s901B(4)). The regulators may provide advice to the Minister, either on their own initiative or at the request of the Minister (s901B(6)).</p> <ul style="list-style-type: none"> <li>• Under the top-down approach, OTC derivatives products will be considered for mandatory clearing based on a broad range of information available to the regulators about activity in the OTC derivatives market and product characteristics.</li> <li>• Under the bottom-up approach, OTC derivatives products already cleared (or prospectively to be cleared) by a central counterparty licensed to operate in Australia will</li> </ul>	<p><i>The Australian legislation does not include requirements that are equivalent to those of EMIR. However, in view of regulators statement and reports the process to determine the clearing obligation can be considered equivalent.</i></p>

<p>including:</p> <ul style="list-style-type: none"> <li>(i) the number of transactions;</li> <li>(ii) the total volume;</li> <li>(iii) the total open interest;</li> <li>(iv) the depth of orders, including the average number of orders and of requests for quotes;</li> <li>(v) the tightness of spreads;</li> <li>(g) (vi) the measures of liquidity under stressed market conditions; and</li> <li>(vii) the measures of liquidity for the execution of default procedures.;</li> <li>(h) evidence of availability to market participants of fair, reliable and generally accepted pricing information for contracts in the class of OTC derivative contracts;</li> <li>(i) evidence of the impact of the clearing obligation on availability to market participants of pricing information.</li> <li>(j) data relevant for assessing the expected volume of the class of OTC derivative contracts if it becomes subject to the clearing obligation;</li> <li>(k) evidence of the ability of the CCP to handle the expected volume of the class of OTC derivative contracts if it becomes subject to the clearing obligation and to manage the risk arising from the clearing of the relevant class of OTC derivative contracts, including through client or indirect client clearing arrangements;</li> <li>(l) the type and number of counterparties active and expected to be active within the market for the class of OTC derivative contracts if it becomes subject to</li> </ul>	<p>be considered for mandatory clearing.</p> <p>In the public statement, the regulators stated that in assessing the potential benefit of central clearing, the regulators may consider factors such as:</p> <ul style="list-style-type: none"> <li>• absolute and relative notional outstanding of the product under consideration, and metrics for associated risk (e.g. market value and gross credit exposure);</li> <li>• magnitude and dispersion of bilateral counterparty exposures;</li> <li>• profile of participation (e.g. dealer, non-dealer bank, non-bank financial institution, corporate); and</li> <li>• potential impact of central clearing on market functioning (e.g. liquidity, price discovery).</li> </ul> <p>The regulators also stated that for each product being considered the regulators will take into account:</p> <ul style="list-style-type: none"> <li>• the extent to which market participants are already centrally clearing that product;</li> <li>• the availability or accessibility of central clearing of that product for different types of Australian market participants, whether as direct participants or as clients;</li> <li>• whether participants have already established appropriate commercial and opera-</li> </ul>	
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<p>the clearing obligation;</p> <p>(m) an outline of the different tasks to be completed in order to start clearing with the CCP, together with the determination of the time required to fulfil each task;</p> <p>(n) information on the risk management, legal and operational capacity of the range of counterparties active in the market for the class of OTC derivative contracts if it becomes subject to the clearing obligation.</p> <p>Within 6 months of receiving the notification, ESMA must issue draft regulatory technical standards, for adoption by the Commission, specifying:</p> <p>(i) the class of OTC derivatives that should be subject to the Clearing Obligation;</p> <p>(ii) the date or dates from which the Clearing Obligation takes effect (the “Clearing Obligation Effective Date”), including any phase-in and the categories of counterparties to which the Clearing Obligation applies; and</p> <p>(o) (iii) the minimum remaining maturity (the “Minimum Remaining Maturity”) of the OTC derivative contracts entered into or novated after the notification, which, despite being entered into before the Clearing Obligation Effective Date, shall be subject to the Clearing Obligation.</p> <p>(p)</p>	<p>tional arrangements with central counterparties or whether such arrangements are still under negotiation for particular types of participants; and</p> <ul style="list-style-type: none"> <li>evidence of commercial pressure or regulatory incentives to centrally clear that product (which may include regulatory incentives as a result of the cross-border reach of regulation in other jurisdictions).</li> </ul>	
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<p><u>Top-down approach</u></p> <p>ESMA must, on its own initiative, identify and notify to the Commission the classes of OTC derivatives that meet the criteria to be subject to the Clearing Obligation, but for which no CCP has yet received an authorization. Following such notification, ESMA must publish a call for a development of proposals for the clearing of those classes of OTC derivatives. No CCP, however, shall be forced to clear contracts that it is not able to manage and the Clearing Obligation will actually enter into force only following the bottom-up approach described above.</p> <p>If a class of OTC derivative contracts no longer has a CCP which is authorized or recognized to clear those contracts under EMIR, it will cease to be subject to the Clearing Obligation.</p>	<p><b>No corresponding rule</b></p> <p>It is worth noting that the Act adopted in November 2012 does not require regulators to use a top down approach. However, in their Public Statement on Mandatory Clearing, mentioned above, the regulators have indicated that they will use a bottom-up and a top-down approach when advising the Minister</p>	<p><i>The Australian legislation does not include requirements that are equivalent to those of EMIR. However, in view of regulators statement and reports the process to determine the clearing obligation can be considered equivalent.</i></p>
<p><b>Arrangements to clear</b></p> <p><u>Principle.</u> The OTC derivative contracts that are subject to the Clearing Obligation must be cleared in a CCP established in a Member State that is authorized by its CCPs Competent Authority (or in a CCP established in a third country that is recognized by ESMA) to clear that class of OTC derivatives.</p> <p>For purposes of the Clearing Obligation, a counterparty must:</p> <ul style="list-style-type: none"> <li>(a) become a Clearing Member of a CCP authorized or recognized to clear the contracts covered by the Clearing Obligation; or</li> <li>(b) become a Client of a Clearing Member (“Direct</li> </ul>	<p><b>No corresponding rule.</b></p> <p>It is worth noting that the regulators will consider arrangements to clear when provideng advice to the Minister on the products to subject to the clearing obligation.</p> <p>Section 901A(7), which entered into effect on 3 January 2013, defines "clearing requirements" as requirements for derivative transactions to be cleared through licensed clearing and settlement (CS) facilities or prescribed CS facilities.</p> <p>Consequently, before the clearing obligation can take effect, relevant CCPs must be authorised for the purposes of the Corporations Act (by being licensed or prescribed).</p>	<p><i>No determinations have taken place to date. Arrangements to clear are expected to be determined in a broadly equivalent manner, when determinations will be taken.</i></p>

<p>Clearing Arrangements”); or</p> <p>(c) establish an indirect clearing arrangement, provided that those arrangements do not increase counterparty risk and ensure that the assets and positions of the counterparty (i.e., the Indirect Client) benefit from protection with equivalent effect to the client segregation and portability requirements and default procedures in EMIR.</p>	<p>In implementing any Ministerial mandate, ASIC would, through the derivative transaction rules, determine the modalities of the clearing obligation, which could deal with arrangements to clear..</p>	
<p><b>B. Non-financial counterparties (Article 10)</b></p>		

<p><b>Treatment of non-financial counterparties</b></p> <p>Non-financial counterparties are subject to the clearing obligation if the rolling average position over 30 days exceed the clearing threshold.</p> <p>The clearing threshold is calculated excluding the hedging positions and in terms of gross notional value: 1 bn for credit and equity OTC derivatives; 3 bn for interest rate, fx, commodities and other OTC derivatives.</p>	<p><b>No corresponding rule</b></p> <p>It is worth noting that the Act adopted in November 2012 does not specify the scope of application to persons but allows mandatory obligations to apply to any party to a derivatives transaction.</p> <p>The precise scope of application with respect to persons would be determined by ASIC rulemaking if a Ministerial determination is made. Government could use Regulations to restrict the scope of application to persons by limiting ASIC rulemaking</p>	<p><i>Possible difference in personal scope. Condition on persons to apply</i></p>
<p><b>Hedging Activity.</b></p> <p><b>Principle.</b> When assessing whether its positions in OTC derivative contracts exceed the Clearing Threshold, a non-financial counterparty must include all the OTC derivative contracts entered into by it or by other non-financial entities within its group that are not Hedging Contracts (as defined below).</p>	<p><b>No corresponding rule</b></p> <p>It is worth noting that when ASIC will prepare rules they could consider factors such as whether a transaction is entered into for hedging purposes.</p>	<p><b>Not equivalent</b></p>
<p><b>Definition of Hedging Contracts.</b></p> <p>An OTC derivative contract is objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity of the non-financial counterparty or of that group, when, whether by itself or in combination with other derivative contracts, and whether directly or through closely</p>	<p><b>No corresponding rule</b></p> <p>It is worth noting that when ASIC will prepare rules they could consider factors such as whether a transaction is entered into for hedging purposes.</p>	<p><b>Not equivalent</b></p>

<p>correlated instruments, it meets one of the following conditions:</p> <p>b) it covers the risks arising from the potential change in the value of assets, services, inputs, products, commodities or liabilities that the non-financial counterparty or its group owns, produces, manufactures, processes, provides, purchases, leases, sells or incurs or reasonably anticipates owning, producing, manufacturing, processing, providing, purchasing, merchandising, leasing, selling or incurring in the normal course of its business;</p> <p>c) it covers the risks arising from the potential indirect impact on the value of assets, services, inputs, products, commodities or liabilities referred to in subparagraph (a), resulting from fluctuation of interest rates, inflation rates, foreign exchange rates or credit risk;</p> <p>d) it qualifies as a hedging contract pursuant to International Financial Reporting Standards (IFRS) adopted in accordance with Article 3 of Regulation (EC) No 1606/2002.</p> <ul style="list-style-type: none"> <li>- Macro or portfolio hedging contracts may qualify as Hedging Contracts if they meet the criteria of the definition of Hedging Contracts;</li> <li>- OTC derivatives offsetting Hedging Contracts may also qualify as Hedging Contracts;</li> <li>- OTC derivative contracts related to employee</li> </ul>		
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<p>benefits such as stock options may be considered in the scope of Hedging Contracts;</p> <p>- OTC derivative contracts reducing risks relating to the acquisition of a company by a non-financial counterparty may be considered in the scope of Hedging Contracts;</p> <p style="padding-left: 40px;">OTC derivative contracts related to credit risk fall within the scope of Hedging Contracts.</p>		
<p><b>C. Timely Confirmation (Article 11(1)(a))</b></p>		
<p><i>Confirmation</i> means the documentation of the agreement of the counterparties to all the terms of an OTC derivative contract. Such documentation may refer to one or more master agreements, master confirmation agreements, or other standard terms. It may take the form of an electronically executed contract or a document signed by both counterparties.</p> <p>OTC derivative contracts entered into between financial counterparties or Non-Financial Counterparties above the clearing threshold must be confirmed, where available via electronic means, as soon as possible and at the latest as follows:</p> <p style="padding-left: 40px;">(a) for credit default swaps and interest rate swaps:</p> <p style="padding-left: 80px;">(i) if concluded on or before February 28, 2014: by the end of the second business day following</p>	<p><b>No corresponding rule</b></p> <p>It is worth noting that entities that are regulated by ASIC (such as financial services providers) are subject to risk management requirements under the Corporations Act s912 (to have adequate risk management systems) unless they are also regulated by APRA, in which case relevant prudential standards apply (for example, Prudential Standard APS 116 on risk management for market risk). ASIC has issued regulatory guidance on risk management systems for financial intermediaries (see RG 104 - Licensing: Meeting the general obligations).</p> <p>Entities regulated by ASIC also have the obligation to conduct financial services (including derivatives transactions) honestly, efficiently and fairly.</p> <p>These principles-based regulatory requirements apply to entities' activities in the OTC derivatives</p>	<p><b>Not equivalent</b></p>

<p>the date of execution;</p> <p>(ii) if concluded after February 28, 2014: by the end of the next business day following the date of execution;</p> <p>(b) for equity swaps, foreign exchange swaps, commodity swaps and all other derivatives:</p> <p>(i) if concluded on or before August 31, 2013: by the end of the third business day following the date of execution;</p> <p>(ii) if concluded between August 31, 2013 and August 31, 2014: by the end of the second business day following the date of execution;</p> <p>(iii) if concluded after August 31, 2014: by the end of the next business day following the date of execution</p>	<p>markets and breaches are enforceable by ASIC or APRA as relevant.</p> <p>APRA-regulated institutions are also subject to regulatory guidance (for example, Prudential Practice Guide APG 116 – Market risk) which further elaborates on the regulator's expectations around risk management practices.</p> <p>Finally there are industry conventions about timely confirmation, including deadlines for trade confirmation for specific classes of derivatives. While these are not legally binding or enforced by the regulator, ASIC can take the conventions into account when considering whether a licensed entity has complied with relevant regulatory obligations.</p>	
<p><b>Timing</b></p> <p>For transactions concluded after 4:00 p.m. local time, or with a counterparty located in a different time zone which does not allow confirmation by the set deadline, the confirmation must take place as soon as possible and, at the latest, one business day following the deadline set out above</p>	<p><b>No corresponding rule</b></p> <p>There are industry conventions about timely confirmation, including timing of trade confirmation for specific classes of derivatives. While these are not legally binding or enforced by the regulator, ASIC can take the conventions into account when considering whether a licensed entity has complied with relevant regulatory obligations.</p>	<p><b>Not equivalent</b></p>

<p><b>Reporting</b></p> <p>Financial counterparties must have the necessary procedure to report on a monthly basis to the relevant competent authority the number of unconfirmed OTC derivative transactions referred to above that have been outstanding for more than five business days</p>	<p><b>No corresponding rule</b></p>	<p><b>Not equivalent</b></p>
<p>A counterparty may delegate the performance of its confirmation obligation. However, such counterparty remains responsible for compliance with such obligation</p>		
<p><b>Portfolio Reconciliation Article 11(1)(b)</b></p>		
<p><i>Portfolio reconciliation.</i> Financial and non-financial counterparties to an OTC derivative contract must agree in writing or other equivalent electronic means with each of their counterparties on the terms on which portfolios shall be reconciled. Such agreement must be reached before entering into the OTC derivative contract</p>	<p><b>No corresponding rule</b></p> <p>It is worth noting that entities that are regulated by ASIC and/or APRA are subject to risk management requirements as detailed above, and entities regulated by ASIC have the obligation to conduct financial services (including derivatives transactions) honestly, efficiently and fairly. These principles-based regulatory requirements apply to entities' activities in the OTC derivatives markets and breaches are enforceable by ASIC and/or APRA, depending on which requirement may not have been complied with.</p> <p>Although it applies only to ADIs for the purpose of Internal ratings-based approach to credit risk, it is worth noting that APRA' prudential guide APG 113, that came into effect in January 2013, provides</p>	<p><b>Not equivalent</b></p>

	<p>guidance on portfolio reconciliation. In paragraph 26, APRA envisages that an authorised deposit-taking institution (“ADI”) with significant exposure to OTC derivative counterparty credit risk would seek to mitigate operational risk by regularly reconciling trade populations, trade valuations and collateral valuations with counterparties. It is worth noting that the above applies to ADIs for the purpose of Internal ratings-based approach to credit risk.</p>	
<p>Portfolio reconciliation must be performed by the counterparties to the OTC derivative contracts with each other, or by a qualified third party duly mandated to this effect by a counterparty.</p>	<p><b>No corresponding rule</b></p> <p>Although it applies only to ADIs for the purpose of Internal ratings-based approach to credit risk, it is worth noting that APRA’ prudential guide APG 113 provides guidance on portfolio reconciliation. In paragraph 26, APRA envisages that an ADI with significant exposure to OTC derivative counterparty credit risk would seek to mitigate operational risk by regularly reconciling trade populations, trade valuations and collateral valuations with counterparties.</p>	<p><b>Not equivalent</b></p>
<p>The portfolio reconciliation must cover key trade terms that identify each particular OTC derivative contract and must include at least the valuation attributed to each contract in accordance with the mark-to-market obligation</p>	<p><b>No corresponding rule</b></p> <p>APRA’ prudential guide APG 113 provides guidance on portfolio reconciliation. In paragraph 26, APRA envisages that an ADI with significant exposure to OTC derivative counterparty credit risk would seek to mitigate operational risk by regularly reconciling</p>	<p><b>Not equivalent</b></p>

	trade populations, trade valuations and collateral valuations with counterparties.	
<p>In order to identify at an early stage, any discrepancy in a material term of the OTC derivative contract, including its valuation, the portfolio reconciliation must be performed within the following timeframe:</p> <p>(a) for a financial counterparty or a Non-Financial Counterparty above the clearing threshold:</p> <ul style="list-style-type: none"> <li>(i) each business day when the counterparties have 500 or more OTC derivative contracts outstanding with each other;</li> <li>(ii) once per week when the counterparties have between 51 and 499 OTC derivative contracts outstanding with each other at any time during the week;</li> <li>(iii) once per quarter when the counterparties have 50 or less OTC derivative contracts outstanding with each other at any time during the quarter;</li> </ul> <p>(b) for a non-financial counterparty below the clearing threshold:</p> <ul style="list-style-type: none"> <li>(i) once per quarter when the counterparties have more than 100 OTC derivative contracts outstanding with each other at any time during the quarter;</li> <li>(ii) once per year when the counterparties have 100 or less OTC derivative contracts outstanding with each other.<sup>3</sup></li> </ul>		<b><i>Not equivalent</i></b>

<b>Portfolio compression 11(1)</b>		
<p><b>Portfolio compression.</b></p> <p>Financial counterparties and non-financial counterparties with 500 or more OTC derivative contracts outstanding with a counterparty which are not centrally cleared must have procedures to regularly, and at least twice a year, analyse the possibility to conduct a portfolio compression exercise in order to reduce their counterparty credit risk and engage in such a portfolio compression exercise.</p> <p>Financial counterparties and non-financial counterparties must ensure that they are able to provide a reasonable and valid explanation to the relevant competent authority for concluding that a portfolio compression exercise is not appropriate</p>	<p><b>No corresponding rule</b></p> <p>It is worth noting that the regulators have focused on portfolio compression in recent market assessments. In the July OTC derivatives market report, the regulators stated they will consider if further regulatory action is required, depending on the results of the latest multilateral compression cycle in 2013.</p> <p>APRA' prudential guide APG 113, that came into effect in January 2013, provides guidance on portfolio compression. In paragraph 26, APRA envisages that an ADI with significant exposure to OTC derivative counterparty credit risk would seek to mitigate operational risk by regularly reconciling trade populations, trade valuations and collateral valuations with counterparties and, where practical, take opportunities to participate in portfolio compression exercises<sup>9</sup>.</p>	<p><b>Not equivalent</b></p>
<b>Dispute resolution 11(1)</b>		
<p><b>Dispute resolution.</b> When concluding OTC derivative contracts with each other, financial</p>	<p><b>No corresponding rule</b></p> <p>It is worth to note that entities that are regulated by</p>	<p><b>Not equivalent</b></p>

<sup>9</sup> See [http://www.apra.gov.au/adi/PrudentialFramework/Documents/APG\\_113\\_January\\_2013.pdf](http://www.apra.gov.au/adi/PrudentialFramework/Documents/APG_113_January_2013.pdf)

<p>counterparties and non-financial counterparties must have agreed detailed procedures and processes in relation to:</p> <p>(a) the identification, recording, and monitoring of disputes relating to the recognition or valuation of the contract and to the exchange of collateral between counterparties. Those procedures must at least record the length of time for which the dispute remains outstanding, the counterparty and the amount which is disputed; and</p> <p>(b) the resolution of disputes in a timely manner with a specific process for those disputes that are not resolved within five business days.</p>	<p>ASIC and/or APRA are subject to risk management requirements as detailed above, and entities regulated by ASIC have the obligation to conduct financial services (including derivatives transactions) honestly, efficiently and fairly. These principles-based regulatory requirements apply to entities' activities in the OTC derivatives markets and breaches are enforceable by ASIC and/or APRA, depending on which requirement may not have been complied with.</p>	
<p>Financial counterparties must report to the relevant competent authority any disputes between counterparties relating to an OTC derivative contract, its valuation or the exchange of collateral for an amount or a value higher than €15 million and outstanding for at least 15 business days.</p> <p>A counterparty may delegate the performance of its obligations related to dispute resolution. However, such counterparty remains responsible for compliance with such obligation</p>	<p><b><i>No corresponding rule</i></b></p>	<p><b><i>Not equivalent</i></b></p>
<p><b>G. Mark-to-Market and Mark-to-model Article 11(2)</b></p>		
<p>Financial counterparties and non-financial counterparties above the clearing threshold must mark-</p>	<p><b><i>No corresponding rule</i></b></p> <p>It is worth noting that entities that are regulated by ASIC and/or APRA are subject to risk management</p>	<p><b><i>Not equivalent</i></b></p>

<p>to-market on a daily basis the value of outstanding contracts, or, if market conditions prevent marking-to-market, use reliable and prudent marking-to-model</p>	<p>requirements as detailed above, and entities regulated by ASIC have the obligation to conduct financial services (including derivatives transactions) honestly, efficiently and fairly. These principles-based regulatory requirements apply to entities' activities in the OTC derivatives markets and breaches are enforceable by ASIC and/or APRA, depending on which requirement may not have been complied with.</p> <p>Under APS 111 Attachment A related to measurement of capital, ADIs are required to mark-to-market at least daily (paragraph 8) or use mark-to-model if they meet certain conditions (paragraph 12)<sup>10</sup>.</p>	
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<sup>10</sup> Please see: [http://www.apra.gov.au/adi/PrudentialFramework/Documents/Basel-III-Prudential-Standard-APS-111-\(January-2013\).pdf](http://www.apra.gov.au/adi/PrudentialFramework/Documents/Basel-III-Prudential-Standard-APS-111-(January-2013).pdf)



<p><b>Market conditions that prevent marking-to-market.</b></p> <p>Market conditions prevent marking-to-market of an OTC derivative contract when:</p> <p>(a) the market is inactive, i.e., when quoted prices are not readily and regularly available and those prices available do not represent actual and regularly occurring market transactions on an arm’s length basis. A market may be inactive for several reasons including when there are no regularly occurring market transactions on an arm’s length basis; or</p> <p>(b) the range of reasonable fair values estimates is significant and the probabilities of the various estimates cannot reasonably be assessed.</p>	<p><b>No corresponding rule</b></p>	<p><b>Not equivalent</b></p>
<p><b>Marking-to-model.</b></p> <p>For using marking-to-model, financial and non-financial counterparties shall have a model that:</p> <p>(a) incorporates all factors that counterparties would consider in setting a price, including using as much as possible marking-to-market information;</p> <p>(b) is consistent with accepted economic methodologies for pricing financial instruments;</p> <p>(c) is calibrated and tested for validity using prices from any observable current market transactions in the same financial instrument or based on any available observable market data;</p>	<p><b>No corresponding rule</b></p>	<p><b>Not equivalent</b></p>

<p>(d) is validated and monitored independently, by another division than the division taking the risk;</p> <p>(e) is duly documented and approved by the board of directors (or a delegated committee thereof) as frequently as necessary, following any material change and at least annually. Models may be developed externally, in which case they shall still be approved as mentioned above.</p>		
<b>Bilateral Margins and capital Article 11(3)</b>		
<p><b><i>General provision in EMIR</i></b></p> <p>Financial counterparties shall have risk-management procedures that require the timely, accurate and appropriately segregated exchange of collateral with respect to OTC derivative contracts that are entered into on or after 16 August 2012. Non-financial counterparties referred to in Article 10 shall have risk-management procedures that require the timely, accurate and appropriately segregated exchange of collateral with respect to OTC derivative contracts that are entered into on or after the clearing threshold is exceeded.</p> <p>Regulatory technical standards specifying the risk management procedures, including the levels and type of collateral and the segregation arrangements are still to be developed in order to ensure international compatibility of the rules.</p>	<p><b><i>No corresponding rule</i></b></p> <p>Regulators have indicated that they provide advice to the Government about implementing the principles published by the WGMR, this approach seeks to minimise cross border issues.</p>	<p><b><i>Undetermined</i></b></p> <p>Pending the definition of the technical standards specifying the details of bilateral margins and capital, it is not possible to perform an equivalence assessment on these provisions.</p>



## ANNEX II - Legally binding requirements which are equivalent to those related to trade repositories under EMIR

### Australian References:

- *Corporations Act (2001)* - <http://www.comlaw.gov.au/Details/C2013C00003> (version as at 15 September 2013)
- "Trade Repository Rule" is a reference to the ASIC Derivative Trade Repository Rules 2013 - <http://www.comlaw.gov.au/Details/F2013L01344>
- "Derivative Transaction Rule" is a reference to the ASIC Derivative Transaction Rules (Reporting) 2013
- "Corporations Amendment (Derivatives Transactions) Regulations 2013" - <http://www.comlaw.gov.au/Details/F2013L01440>
- "Corporations Amendment (Derivative Trade Repositories) Regulation 2013" - <http://www.comlaw.gov.au/Details/F2013L01279>

There are also informational references to the "Regulatory Guide"; the ASIC Regulatory Guide 249 (Derivative trade repositories) - [http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg249-published-11-July-2013.pdf/\\$file/rg249-published-11-July-2013.pdf](http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/rg249-published-11-July-2013.pdf/$file/rg249-published-11-July-2013.pdf). Derivative Transaction Rule.

Description of EU Rules on TRs	Description of the corresponding Australian provisions	Assessment of Equivalence
<p>A trade repository is a legal person that centrally collects and maintains records of derivatives. (EMIR Article 2(2))</p>	<p><b>Corporations Act s761A</b></p> <p>“A derivative trade repository means a facility to which information about derivative transactions, or about positions relating to derivative transactions, can be reported.”</p> <p>The operator of the facility must be a body corporate. Section 905B of the Corporations Act only allows a body corporate to, by lodging an application with ASIC in the prescribed form, apply for a Licence authorising the body corporate to operate a Trade Repository.</p>	<p><b>Equivalent</b></p>



<p>The senior management<sup>iv</sup> and members of the board<sup>v</sup> of a trade repository must be of sufficiently good repute and experience so as to ensure the sound and prudent management of the trade repository (EMIR, Art. 78(6)).</p>	<p><b>Trade Repository Rule 2.4.6</b></p> <p><b>Human resources</b></p> <p>“Without limiting Rule 2.4.5, an Operator must at all times ensure its Officers, managers and employees are fit for office, taking into account the experience, qualifications and skills necessary to perform their respective roles and responsibilities in the governance, management and operation of the Trade Repository.”</p> <p>In addition, no disqualified person may be involved in the operator of a trade repository:</p> <ul style="list-style-type: none"> <li>- Section 905C(1) of the Corporations Act provides ASIC may only grant an Australian TR licence if no "disqualified individual" appears to be involved in the applicant;</li> <li>- Section 904A(c) of the Corporations Act provides that a licensed trade repository operator must also on an ongoing basis take all reasonable steps to ensure no "disqualified individual" becomes or remains involved in the operator;</li> <li>- A disqualified individual includes a person that ASIC has declared in writing is disqualified, see section 853A(a) of the Corporations Act.</li> </ul> <p>Section 852C of the Corporations Act gives ASIC to power to declare that an individual that is involved in a TR applicant or licensee is disqualified if ASIC is satisfied that, because the person is unfit to be involved in the applicant or licensee (having regard to matters such as their <i>fame, character and integrity</i> rather than their competence, experience, knowledge or other such attributes), there is a risk that the applicant or licensee will breach its obligations under Chapter 7 of the Corporations Act if the declaration is not made.</p> <p>A person is "involved in" an applicant or licensee, if they are a director, secretary or senior manager of the applicant/licensee or its holding company, or they hold more than 15% of the voting power in the applicant or licensee, or its holding company.</p>	<p><b>Equivalent</b></p>
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	<p>The provisions in the Corporations Act are also supplemented by Rule 2.6.2 of the Trade Repository Rules which provides that an operator must notify ASIC in writing as soon as practicable after the operator becomes aware that (amongst other):</p> <ul style="list-style-type: none"> <li>- any civil or criminal legal proceeding has been instituted against an officer of the operator (which includes a director or secretary of the operator, or any person who makes or participates in making decisions affecting the whole, or a substantial part of the business of the operator), other than by ASIC, whether or not in Australia; or</li> <li>- any disciplinary action has been taken against an officer of the operator by any regulatory authority other than ASIC, whether or not in Australia.</li> </ul>	
<p>A trade repository must have robust governance arrangements, including a clear organizational structure with well defined, transparent and consistent lines of responsibility.<sup>vi</sup></p>	<p><b>Trade Repository Rule 2.4.1</b></p> <p><b>Governance</b></p> <p>“(1) An Operator must establish, implement, maintain and enforce documented arrangements for the governance and management of the Trade Repository that are clear and transparent, promote the secure, efficient and effective operation of the Trade Repository, and support the stability of the broader financial system, other relevant public interest considerations, and the objectives of Users.</p> <p>(2) The governance arrangements referred to in subrule (1) must provide for:</p> <ul style="list-style-type: none"> <li>(a) clear and direct lines of accountability in the governance and management of the Trade Repository;</li> <li>(b) clearly defined roles and responsibilities for the Operator’s Officers and members of its governing body and management in the governance and management of the Trade Repository, including roles and responsibilities in relation to the identification, measurement, monitoring and manage-</li> </ul>	<p><b>Equivalent</b></p>



	<p>ment of risks;</p> <p>(c) clearly defined decision-making processes, including processes for:</p> <p>(i) decision making in crises and emergencies; and</p> <p>(ii) ensuring significant decisions in relation to the design, rules or overall strategy of the Trade Repository are made taking into account the objectives of Users and, where appropriate, are disclosed to Users; and</p> <p>(d) internal control functions to be exercised by persons with adequate authority, independence, resources, and access to the governing body and senior management to perform the control function.</p>	
<p>A trade repository must have adequate internal control mechanisms, including sound administrative and accounting procedures, which prevent any disclosure of confidential information EMIR, Art. 78(1).</p>	<p><b>Trade Repository Rule 2.4.1</b></p> <p><b>Governance</b></p> <p>“(1) An Operator must establish, implement, maintain and enforce documented arrangements for the governance and management of the Trade Repository that are clear and transparent, promote the secure, efficient and effective operation of the Trade Repository, and support the stability of the broader financial system, other relevant public interest considerations, and the objectives of Users.</p> <p>(2) The governance arrangements referred to in subrule (1) must provide for:</p> <p>(a) clear and direct lines of accountability in the governance and management of the Trade Repository;</p> <p>(b) clearly defined roles and responsibilities for the Operator’s Officers and members of its governing body and management in the governance and management of the Trade Repository, including roles and responsibilities in relation to the identification, measurement, monitoring and manage-</p>	<p><b>Broadly Equivalent</b>, as accounting is not explicitly mentioned. However on balance, this gap does not undermine the consistency of objectives between the Australian and the EU regimes.</p>

	<p>ment of risks;</p> <p>(c) clearly defined decision-making processes, including processes for:</p> <ul style="list-style-type: none"> <li>(i) decision making in crises and emergencies; and</li> <li>(ii) ensuring significant decisions in relation to the design, rules or overall strategy of the Trade Repository are made taking into account the objectives of Users and, where appropriate, are disclosed to Users; and</li> </ul> <p>(d) internal control functions to be exercised by persons with adequate authority, independence, resources, and access to the governing body and senior management to perform the control function.”</p> <p><b>Trade Repository Rule 2.4.3</b></p> <p><b>Monitoring and enforcement of compliance with obligations</b></p> <p>“(1) An Operator must establish, implement, maintain and enforce policies, procedures, systems and controls for monitoring and enforcing compliance by its Officers and employees with these Rules, the <i>ASIC Derivative Transaction Rules (Reporting) 2013</i>, the Corporations legislation and any other applicable law of a State or Territory or law of the Commonwealth.</p> <p>(2) Without limiting subrule (1), the Operator must ensure that the arrangements, rules, procedures, policies, plans, systems and controls required by these Rules are reviewed, audited and tested periodically and after significant changes, to ensure compliance with these Rules.”</p> <p><b>Trade Repository Rule 2.4.5</b></p> <p><b>Resources</b></p>	
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	<p>“An Operator must establish and maintain sufficient and appropriate human, technological and financial resources to ensure that the Trade Repository operates at all times securely, efficiently and effectively.”</p> <p><b>Trade Repository Rule 2.4.8</b></p> <p><b>Integrity and security of computer systems and other systems</b></p> <p>“An Operator must establish, implement, maintain and enforce policies, procedures, and physical and electronic controls over its systems for accepting, retaining, using, disclosing and providing access to Derivative Trade Data designed to:</p> <ul style="list-style-type: none"> <li>(a) maintain the integrity, security and confidentiality of Derivative Trade Data at all times during transmission between the Trade Repository, Australian Regulators and Users, and while retained in the Trade Repository; and</li> </ul> <p>Note: For example, ensuring the Derivative Trade Data is protected from loss, leakage and corruption.</p> <ul style="list-style-type: none"> <li>(b) prevent unauthorised use or disclosure of, or access to, Derivative Trade Data.”</li> </ul>	
<p><sup>vii</sup> A trade repository must maintain and operate effective written organizational and administrative arrangements to identify and manage any potential conflicts of interest concerning its managers, employees, or any person directly or indirectly linked to them by close links.<sup>viii</sup></p>	<p><b>Trade Repository Rule 2.4.2</b></p> <p><b>Handling of conflicts of interest</b></p> <p>“An Operator must establish, implement, maintain and enforce documented arrangements for identifying and effectively managing (including by avoiding, controlling or disclosing) any actual or potential conflicts between:</p> <ul style="list-style-type: none"> <li>(a) the interests of the Operator, its related bodies corporate or members of the Operator’s governing body, and the interests of Users;</li> </ul>	<p><b>Broadly Equivalent.</b> In Australia there is no specification of close links. However a mention of “related bodies corporate” is included, even if these are not defined and cannot thus be compared against the EU definition of close links. On balance, this difference does not undermine the consistency of objectives</p>





	<p>(b) the interests of different Users; and</p> <p>(c) the interests of the Operator, its related bodies corporate or members of the Operator’s governing body, and the need to ensure the Trade Repository’s services are provided in a secure, efficient and effective manner.”</p>	<p>between the Australian and the EU regimes.</p>
<p>Trade repositories are required to indicate material shareholders (i.e. 5% or more) in new applications and to notify ESMA without undue delay of material changes to the constitution for registration.<sup>ix</sup></p>	<p><b>Regulatory Guide A2.2</b></p> <p><b>Ownership</b></p> <p>“Your application must contain a list of each person or entity who directly or indirectly holds or controls 5% or more in aggregate of your capital or your voting rights or whose holding or holdings make it possible to exercise a significant influence over your management”.</p>	<p><b>Equivalent</b></p>
<p><i>Compliance with EMIR.</i> A trade repository must establish adequate policies and procedures sufficient to ensure its compliance, including of its managers and employees, with all the provisions of EMIR.<sup>x</sup></p>	<p><b>Corporations Act s903D</b></p> <p><b>Obligation to comply with derivative trade repository rules</b></p> <p>“A person must comply with provisions of the derivative trade repository rules that apply to the person.”</p> <p><b>Corporations Act s904A</b></p> <p><b>General obligations</b></p> <p>“A derivative trade repository licensee must:</p> <p>(a) comply with the conditions on the licence; and</p> <p>(b) if the licensee is a foreign body corporate—be registered under Division 2 of Part 5B.2; and</p>	<p><b>Equivalent</b></p>



	<p>(c) take all reasonable steps to ensure that no disqualified individual becomes, or remains, involved in the operator (see Division 2 of Part 7.4).”</p>	
<p><i>Access to services.</i> A trade repository must have objective, non-discriminatory and publicly disclosed requirements for access by undertakings subject to the Reporting Obligation.<sup>xi</sup></p> <p>A trade repository must allow reporting entities to access specific services separately.<sup>xii</sup></p>	<p><b>Trade Repository Rule 2.2.2</b></p> <p><b>Access and participation requirements</b></p> <p>“(1) An Operator must have and apply objective conditions for access to and participation in the Trade Repository’s services that permit open and non-discriminatory access to and participation in the Trade Repository by Users and, if applicable, Indirect Participants.</p> <p>(2) The access and participation conditions referred to in subrule (1) must include conditions reasonably designed to ensure Users and, if applicable, Indirect Participants do not pose undue risks to the secure, efficient and effective operation of the Trade Repository.</p> <p>(3) The access and participation conditions referred to in subrule (1), other than the conditions in subrule (2), must not unreasonably prohibit or limit access to or participation in the Trade Repository, and the Operator must not impose unreasonable conditions on participation or access.</p> <p>(4) An Operator must monitor compliance with its access and participation conditions on an ongoing basis and have clearly defined procedures for facilitating the disciplining, suspension or orderly exit of a User that breaches or no longer meets the access or participation conditions.”</p>	<p><b>Equivalent</b></p>
<p><i>Access to information.</i> A trade repository must grant service providers non-discriminatory access to information maintained by the trade repository, on condition that the relevant counterparties have</p>	<p><b>Trade Repository Rule 2.2.2</b></p> <p><b>Access and participation requirements</b></p> <p>“(1) An Operator must have and apply objective conditions for</p>	<p><b>Equivalent</b></p>



<p>provided their consent.</p> <p>Criteria that restrict access may only be permitted to the extent that their objective is to control the risk to the data maintained by a trade repository.<sup>xiii</sup></p>	<p>access to and participation in the Trade Repository's services that permit open and non-discriminatory access to and participation in the Trade Repository by Users and, if applicable, Indirect Participants.</p> <p>(2) The access and participation conditions referred to in subrule (1) must include conditions reasonably designed to ensure Users and, if applicable, Indirect Participants do not pose undue risks to the secure, efficient and effective operation of the Trade Repository.</p> <p>(3) The access and participation conditions referred to in subrule (1), other than the conditions in subrule (2), must not unreasonably prohibit or limit access to or participation in the Trade Repository, and the Operator must not impose unreasonable conditions on participation or access.</p> <p>(4) An Operator must monitor compliance with its access and participation conditions on an ongoing basis and have clearly defined procedures for facilitating the disciplining, suspension or orderly exit of a User that breaches or no longer meets the access or participation conditions.”</p> <p><b>Trade Repository Rule 2.3.3</b></p> <p><b>Use and disclosure of Derivative Trade Data</b></p> <p>"(1) An Operator must establish, implement, maintain and enforce policies, procedures, systems and controls designed to ensure that the Operator, its Officers and employees comply with section 904B of the Act in handling, using and disclosing Derivative Trade Data.</p> <p>(2) For subparagraph 904B(1)(b)(ii) of the Act, an Operator is permitted to use and disclose:</p> <p>...</p> <p>(i) the Participant that reported the Derivative Trade Data has given prior written consent to the use or disclosure of the Derivative Trade Data by the Operator; and</p>	
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	<p>(ii) where the Derivative Trade Data is capable of identifying a counterparty to a Derivative Transaction, that counterparty has consented in writing to the use or disclosure of the Derivative Trade Data.</p> <p>(3) For the purposes of paragraph (2)(b), an Operator:</p> <p>(a) must not require a Participant to consent to the use or disclosure of Derivative Trade Data reported by the Participant as a condition of the Participant’s access to the Trade Repository’s services; and</p> <p>(b) must not induce or attempt to induce a Participant to consent to the use or disclosure of the Participant’s Derivative Trade Data by offering or providing to the Participant incentives or benefits that are not offered or provided to Participants that do not consent to the use or disclosure of their Derivative Trade Data, unless the incentive or benefit is reasonably related to the value to the Operator of using or disclosing the Participant’s Derivative Trade Data.</p> <p>Note: An example of an incentive or benefit for the purposes of paragraph (3)(b) is a reduced fee, rate or charge for access to the Trade Repository’s services.</p> <p>Maximum penalty: 1,000 penalty units"</p>	
<p><i>Prices and fees for services under EMIR.</i> Prices and fees, including discounts and rebates and their conditions, must be publicly disclosed, for each separate service provided, and must be cost-related.<sup>xiv</sup></p>	<p><b>Trade Repository Rule 2.5.2</b></p> <p><b>Public disclosures</b></p> <p>“(1) An Operator must disclose, on a publicly accessible section of its website and at no charge, a description of:</p> <ul style="list-style-type: none"> <li>• the Trade Reporting Services and any Ancillary Services;</li> <li>• the class or classes of Derivatives for which the Trade Repository can provide services for the purposes of Part 7.5A of the Act, as specified in the conditions of the Operator’s Licence;</li> </ul>	<p><b>Broadly Equivalent.</b> In Australia there is no specific reference to prices and fees that should be cost-related. However it is expected that TRs wishing to be recognised in Europe will need to offer competitive fees structures. Therefore, on balance, this gap does not undermine the consistency of objectives</p>



	<p>Note: See paragraph 905F(4)(b) of the Act.</p> <ul style="list-style-type: none"> <li>• key elements of the Operator’s rules, procedures and contractual arrangements referred to in Rule 2.2.1, including the dispute resolution procedures referred to in paragraph 2.2.1(3)(b);</li> <li>• the Operator’s access and participation conditions referred to in Rule 2.2.2;</li> <li>• the organisational, legal and ownership structure of the Operator and the arrangements for the governance and management of the Trade Repository referred to in Rule 2.4.1;</li> <li>• the Operator’s policies and procedures in relation to the commercial use of Derivative Trade Data retained in the Trade Repository; and</li> </ul> <p>Note: See also Rule 2.3.3.</p> <ul style="list-style-type: none"> <li>• the fees, rates and charges for the services referred to in paragraph (a), at an individual service level, and the Operator’s policies in relation to discounts and rebates, if any.</li> </ul> <p>An Operator must ensure the disclosures required under subrule are at all times complete, accurate and current.”</p>	<p>between the Australian and the EU regimes.</p>
<p><i>Provision of ancillary services.</i> Trade repositories must maintain the ancillary services<sup>xv</sup> they provide (if any) operationally separate from the trade repository’s function of centrally collecting and maintaining records of derivatives.<sup>xvi</sup></p>	<p><b>Trade Repository Rule 2.4.12</b></p> <p><b>Operational separation of functions</b></p> <p>“Where the Operator, a related body corporate of the Operator, or any other company with which the Operator has a material agreement in connection with the Trade Reporting Services, provides Non-Trade Reporting Services, the Operator must:</p> <p>(a) disclose to ASIC a description of all of the Non-Trade Reporting Services, and update the disclosure as soon as practicable after any changes are made to the Non-Trade Reporting Services; and</p> <p>(b) establish, implement, maintain and enforce policies, procedures,</p>	<p><b>Equivalent</b></p>



	<p>systems and controls designed to ensure operational separation between the Non-Trade Reporting Services and the Trade Reporting Services.”</p>	
<p>A trade repository must maintain and operate an adequate organizational structure to ensure continuity and orderly functioning of the trade repository in the performance of its services and activities. It must employ appropriate and proportionate systems, resources and procedures.<sup>xvii</sup></p> <p>A trade repository must identify sources of operational risk and minimize them through the development of appropriate, reliable and secure systems, controls and procedures having adequate capacity to handle the information received.<sup>xviii</sup></p>	<p><b>Trade Repository Rule 2.4.10</b>  <b>Business continuity planning</b>          “An Operator must establish, implement, maintain and enforce business continuity, backup and data recovery plans designed to:</p> <ul style="list-style-type: none"> <li>(a) address events that pose a significant risk of disruption to the Trade Repository’s operations or services, including events that could cause a wide-scale or major disruption; and</li> <li>(b) in the event of any disruption to the Trade Repository’s operations or services, enable the timely restoration of those operations and services and enable the Operator to meet its obligations to Australian Regulators and Users.”</li> </ul> <p><b>Trade Repository Rule 2.4.11</b>  <b>Recovery and resolution</b>          “(1) An Operator must establish, implement, maintain and enforce policies, procedures and plans designed to:</p> <ul style="list-style-type: none"> <li>(a) identify scenarios that may potentially prevent the Operator from being able to provide the Trade Repository’s critical operations or services as a going concern and assess the effectiveness of a full range of options for recovery or orderly wind-down; and</li> <li>(b) provide for the recovery or orderly wind-down of the Trade Repository’s critical operations or services based on the results of the assessment referred to in paragraph (a).</li> </ul> <p>(2) An Operator must, on request by an Australian Regulator, provide the Australian Regulator with information reasonably required by the Australian Regulator for purposes of resolution</p>	<p><b>Equivalent</b></p>

	<p>planning in respect of the Operator or in respect of Users.</p> <p>(3) In establishing, implementing, maintaining and enforcing the policies, procedures and plans required under subrule (1), the Operator must take into account its obligations under Rules 2.3.2 and 2.3.4, and any obligations that may arise under section 904K of the Act in the event that the Trade Repository ceases to be licensed under section 905C of the Act.”</p> <p><b>Trade Repository Rule 2.4.4</b></p> <p><b>Risk management</b></p> <p>“(1) An Operator must establish, implement, maintain and enforce policies, procedures, systems and controls to enable the Operator to identify, measure, monitor and effectively manage risks to the secure or efficient or effective operation of the Trade Repository, including legal, operational and business risks.</p> <p>(2) In establishing, implementing, maintaining and enforcing the policies, procedures, systems and controls required by subrule (1), the Operator must take into account, at a minimum, legal, operational and business risks that arise or may arise:</p> <ul style="list-style-type: none"> <li>a) from Users and, if applicable, Indirect Participants;</li> <li>b) in relation to the Operator’s operational and contractual arrangements with Linked Providers; and</li> <li>c) from the provision of Non-Trade Reporting Services by the Operator, a related body corporate of the Operator, or any other company with which the Operator has a material agreement in connection with Trade Reporting Services.”</li> </ul> <p>Note: See also Rule 2.2.1 (Legal basis), Rule 2.4.5 (Resources), Rule 2.4.7 (Financial resources), Rule 2.4.8 (Integrity and security of computer systems and other systems), Rule 2.4.9 (Operational reliability), Rule 2.4.10 (Business continuity planning), Rule 2.4.11 (Recovery and resolution) and Rule 2.4.12 (Operational separation of functions).</p>	
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	<p><b>Trade Repository Rule 2.4.5</b></p> <p><b>Resources</b></p> <p>“An Operator must establish and maintain sufficient and appropriate human, technological and financial resources to ensure that the Trade Repository operates at all times securely, efficiently and effectively”</p>	
<p><i>In case of incidents.</i> A trade repository must establish, implement and maintain an adequate business continuity policy and disaster recovery plan aiming at ensuring the maintenance of its functions, the timely recovery of operations and the fulfilment of the trade repository’s obligations. Such a plan must at least provide for the establishment of backup facilities.<sup>xix</sup></p>	<p><b>Trade Repository Rule 2.4.10</b></p> <p><b>Business continuity planning</b></p> <p>“An Operator must establish, implement, maintain and enforce business continuity, backup and data recovery plans designed to:</p> <ul style="list-style-type: none"> <li>(a) address events that pose a significant risk of disruption to the Trade Repository’s operations or services, including events that could cause a wide-scale or major disruption; and</li> <li>(b) in the event of any disruption to the Trade Repository’s operations or services, enable the timely restoration of those operations and services and enable the Operator to meet its obligations to Australian Regulators and Users.”</li> </ul>	<p><b>Equivalent</b></p>
<p>The trade repository must ensure orderly substitution including the transfer of data to other trade repositories and the redirection of reporting flows to other trade repositories.<sup>xx</sup></p>	<p><b>Trade Repository Rule 2.4.10</b></p> <p><b>Business continuity planning</b></p> <p>“An Operator must establish, implement, maintain and enforce business continuity, backup and data recovery plans designed to:</p> <ul style="list-style-type: none"> <li>(a) address events that pose a significant risk of disruption to the Trade Repository’s operations or services, including events that could cause a wide-scale or major disruption; and</li> <li>(b) in the event of any disruption to the Trade Repository’s operations or services, enable the timely restoration of those operations and services and enable the Operator to meet its obligations to Australian Regulators and Users.”</li> </ul>	<p><b>Equivalent</b></p>



**Trade Repository Rule 2.4.11**

**Recovery and resolution**

“(1) An Operator must establish, implement, maintain and enforce policies, procedures and plans designed to:

- (a) identify scenarios that may potentially prevent the Operator from being able to provide the Trade Repository’s critical operations or services as a going concern and assess the effectiveness of a full range of options for recovery or orderly wind-down....”

Directions relating to derivative trade data if repository ceases to be licensed

“(1) This section applies to derivative trade data that was being retained in a derivative trade repository before the repository ceased to be a licensed derivative trade repository.

(2) ASIC may give a written direction to a person referred to in subsection (3):

- (a) requiring the person to deal, in a specified way, with derivative trade data to which this section applies; or
- (b) imposing limitations on the use or disclosure by the person of derivative trade data to which this section applies.”

Note: A direction could, for example, require the person:

- (a) to destroy all records of the data over which the person has control; or
- (b) to transfer all records of the data over which the person has control to a licensed derivative trade repository or a prescribed derivative trade repository\*.



<p>Trade repositories are required to provide financial reports and business plans as part of their application, and demonstrate proper resources and expected business status in six months after registration is granted.</p>	<p><b>Trade Repository Rule 2.4.5</b></p> <p><b>Resources</b></p> <p>“An Operator must establish and maintain sufficient and appropriate human, technological and financial resources to ensure that the Trade Repository operates at all times securely, efficiently and effectively.”</p> <p><b>Regulatory Guide, Appendix 2, A2.5</b></p> <p><b>Financial resources and business plans</b></p> <p><b>RG 249.13</b> – “Your application must include the following financial and business information:</p> <ul style="list-style-type: none"><li>(a) a complete set of your audited consolidated financial statements (and those of any corporate group of which you are a member), prepared on an annual basis in conformity with international or Australian accounting standards, for the three financial years preceding the date of your application;</li><li>(b) the name and national registration number of your external auditor;</li><li>(c) a financial business plan contemplating different business scenarios for the trade repository services over a minimum three-year period;</li><li>(d) details of the funding referred to in Rule 2.4.7;</li><li>(e) a viable recovery or orderly wind-down plan, as referred to in Rule 2.4.11;</li><li>(f) where the historical financial information referred to in (a) is not available:<ul style="list-style-type: none"><li>i. a statement demonstrating proper resources and expected business status in six months after registration is granted;</li></ul></li></ul>	<p><b>Equivalent</b></p>
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	<ul style="list-style-type: none"> <li>ii. an interim financial report where the financial statements are not yet available for the requested period of time; and</li> <li>iii. a statement of financial position, such as a balance sheet, of income, changes in equity and cash flows, and notes comprising a summary of accounting policies and other explanatory notes;</li> </ul> <p>(g) an indication of future plans for the establishment of subsidiaries and their location; and</p> <p>(h) a description of the business activities you plan to carry out, specifying the activities of subsidiaries.”</p> <p>Note: In this guide ‘Part 2.4’ or ‘Rule 2.4.2’ (for example) refer to a particular part or rule of the derivative trade repository rules.</p>	
<p><i>Initial record of data.</i> A trade repository must promptly record the information received pursuant to the Reporting Obligation.<sup>xxi</sup></p>	<p><b>Trade Repository Rule 2.3.1</b></p> <p><b>Acceptance of Derivative Trade Data</b></p> <p>“(1) An Operator must accept from Participants Derivative Trade Data for all classes of Derivatives specified in the conditions of the Operator’s Licence.</p> <p>....</p> <p>(3) Without limiting subrule (2), an Operator must establish, implement, maintain and enforce policies, procedures, systems and controls:</p> <ul style="list-style-type: none"> <li>a) Reasonably designed to maintain a continuous, reliable and secure connection between the Trade Repository and Participants for the purposes of accepting Derivative Trade Data; and</li> <li>b) designed to provide reasonable assurance that Derivative Trade Data reported to the Trade Repository by Participants is and remains at all times complete, accurate and current.”</li> <li>c)</li> </ul>	<p><b>Equivalent</b></p>



*Position calculations.* A TR must calculate the positions by class of derivatives and by reporting entity based on the details of the derivative contracts reported pursuant to the Reporting Obligation.<sup>xxii</sup>

**Trade Repository Rule 2.3.4**

**Provision of access to Derivative Trade Data**

**Provision of access to Australian Regulators**

“(5) An Operator must provide to each Australian Regulator, if requested by that Australian Regulator and at no charge, continuous, direct and immediate electronic access to the following information retained in the Trade Repository:

- (a) all Derivative Trade Data reported by Participants in accordance with the Reporting Requirements; and
- (b) all information (including statistical data) that is created or derived from Derivative Trade Data referred to in paragraph (a).”

**Trade Repository Rule 2.3.5**

**Obligation to create and disclose weekly statistical data**

“(1) An Operator must create and disclose in accordance with this Rule statistical data on Derivative Trade Data (in this Rule, Relevant Derivative Trade Data) that is retained in the Trade Repository and that was reported to the Trade Repository by Participants in accordance with the ASIC Derivative Transaction Rules (Reporting) 2013.

(2) For the purposes of subrule (1), an Operator must, for each 7-calendar day period (in this Rule, Relevant Period) commencing from the day the Operator first accepts a report of Relevant Derivative Trade Data, create the following statistical data from the Relevant Derivative Trade Data:

- a) all aggregate open positions as at the end of the last day in the Relevant Period for which the statistical data is created; and
- b) volumes by number and by value of Derivative Transactions

**Broadly equivalent.**

Positions calculation is not explicitly required to TRs, but reporting of positions is also envisaged in the Australian regime. Therefore on balance the outcome of the two regimes is similar.



	<p>reported during the Relevant Period.</p> <p>(3) The statistical data created in accordance with subrule (2) must include breakdowns by the following categories (if applicable):</p> <ul style="list-style-type: none"> <li>a) the asset class, currency of the notional amount, type and maturity of the Derivatives to which the statistical data relates;</li> <li>b) the geographic location of the reference asset, rate, index, commodity or other thing underlying the Derivatives to which the statistical data relates; and</li> <li>c) whether the Derivatives to which the statistical data relates are cleared or uncleared.</li> </ul> <p>(4) Subject to subrule (6), an Operator must disclose the statistical data required under subrules (1)–(3) in relation to a Relevant Period, from a day that is between 3–5 business days after the day on which the Relevant Period ends.</p> <p>(5) An Operator must disclose the statistical data required under subrules (1)–(3) by making the statistical data available at no charge and through a publicly accessible website.</p> <p>(6) The statistical data published under this Rule must not include Derivative Trade Data capable of identifying a counterparty to a Derivative Transaction.”</p>	
<p><i>Confidentiality.</i> A trade repository must ensure the confidentiality, integrity and protection of the information received under the Reporting Obligation.<sup>xxiii</sup></p>	<p><b>Trade Repository Rule 2.4.8</b></p> <p><b>Integrity and security of computer systems and other systems</b></p> <p>“An Operator must establish, implement, maintain and enforce policies, procedures, and physical and electronic controls over its systems for accepting, retaining, using, disclosing and providing access to Derivative Trade Data designed to:</p> <ul style="list-style-type: none"> <li>(a) maintain the integrity, security and confidentiality of</li> </ul>	<p><b>Equivalent</b></p>



	<p>Derivative Trade Data at all times during transmission between the Trade Repository, Australian Regulators and Users, and while retained in the Trade Repository; and</p> <p>Note: For example, ensuring the Derivative Trade Data is protected from loss, leakage and corruption.</p> <p>(b) prevent unauthorised use or disclosure of, or access to, Derivative Trade Data.</p>	
<p>A trade repository must employ timely and efficient record keeping procedures to document changes to recorded information.<sup>xxiv</sup></p>	<p><b>Trade Repository Rule 2.3.2</b></p> <p><b>Retention of Derivative Trade Data</b></p> <p>“(1) An Operator must ensure that all Derivative Trade Data accepted by the Trade Repository, and each alteration and correction to that Derivative Trade Data, is recorded on a timely basis.</p> <p>(2) An Operator must retain all records of Derivative Trade Data accepted by the Trade Repository, and records of each alteration or correction to that Derivative Trade Data, from the date the record is first made until five years have elapsed since the Derivative to which the record relates expires or terminates.</p> <p>(3) An Operator must ensure that each record referred to in subrule (2) is, for the period of time that the record must be retained under that subrule, retained in a secure location and in an electronic format, and is immediately accessible by the Operator.</p> <p>(4) An Operator must create at least one backup copy of each record referred to in subrule (2) and must ensure that, for the period of time that the record must be retained under that subrule, the backup copy is retained in a secure location and in an electronic format, separate from the location of the record, and is accessible by the Operator within 3 business days.</p> <p>(5) This Rule applies subject to any direction given by ASIC under section 904K of the Act.”</p> <p><b>A3.3 Handling and use of derivative trade data by Trade</b></p>	<p><b>Equivalent</b></p>



<p>A trade repository must allow the parties to a contract to access and correct the information on a contract in a timely manner.<sup>xxv</sup></p>	<p><b>Repositories and their Officers and employee</b></p> <p><b>Acceptance of Derivative Trade Data</b></p> <p>“<b>RG 000.172</b> - An Operator must create and maintain policies and procedures for the reporting of trade data in accordance with Rule 2.3.1. This includes policies, procedures and controls that are designed to provide reasonable assurance that any trade data reporting to the repository by participants is and remains complete, accurate and current.</p> <p><b>RG 000.173</b> - What may be considered adequate policies and procedures in a particular scenario or for a particular trade repository's operations will depend on the facts and circumstances of the trade repository's business. We expect to engage with applicants for an ADTR licence on these arrangements during the licensing process and on an ongoing process as part of assessments.</p> <p><b>RG 000.174</b> - What is necessary to comply with this rule could include a combination of:</p> <ul style="list-style-type: none"> <li>(a) requiring reporting entities to confirm data submitted is accurate and complete;</li> <li>(b) adequate ongoing representations and warranties from users in user agreements as to the accuracy and completeness of data submitted; and</li> <li>(c) processes to identify material discrepancies or incomplete data fields in reports submitted by or on behalf of reporting entities for the same transactions, and implementing procedures to verify the accuracy of this data with the counterparties.”</li> </ul> <p><b>Trade Repository Rule 2.3.4</b></p> <p><b>Provision of access to Derivative Trade Data</b></p> <p><b>Participant access</b></p> <p>“(1) Subject to subrule (4), an Operator must provide each</p>	<p><b>Equivalent</b></p>
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	<p>Participant with access to the records of the Derivative Trade Data that the Participant has reported to the Trade Repository, including access for the purposes of making necessary corrections or alterations to that Derivative Trade Data.</p> <p>(2) To the extent not provided under subrule (1) and subject to subrule (4), an Operator must provide each Participant with access to the records of each Derivative for which the Participant is a counterparty or for which the Participant reported on behalf of the counterparty.</p> <p>(3) An Operator must ensure that its rules, procedures and contractual arrangements relating to the provision of access to Derivative Trade Data clearly define the categories of access available to Participants, if there is more than one category.</p> <p>(4) An Operator is not required to provide access under this Rule to an entity that is suspended from being, or has ceased to be, a Participant in the Trade Repository.”</p>	
<p>A trade repository must maintain the records for at least 10 years following the termination of the contract.<sup>xxvi</sup></p>	<p><b>Trade Repository Rule 2.7.1</b></p> <p><b>Keeping of records</b></p> <p>“(1) An Operator must keep records that enable the Operator to demonstrate that it has complied with the requirements of these Rules.</p> <p>(2) An Operator must keep the records referred to in subrule (1) for a period of at least five years from the date the record is made or amended, or for any longer period for which the record is required to be kept under any other Rule.”</p>	<p><b>Broadly Equivalent</b>, as even if a record-keeping requirement is considered, the duration of the retention of data is far less demanding. However on balance, this gap does not undermine the consistency of objectives between the Australian and the EU regimes.</p>
<p>A trade repository may not use the data it receives under EMIR for commercial purposes unless the relevant counterparties have provided their consent.<sup>xxvii</sup></p> <p>A trade repository must take all reasonable steps to prevent any misuse of the information maintained in its systems.<sup>xxviii</sup></p>	<p><b>Trade Repository Rule 2.3.3</b></p> <p><b>Use and disclosure of Derivative Trade Data</b></p> <p>“(1) An Operator must establish, implement, maintain and enforce policies, procedures, systems and controls designed to ensure that the Operator, its Officers and employees comply with section 904B of the Act in handling, using and disclosing Derivative Trade Data.</p>	<p><b>Equivalent</b></p>





A natural person who has a close link<sup>xxx</sup> with a trade repository or a legal person that has a parent undertaking<sup>xxx</sup> or a subsidiary relationship<sup>xxxi</sup> with a trade repository may not use confidential information recorded in a trade repository for commercial purposes.<sup>xxxii</sup>

(2) For subparagraph 904B(1)(b)(ii) of the Act, an Operator is permitted to use and disclose:

- (a) statistical data that the Operator has disclosed in accordance with Rule 2.3.5 or Rule 2.3.6;
- (b) Derivative Trade Data other than statistical data referred to in paragraph (a) that is, or that is created or derived from, Derivative Trade Data that has been reported to the Operator by a Participant, only if:
  - (i) the Participant that reported the Derivative Trade Data has given prior written consent to the use or disclosure of the Derivative Trade Data by the Operator; and
  - (ii) where the Derivative Trade Data is capable of identifying a counterparty to a Derivative Transaction, that counterparty has consented in writing to the use or disclosure of the Derivative Trade Data.

(3) For the purposes of paragraph (2)(b), an Operator:

- (a) must not require a Participant to consent to the use or disclosure of Derivative Trade Data reported by the Participant as a condition of the Participant's access to the Trade Repository's services; and
- (b) must not induce or attempt to induce a Participant to consent to the use or disclosure of the Participant's Derivative Trade Data by offering or providing to the Participant incentives or benefits that are not offered or provided to Participants that do not consent to the use or disclosure of their Derivative Trade Data, unless the incentive or benefit is reasonably related to the value to the Operator of using or disclosing the Participant's Derivative Trade Data."

Note: An example of an incentive or benefit for the purposes of paragraph (3)(b) is a reduced fee, rate or charge for access to the Trade Repository's services.

	<p><b>Trade Repository Rule 2.4.12</b></p> <p><b>Operational separation of functions</b></p> <p>“Where the Operator, a related body corporate of the Operator, or any other company with which the Operator has a material agreement in connection with the Trade Reporting Services, provides Non-Trade Reporting Services, the Operator must:</p> <ul style="list-style-type: none"><li>(a) disclose to ASIC a description of all of the Non-Trade Reporting Services, and update the disclosure as soon as practicable after any changes are made to the Non-Trade Reporting Services; and</li><li>(b) establish, implement, maintain and enforce policies, procedures, systems and controls designed to ensure operational separation between the Non-Trade Reporting Services and the Trade Reporting Services.”</li></ul> <p><b>Trade Repository Rule 2.4.8</b></p> <p><b>Integrity and security of computer systems and other systems</b></p> <p>“An Operator must establish, implement, maintain and enforce policies, procedures, and physical and electronic controls over its systems for accepting, retaining, using, disclosing and providing access to Derivative Trade Data designed to:</p> <ul style="list-style-type: none"><li>(a) maintain the integrity, security and confidentiality of Derivative Trade Data at all times during transmission between the Trade Repository, Australian Regulators and Users, and while retained in the Trade Repository; and</li></ul> <p>Note: For example, ensuring the Derivative Trade Data is protected from loss, leakage and corruption.</p> <ul style="list-style-type: none"><li>(b) prevent unauthorised use or disclosure of, or access to, Derivative Trade Data.”</li></ul>	
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	<p><b>Trade Repository Rule 2.5.2</b></p> <p><b>Public disclosures</b></p> <p>“An Operator must disclose, on a publicly accessible section of its website and at no charge, a description of:</p> <p>...</p> <p>(f) the Operator’s policies and procedures in relation to the commercial use of Derivative Trade Data retained in the Trade Repository.”</p> <p>...</p> <p><b>Regulatory Guide</b></p> <p><b>Operational Separation of functions</b></p> <p>“<b>RG 249.204</b> - Where an operator, a related body corporate of the operator, or any other company with which the Operator has a material agreement in connection with the trade reporting services, provides non-trade reporting services (including ancillary services), the Operator must comply with Rule 2.4.12. This includes ensuring operational separation between non-trade reporting services and trade reporting services.</p> <p>Operational separation does not require the services to be provided by different legal entities, and may be achieved by adequate policies and procedures such as supervisory arrangements, information barriers, separate business units and reporting lines and independent remuneration structures.”</p>	
<p>Counterparties and CCPs shall ensure that the details of any derivative contract they have concluded and of any modification or termination of the contract are reported to a trade repository. The details shall be reported no later than the working day following the conclusion, modification or termination of the contract.</p> <p>(EMIR Article 9)</p>	<p><b>Derivative Transaction Rule 2.2.1</b></p> <p><b>Transaction Reporting Requirements and Position Reporting Requirements</b></p> <p><b><u>Core Transaction Reporting Requirements and Position Reporting Requirements</u></b></p> <p>“(1) Subject to subrules (2) and (3) and Part 2.4, a Reporting Entity must report information about:</p>	<p><b>Broadly Equivalent</b>, since :</p> <p>- EMIR reporting regards transactions, not positions, and Australian reporting encompasses both, rather than leaving the latter to be calculated by TRs based on the transaction reports;</p>



	<p>(a) each of its Reportable Transactions in accordance with the Transaction Reporting Requirements in Part S1.1 of Schedule 1, during the applicable Reporting Periods set out in that Part, other than a Reportable Transaction that is a modification, termination or assignment referred to in paragraph (c);</p> <p>(b) each of its Reportable Positions in accordance with the Position Reporting Requirements in Part S1.2 of Schedule 1, by the applicable Position Reporting Date for that Reportable Position set out in that Part; and</p> <p>(c) each Reportable Transaction that is a modification, termination or assignment of a Reportable Position and that occurs before the applicable Position Reporting Date for that Reportable Position, in accordance with Rule 2.4.4, and must report the information in accordance with the requirements of this Part.”</p> <p>Note: Parts S1.1 and S1.2 of Schedule 1 deal with phased implementation of the Transaction Reporting Requirements and Position Reporting Requirements.</p> <p><b><u>Exception where no Licensed Repository or Prescribed Repository</u></b></p> <p>“(2) A Reporting Entity is not required to comply with the requirements of subrule (1) and this Part that would otherwise apply to the Reporting Entity in relation to a Reportable Transaction or a Reportable Position if, at the time the Reporting Entity is required to comply with the requirements:</p> <p>(a) there is no Licensed Repository authorised to provide services in respect of the class of Derivatives that includes the Derivatives to which the Reportable Transaction or Reportable Position relates; and</p> <p>(b) there is no Prescribed Repository that is prescribed in relation to the class of Derivatives that includes the Derivatives to which the Reportable Transaction or Reportable Position relates.”</p>	<p>- where no Licensed Repository or Prescribed Repository exists, the reporting obligation does not apply, whereas in the EU, after a certain time, reporting would be made effective via direct reporting to ESMA.</p> <p>It is however expected that a TR will be operational and that in case of resolution, the obligation on portability will apply. According to information received, eight trade repositories have already been prescribed under Corporations Regulation 7.5A.30.</p> <p>Therefore the differences highlighted above do not undermine the consistency of objectives between the Australian and the EU regimes.</p>
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	<p><b>Exception for foreign entities</b></p> <p>“(3) A Reporting Entity other than an Australian Entity or an RE or Trustee acting in its capacity as RE or Trustee of an Australian Entity, is not required to comply with the requirements of subrule (1) and this Part that would otherwise apply to the Reporting Entity in relation to a Reportable Transaction or a Reportable Position if, at the time the Reporting Entity is required to comply with the requirements:</p> <ul style="list-style-type: none"> <li>(a) there is a Prescribed Repository in the jurisdiction (in this Rule, the Foreign Jurisdiction) in which the Reporting Entity is incorporated or formed; and</li> <li>(b) either: <ul style="list-style-type: none"> <li>(i) the Reporting Entity or another entity has reported information about the Reportable Transaction or the Reportable Position to the Prescribed Repository, in compliance with requirements in the Foreign Jurisdiction that are substantially equivalent to the requirements that would otherwise apply to the Reporting Entity in relation to the Reportable Transaction or Reportable Position under subrule (1) and this Part; or</li> <li>(ii) the Reporting Entity is exempt from the requirement in the Foreign Jurisdiction to report information about the Reportable Transaction or the Reportable Position, or there is no requirement in the Foreign Jurisdiction to report information about the Reportable Transaction or Reportable Position.”</li> </ul> </li> </ul> <p><b>Derivative Transaction Rule 2.2.3</b></p> <p><b>Reporting Requirement—Timing (generally, T+1)</b></p> <p>“(1) Subject to subrule (2), a Reporting Entity that is required to report:</p> <ul style="list-style-type: none"> <li>(a) information about a Reportable Transaction in accordance</li> </ul>	
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	<p>with paragraph 2.2.1(1)(a) or (c); or</p> <p>(b) a change to information about a Reportable Transaction or Reportable Position in accordance with subrule 2.2.2(1),</p> <p>must report the information or change by no later than the end of the next Business Day after the requirement to report the information or change arises.</p> <p>(2) If the Licensed Repository or Prescribed Repository to which the information or change is to be reported is not available to accept the report of information or changes by the time required under subrule (1), the Reporting Entity must report the information or changes as soon as practicable after the Licensed Repository or Prescribed Repository becomes available to accept the report.”</p>	
<p>Both counterparties (as well CCPs) are responsible for the reporting obligation. However, a counterparty or a CCP which is subject to the reporting obligation may delegate the reporting of the details of the derivative contract. (EMIR Article 9)</p>	<p><b>Derivative Transaction Rule 2.2.1</b></p> <p><b>Transaction Reporting Requirements and Position Reporting Requirements</b></p> <p><b><u>Core Transaction Reporting Requirements and Position Reporting Requirements</u></b></p> <p>“(1) Subject to subrules (2) and (3) and Part 2.4, a Reporting Entity must report information about:</p> <p>(d) each of its Reportable Transactions in accordance with the Transaction Reporting Requirements in Part S1.1 of Schedule 1, during the applicable Reporting Periods set out in that Part, other than a Reportable Transaction that is a modification, termination or assignment referred to in paragraph (c);</p> <p>(e) each of its Reportable Positions in accordance with the Position Reporting Requirements in Part S1.2 of Schedule 1, by the applicable Position Reporting Date for that Reportable Position set out in that Part; and</p> <p>(f) each Reportable Transaction that is a modification,</p>	<p><b>Broadly Equivalent</b>, since where no Licensed Repository or Prescribed Repository exists, the reporting obligation does not apply, whereas in the EU, after a certain time, reporting would be made effective via direct reporting to ESMA. It is however expected that TRs will be operational. Therefore this difference is not material to undermine the overall equivalence determination.</p>



termination or assignment of a Reportable Position and that occurs before the applicable Position Reporting Date for that Reportable Position, in accordance with Rule 2.4.4, and must report the information in accordance with the requirements of this Part.”

Note: Parts S1.1 and S1.2 of Schedule 1 deal with phased implementation of the Transaction Reporting Requirements and Position Reporting Requirements.

**Exception where no Licensed Repository or Prescribed Repository**

“(2) A Reporting Entity is not required to comply with the requirements of subrule (1) and this Part that would otherwise apply to the Reporting Entity in relation to a Reportable Transaction or a Reportable Position if, at the time the Reporting Entity is required to comply with the requirements:

- (c) there is no Licensed Repository authorised to provide services in respect of the class of Derivatives that includes the Derivatives to which the Reportable Transaction or Reportable Position relates; and
- (d) there is no Prescribed Repository that is prescribed in relation to the class of Derivatives that includes the Derivatives to which the Reportable Transaction or Reportable Position relates.”

**Exception for foreign entities**

“(3) A Reporting Entity other than an Australian Entity or an RE or Trustee acting in its capacity as RE or Trustee of an Australian Entity, is not required to comply with the requirements of subrule (1) and this Part that would otherwise apply to the Reporting Entity in relation to a Reportable Transaction or a Reportable Position if, at the time the Reporting Entity is required to comply with the requirements:

- (c) there is a Prescribed Repository in the jurisdiction (in this Rule, the Foreign Jurisdiction) in which the Reporting



	<p>Entity is incorporated or formed; and</p> <p>(d) either:</p> <p>(iii) the Reporting Entity or another entity has reported information about the Reportable Transaction or the Reportable Position to the Prescribed Repository, in compliance with requirements in the Foreign Jurisdiction that are substantially equivalent to the requirements that would otherwise apply to the Reporting Entity in relation to the Reportable Transaction or Reportable Position under subrule (1) and this Part; or</p> <p>(iv) the Reporting Entity is exempt from the requirement in the Foreign Jurisdiction to report information about the Reportable Transaction or the Reportable Position, or there is no requirement in the Foreign Jurisdiction to report information about the Reportable Transaction or Reportable Position.”</p> <p><b>Derivative Transaction Rule 2.2.7</b></p> <p><b>Derivative Transaction Information-Use of agents</b></p> <p>“A Reporting Entity may appoint one or more persons to report on its behalf information under subrule 2.2.1(1) or any change to that information under subrule 2.2.2(1).”</p> <p>Note: For example, the Reporting Entity may appoint a counterparty of the Reporting Entity, central counterparty, trading platform, service provider, broker or any other third party.</p>	
<ul style="list-style-type: none"> <li>• Details of the derivative contract.</li> <li>• Table of fields include specific EU fields: <ul style="list-style-type: none"> <li>- confirmation timestamp</li> <li>- delivery of commodity derivatives underlyings</li> <li>- change log of TR</li> <li>- clearing threshold and hedging status</li> <li>- trade with non-EEA C/P,</li> </ul> </li> </ul>	<p><b>Derivative Transaction Rules</b></p> <p><b>Schedule 2 Information requirements</b></p> <p>“The full list of counterparty data is included in schedule 2, part S2.1 of the Derivative Transaction Rules.</p> <p>Relevant information to be reported includes:</p>	<p><b>Equivalent</b></p>





<p>- intragroup flag</p> <p>(EMIR Art 9, RTS/ITS Art9) (EMIR Article 9, TR RTS)</p>	<ul style="list-style-type: none"> <li>• Details of the derivatives contract.</li> <li>• <i>Confirmation timestamp</i> - The time and date (expressed as AEDT/AEST as applicable – see Rule 1.2.1) the terms of the Derivative to which the Reportable Transaction relates were confirmed by both counterparties (if applicable).</li> <li>• <i>Delivery type</i> - A notation to indicate whether the Derivative to which the Reportable Transaction relates is physical (deliverable) or cash (non-deliverable) or a combination of both physical and cash.</li> <li>• <i>Delivery start date and time</i> - The start date and time (expressed as AEDT/AEST as applicable - see Rule 1.2.1) of delivery of the commodity underlying the Derivative to which the Reportable Transaction relates.</li> <li>• <i>Delivery end date and time</i> - The end date and time (expressed as AEDT/AEST as applicable - see Rule 1.2.1) of delivery of the commodity underlying the Derivative to which the Reportable Transaction relates.</li> <li>• <i>Action type</i> - A notation to indicate whether the report being made relates to :             <ul style="list-style-type: none"> <li>(a) a Reportable Transaction that is an entry into of an arrangement that is a Derivative, in which case the notation must be “new”;</li> <li>(b) a Reportable Transaction that is a modification of an arrangement that is a Derivative, in which case the notation must be “modify”;</li> <li>(c) a Reportable Transaction that is a termination of an arrangement that is a Derivative, in which case the notation must be “cancel”; or</li> <li>(d) a compression of a Derivative, in which case the notation must be “compression”.</li> </ul> </li> </ul> <p>For the purposes of subrule 2.2.2(1), a notation to indicate whether</p>	
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	<p>the change relates to:</p> <ul style="list-style-type: none"> <li>(a) a cancellation of a report previously made in error, in which case, the notation must be “error”;</li> <li>(b) a change or update to the information referred to in items 30–32 (mark-to-market, mark-to-model, or other valuation) or items 40–44 (collateral), in which case the notation must be “valuation update”; or</li> <li>(c) any other amendments to a report previously made, in which case the notation must be “other”.</li> </ul> <ul style="list-style-type: none"> <li>• <i>Hedging transaction</i> - An indication of whether the Derivative to which the Reportable Transaction relates is entered into by the Reporting Entity for the purpose of managing a financial risk that arises in the ordinary course of business.</li> <li>• <i>Domicile of Reporting Counterparty</i> - The jurisdiction of incorporation or formation of the Reporting Counterparty.”</li> </ul>	
<p>Reports include information on exposures (information on mark-to-market or mark-to-model valuation of contracts and collateral) (RTS/ITS Art9)</p> <p><i>Reporting of exposures:</i><sup>xxxiii</sup> The data on collateral required as part of the Counterparty Data must include all posted collateral. Where a counterparty does not collateralise on a transaction level basis, counterparties must report to a trade repository collateral posted on a portfolio basis. When the collateral related to a contract is reported on a portfolio basis, the reporting counterparty must report to the trade repository a code identifying the portfolio of collateral posted to the other counterparty related to the reported contract. Non-financial counterparties other than Non-Financial Counterparties Subject to Clearing Obligation are not required to report collateral, mark-to-market, or mark-to-model valuations of</p>	<p><b>Derivative Transaction Rules</b></p> <p><b>Schedule 2 Information requirements</b></p> <p>“The full list of counterparty data is included in schedule 2, part S2.1 of the Derivative Transaction Rules.</p> <p>Relevant information to be reported includes:</p> <ul style="list-style-type: none"> <li>(a) <i>Mark-to-market/mark-to-model/other value of Derivative</i> - The valuation of the Derivative to which the Reportable Transaction relates, as calculated using the method identified under item 32.</li> <li>(b) <i>Currency used for mark-to-market/mark-to-model/other valuation</i> - The currency used for the valuation referred to in item 30.</li> <li>(c) <i>Valuation type (mark-to-market/mark-to-model/other)</i> - A notation to indicate whether the valuation referred to in item 30 was a mark-to-market or mark-to-model valuation, or a</li> </ul>	<p><b>Equivalent</b></p>



<p>the contracts. For contracts cleared by a CCP, mark-to-market valuations must only be provided by the CCP.</p>	<p>different form of valuation.</p> <p>(d) <i>Collateralisation (Y/N)</i> - A notation to indicate whether the Reportable Transaction is collateralised by one or both counterparties to the Reportable Transaction.</p> <p>(e) <i>Collateral portfolio</i> - If the Reportable Transaction is collateralised, a notation to indicate whether the collateralisation was performed on a Portfolio Basis.</p> <p>(f) <i>Collateral portfolio code</i> - If the Reportable Transaction is collateralised and collateral is reported on a Portfolio Basis, a unique code, determined by the Reporting Counterparty, to identify the portfolio.</p> <p>(g) <i>Currency of collateral value</i> - The currency of the collateral value identified under item 43.</p> <ul style="list-style-type: none"> <li>• Value of collateral - If the Reportable Transaction is collateralised: <ul style="list-style-type: none"> <li>(a) the value of the collateral posted by the Reporting Counterparty to the Non-Reporting Counterparty; or</li> <li>(b) where collateral is posted by the Reporting Counterparty to the Non-Reporting Counterparty on a Portfolio Basis, the value of all collateral posted for the portfolio.”</li> </ul> </li> </ul>	
<p>International codes used for reporting purposes: (temporary BIC) - LEI, UPI, trade ID generated by the counterparties (RTS/ITS Art 9)</p>	<p><b>Derivative Transaction Rules</b></p> <p><b>Schedule 2 Information requirements</b></p> <p>“The full list of counterparty data is included in schedule 2, part S2.1 of the Derivative Transaction Rules.</p> <p>For all counterparties we require</p> <ul style="list-style-type: none"> <li>• An identifier of the Counterparty, using: <ul style="list-style-type: none"> <li>(a) in the case of an entity, a Legal Entity Identifier (LEI) or interim entity identifier or, if no LEI or interim entity</li> </ul> </li> </ul>	<p><b>Equivalent</b>, assuming that all codes to be used will be consistent at the international level.</p>



	<p>identifier is available for the entity, an Australian Business Number (ABN) or, if no ABN is available, a Business Identifier Code (BIC code); or</p> <p>(b) in the case of an individual, a client code assigned by the Reporting Counterparty.</p> <ul style="list-style-type: none"> <li>• <i>Unique product identifier</i> - The universal product identification code for the Derivative to which the Reportable Transaction relates, based on the taxonomy of the Derivative or, if no universal product identification code is available, a product identification code of the Derivative using an internationally accepted product taxonomy.;</li> <li>• <i>Unique transaction Identifier</i> - The universal transaction identifier for the Reportable Transaction or, if no universal transaction identifier is available, the single transaction identifier as used by the counterparties or the trade identifier used by the trading venue (if applicable) on which the Reportable Transaction was executed, or if none of these are available, the internal trade identifier used by the Reporting Counterparty.”</li> </ul>	
<p>The reports must include the following information:</p> <p><i>Counterparty data.</i><sup>xxxiv</sup> The reports must include information relating to the counterparties to the derivative contract, including, where different, the beneficiary of the rights and obligations arising from it. Such information must include the details set out in a table in an annex to the Reporting Obligation RTS (the “Counterparty Data”).<sup>xxxv</sup></p> <p><i>Cleared trades.</i><sup>xxxvi</sup> Where a contract is concluded in a trading venue and cleared by a CCP such that a counterparty is not aware of the identity of the other counterparty, the reporting counterparty must identify that CCP as its counterparty.</p>	<p><b>Derivative Transaction Rules</b></p> <p><b>Schedule 2 Information requirements</b></p> <p>“The full list of counterparty data is included in schedule 2 of the Derivative Transaction Rules. Relevant information to be reported includes:</p> <p><i>Identifier of Beneficiary</i> - If the beneficiary of the rights and obligations arising from the Derivative to which the Reportable Transaction relates is not the Reporting Counterparty:</p> <ul style="list-style-type: none"> <li>(a) an identifier of the beneficiary of the Reporting Counterparty, using: <ul style="list-style-type: none"> <li>(i) in the case of an entity, a Legal Entity Identifier (LEI) or interim entity identifier or, if no LEI or interim entity identifier is available for the entity, an Australian Busi-</li> </ul> </li> </ul>	<p><b>Equivalent</b></p>



	<p>ness Number (ABN) or, if no ABN is available, a Business Identifier Code (BIC code); or</p> <p>(ii) in the case of an individual, a client code as assigned by the Reporting Counterparty; or</p> <p>(b) where the Reportable Transaction was executed via a structure, such as a trust or managed investment scheme, representing a number of beneficiaries, an identifier of the structure (i.e. as the trust or managed investment scheme).</p> <ul style="list-style-type: none"> <li>• <i>Name of beneficiary or structure</i> - The legal name of the beneficiary or structure (if any) identified under item 10.</li> <li>• <i>Identifier of Non-Reporting Counterparty</i> – An identifier of the Non-Reporting Counterparty, using: <ul style="list-style-type: none"> <li>(a) in the case of an entity, a Legal Entity Identifier (LEI) or interim entity identifier or, if no LEI or interim entity identifier is available for the entity, an Australian Business Number (ABN) or, if no ABN is available, a Business Identifier Code (BIC code); or</li> <li>(b) in the case of an individual, a client code assigned by the Reporting Counterparty.</li> </ul> </li> <li>• <i>Name of central clearing facility</i> - The name of the central clearing facility where the Derivative to which the Reportable Position relates was cleared (if applicable).”</li> </ul>	
<p><sup>xxxvii</sup> The reports must include information relating to the main characteristics of the derivative contract concluded between the two counterparties, including their type, underlying maturity, notional value, price, and settlement date. Such information must include the details set out in a table in an annex to the Reporting Obligation RTS (the “Common Data”).<sup>xxxviii</sup></p> <p>Where a derivative contract includes features typical of more than one underlying asset as</p>	<p><b>Derivative Transaction Rules</b></p> <p><b>Schedule 2 Information requirements</b></p> <p>“The full list of counterparty data is included in schedule 2 of the Derivative Transaction Rules.</p> <p>Relevant information to be reported includes:</p> <ul style="list-style-type: none"> <li>• <i>Contract type</i> - The type of Derivative to which the Reportable Transaction relates, such as “swap”, “swaption”, “forward”, “option”, “basis swap”, “index swap” or “basket swap”, unless this information is contained in the unique product identifier</li> </ul>	<p><b>Broadly Equivalent</b> The resemblance rule (to qualify contracts that include elements of more than one class) was not indicated. However it is expected that the internationally agreed codes will help indentifying the relevant contracts in a consistent manner. Therefore, on balance, this gap does not undermine the consistency of</p>



<p>specified in this table, the report must indicate the class that the counterparties agree the contract most closely resembles before the report is sent to a trade repository.<sup>xxxix</sup></p>	<p>referred to in item 2, in which case this field may be left blank or omitted.</p> <ul style="list-style-type: none"> <li>• <i>Maturity, termination or end date</i> - The date of expiry of the Derivative to which the Reportable Transaction relates.</li> <li>• <i>Notional amount</i> - The total notional amount, or total quantity in the unit of measure of the commodity underlying the Derivative to which the Reportable Transaction relates, or payout where a fixed payment is made at maturity based on certain conditions being met at expiry or during the life of the Derivative to which the Reportable Transaction relates.</li> <li>• <i>Unique product identifier</i> - The universal product identification code for the Derivative to which the Reportable Position relates, based on the taxonomy of the Derivative or, if no universal product identification code is available, a product identification code of the Derivative using an internationally accepted product taxonomy.”</li> </ul>	<p>objectives between the Australian and the EU regimes</p>
<p>Where an existing contract is subsequently cleared by a CCP, clearing should be reported as a modification of the existing contract.<sup>xl</sup></p> <p>Modifications to the data registered in trade repositories must be kept in a log identifying the person or persons that requested the modification, including the trade repository itself if applicable, the reason or reasons for such modification, a date and timestamp and a clear description of the changes, including the old and new contents of the relevant data.</p>	<p><b>Derivative Transaction Rule S2.1.1</b></p> <p><b>Derivative Transaction Information</b></p> <p>“For the purposes of these Rules, the Derivative Transaction Information in relation to a Reportable Transaction is:</p> <p>(a) if the Reportable Transaction is the entry into of an arrangement that is a commodity derivative that is not an electricity derivative, the information about the Reportable Transaction set out in column 3 of Table S2.1(1) and the additional information about the Reportable Transaction set out in column 3 of Table S2.1(2), to the extent that information is relevant to the Reportable Transaction;</p> <p>(b) if the Reportable Transaction is the entry into of an arrangement that is a credit derivative or an equity derivative, the information about the Reportable Transaction set out in column 3 of Table S2.1(1) and the additional information about the Reportable Transaction set out in column 3 of Table S2.1(3), to the extent that information is relevant to the Reportable</p>	<p><b>Equivalent</b></p>

	<p>Transaction;</p> <p>(c) if the Reportable Transaction is the entry into of an arrangement that is a foreign exchange derivative, the information about the Reportable Transaction set out in column 3 of Table S2.1(1) and the additional information about the Reportable Transaction set out in column 3 of Table S2.1(4), to the extent that information is relevant to the Reportable Transaction;</p> <p>(d) if the Reportable Transaction is the entry into of an arrangement that is an interest rate derivative, the information about the Reportable Transaction set out in column 3 of Table S2.1(1) and the additional information about the Reportable Transaction set out in column 3 of Table S2.1(5), to the extent that information is relevant to the Reportable Transaction;</p> <p>(e) if the Reportable Transaction is the modification or termination of an arrangement referred to in paragraphs (a)–(d), any changes to the information set out in Tables S2.1(1)–(5) resulting from the modification or termination of the arrangement, to the extent that information is relevant to the Reportable Transaction; and</p> <p>(f) if the Reportable Transaction is the assignment, by a party to an arrangement referred to in paragraphs (a)–(d), of some or all of the party’s rights and obligations under the arrangement, any changes to the information set out in Tables S2.1(1)–(5) resulting from the assignment, to the extent that information is relevant to the Reportable Transaction.</p> <p>The full list of counterparty data is included in schedule 2 of the Derivative Transaction Rules. Relevant information about the reportable transaction includes:</p> <ul style="list-style-type: none"> <li>• <i>Action type</i> - A notation to indicate whether the report being made relates to :</li> </ul>	
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- (a) a Reportable Transaction that is an entry into of an arrangement that is a Derivative, in which case the notation must be “new”;
- (b) a Reportable Transaction that is a modification of an arrangement that is a Derivative, in which case the notation must be “modify”;
- (c) a Reportable Transaction that is a termination of an arrangement that is a Derivative, in which case the notation must be “cancel”; or
- (d) a compression of a Derivative, in which case the notation must be “compression”.

For the purposes of subrule 2.2.2(1), a notation to indicate whether the change relates to:

- (a) a cancellation of a report previously made in error, in which case, the notation must be “error”;
- (b) a change or update to the information referred to in items 30–32 (mark-to-market, mark-to-model, or other valuation) or items 40–44 (collateral), in which case the notation must be “valuation update”; or
- (c) any other amendments to a report previously made, in which case the notation must be “other”.

- *Confirmation timestamp* - The time and date (expressed as AEDT/AEST as applicable – see Rule 1.2.1) the terms of the Derivative to which the Reportable Transaction relates were confirmed by both counterparties (if applicable).
- *Execution timestamp* - If the Reportable Transaction was executed on a trading venue, the time and date (expressed as AEDT/AEST as applicable - see Rule 1.2.1) the Reportable Transaction was executed on a trading venue.
- *Clearing timestamp* - If the Derivative to which the Reportable





	Transaction relates was centrally cleared, the time and date the Derivative was cleared.”	
The information in the reports must be provided in the format specified in a table in an annex to the Reporting Obligation ITS. <sup>xli</sup>	<p><b>Derivative Transaction Rule 2.2.4</b>  <b>Reporting Requirement—Format</b></p> <p>“A Reporting Entity that is required to report:</p> <p>(a) information about a Reportable Transaction or a Reportable Position in accordance with subrule 2.2.1(1); or</p> <p>(b) a change to information referred to in paragraph (a), in accordance with subrule 2.2.2(1),</p> <p>must report the information or change in an electronic form and in accordance with any format requirements specified:</p> <p>(c) in these Rules; and</p> <p>(d) by the Licensed Repository or Prescribed Repository to which the information or change is reported, to the extent those format requirements are not inconsistent with any format requirements referred to in paragraph (c).”</p>	<b>Equivalent</b> , although matters around formats will have to be confirmed at implementation stage and following international consistency concerns, notably for enabling reconciliation of data between TRs and where needed between regulators and counterparties.
<p>(i) A report must identify a derivative contract using a unique product identifier (a “UPI”) which is: unique; neutral; reliable; open source; scalable; accessible; available at a reasonable cost basis; and subject to an appropriate governance framework.</p> <p>(ii) Where a UPI does not exist, a report must identify a derivative contract by using the combination of the assigned ISO 6166 ISIN code or Alternative Instrument Identifier code with the corresponding ISO 10962 CFI code.</p> <p>(iii) Where the combination referred to in (ii) is not available, the type of derivative must be identified on the following basis:</p> <p>(a) The class of the derivative must be</p>	<p><b>Derivative Transaction Rule</b>  <b>Schedule 2, Part S2.1.1 - Derivative Transaction Information</b></p> <p>“The full list of counterparty data is included in schedule 2 of the Derivative Transaction Rules. Relevant information about the reportable transaction includes:</p> <ul style="list-style-type: none"> <li>• <i>Unique product identifier</i> - The universal product identification code for the Derivative to which the Reportable Transaction relates, based on the taxonomy of the Derivative or, if no universal product identification code is available, a product identification code of the Derivative using an internationally accepted product taxonomy.</li> <li>• <i>Contract type</i> – The type of Derivative to which the Reportable Transaction relates, such as “swap”, “swaption”, “forward”,</li> </ul>	<b>Equivalent</b> , although matters around formats will have to be confirmed at implementation stage and following international consistency concerns, notably for enabling reconciliation of data between TRs and where needed between regulators and counterparties.



<p>identified as one of the following: commodities; credit; foreign exchange; equity; interest rate; or other.</p> <p>(b) The derivative type must be identified as one of the following: contracts for difference; forward rate agreements; forwards; futures; options; swaps; or other.</p> <p>(c) For derivatives not falling into a specific derivative class or derivative type (as set out in (a) and (b)), the report must be made on the basis of the derivative class or derivative type that the counterparties agree the derivative contract most closely resembles.</p>	<p>“option”, “basis swap”, “index swap” or “basket swap”, unless this information is contained in the unique product identifier referred to in item 2, in which case this field may be left blank or omitted.”</p>	
<p>The counterparties to a trade must generate a unique trade identifier for each derivative contract to enable trade repositories to aggregate and compare data across different trade repositories.</p>	<p><b>Derivative Transaction Rule</b></p> <p><b>Schedule 2, Part S2.1.1 - Derivative Transaction Information</b></p> <p>“The full list of counterparty data is included in schedule 2 of the Derivative Transaction Rules. Relevant information about the reportable transaction includes...</p> <p><i>Unique Transaction identifier</i> - The universal transaction identifier for the Reportable Transaction or, if no universal transaction identifier is available, the single transaction identifier as used by the counterparties or the trade identifier used by the trading venue (if applicable) on which the Reportable Transaction was executed, or if none of these are available, the internal trade identifier used by the Reporting Counterparty.”</p>	<p><b>Equivalent</b>, although matters around formats will have to be confirmed at implementation stage and following international consistency concerns, notably for enabling reconciliation of data between TRs and where needed between regulators and counterparties.</p>
<p><i>Reporting start date</i></p> <p>- ESMA has set out various reporting start date in the Reporting Obligation ITS:</p> <p>(i) For credit derivative and interest rate derivative contracts:</p>	<p><b>Derivative Transaction Rule</b></p> <p><b>Schedule 1, Table 1: Transaction Reporting Requirements</b></p> <p>“See Pages 19-20 of Derivative Transaction Rules for full list of reporting start dates.</p> <p>The commencement of the mandatory reporting start date varies</p>	<p><b>Broadly Equivalent</b>, as not all dates are the same. However on balance, the calendar is not incompatible and does not undermine the consistency of objectives</p>



<p>(a) If a trade repository for that class of derivatives has been registered<sup>xliii</sup> before April 1, 2013, the Reporting Obligation will apply from July 1, 2013.</p> <p>(b) If there is no trade repository registered for that class of derivatives on or before April 1, 2013, the Reporting Obligation will apply 90 days after the registration of a trade repository for that class of derivatives.</p> <p>(c) If there is no trade repository registered for that class of derivatives by July 1, 2015, the Reporting Obligation will apply from that date and contracts must be reported to ESMA.<sup>xliiii</sup></p>	<p>depending on the type of counterparty and the asset class of derivatives being reported. This mandatory reporting obligation will be implemented in three phases:</p> <ul style="list-style-type: none"> <li>- phase 1 begins 1 October 2013 for Australian Entities that are registered as a swap dealer with the US Commodity Futures Trading Commission),</li> <li>- phase 2 begins 1 April 2014 (for large financial institutions with greater than \$50 billion notional OTC derivatives outstanding)</li> <li>- phase 3 begins 1 October 2014 (for remaining financial institutions).</li> </ul> <p>For Phases 2 and 3, initially credit and interest rate derivatives will be required to be report, with other asset classes following 6 months later.</p> <p>In addition, there will be an optional opt-in reporting phase available for those counterparties wishing to opt-in to an earlier mandatory reporting requirement, and this will be available from the time the rules are adopted.</p> <p>Under Derivatives Transaction Rule 2.2.1 (2), a reporting entity is not required to comply with a reporting obligation if there is no TR licensed or prescribed that can receive the report. We do however expect a number of TRs to be both licensed and prescribed, and the reporting obligation can commence on 1 April 2014 even if there is no TR licensed at this time (under transitional provisions to be finalised by Treasury).</p> <p>For a transitional period until 1 October 2014, reporting entities may meet their reporting obligation by:</p> <ul style="list-style-type: none"> <li>• Reporting one-sided rather than two-sided (Rule 2.4.2);</li> <li>• Not reporting information about mark-to-market valuations, collateral or barriers (Rule 2.4.3); and</li> <li>• Australian entities will be able to report to prescribed TRs (Rule 2.4.5, from 1 October 2014 reporting entities that are Australian</li> </ul>	<p>between the Australian and the EU regimes.</p>
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	entities will need to report to licensed TRs).”	
<p>(ii) For all other derivative contracts:</p> <p>(a) If a trade repository for that class of derivatives has been registered before October 1, 2013, the Reporting Obligation will apply from January 1, 2014.</p> <p>(b) If there is no trade repository registered for that class of derivatives on October 1, 2013, the Reporting Obligation will apply 90 days after the registration of a trade repository for that class of derivatives.</p> <p>(c) If there is no trade repository registered for that class of derivatives by July 1, 2015, the Reporting Obligation will apply from that date and contracts must be reported to ESMA.<sup>xliv</sup></p>	Refer to row above.	<b>See above.</b>
<p>The Reporting Obligation applies to derivative contracts entered into before August 16, 2012 which remain outstanding on that date, and to derivative contracts entered into on or after August 16, 2012.<sup>xlv</sup></p> <p>(i) Derivative contracts which were outstanding on August 16, 2012 and are still outstanding on the reporting start date must be reported to a trade repository within 90 days of the reporting start date.</p> <p>(ii) Derivative contracts which were entered into before, on or after August 16, 2012, that are not outstanding on or after the reporting start date must be reported to a trade repository within 3 years of the reporting start date.</p>	<p>The reporting requirements for existing transactions is outlined in Rule 2.2.1(1) of the Derivative Transaction Rules. This outlines that positions in Reportable Transactions that were outstanding on the Reporting Start Date need to be provided to a TR by the date provided in Table 2 of Schedule 1 of the Derivative Transaction Rules. The date provided is generally 6 months after the date the reporting obligation commences for each class of reporting entities in each asset class.</p> <p>The information that will need to be reported in respect of these outstanding trades is listed in Part S2.2 of Schedule 2 of Derivative Transaction Rules, and includes mark-to-market valuations and collateral information.</p>	<b>See above.</b>



<p>The reporting start date must be extended by 180 days for the reporting of exposures.<sup>xlvi</sup></p>		
<p>Counterparties must keep a record of any derivative contract they have concluded and any modification thereof for at least five years following the termination of the contract.<sup>xlvii</sup></p>	<p><b>Derivative Transaction Rules 2.3.1</b></p> <p><b>Keeping of records</b></p> <p>"(1) A Reporting Entity must keep records that enable the Reporting Entity to demonstrate it has complied with the requirements of these Rules.</p> <p>(2) A Reporting Entity must keep the records referred to in subrule (1) for a period of at least five years from the date the record is made or amended.</p> <p>(3) Without limiting subrule (1) and subject to subrule (4), a Reporting Entity must keep a record of all information that it is required to report under subrules 2.2.1(1) and 2.2.2(2).</p> <p>(4) A Reporting Entity is not required to keep the records referred to in subrule (3) where the Reporting Entity has arrangements in place to access those records in a Licensed Repository or Prescribed Repository, either directly or through another person, for the period set out in subrule (2)."</p> <p>Section 286 of the Corporations Act requires a company registered under the Corporations Act to maintain financial records that correctly record and explain its transactions, and to keep the records for 7 years after the transactions covered by the record are completed. This section would apply to a registered company's derivatives transactions.</p>	<p><b>Equivalent</b></p>
<p><i>When one report is made on behalf of both counterparties:</i><sup>xlvi</sup></p> <p>(a) it must contain the Counterparty Data in relation to each of the counterparties;</p> <p>(b) the Common Data must be submitted only once; and</p>	<p><b>Derivative Transaction rules 1.2.5</b></p> <p><b>Reporting Entities and Reportable Transactions</b></p> <p>"(1) Subject to subrule (2) and for the purposes of these Rules:</p> <p>(a) each entity referred to in column 2 of Table 1 is a <b>Reporting Entity</b>; and</p>	<p><b>Broadly Equivalent</b>, since there is no explicit reference to no duplication. However it is expected that TR rules will ensure that counterparties do not submit reports in a duplicate manner. Therefore</p>



<p>(c) it must state that the report is being made on behalf of both counterparties.</p>	<p>(b) each of the following Derivative Transactions is a <b>Reportable Transaction</b> in relation to the Reporting Entity:</p> <ul style="list-style-type: none"> <li>(i) the entry into of an arrangement that is an OTC Derivative of the kind referred to in column 3;</li> <li>(ii) the modification or termination of an arrangement that is an OTC Derivative entered into as referred to in subparagraph (i); and</li> <li>(iii) the assignment, by a party to an arrangement that is an OTC Derivative entered into as referred to in subparagraph (i), of some or all of the party's rights and obligations under the arrangement, where the Reporting Entity has actual knowledge of the assignment.</li> </ul> <p>(2) A <b>Reportable Transaction</b> includes a Derivative Transaction referred to in paragraph (1)(b) by an RE or Trustee in its capacity as RE or Trustee of an Australian Entity, and in those circumstances the Reporting Entity is the RE or Trustee.”</p>	<p>on balance, this gap does not undermine the consistency of objectives between the Australian and the EU regimes.</p>
<p><i>Delegation to third-parties.</i> A counterparty or a CCP which is subject to the Reporting Obligation may delegate the performance of such obligation to a third party.<sup>xlix</sup></p>	<p><b>Derivative Transaction Rule 2.2.7</b></p> <p><b>Derivative Transaction Information - Use of agents</b></p> <p>A Reporting Entity may appoint one or more persons to report on its behalf information under subrule 2.2.1(1) or any change to that information under subrule 2.2.2(1).</p> <p>Note: For example, the Reporting Entity may appoint a counterparty of the Reporting Entity, central counterparty, trading platform, service provider, broker or any other third party.</p>	<p><b>Equivalent</b></p>
<p><i>No duplication.</i> Counterparties and CCPs must ensure that the details of their derivative contracts are reported without duplication.<sup>1</sup></p>		<p><b>Broadly Equivalent</b>, since there is no explicit reference to no duplication. However it is expected that TR rules will</p>



		ensure that counterparties do not submit reports in a duplicate manner. Therefore on balance, this gap does not undermine the consistency of objectives between the Australian and the EU regimes
<p>The performance of the Reporting Obligation (whether directly by a counterparty or a CCP or through an entity acting on its behalf) shall not be considered in breach of any restriction on disclosure of information imposed by that contract or by any legislative, regulatory or administrative provision and no liability resulting from such disclosure shall lie with the reporting entity or its directors or employees.<sup>li</sup></p>	<p><b>Corporations Act s907C</b></p> <p><b>Compliance with requirements to provide derivative trade data or other information: protection from liability</b></p> <p>If:</p> <ul style="list-style-type: none"> <li>(a) a person (the protected person): <ul style="list-style-type: none"> <li>(i) provides derivative trade data, or other information, to another person; or</li> <li>(ii) otherwise allows another person access to derivative trade data, or other information; and</li> </ul> </li> <li>(b) the protected person does so, in good faith, in compliance with a requirement imposed by or under: <ul style="list-style-type: none"> <li>(i) a provision of this Part, or of regulations made for the purpose of a provision of this Part; or</li> <li>(ii) a provision of the derivative transaction rules or the derivative trade repository rules;</li> </ul> </li> </ul> <p>the protected person is not liable to an action or other proceeding, whether civil or criminal, for or in relation to that conduct.</p>	<p><b>Equivalent</b></p>
<p>Registration with ESMA (EMIR Art 56 and RTS/ITS Art 56)</p>	<p>Corporations Act 2001 – s902A</p> <p>“ASIC to supervise licensed derivative trade repositories</p> <p>(1) ASIC has the function of supervising licensed derivative trade repositories.</p> <p>(2) If a licensed derivative trade repository is wholly or partly operated in a foreign country, ASIC may, to such extent as ASIC</p>	<p><b>Equivalent</b></p>



	<p>considers appropriate, perform the function of supervising the repository by satisfying itself:</p> <p>(a) that the regulatory regime that applies in relation to the repository in that country provides for adequate supervision of the repository; or</p> <p>(b) that adequate cooperative arrangements are in place with an appropriate authority of that country to ensure that the repository will be adequately supervised by that authority.”</p>	
<p><i>Disclosure</i> to the public and to relevant authorities Third countries authorities need to conclude an international agreement with the EU and a cooperation arrangement with ESMA.  (EMIR Art 81 and RTS art 81)</p>	<p><b>Corporations Act s904B Obligation relation to derivative trade data</b></p> <p>“(2) Any of the following persons or bodies may request a derivative trade repository licensee to provide the person or body with derivative trade data that is retained in the derivative trade repository:</p> <p>...</p> <p>(d) a person or body prescribed by the regulations for the purpose of this paragraph;</p> <p>...</p> <p>(3) Regulations must not be made prescribing a person or body for the purpose of paragraph (2)(d) unless the Minister is satisfied that there are adequate controls on the use or disclosure of any derivative trade data provided to the person or body pursuant to requests under subsection (2).”</p> <p><b>Trade Repository Rule 2.3.4 Provision of access to Derivative Trade Data Requests to provide data to Australian and Prescribed Foreign Regulators</b></p>	<p><b>Equivalent</b></p>





	<p>“(8) For the purposes of subparagraph 904B(5)(b)(ii) of the Act, an Operator that receives a request from a Prescribed Foreign Regulator under subsection 904B(2) of the Act for Derivative Trade Data retained in the Trade Repository, is excused from complying with the request unless:</p> <ul style="list-style-type: none"> <li>(a) the request is for: <ul style="list-style-type: none"> <li>(i) Derivative Trade Data reported by Participants in accordance with the Reporting Requirements; or</li> <li>(ii) information (including statistical data) that is created or derived from the Derivative Trade Data referred to in subparagraph (i);</li> </ul> </li> <li>(b) the Derivative Trade Data is required by the Prescribed Foreign Regulator in the performance of its functions or exercise of its powers; and</li> <li>(c) the request is made subject to and in accordance with internationally accepted regulatory access standards applicable to Derivative Trade Repositories.”</li> </ul> <p>Note: Under this Rule, an Operator may be required to provide the Prescribed Foreign Regulator with aggregate-level data, position-level data or transaction-level data (including the identity of counterparties), depending on the Prescribed Foreign Regulator’s regulatory mandate.</p>	
<p>A trade repository must regularly, and in an easily accessible way, publish aggregate positions by class of derivatives on the contracts reported to it.<sup>lii</sup></p> <p><i>Scope of disclosure.</i><sup>liii</sup> The data, which may not allow the identification of any party to any contract,<sup>liv</sup> must include at least:</p> <ul style="list-style-type: none"> <li>(a) a breakdown of the aggregate open positions for each of the following classes of derivatives: commodities; credit; foreign exchange; equity;</li> </ul>	<p><b>Trade Repository Rule 2.3.5</b></p> <p><b>Obligation to create and disclose weekly statistical data</b></p> <p>“(1) An Operator must create and disclose in accordance with this Rule statistical data on Derivative Trade Data (in this Rule, Relevant Derivative Trade Data) that is retained in the Trade Repository and that was reported to the Trade Repository by Participants in accordance with the ASIC Derivative Transaction Rules (Reporting) 2013.</p> <p>(2) For the purposes of subrule (1), an Operator must, for each 7-calendar day period (in this Rule, Relevant Period) commencing</p>	<p><b>Equivalent</b></p>



<p>interest rate; or other;</p> <p>(b) a breakdown of aggregate transaction volumes for each of the classes of derivatives mentioned in (a) above;</p> <p>(c) a breakdown of aggregate values for each of the classes of assets mentioned in (a) above.</p> <p><i>Means of disclosure.<sup>lv</sup></i> The data must be published on a website or an online portal which is easily accessible by the public.</p> <p><i>Frequency of disclosure.<sup>lvi</sup></i> The data must be published and updated at least weekly.</p>	<p>from the day the Operator first accepts a report of Relevant Derivative Trade Data, create the following statistical data from the Relevant Derivative Trade Data:</p> <p>(a) all aggregate open positions as at the end of the last day in the Relevant Period for which the statistical data is created; and</p> <p>(b) volumes by number and by value of Derivative Transactions reported during the Relevant Period.</p> <p>(3) The statistical data created in accordance with subrule (2) must include breakdowns by the following categories (if applicable):</p> <p>(a) the asset class, currency of the notional amount, type and maturity of the Derivatives to which the statistical data relates;</p> <p>(b) the geographic location of the reference asset, rate, index, commodity or other thing underlying the Derivatives to which the statistical data relates; and</p> <p>(c) whether the Derivatives to which the statistical data relates are cleared or uncleared.</p> <p>(4) Subject to subrule (6), an Operator must disclose the statistical data required under subrules (1)–(3) in relation to a Relevant Period, from a day that is between 3–5 business days after the day on which the Relevant Period ends.</p> <p>(5) An Operator must disclose the statistical data required under subrules (1)–(3) by making the statistical data available at no charge and through a publicly accessible website.</p> <p>(6) The statistical data published under this Rule must not include Derivative Trade Data capable of identifying a counterparty to a Derivative Transaction.”</p>	
<p>A trade repository must collect and maintain data and must ensure that certain authorities have direct and immediate access to the details of derivatives contracts they need to fulfil their</p>	<p><b>Corporations Act s904B</b>  <b>Obligation relation to derivative trade data</b></p> <p>“(2) Any of the following persons or bodies may request a derivative</p>	<p><b>Equivalent</b></p>



<p>respective responsibilities and mandates.<sup>lvi</sup></p> <p><i>Scope</i><sup>lviii</sup></p> <p>(i) Available data includes all transaction data allowing ESMA to fulfil its supervisory competences,<sup>lix</sup> including transaction level data (a) for all counterparties within its jurisdiction, and (b) for derivative contracts where the reference entity of the derivative contract is located within its jurisdiction or where the reference obligation is sovereign debt of its jurisdiction.<sup>lx</sup></p> <p>(ii) ESMA must enact internal procedures in order to ensure appropriate staff access and any relevant limitations of access as regards non-supervisory activities under ESMA’s mandate.<sup>lxi</sup></p> <p>(iii) ESMA must share the information necessary for the exercise of their duties with other relevant authorities of the Union.<sup>lxii</sup></p>	<p>trade repository licensee to provide the person or body with derivative trade data that is retained in the derivative trade repository:</p> <ul style="list-style-type: none"> <li>(a) ASIC;</li> <li>(b) APRA;</li> <li>(c) the Reserve Bank of Australia;</li> <li>(d) a person or body prescribed by the regulations for the purpose of this paragraph;</li> </ul> <p>...”</p> <p><b>Trade Repository Rule 2.3.4</b></p> <p><b>Provision of access to Australian Regulators</b></p> <p>“(5) An Operator must provide to each Australian Regulator, if requested by that Australian Regulator and at no charge, continuous, direct and immediate electronic access to the following information retained in the Trade Repository:</p> <ul style="list-style-type: none"> <li>(a) all Derivative Trade Data reported by Participants in accordance with the Reporting Requirements; and</li> <li>(b) all information (including statistical data) that is created or derived from Derivative Trade Data referred to in paragraph (a).”</li> </ul> <p>Note 1: Direct access may be provided through an electronic system, platform or framework that provides secure internet or web-based access to Derivative Trade Data, or by way of a direct real-time feed of Derivative Trade Data.</p> <p>Note 2: Under this Rule, an Operator may be required to provide access to aggregate-level data, position-level data and transaction-level data (including the identity of counterparties).</p>	
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**Requests to provide data to Australian Regulators and Prescribed Foreign Regulators**

“(6) For the purposes of subparagraph 904B(5)(b)(ii) of the Act, an Operator that receives a request from an Australian Regulator under subsection 904B(2) of the Act for Derivative Trade Data retained in the Trade Repository, including a request for information referred to in subrule (5), is excused from complying with the request unless the request is for Derivative Trade Data that is required by the Australian Regulator in connection with the performance of its functions or exercise of its powers.

(7) An Operator that receives a request from an Australian Regulator under subsection 904B(2) of the Act for Derivative Trade Data retained in the Trade Repository, including a request for Derivative Trade Data referred to in subrule (5), must comply with any reasonable requirement specified in the request to provide the Derivative Trade Data:

- (a) on an ad hoc or periodic basis, or each time a particular circumstance or event occurs;
- (b) by a specified time; and/or
- (c) in a specified format.”

**Information taken to be given to ASIC in confidence**

“(10) For subsection 903A(5) of the Act, information given to ASIC by an Operator (or an Officer of an Operator), under a provision of:

- (a) Part 7.5A of the Act;
- (b) regulations made for the purpose of Part 7.5A of the Act; or
- (c) these Rules or the *ASIC Derivative Transaction Rules (Reporting) 2013*,

is to be taken, for the purpose of section 127 (confidentiality) of the Australian Securities and Investments Commission Act 2001, to be given to ASIC in confidence in connection with the performance of



	<p>ASIC’s functions under the Act, unless the information has been made publicly available in accordance with the provisions referred to in paragraphs (a)–(c) or as otherwise required or permitted by law.</p> <p>(11) An Operator must not disclose that:</p> <p>(a) a request for particular Derivative Trade Data was made under subsection 904B(2) of the Act, or that particular Derivative Trade Data was provided in compliance with such a request;</p> <p>(b) access to particular Derivative Trade Data was provided in accordance with subrule (5), other than for the purposes of seeking legal advice or as required by law.”</p>	
<p><i>The ESRB.</i> Available data includes transaction level data (a) for all counterparties within its jurisdiction, and (b) for derivative contracts where the reference entity of the derivative contract is located within its jurisdiction or where the reference obligation is sovereign debt of its jurisdiction.<sup>lxiii</sup></p> <p><i>The competent authority supervising CCPs accessing trade repositories.</i> Available data includes all the transaction data cleared or reported by the CCP.<sup>lxiv</sup></p> <p><i>The competent authority supervising trading venues of the reported contracts.</i> Available data includes all the transaction data on contracts executed on those venues.<sup>lxv</sup></p> <p><i>The relevant members of the ESCB.</i></p> <p>(i) Available data includes all the transaction data cleared or reported by the relevant CCP overseen by that member of the ESCB.<sup>lxvi</sup></p>	<p><i>As noted in "Disclosure to the public and to relevant authorities" (above), a TR is required to provide data on request to any other person (including a foreign regulator) as long as the foreign person is prescribed by the Minister by regulation, subject to the rule noted below:</i></p> <p><b>Trade Repository Rule 2.3.4</b></p> <p><b>Provision of access to Derivative Trade Data</b></p> <p><b>Requests to provide data to Australian and Prescribed Foreign Regulators</b></p> <p>“(8) For the purposes of subparagraph 904B(5)(b)(ii) of the Act, an Operator that receives a request from a Prescribed Foreign Regulator under subsection 904B(2) of the Act for Derivative Trade Data retained in the Trade Repository, is excused from complying with the request unless:</p> <p>(a) the request is for:</p> <p>(i) Derivative Trade Data reported by Participants in accordance with the Reporting Requirements; or</p>	<p><b>Broadly Equivalent</b>, since there is no explicit specification of entities or access levels, but the request must be made subject to, and in accordance with “internationally accepted regulatory access standards applicable to Derivative Trade Repositories”. Given that international standards are consistent with the EU regime on data access, the different approach between EU and Australian in determining access level does not undermine the consistency of objectives between the Australian and the EU regimes.</p>



(ii) Available data also includes transaction level data (a) for all counterparties within its jurisdiction, and (b) for derivative contracts where the reference entity of the derivative contract is located within its jurisdiction or where the reference obligation is sovereign debt of its jurisdiction.<sup>lxvii</sup>

(iii) Available data includes all position data for derivative contracts in the currency issued by that member.<sup>lxviii</sup>

The relevant authorities of a third country that have entered into an international agreement with the Union regarding mutual access to, and exchange of, information on derivative contracts held in trade repositories established in a third country.<sup>lxix</sup> Available data will be determined taking into account the relevant authority's mandate and responsibilities.<sup>lxx</sup>

Where a third country has no trade repository, the requirement for an international agreement is waived.

- *The supervisory authorities appointed pursuant to the EU Directive on takeover bids.*<sup>lxxi</sup>

(a) Available data includes all the transaction data on derivatives where the underlying asset is a security issued by a company which meets one of the following conditions:

(i) it is admitted to trading on a regulated market within their jurisdiction;

(ii) information (including statistical data) that is created or derived from the Derivative Trade Data referred to in subparagraph (i);

(b) the Derivative Trade Data is required by the Prescribed Foreign Regulator in the performance of its functions or exercise of its powers; and

(c) the request is made subject to and in accordance with internationally accepted regulatory access standards applicable to Derivative Trade Repositories.”

Note: Under this Rule, an Operator may be required to provide the Prescribed Foreign Regulator with aggregate-level data, position-level data or transaction-level data (including the identity of counterparties), depending on the Prescribed Foreign Regulator's regulatory mandate.



(ii) it has its registered office or, where it has no registered office, its head office, in their jurisdiction; or

(iii) it is an offeror for a company within (i) or (ii) and the consideration offered by the offeror includes securities.

(b) Available data includes information on:

(i) the underlying securities;

(ii) the derivative class;

(iii) the sign of the position;

(iv) the number of reference securities;

(v) the counterparties to the derivatives.<sup>lxxii</sup>

- *The relevant securities and market authorities of the Union.* Available data includes all transaction data on markets, participants, contracts and underlying assets that fall within the scope of that authority according to its supervisory responsibilities and mandates.<sup>lxxiii</sup>
- *The relevant authorities of a third country that have entered into a cooperation agreement with ESMA in relation to trade repositories.*<sup>lxxiv</sup> Available data will be determined taking into account the relevant authority's mandate and responsibilities.<sup>lxxv</sup>
- *The Agency for the Cooperation of Energy Regulators.* Available data includes all transaction regarding derivatives where the underlying asset is energy.<sup>lxxvi</sup>

*For all of the aforementioned entities. For the*



purposes of prudential supervision of counterparties subject to the Reporting Obligation,<sup>lxxvii</sup> available data includes all transaction data of such counterparties.<sup>lxxviii</sup>

A TR must provide access to data to the authorities mentioned above, in accordance with the relevant international communication procedures and standards for messaging and reference data.

The counterparties to a trade must generate a unique trade identifier for each derivative contract to enable trade repositories to aggregate and compare data across different trade repositories.





<sup>1</sup> *Corporations Act 2001, s901A(1), s901B(2)*

<sup>2</sup> *Ibid.*

<sup>3</sup> OTC Derivatives RTS, Art. 12(3).

<sup>iv</sup> Under EMIR, Art. 2(29), “senior management” includes the person or persons who effectively direct the business of the trade repository, and the exclusive member or members of the board.

<sup>v</sup> Under EMIR, Art. 2(27), “board” means administrative or supervisory board, or both, in accordance with national company law.

<sup>vi</sup> EMIR, Art. 78(1).

<sup>vii</sup> EMIR, Art. 78(2).

<sup>viii</sup> Under EMIR, Art. 2(24), “close links” means a situation in which two or more natural or legal persons are linked by:

(a) participation, by way of direct ownership or control (as defined below), of 20% or more of the voting rights or capital of an undertaking; or

(b) control or a similar relationship between any natural or legal person and an undertaking or a subsidiary (as defined below) of a subsidiary also being considered a subsidiary of the parent undertaking (as defined below) which is at the head of those undertakings.

A situation in which two or more natural or legal persons are permanently linked to one and the same person by a control relationship may also be regarded as constituting a close link between such persons.

Under EMIR, Art. 2(23), “control” means the relationship between a parent undertaking and a subsidiary, as described in Article 1 of Directive 83/349/EEC.

Under EMIR, Art. 2(21), a “parent undertaking” means a parent undertaking, as described in Articles 1 and 2 of Directive 83/349/EEC.

Under EMIR, Art. 2(22), a “subsidiary” means a subsidiary undertaking, as described in Articles 1 and 2 of Directive 83/349/EEC, including a subsidiary of a subsidiary undertaking of an ultimate parent undertaking.

<sup>ix</sup> EMIR, Art. 55.

<sup>x</sup> EMIR, Art. 78(3).

<sup>xi</sup> EMIR, Art. 78(7).

<sup>xii</sup> EMIR, Art. 78(8).

<sup>xiii</sup> EMIR, Art. 78(7).

<sup>xiv</sup> EMIR, Art. 78(8).

<sup>xv</sup> Including trade confirmation, trade matching, credit event servicing, portfolio reconciliation or portfolio compression services.

<sup>xvi</sup> EMIR, Art. 78(5).

<sup>xvii</sup> EMIR, Art. 78(4).

<sup>xviii</sup> EMIR, Art. 79(1).

<sup>xix</sup> EMIR, Art. 79(2).

<sup>xx</sup> EMIR, Art. 79(3).

<sup>xxi</sup> EMIR, Art. 80(3).

<sup>xxii</sup> EMIR, Art. 80(4).

<sup>xxiii</sup> See Section I.B. entitled “Reporting Obligation (EMIR, Art. 9)” above.

<sup>xxiv</sup> EMIR, Art. 80(3).

<sup>xxv</sup> EMIR, Art. 80(5).

<sup>xxvi</sup> EMIR, Art. 80(3).

<sup>xxvii</sup> EMIR, Art. 80(2).

<sup>xxviii</sup> EMIR, Art. 80(6).

<sup>xxix</sup> See above.

<sup>xxx</sup> See above.

<sup>xxxi</sup> See above.

<sup>xxxii</sup> EMIR, Art. 80(6).

<sup>xxxiii</sup> Reporting Obligation RTS, Art. 3.

<sup>xxxiv</sup> EMIR, Art. 9(5)(a) and Reporting Obligation RTS, Art. 1(1)(a).

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- xxxv See Table 1 in the Annex to the Reporting Obligation RTS.
- xxxvi Reporting Obligation RTS, Art. 2(2).
- xxxvii EMIR, Art. 9(5)(b) and Reporting Obligation RTS, Art. 1(1)(b).
- xxxviii See Table 2 in the Annex to the Reporting Obligation RTS.
- xxxix Reporting Obligation RTS, Art. 1(6).
- xl Reporting Obligation RTS, Art. 2(1).
- xli Reporting Obligation ITS, Art. 1 and Tables 1 and 2 in the Annex to the Reporting Obligation RTS.
- xlii Under EMIR, Art. 55.
- xliii In accordance with EMIR, Art. 9(3).
- xliv In accordance with EMIR, Art. 9(3).
- xlv EMIR, Art. 9(1).
- xlvi As prescribed under Reporting Obligation RTS, Art. 3.
- xlvii EMIR, Art. 9(2).
- xlviii Reporting Obligation RTS, Art. 1(3) and (4). Under the Reporting Obligation RTS, Art. 1(5), where one counterparty reports the details of a contract to a trade repository on behalf of the other counterparty, the details reported must include the full set of details that would have been reported had the contracts been reported to the trade repository by each counterparty separately.
- xliv EMIR, Art. 9(1). Under the Reporting Obligation RTS, Art. 1(5), where a third entity reports a contract to a trade repository on behalf of one or both counterparties, the details reported must include the full set of details that would have been reported had the contracts been reported to the trade repository by each counterparty separately.
- <sup>1</sup> EMIR, Art. 9(1).
- li EMIR, Art. 9(4).
- lii EMIR, Art. 81(1).
- liii TRs Transparency Obligation RTS, Art. 1(1).
- liv EMIR, Art. 81(5).
- lv TRs Transparency Obligation RTS, Art. 1(2).
- lvi TRs Transparency Obligation RTS, Art. 1(2).
- lvii EMIR, Art. 81(2).
- lviii As listed in EMIR, Art. 81(3).
- lix TRs Transparency Obligation RTS, Art. 2(1).
- lx TRs Transparency Obligation RTS, Art. 2(9).
- lxi TRs Transparency Obligation RTS, Art. 2(2).
- lxii EMIR, Art. 81(4).
- lxiii TRs Transparency Obligation RTS, Art. 2(9).
- lxiv TRs Transparency Obligation RTS, Art. 2(4).
- lxv TRs Transparency Obligation RTS, Art. 2(5).
- lxvi TRs Transparency Obligation RTS, Art. 2(4).
- lxvii TRs Transparency Obligation RTS, Art. 2(9).
- lxviii TRs Transparency Obligation RTS, Art. 2(10).
- lxix In accordance with EMIR, Art. 75.
- lxx TRs Transparency Obligation RTS, Art. 3(1).
- lxxi Under Article 4 of Directive 2004/25/EC of the European Parliament and of the Council of April 21, 2004.
- lxxii TRs Transparency Obligation RTS, Art. 2(6) and (7).
- lxxiii TRs Transparency Obligation RTS, Art. 2(8).
- lxxiv In accordance with EMIR, Art. 76.
- lxxv TRs Transparency Obligation RTS, Art. 3(2).



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<sup>lxxvi</sup> TRs Transparency Obligation RTS, Art. 2(3).

<sup>lxxvii</sup> See Section I.B. entitled “Reporting Obligation (EMIR, Art. 9)” above.

<sup>lxxviii</sup> TRs Transparency Obligation RTS, Art. 2(11).