

Explanatory Note On the Proposed Division IV of the Securities (Margin Financing) (Amendment) Bill

Division 4 — Contracts with Unregistered Financier

121AD Agreements Made With Unregistered Persons

Under this clause, agreements concluded in the course of carrying on business in breach of section 121C will be unenforceable by the unregistered person against the customer. However, the customer can still recover any money paid or property transferred and compensation for any loss.

121AE Agreements made unenforceable by section 121AD

This clause provides that compensation payable under 121AD is the amount agreed between the parties or, on the application of either party, the amount determined by the court.

This clause gives a court discretion to allow the contract which would otherwise be unenforceable under clause 121AD to be enforced against the customer where it takes the view that it would be “just and equitable” to do so and certain other conditions are met.

The enforcement conditions are that it is just and equitable for the agreement to be enforced or (as the case may be) for the money or property paid or transferred under the agreement to be retained and that the provider reasonably believed that he was not contravening section 121C by making the agreement.

Clients Not To Get Windfall Benefits

If the purchaser -

- (a) elects not to perform the agreement, or
- (b) as a result of this section, recovers money paid or other property transferred by him under the agreement,

he must repay any money and return any other property received by him under the agreement.

Division 4 - Contracts with unregistered financiers

121AC. Application and interpretation

of this Division

(1) This Division applies to contracts entered into after the commencement of this Division by unregistered securities margin financiers with their clients in connection with the business of securities margin financing carried on by those financiers.

(2) A reference in this Division to an unregistered securities margin financier is a reference to a securities margin financier -

(a) who is not registered under Division 2; or

(b) whose registration under that Division is suspended, but does not include a reference to a person who does not contravene section 121C because of the operation of section 121BH(1) or 121BI.

121AD. Agreements made by unregistered

persons

(1) An agreement made by an unregistered securities margin financier (“the provider”) in the course of carrying on a business of securities margin financing in contravention of section 121C is unenforceable against the other party (“the purchaser”).

(2) The purchaser is entitled to recover -

- (a) any money or other property paid or transferred by him under the agreement; and
 - (b) compensation for any loss sustained by him as a result of having parted with it.
- (3) “Agreement” means an agreement -
- (a) made after this section comes into force; and
 - (b) the making or performance of which constitutes, or is part of, the business activity of securities margin financing.

121AE. Agreements made unenforceable by

section 121AD

- (1) This section applies to an agreement which is unenforceable because of section 121AD.
- (2) The amount of compensation recoverable as a result of that section is -
- (a) the amount agreed by the parties; or
 - (b) on the application of either party, the amount determined by the court.
- (3) If the court is satisfied that the enforcement conditions are met, it may allow -
- (a) the agreement to be enforced; or
 - (b) money and property paid or transferred under the agreement to be retained.
- (4) The enforcement conditions are that it is just and equitable for the agreement to be enforced or (as the case may be) for the money or property paid or transferred under the agreement

to be retained and that the provider reasonably believed that he was not contravening section 121C by making the agreement.

(5) If the purchaser -

- (a) elects not to perform the agreement, or
- (b) as a result of this section, recovers money paid or other property transferred by him under the agreement,

he must repay any money and return any other property received by him under the agreement.

(6) If property transferred under the agreement has passed to a third party, a reference in section 121AD or this section to that property is to be read as a reference to its value at the time of its transfer under the agreement.