Enhanced Protection of Client Money - Annexure

Contents

1. There should be just *one* Australian client money regime

CLERP 6 called for harmonisation of regulation to achieve efficiency and consistency.

Fifteen years after the CLERP 6 reforms were first implemented, there is still significant opportunity for harmonisation of regulation. This is because there is not merely a single Australian client money regime. Participants in each licensed Australian market are subject to client money requirements imposed by ASIC market integrity rules (MIRs), in addition to Corporations Act client money requirements. Aspects of the different regimes do not fit well together.

The problems of parallel and unharmonised client money regimes are particularly difficult for participants who provide their clients with simultaneous access to more than one market, which is not uncommon. Some specific examples of the problems caused by “mini MIR” client money regimes include (focusing on ASX24 MIRs):

(a) Related bodies corporate

Rule 2.2.6(l) of the ASX24 MIRs states effectively that funds belonging to related bodies corporate (RBCs) do not constitute client money. The Corporations Act, however, provides that the money of RBCs is client money (provided the relevant criteria in the Corporations Act are satisfied). The ASX24 MIRs prevail over the Corporations Act. This conflict should be resolved by removing the MIRs provision. Resolution of this problem is necessary because RBCs may be themselves acting on behalf of unrelated entities. RBCs are also separate entities, and can have different shareholders.

(b) Other clearing houses

The client money provisions of the ASX24 MIRs do not well accommodate a broker providing its client with futures clearing services in relation to exchanges other than ASX24.

An example is provided by subtle but important differences between the ‘top-up’ requirements in the ASX24 MIRs (clause 2.2.6(f)) and the ASX MIRs (see 3.5.7). There is not an obvious policy reason for a difference in approach. Further confusion is caused by the Corporations Act itself not permitting top-ups at all (a provision which ASIC has only recently started strictly enforcing). A broker who provides clearing services to a client across multiple markets (e.g. ASX and ASX24, but also foreign ones such as LME or ICE), when faced with a client margin default, will have to somehow reconcile all of these differences.

As another example, an interpretation of clause 2.2.6(b) of the ASX24 MIRs is that a futures broker is prohibited from operating a single account in relation to moneys of clients across futures markets beyond ASX24 (because of the way the definition of "client" and associated defined terms tie into the ASX 24 market). This presents real challenges, as clients often provide margin amounts to futures brokers to cover amounts owed under multiple markets/CCPs, and they do not state what amounts correspond to what markets/CCPs. There is no reason why the client money account should be ASX24-specific in this way.

(c) "Regulated population" problems

Market integrity rules for ASX24 create obligations in relation to the handling of client money for ASX24 trading. The entities that are subject to market integrity rules are market participants, not clearing participants. Clearing participants handle client money, market participants (in that capacity) do not. The result is that an entity that is solely a clearing participant on ASX24 is not expressed to be caught by the MIRs at all.

Client money provisions in MIRs that are: (i) not already contained in the Corporations Act regime; and (ii) necessary to deal with some unique aspect of the financial products traded on such market (if indeed there are any such provisions), should be made to apply to all the entities who handle such client money.

Further, it should be considered whether client money provisions in MIRs are mere historical legacies or whether client money provisions outside the Corporations Act serve any regulatory purpose at all. If it is accepted that the Corporations Act client money provisions should cover the field, client money provisions in MIRs should be repealed.

2. Problems in insolvency

Insolvencies of licensees who hold client money have highlighted a number of aspects of Australian client money regulation where there is room for improvement, in a way which would provide considerable benefit to clients. These have been highlighted in cases like the MF Global case.[1]

Problems with the way the regime operates on a licensee's insolvency invariably result in there being a lengthy period of time between the commencement of insolvency and the date on which the clients of the licensee are paid their entitlements from the client money pool. This is attributable to the need for the licensee's liquidator to apply to a court for directions about elements of the resolution of the pool.

Clients of a failed licensee are put through significant hardship, in terms of financial losses, risk exposure, administration and inconvenience. Being separated from its assets for a period can increase the risk of a client itself failing. Given all this, anything that could be done to improve the operation of the client money regime, particularly on licensee insolvency, and in doing so reduce the period of time it takes for clients to recover their entitlements, would be welcome. Speed of recovery was a focus of the UK's Financial Conduct Authority in its noteworthy 2013 consultation paper on changes to the UK's client assets regime.[2] In Australia we ought to similarly give some consideration to ways in which recovery periods can be lessened. We understand Treasury will be receiving other and more detailed submissions on problems with the client money regime that are routinely encountered in insolvency. Our view is that it is critical that reform in response is considered.

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[1] *In re MF Global Australia Ltd (in liq)* [2012] NSWSC 994 (29 August 2012), Paragraph 161

[2] https://www.fca.org.uk/static/documents/consultation-papers/cp13-05.pdf

3. Cross-border operations impeded

The Murray FSI report urged that impediments to cross-border competition and other barriers to the free flow of capital across borders be removed.[3] There is opportunity to reform Australia's client money regime to remove impediments to cross-border activity.

Australia's client money regime does not perform well in relation to cross-border activity. The extent of the international reach of the Corporations Act regime is not clear in relation to activities conducted by Australian licensees through offshore branches, and in relation to activities of foreign licensees when dealing with Australian clients. On its face, the provisions apply to any money received by a licensee from a client anywhere in the world. Regulatory agencies accept that wholly offshore activity should not be caught (e.g. money received by the London branch of a licensee from a UK client). However, without the benefit of a clear statement as to where a necessary nexus line is to be drawn, the location of the line in specific situations is unclear.

Even where the regime *does* clearly apply to cross-border activity of a licensee, it often interacts poorly with foreign requirements that licensees are subject to. For example, a bank operating in the UK and Australia needs to comply with both UK and Australian client money rules for such clients. Most banks have found this problematic. What is missing is a regulatory mechanism which allows a licensee that operates across borders to achieve compliance through substituted compliance with the offshore client money requirements, at least in the case of institutional/wholesale clients. We would contend this is the type of issue the Murray FSI interim report had in mind.[4]

While licensees are not able to avoid such conflicts, there are a set of exemptions which permit offshore providers of services in relation to derivatives to operate in Australia with wholesale or institutional clients, ***without any licensee obligations at all*** (e.g. FFSP Class Orders[5], Regulation 7.6.02AG exemptions). As the Australian client money rules apply only to licensees, offshore providers relying on exemptions need only comply with offshore client money rules.

The problems that licensees face are caused by conflicting requirements in relation to cross-border activity has contributed to international participants exiting markets such as futures broking in Australia. The inconsistency in policy is driving more activity with Australian clients and counterparties into institutions which are unlicensed. We would argue this is not in the interests of Australian financial markets. It also pushes such activity into lesser capitalised institutions, and is a barrier to banks operating on a cross border basis.

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[3] See Box 4 (*International Competitiveness*) page 20 of the final report.
http://fsi.gov.au/files/2014/12/FSI_Final_Report_Consolidated20141210.pdf

[4] See "Regulatory recognition arrangements" page 4-94
http://fsi.gov.au/files/2014/07/FSI_Report_Final_Reduced20140715.pdf.

[5] See RG 176

http://download.asic.gov.au/media/1240973/rg176-published-29-june-2012.pdf?_ga=1.184707119.784713669.1433358203

4. Practical problems

(a) Does subsection 981E(2) prohibit automatic bank fees debiting?

Bank account terms of agreement frequently permit the account bank to set-off amounts it is owed by way of bank fees against the balance of the bank account. This is something that a client may agree to. However, section 981E(2), and particularly its reference to "set off", has caused confusion as to whether or not this is permitted, and practical problems among participants. It would be beneficial to have the position clarified.

(b) Moving money between accounts

For many types of financial products it is necessary for a licensee to maintain more than a single client account. This could be because the products pertain to more than a single currency, or because it benefits the client to have some diversification of banker risk. The question then arises as to whether or not each account has to be viewed on a standalone basis for the purposes of compliance with the client money regime, or whether accounts with the same beneficiaries can be pooled, for the purposes of day-to-day dealings with the accounts. The former view would be administratively inoperable for businesses like futures and would not serve clients well. It is also potentially anti-competitive, as it creates an impediment to a licensee moving its client money accounts from one ADI to another. However, the Corporations Act regime is not as clear as it could be in relation to multiple accounts. Insolvency officials and courts have faced this problem, and have had to work around it by making orders for pooling of accounts.

(c) *Samuel's* case

The consequences of *Samuel's* case[6] are difficult to deal with, and not well appreciated by licensees. The case needs to be considered by Government and possibly dealt with by reform.

By way of background, Samuel Holdings Pty Ltd (Samuel) applied to Opes Prime Stockbroking (Opes) to open a margin lending account. Samuel engaged Wilson HTM Investment Group (Wilson) as stockbroker to acquire shares in Arrow Energy. Samuel transferred 40% of the purchase price ($74,600) to Opes. This was to be "collateral" for the loan (leaving aside some complications here around the intended collateral arrangements). Opes was to lend 100% of the purchase price to Samuel, who was to provide it to Wilson, who was to use it to purchase shares for Samuel. Opes became insolvent, at a point that only the collateral sum had been paid by Samuel to Opes. Samuel claimed repayment from the National Guarantee Fund (NGF), which is set up under the Corporations Act to compensate people who suffer losses as a result of dealing on a financial market with a dealer who becomes insolvent. The NGF administrator claimed that the money was not client money and there was not a statutory trust under section 981H of the Corporations Act.

The Queensland Court of Appeal determined that this was indeed client money, in the hands of Opes. While Opes was not holding the collateral money "in

[6] *Securities Exchange Guarantee Corporation Ltd v Samuel Holdings Pty Ltd* [2001) 253 FLR 221

connection with" a financial service that Opes provided, Opes *was* holding it "in connection with" a financial service, being the stockbroking service provided by Wilson.

This case highlights a number of concerning points:

- ***The difficulty of determining what is client money***. Financial institutions receive payments almost continuously. It is impossible to make an assessment in relation to each sum, on receipt, as to whether or not it is connected to a financial product that is being provided by another AFSL holder, and if it is, treat it as client money. This problem arises because of the extremely wide interpretation of 'in connection with'.
- ***No available conservative option***. With some regulatory obligations that lack clarity, it is pragmatic to take a conservative approach and be assured of compliance. With client money, there is no safe house. A licensee must, on or very shortly after receipt, make a correct determination as to whether or not a sum is client money. If the licensee wrongly determines an amount is <u>not</u> client money, the licensee will have failed to protect the client's money. If the licensee wrongly determines that an amount <u>is</u> client money, the licensee will have potentially co-mingled house and client money.
- ***Lack of industry awareness***. This case is one that is not well known, and whose consequences are no doubt not fully grasped. Also, this is a Queensland case, and we do not have clarity as to how it might be applied in other jurisdictions.
- ***The need for law reform***. There is a need for *Samuel's* case to be either approved or rejected legislatively. If approved, the extent of the reach of client money rules to money in third party hands should be clarified with practical guidance.

(d) 'In connection with'

The use of words 'in connection with' in section 981A has the potential to cast the client money net very wide. This was demonstrated by *Samuel's* case.

It is worth noting that the width of 'in connection with' has many other implications. We provide here another example. We apologise for this being a slightly esoteric, but it highlights the difficulties licensees face in dealing with client money provisions on a daily basis.

- A licensee provides an investment loan to a client, which is not a margin lending facility.
- The loan is provided to purchase financial products.
- The financial products secure the loan.
- Distributions and / or realisation proceeds of the underlying financial products are to be applied to repay the loan.

In this situation, the loan itself is excluded from the client money regime because it is not a financial product (see section 765A(1)(h)(i)).

However, distributions and realisation proceeds can be said to be received "in connection with" a financial product, being the financial products that the loan funds purchase. Distribution and/or realisation proceeds applied to repay the loan would be exempted from the application of section 981A by sub-section (2)(b)(i). However, any amounts received in excess of the loan balance (which are frequently received in connection with such products) will be required to be held in accordance with the client money regime.

If such excess funds were received by a lender that is *not a licensee* they would not be captured by 981A and would not receive client money protection.

Changes should be made to the client money regime to ensure that funds received by licensees and non-licensees are treated equally and given equivalent and consistent protection.

(e) Rectifying a licensee error

Nothing in the Corporations Act permits a licensee to top-up a client account if the balance of the account is less than it ought to be. For example, if the licensee makes an error and pays money from a client account that it should not have, there is not a clear legislative route for the money to be paid back into the account. This is clearly not the legislative intent, and the requirements should be amended to correct this.

(f) Licensee-to-licensee payments

The requirement under Corporations Regulation 7.8.02(1A), in relation to licensee-to-licensee payments, is very broad and onerous and can lead to anomalous results. There are many instances where amounts constituting client money may be paid to a licensee in circumstances where such amounts will not constitute client money in the hands of the receiving licensee. Examples include where:

(i) the recipient licensee is the client;

(ii) the recipient licensee is a bank with which the client holds its bank account; or

(iii) amounts fall within an exemption in section 981A(2), for example where the recipient licensee receives the money as remuneration payable to it.

In these circumstances the receiving licensee would not otherwise be required to pay the amounts into an account maintained under S981B, and yet the regulation requires that this is what must happen. There may also be many instances where the paying licensee is paying amounts under instruction from its clients in circumstances where it does not and cannot reasonably be expected to know that the recipient is a licensee or whether the recipient will be receiving amounts as client money. It can also be operationally challenging to require an automated payment system to generate payment notifications in respect of payments in certain circumstances but not all.

Such problems with regulation 7.8.02(1A) should be considered and rectified.

(g) Application to margin lending

Australia's client money regime predates, by a significant period, margin lending becoming a financial product. The client money regime does not work well in the context of credit, where repayments of a margin loan could constitute "client money", and such repayments flow through the client money account in certain circumstances, when such funds really belong to the licensee.

(h) Whether withdrawal-eligible amounts should be *non*-client money

Some or all of the permitted withdrawals from a client money account in Corporations Regulation 7.8.02(1) should in fact be replicated in section 981A(2), so that such funds are not client money at all and do not need to pass through a client money account before being paid out again. Reform on this point should be considered.

(i) Payments into a 981B account

Section 981B essentially requires that client money be paid into a client money account. While it would seem a reasonable interpretation, it could be made explicit that funds may pass through an interim account, provided that such funds are within a client money account by the end of the next business day, as required by section 981B.

5. Auditors' reporting obligations

Notifications in section 912D of the Corporations Act require a licensee to report breaches or likely breaches of financial services laws in circumstances where that breach or likely breach is significant.

Section 912D puts the onus on the licensee to determine the significance of the breach.

Section 990K of the Corporations Act requires a licensee's auditor to notify ASIC of, among other things, a breach of the client money provisions in Part 7.8. Unlike section 912D, however, there is no "significance" threshold, with the result that an auditor has the obligation to report all breaches, whether or not they believe they are significant and whether or not they compromise client protection.

Our view is that problems with reporting of insignificant breaches are compounded by client money law, as this submission points out, containing a number of flaws, presenting interpretation challenges for licensees, and different licensees taking different interpretations regarding provisions.

Auditors' breach reporting requirements for client money should adopt the same standard as section 912D. There is precedent for this in section 311 of the Corporations Act, where an auditor's effective obligation to report contraventions to ASIC is subject to a significance test. Taking this approach in section 990K would provide ASIC with comfort that an independent person (the auditor) has reviewed the entity's client money incidents and has formed its own view on their significance. Reporting of all breaches, irrespective of materiality, provides no commensurate benefit to client protection. Further, the reporting is costly to licensees and diverts ASIC's limited resources.

6. Application of the regime to custodial and depository services

There is not a clear industry consensus or regulatory guidance as to the application of the client money regime to amounts held under custody arrangements. Further guidance should be provided to ensure money held by custodians is treated correctly, and consistently, by all custodians.

7. An ADI exemption

Australia should consider following the lead of jurisdictions like the UK and Hong Kong, where banks are given the option of an exemption from client money rules. Such an exemption acknowledges that money held with an ADI has already achieved a very high level of client protection, and the level of security contemplated in paragraph 981B(1)(a)(i) of the Corporations Act.

An RBA quarterly bulletin article explains:

> *Depositors in authorised deposit-taking institutions (ADIs) in Australia benefit from a number of layers of protection designed to ensure that their funds are safe. At the broadest level, Australia has a strong system of prudential regulation and supervision which, together with sound management at individual institutions, has meant that problems in ADIs have been rare. In addition, depositors benefit from strong protections in the unlikely event that an ADI fails. They have a priority claim on the assets of a failed ADI ahead of other unsecured creditors, known as 'depositor preference'.*[7]

The benefits of such an exemption in the Australian regime should be evaluated.

[7] http://www.rba.gov.au/publications/bulletin/2011/dec/pdf/bu-1211-5.pdf

Schedule 1: The Government's proposed 981D reform

The main reform contemplated in the paper is the removal of a licensee's ability to rely on section 981D in relation to retail clients, and certain wholesale clients, other than where payment from the client money account was made "pursuant to the market integrity rules or the operating rules of a licensed market or the operating rules of a licensed CS facility".

We make the following comments on this proposal.

(a) Futures clearing exception flaw

Section 981D should facilitate existing practices in exchange-traded derivatives clearing (**ETD** - e.g. futures). Although there has been debate about the width of the section and its application in relation to over-the-counter (OTC) derivatives trading, our view is that the application of the section to ETD clearing, by way of contrast, has always been broadly accepted. There has been no consultation or discussion that we are aware of, prior to the appearance of this paper, of the need for the scope of 981D to be pared back in relation anything other than OTC derivatives.

However, the amendment as proposed by the Government would render s981D ineffective for retail ETD trading in all but very limited circumstances. These limited circumstances are where both:

(i) the licensee / broker who receives the client money is margining trades cleared on ASX or ASX24 markets; **<u>and</u>**

(ii) such licensee / broker is itself a clearing member of such clearing houses.

The diagram below represents the way in which ETD clearing on behalf of clients is typically structured. Such a structure varies little across different markets and jurisdictions. Two things worth highlighting regarding this diagram include:

(A) Clients often trade multiple ETD markets, and do not confine their trading to products cleared on Australian clearing houses. Our view is that the Government proposal to retain the use of 981D, effectively, only where client money is received in relation to Australian ETD trading, is too narrow.

(B) As can be seen from diagram, a feature of ETD markets is that it is common for clients to trade ETD contracts that are cleared by a clearing house that its broker is not itself a member of. Brokers do not maintain memberships on all the world's clearing houses. This is for mostly cost and regulatory reasons. Quite often, futures brokers that service retail clients have no clearing house memberships at all. For example, in Australia there are many brokers that offer ETD clearing services to retail clients. Of these, we understand there are very few brokers with an ASX24 clearing membership (and it may be only a single broker). Other brokers providing services to retail claims clear their clients' ASX24 ETD contracts in turn through other brokers, being brokers who provide clearing services to wholesale clients. Our view is that the Government proposal, in permitting only brokers with direct clearing house connections to utilise 981D, is too narrow. It will provide very little benefit to retail futures clearing.

Our view is that any amendment to 981D should still permit the section to fulfil its original and core objective. This is to permit the section's operation in relation to any ETD clearing. This could be done by retaining 981D in relation to client money of retail clients that is paid by the client as margin in relation to exchange traded derivatives[8] that the licensee clears on behalf of the client.

(b) Sophisticated investor

The Government proposal effectively turns "sophisticated investors" into retail investors for the purposes only of the new section 981D. We believe that creating a third category of Australian client creates an unnecessary complication and regulatory burden for licensees. The three categories would be:

(i) clients who are <u>retail</u> for the purposes of all Chapter 7 obligations (e.g. PDS issuance, 981D etc);

(ii) clients who are <u>wholesale</u> for such purposes;

(iii) clients who are <u>wholesale</u> for the majority of Chapter 7 obligations (e.g. PDS issuance etc), but who must be considered together with <u>retail</u> clients as far as any client money arrangements are concerned, because of the proposed change to 981D in relation to sophisticated investors.

The creation of a third category of client in the Australian regulatory regime would result in a significant additional administrative burden for licensees. Our view is that the case for this increased complexity is not made out in the Government paper. There is also not an explanation in the policy paper as to why this category of wholesale investor has been singled out for treatment as a retail client for the purposes of the proposed amendment.

If there are concerns about the line between wholesale and retail, this should be addressed elsewhere so that the changes (and benefits) can flow through the Corporations Act, rather than introducing another category. We note that problems created by introducing another category would add to those already

[8] AFMA has previously proposed a definition of "exchange traded derivatives" in connection with the ASIC OTC transaction reporting regime, where futures contracts have been inadvertently captured.

caused by the introduction of a concept of a "natural person" into the margin lending provisions.

(c) Reconciliation requirements

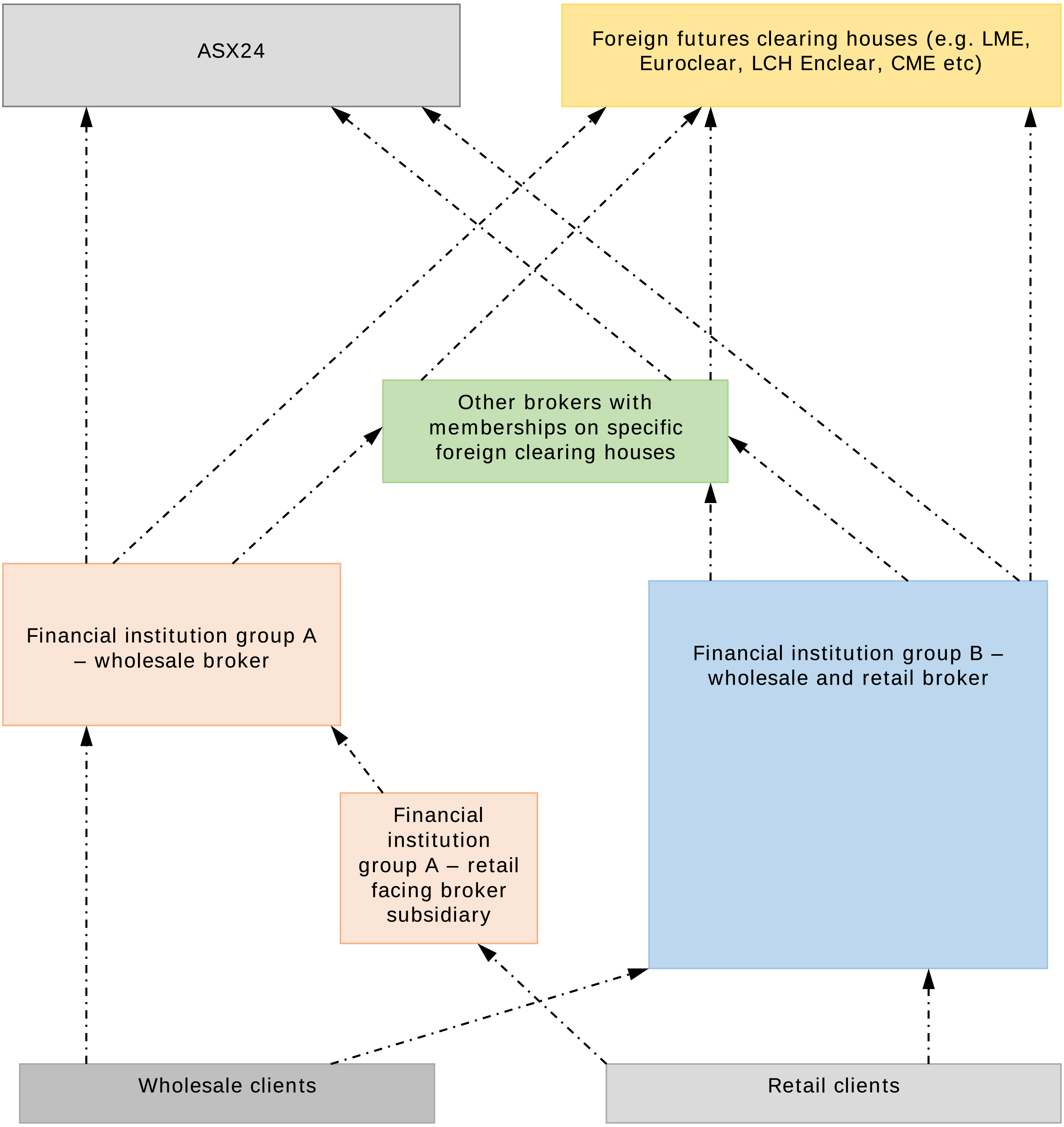
Currently participants on the ASX derivatives markets have client money reconciliation requirements pertaining to those markets. These obligations are not harmonised and their differences create difficulties for participants that operate across markets.

This present proposal is to impose another set of reconciliation obligations on licensees. These reconciliation obligations will pertain to just retail (including 761GA wholesale) clients only. They will not pertain to client money received in connection with derivatives that are cleared by the licensee directly on ASX clearing houses (i.e. client money received in relation to all other ETD trading, including ASX clearing where another broker is used, is within the scope of the new reconciliation obligation).

Our comment on the reconciliation proposal is that Government should take the opportunity to consider to what extent reconciliation obligations in relation to client money achieve regulatory aims. Assuming that reconciliation obligations provide a regulatory benefit, it would be desirable to consider to what extent there is a basis for imposing different reconciliation obligations in relation to different markets and different client types. As with other elements of the Australian client money regime, and consistent with Wallis / FSR objectives, harmonisation of approach, as far as possible, would be desirable.

If the present reconciliation proposal were to be implemented, its interaction with existing ASX derivatives market reconciliation obligations should be considered, and any duplication avoided.

Diagram 1: Representation of standard ETD clearing arrangements



Explanation: A wholesale client may engage a futures broker who either specialises in wholesale broking (the upper red entity) or conducts both wholesale and retail broking (the blue entity). A retail client may engage a futures broker, specialising in dealings with retail and smaller clients, who is affiliated with a wholesale broker (the lower red entity), or a broker who deals with both retail and wholesale clients (the blue entity).

An Australian broker servicing wholesale clients will invariably have an ASX24 clearing membership. It may access offshore clearing houses directly via memberships, or via other brokers. A broker servicing wholesale and retail clients may or may not have an ASX24 clearing membership, and if it does not, will have to access ASX24 clearing via a third party broker.

Schedule 2: History of Australian client money regulation

Client money requirements that apply broadly across financial markets were implemented following the Wallis Financial System Inquiry.

However, the client money requirements that we have today have their origins in provisions that pre-dated Wallis, and which applied to client money held in relation to futures and securities trading. These were contained in the Securities Industry Act 1980 and the Futures Industry Act 1986, and after that the Corporations Law.[9] Client money provisions in these laws are very similar to contemporary Corporations Act client money requirements.

The final report of the Wallis Inquiry was completed in March 1997.[10] Prior to Wallis, only regulation of specific financial products such as futures and securities included client money rules. As noted by Joe Hockey as Minister for Financial Services and Regulation in 2001:

> *The FSI found that financial system regulation was piecemeal and varied, and was determined according to the particular industry and the product being provided. This was seen as inefficient, as giving rise to opportunities for regulatory arbitrage, and in some cases leading to regulatory overlap and confusion.*[11]

In response to the Wallis Inquiry, the Government introduced the Corporate Law Economic Reform Program (CLERP) in 1997. Initially seven discussion papers were issued to the public for comment. The sixth of these was released in December 1997 and was titled *Financial Markets and Investment Products (CLERP 6).*[12] It was followed by a consultation paper in March 1999 titled *Financial Products, Service Providers, and Markets - An Integrated Framework.*[13] This outlined the new regulatory framework, intended to be inserted into the Corporations Law, which would apply "for all financial products that would provide consistent regulation of functionally similar markets and products". An exposure draft of legislation to implement CLERP 6 was released in February 2000.[14] The constitutional problem with the Corporations Law scheme intervened, and the Financial Services Reform Bill was re-drafted to amend the newly enacted Corporations Act,[15] and passed later in 2001.

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[9] Both Acts were repealed in 2001. Before that, these provisions had been incorporated into the old Corporations Law prior to it being replaced with the Corporations Act 2001 (see the old Corporations Law). On the replacement of the old Corporations Law with the 2001 Act, these provisions formed part 7.6 (securities) and section 1209 (futures).

[10] See final report.

[11] https://www.comlaw.gov.au/Details/C2004B00956/Revised%20Explanatory%20Memorandum/Text

[12] http://archive.treasury.gov.au/documents/286/PDF/full.pdf

[13] http://archive.treasury.gov.au/contentitem.asp?NavId=017&ContentID=268

[14] http://archive.treasury.gov.au/contentitem.asp?ContentID=272

[15] The Corporations Act 2001 (this is the Act as enacted) was assented to in June 2001, and the Financial Services Reform Act 2001 was assented to in September 2001.