

# 2015: Super Forever...



## The long arm of the new global law

The surprising impact of  
international derivatives law  
on Australian superannuation funds

# 2015: Super Forever...



KING & WOOD  
MALLESONS

## Investment Management Agreement

Superannuation Trustee Limited ("Trustee")  
Investment Manager Limited ("Investment Manager")

King & Wood Mallesons  
Level 51  
Governor Phillip Tower  
1 Farrer Place  
Sydney NSW 2000  
Australia  
T +61 2 9296 2000  
F +61 2 9296 3999  
DX 113 Sydney  
www.kwm.com

Authority  
to invest

Authority  
to enter  
derivatives

ISDA MARCH 2013

The International Swaps and Derivatives Association, Inc. ("ISDA") has published this ISDA 2013 EMIR NFC Representation Protocol (this "Protocol") to enable parties to Covered Master Agreements (as defined in paragraph 4 below) to amend the terms of each such Covered Master Agreement to reflect certain contemporary requirements imposed by Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories ("EMIR").

### 1. Use of Protocol

(a) A person who adheres to this Protocol in accordance with paragraph 2 may as a result of such adherence be deemed to have agreed to the terms of this Protocol in respect of such Covered Master Agreement as if it were a party to the 2013 DF Protocol.

(b) The "Protocol Covering" a Covered Master Agreement shall be the 2013 DF Protocol, unless the parties to the Covered Master Agreement have agreed in writing to use a different version of the Protocol.

(c) An Adhering Party may amend the terms of this Protocol in the case of such PC Pursuant to one of the following:

- (1) C...
- (2) CFTC, Final Rule, End-User...
- (3) CFTC Final Rule, Clearing Requirement Determination...

ISDA  
International Swaps and Derivatives Association, Inc.  
ISDA 2013 EMIR NFC REPRESENTATION PROTOCOL  
published on 8 March 2013

ISDA MARCH 2013

by the Inter

Accordingly, a party that has entered into a Covered Master Agreement may adhere to this Protocol and be bound by its terms by completing and delivering a letter substantially in the form of Exhibit 1 to this Protocol (an "Adherence Letter") to ISDA, as agent, as described below.

### 1. Adherence to and Effectiveness of the Protocol

(a) By adhering to this Protocol in the manner set forth in this paragraph 1, a party (an "Adhering Party") that wishes to amend the terms of a Covered Master Agreement, in each case on the terms and subject to the conditions set forth in this Protocol and the relevant Adherence Letter, agrees that the terms of each Covered Master Agreement, if any, between it and each other Adhering Party will be amended with effect from the Implementation Date in accordance with the terms of the Attachment hereto.

(b) Adherence to this Protocol will be evidenced by the execution and online delivery, in accordance with this paragraph, to ISDA, as agent, of an Adherence Letter (in accordance with subparagraphs 1(b)(i) through 1(b)(iii) below). ISDA shall have the right, in its sole and absolute discretion, upon thirty calendar days' notice on the "ISDA 2013 EMIR NFC Representation Protocol" section of its website at [www.isda.org](http://www.isda.org) (or by other suitable means) to designate a closing date of this Protocol (such closing date, the "Cut-off Date"). After the Cut-off Date, ISDA will not accept any further Adherence Letters to this Protocol.

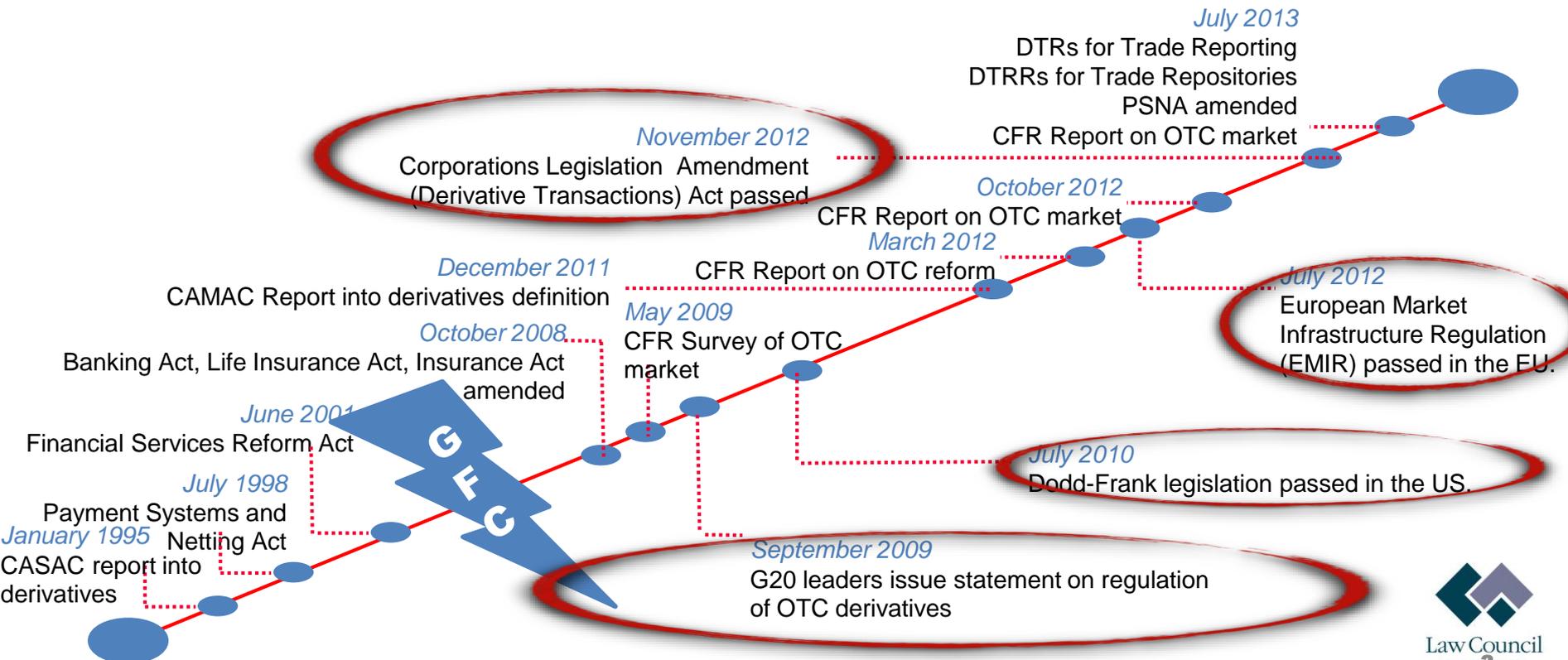
(c) Each Adhering Party will access the Protocol Management section of the ISDA website at [www.isda.org](http://www.isda.org) to enter information online that is required to generate its form of Adherence Letter. Either by directly downloading the populated Adherence Letter from the Protocol Management system or upon receipt via e-mail of the populated Adherence Letter, each Adhering Party will print, sign and upload the signed Adherence Letter from a PDF (portable document format) attachment into the Protocol Management system. Once the signed Adherence Letter has been approved and accepted by ISDA, the Adhering Party will receive an e-mail confirmation of the Adhering Party's adherence to the Protocol.



Law Council  
OF AUSTRALIA

Legal Practice Section

# 2015: Super Forever...

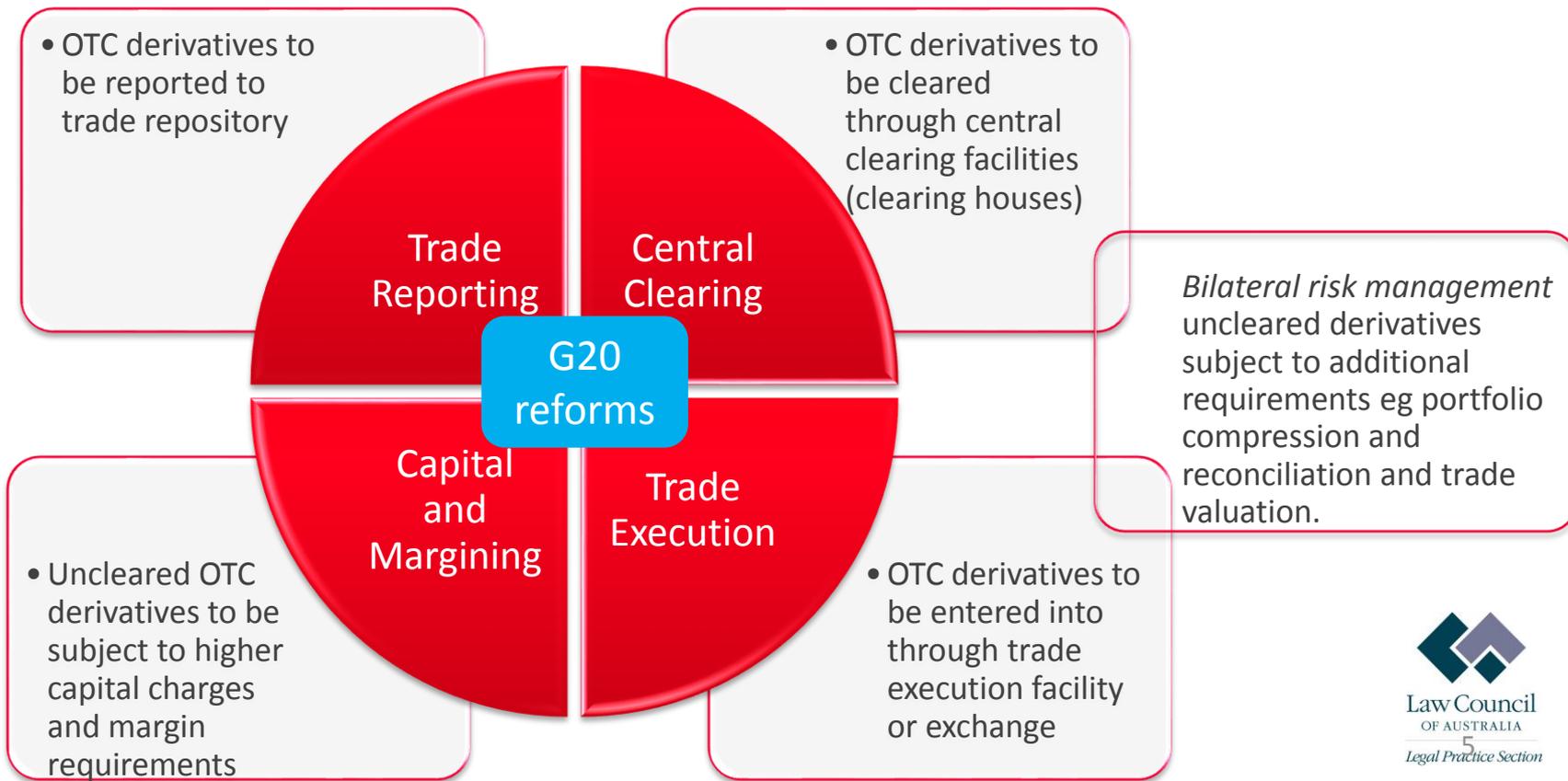


# 2015: Super Forever...



- *Improving over-the-counter derivatives markets:* All standardized OTC derivative contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end-2012 at the latest. OTC derivative contracts should be reported to trade repositories. Non-centrally cleared contracts should be subject to higher capital requirements. We ask the FSB and its relevant members to assess regularly implementation and whether it is sufficient to improve transparency in the derivatives markets, mitigate systemic risk, and protect against market abuse.

# 2015: Super Forever...



# 2015: Super Forever...



## Do you enter into derivatives ....

... from a place which is overseas?

you might be **directly** subject to the overseas derivatives regulation.

... regularly with people **who are** overseas?

you might be **directly** subject to the overseas derivatives regulation.

... with anyone **from overseas**?

You might be **indirectly** subject to overseas derivatives regulation

... with anyone who is **regulated overseas**?

You might be **indirectly** subject to overseas derivatives regulation

Global laws touch you.

**Risk.net**  
Financial Risk Management News and Analysis

Extraterritoriality: CFTC rules 'confusing and inconsistent'



Law Council  
OF AUSTRALIA

Legal Practice Section

# 2015: Super Forever..



“In light of the uncertainty around the international framework for regulation of OTC derivatives, ***the Australian legislation does not pre-empt international developments***; it instead allows for mandates to be determined based on regular consideration of domestic market developments and in coordination with other economies. ”



## Corporations Legislation Amendment (Derivative Transactions) Act 2012

No. 178, 2012

**An Act to amend the law relating to transactions in derivatives, and for other purposes**

[Assented to 6 December 2012]

The Parliament of Australia enacts:

### 1 Short title

This Act may be cited as the *Corporations Legislation Amendment (Derivative Transactions) Act 2012*.

Corporations Legislation Amendment (Derivative Transactions) Act 2012 No. 178, 2012 1

# 2015: Super Forever...



## ASIC Derivative Transaction Rules (Reporting) 2013

I, Oliver Harvey, acting with the written consent of the Minister, make the following derivative transaction rules under section 901A of the *Corporations Act 2001*.

Dated this the 9th day of July 2013

Signed by Oliver Harvey  
as delegate of the Australian Securities and Investments Commission

- Many superannuation trustees are caught as “reporting entities”
- Reporting entities need to report reportable transactions, which includes most OTC derivatives
- Reporting entities are included in phases, but entities holding an AFSL will be included during 2015.

12 December 2014 Media Release

 SENATOR THE HON MATHIAS CORMANN  
ACTING ASSISTANT TREASURER 

---

### Making over-the-counter derivatives markets safer

The Government is implementing a range of reforms to make over-the-counter derivatives markets safer and ensure that regulatory reforms do not impose an unnecessary compliance burden on industry. These reforms include:

- Requiring central clearing of over-the-counter interest rate derivatives denominated in Australian dollars and four other global currencies;
- Providing relief from the trade reporting requirements for organisations that undertake small amounts of over-the-counter derivative activity by allowing ‘single-sided’ reporting;
- Permanently exempting end users from the regulatory framework applying to over-the-counter derivatives; and
- Increasing cross-border cooperation in derivatives market regulation between Australia and Singapore.

#### Central clearing of over-the-counter interest rate derivatives

Following the consultation process earlier this year, the Government will mandate central clearing of over-the-counter interest rate derivatives denominated in Australian dollars and four global currencies for the major domestic and foreign banks.

This aligns Australia with the central clearing reforms agreed by the G20 in the aftermath of the global financial crisis.

A Ministerial determination and regulations will be made available for public consultation in early 2015. Regulations setting out the details of implementation will be released at the same time by the Australian Securities and Investments Commission.

#### ‘Single-sided’ reporting for Phase 3B entities

Financial services organisations that engage in small amounts of over-the-counter derivative activity will benefit from ‘single-sided’ reporting relief, provided they conclude their derivatives transactions with counterparties that are already required to report the trade.

This will apply to all Phase 3B entities as defined in the trade reporting rules.

This means that the trade reporting compliance burden will mainly fall on larger financial institutions that are systemically important, while still providing regulators with information they need to effectively supervise over-the-counter derivatives markets.

Regulations setting out the details of the ‘single-sided’ reporting regime will be released for public consultation in early 2015.

#### Permanently exempt end users from the regulatory framework

Research indicates that end users, in particular non-financial corporates, do not play a systemically significant role in over-the-counter derivatives markets in Australia.

We have permanently exempted end users from the regulatory framework applying to over-the-counter derivatives. The previous relief was due to expire on 31 December 2014.

This permanent exemption provides certainty for end users that they can continue to use over-the-counter derivatives to hedge their business risks without incurring unnecessary compliance costs.

12/2014 7:00PM AEST 06/10/14

# 2015: Super Forever...



## 2.2.7 Derivative Transaction Information—Delegation of reporting

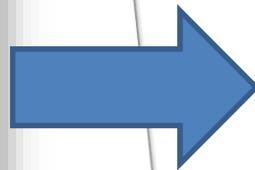
(1) A Reporting Entity may appoint one or more persons (in this Rule, each a *Delegate*) to report on behalf of the Reporting Entity in accordance with Rules 2.2.1 to 2.2.5 and 2.2.8.

(2) A Reporting Entity that appoints a Delegate in accordance with subrule (1) is taken to have complied with Rules 2.2.1 to 2.2.5 in relation to each Reportable Transaction and Reportable Position which the Delegate has been appointed to report, if:

- (a) the terms of the Delegate's appointment and any related agreements or arrangements are documented in writing; and
- (b) the Reporting Entity makes regular enquiries reasonably designed to determine whether the Delegate is discharging its obligations under the terms of its appointment.

Note 1: 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.

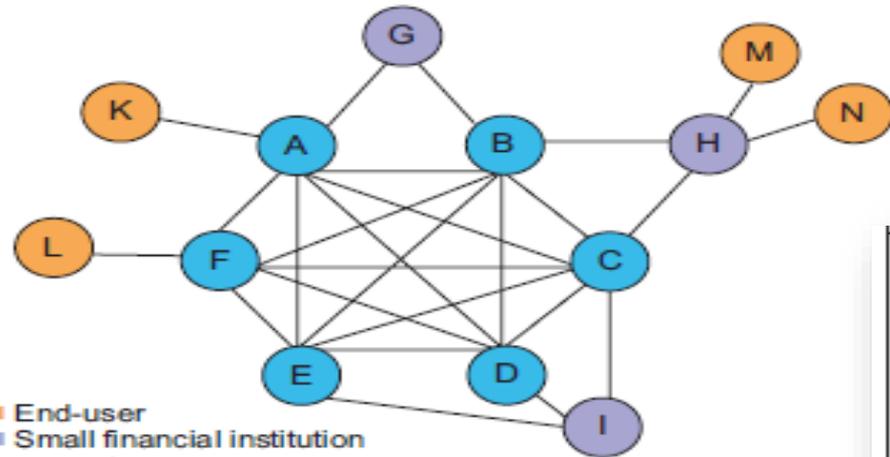
Note 2: While other forms of reporting delegation are permitted under the Rules, a Reporting Entity will only be taken under this Rule 2.2.7 to have complied with the reporting obligations in Rules 2.2.1 to 2.2.5 for those Reportable Transactions and Reportable Positions reported by a Delegate in accordance with this Rule 2.2.7.



# 2015: Super Forever...

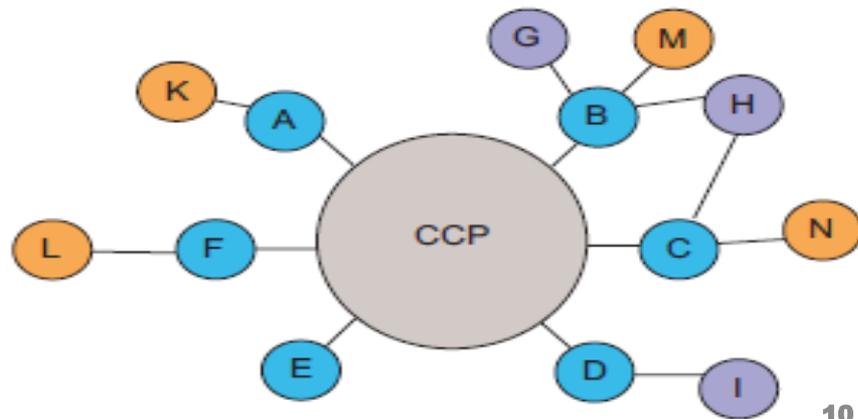


Bilateral clearing



- End-user
- Small financial institution
- Large financial institution

Central clearing



# 2015: Super Forever...



Access to US  
clearing

Compliance  
with new  
margining

## 13.15A Charges in relation to certain derivatives contracts

- (1) A trustee may give a charge over, or in relation to, an asset of a fund if:
  - (a) the charge is given in relation to a derivatives contract entered into:
    - (i) by, or on behalf of, the trustee; or
    - (ii) by a broker on the instructions, or on account, of the trustee; or
    - (iii) by a broker for the benefit of the trustee; and
  - (b) the charge is given in order to comply with the rules of an approved body (as defined in subregulation (2)) that requires the performance of obligations in relation to the derivatives contract to be secured; and

# 2015: Super Forever...



Reform	May change transaction ...			May change operational costs
	commercial structure	legal structure	document structure	
Trade Reporting	✗	✗	✓	✓
Trade Execution	✓	✓	✓	✓
Central Clearing	✓	✓	✓	✓
Increased capital	✓	✗	✗	✓
Margining	✓	✓	✓	✓
Risk Management	✗	✗	✓	✓

# 2015: Super Forever...



## The long arm of the new global law

Scott Farrell

King & Wood Mallesons