



**energy savings**  
Industry Association

## **ESIA Submission:**

**Australian Securities and Investment  
Commission (ASIC)  
Consultation**

**CP 378 Safeguard Mechanism Reforms:  
Updates to RG 236 (Regulatory Guide – *Do I  
need an AFS licence to participate in carbon  
markets?*)**

3 June 2024 (Extension to 7 June)

Submitted to ASIC at [RG236.Feedback@asic.gov.au](mailto:RG236.Feedback@asic.gov.au)

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# 1. Introduction

The Energy Savings Industry Association (ESIA) welcomes the opportunity to provide this submission to Australian Securities and Investment Commission (ASIC) the which commenced on 6 May 2024:

## **CP 378 Safeguard Mechanism Reforms: Updates to RG 236 (Regulatory Guide – *Do I need an AFS licence to participate in carbon markets?*)**

The ESIA has referred to the webpage:

- <https://asic.gov.au/regulatory-resources/find-a-document/consultations/cp-378-safeguard-mechanism-reforms-updates-to-rg-236>
- <https://download.asic.gov.au/media/qbhhhvrd/attachment-to-cp-378-published-6-may-2024.pdf>

This ESIA submission can be made public.

### **About ESIA**

The ESIA is the peak national, independent association representing and self-regulating businesses that are accredited to create and trade in energy efficiency certificates in market-based energy savings schemes in Australia. These activities underpin the energy savings schemes which facilitate the installation of energy efficient products and services to households and businesses. Members represent most of the energy efficiency certificate creation market in Australia. Schemes are established in Vic, NSW, SA and ACT. Members also include product and service suppliers to accredited providers under the schemes. As well, the ESIA represents member interests in national and state initiatives that include energy efficiency and demand reduction, such as the Federal Government's Carbon Farming Initiative energy efficiency methods and the NSW Peak Demand Reduction Scheme. Got to <https://esia.asn.au/>

### **Further engagement**

We welcome the opportunity to discuss this submission and further insights: please contact the ESIA Executive Director at [REDACTED].

## ESIA – Key Recommendations

1. The consultation on the draft RG236, p31, needs to consider the impacts of the following:

- a. **Wording in the guide does not clarify whether an Australian Financial Services License (AFSL) is required to trade forward contracts (generally understood to be considered derivatives) in the white certificate schemes operating in Australia**, including but not limited to:
  - i. Victorian Energy Upgrades program including Victorian Energy Efficiency Certificates (VEECs).
  - ii. NSW Energy Security Safeguard including:
    - NSW Energy Savings Scheme – Energy Savings Certificates (ESCs); and
    - NSW Peak Demand Reduction Scheme – Peak Reduction Certificates (PRCs).
  
- b. **Use of the word ‘likely’ results in a major grey area** which is highly significant to white certificate scheme certificate creators and traders including: obligated parties (e.g. electricity retailers) and in Victoria Accredited Persons (APs) and in NSW Accredited Certificate Providers (ACPs).

For example:

- i. APs and ACPs with an AFSL could engage in both spot and forward contracts, whereas would those without an ASFL only be able to engage in spot contracts?
- ii. Or would an AFSL be needed only in certain circumstances for both spot and forward contracts, such as for example:
  - when counterparties are endeavouring to net settle
  - when counterparties are not an AP, ACP, nor a liable party, and who buy and sell certificates (i.e. are purely certificate traders and not certificate creators and so primarily seek to profit from certificate market volatility).

2. **The ESIA would welcome the opportunity to explore with ASIC potential guidance descriptions of regular situations where an AFSL is not required and others where it is required, if at all, in the white certificates markets.**

3. **The ESIA does not have position on for what an AFSL is required**, and rather seeks further engagement to explore where such a requirement may be best placed to strengthen certainty and resilience of the white certificate market, as well as where it may inadvertently be required and which undermines the operation of the white certificate market.

# ESIA – Some key reference points in the RG236 draft

## 1. Key reference points in the draft RG236 include but may not be limited to:

Page 31:

[ATTACHMENT TO CP 378 / DRAFT REGULATORY GUIDE 236: Do I need an AFS licence to participate in carbon markets?](#)

### Other emissions and environmental units

RG 236.119 There are a variety of other emissions and environmental units that can be traded in markets in Australia and overseas, including:

- (a) Biodiversity Certificates issued under the *Nature Repair Act 2023*;
- (b) Large Scale Generation Certificates and Small Scale Technology Certificates issued under the *Renewable Energy (Electricity) Act 2000*;
- (c) Energy Savings Certificates issued under the *NSW Electricity Supply Act 1995*;
- (d) Victorian Energy Efficiency Certificates issued under the *Victorian Energy Efficiency Target Act 2007*;
- (e) European Union Allowances issued by a member state of the European Union, or by other jurisdictions participating in the European Union Emissions Trading System;
- (f) New Zealand Emissions Units issued by the New Zealand Government under the New Zealand Emissions Trading Scheme; and
- (g) Verified Carbon Units issued according to the international Verified Carbon Standard.

RG 236.120 We consider that these other emissions and environmental units are generally not financial products. Unlike ACCUs and EIEUs, they have not been specifically listed as financial products in the Corporations Act: see s764A of the Corporations Act.

RG 236.121 We do not consider that these types of units fall within the general definition of a financial product (i.e. a facility for making a financial investment or managing a financial risk: see s763A of the Corporations Act). These types of units are ordinarily acquired to conserve or improve certain aspects of the physical environment (e.g. investing in nature repair projects through biodiversity certificates), or to offset other emissions that cannot be avoided in the short term. They are not ordinarily acquired to manage the financial consequences that may flow if a particular outcome occurs. Therefore, we do not consider that these units are ordinarily used to manage a financial risk, and no AFS licensing obligations apply to activities conducted directly in relation to these other emissions and environmental units.

RG 236.122 However, if a derivative is created over one of these other units, the derivative itself is likely to be a financial product regulated under the Corporations Act. Additionally, if such units are held as part of the scheme property of a registered managed investment scheme, the responsible entity will need to comply with the relevant requirements of the Corporations Act: see Section E, RG 236.54 to RG 236.59.

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## D Providing financial services involving regulated emissions units

### Key points

Generally, you are providing a financial service if you:

- provide financial product advice;
  - deal in a financial product;
  - make a market for a financial product;
  - operate a registered managed investment scheme;
  - operate the business and conduct the affairs of a corporate collective investment vehicle;
  - provide a custodial or depository service;
  - provide a crowd-funding service;
  - provide a claims handling and settlement service;
  - provide a superannuation trustee service; or
  - are a traditional trustee company providing traditional trustee services.
- This section explains when commonly undertaken activities relating to regulated emissions units are likely to amount to one or more of these types of financial services. It does not cover every type of financial service that may be provided involving regulated emissions units.

### Types of financial services that relate to regulated emissions units

RG 236.123 As ACCUs and EIEUs (including SMCs) are financial products, providing financial services in relation to these emissions units is regulated under the Corporations Act.

RG 236.124 This section explains how the financial services provisions of the Corporations Act outlined in Section B apply to ACCUs and EIEUs (including SMCs). A summary of when you may be providing a financial service for these regulated emissions units is provided in Table 4.

RG 236.125 Additionally, emissions units may be associated with another financial product in various ways (e.g. derivatives over emissions units and managed investment schemes holding emissions units as scheme property). These arrangements are regulated as the associated financial product, rather than as an emissions unit: see RG 236.155.

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regulations.

RG 236.150 In deciding whether a particular activity constitutes dealing in a regulated emissions unit, it is important to examine the activity itself, and not whether the activity relates to a particular scheme or program. The crucial question is whether the dealing involves an emissions unit that is a financial product.

Whether or not that dealing occurs under the ACCU Scheme, the safeguard mechanism, or another mechanism, is not relevant to the question of whether there is a dealing in a financial product.

RG 236.151 If your activities amount to a dealing in a financial product, this does not necessarily mean you will require an AFS licence. You only require an AFS licence to provide financial services while carrying on a financial services business: see Section E. Additionally, there are some exemptions from the requirement to hold a licence for dealings in regulated emissions units or in derivatives over emissions units: see Table 7 and Table 8 in Section E.

The safeguard facility has an excess of SMCs for several years. During that period, it regularly states the price at which it is prepared to sell the SMCs. Other people can reasonably expect to be able to purchase SMCs at the price the facility states. In these circumstances, the safeguard facility may be a market maker.

### Other financial products and services related to emissions units

RG 236.155 Emissions units (whether specifically financial products or not) may be associated with another financial product in various ways (e.g. a derivative or as the scheme property of a managed investment scheme). In this case, the other financial product (meaning the derivative or the managed investment scheme) will be regulated, rather than the underlying emissions unit that the derivative relates to or that is scheme property of the managed investment schemes.

#### Derivatives over emissions units

RG 236.156 Derivatives over emissions units (including non-regulated emissions units) are financial products. Consequently, you will be providing a financial service if you:

- (a) provide financial product advice about derivatives over emissions units;
- (b) deal in a derivative over emissions units; or
- (c) make a market for derivatives over emissions units.

Note: A carbon abatement contract is neither a derivative nor a financial product: see regs 7.1.04(8)(d) and 7.1.07J of the Corporations Regulations.

RG 236.157 Similar factors apply to derivatives as to other financial products when determining whether a person is providing financial product advice, dealing or marking a market in derivatives. One key distinction in relation to derivatives is that when two people enter into a derivatives contract that is not on a licensed financial market, both people are considered to be issuing a financial product, even if they are acting on their own behalf. Therefore, they both may need to hold an AFS licence if they are carrying on a financial services business and no licensing exemption applies to them: see Section E.

Note: See s761E of the Corporations Act for when a derivative is issued.

RG 236.158 A person offering, issuing, selling or recommending a derivative to a retail client may need to provide the client with a PDS for that derivative product: see RG 236.210.

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## E When you need an AFS licence

### Key points

You will require an AFS licence to provide financial services while carrying on a financial services business in Australia, unless an exemption applies.

You will also need a licence if you're acting as a responsible entity of a registered scheme.

This section sets out circumstances in which you will need an AFS licence and when an exemption from the AFS licensing regime applies.

Relevant considerations are:

- whether a person is carrying on a financial services business;
- whether the business is being conducted in Australia; and
- whether an exemption applies, so that a licence is not required.

If you are dealing in regulated emissions units on your own behalf, this does not constitute dealing, and is not an activity that requires an AFS licence.

### 'Carrying on a financial services business in Australia'

RG 236.171 If you are 'carrying on a financial services business' in Australia, you will need an AFS licence to provide financial services unless a licensing exemption applies.

RG 236.172 The meaning of 'carrying on a financial services business' has been interpreted by Australian courts, and is qualified and modified by provisions in the Corporations Act.

Note: See also [RG 121](#) for further guidance on 'carrying on a financial services business in Australia'.

RG 236.173 Australian courts have stressed that whether an entity's activities constitute 'carrying on a business in Australia' depends on the factual circumstances.

RG 236.174 Generally, if the financial services you provide are more than very minor and are systematic, repetitious and have continuity, then you are carrying on a financial services business.

RG 236.175 However, system, repetition and continuity are not the only relevant factors for determining whether an entity is 'carrying on a business'. For example, a one-off transaction may amount to the carrying on of a business, if there is an intention that the transaction is to be the first in a series of transactions. The nature of the business being conducted and the statutory context are also

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**Table 7: AFS licensing exemptions for types of dealings in regulated emissions units by particular entities**

Type of dealing	Entities dealing for the following purposes: <ul style="list-style-type: none"> <li>• safeguard mechanism</li> <li>• overseas scheme entities</li> <li>• voluntary offsetters</li> </ul>	Entities involved in offset projects: <ul style="list-style-type: none"> <li>• project proponents</li> </ul>	Intermediaries: <ul style="list-style-type: none"> <li>• brokers</li> <li>• specialist emissions unit traders</li> <li>• financial institutions</li> </ul>
On own behalf	Licensing exemption applies: see s766C(3) of the Corporations Act.	Licensing exemption applies: see s766C(3) of the Corporations Act.	Licensing exemption applies: see s766C(3) of the Corporations Act.
On behalf of a related body corporate	Licensing exemption applies: see s911A(2)(i) of the Corporations Act	Licensing exemption applies: see s911A(2)(i) of the Corporations Act.	Licensing exemption applies: see s911A(2)(i) of the Corporations Act.
On behalf of a related body corporate or associated entity	Licensing exemption applies if dealing in regulated emissions units done for the purposes of managing a financial risk in relation to the surrender, cancellation or relinquishment of regulated emissions units, and dealing in regulated emissions units is not the principal activity of the entity's business: see reg 7.6.01(1)(ma) of the Corporations Regulations. For related bodies corporate, see also s911A(2)(i) of the Corporations Act.	Licensing exemption applies if dealing on behalf of a related body corporate: see s911A(2)(i) of the Corporations Act.	Licensing exemption applies if dealing on behalf of a related body corporate: see s911A(2)(i) of the Corporations Act.
On behalf of any other person	Generally, no exemption applies.	Generally, no exemption applies.	Generally, no exemption applies.

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**Table 8: AFS licensing exemptions for types of 'dealings' in derivatives over regulated emissions units or foreign exchange contracts by particular entities**

Type of dealing	Entities dealing for the following purposes: <ul style="list-style-type: none"> <li>• safeguard mechanism</li> <li>• overseas scheme entities</li> <li>• voluntary offsetters</li> </ul>	Entities involved in offset projects: <ul style="list-style-type: none"> <li>• project proponents</li> </ul>	Intermediaries: <ul style="list-style-type: none"> <li>• brokers</li> <li>• specialist emissions unit traders</li> <li>• financial institutions</li> </ul>
On own behalf	<p>Licensing exemption applies if dealing is for the purposes of managing a financial risk in relation to surrender, cancellation or relinquishment of regulated emissions units, and dealing in derivatives or foreign exchange contracts is not the principal activity of the entity's business: see reg 7.6.01(1)(ma) of the Corporations Regulations.</p> <p>Licensing exemption applies if dealing is for the purposes of managing a financial risk, and dealing in derivatives or foreign exchange contracts is not a significant part of the entity's business: see reg 7.6.01(1)(m) of the Corporations Regulations.</p>	<p>Licensing exemption applies if dealing is for the purposes of managing a financial risk, and dealing in derivatives or foreign exchange contracts is not a significant part of the entity's business: see reg 7.6.01(1)(m) of the Corporations Regulations.</p>	Generally, no exemption applies.
On behalf of a related body corporate	Licensing exemption applies: see s911A(2)(i) of the Corporations Act	Licensing exemption applies: see s911A(2)(i) of the Corporations Act	Licensing exemption applies: see s911A(2)(i) of the Corporations Act
On behalf of a related body corporate or associated entity	Licensing exemption applies if dealing is for the purposes of managing a financial risk in relation to surrender, cancellation or relinquishment of regulated emissions units, and dealing in derivatives or foreign exchange contracts is not the principal activity of the entity's business: see reg 7.6.01(1)(ma) of the Corporations Regulations. For related bodies corporate, see also s911A(2)(i) of the Corporations Act.	Licensing exemption applies if dealing on behalf of a related body corporate: see s911A(2)(i) of the Corporations Act. Otherwise, generally no exemption applies.	Licensing exemption applies if dealing on behalf of a related body corporate: see s911A(2)(i) of the Corporations Act. Otherwise, generally no exemption applies.
On behalf of any other person	Generally, no exemption applies.	Generally, no exemption applies.	Generally, no exemption applies.

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## Definitions of Key Terms – Meaning in the Draft Guide

### Dealing, P33

<b>Dealing in a financial product</b>	Who is undertaking the transaction?	Dealing in a financial product includes conduct such as issuing, buying or selling a financial product. Arranging for another person to deal is also generally a dealing. Some activities that would otherwise be dealing, which are done on your own behalf, are not considered to be dealing. However, an exception to this rule is dealing by issuing derivatives and interests in a managed investment scheme.  Some AFS licensing exemptions apply to persons dealing: see Section E.
See RG 236.144 to RG 236.151.	What is the purpose of the transaction?	

### Derivative, P62: derivative

An arrangement under which the amount of the consideration, or the value of the arrangement, is ultimately determined, derived from or varies by reference to the value or amount of something else, subject to certain exceptions

Note: See s761D of the Corporations Act.

## Financial Product/Service/Advice etc, P64:

financial product	<p>A facility through which, or through the acquisition of which, a person does one or more of the following:</p> <ul style="list-style-type: none"><li>• makes a financial investment (s763B);</li><li>• manages financial risk (s763C); or</li><li>• makes non-cash payments (s763D)</li></ul> <p>Note: See Div 3 of Pt 7.1 of the Corporations Act for the exact definition. In addition to the general categories above, this specifies certain things as being included or excluded from the definition.</p>
financial product advice	<p>A recommendation or a statement of opinion, or a report of either of those things, that:</p> <ul style="list-style-type: none"><li>• is intended to influence a person or people in making a decision about a particular financial product or class of financial products, or an interest in a particular financial product or class of financial products; or</li><li>• could reasonably be regarded as being intended to have such an influence.</li></ul> <p>This does not include anything in an exempt document or statement</p> <p>Note: This is a definition in s9 of the Corporations Act.</p>
financial service	<p>Has the meaning given in Div 4 of Pt 7.1 of the Corporations Act</p>
financial services business	<p>A business of providing financial services</p>
financial services laws	<p>Has the meaning given in s761A of the Corporations Act</p>
financial services provider	<p>A person who provides a financial service</p>

### Corporations Act Div 4 of Pt 7.1

[https://www5.austlii.edu.au/au/legis/cth/consol\\_act/ca2001172/s9.html#division](https://www5.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s9.html#division)