

# S E G C

## NGF Information Booklet



## **Client Information Booklet**

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### *IMPORTANT DISCLAIMER*

*This booklet has been prepared to provide only a basic outline of the operation of the National Guarantee Fund and the provisions of the Corporations Act and Corporations Regulations which govern it. It is not intended to be a guide to when you may make a claim or what compensation you might receive. You should not use this booklet as a precise statement of the legislative provisions which govern the operation of the Fund and the availability of claims.*

*If the question of Fund coverage is material to a particular investment decision, you should consult the provisions of the Corporations Act and Corporations Regulations and obtain your own legal advice. No reliance should be placed on the contents of this booklet in the making of investment decisions or in deciding whether or not to make a claim on SEGC.*

*To the extent permitted by law, SEGC expressly disclaims all liability to any person in respect of any statement in or omission from this booklet.*

## **NATIONAL GUARANTEE FUND**

### **INTRODUCTION**

This booklet contains general information about the National Guarantee Fund (the Fund, or NGF) to help you (as the client of a Dealer) to understand the protection that the Fund provides when you deal through a Dealer in securities quoted or admitted to trading status on the financial market operated by ASX Limited (ASX). For this purpose, "securities" includes shares, debt instruments, interests in managed investment schemes and warrants admitted to trading status on ASX. Except in limited circumstances, it does not include ASX exchange traded options. NGF protection does not apply to dealings in ASX futures contracts.

The legislation that governs the operation of the National Guarantee Fund is set out in Division 4 of Part 7.5 of the Corporations Act 2001 and Division 4 of Part 7.5 of the Corporations Regulations 2001 (the legislation). The legislation is quite technical, and must be read in light of the definitions which affect the meaning of all provisions. Terms which are defined in the legislation are capitalised in this booklet and where the meaning is necessary for your understanding of the NGF regime, we have described the meaning.

This booklet is intended to give you a brief overview of the provisions governing the operation of the Fund, and in particular the key sections that deal with your rights to make a claim. You should not rely on the information contained in this booklet as legal advice, or as a precise definition of rights to claim or limits on those rights in a particular case. If you wish to know whether the Fund will protect you in a particular circumstance (for example, with respect to a particular financial transaction with a Dealer), you should seek specific legal advice.

References in this booklet to "Dealer" are references to a Market Participant of ASX (as that term is defined in the ASX operating rules) and, in limited circumstances, a Participant of ASX Clear Pty Limited (formerly called Australian Clearing House Pty Ltd) (ASX Clear) (as that term is defined in the operating rules of ASX Clear).

### **WHAT IS THE NATIONAL GUARANTEE FUND?**

The National Guarantee Fund is a compensation fund that is available to meet valid claims arising from dealings with Dealers, in the circumstances set out in the legislation.

When the six State stock exchanges merged to form the national ASX in 1987, the assets of the fidelity funds of those State exchanges were also merged to form the Fund. The NGF provides investor compensation in the circumstances set out in Part 7.5 of the Corporations Act. As at 30 June 2010 the amount in the NGF was approximately \$111 million.

The Fund is administered by Securities Exchanges Guarantee Corporation Ltd (SEGC). SEGC is a subsidiary of ASX, but operates independently and in accordance with Division 4 of Part 7.5 of the Corporations Act.

Payments from the Fund may only be made in accordance with the legislation. Such payments include the costs of making further inquiries and settling claims, and the administration costs of SEGC and the Fund.

### **WHAT CLAIMS CAN BE MADE ?**

There are four subdivisions of Division 4 of Part 7.5 of the Corporations Regulations which set out the types of claims which you may make on SEGC. In general terms:

- Subdivision 4.3 provides for the completion of sales and purchases (and cash compensation for purchases in certain circumstances) of securities transactions entered into by a Dealer on ASX's equities and debt markets where those transactions are required to be reported to ASX by the Dealer.
- Subdivision 4.7 provides for compensation for loss that results if a Dealer transfers securities without authority.
- Subdivision 4.8 provides for compensation for loss that results if a Dealer wrongly cancels or fails to cancel a certificate of title to securities (though this basis for claiming is unlikely to arise because all securities quoted on ASX have since February 1999 been required by the ASX Listing Rules to be held in uncertificated form).
- Subdivision 4.9 provides for compensation for loss that results if a Dealer becomes insolvent and fails to meet its obligations to a person who had previously entrusted property to it.

The claims which can be made on SEGC by you (as a client of a Dealer) are explained in more detail below. **There are limits on the claims which can be made and these are described in this booklet, starting on page 6.**

### **CLAIMS YOU MAY MAKE ON SEGC**

#### ***Subdivision 4.3 - Completion of purchases and sales on ASX's equities and debt markets***

If a Dealer has bought securities on your behalf and you have paid for them, but the Dealer has not provided the securities to you either within the time set out in the rules of the relevant financial market (or, if no time period is stated, within a reasonable time period after the purchase), you may make a claim on SEGC for the securities. If SEGC is satisfied your claim is valid, it will transfer to you securities of the same kind and number as those claimed. If for some reason the securities are not available (usually because trading in the securities has been suspended), SEGC will settle a valid claim by paying an amount of money to you to compensate for your loss.

If a Dealer has sold securities on your behalf and you have made the securities available to the Dealer so that the Dealer can settle the transaction, but you have not been paid the sale proceeds either within the time set out in the rules of the relevant financial market (or, if no time period is stated, within a reasonable time period after the sale), you may claim on SEGC and if SEGC is satisfied that your claim is valid, it will pay you those sale proceeds.

If your Dealer has been "suspended" from trading on ASX's markets or from settling in CHES and as a result has not completed your transaction, and you have delivered the securities or paid the consideration (as the case requires) or you are ready, willing and able to do so in order to complete the transaction, you may make a claim on SEGC.

Note that the provisions of Subdivision 4.3 do not apply to wholesale Loan Securities transactions and ETF Special Trades (as defined in the ASX operating rules).

### ***Subdivision 4.7 - Unauthorised transfer of securities***

If a Dealer purports to transfer securities on your behalf as transferor, and you have not authorised the transfer, you may claim on SEGC for loss you suffer because of that unauthorised transfer.

If securities have been transferred to you (for example as a buyer) by a Dealer but the transfer was without the authority of the transferor, you may also claim under this Subdivision for any loss that results (provided you did not know that the transfer was unauthorised).

Claims under Subdivision 4.7 may be made for both electronic transfers and market transfers which were executed by the Dealer stamping a transfer with a stamp that purports to be the Dealer's stamp.

You should be aware that, in the case of an electronic transfer, if you authorised a *disposal* of securities you are taken to have authorised the transfer of those securities in accordance with the operating rules of the financial market.

Generally, SEGC will settle a valid claim under Subdivision 4.7 by supplying replacement securities. If it is not practicable for SEGC to obtain replacement securities, SEGC will pay compensation for the loss suffered in respect of the transferred securities.

### ***Subdivision 4.8 - Certificate cancellation in breach of the relevant provisions of the old SCH Business Rules***

It is unlikely that circumstances entitling you to make a claim under Subdivision 4.8 would arise, since all securities quoted on ASX have since February 1999 been required by the ASX Listing Rules to be held in uncertificated form. Under CHESS, settlement of purchases and sales by Dealers of quoted equities and debt securities is effected by electronic transfers. This means that the securities must be available in a CHESS holding in time for settlement (generally 3 business days after the trade date - "T+3").

Prior to February 1999, shareholders could hold quoted securities in certificated form. If a securities holding was certificated, the share certificate had to be "cancelled" by the selling Dealer and the holding converted to a CHESS holding before settlement could occur. Dealers were permitted to cancel share certificates provided they did so in accordance with the certificate cancellation provisions in the old SCH Business Rules which governed the operation of CHESS. If those provisions were contravened by a Dealer and you suffered loss as a result, then you may be able to make a claim on SEGC, provided that you were not involved in the breach of the provisions and that you have not made or are not entitled to make a claim under Subdivision 4.7 (the unauthorised transfer provisions – see above).

### ***Subdivision 4.9 - Property entrusted to a Dealer who becomes insolvent***

If you have entrusted property (which includes money or securities) to a Dealer and that Dealer later becomes insolvent, you may claim on SEGC for any property which has not been returned to you or which has otherwise not been dealt with in accordance with the Dealer's obligations to you. The property must have been entrusted in the course of or in connection with the Dealer's business of dealing in securities and the property must have been received by the Dealer on your behalf or as trustee for you. Money loaned to a Dealer is specifically excluded.

This type of claim generally occurs if there is a shortfall of money in the trust account of the Dealer or if there is a shortfall in securities in the custodian holdings of the Dealer.

You cannot make a claim if:

- before the Dealer became insolvent, the trust property ceased to be under the sole control of the Dealer; or
- your act or omission directly or indirectly resulted in circumstances which, in the opinion of SEGC or the court, materially contributed to the Dealer becoming insolvent.

Note that this protection applies in relation to property entrusted to a Participant of ASX Clear as well as property entrusted to a Market Participant of ASX.

SEGC generally settles valid claims under this Subdivision by replacing the property. If the property is securities and replacement securities cannot be obtained, SEGC will pay compensation for the loss.

### ***Claims in relation to exchange traded derivatives***

The provisions of Subdivision 4.3 referred to above in relation to ASX's securities markets do not apply to trading of individual derivatives contracts (other than ASX traded warrants). However, the Fund does provide the following protection to clients of Dealers who trade on the ASX derivatives market.

First, if an Exchange traded option over quoted securities is exercised, the resulting purchase and sale will generally be covered by the contract completion provisions of Subdivision 4.3 discussed above.

Second, if you have entrusted property to a Dealer in the course of dealing in exchange traded options, the Fund provides protection against loss of that property in accordance with the provisions of Subdivision 4.9, also discussed above.

The NGF does not provide protection in relation to futures. The ASX Supplemental Compensation Fund covers claims in relation to money or property entrusted to a participant of ASX in respect of actual or proposed dealings in futures.

### ***Interest and costs***

SEGC will pay interest on your claim (if it is cash settled), excluding the amount of the claim which is attributable to costs and disbursements, for the time periods and at the interest rate (currently 5% per annum) that are set out in the legislation. You may also claim for the reasonable costs of making and proving your claim.

### **WHAT LIMITS ARE THERE ON CLAIMS ?**

The legislation places some restrictions on claims on SEGC. These include:

#### ***Payment limits***

Naturally, the extent to which claims may be met is subject to the overall limit of the amount available to the Fund. The size of the fund is noted earlier, but this may vary significantly from time to time.

There is no maximum amount that applies to any individual claim. However, in relation to claims for property entrusted to a Dealer under Subdivision 4.9, the total available for all claims under that Subdivision for any one insolvent Dealer is 15% of the "Minimum Amount" of the Fund as at the end of the day on which the Dealer became insolvent.<sup>1</sup> As at 30 June 2010 the Minimum Amount of the Fund was \$76 million, so the total available under Subdivision 4.9 for any one insolvent Dealer would have been \$11.4 million. If the total of all valid claims under Subdivision 4.9 for any one Dealer does not exceed that amount, then all claims will be settled in full. If the total of claims is more than that amount claims will be settled on a pro-rata basis.

In allowing and settling a claim under any Subdivision, SEGC is entitled to take into account any amount of money that the claimant owes to the Dealer and to take into account the value of any securities that the claimant is obliged to supply to the Dealer.

#### ***Reduction in compensation***

In certain circumstances, SEGC may reduce the amount of compensation payable to you. For example:

- by reference to any right of set-off available to you,
- reference to the extent to which you were responsible for causing the loss,
- if you have received a benefit from a person for assigning any of your rights or remedies in relation to the loss without SEGC's written consent and you continue to suffer a loss at the date of the determination of the claim, SEGC may reduce the amount of compensation payable by the amount that fairly represents the extent to which you have adversely affected SEGC's ability to recover the amount of the compensation that would otherwise be payable to you in respect of the claim.

It is not possible to fully describe in this booklet all the circumstances under which compensation may be reduced.

#### ***Time limits***

SEGC may publish a notice calling for claims in relation to completion of a purchase or sale (Subdivision 4.3), loss resulting from an unauthorised transfer (Subdivision 4.7), wrongful

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<sup>1</sup> Under the Corporations Act the SEGC Board may, with the approval of the Minister responsible for the Corporations Act, determine that a particular amount (referred to in the legislation as the "Minimum Amount") is the amount needed to maintain the NGF at a viable level to meet claims and administration costs of SEGC and the NGF.

cancellation of a certificate of title to securities (Subdivision 4.8) or property entrusted to a Dealer who becomes insolvent (Subdivision 4.9). The notice will specify the time by which claims must be made. If SEGC has not published such a notice, the claim must be made within 6 months after the day on which you became entitled to make the claim (Subdivision 4.3), the day you became aware of having suffered the loss (Subdivision 4.7 and 4.8) or the day you became aware that the Dealer was insolvent (Subdivision 4.9).

The Board of SEGC may allow a claim even if it is late, if it is satisfied that it is appropriate to do so. The onus is on you to satisfy the Board that it is appropriate to allow a claim even though it is lodged after the time periods set out in the legislation.

### ***Excluded persons***

"Excluded Persons" are not entitled to claim as a transferee under the unauthorised transfer provisions of Subdivision 4.7 or under the property entrusted provisions of Subdivision 4.9 on the basis that they are affiliated with the Dealer in one of the ways specified in the Corporations Regulations. An "excluded person" includes the Dealer itself (and, where the Dealer is a company, the officers, excluding the employees, of the company), a spouse or relative of the Dealer (or company officer), companies which those persons control, and trustees of trusts under which those persons may benefit.

### ***Loans***

No claim on SEGC is available for money that has been lent to a Dealer and has not been repaid. There is a legal difference between a client entrusting money or other property to a Dealer to be held in trust or in custody (in which case, a Subdivision 4.9 claim may be available if the Dealer becomes insolvent), and a client lending money to the Dealer (in which case there is no Subdivision 4.9 claim). Where interest is paid by a person on money deposited with or received by that person, this is likely to be categorised at law as a loan to that person. If you are unsure as to whether you are making a loan to the Dealer, you should ask the Dealer to inform you.

### ***Transactions with a Dealer's related entities***

You cannot make a claim on SEGC in respect of default by any entity other than the Dealer. If, for example, you deposit property with a company related to the Dealer, such as an associated custodian or finance company, SEGC will not be able to meet any claims for losses which may subsequently occur.

Therefore, if you wish to receive the protection of the Fund, you should be careful to ensure that the arrangement under which you entrust money or other property clearly requires your Dealer to hold the property on your behalf or as trustee for you.

### ***Dealer carrying on securities business in Australia***

Generally, in order to make a claim in respect of conduct of a Dealer, or the Dealer's obligation to pay money or transfer securities to you, the Dealer must at the relevant time have been carrying on a securities business in Australia. If the Dealer was not carrying on such a securities business at the relevant time, you may also be able to make a claim (other than under Subdivision 4.3) if the last securities business of that Dealer was carried on in Australia.

### **HOW TO MAKE A CLAIM**

Claims must be made in writing and be given to SEGC. Claim forms are available from SEGC.

It is important that all relevant details are included in the claim and that all relevant documents (for example, contract notes) are attached so that the claim can be processed as quickly as possible.

It is difficult to estimate how long it will take to process a claim as this will depend upon the complexity of the claim. In simple cases, a claim might simply be verified by checking against the Dealer's records. However, in other cases it may be necessary for SEGC to make further inquiries of and to ask for additional information from you, the Dealer concerned, share registries, ASX or its subsidiaries or anyone else involved in the claim.

If your claim is outside the time limits referred to earlier in this booklet, you should include all information that may be relevant for the Board of SEGC to consider in deciding whether or not it is appropriate for your claim to be considered anyway.

If you wish to make a claim but all the necessary details are not available before a time limit expires, please notify SEGC of your claim and give all the details that are currently available.

After inquiries are completed, claims are put to the Board of SEGC (or its delegate) for determination. If the Board is satisfied that you are entitled to make the claim, that is, all the requirements under the legislation have been met, the claim will be allowed.

SEGC will keep you informed of the progress of your claim and any arrangements for settlement of the claim.

If the claim is disallowed (whether wholly or partly), SEGC will notify you of its decision. If you are dissatisfied with the decision you have 3 months to "appeal" from the date of notice of disallowance by bringing legal proceedings in court to establish your claim.

### **PRIVACY**

SEGC is committed to protecting the privacy of your personal information in accordance with the National Privacy Principles. As part of this commitment, we have adopted a Privacy Statement which sets out our policies on the management of personal information that SEGC collects, handles and uses. A copy of the Statement is available from our website located at [www.segc.com.au](http://www.segc.com.au). If you have any queries about the privacy of your personal information, or if you would like us to send you a copy of our Privacy Statement, please do not hesitate to contact us.

### **FINAL NOTE**

In most cases, if you have a complaint about your Dealer, you should first discuss the problem with the Dealer, as this will usually be the quickest means of resolving the problem. Your complaint may also be able to be handled by the Financial Ombudsman Service (FOS) (1300 78 08 08). The FOS website is [www.fos.org.au](http://www.fos.org.au).

If you have any questions about the operation of the National Guarantee Fund, SEGC staff will be happy to provide further information.

## **Client Information Booklet**

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