



Financial Services Law

By Zohra Arbabzada

All legislative references made in this document are to the *Corporations Act 2001* (Cth).

General definition of financial product

Section 761A tells us to look towards Division 3 (discussed below) in relation to the definition of financial product.

- **Section 763A** tells us of the requirements of the general test which must be fulfilled for it to be found that a product is a financial product. **Section 763A** tells us that if a person a.) makes a financial investment, b.) manages a financial risk or c.) makes a non-cash payment, then it is deemed as being a financial product.

Makes a financial investment

- **Section 763B** expands on what constitutes the making of a financial investment. It tells us that a financial investment has been made when a contribution has been made with the intention of financial return to be generated from the person to whom the contribution is made to, with the investor having no day to day control.

Manages financial risks

- **Section 763C** expands on what constitutes a managed financial risk. It tells us that a person has attempted to manage financial risk if they have a.) managed their financial circumstances or b.) tried to avoid or limit the financial consequence(s) or fluctuation of a financial product.

Makes a non-cash payment

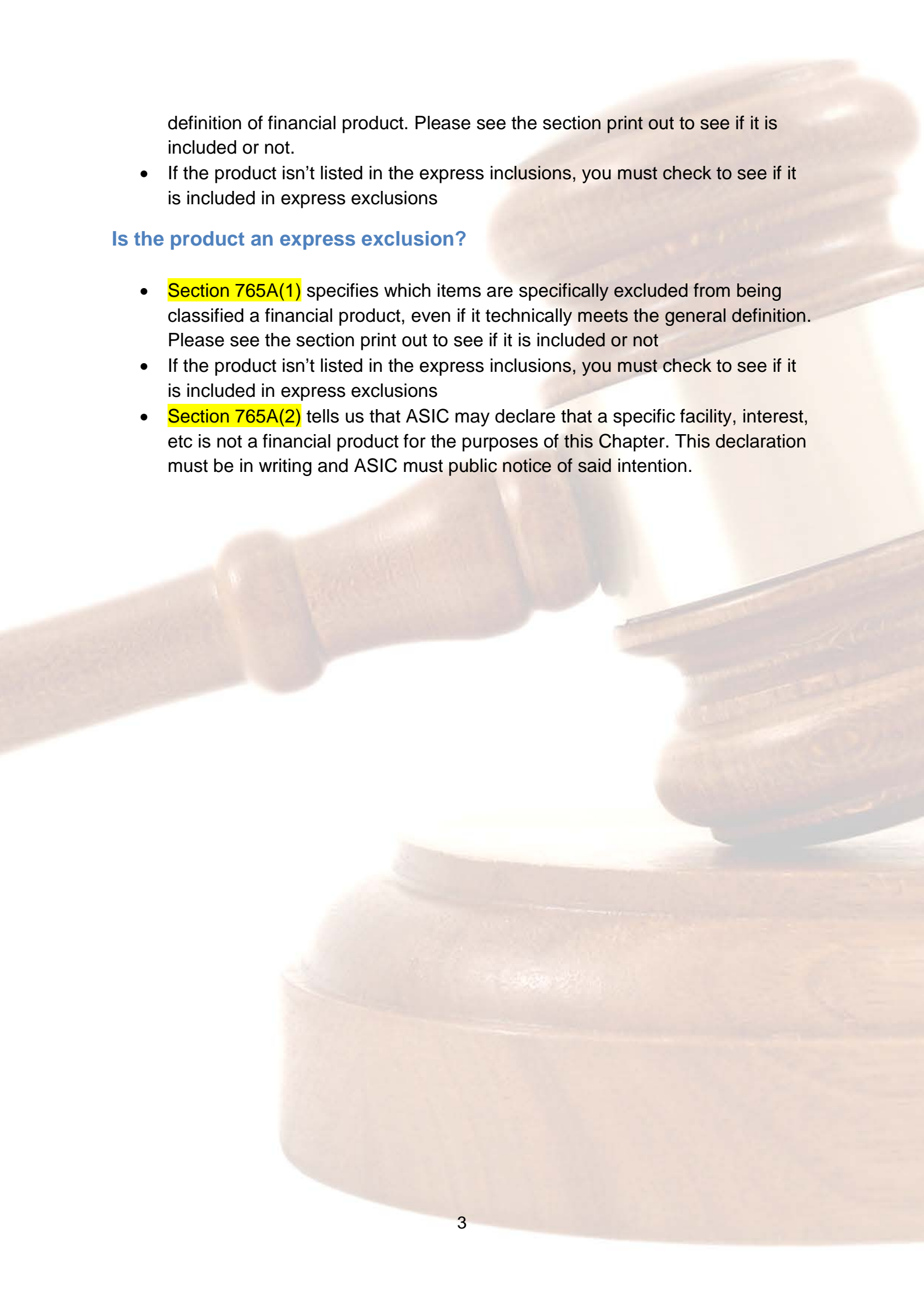
- **Section 763D** tells us that if a payment is made in the form of a non-cash payment, then it is ordinarily deemed as having passed step 1 of the general definition of financial product.
- **Section 763D(2)** specifically tells us that despite meeting the literal definition of section 763D, making payments by means of a facility in for direct debit of a deposit account does not fall within the meaning of non-cash payment.

Is it an incidental product?

- **Section 763E** tells us that if a product is incidental in nature, it cannot be deemed as being a financial product despite meeting the general definition.

Is the product an express inclusion?

- **Section 764A(1)** tells us what specific products are always classified as financial products, regardless of whether or not they have met the general



definition of financial product. Please see the section print out to see if it is included or not.

- If the product isn't listed in the express inclusions, you must check to see if it is included in express exclusions

Is the product an express exclusion?

- **Section 765A(1)** specifies which items are specifically excluded from being classified a financial product, even if it technically meets the general definition. Please see the section print out to see if it is included or not
- If the product isn't listed in the express inclusions, you must check to see if it is included in express exclusions
- **Section 765A(2)** tells us that ASIC may declare that a specific facility, interest, etc is not a financial product for the purposes of this Chapter. This declaration must be in writing and ASIC must public notice of said intention.

Disclosure regimes for securities

Section 761A defines securities as shares or debentures.

Section 113(3) tells us that a proprietary company cannot issue securities to the general public. **Section 113(3)(a)** tells us that it is a strict liability offence for a proprietary company to issue securities to the general public. **Schedule 3** tells us that a criminal penalty may be imposed when a proprietary company issues securities to the general public. **Section 165** tells us that ASIC can request a proprietary company whom has issued securities to the public to convert to a public company.

Only public companies can issue securities.

When a disclosure document is not needed

If a person falls within one of the below categories, a disclosure document is not needed:

Small scale personal offers

Section 708(1) tells us that if the company is raising no more than \$2 million dollars, and targeting no more than 20 specific people, then a disclosure document is not needed.

Offers to sophisticated investors

\$500,000 minimum investment

Section 708(8) tells us that if the company is targeting a person to invest a minimum of \$500,000, then this person will be considered a sophisticated investor.

A wealthy investor (either by net assets or annual income)

Section 708(8)(c) tells us that a wealthy investor is a person (company or individual) who has a net asset of \$2.5 million. A wealthy investor which meets this definition would be considered a sophisticated investor.

Section 708(8) tells us that a person who has a gross income of \$250,000 per annum for two consecutive years is considered to be a sophisticated investor.

Experienced investor

If you have a letter from a financial services licensee that states that you know what you are doing when it comes to investing, then you are considered to be a sophisticated investor.

Company or trustee

If you are a company or trustee that is controlled by a wealthy investor, then the company or the trustee will be deemed as a sophisticated investor.