



November 2003

Financial Services Law

ARE YOU COVERED BY YOUR D&O POLICY? IMPLICATIONS OF SOME RECENT DECISIONS

In the December Bulletin we will review some recent decisions and their implications on your D&O coverage.

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FSR UPDATE

The *Financial Services Reform Amendment Bill 2003* had its third reading in the House of Representatives on 5 November 2003.

In addition, draft *Corporations Regulations* (Batch 6) were released on 6 November 2003 to provide industry with more certainty regarding transition to the new licensing, conduct and disclosure regime. Some of the regulations relate to the Bill and are dependent on its enactment.

Proposed regulations under the existing FSR Act include:

- Allowing for aggregation of related transactions in determining whether the price or value of a financial service exceeds the threshold for a wholesale client (currently \$500,000) (Reg 7.1.17B).
- The current Reg 7.1.33B deems that the licensed distributor of a financial product is the provider of general advice rather than the product issuer, and that product issuer is not required to be licensed. The amendment proposes that, where the product issuer itself is licensed to provide general advice, Reg 7.1.33B should not apply (the product issuer is the provider of the general advice, not the licensee distributor).
- Reg 7.6.01(1)(x) will extend the exemption from the financial product advice provisions for lawyers so the exemption also applies to financial services ancillary to the provision of advice, such as dealing.
- Reg 7.7.02(5)(A) sets out the range of disclosures in advertisements that must be included in place of a Financial Services Guide (FSG).
- Reg 7.9.07J clarifies the operation of section 1013A to provide that a Product Disclosure Statement (PDS) can only be provided by a single issuer (although ASIC relief in this area is unaffected to allow multi-issuer PDSs in certain circumstances).
- Division 5AA will ensure that the exemptions under Reg 7.9.61 apply to all financial products.
- Proposed Regulations 7.9.88, 7.9.89 and 7.9.93 will address inconsistencies and anomalies with the provisions in the *Corporations Regulations* that deal with superannuation payment split notices.

The proposed regulations under the Bill include:

- Reg 7.6.01C specifies a range of FSR-related documents requiring disclosure of an Australian Financial Services Licence number.
- Reg 7.7.08A pertains to the proposed new section 942DA under which a PDS and FSG can be combined into a single document.

Proposed regulations made under the Bill as government amendments include Reg 7.7.20, which exempts the provision of the general advice warning and an FSG when advertising in the media or on billboards.

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Amendments relating to section 946B of the Act include proposed Reg 10.2.214, which sets out transitional arrangements in relation to proposed amendments to section 946B of the Act under the Bill. These amendments make changes to the requirements relating to the provision of a Statement of Advice (SOA) in "live" market situations where advice is required promptly. The proposed regulation provides that it will not be a pre-requisite to the operation of section 946B that existing clients receive an SOA, provided certain conditions are met.

Emily Nighjoy-Wong, Lawyer

ASIC PS177 RELEASED: AUSTRALIAN MARKET LICENCES FOR OVERSEAS OPERATORS

On 30 October 2003, the Australian Securities and Investments Commission released Policy Statement 177, which relates to the licensing requirements for, and obligations of, operators of financial markets in foreign jurisdictions who wish to operate in Australia.

According to Malcolm Rodgers, Executive Director of Policy and Markets Regulation, PS177 gives effect to the government's intention to enhance the flexibility of the regulatory regime for markets under FSR and to facilitate the entry into Australia of overseas markets where the home regulatory regime for the overseas market is sufficiently equivalent to the Australian regime.

PS177 also explains the process for applying for an overseas market licence. Schedule 1, Part A sets out the information to include in the application to demonstrate compliance with Australian obligations. Schedule 1, Part B sets out the information required to demonstrate the nature of the home regulatory regime.

If you need any assistance in preparing your application, please contact Andrew Goldstein (agoldstein@ebsworth.com.au).

Andrew Goldstein, Technical Analyst

LIFE INSURANCE UPDATE

USE OF GENETIC INFORMATION

The Australian Competition and Consumer Commission (ACCC) has issued an interim determination to authorise, for a period of two years, part of the

Investment and Financial Services Association's Genetic Testing Policy, which bars life insurers from requiring life insurance applicants to undergo genetic testing. The ACCC is seeking public comments before issuing its final decision.

In comparison, the US Senate has recently passed the Bill entitled *Genetic Information Non-discrimination Act* (section 1053) by unanimous vote. The Bill will now be debated in the US House of Representatives. This Bill prohibits US insurers from collecting an applicant's genetic information before enrolling the person in an insurance plan. Insurers could not use genetic information (e.g. genetic test results) to deny cover or to set premium rates. If insurers possess any genetic information about a person, they must comply with existing privacy laws.

IFSA FACT SHEET – HEPATITIS C

The Investment and Financial Services Association has issued a Fact Sheet about how a positive Hepatitis C diagnosis may impact on insurance premiums and product features. This Fact Sheet can be downloaded from: www.ifsa.com.au

RECENT DECISION: LIFE AGENT LIABLE FOR INSURER'S LOST OPPORTUNITY TO IMPOSE EXCLUSION

The Supreme Court of Victoria has held that an insurer's agent may be liable to the insurer if it does not properly assist an applicant in filling out an application, particularly by answering the questions in the proposal form (*Dickinson v National Mutual Life Association of Australasia Ltd (trading as AXA Australia)*). Even where it could not be shown that the insurer would have acted differently if aware of the non-disclosed risk, the Court held that the insurer may still have a claim in damages for the loss of an opportunity to act differently.

For a detailed summary of this case, please visit our website at www.ebsworth.com.au to access our *E&E Insurance Review* (November 2003, vol. 15, no. 2) or contact Alisa Kwan on +61 22 9234 2273 for a copy.

ASIC'S GUIDANCE SOUGHT ON APPLICATION OF SECTION 1017E

The Investment and Financial Services Association has recently written to ASIC (letter dated 10 November 2003) seeking guidance on how life insurers can comply with the requirements of the *Life Insurance Act* (particularly section 30), in relation to the management of statutory funds, and section 1017E of the *Corporations Act*, which are arguably inconsistent.

Under section 30 of the *Life Insurance Act*, a life company must credit to a statutory fund "all amounts received by [the] life company in respect of business of [the] fund...". However, section 1017E of the *Corporations Act* requires product issuers to deposit application money into a section 1017E account until the product is issued. Money in a section 1017E account is held on trust by the issuer for the benefit of the applicant, rather than to meet the liabilities of the statutory fund generally.

We will provide an update on this issue when ASIC publishes its response.

Alisa Kwan, Lawyer

APRA RELEASES STAGE 2 GENERAL INSURANCE REFORMS PAPER

On 20 November 2003, the Australian Prudential Regulation Authority (APRA) released its Stage 2 discussion paper on reforms to the framework for supervision of general insurers. As part of a consultative process, APRA invites industry comment by 27 February 2004.

The Paper considers a number of the recommendations made by Justice Neville Owen in the HIH Royal Commission Report released in April this year. Part I of the Paper identifies issues or deficiencies in the prudential regime and APRA's proposals to resolve these by revising existing prudential standards and guidance notes. Part II examines how APRA can increase the level of disclosure about the activities of general insurers, both in terms of APRA's own disclosure and by increasing the information flow from insurers themselves. Key proposals in Part I of the Paper are:

- Three new prudential standards dealing with governance, fitness and proprietary, and audit are proposed to replace the requirements of GPS220 (the Paper does not canvass APRA's proposals in relation to fitness and proprietary – these are flagged for 2004).
- Boards of locally incorporated insurers are to be comprised of a majority of "independent", "non-executive" directors (defined at page 20 of the Paper).
- Reinsurance arrangements, including treaties, must be fully documented before they can be included in capital calculations (see page 40 of the Paper).
- Outsourcing arrangements must be documented and require due diligence, approvals and ongoing monitoring (see page 38 of the Paper).
- Financial reinsurance must involve a transfer of risk. APRA is seeking industry comments to assist in the establishment of specific standards for financial reinsurance (see page 42 of the Paper).
- APRA is to develop CLERP 9 proposals relating to the independence of auditors and make suggestions relating to the rotation of actuaries as well as introduce peer review practices for actuaries (see page 30 of the Paper).
- A new prudential standard is proposed requiring approved actuaries to prepare financial condition reports (FCRs) incorporating a number of specific elements (see page 32 of the Paper).

- Insurers will be required to submit a risk management strategy (RMS) to APRA on an annual basis, not only if material changes are made (see page 35 of the Paper).
- Development of a new prudential standard applicable to general insurers in run-off (see page 45 of the Paper).

A full copy of the report is available at: www.apra.gov.au

Andrew Goldstein, Technical Analyst

REVIEW OF THE INSURANCE CONTRACTS ACT: SECTION 54

The first report of the *Insurance Contracts Act 1984* (Cth) review was released at the end of October 2003. The draft legislative amendments relating to section 54 will be prepared and will be the subject of public consultations later this year.

The report made recommendations including:

- the amendment of section 54 only in respect of "claims made" insurance, but the operation of the section "should not be amended or affected" in relation to "occurrence based" policies;
- section 54 be amended so as not to apply to failures to notify circumstances;
- the Act be amended to provide for an extended reporting period of 45 days for the late notification of circumstances; and
- insurers be required to notify insureds not earlier than one month and no later than seven business days prior to the expiration of the relevant policy, of the importance of notifying facts or circumstances, unless the insured is, to the insurer's knowledge, advised by an insurance broker.

The review panel is now calling for submissions at large from stakeholders in respect of the remainder of the Insurance Contracts Act, which are due by 31 December 2003. The panel envisages some roundtable stakeholder meetings in early February 2004, followed by the release of an issues or discussion paper in late February or early March 2004.

A copy of the report is available on the Treasury website at: icareview.treasury.gov.au/content/default.asp

Alisa Kwan, Lawyer & Georgina Orr, Lawyer

NEWS IN BRIEF

SUPERANNUATION NEWS

Co-contribution and Surcharge Rate Reduction

The *Superannuation (Government Co-contribution for Low Income Earners) Act 2003 No. 110* (Cth), the *Superannuation (Government Co-contribution for Low Income Earners) (Consequential Amendments) Act 2003 No. 111* (Cth) and the *Superannuation (Surcharge Rate Reduction) Amendment Act 2003 No. 112* (Cth) received assent on 12 November 2003.

Under the Acts, the superannuation surcharge rate will fall from 15% to 12.5% over three years, and the government will match the superannuation contributions of low income earners by up to a maximum of \$1,000 a year. The two Co-contribution Acts commenced on 12 November 2003; the operative provisions of the Surcharge Rate Reduction Act are taken to have commenced on 1 July 2003.

Superannuation Safety Amendment Bill 2003

The *Superannuation Safety Amendment Bill 2003* was introduced for second reading in the House of Representatives on 27 November 2003. The Bill requires trustees of superannuation funds regulated by APRA to be licensed, to prepare risk management plans and to have enhanced reporting requirements to increase the flow of information to APRA. The new measures are intended to commence on 1 July 2004, with a two-year transition period.

Superannuation Guarantee Rulings SGR 94/4 and 94/5

The Commissioner of Taxation has issued addenda to these Rulings, which provide current ATO practice in relation to calculating *ordinary time earnings* and *salary and wages* for SG purposes.

ASIC NEWS

Relief for general advice provided to wholesale clients

ASIC released a new Class Order [CO 03/911] on 12 November 2003 which provides licensing relief for some entities that provide general advice in offer documents given to wholesale clients.

Disclosure of instalment fees

ASIC is undertaking a campaign to determine whether the disclosure of any higher premiums and/or fees and charges for paying by instalments is of an adequate standard and whether breaches of relevant legislation have occurred as a result of any non-disclosure. For a copy of the Circular and ASIC's letter, please visit: www.ifsa.com.au

NON-UNIFORM REFORM FOR PROPORTIONATE LIABILITY

All Australian jurisdictions have agreed to replace rules of joint and several liability with a system of proportionate liability, however, these changes have not been implemented uniformly. Australia's attorneys-general recently abandoned attempts to reach a uniform national approach. Professional advisers are expected to be the big winners under the new reforms, however, concern has been expressed that the non-uniform reform of joint and several liability may lead to forum shopping in some instances.

"LAND RICH" PROVISIONS NSW DUTIES ACT AMENDMENT

The *Duties Amendment (Land Rich) Bill 2003* has been introduced to the NSW Parliament to repeal and re-enact the "land rich" provisions in the *Duties Act 1997* with effect from 14 November 2003. Briefly, the effect of the amendments is that if a person (together with associates) obtains a 20% interest in a company or unit trust (rather than 50%) that has more than \$2 million (formerly \$1 million) worth of land (directly or indirectly) and that land represents at least 60% of its total assets (formerly 80%), duty at land transfer rates might apply.

Georgina Orr, Lawyer & Andrew Logan, Lawyer

IN PROFILE



ROBERT SEVERINO,
SENIOR ASSOCIATE
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Ebsworth & Ebsworth has appointed Robert Severino as a Senior Associate in our Sydney office, further boosting our successful financial services group. In addition to extensive experience in superannuation, Robert's principal areas of practice are financial product distribution, managed investments, life insurance, and compliance. Robert has had significant involvement in advising corporate superannuation fund trustees on successor fund transfers to master trusts, as well as advising clients on the licensing and product disclosure requirements of the Financial Services Reform Act. Prior to joining the firm he held legal and compliance roles with Tyndall, Australian Casualty & Life and Zurich. Bringing a wealth of business and legal experience to the firm, Robert has been a key adviser to the industry in the area of family law and superannuation and has a reputation for developing innovative legal products to help clients implement new laws.

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