



October 2003

Financial Services Law

ALSO IN THIS ISSUE

Government response to HIH Royal Commission recommendations	2
Progress of FSR 'Fix-it' Bill	3
GST compliance update	3
Further developments for foreign financial services providers	4
Super payments to casuals under federal awards	4
News in brief	5

REVIEW OF THE INSURANCE CONTRACTS ACT

A review of the Insurance Contracts Act was announced on 10 September 2003 by Senators Helen Coonan and Ian Campbell. The stated aim is to ensure that the Act continues to meet its original consumer protection objectives in a balanced fashion.

Phase one of the review focused on the application of section 54, which applies widely to prevent insurers from refusing to pay a claim if non-compliance with policy requirements did not cause or contribute to the loss.

Phase two involves a broader review of the operation of the Act and is due for completion by 31 May next year.

Ebsworth & Ebsworth Partner Peter MacKenzie is part of a team of life insurance experts who are preparing a submission to the panel on behalf of the Investment and Financial Services Association Limited (IFSA) for phase two of the panel's review. Any comments in relation to the Insurance Contracts Act and life insurance should be forwarded to IFSA.

Georgina Orr, Lawyer and Andrew Logan, Lawyer

COMPANY REFORM MOMENTUM CONTINUES WITH CLERP 9

On 8 October 2003 Treasurer Peter Costello released the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Bill* and accompanying commentary for public consultation – CLERP 9. Comments must be lodged by 10 November.

Financial Services Law

The draft Bill aims to improve the operation of the market by promoting transparency, accountability and shareholder rights. The Bill contains measures to enhance auditor independence, achieve better disclosure outcomes and improve enforcement arrangements for corporate misbehaviour. Key features of the draft Bill include:

- the expansion of the Financial Reporting Council's (FRC) role to include oversight of the audit standard setting arrangements – the Auditing and Assurance Standards Board (AuASB) will be reconstituted with a government appointed chairman under the oversight of the FRC, similar to the Australian Accounting Standards Board and auditing standards made by the AuASB will be given legislative backing;
- measures to enhance auditor independence including mandatory auditor rotation after five consecutive years, with a two-year cooling-off period before a person who has played a "significant role" in the audit can be reassigned to that audited body;
- the introduction of a proportionate liability regime in respect of economic loss or damage to property;
- chief executive and chief financial officers of listed entities required to make a written declaration to the board that the annual financial statements are in accordance with the *Corporations Act 2001* (Act) and accounting standards, the statements present a true and fair view of the entity's financial position and the financial records have been kept in accordance with the Act;
- annual directors' report to include an operating and financial review;
- company auditors required to lodge annual statements;
- civil liability for a breach of continuous disclosure provisions will be extended to individuals involved in the contravention;
- disclosures made to ASIC in good faith and on reasonable grounds given qualified privilege and protection from victimisation;
- remuneration details of directors and executives of listed companies to be disclosed in the annual report;
- financial services licensees to have adequate arrangements for managing conflicts of interest; and
- disclosure documents must be presented in a clear, concise and effective manner.

Andrew Goldstein, Technical Analyst

GOVERNMENT RESPONSE TO HIH ROYAL COMMISSION RECOMMENDATIONS

On 12 September 2003, the Commonwealth Government released its final response to the findings of the HIH Royal Commission. Some of the 61 policy recommendations fell within the responsibility of various independent governmental bodies such as APRA, the ASX and the Australian Accounting Standards Board and have been referred to them for consideration and response.

A number of the recommendations relating to corporate governance and financial reporting have been adopted in the CLERP 9 draft legislation, and others through Australia's adoption of international accounting standards. The government has referred the recommendation to abolish stamp duty and the fire services levy to the States and Territories.

'SAFETY NET' SCHEME TO BE STUDIED

A study of financial system guarantees will consider the merits of introducing a systematic scheme to support policyholders of insurance companies in the event of failure. A technical study will allow interested parties to consider the issues and formulate their views. Treasury will then conduct a public contribution process on policy options, with the final report due by 26 March 2004.

REVIEW OF DISCRETIONARY MUTUAL FUNDS & DIRECT OFFSHORE FOREIGN INSURERS

A review of the extent and nature of discretionary mutual funds and direct offshore foreign insurers' operations in Australia aims to determine whether it is necessary and possible to provide the same level of protection as provided where insurers are subject to prudential regulation under the *Insurance Act 1973* (Cth). The review must report to the government by 30 January 2004.

AMENDMENTS TO APRA GOVERNANCE

An enhanced corporate governance structure for APRA has been implemented through amendments to the APRA Act, effective from 1 July 2003. APRA has been asked to consider:

- establishing an advisory board;
- implementing a program to build the skills of staff;
- developing a more sceptical, questioning and, where necessary, aggressive approach to its prudential supervision of general insurers;
- developing mechanisms to investigate reinsurance arrangements for general insurers on a random but frequent basis; and
- developing reporting returns for insurers to enable external users to assess an insurer's outstanding claims provisions and reinsurance arrangements.

The Corporations Act will also be amended to require the court to consider the interests of policyholders when deciding whether to make a winding-up order.

Julia Best, Lawyer

PROGRESS OF FSR 'FIX-IT' BILL

In late September, the Commonwealth Government released draft amendments to the *Financial Services Reform Amendment Bill 2003*. These include proposals to make the following changes:

- ensuring that inviting someone to sell their financial product off-market is an offence;
- requiring additional disclosure from off-market dealers;
- excluding trustees of superannuation funds with assets of less than \$10 million from the definition of "professional investor";
- providing a consistent basis to determine when general insurance products are provided to retail clients;
- ensuring that experts who report on financial products do not automatically receive the benefit of the exempt document status in which their reports appear;
- permitting ASIC stop-order provisions to operate in relation to non-materially adverse circumstances, subject to existing due process requirements;
- clarifying the concepts of "up-to-date" and "defective" in respect of a Product Disclosure Statement (PDS);
- amending the definition of "eligible application" so restricted issues or sales of financial products may occur or a person may become a "standard employer-sponsor" in relation to a superannuation entity, provided the application is derived from a PDS that is not defective at that time;
- allowing for the provision of a revised PDS (instead of a supplementary PDS) in relation to the issue of products, where an application is based on a defective PDS;
- including a regulatory power to specify limited situations when, despite general advice being provided, the general advice warning would not need to be given;
- removing the practical difficulties of reading a block statement, by permitting information to be provided in a more tailored manner, without reducing the disclosure obligations and removing the requirement for information to be given based on material prepared by the product issuer;
- amending sections 1414, 1426 and 1428, so the transitional period ends when a market or clearing and settlement facility licence is varied, rather than upon the licensee lodging an application to vary its licence.

These proposals were revised on 23 October to include:

- amending the "execution-related telephone advice" and related statement of advice exemption provisions; and
- clarifying the concepts of "up-to-date" and "defective" in respect of a Financial Services Guide (FSG).

The proposed amendments are now expected to be debated in early November.

Emily Nighjoy-Wong, Lawyer

GST COMPLIANCE UPDATE

On 10–11 October, Lyn Nicholson, a partner in our Sydney office, attended the 2003 National GST Intensive Course offered by the Taxation Institute of Australia, which included a number of issues relevant to clients in the financial services industry.

Caroline James of ING, together with Ian Jeffrey and Heydon Miller of PricewaterhouseCoopers, considered the development of the apportionment principles in relation to financial supplies and acquisitions. They noted that the development of principles overseas is based on similar but different law, and the use of imprecise language makes it difficult to translate the principles to Australia.

They concluded that there are many different approaches that could reasonably be taken to apportionment. From a compliance perspective, in implementing any apportionment strategy, it may be appropriate to liaise with the Australian Taxation Office (ATO) prior to signing off, rather than engaging in a dispute with the ATO later.

CO-OPERATIVE AGREEMENTS WITH THE ATO

This compliance aspect was explored further in the session provided by the ATO's Steve Vesperman on the GST compliance program for 2003–2004 and, in particular, the push to have businesses enter into the new Co-operative Compliance Advance Agreements (CCAAs). These are agreements where the ATO effectively signs off on the way an organisation deals with GST. The precursor to entering into a CCAA is for an organisation to open its processes to an ATO review to ensure they demonstrate a high level of GST compliance.

The benefits are potential future costs savings in the event there is a GST audit or an error is found and penalties are liable to be applied. Companies that have entered into a CCAA will be given favourable consideration in respect of the imposition of penalties.

ATO TARGETS FINANCIAL SERVICES SECTOR

In any event, the ATO statement on the compliance focus for 2003–2004 indicates that within its target industry and risk segments are large corporates in the financial services sector. This means you may be at risk and, while many organisations will have comprehensive GST compliance programs in place, it is worth considering a CCAA. The ATO cited an example of a large corporate that has entered into a CCAA and aims to promote this to institutional investors as evidence of its governance strategy.

If a CCAA seems too much work, the "Better Practice Guide for the Management of GST Administration" sets out guidelines for better practice, comprehensive KPIs and provides an insight into the ATO's approach.

The guide can be accessed at the ATO website:
www.ato.gov.au/businesses/content.asp?doc=\content\33253.htm

Lyn Nicholson, Partner

DEVELOPMENTS FOR FFSPs

PS 176 – LICENSING RELIEF FOR WHOLESALE FOREIGN FINANCIAL SERVICES PROVIDERS (FFSPs)

ASIC released Policy Statement 176 on 12 September to deal with applications by FFSPs for licensing relief under section 911A(2)(l) of the *Corporations Act 2001*.

Applications can be made by individuals, corporations or industry associations. There are two types of exemptions available for FFSPs:

- **individual** exemption (linked to a particular FFSP and limited to the particular financial services provided in Australia); and
- **class order** exemption (linked to several applications or a joint application for particular financial services regulated by a particular overseas regulatory authority).

Different conditions will be imposed on each of these types of exemptions. ASIC must be notified in writing if an FFSP intends to rely on a class order exemption. PS 176 sets out how FFSPs may apply for these exemptions. Generally, the applicant must satisfy the following criteria:

- financial services must be provided to wholesale clients only;
- the FFSP must be “regulated” by an overseas regulatory authority, which must be able to monitor and enforce compliance and conduct investigations through use of compulsory powers;
- overseas regulation is “sufficiently equivalent” to regulation by ASIC (see PS 176.23, 176.59 and Schedule 2); and
- effective cooperation arrangements must be in place between ASIC and the overseas regulator.

There is no prescribed application form, but FFSPs should ensure their applications address those sample questions set out in Schedule 1 of PS 176.

NEW CLASS ORDER EXEMPTIONS FOR FFSPs

The jurisdictional reach of the financial services reform legislation is very broad by virtue of section 911D, which provides that a person will be carrying on a financial services business “in this jurisdiction” if, in the course of carrying on the business, that “person engages in conduct that is:

- intended to induce people in this jurisdiction to use the financial services the person provides; or
- is likely to have that effect,

whether or not the conduct is intended, or likely, to have that effect in other places as well”.

As a result, the arrangement of a global insurance program in London may amount to the provision of a financial service in Australia simply because an

Australian subsidiary is one of several insureds. Problems also arise where a person obtains a financial product while overseas but then moves to Australia – by the actions of its customer, the provider could accidentally be carrying on a financial service in Australia. ASIC addressed these uncertainties through the class order exemptions issued under section 911A(2)(l) on 26 September, taking effect from 1 October:

- **Class Order (CO 03/824)** exempts a person from the licensing requirement where they deal with wholesale clients only and, but for section 911D, the person would not be carrying on a financial services business in this jurisdiction.
- **Class Order (CO 03/825)** exempts a person from holding an Australian financial services licence where they provide further financial services to an existing client (that is, a retail/wholesale client who holds a product previously issued by the person), and that client acquired the original product outside this jurisdiction but moved to Australia after acquiring the original product, and the further financial services provided relate to the original product.

Alisa Kwan, Lawyer

SUPER PAYMENTS TO CASUALS UNDER FEDERAL AWARDS

A recent decision of the High Court has found that employers’ contributions to casual employees pursuant to the *Superannuation Guarantee (Administration) Act 1992* will not cover overtime and penalty work.

Australian Communication Exchange Ltd v Deputy Commissioner of Taxation [2003] HCA 55

FACTS

The central issue in the case concerned the construction of clauses within the *Clerical Employees Award – State (QLD)* (Award) which governed the obligations of the Australian Communication Exchange (ACE) to make contributions to a superannuation fund for casual employees. Clause 3.5(2)(a) of the Award obliged ACE to contribute to an approved fund on behalf of each employee “an amount calculated at 3% of the employee’s ordinary time earnings” (defined as “the actual rate of pay the employee receives for ordinary hours of work”, and included “casual rates received for ordinary hours of work” but excluded “overtime”).

The Award had three employment classifications: full-time, part-time and casual. Casuals were entitled to be paid at overtime rates for work outside ordinary working hours or in excess of eight hours in any one day or 38 hours in any one week. The Award defined “ordinary hours of work” as being an average of 38 hours per week, worked any time between 6.30am and 6.30pm, Monday to Friday, and between 6.30am and 12.30pm on Saturday. For casual employees, therefore, an entitlement to overtime payments was essentially related to work performed outside of “ordinary hours of work”.

DECISION

A majority of the High Court held that superannuation contributions for casual employees were not payable for hours worked outside “ordinary hours of work”.

IMPLICATIONS

Although a High Court decision, it must be kept in perspective that this was only a majority decision, and a decision that turned decisively on the construction of the Award. The decision does, however, provide guidance to employers as to the extent of their superannuation contribution obligations to casual employees employed under federal awards.

Damian Sloan, Partner and Daniel Miller, Lawyer

NEWS IN BRIEF

ASIC UPDATES

- **Multiple issuer PDSs:** ASIC has released a Class Order [CO 03/0876] relating to the preparation of a PDS under section 1013A of the *Corporations Act 2001* by multiple issuers. Further to our comments in last month’s Bulletin, ASIC has confirmed the circumstances in which the relief will apply, including where the financial products offered in the single PDS are of the same kind. ASIC did, however, concede that there may be some circumstances where related issuers may wish to use a single PDS for different kinds of financial product, and relief in these situations will be addressed on a case-by-case basis.
- **Alternative measures for PS 166:** ASIC announced late last month an alternative means for entities within a corporate group to satisfy the cash needs requirement under PS 166: Licensing: Financial Requirements, without preparing cash flow projections on an individual entity basis. Under the variation, a licensee can now meet the cash needs requirement if an ADI provides an unqualified and enforceable financial commitment to pay an unlimited amount to the licensee, or to meet the licensee’s liquidity obligations under the licence. ASIC will consider applications to foreign deposit-taking institutions on a case-by-case basis.
- **Amended Pro Forma 209: AFSL conditions:** ASIC has released an amended version of PF 209, and the changes come into effect immediately. The amendments relate, amongst others, to the following:
 - authorisation for general insurance recognises a separate category of consumer credit insurance only;
 - base level financial requirements provide a third option for meeting the three-monthly cash flow;
 - financial requirements for foreign exchange dealers;
 - stockbroker responsibility for subsidiary companies;
 - retention of FSGs, SoAs and material relating to personal advice; and
 - agreements with holders of financial products on trust.
- **New version 4 of eLicensing and AFS licensing kit:** The release of this new version follows recent updates to ASIC industry guides, and provides further clarification of ASIC’s operational processes. Most changes are fairly minor and a list can be found at: www.asic.gov.au

“TERMS AND CONDITIONS APPLY” IS AN INSUFFICIENT DISCLAIMER

The Federal Court held that the words “conditions apply” cannot be used as a catch-all to conceal important information. ACCC chairman, Graeme Samuel, said the expression cannot be used by advertisers to “make bold promises and then use the fine print to avoid honouring them”. Justice Conti commented that the scope of such disclaimers must make an effective qualification of the representations made, otherwise it is likely to have a misleading effect (*ACCC & anor v Commonwealth Bank of Australia* [2003] FCA 1129 (17 October 2003)).

TPA AMENDMENT BILL SUPPORTS TORT REFORM

The *Trade Practices Amendment (Public Liability Insurance) Bill 2003* was introduced to Parliament on 18 August. It seeks to amend the *Trade Practices Act 1974* (Act) to prevent individuals (and the ACCC) from bringing actions for damages for personal injury or death resulting from contraventions of Division 1 of Part V of the Act. Part V of the Act establishes consumer protection measures, and this reform aims to reduce claims in negligence being framed as a breach of section 52 (or other Part V provisions) in order to circumvent recent state-based legislation designed to reduce damages for personal injury claims.

TAX BREAK FOR FOREIGN PENSIONERS

The federal government will allow lump sums from super funds transferred into Australia to be taxed at a concessional rate, as part of its response to the Senate Select Committee’s Report into the Taxation of Overseas Superannuation Funds. Transfers made within the first six months of the taxpayer becoming a resident are tax-free. This will remain, however, transfers made after this time will become “taxable contributions” and will be taxed at the concessional rate within the fund, rather than being taxed at the taxpayer’s marginal rate. Senator Coonan said there will be industry consultation before this and other changes flowing from the committee’s report are implemented.

Georgina Orr, Lawyer

SYDNEY

Peter MacKenzie, Partner
pmackenzie@ebsworth.com.au

Ann Newbrun, Partner
anewbrun@ebsworth.com.au

Brian Thomas, Partner
bthomas@ebsworth.com.au

135 King Street
Sydney NSW 2000
Australia

GPO Box 713
Sydney NSW 2001
Australia
DX 103 Sydney

Tel (61-2) 9234 2366
Fax (61-2) 9235 3606

MELBOURNE

Ian Enright, Partner
ienright@ebsworth.com.au

John Goulios, Partner
jgoulios@ebsworth.com.au

Rialto South Tower
525 Collins Street
Melbourne Vic 3000
Australia

GPO Box 4542
Melbourne Vic 3001
Australia
DX 640 Melbourne

Tel (61-3) 8624 2000
Fax (61-3) 8624 2031

BRISBANE

Peter Daley, Partner
pdaley@ebsworth.com.au

Riverside Centre
123 Eagle Street
Brisbane Qld 4000
Australia

PO Box 7081
Riverside Centre
Brisbane Qld 4001
Australia
DX 282 Brisbane

Tel (61-7) 3303 8888
Fax (61-7) 3303 8822

www.ebsworth.com.au

We regularly produce publications to keep our clients up-to-date with important legal developments. If you do not wish to receive this publication in the future, email us at publications@ebsworth.com.au

Ebsworth & Ebsworth Lawyers respects your privacy and allows only limited use and disclosure of personal information. A copy of our privacy policy is available on our website.

Liability limited by the Solicitors’ Scheme, approved under the *Professional Standards Act 1994* (NSW).