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in this issue

Super calculators: tool or advice?	2
Super co-contributions: draft amending regulations released	2
No looking back?	2
Inadequate prominence for qualifications in ads deemed misleading	3
Lloyd's underwriters now allowed to write medical indemnity cover	3
News in brief	4

A super budget

Whether the Federal Budget hit the mark with voters remains to be seen. And while the superannuation industry didn't see any major policy shifts from its "Call for super action", the Federal Budget delivered on 11 May did see a few changes for superannuation.

There was, of course, no abolition of contributions tax (or the dreaded surcharge). However, the superannuation surcharge did get a look in with a proposal to reduce it to 12.5% in the next financial year, with an ultimate reduction to 7.5% in the 2006–2007 and following financial years. It seems that this proposal is currently unlikely to pass the Senate.

CGT roll-over relief also featured prominently in light of the anticipated consolidation of the superannuation industry in the next two years. It is proposed that no CGT liability will arise at the time of a successor fund transfer. Instead, the CGT liability will arise in the subsequent disposal of assets by the successor fund.

Government co-contribution measures were also adjusted. The maximum government co-contribution will increase from \$1,000 to \$1,500 and will be available to employees who make personal contributions with incomes below \$28,000. The maximum co-contribution will be reduced by 5 cents for each \$1 of income, phasing out at \$58,000.

And in what has been described as a "nasty surprise for self-managed super", small funds will be prevented from providing lifetime or life expectancy pensions. Instead, such funds will have to purchase such income streams from third-party providers.

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Super calculators: tool or advice?

“The mere provision of a superannuation calculator does not mean the provider will always need an AFS licence or authorisation under the Corporations Act” – that’s the view expressed by the Australian Securities and Investments Commission (ASIC) in Information Release IR 04-17 issued on 4 May 2004 to provide guidance on the use of superannuation calculators.

In the Information Release, ASIC noted a view in some sections of the industry that an Australian financial services (AFS) licence or authorisation is always required for the provision of a superannuation calculator. In response, ASIC said: “We are issuing this guidance to clarify that we do not think a licence or authorisation will always be required”.

ASIC is of the view that superannuation calculators can often be provided without a licence or authorisation, particularly where all of the following are satisfied:

1. the calculator allows the consumer to alter all “default settings” for the various assumptions;
2. any default settings are based on industry-wide rather than fund-specific information;
3. the calculator is accompanied by a clear explanation of its purpose and limitations, including an explanation of the assumptions (including the limitations of those assumptions) and a clear statement that the calculator is intended to illustrate the broad impact of consumer choices and is not a prediction of a consumer’s final superannuation benefit;
4. the calculator is accompanied by a clear statement to the effect that the calculator is not intended to be relied on for the purposes of making a decision in relation to a financial product, including a decision in relation to a particular superannuation fund or strategy, and that consumers should consider obtaining advice from an AFS licensee before making any financial decisions; and
5. the calculator forms part of, or is linked to, other educational material and is distinct from any fund’s promotional or marketing material.

Determining whether a licence or authorisation is required will depend on the facts of each case. ASIC concludes by saying: “A licence or authorisation is more likely to be required if the calculator is intended to, or might reasonably be regarded as intended to, encourage

consumers to make a decision about a particular financial product or strategy”.

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Super co-contributions: Draft amending regulations released

On 4 May 2004, the Assistant Treasurer released draft amending regulations to the Superannuation (Government Co-contribution for Low Income Earners) Regulations 2004.

The draft regulations do the following two things:

- they introduce a definition of “eligible account” (which is generally the account the person has nominated for the purpose of receiving a co-contribution); and
- they insert a table which sets out the destination of a co-contribution (which is generally the eligible account).

An eligible account cannot be an account which:

- is, generally speaking, maintained solely for the purpose of providing benefits on or after the member’s death; or
- has commenced paying a pension or an annuity.

The draft regulations are expected to be gazetted before 30 June 2004 to ensure the rules are in place prior to the first co-contribution payments becoming payable in the 2004–2005 financial year.

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No looking back?

For some trustees of superannuation funds, the question may arise: “Can I make an amendment to the Trust Deed with retrospective effect?” This issue will be particularly pertinent where the amendment power of the Trust Deed does not expressly provide for retrospective amendments.

There has been little judicial consideration of the issue in Australia and our review of the case law in local and

foreign jurisdictions demonstrates that the matter is not conclusive.

A possible solution may be to first amend the power of amendment to expressly provide for retrospectivity, although this also is a contentious issue, depending on the nature of the existing amendment power. Any such attempt should be approached with extreme caution.

While existing funds and trustees may face this quandary, new funds and their trustees should anticipate the matter prior to establishment and ensure that at the very least, the amendment power of the proposed Trust Deed expressly permits amendments to be made with retrospective effect.

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Inadequate prominence for qualifications in ads deemed misleading

The Full Court of the Federal Court dismissed an appeal by Medical Benefits Fund of Australia Limited (MBF) in December 2003 to overturn the primary judge's findings that MBF was liable for misleading television and billboard advertisements.

The advertisements allegedly contained a number of misrepresentations by MBF – for instance, that it would waive all waiting periods applying in respect of pregnancy and obstetrics for consumers who purchased health insurance before 30 June 2000, and that they could claim expenses relating to pregnancy the day after joining. The Full Court found that although MBF had qualified those misleading representations in the advertisements by written disclaimers, the impact of the fine print disclaimers was disproportionate to the impact of the images and the primary misleading statements made by MBF, therefore the qualifications were insufficient to draw the attention of prospective customers to the effect of the disclaimers.

MBF argued that even if a prospective customer was misled by the television and billboard advertisements, subsequent disclosures made by MBF (e.g. telephone enquiries, information contained on MBF's website or promotional booklets) would have dispelled any misapprehension. The Full Court rejected this argument.

With respect to the primary judge's order requiring corrective advertisements to be placed in newspapers and television respectively, the Full Court upheld the first finding but set aside the orders for corrective television advertising.

Great care must be taken to ensure that any qualifications to statements made in advertising materials are prominently displayed. In the context of television advertisements (or advertisements by other interactive media), factors such as the duration of the clip and the effectiveness of using visual images as opposed to text messages will need to be taken into consideration when determining where, when and how to display the qualification. In the context of print-based advertisements, display of the qualification should be clear, proximate and in the same size and prominence as the statements which are the subject of the qualification.

On 17 May 2004, the *Australian Financial Review* reported that the Australian Competition and Consumer Commission (ACCC) has forced another health insurer, Medibank Private, to establish a \$5 million special fund to compensate consumers who were misled by one of its advertising campaigns. This shows that the ACCC is willing to seek alternative types of remedies against companies in breach of the Trade Practices Act and the Court is receptive to those alternatives.

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Lloyd's underwriters now allowed to write medical indemnity cover

On 14 May 2004, the federal government gazetted amendments to the Medical Indemnity (Prudential Supervision and Product Standards) Regulations ("the Regulations") to exclude arrangements under which medical indemnity insurance is provided to health care professionals by Lloyd's underwriters from the regulation of the *Medical Indemnity (Prudential Supervision and Product Standards) Act 2003* ("the Act").

The Act originally provided that medical indemnity cover for health care professionals can only be provided by "general insurers", and the original definition of

“general insurer” did not include Lloyd’s underwriters. Various industry participants made representations to the government for changes to the Act and the Regulations to allow Lloyd’s underwriters to offer medical indemnity cover under the Act. The government agreed to propose amendments to the Act to achieve this. In the meantime, the government had passed retrospective amendments to the Regulations (effective 1 July 2003) to allow Lloyd’s underwriters to participate in this market. These amendments will cease to operate once the corresponding amendments to the Act come into effect. Ebsworth & Ebsworth has advised a number of clients on the interpretation of the Act and the Regulations.

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News in brief

General insurance

Proposed legislation to be introduced to federal parliament in the Winter 2004 sittings, which commenced on 11 May, include the Financial Sector Legislation Amendment Bill which will, among other things:

- clarify the scope of the *Terrorism Insurance Act 2003*; and
- give effect to outstanding issues arising from regulatory reform in the general insurance industry.

The Proposals Paper on the second stage of the Insurance Contracts Act review was released on 25 May 2004. Comments on the paper are due by 9 June 2004.

Treasury released a summary of its key findings from the review of Discretionary Mutual Funds and Direct Offshore Foreign Insurers (DOFIs) on 27 May 2004.

FSR

ASIC has indicated that disclosure documents (such as prospectuses, product disclosure statements and takeover documents) issued before an entity lodges its first annual financial report under the new International Financial Reporting Standards (IFRS) (for financial years starting on/after 1 January 2005), should contain information on the impact of adopting a new standard. ASIC has released a guide on good disclosure of the

impact on an entity’s financial results of adopting IFRS as Australian accounting standards.

ASIC has issued the following new Class Orders:

- CO 04/239 – granting relief from the requirement to hold an AFSL and relief from the product disclosure and hawking provisions of the *Corporations Act 2001* to persons providing, or advising on, debt factoring arrangements;
- CO 04/443 – Licensing Relief for offshore participants in the market operated by Eurex Frankfurt AG; and
- CO 04/444 – Licensing Relief for offshore participants in the market operated by Chicago Mercantile Exchange Inc.

Superannuation

The ATO has released the following new interpretive decisions:

- ATO ID 2004/339 – Deduction: management fees debited to an allocated pension account.
- ATO ID 2004/340 – Personal superannuation contributions made by a member over the age of 70.

Managed funds

Five compliance plan commentaries have been released by ASIC as practical guidance for operators of managed investment schemes in meeting their compliance obligations under Chapter 5C of the *Corporations Act 2001*. The commentaries provide guidance specific to mortgage, financial asset, property and agricultural schemes and are to be considered alongside Policy Statement 132.

Corporate governance

ASIC has released three papers outlining its proposed policies in relation to the new auditor registration, audit and financial reporting and product disclosure obligations under the CLERP 9 proposal.

Miscellaneous

The “Report of the Review of Financial Systems Levies”, examining the framework for collecting levies from the Financial Services Sector to fund APRA, ASIC and the ATO, was released in May. The Report makes 17 recommendations, which the government has accepted subject to the changes in the levies framework not resulting in increases in the amounts paid by the smallest financial institutions.

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The latest issue of the *E&E Insurance Review* will be published on our website on 14 June... visit www.ebsworth.com.au

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Ebsworth & Ebsworth is internationally recognised as Australia's pre-eminent insurance law firm. Whether it be life insurance, general insurance, marine insurance, reinsurance or professional indemnity insurance, we have the depth and experience which sets the benchmark in Australian insurance law.

But while insurance law is the cornerstone of Ebsworth & Ebsworth's financial service practice, we have also built the reputation of being a quiet achiever in superannuation law.

From fund establishment, disclosure review, outsourcing agreements and licensing to complex fund amalgamations, our team has the experience to deliver quality results.

Innovative solutions

Mindful of the complex legislative environment in which superannuation trustees operate, we have developed innovative and sophisticated methodologies to assist our clients comply with the law.

And we're always looking at ways to help our clients implement new laws. So you can always expect us to develop innovative products to complement our quality legal service.

Ebsworth & Ebsworth is committed to being a premier law firm in specific areas of expertise, with financial services being one of our chosen specialties.

So if you have any questions about superannuation,
just give us a call or drop us a line.



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