Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

29 May – 31 May 2012

Question: **BET 411-425**

Topic: **Life Insurance Companies**

Hansard Page: Written

Senator Madigan asked:

411. For each licensed non-mutual life insurer in Australia, for each of the financial years from 2007-08 to the present and following the global financial crisis (GFC):-

(a) what amount of surplus or loss was annually distributed between policyholders and shareholders?
(b) what has been the annual rise or decline in the total surrender and loan values of traditional whole of life or endowment assurance policies ("traditional policies")?
(c) How many such traditional policies have been forced into lapse by declines in surrender values?
(d) how many such policies in total in each year have been cancelled, surrendered or paid out?
(e) how much would the policyholders or beneficiaries have received if there had been no allocation of losses against them?

412. Are directors of non-mutual life insurance companies under a statutory duty to give priority to the interests of policyholders ahead of the interests of shareholders?

413. If so, how is distributing losses to policyholders consistent with that duty where there is shareholders' capital available to absorb the loss?

414. What legal advice is in the possession of APRA relating to this question of a duty to give priority to the interests of policyholders and would APRA please provide copies to the Committee?

415. Is a policy of life insurance a contract *uberimmae fidei* (of the utmost good faith)?

416. What, if any, is the legal basis on which a life insurance company can purport to distribute an investment loss to a traditional policy described in the policy contract as a "with profit" policy?

(a) What case law (if any) is there to say that a profit includes a loss?

417. What notice is a life insurance company required to give to a policyholder before forfeiting a policy where the surrender value has fallen below a loan outstanding?

418. Is a life insurance company required to draw a policyholder's attention to a fall in the surrender value of a policy?

(a) If not, why not, given that insurance is a contract *uberrimae fidei*?

(b) What legal advice has APRA on this question and would APRA please provide all such advice to the Committee?

419 If a life insurance company does not draw a policyholder's attention to a fall in the surrender value of a policy, cannot such silence constitute misleading or deceptive conduct or unconscionable conduct in terms of trade practices law?

(a) Would APRA please provide all legal advice it has on this question?

420. Would APRA please provide all papers it has or correspondence it has had with Treasury, ASIC or the ACCC relating to the losses or financial stability of the life insurance industry during and after the GFC and/or the treatment of policyholders in the industry's dealing with GFC losses?

421. Would APRA and Treasury please provide all papers they have on the legal and economic aspects of allocating GFC investment losses to holders of traditional or non-traditional life insurance policies?

422. For each licensed life insurance company, would APRA please provide the company actuary's reports and recommendations for allocations of profits and losses between shareholders (if any) and all classes of policyholders for each year from 1 July 2007 together with any internal auditor or other comments or APRA comments thereon which are in APRA's possession?

423. How often have losses been distributed to policyholders of traditional policies by life insurance companies since the enactment of the *Life Insurance Act 1945* and its successor?

(a) Would APRA please provide the details of each such case?

424. What mergers of life insurance company businesses have occurred over the last 20 years?

(a) In each case, what did the Federal Court orders approving the merger require in relation to the contractual rights of pre-existing holders of traditional polices?

(b) Where contractual rights of policyholders were novated pursuant to a Court order, does the Constitution not require "just terms" given that contractual rights under a policy of life insurance are *choses in action* and therefore property?

(c) Is it “just terms” if the acquiring company claims it is entitled to distribute losses to what were originally described as “with profit” traditional life policies?

(d) What steps has APRA taken to ensure any Court orders or undertakings to the Court have been complied with during and after the GFC?

425. Would APRA please provide its files on the above matters for inspection and copying by interested policyholders or their representatives free of charge, as being the interested parties whom APRA is supposed to protect (given that APRA makes a profit from fees levied on insurers and passed on to policyholders?

(a) If not, would APRA please provide the files to the Senate through this Committee for inspection by Senators or their representatives?

Answer:

411. APRA does not collect this information on a routine basis.

(a) - (e) The provision of a more detailed answer to these questions would involve an unreasonable diversion of resources.

412. Section 48 of the *Life Insurance Act 1995* (the Act) requires directors of life insurance companies to give priority to the interests of owners of policies over the interests of shareholders in the event of conflict between their interests.

413. and 414. Provided a life insurance policy by its terms permits such a distribution, a director will not breach section 48 of the Act by making the distribution. A breach of the duty will only arise where there is a conflict between the interests of owners of policies and the interests of shareholders and, where this occurs, directors fail to give priority to the interests of policy owners.

The provision of a more detailed answer to these questions would involve an unreasonable diversion of resources.

415. Yes. Section 13 of the *Insurance Contracts Act 1984 (Cth)* implies into a contract of insurance a duty for each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.

416. The terms of the contract governs the treatment of investment losses.

(a) Whether a profit includes a loss will depend upon the construction of the terms of each contract. As contracts may make many and varied provision for such matters, APRA is not aware of any case law that finds, in all circumstances, that a profit includes or excludes a loss.

417. A life insurance company is required to give an insured notice in writing of any proposed cancellation of a contract of insurance. The specific notice requirements are set out in section 59 of the *Insurance Contracts Act 1984 (Cth)*.

418. and 418. (a) and (b) Unless the terms of a policy require such notice, a life insurance company is under no obligation to draw to a policyholder's attention a fall in the surrender value of a policy.

Where an insurer complies with its contractual duties but an insured believes that the insurer may nonetheless have breached section 13 of the *Insurance Contracts Act 1984 (Cth)*, it is open to the insured to bring proceedings for breach of the duty against the insurer. The Australian Securities and Investments Commission (ASIC) is responsible for the general administration of the *Insurance Contracts Act 1984 (Cth).*

419 and 419.(a). These are matters that fall outside APRA's statutory duties and functions. As indicated in the answer to Question 418 above, ASIC has the general administration of the *Insurance Contracts Act 1984 (Cth)*.

420.- 422. The provision of an answer to these questions would involve an unreasonable diversion of resources.

423. and 423. (a) APRA does not collect such information on a routine basis. The provision of a more detailed answer to these questions would involve an unreasonable diversion of resources.

424. and 424. (a) A large number of mergers and amalgamations of life insurance companies have occurred over the last 20 years. Before a merger can proceed, it is subject to scrutiny by the Federal Court at open hearings. Materially, a merger scheme cannot take effect until such time, if any, as the Federal Court confirms the scheme under Part 9 of the Act.

The orders made by the Federal Court in respect of each confirmed scheme are on the public record. The Court publishes its reasons for judgement and these are accessible from the website of the Federal Court of Australia at the following link: http://www.fedcourt.gov.au/searchjudgments.html

Importantly, policy owners have the right to be heard by the Court at hearings relating to merger applications. Policy owners are required to be given a copy of a summary of the scheme approved by APRA before a hearing and have a right to inspect scheme documents prior to the hearing date. Notice of the hearing date is required to be published in the Gazette and major newspapers circulating in each state and territory in which affected policy owners reside.

(b) and (c) All aspects of a scheme are considered by the Federal Court including any variation to the terms of life insurance policies affected by a scheme. Where contract variations are proposed (which is relatively infrequently), APRA and individual policy owners are able to make representations to the Court on the effect (including the fairness) of the changes on the interests of affected policy owners (viewed as a whole) prior to the Court confirming a scheme.

If a person believes that the Federal Court has made an error of law in respect of a particular scheme, it is open to such a person (if they have legal standing) to consider bringing an appeal against such a judgment. APRA is not aware of any person having done so (nor contemplated doing so) over the past 20 years. Further, APRA is satisfied that policy owners have been afforded reasonable opportunity to have a say in relation to each Scheme that has been confirmed by the Federal Court.

(d) It is not APRA's role to monitor companies' compliance with Court orders with respect to merger schemes. However a breach of a Court order is a matter that APRA would expect to be given notice of and would expect the parties to disclose to the Court for remedial orders. If affected policy owners believe breaches of court orders are occurring, APRA would expect to be given notice of such alleged breaches.

425. and 425. (a) The provision of an answer to these questions would involve an unreasonable diversion of resources.