Parliamentary Joint Committee on Corporations and Financial Services

Corporations Amendment Regulations 2003 (Batch 6); Corporations Amendment Regulations 2003/04 (Batch 7); and Draft Regulations–Corporations Amendment Regulations 2004 (Batch 8)

March 2004

ISBN 0 642 71370 7

Printed by the Senate Printing Unit, Parliament House, Canberra.

MEMBERS OF THE COMMITTEE

Senator Grant Chapman, **Chairman**

Senator Penny Wong, **Deputy Chair**

Senator George Brandis

Senator Stephen Conroy

Senator Andrew Murray

Mr Anthony Byrne MP

Mr Steven Ciobo MP

Mr Alan Griffin MP

Mr Gregory Hunt MP

Mr Stewart McArthur MP

SECRETARIAT

Dr Kathleen Dermody, Secretary

Mr Paul Lucerne, Principal Research Officer

Ms Angela Lancsar, Executive Assistant

Suite SG.64
Parliament House
Canberra ACT 2600

T: 61 2 6277 3583
F: 61 2 6277 5719
E: corporations.joint@aph.gov.au
W: www.aph.gov.au/senate/committee/corporations_ctte

TERMS OF REFERENCE

On 5 February 2004, the Parliamentary Joint Committee on Corporations and Financial Services resolved to inquiry into and report by 11 March 2004 on the following package of regulations:

- the Corporations Amendment Regulations 2003 (Batch 6);
- Draft Regulations—Corporations Amendment Regulations 2003/04 (Batch 7); and
- Draft Regulations—Corporations Amendment Regulations 2004 (Batch 8).

TABLE OF CONTENTS

CHAPTER 1

INTRODUCTION

Background

1.1 The *Financial Services Reform Act 2001 (*FSRA) was the culmination of a comprehensive reform project that was looking at the regulatory requirements applying to the financial services industry. It amended the *Corporations Act 2001* and is contained in Chapter 7 of that Act.

1.2 The significant reforms introduced by the FSRA into the Corporations Act were designed to facilitate a more efficient and flexible regime for financial markets and products through an integrated regulatory framework for financial products.[1] The FSRA provided basic principles for uniform regulation across the financial services sector. The Act commenced on 11 March 2002 but provided a two-year transition period to allow time for existing industry participants to move to the new regime.

1.3 The Corporations Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be specified in regulations. Many regulations have been made since the commencement of the FSRA to give effect to the practical application of the legislation. The corporations amendments regulations under consideration by this Committee are the latest batches of regulations to be made and are intended 'to support the reforms to the regulation of the financial services industry which were implemented in the FSRA and associated legislation'.[2]

1.4 The Parliamentary Joint Committee on Corporations and Financial Services has taken an active interest in the development and implementation of regulations which now form an important and solid body of FSR legislation. The making of regulations, however, is an on-going process. The Government released its most recent set of regulations in December, January and February as Batches 6, 7 and 8.

Establishment of the inquiry

1.5 In keeping with its involvement in the development of the FSR regime, the Committee, on 5 February 2004, resolved to inquire into and report by 11 March 2004 on the following new package of regulations:

---

1 See for example Revised Explanatory Memorandum, Financial Services Reform Bill 2001, p. 23.

2 Explanatory Statement, Statutory Rules 2003 No…, issued by the Parliamentary Secretary to the Treasurer, Corporations Act 2001, Corporations Amendment Regulations 2-3 (No. …), p. [1].

- the Corporations Amendment Regulations 2003 (Batch 6);
- Draft Regulations—Corporations Amendment Regulations 2003/04 (Batch 7); and
- Draft Regulations—Corporations Amendment Regulations 2004 (Batch 8).

1.6 On 11 March, the Committee agreed to extend the reporting date to on or before 25 March 2004.

1.7 Batch 6 was gazetted on 23 December 2003. The regulations in this batch comprise a collection of non-related regulations that cover numerous matters. They deal with subjects such as the definition of a medical indemnity insurance product, specific things that are not financial products and general advice. The regulations also cover conduct that does not constitute dealing in a financial product—lawyers acting on instructions; and disclosure issues such as Product Disclosure Statements which may be presented later; obligation to cite licence number in documents; and specifying circumstances in which a Financial Services Guide (FSG) and a Product Disclosure Statement (PDS) can be combined. There are also regulations governing further market advice (for summary of regulations see appendix 3 and 4).

1.8 Batch 7 was released on 24 December 2003 as draft regulations for consultation. The regulations in this batch are concerned mainly with clarifying the meaning of 'class of financial service'; extending the scope of relief offered in regulation 7.1.29 to allow generic risk management advice that is not restricted merely to business clients. The regulations also deal with matters such as the licensing of overseas derivative counterparties; granting exemption from having to notify ASIC of the appointment of an authorised representative who gives personal advice about a basic deposit product or a facility for making non-cash payments that relate to a basic deposit product; limiting the application of the term 'able to be traded'; and with disclosure requirements in the FSG (for summary of the draft regulations see appendix 5). The regulations were made on 19 February 2004 and gazetted on 26 February. Changes have been made to the draft regulations most notably the inclusion of new regulation 7.1.29A. In light of this recent amendment, the Committee decided to conduct a separate report on this particular regulation.

1.9 Batch 8 was released on 7 January 2004 as draft regulations for consultation. The regulations deal with dollar disclosure making clear that ASIC would require the disclosure in dollar terms unless the issuer was able to provide compelling reasons for this not to be possible.

Conduct of the inquiry

1.10 The Committee advertised the inquiry on its web site and in the *Australian* on 11 February 2004 calling for written submissions. It also wrote to over 40 associations, organisations and individuals interested in the FSR program drawing attention to the inquiry and inviting submissions.

Submissions

1.11 The Committee received 24 submissions, which are listed in Appendix 1 of this report. Copies are published on the Committee's website at http://www.aph.gov.au/senate/committee/corporations_ctte/inquire.htm.

Hearing and evidence

1.12 The Committee held a public hearing in Parliament House, Canberra, on 3 March 2004. It took evidence from those representing consumer interests, the banking, superannuation, insurance and investment industries and from officers of the Department of the Treasury and ASIC. Those who attended the inquiry are listed in Appendix 2. The transcript of the hearing is available on the website address above.

Structure of the report

1.13 The report is divided into three parts:

- *Part 1* examines the regulations gazetted on 23 December 2003 and are contained in two documents which cover a range of matters;
- *Part 2* considers the draft regulations in Batch 7 released on 24 December 2003 and the regulations as made on 19 February 2004 which also deal with a number of subjects; and
- *Part 3* focuses on the draft regulations contained in Batch 8. The proposed regulations amend the 'reasonably practicable' criteria for disclosure requirements that were effected through Schedule 3 of the Corporations Amendment Regulations 2003 (No. 8). They follow the commitments made by the Government to the Senate during debate on the Financial Services Reform Amendment Bill 2003 on 5 December 2003.

1.14 As noted earlier, the Committee has decided to present a separate report on regulation 7.1.29A contained in Batch 7 together with regulations 7.1.35A and 7.1.40(h) from Batch 6. They deal with conduct that does not constitute dealing in a financial product and relate specifically to accountants and lawyers.

Acknowledgment

1.15 The Committee is grateful to, and wishes to thank, all those who assisted with its inquiry.

CHAPTER 2

CORPORATIONS AMENDMENTS REGULATIONS (BATCH 6)

Background

2.1 The Draft Corporations Amendments Regulations 2003 comprise two documents—regulations made under the FSR Amendment Act 2003 and regulations contained in Batch 6. They were released by the Department of the Treasury on 19 December 2003, gazetted on 23 December and tabled in the Senate on 10 February 2004.

2.2 This chapter will simply outline the contents of both documents and then examine more closely the few regulations that drew comment.

First Document

2.3 The Financial Services Reform Amendment Act 2003 was passed by the Parliament on 5 December 2003. According to the Explanatory Statement to the regulations, 'the Act makes technical amendments to the FSRA, to promote certainty, clarifying, where necessary, various provisions under the regime'. The Amendment Act allows regulations to be made to give effect to its provisions. The regulations in this document are designed to 'support the reforms to the regulation of the financial services industry which were implemented in the FSRA, the FSR Amendment Act and associated legislation'.[1] The regulations are mainly concerned with the provisions governing licensing of providers of financial services, financial services disclosure and financial product disclosure and other provisions relating to issue, sale and purchase of financial products. A full summary of the regulations is provided in Appendix 3.

Senate Economics Legislation Committee's inquiry into regulations contained in the first document

2.4 Most of the regulations contained in this batch were examined in their draft form by the Senate Economics Legislation Committee in December 2003. Generally those presenting evidence either did not comment on the proposed regulations or, if they did, supported them.

2.5 During that Committee's inquiry, only a few of the above regulations were mentioned specifically. The Australian Association of Permanent Building Societies

---

1 Explanatory Statement Statutory Rules 2003 No …, issued by the Parliamentary Secretary to the Treasurer, Corporations Act 2001, Corporations Amendment Regulations 2003 (No. …), p. [1].

identified a number of the regulations that were particularly important to industry either because they would provide certainty or else facilitate the proper implementation of the legislation. They included proposed regulation 7.6.01C, 7.6.02A and 7.9.80B and C. The following section considers the regulations that generated some concern.

Proposed regulation 7.6.01C

2.6 Proposed new regulation 7.6.01C—obligation to cite licence number in documents—specifies the FSR-related documents requiring an AFSL number. It does not require the number to be included on periodic statements until 1 July 2004. The Australian Bankers' Association (ABA) also singled out this regulation for endorsement which it maintained would reduce 'significantly the number and range of documents on which a licensee's licence number must appear'. It supported the transitional arrangements that would permit the use of existing stocks of stationary before licence numbers are provided and allow adequate time for systems changes.[2] While generally approving of the regulation, CUSCAL noted what appeared to be an anomaly in the dates specified in this proposed regulation and regulation 10.2.44A(3). Regulation 7.6.01C(2) specifies 1 July 2004 as the date which AFSL numbers must be included on periodic statements. The date given in regulation 10.2.44A(3) is 11 March 2005.[3]

2.7 The Department of the Treasury informed the Committee that after the amendments to regulation 7.6.01C, Treasury intended omitting the transitional regulation which would have had the effect of requiring periodic statements to cite AFSL number from 1 July 2004. It explained that consultation with industry found that this timeframe would be difficult to comply with owing to the system changes involved with periodic statements. Consequently, it is intended that the transitional regulation will be omitted and an amendment will be made to the date prescribed in regulation 7.6.01C for periodic statements to 1 January 2005.[4]

Committee view

The Committee notes Treasury's explanation.

Proposed regulation 7.6.02A

2.8 The ABA also gave proposed regulation 7.6.02A a special mention. This regulation lists the Commonwealth Acts that are subject to the breach reporting obligation in s 912D. The Association stated that the proposed regulation would 'relieve ASIC of a huge administrative process in receiving and recording a multitude

---

2 Submission to the Senate Economics Legislation Committee, p. 4.

3 *Submission* to Senate Economics Legislation Committee, 28 November 2003, p. 2.

4 See Appendix 6, Treasury's answers to written questions on notice.

of breach reports' and would 'focus both the licensee and ASIC on those breaches of laws directly relevant to the obligations of licensees under the Act'.[5] CUSCAL, however, noted that the list contained the *Banking Act 1959* and expressed its view that the relevant financial services laws should be limited to those laws administered by ASIC. It explained:

> …we are not convinced there is any benefit in requiring AFSL holders to report to ASIC breaches of laws administered by APRA. The response to any breach of a law administered by APRA is best determined by the prudential regulator, APRA, rather than the disclosure-oriented regulator, ASIC.
>
> In our view it would be preferable for APRA to decide what breaches are relevant to ASIC and to notify ASIC about them. We can see no justification for ADIs to report the same information to both regulators.[6]

2.9 In responding to CUSCAL's view, the Department of the Treasury explained that ASIC and APRA have complimentary regulatory roles and responsibilities. It said:

> ASIC is responsible for ensuring that services are, and continue to be, provided in compliance with the licensing obligations under FSR. A breach of the Banking Act by an AFSL holder which might call into question the entity's capacity to provide services efficiently, honestly and fairly or of its financial soundness and consequently would be information that is relevant to ASIC's responsibilities. It is important that ASIC should have access to this information from the licensee directly and as soon as possible.[7]

Committee view

The Committee understands that there is potential for overlap in reporting obligations to APRA and ASIC but accepts that the regulation is to ensure that ASIC receives relevant information promptly and can deal with it effectively.

Regulation 7.6.08

2.10 One regulation that aroused some controversy during the Senate Committee's inquiry—draft regulation 7.6.08—which proposed changes to the use of the words 'independent, impartial or unbiased' by financial services providers has been omitted from the regulations gazetted in December 2003. The Committee sought information from the Department of the Treasury on this matter.

---

5 *Submission* to the Senate Economics Legislation Committee, p. 4.

6 *Submission* to the Senate Economics Legislation Committee, p. 2.

7 Appendix 6, Treasury's answers to written to questions on notice, 3 March 2004.

2.11 Treasury explained that the proposed amendments were intended 'to address practical issues associated with the rebating of commissions' that had been raised with the department earlier in the FSG transitional period. It informed the Committee that the regulation had not been advanced any further because of a lack of comment from industry during the consultative period on the proposed approach.[8]

Committee view

The Committee notes Treasury's explanation.

Evidence before the Committee

2.12 Overall, the regulations before the Senate Economics Legislation for inquiry and report met no opposition and the Senate Committee proposed no amendment to them.

2.13 Similarly, the regulations before this Committee received little comment except new regulation 7.7.20 (which will be discussed later in conjunction with regulation 7.7.02A(5a) contained in the second document) and regulations 7.8.22A and 10.2.214 which are considered in the following section.

Regulation 7.8.22A—disclosure during hawking of certain financial products

2.14 The Association of Financial Advisers (AFA) sought clarification on the situation involving contacting people with lapsing policies. It stated its belief that where an adviser receives notice from the insurance company that a policy premium has not been paid, a phone call without a forewarning letter is a breach of the current hawking regulations where a recommendation to change the policy to something more suitable occurs.

2.15 The Department of the Treasury noted that AFA's concerns related to the operation of ss 992A and 992AA of the Corporations Act rather than the regulation in question. In the department's view there was insufficient information to be able to comment on whether 'the hawking prohibitions would or would not operate in the example provided'.[9]

2.16 It referred to ASIC's guidance on the subject provisions, *The Hawking Prohibitions—An ASIC Guide,* which includes references to circumstances related to dealing with existing clients.

---

8 Appendix 6, Treasury's answers to written to questions on notice, 3 March 2004.

9 Appendix 6, Treasury's answers to written to questions on notice, 3 March 2004, p. 4.

Committee view

2.17 The Committee notes Treasury's explanation and suggests that if ASIC's guide does not assist in clarifying this matter, that the AFA contact either Treasury or ASIC for further assistance.

Regulation 10.2.214—further market-related advice

2.18 The Explanatory Memorandum notes that the regulation provides that it will not be a prerequisite to the operation of s 946B that existing clients receive a SoA, 'provided that such clients have been given 'personal securities recommendations' under s 851 of the Act in force prior to the changes made by the FSR Act and certain conditions are met.[10] AFA suggested that as the new regulation 10.2.214 should apply to all previous recommendations in both the security and risk side, it should refer to both recommendations given through the old Corporations Act and the Agents and Brokers Act.[11]

2.19 The Department of the Treasury offered the following explanation:

> This regulation applies to entities giving clients further market-related advice as described in subsection 946B (1) of the Act. Further market-related advice refers to recommendations about products that are able to be traded on a licensed market (for example, securities, managed investment products or derivatives). Advice on products not able to be traded would fall outside the scope of the FSRA provisions. The exemption from providing a prerequisite SoA, only applies to entities that have previously fulfilled their disclosure obligations under section 851 of the Act in force prior to the introduction of FSR. This would not apply where section 851 did not apply, for example to insurance products.[12]

Committee view

The Committee notes Treasury's explanation.

Second document

2.20 According to the Explanatory Memorandum, the regulations contained in the second document are intended:

> to support the reforms to the regulation of the financial services industry which were implemented in the FSRA and associated legislation. The Regulations facilitate transition to the new licensing, conduct and disclosure

10 Explanatory Memorandum, p. 5.

11 *Submission* 11, p. 2.

12 Appendix 6, Treasury's answers to written questions on notice, 3 March 2004.

> arrangements and promote certainty, clarifying, where necessary, various provisions under the FSRA.[13]

2.21 They range over a number of matters but their main focus is on specifying things that are not financial products such as credit facilities and electronic funds transfer and circumstances where a person is not providing a financial service or financial product advice. They also deal with matters such as granting relief from FSG requirements. A full summary of the regulations is given in Appendix 4.

2.22 As with the regulations contained in the first document, a number in this second document were also examined by the Senate Economics Committee. Again they drew little comment. Both the Australian Association of Building Societies and the ABA supported proposed regulations 7.9.80B and C. The ABA maintained that they were critical in 'delivering the relief provided under section 1012G as part of the objective to improve the workability and customer experience for the disclosures required to be made under Section 1012G'.[14] The current regulations, however, include only regulation 7.9.80C.

2.23 Submissions to this inquiry similarly made scant reference to the regulations and no opposition was raised to them. The Insurance Council of Australia raised one matter relating to radio advertising—regulations 7.7.02(5A) and 7.7.20.

Regulations 7.7.02(5A) and 7.7.20

2.24 General advice is usually accompanied by a general advice warning which alerts those receiving the advice that their personal circumstances have not been taken into account. The FRS Amendment Act recognised that there are situations where general advice is given but providing the warning may be neither practical nor enhance consumer protection.[15] The Amendment Act inserted a regulation-making power in s 949A to specify limited circumstances where the general advice warning will not need to be provided. The Act anticipated that the regulations under the section would only be made in circumstances where the absence of the warning would not have a material detriment on consumers. The Explanatory Memorandum stated:

> An example could be general advice provided to the public at large through a radio advertisement. However, regulations would not be envisaged in

---

13 Explanatory Statement Statutory Rules 2003 No …, issued by the Parliamentary Secretary to the Treasurer, Corporations Act 2001, Corporations Amendment Regulations 2003 (No. …), p. [1].

14 *Submission* to Senate Economics Legislation Committee, p. 5.

15 See Revised Explanatory memorandum, Financial Services Reform Amendment Bill 2003, p. 24.

circumstances where there is potential for an investor to be significantly influenced by the advice, for example, during an investment seminar.[16]

2.25 Section 941 of the Corporations Act stipulates the situations in which a FSG is not required. Under subsection 941C(8) a FSG does not have to be given to the client in circumstances specified in regulations. Under this provision, Regulation 7.7.02(5) stipulates certain circumstances where a FSG does not have to be given to a client. They are:

- the advice is provided in circumstances in which s 1018A applies;[17]
- the advice is only general advice in relation to a financial product that is, or a class of financial products that includes, a financial product issued by the product issuer;
- the advice is in the form of advertising the financial product:
  - on a billboard or a poster; or
  - in the media within the meaning of sub regulation 7.6.01(7);[18]
- the advertisement indicates that a person should consider whether or not the product is appropriate for the person.

2.26 Regulation 7.7.02(5A) recognises limited circumstances where relief is provided from both the FSG and disclosures normally required in place of a FSG.[19] Subsection 941C of the Act sets down the situations in which a FSG is not required, for example if the client has already received the information; or if the financial service is general advice provided in a public forum. Certain basic deposit products and facilities for making non-cash payments that are related to a basic deposit product

---

16 Revised Explanatory Memorandum, Financial Services Reform Amendment Bill 2003, p. 24.

17 Section 1018A sets down a number of disclosure requirements for advertising or other promotional material for financial product such as the advertisement or statement must

(a) identify the issuer of the product and if relevant the seller of the product; and

(b) indicate that a PDS for the product is available and where it can be obtained; and

(c) indicate that a person should consider the PDS in deciding whether to acquire, or to continue to hold, the product.

18 Media under this sub section means any newspaper, magazine, journal or other periodical, a radio or television broadcasting service; an electronic service (internet) that is operated on a commercial basis and similar to a newspaper, a magazine, a radio broadcast or a television broadcast.

19 Explanatory Statement, Statutory Rules 2003 No…, issued by the Parliamentary Secretary to the Treasurer, *Corporations Act 2001, Corporations Amendment Regulations 2003 (No…),* p. 7.

are also exempted. This regulation pursuant to paragraph 941C(8), which allows regulations to specify other exemptions, sets down a number of circumstances where a FSG does not have to be provided. They include where the advice is in the form of advertising the financial product on a bill board or a poster; or in the media such as a newspaper, magazine, journal or other periodical or a radio or television broadcasting service.

2.27 The Insurance Council of Australia (ICA) was particularly concerned with radio advertisements. While it recognised that these subregulations provide limited exemption from providing a general advice warning and an FSG it noted that s 1018A:

> requires identification of the issuer or the issuer and seller of the product (depending on the distribution channel for that product), an indication that a PDS is available for that product and where it can be obtained, and an indication that a person should consider the PDS in deciding whether to acquire, or to continue to hold, the product.[20]

2.28 The Council suggested that some companies have calculated that the extra time needed in order to comply with the Act is 15 seconds. This equates to an 'additional cost of approximately $1 million relative to current expenditure of approximately $2 million, that is, the additional cost may be in the vicinity of 50%'. It stated further its belief that:

> …even if broadcast time was not extended and current advertisement content was modified to incorporate Section 1018A disclosure, there is a significant 'opportunity cost' borne by the advertiser in terms of dilution of marketing impact.[21]

2.29 It suggested that its member companies will be forced to consider the prospect of a severe reduction in radio investment and exposure in the event that relief from this requirement is not provided. It asserted that the relief sought would not affect the level and quality of product information possessed by prospective retail clients and 'the rationale for the continued application of Section 1018A to general public radio advertisements is somewhat diminished'. It stated further:

> The fact is, that in the event a retail client responds to the radio advertisement and contacts the providing entity, that person will receive relevant disclosure, oral and written, at or very soon after that time.[22]

The Department of the Treasury explained that the proposed regulation 'envisages limiting the disclosure required under s 1018A to the identification of the issuer or the issuer and seller of the product (depending on the distribution channel for that

---

20 *Submission* 3, p. 4.

21 *Submission* 3, p. 5.

22 *Submission* 3, p. 5.

product) for modes of advertising referred to in 7.7.02(5A)(c). It advised the Committee that a draft regulation 'is being prepared to address these concerns and will be released for public consultation in the near future'.[23]

Committee view

The Committee notes Treasury's response and encourages the Insurance Council of Australia and Treasury to work together in drafting a regulation that addresses the Council's concerns but does not in any way compromise consumer interests.

2.30 The Committee believes that the current disclosure requirement continues to discriminate against radio advertising compared with other, especially visual, forms of advertising by increasing the time and hence, the cost, of a thirty second advertisement by some fifty per cent.

Recommendation 1

The Committee recommends that the regulation governing radio advertising be amended to require only a brief general disclosure statement, such as "Be sure to get your Product Disclosure Statement when you ring …….!" (Name of one of either broker, agent, company advertising etc inserted). The words required should take no longer than four seconds to read in normal advertising voice mode.

2.31 CUSCAL raised a related matter about disclosure requirements when providing general advice to a retail client and the obligation to warn the client that the advice does not take account of client's objectives, financial situation or needs. Under s 949A the providing entity must warn the client of a number of matters at the time of, and by the same means as, providing the advice. For example, the providing entity must inform the client that the advice has been prepared without taking account of the client's objectives, financial situation or needs and because of that the client should, before acting on the advice, consider the appropriateness of the advice. It also requires that if the advice relates to the acquisition, or possible acquisition, of a PDS that the client should obtain a PDS relating to the product and consider the statement before making any decision about whether to acquire the product.[24]

2.32 In CUSCAL's view the repeated exposure to the advice warning 'in relation to simple, well understood products will be tedious and irritating for consumers'.[25]

2.33 The Department of the Treasury informed the Committee that it is 'currently examining this concern, especially in relation to its practical operation'.[26]

---

23 Appendix 6, Treasury's answers to written questions on notice, 3 March 2004.

24 S 949A(2).

25 *Submission* 2, p. [1].

Committee view

The Committee notes Treasury's response and suggests that CUSCAL and the department consult further on this matter.

Regulation 7.1.35A and 7.1.40(h)

2.34 The Law Council of Australia wrote to the Committee to express its support for regulations 7.1.35A and 7.1.40(h). These regulations deal with lawyers and align closely to the relief offered to accountants. They will be examined in conjunction with the Committee's inquiry into and report on Regulation 7.1.29A. This new regulation provides an exemption from the FSRA for recognised accountants making a recommendation that a person acquire or dispose of a self-managed superannuation product. The Committee will present a separate report on this matter.

Summary

The regulations contained in the first and second documents in Batch 6 attracted little comment either in submissions or during the public hearing. Where some concerns were raised, the Committee sought written advice from the Department of the Treasury and has noted its responses. As mentioned above, the Committee will be reporting on regulations 7.1.35A and 7.1.40(h) together with 7.1.29A in due course after it has held a public hearing on these regulations. In light of the lack of comment on the regulations in both documents, apart from the three regulations still to be considered, the Committee believes that they are appropriate.

---

26 Appendix 6, Treasury's answers to written questions on notice, 3 March 2004.

CHAPTER 3

CORPORATIONS AMENDMENTS REGULATIONS (BATCH 7)

3.1 The Draft Corporations Amendments Regulations (Batch 7) were released by the Department of the Treasury on 24 December 2003 for consultation. Treasury set Friday, 23 January 2004, as the closing date for submissions. On 23 February 2004, the Government announced that the regulations had been made and were to be gazetted on 26 February 2004.

3.2 According to the commentary accompanying the release of the proposed regulations, they:

> …contain a number of technical amendments that will refine the operation of certain elements of the Financial Services Reform Act 2001.
>
> The refinements will provide stability and enhance industry certainty regarding the new legislative arrangements to facilitate transition to the new licensing, conduct and disclosure regime.[1]

3.3 The regulations made on 24 February contain a number of changes from the draft regulations released for consultation on 24 December 2003. In Regulation 7.7.05C the meaning of remuneration has been further defined by inserting after the word 'remuneration', the phrase '(including commission) or other benefits that are received only in respect of, or that are only attributable to, a financial service …'

3.4 Aside from a number of minor drafting amendments, the most significant change is the inclusion of new regulation 7.1.29A. As mentioned earlier, this regulation will be the subject of a separate hearing and report. A summary of the regulations is provided in Appendix 5.

3.5 Submissions to the inquiry made few comments on this batch of draft regulations. Only regulations 7.9.07G and 7.7.05B drew attention. They are discussed in the following section.

Regulation 7.9.07G

3.6 The American Home Assurance Company drew attention to proposed regulation 7.9.07G. It understood the intention of this regulation was 'to reduce the strict reliance on the Product Disclosure documentation under the Corporations Act by

---

1 http://www.treasury.gov.au/contentitem.asp?pageId=&ContentID=802

including the current law of the Insurance Contracts Act 1984 as a means by which disclosure could be achieved for existing policyholders'.[2] It stated:

> If therefore a customer already has a policy which complies with the Insurance Contracts Act, that customer will be treated as having sufficient information, without the requirement for a further Product Disclosure Statement at or before the time at which that policy is actually renewed. This interpretation is based upon the fact that in the draft regulation as set out, sub paragraph (i) indicates that the Product Disclosure Statement and the Policy Document are alternatives for each other.[3]

3.7 The commentary accompanying the draft regulations made clear that the proposed regulation recognised the existing disclosure obligation under the *Insurance Contracts Acts 1984* in determining the extent of disclosure required under Division 2 of Part 7.9 of the Act. This part deals with Product Disclosure Statements. The American Home Assurance Company suggested that the following sub paragraph be inserted at i) into the proposed regulation:

> i) a Product Disclosure Statement or a contract of insurance as defined in Section 10 of the *Insurance Contracts Act 1984,* including a notice evidencing renewal of such a contract; and …

3.8 It concluded that their intended amendment:

> …is to make clear the fact that full disclosure can be achieved through the existing customer's possession of a policy document which complies with the Insurance Contracts Act, and a renewal notice which relates to that policy. It also facilitates the use of the renewal notice as a means by which disclosure information not contained in the policy document may be provided to a customer, which information, together with the policy itself, satisfies the disclosure requirements of the Corporations Act.[4]

3.9 The Department of the Treasury informed the Committee that during the consultation period on this regulation concerns were raised in relation to associated enforcement and liability provisions that have not been able to be satisfactorily resolved. Treasury advised the Committee that Treasury will not be recommending that the regulation proceed at this time.[5]

Regulation 7.7.05B

3.10 Regulation 7.7.05B removes the need to identify an individual or corporate authorised representative in a FSG where their identity or remuneration is not material

---

2 *Submission* 7, p. [2].

3 *Submission* 7, p. [3].

4 *Submission* 7, p. [3].

5 See Appendix 6, Treasury's answers to written questions on notice, 3 March 2004.

to the decision to acquire a financial service. Previously the regulation applied only to individuals. The regulation extends the relief to allow generic references in the FSG to both an individual and a corporate representative. The commentary accompanying the draft regulations explained further:

> The relief recognises that when identity/remuneration of the authorised representative is immaterial, the client will not find such information useful in making a decision about acquiring a financial service. An example is a salaried worker in a call centre. In contrast, the identity of an authorised representative who receives a sales-based commission should be disclosed in the FSG as this information could be relevant to the client's decision to acquire a financial product.[6]

3.11 The ABA welcomed the amended regulation but was critical that the regulation was limited to cases of general but not personal advice. It submitted that the regulation should be extended to an individual who provides financial product advice irrespective of whether that advice is general or personal advice. It gave the following reasons in support of their submission:

> 1. paragraph 2(c) of the proposed amendment explicitly concerns itself with the materiality of the individual's identity in respect of the decision by the retail client whether to obtain the financial service; and
>
> 2. in the normal course the identity of an authorised representative will be recorded by the licensee or the corporate authorised representative as part of their ordinary record-keeping and that this information would be available should the individual's identity be needed to be verified later on.[7]

3.12 The ABA suggested further that for the sake of consistency, the regulation should be broadened to include situations where FSG information is required for advice given on basic deposit products and related non-cash payment facilities. It noted that although a FSG does not have to be given for advice on these classes of products, the identity of the providing entity must be disclosed.

3.13 The Committee notes the explanation given in the commentary accompanying the draft regulations (and in the Explanatory Memorandum for the regulations) which stated:

> The regulation is also limited to dealing and general advice. This is because in these instances, the identity of the authorised representative is not likely to have a material impact on the decision to acquire the financial service. In

---

6 Draft Regulations for Consultation—Corporations Amendment Regulations 2003/04 (Batch 7), Commentaries, p. 4. The wording is slightly different in the Explanatory Memorandum, see p. 6.

7 *Submission* 14, p. 2.

> contrast, for other financial services, such as the provision of personal advice, it is more likely that the identity of the authorised representative will be a material consideration for a retail client.[8]

The Department of the Treasury reinforced the statement made in the Explanatory Memorandum. It informed the Committee that 'it is generally considered that where personal advice is given that the identity of the authorised representative will be a material consideration for the retail client. Therefore, the exemption does not apply to personal advice.'[9] It noted, however, that Treasury is considering the ABA's proposal in relation to the FSG information and the Committee encourages both parties to discuss the matter further.

Regulation 7.1.29A

3.14 A new regulation 7.1.29A—Self-managed superannuation funds—was not included in the draft Batch 7 released for consultation in December 2003. It has, however, been inserted in the regulations gazetted on 26 February 2004.

3.15 This regulation is to provide relief from the FSR Act for accountants who provide advice to their clients on the decision to acquire or dispose of an interest in a self-managed superannuation fund. The Government accepts that such advice should not require licensing under the FSRA regime. As noted in the previous chapter, this regulation in conjunction with regulations of a similar nature dealing with lawyers is to be examined in due course and reported separately.

Summary

3.16 The regulations contained in Batch 7 attracted little comment either in submissions or during the public hearing. Where some concerns were raised, the Committee sought written advice from the Department of the Treasury and has noted its responses. As mentioned above, the Committee will be reporting on regulation 7.1.29A after it has held a public hearing on the regulations. In light of the lack of comment on the regulations in Batch 7, the Committee believes that the regulations as gazetted on 26 February 2004 apart from regulation 7.1.29A, which is still to be considered, are appropriate.

---

8 Corporations Amendments Regulations Commentaries, p. 4; and Explanatory Memorandum, p. 6.

9 Answers to written questions on notice from Treasury, 3 March 2004

CHAPTER 4

DOLLAR DISCLOSURE

Background

4.1 On 26 June 2003, the Hon Peter Slipper, MP, the Parliamentary Secretary to the Minister for Finance and Administration, introduced the Financial Services Reform Amendment Bill 2003 (FSR Amendment Bill) in the House of Representatives. The Bill was intended 'to promote investor confidence and improve market efficiency'. Mr Slipper told the House:

> The FSR Act provides consumers with enhanced protection due to improved conduct and disclosure requirements. The reforms will provide an environment in which investors can be confident that those who provide financial services and products are effectively regulated and have appropriate training, competence, skill and integrity.[1]

4.2 He recognised that while significant advances had been made under the FSR regime, industry had raised issues that could only be addressed through regulations. The Corporations Amendment Regulations 2003 (No. 8) No. 282 (Batch 5), which were made on 6 November 2003, were part of the Government's response to industry's concerns. They were gazetted on 13 November 2003 and tabled in the Senate on 24 November 2003.

Schedule 3 in the Corporations Amendment Regulations 2003 (No. 8) No. 282—disclosure of dollar amounts

4.3 This batch of regulations traverse a range of matters but the main focus is on providing certainty and giving clarity to the new legislative arrangements under the FSRA. For the purpose of this inquiry, the relevant regulations are contained in Schedule 3. They deal firstly with the content of the Statement of Advice (SoA), and state clearly that such documents must include in the detailed statements on remuneration and other benefits that the client has or is to receive the amount of the remuneration, commission and benefits payable:

(i) stated as an amount in dollars; or

(ii) if it is not reasonably practicable for an amount to be identified when the document is provided—set out as a description of the remuneration, commission and benefits as a percentage of a specified matter (including, if appropriate, worked dollar examples): or

---

1 House of Representatives, *Hansard*, 26 June 2003, p. 17637.

(iii) if it is not reasonably practicable for an amount or a percentage to be identified when the relevant document is provided—set out as a description of the method of calculating the remuneration, commission and benefits (including, if appropriate, worked dollar examples).

4.4 The regulations place a similar dollar disclosure requirement on information contained in Product Disclosure Statements (PDS) including any significant benefits to which a holder may be entitled, the cost of the product, any amounts payable by a holder of the product, amounts deducted from the fund by way of fees, expenses or charges, commissions or similar payments which may impact on the amount of any return on the product. Similar options for disclosure apply if it is not 'reasonably practicable' for the amount to be disclosed in dollar terms.

4.5 The dollar disclosure requirement also applies to information provided in periodic statements.

4.6 According to the Explanatory Statement, the regulations:

> …explicitly require items that can be disclosed as amounts under the FSRA to be displayed in dollar terms, in the first instance. If it is not reasonably practicable to provide the amount in dollar terms the regulations require the disclosure of items in percentage terms. Again if presentation as a percentage is not reasonably practicable, then a description (as appropriate) of how the item is determined must be provided…
>
> The inclusion of 'reasonably practicable' criterion provides a means to address any practical difficulties in the application of these disclosure obligations. This may include consideration of a regulated person's ability to determine and disclose amounts due to administrative, systems or resource concerns.[2]

4.7 The Government anticipated that industry's capacity to disclose information in dollar terms would improve with the passage of time as systems were developed and products evolve.[3] To allow adequate time for industry to make the adjustment, the Schedule 3 amendments were to apply to documents prepared on or after 1 July 2004 and the application of the 'reasonably practicable' criterion was to take account of any transitional problems thereafter.

---

2 Explanatory Statement, Statutory Rules 2003 No… Issued by the Parliamentary Secretary to the Treasurer, Corporations Act 2001, Corporations Amendment Regulations 2003) No.…), p. 8.

3 Explanatory Statement, Statutory Rules 2003 No… Issued by the Parliamentary Secretary to the Treasurer, Corporations Act 2001, Corporations Amendment Regulations 2003) No.…), p. 8.

Consideration of, and debate on, Schedule 3—disclosure of dollar amounts

4.8 The regulations were examined by the Senate Economics Legislation Committee in December 2003. It noted the concerns expressed by the Australian Consumers' Association about the dollar disclosure proposals. The Association was particularly concerned that they would wind back the disclosure requirements, they were contrary to the good disclosure principles in ASIC Policy Statement 168 and that consumers were unlikely to obtain the information they need when comparing funds and costs. Overall, the Committee considered the regulations contained in Batch 5 to be 'appropriate'.

4.9 Labor Members of the Committee were not convinced that the regulations were adequate to protect consumer interests. In a minority report they raised doubts about whether the 'dollar disclosure regime' would enhance or detract from the disclosure regime. They stated:

> The Labor members are concerned that the 'reasonably practicable' test will allow providers to avoid disclosing fees and charges in dollar terms. It seems that the 'reasonably practicable' test will facilitate industry expediency in relation to fee disclosure at the expense of consumer protection.[4]

4.10 On 4 December 2003, Senator Stephen Conroy moved a notice of motion in the Senate that Schedule 3 of the Corporations Amendment Regulations (No. 8), as contained in Statutory Rules 2003 No. 282 be disallowed.[5]

4.11 On the same day, during debate on the FRS Amendment Bill, both Opposition Senators and the Australian Democrats expressed serious concerns about this regulation. Senator Conroy told the Chamber:

> Labor believe that consumers have a right to know what fees they are paying in dollar terms and they are entitled to know a bottom line figure. This is a simple concept, yet the government has failed for a second time to mandate disclosure in dollar terms.[6]

In his view:

---

4 Labor Members Minority Report, in Senate Economics Legislation Committee, *Financial Services Reform Amendment Bill 2003 and certain associated regulations*, December 2003, p. 22.

5 On 12 February, the notice of motion was postponed till 8 March 2004. Senate Journals, 12 February 2004, p. 3009.

6 Senate *Hansard*, 4 December 2003, p. 19340.

> The new regulations give every product issuer in the country an escape route to avoid disclosing in dollar terms. That escape route is called the 'reasonably practicable' test'.[7]

4.12 Similarly, Senator Andrew Murray, Australian Democrats, voiced his dissatisfaction with the current wording of the regulation. He stated:

> The Democrats strongly agree with the dollar and then percentage description hierarchy of fee disclosure that is enshrined in the regulations. We share the concern that the 'reasonably practicable' test in the regulations would prove to be too weak. We support the Labor Party in seeking to legislate to specify dollar disclosure unless ASIC considers that this is not possible. This would send the clearest message to financial service providers that dollar fee disclosure should become the norm.[8]

4.13 He drew attention to correspondence from Mr Ian Johnston, ASIC, to the Senate Economics Legislation Committee in which Mr Johnston explained that ASIC's 'starting point would be that the law requires dollar disclosure unless compelling reasons are provided as to why this could not be achieved'.[9]

4.14 During this debate, Senator the Hon Ian Campbell, Minister for Local Government, Territories and Roads, also cited Mr Johnston's advice that ASIC would require 'disclosure in dollar terms unless the issuer was able to provide compelling reasons as to why this was not reasonably practicable'.[10] He quoted further from Mr Johnston's correspondence:

> We would also have advised the Committee that what we would regard as 'not reasonably practicable' today, may not satisfy us as to what is not reasonably practicable six months, or twelve months later. In other words, ASIC would be making it clear to industry that we would require dollar disclosure to be the norm in disclosure documents, particularly in personalised periodic statements.[11]

4.15 In addressing this issue of dollar disclosure, the Senate, during debate on the FSR Amendment Bill, agreed to a number of amendments to the Bill moved by Senator Campbell. They require the disclosure of items in dollar terms in SoAs, PDSs and Periodic Statements unless otherwise provided in regulations. In turning to the regulations, Senator Campbell informed the Senate that the Government was going to

---

7 Senate *Hansard*, 4 December 2003, p. 19340.

8 Senate *Hansard*, 4 December 2003, p. 19344.

9 Senate *Hansard*, 4 December 2003, p. 19344.

10 Senate *Hansard*, 4 December 2003, p. 19348.

11 Senate *Hansard*, 4 December 2003, p. 19348.

commit to changing the wording of the regulation to, effectively, dollar disclosure unless ASIC determine that for compelling reasons it is not possible to do so.[12]

Amendments to regulations—dollar disclosure

4.16 Following the announcement of the Government's commitment to amend the regulations governing disclosure in dollar amounts, a set of draft regulations were released on 7 January 2004 for consultation. These proposed amendments affect the amendments contained in Schedule 3 and reflect the Government's undertaking to require dollar disclosure in SoAs, PDSs and Periodic Statements unless ASIC determines that for compelling reasons it is not possible to do so.

4.17 The wording of the various proposed regulations share common phrases to the effect that if ASIC determines that, for a compelling reason, it is not possible to state information to be disclosed in accordance with the relevant statutory provision as an amount in dollars, the information may be set out as a description of the amount as a percentage of a specified matter (including, if appropriate, worked dollar examples). If ASIC determines that for a compelling reason, it is not possible to state information as an amount in dollars or to describe the amount as a percentage, the information may be set out as a description of the method of calculating the remuneration, charge, benefit, interest or cost etc (including, if appropriate, worked dollar examples).

4.18 With Periodic Statements the requirement is similar. If ASIC determines that, for a compelling reason, it is not possible to state the amount of a deduction in dollars, the amount of the deduction may be set out as a description of the fees, charges or expenses as a percentage of a specified matter (including, if appropriate, worked dollar examples). If ASIC determines that, for a compelling reason, it is not possible to state the amount of a deduction in dollars or to set the amount as a percentage the product issuer may provide:

(i) a statement informing the holder of the product that amounts for fees, charges or expenses are applicable; and

(ii) if information about the amount of the deduction is not provided details of the means by which a product holder can gain access to information relating to the amount.

Evidence Presented to the Committee

4.19 Of the 24 submissions received by the Committee, 15 wrote at length on the regulations governing dollar disclosure. Those troubled by the proposed regulations divide into schools:

- Those who want water-tight assurances that full dollar disclosure requirements will be required with no opportunities for financial services

12 Senate *Hansard*, 4 December 2003, p. 19422.

providers to circumvent the intention of the legislation. They share a strong belief that there are no impediments to the design of products that prevent the total costs to the consumer from being shown.[13]

- Those who are worried by the possible literal interpretation that could be given to the expression 'compelling reasons' and 'it is not possible' to state the amount in dollars. A number are seeking relief from the dollar disclosure requirement because of the perceived difficulty in providing a dollar amount, the costs associated with systems changes or its potential to mislead or confuse the consumer.

4.20 The following section examines the arguments put forward by both the schools. It looks at definitional problems in the regulations, particular services or products deemed unsuitable or inappropriate for dollar disclosure, ASIC guidance, compliance costs, the transition period, ASIC's ability to make a determination and the related issue of the demands placed on ASIC.

Definitional problems—Meaning of 'compelling reasons'; 'not possible'; 'if appropriate, worked dollar examples' and 'any other amount'

'Compelling reasons' and 'not possible'

4.21 Although there are clear differences in opinion about the regulations most shared a concern about the terms 'compelling reason' and 'not possible' which are not defined in legislation.[14]

4.22 The Insurance Council of Australia (ICA) strongly believed that the words 'If ASIC determines that, for a compelling reason, it is not possible to state the information to be disclosed…as an amount in dollars, the information may be set out as a description of…' would create difficulties for ASIC and general insurers. It cited a number of problems including:

- there is no definition of the term 'compelling reason';
- there is no guidance as to how ASIC should arrive at its determination or any mechanism for review of ASIC decisions; and
- the term 'compelling reason' has the potential to lead to inconsistent decisions being made by ASIC.[15]

---

13 See for example the evidence of Mr Kevin Bailey, *Committee Hansard*, p. 4 who said ' I cannot foresee why it is service provider difficult unless they have employed actuaries or spin meisters to design their systems to make them difficult to disclose in the first place, then let them pay a few dollars to get back on the level playing field. So I am totally opposed to the fact that they should be given any leeway to continue in their practices which have not been in the consumers' interest to date.'

14 See for example *Submission* 3, p. 6; *Submission* 6, p. 1; *Submission* 11, p. 2.

4.23 Similarly, ASFA highlighted the difficulties in interpreting the terms 'compelling reason' and 'not possible' and the need to give certainty to these terms. It contended that a compelling reason for not disclosing on a dollar basis may include instances where such disclosures are either misleading or significantly confuse the consumer. Another reason for non-disclosure in dollar amounts cited by ASFA involved cases where it is technically impossible to give a dollar amount for example where particular fees are determined as a percentage of a member's account balance.[16]

4.24 It also maintained that:

> Clarification needs to be provided as to when worked dollar examples of percentage-based fees would suffice in meeting the dollar-based disclosure obligation…the parameters for such examples need to be standardised, for example the impact of entry and exit fees.[17]

4.25 While some submissions stressed the difficulty in interpreting the meaning of 'compelling reason' and 'not possible', Investment & Financial Services Association Ltd (IFSA) rejected outright the use of the term 'not possible'. Mr Philip French, ISFA, told the Committee that the not possible test is an absolute concept—'if it can be done it must be done, regardless of cost or any other factor, such as detriment to providers or consumers'.[18]

4.26 IFSA argued that if implemented the new regulations would 'place an unreasonably heavy burden on industry, consumers and the regulator'. It explained:

> While the term 'reasonably practicable' is understood to encompass the concept of what can reasonably be achieved at a given point in time (taking into account such factors as cost, industry standards/practice, the state of technology etc), 'not possible' is an absolute concept—ie if it can be done, it must be done, regardless of cost or any other factor such as detriment to provider or consumer. To require companies to prove, by providing 'compelling reasons', that it is not possible to do something, these regulations will, if implemented, set an impossible standard.[19]

4.27 It suggested that it would be fairer and more in accord with the objectives of the FSR to set a standard based on the provision of 'compelling reasons as to why dollar disclosure is not reasonably practicable'. According to IFSA, the legal definition of 'reasonably practicable' is well known within both the legal and regulatory communities. It argued that such a test 'would allow ASIC the scope to more easily

---

15 *Submission* 3, pp. 6–7.

16 Submission to the Treasury, 23 January 2004.

17 Submission to the Treasury, 23 January 2004, p. [3].

18 *Committee Hansard*, p. 49.

19 *Submission* 10, p. 2.

administer the requirements of the legislation and would assist in enforcement, in the event that a matter was referred for judicial determination'.[20]

4.28 The Financial Planning Association (FPA) agreed with this view urging a return to the 'reasonably practical' standard.[21] It told the Committee:

> Importantly the 'reasonably practicable' test was developed after six years of consultation between industry, consumer groups and policy-makers. It had been accepted by all participants as the appropriate disclosure benchmark for consumer protection and industry efficiency outcomes. Accordingly, we firmly believe that the 'reasonably practicable' test should be allowed to operate in the marketplace before a change is made to a higher and technically dependent benchmark.[22]

Committee view

4.29 The Committee understands the concerns of some financial services providers about the strict application of the terms 'compelling reasons' and 'not possible to state an amount in dollar terms'. The Committee, however, is aware of the potential for the term 'reasonably practicable' to be used to undermine the intention of the Act which stipulates that unless in accordance with the regulations 'any amounts are to be stated in dollars'. At the moment, the Committee is not inclined to change the test to 'reasonably practicable'. It appreciates that ASIC must start to provide guidance on a number of cases where the compelling reasons test may apply. ASIC has acknowledged that it is yet to start to examine such cases (see paragraph 4.64).

'If appropriate, worked dollar examples'

4.30 The regulations allow for information to be set out as a description of the amount as a percentage of a specified matter including, if appropriate, worked dollar examples. The Association of Financial Advisers (AFA) wondered what ASIC would consider appropriate and of the wording of worked dollar examples. It observed:

> We understand that FSRA and ASIC require the need for dollar worked examples as being part of the FSG but we note that this amended regulations are for Statement of Advice and Product Disclosure Statements. FSGs are not mentioned. We believe that the Government through Treasury should be more specific even to the point of giving examples of 'worked dollar examples'.[23]

---

20 *Supplementary Submission*, p. 1.

21 *Submission* 16, p. 1.

22 *Submission* 16, p. 2.

23 *Submission* 11, p. 2.

Committee view

The Committee understands that ASIC is aware that it will have to offer guidance to industry on a range of matters.

'Any other amount'

4.31 Mr Michael Lannon, 20/20 Funds DirectInvest, raised questions about the meaning of 'any other amount' in the amendment that was passed to the FSR Amendment Bill in December which inserted subsection 5(A) in s 1017D. It reads:

> Unless in accordance with the regulations:
>
> (a) for information to be disclosed in accordance with paragraphs (5)(a); (b), (c), (d) and (e), any amounts are to be stated in dollars; and
>
> (b) for any other information in relation to amounts paid by the holder of the financial product during the period, any amounts are to be stated in dollars.[24]

4.32 He asked whether the term 'any other amount' includes up-front commissions, trailing commissions, adviser services fees, member fees, management fees, administration fees and expense recovery fees. He stated:

> Of the myriad of fees charged to investors I think the regulations need to clearly define the fees that are to be disclosed.[25]

4.33 Mr Michael Rosser, Treasury, made clear that the legislation encompasses the range of fees and charges. He told the Committee:

> Generally speaking, some of the evidence that was provided earlier gave some implication that there was, if you like, a bit of a vacuum in terms of the regulatory obligation. I would like to say that I do not believe that that is the case.[26]

ASIC also reinforced this point by making plain that the Corporations Act require disclosure of all fees and charges, including upfront fees and ongoing fees.[27]

Committee view

4.34 The Committee is strongly of the view that the legislation requires the disclosure of all fees and charges no matter what terminology is being used. It realises that the dollar disclosure regime will have to be carefully monitored to ensure that all

---

24 *Submission* 8, p. [2].

25 *Submission* 8, p. [2].

26 *Committee Hansard*, p. 89.

27 *Committee Hansard*, p. 96.

fees and charges are indeed captured by the legislation and are being disclosed in accord with the legislation.

Particular services or products deemed unsuitable or inappropriate for dollar disclosure

4.35 The Australian Bankers' Association (ABA) was concerned about the lack of flexibility in the legislation and its capacity to balance consumer benefit and efficiency. It submitted:

> …the imposition of a universal obligation regardless of scale, cost and workability would be inconsistent with Parliament's objective for the financial services regime to improve efficiency in the financial services sector.[28]

4.36 A number of submissions cited practical day-to-day examples of where in their opinion the dollar-disclosure requirement under the new regulations does not recognise the difficulties in meeting the dollar-disclosure obligations or indeed appreciate the consumer detriment that may result from their implementation.

Simple deposit products

4.37 CUSCAL cited the problem with disclosing in a periodic statement, at the end of the reporting period, the termination value of an investment. It maintained that the 'termination value of a pre-term deposit would require an elaborate calculation to produce a figure that may confuse or mislead the depositor'. It explained:

> Early withdrawal of part or all of a term deposit generally involves a penalty of some kind, such as a reduction in the interest rate or a fee. The interest penalty may be a specified reduction in the rate, a reduced rate plus a fee, or a sliding scale of rate reductions based on the proportion of the term completed and/or the amount left in the deposit.
>
> These variables would have to be calculated if the 'termination value' of a pre-term term deposit is to be disclosed as a dollar amount in a Periodic Statement.
>
> This dollar figure would be immediately out-of-date—ie, it would relate to the point in time that is the 'end of the reporting period' rather than the point at which the Periodic Statement is received or any future point.
>
> There is a risk that the 'termination value' figure might be confused with the amount due to the depositor at the end of the term, needlessly alarming the depositor.[29]

28 *Submission* 14, p. 3.

29 *Submission* 2, p. 3.

It concluded:

> In this case, it would appear that the disclosure imperative has become unhinged from the primary consideration—consumer benefit.[30]

4.38 The Australian Association of Permanent Building Societies (AAPBS) also cited problems with termination value and term deposits products where dollar disclosure requirements would 'either be impossible, or, where they are theoretically possible to achieve, can only be effected at a significant cost'.[31]

4.39 It shared CUSCAL's view that in some cases the disclosure requirement will not be in the customer's interest:

> The information required to be disclosed under these sections is, at best, meaningless and provides no benefit to depositors since the termination value is calculated as at the end of the reporting period—a moment that has passed. A depositor would have no interest in knowing what the value of his investment would have been had he redeemed the term deposit before maturity.
>
> At worst, the requirement will mislead our depositors and cause anxiety, particularly amongst our older depositors who do not expect to see in their statements a second amount that is less than would otherwise be payable if the term deposit reaches maturity. After all, they will not have sought to redeem the term deposit during the statement period, yet are being advised of the termination value *had they done so.*[32]

4.40 Mr Lawler, CUSCAL, suggested that deposits be removed from the dollar amounts requirement, or at least be removed from the periodic statement.[33] He was of the view that this could be achieved through providing a specific exemption in regulation. Mr Venga, AAPBS, put forward the option to define termination value for deposit products only as the closing balance.[34] Mr Lawyer did appreciate, however, that information on termination value should be available in the periodic statement. He told the Committee:

> The sort of information that is provided now, which is usually an interest penalty of some kind, or possibly a fee and an interest fee penalty, you would continue to disclose that. You would continue to provide information about a termination value but you would not have the requirement to put in a dollar amount.[35]

---

30 *Submission* 2, p. 3.

31 *Submission* 6, p. 1.

32 *Submission* 6, pp. 3–4.

33 *Committee Hansard*, p. 63.

34 *Committee Hansard*, p. 66.

35 *Committee Hansard*, p. 65.

Committee view

4.41 The Committee accepts that the requirement to provide a termination value in periodic statements for fixed term deposits products may be a genuine case of where the dollar disclosure requirement does not produce the intended result. According to the evidence, the amount stated as the termination value is out-of-date when the customer receives the information and is likely to confuse the customer whose main interest is the value at maturity. In such a case it would appear to be far more sensible for a periodic statement to state clearly that penalties apply to an early redemption and to detail what those penalties are including the loss of benefits.

4.42 The Committee understands, however, that with the current wording of the regulation, ASIC does not have the discretion to offer relief because it is possible to place a dollar amount on the termination value.

4.43 It would appear that in such cases, the solution would be to make a new regulation that would provide the necessary exemption but only for the specific product. In this way relief can be granted to genuine cases but without in any way weakening the dollar disclosure requirements. Thus, the message remains unequivocal that the providers of financial services or products must fully disclose amounts in dollar terms (see recommendation 5).

4.44 The following section discusses a number of other examples raised by witnesses who suggest that in some instances the dollar disclosure requirement is not appropriate.

General insurance

4.45 The ICA told the Committee that for many insurance products it is not possible to state the product benefits as dollar amounts in the PDS and cited the case of a policy that covers a partial loss on an indemnity basis. According to the ICA the same applies for many insurance policies where it is not possible to state the cost of the product as a dollar amount in the PDS because the cost varies according to the sum insured and other rating factors.[36] Mr Drummond noted that:

> the PDS for general insurance products will very largely be a generic PDS covering a type of product. It will not be a PDS specific to an individual customer. So the ability to state these benefits or costs in dollar terms is just not practical.[37]

4.46 While the ICA noted that there may not be any difficulty in stating commission for an insurance product as a dollar amount in an SoA, it is not possible in many cases to state other benefits as a dollar amount. The Council explained that

---

36 *Submission* 3, p. 6.

37 *Committee Hansard*, p. 72.

these other benefits 'do not relate just to the particular product that is the subject of the advice'.[38]

4.47 The Council also noted that the proposed regulations would cut across an agreed position with ASIC relating to the general insurance industry, which allows the issuer of a PDS to satisfy the requirements of s 1013D of the Corporations Act 'by setting out the means by which the cost of the product, premium, is calculated'.[39]

4.48 The American Home Assurance Company also referred to an understanding reached with ASIC that 'the issuer of a PDS can satisfy the requirements of s 1013D of the Act by setting out the means by which the cost of the product is calculated'.[40]

Committee view

4.49 The Committee suggests that the insurance industry and ASIC discuss further the manner in which the cost of insurance products are to be calculated and disclosed to ensure that they have a common understanding of the disclosure obligations under the legislation.

Exchange Traded Options for retail clients

4.50 The Securities & Derivatives Industry Association (SDIA) asserted that the new regulation would not facilitate certainty and clarity across the industry and not benefit either their members or clients. It described the particular circumstances in retail stockbroking where:

> clients in any firm are charged a range of fees, normally determined by the value of the transactions e.g. $100 minimum + 0.1% of consideration over $10,000, or even the identity of the adviser i.e. senior adviser may charge more. These rates apply, whatever products are dealt. On occasion, clients may pay less than these standard rates. Such occasions may include: high volume clients, resolving a complaint, as a special service to disgruntled client, or as a reward for loyalty. However these non-standard rates will always be charged on an ad hoc basis, in order to facilitate the client relationship. Such benefits are not capable or appropriate to be disclosed in a formal document like a PDS.[41]

4.51 It further noted having multiple versions of PDSs in use at the same time for different advisers or clients across the firm would be unworkable. It would like to proceed on the basis of 'one-PDS-per-firm' for all Exchange Traded Options trading. According to SDIA, it would be an onerous administrative burden for their members

38 *Submission* 3, p. 6.

39 *Submission* 3, p. 7.

40 *Submission* 7, p. 4.

41 *Submission* 4, p. 1.

to have to obtain sign-off from ASIC for every new PDS that does not express fees in dollar amounts.[42]

4.52 The Association proposed that its members 'set out a range of commissions across the firm and its advisers, expressed as a percentage of amount payable, with most firms also specifying a minimum dollar amount, and that such fees may be negotiable'.[43] In brief it wanted:

- fee disclosure in a PDS expressed as a percentage of total consideration to be sufficient under the Law; and
- ASIC approval to do so not be required.[44]

4.53 Mr Douglas Clark, SIDA, told the Committee that they had no idea what policy ASIC would apply in considering an application for relief. He stated further that they would prefer 'to fix it through the regulation, rather then having to go to ASIC in every particular instance that our 69 members issue a product disclosure statement'.[45]

Committee view

4.54 The Committee accepts that there may be genuine cases where dollar disclosure obligations are inappropriate, impracticable or inconsistent with the intention of the legislation to promote efficiency and enhance consumer protection. The Committee has recommended that remedies be sought through the promulgation of regulations (see recommendation 5).

4.55 The Committee wants to emphasise that although it may be difficult for certain products to disclose with accuracy the dollar amount in a PDS, for example if the document is forecasting a return, it believes that any shortcomings in full dollar amount disclosure in a PDS should be rectified in periodic statements. In other words, the Committee is strongly of the view that periodic statements must disclose in dollar amounts all fees and charges and the return on investment. Furthermore, that the information must be presented in such a way that the consumer can place a PDS alongside a Periodic Statement and compare forecasts with actual returns.[46] This matter is discussed in the following chapter.

---

42 *Submission* 4, pp. 1–2.

43 *Submission* 4, p. 1.

44 *Submission* 4, p. 2.

45 *Committee Hansard*, p. 81.

46 Please refer to discussions that took place between Senator Andrew Murray and a number of witnesses, *Committee Hansard*, pp. 8–10 and 18.

Non-monetary significant benefits

4.56 Some witnesses were uncertain as to how to attribute a dollar value to particular 'significant benefits'. AAPBS noted that the term 'significant benefits' is not defined. It submitted that in the context of deposit products, there is no guidance as to what significant benefits might be. It assumed that the following examples would be deemed to be significant benefits in relation to term deposits—the payment of interest on a periodic basis instead of at maturity; the possibility that interest rates may decrease to a rate below the fixed rate, in which case the amount of interest received on the deposit may be more than what the depositor may have been able to receive on an at call investment. It maintained, however, that s 1013D(1)(m) will require significant benefits such as those mentioned to be disclosed in dollar terms which it argued 'is not possible as these benefits cannot be quantified in dollar terms'.[47]

4.57 Ms Carole Ferguson, ISFA, asked whether a significant benefit includes—'for instance, access to a loyalty program and whether that is in fact quantifiable'. From IFSA's perspective 'we would go as far as to say it is not a quantifiable cost or expense or a benefit for a consumer'.[48] Mr Venga similarly sought advice on how to quantify 'the fact that a person has the benefit of being paid interest on a monthly basis as opposed to maturity'.[49] He added:

> …interest rates may decrease at a rate below the fixed rate, and your benefit of course is that you will still be getting the higher rate. It is pure speculation as to how you might put this into dollar terms.[50]

4.58 The ABA provided yet another example of where it would be difficult to produce a dollar amount. It cited the case of the tax benefit a farm management deposit account holder obtains from holding the account because the purpose of the account is to provide a significant tax benefit. It explained:

> It would be extremely difficult to quantify the benefit as the value of the benefit depends on when the customer wishes to withdraw money from the account.[51]

4.59 In its opinion to estimate the value of the benefit would likely mislead the account holder. The Association informed that Committee that this example was only one of a number of examples where the significant benefits of a financial product 'do

---

47 *Submission* 6, pp. 2–3. Section 1013D (m), which was introduced by the FSR Amendment Act 2003, requires that the information in a PDS about the amounts of any significant benefits to which a holder of the product will or may become entitled are to be stated in dollars.

48 *Committee Hansard,* p. 52.

49 *Committee Hansard*, p. 66.

50 *Committee Hansard*, p. 66.

51 *Submission* 14, p. 4.

not readily translate into dollar terms such as the flexibility to be able to transact on the account 24 hours a day 7 days a week at a variety of access points'.[52]

4.60 The ABA attached a schedule to its submission containing examples from its members that demonstrate some of the impracticalities of attempting to make dollar disclosures. They include interest on 'at call' facilities; fixed term investments—prepayment interest adjustment; PDS disclosure for investment-based products; percentage-based fees and percentage-based Commission. IFSA likewise produced a compendium of situations where, in its view, there are difficulties in meeting the dollar-disclosure requirements (see Appendix 7). It strongly advocated that certain financial products be granted exemption from the proposed regulations which included:

- Annuities—an annuity is a contractual entitlement to an income stream. Costs are bundled into the declared earnings rate of the product and investors' returns are not impacted by any fluctuations, either positive or negative, in those costs.

- Participating and non-participating life policies (other than unit-linked business). The concept of 'common fund' should not apply to life products as it is impossible to attribute the costs of these products to an individual investor.

- Closed products operating on systems identified for closure, or which only cater for closed products. Exemption of closed products would take into account the very significant costs required to implement the draft regulations in circumstances where products, or the systems on which they are administered, have been scheduled for closure. The imposition of such costs would not be in the best interests of companies or investors.[53]

ASIC guidance

4.61 IFSA suggested that ASIC will need to consult urgently with industry to develop policy as to the circumstances in which it will be taken to have determined that for particular documents and products there are 'compelling reasons' for not being able to state dollar amounts.[54] IFSA also suggested that the regulations will need to be supplemented by clear guidance as to the factors relevant in determining whether or not the reasons for non disclosure of dollar amounts are accepted as being 'compelling'. In its view:

> …it would be preferable for the regulations to make it clear that 'compelling reasons' would include considerations relating to cost, availability of time

52 *Submission* 14, p. 4.

53 *Supplementary Submission*, pp. 1–2.

54 *Submission* 10, p. 2.

> and resources, nature of the product and likely detriment to providers and consumers, as well as other considerations an individual applicant may wish to bring to ASIC's attention.[55]

4.62 The FPA also stressed the importance of having close consultation with financial services sector participants to develop a comprehensive policy statement as to what constitutes 'compelling reasons' for non disclosure in dollar terms.[56] To the same effect, the ABA submitted that ASIC should consult with industry to develop clear guidance on what ASIC considers 'compelling reasons'. It stated:

> This could include identifying criteria that would help licensees proceed with certainty in complying with proposed requirements. Alternatively, guidance should be provided through the regulations to assist industry to implement their sign off and compliance programs.[57]

4.63 Mr John Rappell, Australian Financial Markets Association, was also of the view that ASIC should consult widely with industry to develop some clear guidance about what compelling reasons would be, 'so that this gives people some room to move on devising their PDSs'.[58]

4.64 ASIC told the Committee that it had not yet started to examine cases where the compelling reasons test might apply. Mr Johnston explained:

> I anticipate that we would go through a process of doing just that, though. In all likelihood that would look like our normal policy proposal paper type consultation, where we might put forward some examples of where we might accept disclosure in other than dollar terms. Those would probably be reasonably generic examples, rather than trying to be very specific on a product basis, because that would narrow the consultation. We would probably also give some examples of where we would not accept an argument that something was not possible and would therefore allow the industry, consumer groups and anyone else who is interested to come back to us and tell us what they thought. It would be important for us to issue some guidance on this. It would also be important, as I said in the opening statement, for us to have the ability to make some class determinations to ease the administrative burden.[59]

Committee view

4.65 Clearly, ASIC acknowledges the need for it to issue guidance on what it would deem to be compelling reasons and to provide examples of where the

---

55 *Submission* 10, p. 2.

56 *Submission* 16, p. 2.

57 *Submission* 14, p. 6.

58 *Committee Hansard*, p. 86.

59 *Committee Hansard*, p. 97.

compelling reasons test might apply. It would seem that ASIC has a far more extensive responsibility than determining what might constitute compelling reasons. Clearly many industry groups are seeking answers to a number of other matters including the meaning of a 'significant benefit' and what means should be used to quantify a benefit in dollar amounts. The Committee notes ASIC's explanation that the ability for ASIC to make some class determinations to ease the administrative burden would also assist in providing a degree of certainty for industry as to the practical application of the regulation.

Compliance costs

4.66 Compliance costs were also a source of concern for some witnesses. A number of submissions referred to the considerable costs and time that would be involved in meeting the new obligations but without 'commensurate benefit to consumers'.[60] ASFA suggested that whether the cost to the product issuer constitutes a 'compelling reason' needs to be clarified. It was of the view that cost as 'a compelling reason' cannot be ruled out entirely. It suggested:

> …where cost is considered, the regulator should be able to secure an undertaking from the product issuer to achieve dollar-based disclosure with a set time period.[61]

4.67 The American Home Assurance Company agreed with a number of witnesses that the cost of complying with the dollar-disclosure requirements would be significant as 'licensees would be placed in a position of reacting to the decisions of a regulator based on the most subjective and individual of judgments'. In its view, '"compelling reasons" is not a term which admits of easy definition or consistent application'.[62]

4.68 The FPA maintained that its members who are AFS licence holders believe that the costs of meeting the higher and untested benchmark proposed by the regulation 'although difficult but *technically* possible, will necessitate significant system changes and process redesign'. It notes that consumers will have the costs of such charges passed on to them with 'the likely consequence that the consumer is forced to meet higher costs for little or no gain'.[63]

4.69 The ABA argued that the requirements under the new regulations ignores the costs involved in introducing systems to meet the requirements and the time it would take to implement the changes to the systems.[64] It noted that the costs and time involved in changing to meet the new dollar-disclosure requirements could also have

---

60 See for example *Submission* 3, p. 6.

61 Submission to the Treasury, 23 January 2004, p. [3].

62 *Submission* 7, p. 4.

63 *Submission* 16, p. 2.

64 *Submission* 14, p. 4.

an adverse effect on competition and especially affect smaller financial service providers. According to the ABA:

> For smaller organisations the economies of scale will be far less for larger organisations so while implementation might be possible (in the literal sense) it would be extremely costly relative to larger organisations, disruptive and damaging to their businesses and hence their capacity to compete and provide high quality services to consumers.[65]

4.70 In essence, the ABA submitted that unless the dollar disclosure test is modified there will be 'costs, disruptions and market implications that will far exceed the benefit intended to be conferred on consumers'.[66]

4.71 To the same effect, IFSA referred to the cost of systems changes and the time taken to implement them. In particular it cited costs associated with systems changes required to implement the On-going Fee Measure/average account balance which it stated varied from company to company but ranged from $300,000 up to $2 million.[67] Ms Ferguson, IFSA, argued that the 'compelling reason' and the 'not possible' standard:

> imposes on members a test which means that, short of having a system which is not possible to be changed, every member would have to then undertake the changes that are necessary, irrespective of the cost, irrespective of the time and irrespective of the impact that that might have on particular member's business.[68]

4.72 CUSCAL was concerned that while disclosure may be possible in a strictly technical sense it may also be 'unduly complicated and extremely costly to implement without necessarily delivering any consumer benefit'.[69] It noted that deposit and payment products are 'simple and well understood' and most depositors are fully informed about fees or interest penalties. It maintained that the requirement for dollar disclosure would impose 'a complex new compliance problem on credit unions and other providers of these products for no consumer benefit'.[70]

---

65 *Submission* 14, p. 5.

66 *Submission* 14, p. 5.

67 *Submission* 10, p. 7.

68 *Committee Hansard*, p. 52.

69 *Submission* 2, p. 2.

70 *Submission* 2, p. 3.

Transition period

4.73 Many witnesses voiced concern not only about compliance costs but also about the short timeframe in which to accommodate the new requirements.[71] Mr Rappell told the Committee:

> With the number of PDS to be examined, it could be quite difficult to get through in an orderly manner by 1 July 2004 when all this becomes enacted. We believe also that there should be ongoing monitoring of this to see how it actually works in practice.[72]

4.74 IFSA suggested that PDSs dated before 1 July 2004 but in use after 1 July 2004 should not need to be supplemented with respect to any changes applying from 1 July 2004.[73] It also strongly recommended that implementation of the new disclosure regime be deferred to at least 1 July 2005 in order:

> to allow reasonable time for consultation with ASIC as to appropriate implementation policies, as well as to allow sufficient time for industry to plan and implement the systems changes.[74]

4.75 The ABA indicated that substantial systems modification would be needed to develop disclosure models where the relevant factors for calculating dollar amounts are known. It suggested that it would be impossible to make such changes before 1 July 2004 and hence recommended an extended transition period to 30 June 2005.[75] The FPA similarly asked for an extension of the transition period to 1 July 2005. It reasoned:

> Assuming that the Regulations will be finalised by late March, the current timeframe leaves less than four months for participants in the financial services sector to implement the significant changes to systems and processes to enable them to achieve compliance with the requirements. This is commercially unrealistic and may not be technically achievable.[76]

Mr Rosser, Treasury, informed the Committee:

> We anticipated that that would be one of the issues that would arise. The reasonably practicable test that was formerly in the regulation was intended to accommodate the temporal aspects of capacity to meet the disclosure obligation. So we anticipated that if the standard was raised then the temporal aspects would be even more acute. We are conscious of the fact

---

71 See Mr Rappell, *Committee Hansard*, p. 86.

72 *Committee Hansard*, p. 86.

73 *Submission* 10, p. 2.

74 *Submission* 10, p. 7.

75 *Submission* 14, p. 5.

76 *Submission* 16, p. 2.

> that it is a regulation in draft form and, therefore, ASIC's capacity to provide guidance on it is somewhat limited and obviously the final form of the regulation is yet to be determined. So with the approach of 1 July I can understand that people have concerns about that.[77]

4.76 In addressing worries about the practical implementation of the dollar disclosure regime, Mr Johnston, ASIC, informed the Committee that ASIC would not be opposed to a transitional period. He suggested that the transition could be 'an across-the-board extension of time…or it could be more tailored…whereby there would have to be some grounds demonstrated before the transitional relief could be granted'. He noted, however, that:

> …with the current form of words, it would be difficult for us to take account of transitional issues. That might need to be specifically recognised, perhaps in regulation. Because of the words being 'not possible', it is difficult for us to then apply that standard with some discretion. I think something is possible or it is not. As I said, it is almost an absolute test. So I think that there probably should be some transitional recognition of the difficulties, but that might be better done in the regulations themselves.[78]

4.77 In his view the promulgation of a regulation would provide greater certainty, because 'if we were asked to say that something is not possible for compelling reasons simply because it is difficult, that just would not seem to work to me'.[79] Ms McAlister, ASIC, suggested that:

> …if the existing regulation allowed a transitional period in cases where there was an unreasonable burden, only on a short-term basis, that might accommodate the sorts of situations…but that would only apply during a transitional period.[80]

Committee view

The Committee appreciates that the timeframe for the implementation of the proposed regulations is short and may cause difficulties for some providers.

Recommendation 2

4.78 The Committee recommends that a regulation be made that would allow a transition period to extend to 1 January 2005. The Committee, however, is strongly of the view that those capable of meeting their dollar disclosure obligations should do so from 1 July 2004.

---

77 *Committee Hansard*, p. 95.

78 *Committee Hansard*, p. 98.

79 *Committee Hansard*, p. 98.

80 *Committee Hansard*, p. 99.

Making a determination

4.79 A number of submissions cited the following features of the regulations which fail to give the certainty that the regulation is expected to provide to industry:

- no guidance as to how ASIC is to arrive at a determination;
- each determination would be on a case by case basis;
- the absence of rules governing the process by which ASIC makes its determination
- no mechanism that allows for a review of decisions made by ASIC.[81]

4.80 The American Home Assurance Company argued that allowing ASIC this degree of discretion 'undermines any semblance of the provision of a uniform set of objective standards by which disclosure documentation, and within it, disclosure of costs, and other amounts can be measured'.[82]

4.81 It submitted that the new regulations confers on ASIC an 'immense level of discretion' in determining what is or is not a 'compelling reason' for dollar disclosure. In its words:

> ASIC is thereby the beneficiary of an unfettered ability to determine, on a case by case basis, which part of a hierarchy of disclosure must be applied to disclosure documentation.[83]

4.82 ASFA asked a range of questions about how ASIC would make its determination—would it be issuing class orders, would applications for individual relief be required or would there be a separate application process?[84]

4.83 ASIC made quite clear that the wording of the regulation provides little room for the Commission to exercise discretion. Mr Johnston told the Committee that it was clear to him that there would be no 'wriggle room': that the current form of the proposed regulation makes it 'crystal clear that dollar disclosure is what needs to occur, unless there are compelling reasons as to why that is not possible'.[85] He explained:

> Firstly, 'not possible' seems to us to be a near absolute test; something is either possible or it is not. Secondly, it is unusual to ask the regulator to make such a determination, arguably before the fact. On one interpretation,

---

81 See for example *Submission* 3, p. 6; *Submission* 7, p. 4.

82 *Submission* 7, p. 4.

83 *Submission* 7, p. 3.

84 Submission to Treasury, 23 January 2004, p. 2.

85 *Committee Hansard*, p. 97.

> and unless ASIC have the power to issue class determinations, ASIC could be called on to make a determination in some hundreds of cases. If this were to eventuate, ASIC would not currently be resourced to make such a large number of determinations. More commonly, ASIC would, in the normal course of its duties, apply the law by reviewing a proportion of disclosure documents and through its compliance reviews.
>
> The point to be made here is not so much that we do not believe it is appropriate for us to fulfil this obligation but, unless there was an ability for us to issue class determinations, we may be called upon to deal with some hundreds of matters in a short space of time, especially with the introduction of this requirement.[86]

4.84 A number of witnesses suggested that any changes needed to accommodate specific products should be dealt with through the promulgation of regulations. IFSA argued that:

> For the sake of clarity, we submit that these matters should be the subject of subordinate legislation, to the greatest extent possible. Whilst ASIC could administer the dollar disclosure requirements using its exemption powers, in IFSA's view this could impose an unnecessarily heavy burden on all concerned as most participants will require relief. Given the nature of the tests (ie that each party would need to demonstrate the effect of the draft regulations in relation to its particular circumstances) we submit that this would be likely to involve significant costs, delays and uncertainty on IFSA members.
>
> In our view the regulations should be framed so that responsibility for deciding what can or cannot be disclosed in dollar amounts falls on product issuers, not the regulator. ASIC already has sufficient power to ensure that the legislative requirements with regard to disclosure documents are met.[87]

4.85 Mr Rosser, Treasury, told the Committee:

> One of the things we would anticipate is that, if the regulation were to be reformulated, it would be reformulated in a way which would enable ASIC to provide class order relief. At the moment, the way it is framed precludes that possibility. It perhaps needs to be reformulated to permit that. That will address some of the issues about prevetting of documents and being able to deal with classes.[88]

Demand on ASIC's resources

4.86 Many in the financial services industry anticipate that the implementation of the proposed regulations will place significant demands on ASIC. Indeed a number of

---

86 *Committee Hansard*, p. 96.

87 *Supplementary Submission*, p. 2.

88 *Committee Hansard*, p. 91.

witnesses referred to the drain on ASIC's resources as the regulator.[89] The AAPBS suggested that a literal interpretation of the term 'if ASIC determines that, for a compelling reason, it is not possible to state the amount in dollar terms' requires ASIC to examine each template for SoA, PDS and periodic statement if dollar disclosure is not possible. It argued that such a requirement would place a heavy demand on ASIC's resources.[90]

4.87 The ICA questioned whether ASIC would have the resources 'to cope with a flood of applications for determinations'.[91] The ABA also mentioned the likely burden imposed on ASIC by the new regulations. It stated:

> If it is intended that ASIC would apply the test by assessing every form of SOA, PDS and PS provided by every licensee, we imagine the administrative burden on ASIC to do this even by 1 July 2004 would be virtually impossible without ASIC very substantially augmenting its resources and diverting resources away from other projects and regulatory activities.[92]

4.88 It suggested, however, that if ASIC had the power to deal with applications for relief by way of class order relief it would help to 'expedite the administration of applications and provide the much needed certainty to relevant organisations'.[93]

Overall, in ASFA's, view the proposed regulation 'would place an unreasonably heavy burden on industry, the regulator and, ultimately, consumers because of the costs involved.'[94]

Recommendation 3

4.89 The Committee is aware that the proposed regulations would place an additional strain on ASIC's resources. It understands in particular the importance for ASIC to produce guidelines that would provide the necessary and much needed advice for industry. It recommends that the Government ensure that funding is available to enable ASIC to assist industry in the smooth transition to the dollar disclosure regime and for it to have adequate resources to enforce the legislation.

---

89 See for example, *Submission* 6, p. 1; *Submission* 7, p. 4

90 *Submission* 6, p. 1.

91 *Submission* 3, p. 6

92 *Submission* 14, p. 5.

93 *Submission* 14, p. 5.

94 *Committee Hansard*, p. 49.

Committee view

4.90 According to the evidence, there are instances where dollar disclosure while possible may be simply not economically viable, practicable, sensible or in the consumers' interest. The Committee did not examine in detail the arguments put forward in support of relief from the dollar disclosure requirement for particular products cited by witnesses during the inquiry. Prima facie, it appears that some cases, such as termination values in term deposits products, have legitimate grounds for exemption from the dollar disclosure requirement. The Committee believes that each case needs to be examined thoroughly before any determination can be reached.

4.91 In light of the number of witnesses who raised concerns about the difficulties they may have in complying with the strict interpretation of the wording of the regulation, the Committee believes that there is a real need for the legislation to have some flexibility to take account of such situations.

4.92 There is the option for the Committee to recommend that the regulation be reformulated to provide ASIC with the necessary latitude to allow for the economic impact of the dollar disclosure requirement on the provider, the practicality of dollar disclosure and whether dollar disclosure is in the interest of consumers. Having said that, however, the Committee remains firm in its conviction that the regulations must not allow any opportunity for providers to avoid their dollar disclosure obligations where it is possible for them to meet that obligation and it is in the interests of consumers for them to do so.

4.93 The Committee accepts that the current wording of the regulation sends an unequivocal message to all financial services providers that they must disclosure amounts in dollar terms unless it is not possible to do so. Nonetheless, as already mentioned, the Committee has evidence before it that suggests this high bench mark may in some cases:

- place unreasonable demands on the providers of some financial products;
- be impractical; or
- not serve the interests of the consumer.

4.94 At the moment, the Committee is disinclined to tinker with the current wording of the regulations and favours the promulgation of additional regulations to provide the necessary flexibility to accommodate the particular cases where ASIC determines that dollar disclosure is not appropriate, impractical or at the time imposes an unreasonable burden on the provider. This means the making of regulations that will allow ASIC to grant relief, either class relief or individual product relief, in limited circumstances and in some instances for a limited period. In this way ASIC, who is best placed to assess the validity of the claim for relief, in consultation with Treasury would recommended that a particular class of product or individual product should be exempt from the dollar disclosure requirement. The regulation would then be promulgated and as a disallowable instrument subject to Parliamentary scrutiny.

Recommendation 4

4.95 The Committee recommends that the wording of the proposed regulations on dollar disclosure remain as currently drafted.

Recommendation 5

4.96 The Committee recommends that to accommodate any particular cases where the dollar disclosure requirements are inappropriate or inconsistent with the intention of the Act, new regulations be promulgated that would allow ASIC the necessary flexibility to offer relief, either class relief or individual product relief, in limited circumstances and in some instances for a limited period, for specific cases where such relief is deemed necessary.

Recommendation 6

The Committee fully supports the objectives of the Financial Services Reform Act 2001. The dollar disclosure legislation is a central plank in the overall disclosure regime designed to protect investors and maintain confidence in the business environment. That Committee recommends that the Government monitor its implementation and related regulations to ensure that it is meeting consumers' interests. Further, it recommends that the Department of the Treasury report back to the Committee by the end of 2007 on the implementation of the dollar disclosure regime.

CHAPTER 5

MEANINGFUL DISCLOSURE

5.1 Much of the evidence presented to the Committee went beyond the regulations under consideration and dealt with the broader issue of effective disclosure with the focus on a fee-disclosure model. Although outside its terms of reference, the Committee briefly discusses this matter which it regards as the next important step in ensuring that consumers are fully informed about the costs and charges of financial services and products.

5.2 Mr Ross Clare, ASFA, observed that disclosure is an issue that has 'quite a long history'.[1] Indeed, in May 2002, Ms McAlister, Freehills, gave evidence before the Committee that '…with some funds that offer, let us say, 20 investment choices, the multiplicity of figures that will be produced could be absolutely dazzling and quite mind boggling'.'[2] At that time, Dr Pragnell, ASFA, told the Committee that they had been 'trying to look at forms that involve simple tables that are reasonably understandable by consumers, that do express the impact of fees and charges on a dollar basis. We are committed to that'.[3]

5.3 Nearly two years on, the formulation of an industry wide acceptable fee disclosure model is still a 'work-in-progress'. Dr Pragnell told the Committee that the boards of ASFA and IFSA 'recently met to consider whether there might be a resolution of differences between the two organisations on the preferred approach to fee disclosure'.[4] ASIC has produced a fee table but in the view of Ms Wolthuizen, Australian Consumers' Association:

> …you would expect that that fee table might be one of the lesser used elements of fee disclosure. It will be useful; it has its place. But I do not think we can ever expect it to take the place of that up-front measure.[5]

5.4 In the view of Professor Ramsay, ASIC's fee tables could be improved and he understood from recent discussions with ASIC they 'are in the process of incorporating suggestions for improvement'. He believed that ASIC intended that 'the fee tables would evolve over time'.[6]

---

1 *Committee Hansard*, p. 12.

2 *Committee Hansard*, 23 May 2002, p. 27.

3 *Committee Hansard*, 23 May 2002, p. 16.

4 *Committee Hansard*, p. 12.

5 *Committee Hansard*, p. 40.

6 *Submission* 20, p. 5.

5.5 According to a number of witnesses, there remains much work to be done to develop an effective fee disclosure model. In the view of Mr Lannon, 20/20 Funds DirectInvest:

> Under the current legislation disclosure to investors is fragmented in such a manner that an investor receives disclosure in a piecemeal fashion. For example there is one disclosure requirement for product issuers to disclose relevant information in the Product Disclosure statement…
>
> A second area of disclosure under the FSR is from the adviser in the 'Statement of Advice'. It is here that the clients have all of the fees received by the adviser clearly spelled out. This disclosure is often contained as part of a 60–70 page financial plan and I question its effectiveness.[7]

5.6 In summary, Mr Lannon argued that the average Australian investor has no idea what fees they are paying because of the range and types of fees charged and a lack of effective continuous disclosure.

> The current disclosure requirements allow for the fund managers to disclose some fees in the Product Disclosure Statement while other fees are required to be disclosed by financial advisers in the financial plan or on the newly required statement of advice. This piecemeal disclosure results in an investor that is ignorant of the fees they are being charged or at best they are confused by the fact that they are only getting partial fee information from multiple sources.[8]

He placed the following proposal for the Committee's consideration:

> All fees associated with managed investments and superannuation funds to be placed on investors' statements in dollar terms including fees paid to and collected on behalf of advisers. Statements should be required to have a clearly outlined section on fees stating the following information in actual dollar terms.
>
> All management fees
> All expenses charged
> Any operators' fees or trustee fees
> All administration or member fees
> All forms of commission paid to intermediaries including
> Up front commissions
> Trailing commissions
> Adviser service fees[9]

7 *Submission* 8, pp. [2].

8 *Submission* 8, p. [3].

9 *Submission* 8, p. [4].

In addition, he stressed the importance of having continuous disclosure of the total fees charged to investors.

5.7 As noted earlier, he questioned the effectiveness of disclosure that is often contained as part of a 60–70 page financial plan. The AFA also pointed to the matter of the presentation and extent of information provided to customers and referred to FSGs of 50 pages or more. It believed that the requirements of the FSRA and ASIC's PS 175 provide information overload for the ordinary person in the street.[10]

5.8 The Australian Consumers Association (ACA) was similarly conscious of addressing the needs of customers and working towards their best interests. It stated:

> In devising a 'meaningful' disclosure format, we must be mindful of the low levels of financial literacy among the Australian population. 'Meaningful' must be from the consumers' perspective, not what is convenient for product developers.[11]

5.9 Professor Ramsay also referred to the low levels of financial literacy and quoted from a recent ANZ research report which found that 'only 60 per cent of people with managed investments and 44 per cent of those with superannuation know their fees well'.[12] He reinforced the view of the ACA for the need to 'ensure that disclosure about fees and commissions is made in a way that is both meaningful for consumers and concise'.[13]

5.10 The ACA recognised that formulating a meaningful form of disclosure covering 'the complex array of fees and charges across financial services is a difficult task, but consumers needs and expectations must be of paramount consideration'.[14] It identified comparability as a critical element in the disclosure of fees and charges:

> Not only must consumers be able to understand how much different products will cost, they must also be able to compare those costs, and 'shop around' for one most appropriate to their needs and circumstances.[15]

5.11 It was among a number of submissions who appreciated the complexities in designing a model that would meet the various objectives of providing full and adequate information but presenting it in a way that could be readily understood by consumers. The ACA put forward a model with a cascading fee disclosure of:

---

10 *Submission* 11, p. 3.

11 *Submission* 12, p. 1.

12 *Submission* 20, p. 2.

13 *Submission* 20, p. 5.

14 *Submission* 12, p. 2.

15 *Submission* 12, p. 2.

- upfront single cost measure in dollar terms, showing amount of fees after withdrawal over 30-year period;
- fee table setting out all fees applicable to that product (ASIC template with modifications);
- specific application of fees to individual balance;
- periodic statement showing how much has been paid in standardised dollar terms.[16]

5.12 Mr Kevin Bailey, The Money Managers Ltd, wanted the regulations to go further and 'define what the aspects of funds management advice and administration are'. [17] He explained:

> One of the things that I see happening a lot these days is that often advisers may go to the extent of disclosing their commission, but let us say the commission is one-third of the cost, all they disclose is one-third of the cost; they do not disclose what the underlying fund managers at an institutional level are receiving. So they are not comparing apples with apples.[18]

5.13 Dr Pragnell, ASFA, noted that ASFA's research showed that people prefer dollar based disclosure fee information and for it to be located in a single location within the disclosure document. Ms Wolthuizen reinforced this view stating that people appreciate information expressed in dollars terms and in a way that allows them to compare one product with another product.[19] She told the Committee that people struggle with the application of percentages and with the comparison of dollar figures and percentages. Dr Pragnell also noted that people appreciate fees being presented in a table format.[20] Professor Ramsay was of the view that consumers would benefit from having a single line figure. He submitted that:

> This should occur in the periodic statement but frequently doesn't. It would be desirable for the PDS to contain such a figure. However, there are particular challenges in achieving this objective for a PDS where discretionary fees may apply and one must ensure that if such a figure is used, it does not mislead consumers.[21]

---

16 *Submission* 12, p. 2.

17 *Committee Hansard*, p. 6.

18 *Committee Hansard* p. 6.

19 *Committee Hansard*, p. 38.

20 *Committee Hansard*, p. 13. See also p. 19.

21 *Submission* 20, p. 6.

5.14 A number of witnesses also suggested that the standardisation of terms or the use of common terminology would help particularly to allow consumers to compare products.[22] Mr Dunnin said:

> …there is a little bit of opportunity for people to switch fees verus costs around, and there are some good examples of a couple of funds at the moment where they have said, 'We are going to get rid of all of our fees,' so when they go to the page in the PDS that says 'fees', they are just going to write 'nil', and it is going to be legitimate and perfectly valid. However, they are still going to have those same expenses, but it is on the cost side…there is a little bit of subterfuge going on.[23]

He added:

> When we talk to different players, we are still debating some of the terminology. Are we talking about investment fees or investment costs? Some organisations and some products use terms such as 'investment management', some talk about 'investment administration', some talk about 'asset administration', some talk about 'plan fees' and some talk about 'member fees'. In industry funds, when we say 'administration costs', those fees actually mean policy fees when you are talking to, say, a commercial master trust. We also have debates about what the words 'fees' and 'costs' mean. We have debates about what the term 'MER' actually means. In some cases it means a total fee estimate; in other cases it just tends to mean the investment related component.[24]

In summary, Ms Wolthuizen stated that:

> Tables, clear headings, standardised format, standardised terminology all provide assistance to consumers to aid their understanding.[25]

5.15 A number of witnesses also spoke of the need to break the fees and charges and other costs into clear demarcated categories. Ms Nicolette Rubinsztein, IFSA, suggested that there should be separate disclosure for the up-front fee and the ongoing fee because consumers need to compare both.[26]

5.16 Ms Wolthuizen also noted that the same terms and the same format should be used for periodic statements.[27] Professor Ramsay gave particular attention to periodic statements. He stated:

---

22 *Committee Hansard*, p. 29. See also Ms Rubinsztein, *Committee Hansard*, p. 60.

23 *Committee Hansard*, p. 29.

24 *Committee Hansard*, p. 31.

25 *Committee Hansard*, p. 37.

26 *Committee Hansard*, p. 56.

27 *Committee Hansard*, p. 40.

> Disclosure of fees and charges in periodic member statements varies to an extraordinary degree. Some periodic member statements make no disclosure to investors about fees and charges. This is unfortunate because it is this document which provides the opportunity for an investor to ascertain precisely what fees and charges have been paid in relation to their investment. This cannot be done in a PDS where there is a limit to the information that can be tailored to individual circumstances.
>
> I view this situation with the utmost concern. I also note there is international interest in improving disclosure of fees and charges in periodic member statements. I see considerable scope for improved disclosure of fees and charges in periodic member statements.[28]

5.17 ASIC took a similar approach. It maintained that the periodic statement 'ought to do the work of allowing an investor to know what the fees, charges and other costs have been of the investment over the period to which the periodic statement relates'.[29]

5.18 Mr Johnston, ASIC, appreciated that the format of periodic statement should complement other disclosure documents:

> One of the things that does occur to us relates to the form that we have required in the ASIC fee table, which splits out various fees and charges. Perhaps we might replicate that format in a periodic statement so that it is easy for the person to go to the original statement and see what was beside each item and then get the periodic statement and see whether it matches up and what the actual experience has been.[30]

He suggested that consumers and investors are better placed to 'compare like with like and see what the actual charges and costs have been over the period.'[31]

5.19 The Committee is particularly concerned that in the specified cases where relief is granted from dollar disclosure, that this lack of full and accurate disclosure is remedied by the periodic statement. Professor Ramsay recognised that with some specific products, the PDS cannot be tailored to individual circumstances that would allow the fees and charges to be stated with accuracy. He held, however, that periodic member statements provide 'the opportunity for an investor to be able to ascertain precisely what fees and charges have been paid in relation to their investment.'. ASIC similarly reinforced the significant role of a periodic statement in providing full and accurate dollar disclosure of fees and charges.[32]

---

28 *Submission* 20, p. 4.

29 *Committee Hansard*, p. 102.

30 *Committee Hansard*, p. 102.

31 *Committee Hansard*, p. 103.

32 Also refer to discussions that took place between Senator Andrew Murray and a number of witnesses, *Committee Hansard*, pp. 8–10 and 18.

5.20 The Committee underlines the importance of periodic statements as a means for the investor to obtain full and accurate information on all the fees and charges they have paid and on the actual return on their investment. It also recognises the need for disclosure documents especially the PDS and the Periodic Statement to be presented in a way that enables an investor to compare forecasts with actual amounts paid. A common fee disclosure model for disclosure documents would also enable an investor to compare products.

5.21 Evidence from other witnesses support these main findings about fee disclosure, so in effect a solid body of consensus is building around what constitutes the key elements of an effective fee disclosure model. [33] Most support a fee model in which:

- the fees and charges represent the total cost to the consumer or investor, in other words that all charges, costs, and fees are disclosed;
- the fees and charges are presented in one statement and in a clearly defined and prominent location in the disclosure document;
- the amounts are disclosed in dollar terms;
- the fees and charges are presented in a table format;
- the fees and charges are set out in such a way that consumers can compare them—some spoke of the need to have separate demarcated categorises such as up-front fees and on-going fees;
- there is a single bottom line figure;
- common or standardised terminology is used;
- a similar format is used for the different types of disclosure documents to enable consumers to compare like with like—for example the format in the periodic statement should resemble that used in the PDS;
- the fee model has been consumer tested and approved.

5.22 Professor Ramsay recommended that the capacity to increase fees and maximum fees should be disclosed in the fees section of the PDS and there should be improved disclosure of the ability of consumers to negotiate rebates with advisers.[34]

---

33 See Ms Rubinsztein, ISFA, *Committee Hansard*, p. 56.

34 *Submission* 20, p. 4.

Committee view

5.23 The Committee recognises the challenge involved in devising a disclosure regime that will equip the customer with the information needed to make an informed choice. Its concern at the moment is with the regulations relating to the provision in the Act that stipulates that unless in accordance with the regulations, 'amounts are to be stated in dollars'. The Committee, however, sees the formulation of a fee disclosure model as the next goal. The evidence presented to the Committee highlights the pressing need to develop and adopt a fee disclosure model that will ensure that disclosure is effective and meaningful for consumers.

Conclusion

5.24 On 10 March 2004, the Parliamentary Secretary to the Treasurer, the Hon Ross Cameron MP, announced that the Government wished to expedite and bring to an effective conclusion current industry discussions on the matter of a simple fee disclosure for investment based financial products, such as superannuation funds. He explained that he had written to the Chief Executive Officers of ASFA and ISFA to seek a resolution to the long standing impasse over this matter of fee disclosure. Mr Cameron said:

> I have asked for the bodies to come to the Government within one month with an agreed single figure fee disclosure model. The Government will then prepare regulations by 1 July incorporating the proposed model in the relevant disclosure documents.[35]

5.25 He noted that the Government did not have a predisposition toward any existing model proposed by any single industry group.

5.26 The Committee welcomes the Government's decisive action but notes that before the adoption of an agreed fee disclosure model certain requirements should be met. As noted in its discussion about possible fee disclosure models, the Committee identified a number of key features that a fee disclosure model should include. The Committee believes that the agreed format for the fee disclosure model should not depart from those suggestions. It notes particularly the requirement for the model to be consumer tested and approved.

SENATOR GRANT CHAPMAN
CHAIRMAN

---

35 The Hon Ross Cameron, MP, Parliamentary Secretary to the Treasurer, Canberra, 10 March 2004.

LABOR MEMBER'S MINORITY REPORT
DRAFT BATCH 8 OF THE CORPORATIONS AMENDMENT REGULATIONS 2004
RE: DOLLAR DISCLOSURE

Introduction

This Minority Report by the Labor members of the Committee relates to draft Batch 8 of the *Corporations Amendment Regulations 2004* and the issue of dollar disclosure.

The evidence provided to the Committee during the hearing on these regulations relates to two key issues:

- The replacement of the old "reasonably practicable" test in the regulations with the new more stringent test (the new test is that disclosure should be made in dollar terms unless ASIC determines that it is not possible for a compelling reason);[1] and
- Whether the regulations should also require disclosure of a "single bottom line figure" to allow consumers to compare fees and charges on different super and retail funds.

History

The debate about effective fee disclosure is not new.

In 2002, Labor with the support of the Democrats, disallowed a regulation in relation to fee disclosure. The regulation provided for disclosure of an 'on going management charge' (OMC). The regulation was disallowed on the basis that the OMC did not provide an effective means of disclosing the "total cost to the consumer" of investing in super products. Also, the OMC was not intended to apply to retail funds.

Since the disallowance of that regulation, the Government has *not* sought to discuss an effective means of fee disclosure with either the Australian Labor Party or the Democrats.

Instead the Government introduced a regulation in 2003 which required disclosure of fees and charges in a dollar terms "where reasonably practicable".

In Labor's view the "reasonably practicable test" set the threshold for disclosure too low. The test was formulated on the basis of industry expediency not consumer protection.

[1] The original regulations produced by the Government said that disclosure in dollar terms was required if it was "reasonably practicable". A hierarchy of disclosure was required such that if disclosure in dollar terms was not "reasonably practicable" disclosure could occur by a percentage and if it was not reasonably practicable to disclose in terms of a percentage, disclosure could be made by a description. This is referred to as the "reasonably practicable test".

The Labor members take the view that disclosure must be considered from the consumer's perspective. The old "reasonably practicable test" allowed disclosure to be determined from the product issuer's perspective.

During the debate, Senator Conroy said that the:[2]

> *"…regulations give every product issuer in the country an escape route to avoid disclosing in dollar terms. That escape route is called the "reasonably practicable test".*

These issues are discussed further in the Labor members Minority Report dated December 2003 and Senator Conroy's speech in the Senate on the *Financial Services Reform Amendment Bill 2003*.

During the debate of the *Financial Services Reform Amendment Bill 2003* in the Senate in December 2003, Labor with the support of the Democrats inserted the requirement that disclosure of fees and charges would be in dollar terms for Statements of Advice (SoA), Product Disclosure Statements (PDS) and periodic statements unless otherwise provided in the regulations.

The Labor members welcome the Government's decision to support Labor's amendments to ensure that the principle of dollar disclosure is enshrined in the law.

In addition, the Government committed to replacing the "reasonably practicable test" in the regulations with a new test that set the threshold for disclosure higher.

The new test was that disclosure in dollar terms would be required *"unless ASIC determines that for compelling reasons it is not possible to do so".*

Professor Ramsay has made a submission to the Committee which supports this new test in Batch 8 of the regulations. His submission notes that the Batch 8 regulations:[3]

> *"..accords with one of the key recommendations in my report to ASIC. In my report I note that there is strong evidence that investors better understand and feel more comfortable with disclosure which is in dollars rather than percentages."*

Dollar Disclosure and the New Test

Now that the law requires disclosure in dollar terms, the issue is whether there are circumstances when dollar disclosure should not be required.
The Labor members are of the view that dollar disclosure should be required "*unless ASIC determines that for compelling reasons it is not possible to do so"* (the new test).

[2] Senate Hansard, 4 December 2003, p. 19340
[3] Submission from Professor Ramsay, dated 16 March 2004.

The evidence provided to the Committee indicated support for the replacement of the old "reasonably practicable test" with the new more stringent test.

Mr Bailey from *The Money Managers* advised the Committee that:[4]

> *"It is gratifying to see regulations reflecting the requirement to disclose in dollar terms (unless it is not possible do so for compelling reason, as determined by ASIC) being recommended, rather than the weaker disclosure which requires dollar disclosure only where it is reasonably practical to do so. Those that choose to disclose in dollar terms today find themselves at a commercial disadvantage to those that determine for themselves that it is too difficult to do so……..*
>
> *The two key changes introduced by the new regulations enhance consumer protection and pave the way for a more competitive and transparent investment environment. The new requirements no longer enable the licensee to determine those circumstances in which they should not be required to disclose in dollar terms by vesting those powers with ASIC."*

The Australian Consumer Association (ACA) have also expressed their concerns with the old test, advising this Committee in December 2003 that the "reasonably practicable test":[5]

> *"…… would see not only a denial of relevant information contrary to the good disclosure principles enunciated by ASIC in PS 168 that disclosure be timely, relevant and complete, promote product understanding, promote comparison, highly important information and have regard to consumers' needs, but in this case it would mean consumers are unlikely to get the very information they need when it comes to comparing different funds and the cost in particular of investing with different funds and different products."*

Committee Recommendations

To enhance the practical implementation of the new test, the Committee has made a number of recommendations.

The Labor's members support the recommendations subject to the comments below.

Committee Recommendation	**Labor Members Position**
Recommendation 2 The Committee recommends that a regulation be made that would allow a transition period to	Support

[4] Committee Hansard, p. 1

5 A further discussion of the shortcomings of the "reasonably practicable test" can be found in the Labor Member's Minority report of December 2003 and Senator Conroy's speech in the Senate on the *Financial Services Reform Amendment Bill 2003* in December 2003.

Committee Recommendation	Labor Members Position
extend to 1 January 2005. The Committee, however, is strongly of the view that those capable of meeting their dollar disclosure obligations should do so from 1 July 2004.	
Recommendation 3 The Committee understands the importance for ASIC to produce guidelines. The Committee recommends that Government ensure appropriate funding to enable ASIC to assist industry to transition and enforce the legislation.	Support The Labor members note that when the new disclosure test was created, it was anticipated that ASIC would produce guidelines to assist industry.
Recommendation 4 The Committee recommends that the wording of the proposed regulations on dollar disclosure remain as currently drafted.	Support
Recommendation 5 The Committee recommends that to accommodate any particular cases where the dollar disclosure requirements are inappropriate or inconsistent with the intention of the Act, new regulations be promulgated that would allow ASIC the necessary flexibility to offer relief, either class relief or individual product relief in limited circumstances and in some instances for a limited period, for specific cases where such relief is deemed necessary.	Support but discuss further with ASIC.
Recommendation 6 The Committee fully supports the objectives of the *Financial Services Reform Act 2001*. The dollar disclosure legislation is a central plank in the overall disclosure regime designed to protect investors and maintain confidence in the business environment. The Committee recommends that the Government monitor its implementation and related regulations to ensure that it is meeting consumers' interests. Further it recommends that the Department of Treasury report back to the Committee by the end of 2007 on the implementation of the dollar disclosure regime.	Support

Single Bottom Line Figure

History

The second key issue that was raised by the witnesses at the Committee hearing was the issue of whether the regulations should also require that fees and charges are disclosed in a "single bottom line figure".

During the debate on the *Financial Services Reform Amendment Bill 2003* in the Senate in December 2003, Senator Conroy expressed his concern that the regulations failed to require the disclosure of a single bottom line figure, he said:

> *"Labor believes that consumers have a right to know what fees they are paying in dollar terms and they are entitled to know a bottom line figure. This is a simple concept, yet the Government has failed for a second time to mandate disclosure in dollar terms."*[6]

In November 2003 at the Association of Super Funds of Australia (ASFA) Conference, the CEO of ASFA, Philippa Smith said that:[7]

> *"ASFA has done the hard part – now all it needs is the support of the regulator and the government."*

Following this Committee's Inquiry on 3 March 2004, the Parliamentary Secretary to the Treasurer (Mr Ross Cameron), announced on 10 March 2004, that he would take steps to resolve the issue and gave Investment and Financial Services Association (IFSA) and Association of Super Funds of Australia (ASFA) one month to come up with an agreed single fee disclosure model.

The Labor members welcome this important step taken by the Parliamentary Secretary to the Treasurer.

In our view, the one month time frame should be adequate time to reach a consensus in light of the fact that the issue has been on the horizon since at least 2002 when the previous regulation was disallowed.

Support for Disclosure of Single Bottom Line Fee

The witnesses at the Inquiry expressed support for the requirement that consumers are given a single bottom line figure in relation to fees and charges.

The Association of Superannuation Funds of Australia (ASFA) advised the Committee that:[8]

> *"..most importantly, is the provision of a single bottom line. AFSA supports meaningful disclosure at point of sale – in other words, disclosure that can be*

[6] Senate Hansard, 4 December 2003, p.19340
[7] ASFA Media Release, *At Last, the Bottom Line on Fees,* 13 November 2003.
[8] Committee Hansard, p. 11.

> *understood by consumers and that allows them to compare the relative costs of investing through a particular vehicle. Fees may not be the only basis on which consumers make a decision. However, when confronted with a choice of fund, consumers need to know up front what it would likely cost them."*

The Australian Consumers Association (ACA) advised the Committee that:[9]

> *Judging from the work that has been done in comprehension testing and consumer testing, the responses from participants in those surveys clearly indicate that they appreciate having that information in a format that they can readily understand, and that ends to be in dollar terms, and one which they can they compare with another product. It is not going to give them all the information (we would not want people to simply be making a choice on the basis of the fee) but how else do you assess value for money if you do not actually know how much money you are going to be paying for a particular product?"*

Professor Ramsay's submission also notes that if a single bottom line figure is possible, "it would be of significant benefit to consumers".[10]

The large number of witnesses said that single bottom line figure is not only desirable but also possible.

Chant West advised the Committee that:[11]

> *"The important point to note here is that all of these clients have been provided with bottom line fee comparisons employing the same methodology used in the research we conducted jointly with ASFA".*

Mr Bailey from *The Money Managers* said that:

> *"Clear, comprehensive and transparent disclosure will empower consumers to make informed and rational decisions, drive down costs and force greedy and manipulative operators out of business. By raising the bar, you will drag this industry above the lowest common denominator and ensure a truly level playing field at a higher professional standard…I am confident to say that it is not only possible to disclose fees in dollar terms to consumers, but it is also simple and inexpensive to do so."*

Rainmaker Information Services' submission to the Committee said that:

> *"..disclosure of fees in both dollar and percentage points therefore requires either generic member assumptions and/or personalized information in member statements. Progressive super fund and platform administrators are already gearing up to provide this information as an opportunity to showcase technological advances."*

---

[9] Committee Hansard, p. 38
[10] Submission from Professor Ramsay, dated 16 March 2004.
[11] Committee Hansard, p. 21

The single bottom line figure enables consumers to compare different products. For example, ASFA advised the Committee that:[12]

> *"the fee illustration allows true comparability on an apples for apples basis…..It will allow them to compare whether a fund is cheap, modestly priced or expensive and to factor that in to their overall decision making of whether that is a suitable product for them."*

Financial literacy and the ANZ Financial Literacy Survey

A number of witnesses (and Professor Ramsay's submission) referred to the ANZ Financial Literacy Survey conducted in 2003 and/or financial literacy generally.

The ANZ survey found that 56% of people with superannuation did NOT have a good understanding of the fees and charges associated with their investment. The survey also found that 40% of people invested in managed funds did NOT have a good understanding of the fees and charges associated with their investment.

In relation to other recent surveys, the Australian Consumers Association (ACA) advised the Committee that:[13]

> *"We know in Australia, from ASFA-commissioned Ageing Agendas research and from the ANZ financial literacy survey, that consumers struggle to understand fees and commissions on many investment and superannuation products. When ACA and ASIC conducted the financial planning survey, even our panel of experts found it difficult in many cases to try and unravel the fee and cost structures of the plans and investments they were presented with as part of that assessment process. When we at ACA have tried to structure or devise and develop better fee disclosure principles and models for consumers, we have always been guided by what people can actually understand. Our interest is not what is convenient for industry to provide."*

In relation to financial literacy, Mr Lannon from 20/20 Funds said that:[14]

> *"What happens typically out here (and I will give you the example) is that the average person is bamboozled. When you walk in to see a financial adviser to get advice in an area where you have little or no knowledge (there are technical terms etc) you are trying to find someone you trust."*

Conclusion

The Labor members are of the view that consumers need a single bottom line figure for fees and charges in order to make fully informed investment decisions.

The Labor members do not have a preference for any particular model and await the outcome of the discussions between IFSA and ASFA. However, the model for a

[12] Committee Hansard, p. 16
[13] Committee Hansard, p. 37
[14] Committee Hansard, p. 44.

single bottom line figure must reflect the total cost to the consumer of investing in the product (this is discussed further below).

Outstanding Issues

There are a number of issues which have been raised in relation to the single bottom line figure and the disclosure documents. Those issues can be summarized as follows:

- Whether the single bottom line figure should include entry and exit fees; and
- The type of disclosure required in the periodic statement.

Entry and Exit Fees

The most contentious issue is whether a single bottom line figure should include entry and exit fees.

A majority of witnesses advised the Committee that a single bottom line figure should **include** entry and exit fees.

For example, when asked by Senator Conroy if a single bottom line figure should include entry and exit fees the following responses were provided:

> Australian Consumers Association: *"Absolutely. I think the Chant West research demonstrates it is a 1% to 1.5% difference in the cost of an investment, and that is an extraordinary amount. To even contemplate leaving that out I think would be misleading in the extreme."*
>
> Chant West: *"We think that certainly they should know what the maximum is, and they should know that it is possible to negotiate those fees."*[15]
>
> ASFA: *"We included entry and exit fees because they can be substantial and have an impact on individuals……..when you are talking about 2, 3, or 4% and sometimes even higher percentages on entry and exit, it can have a significant impact on a person's fund balance, particularly over shorter periods of years."*[16]

Some people in the financial services industry take the view that consumers can negotiate their entry and exit fees and therefore such fees should not be included a single bottom line figure.

IFSA advised the Committee that *"the upfront fee can be dialed down".*[17]

In contrast, Mr Chant from Chant West said that the average consumer has "very little" bargaining power to negotiate entry and exit fees.[18]

---

[15] Committee Hansard, p. 25
[16] Committee Hansard, p. 14
[17] Committee Hansard, p. 56
[18] Committee Hansard, p. 25

Ms Wolthuizen from the ACA said that:[19]

> *"I think most people would anticipate that if a fee is charged and you can negotiate to bring it down, you start from the assumption that the fee is going to be charged. If we want people to start negotiating with planners or with funds about the cost of investing, surely you put up what they could be charged, and then they can start questioning certain fee levels and seeking a better deal."*

Conclusion

A number of witnesses advised the Committee that consumers need to know what the maximum fees and charges are – including entry and exit fees.

The Labor members believe that the "total cost to the consumer" should be disclosed in the single bottom line figure. It would be misleading if entry and exit fees were not included in such a figure.

The Labor members note that both Alex Dunnin from Rainmaker Information Services and Mr Chant from Chant West advised the Committee that they support the approach of considering "the total cost to the consumer."[20]

In addition, the Labor members are of the view that a consumers ability to negotiate entry and exit fees is limited and that failing to include these fees would not yield a figure which indicates the "total cost to the consumer".

Periodic Statements

Professor Ramsay's submission highlights the importance of the periodic statement. In his view, the periodic *statement "is the ideal place for a consumer to be informed precisely what fees and charges he or she has paid."*[21]

He suggests that a single line figure should be disclosed in the periodic statement (although it frequently isn't) and that it is also desirable for the PDS to contain a single line figure.

The Australian Consumers Association called for disclosures in periodic statements to be made in standardized dollar terms, *"so that people become used to a particular from and it is a form they understand."*[22]

20/20 Funds suggested that fees should be disclosed alongside returns.

Mr Lannon from 20/20 Funds said that:[23]

---

[19] Committee Hansard, p. 39
[20] Committee Hansard (Mr Dunnin) p. 30 and p. 24 (Mr West)
[21] Submission from Professor Ramsay, dated 16 March 2004
[22] Committee Hansard, p. 40.
[23] Committee Hansard, p. 43

> *"If you require fund managers to put fees on the statements next to the returns and my return is 3% and my fee is 3% that will raise eyebrows. By disclosing the fees in dollar terms on the statements, the investors will seek out value. It will definitely radically change this industry, because the fees are largely invisible."*

The comments made by witnesses in relation to the periodic statements raise the issue of how the **actual** fees and charges paid by the consumer (as disclosed in the periodic statement) would compare with the **anticipated** fees and charges (which may be disclosed in the PDS in a single fee measure).

The other issue is whether the impact of **anticipated** fees and charges on investor returns should be disclosed or whether the impact of **actual** fees and charges on investor returns should be disclosed.

Professor Ramsay's report to ASIC on fees and charges, notes that a 1% increase in a fund's annual fees and charges can reduce an investor's final account balance in the fund by 18% after 20 years.

The Labor members would like to note these issues for consideration.

Other Issues

A number other issues were raised during the Inquiry. A summary of those issues is set out below.

Level of Fees

Recently, the Treasurer, Mr Costello said that:[24]

> *"I call on the superannuation industry to consider its level of fees. I think that this is one of the things that is concerning people, the level of fees that superannuation funds charge."*

A number of witnesses made the point that effective fee disclosure has a downwards effect on fees.

For example, ASFA advised the Committee that:[25]

> *"I think we would hope that true meaningful disclosure to consumers to allow them to make decisions that include price will put downward pressure on fees."*

International Experience

The Australian Consumers Association (ACA) advised the Committee that:[26]

---

[24] Malcolm Cole, *Industry accused over high fund fees,* Courier Mail, 27 February 2004.
[25] Committee Hansard, p. 17
[26] Committee Hansard, p. 37

> *"An IOSCO paper of last month emphasis that ensuring transparency in this area encourages competition amongst fund operators, and competition leads to a more efficient market, from which investors eventually benefit. I think this is an excellent objective to strive for and one which I would hope that the industry and parliament are able to bring about very quickly."*

ASIC Fee Table

A number of witnesses were of the view that the ASIC Fee Table needed significant changes in order to be of use to consumers. However, there was also recognition that steps are being taken to improve the ASIC Fee Table.

Vested Interests

A number of witnesses raised the issue of vested interests in the industry.

Mr Lannon from 2020 Funds said that:[27]

> *"I think there is a strong incentive for fund companies not to disclose all these fees. I call it the fee-fest. They collect them and make great profits and that is fine, and they are invisible. The banks have had their heyday of being beat up over fees and so they have moved into the next lucrative category – fund management – by acquiring fund management companies, and those fees are invisible."*

Mr Bailey from *The Money Managers* said:[28]

> *"I am well aware that there are many people within the financial services industry that are fighting very hard for standards but are having a tough time of it because of the weight of vested interest in the status quo. Many people call themselves fee based advisors, but the majority of their revenue comes from trailing commissions, which are not disclosed and are very much hidden. Most people would not know what they have paid in trailing commissions to their adviser over the last 12 months, but they know what their telephone bill is and they know what their electricity bill is, because they are delivered in dollars-and-cents terms."*

[27] Committee Hansard, p. 46-47
[28] Committee Hansard, p. 8

The Australian Consumers Association (ACA) advised the Committee that:[29]

> *"Sectors of the financial services industry are benefiting at the moment from a level of protection because of the opacity of fee disclosure that is simply not available to most other areas of the Australian or international economy….."*

SENATOR PENNY WONG

MR ANTHONY BYRNE MP

SENATOR STEPHEN CONROY

MR ALAN GRIFFIN MP

[29] Committee Hansard, p. 37

APPENDIX 1

SUBMISSIONS AND TABLED DOCUMENTS

Number	From
8	20/20 Funds DIRECTINVEST
7	American Home Assurance Company
22	AMP Life Limited
11	Association of Financial Advisers
17	Association of Superannuation Funds of Australia Limited
21	Association of Taxation and Management Accountants
6	Australian Association of Permanent Building Societies
6A	Australian Association of Permanent Building Societies
14	Australian Bankers' Association
14A	Australian Bankers' Association
12	Australian Consumers' Association
2	Credit Union Services Corporation (Australia) Ltd
2A	Credit Union Services Corporation (Australia) Ltd
16	Financial Planning Association
16A	Financial Planning Association
15	Institute of Chartered Accountants in Australia; CPA Australia; and the National Institute of Accountants
18	Institute of Chartered Accountants in England & Wales
13	Institute of Chartered Accountants of New Zealand
3	Insurance Council of Australia Ltd
10	Investment and Financial Services Association Ltd
10A	Investment and Financial Services Association Ltd
10B	Investment and Financial Services Association Ltd
9	Law Council of Australia Word format

19	National Tax & Accountants' Association
5	Peter Davis Taxation & Accounting Services
1	Rainmaker Information Pty Ltd
20	Ramsay, Professor Ian
4	Securities and Derivatives Industry Association
24	Taxpayers Australian Inc.
23	The Strategist Group Pty Ltd

Tabled Documents

Received	Document
03/03/04	*ASIC Fee Template*, February 2004 - A report by IFSA (IFSA Standard No. 12.00
03/03/04	*Ongoing Fee Measure (OGFM),* February 2004 – A report by IFSA (IFSA Standard No. 4.00)
03/03/04	*Summary of Research Findings*, 3 March 2004 – A report by Chant West Financial Services.
03/03/04	*Single Fee Measure, A presentation paper by Colonial First State*

APPENDIX 2

PUBLIC HEARING AND WITNESSES

WEDNESDAY, 3 MARCH 2004 - CANBERRA

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Adams, Mr Mark, Director, Regulatory Policy
Johnston, Mr Ian, Executive Director, Financial Services Regulation
McAlister, Ms Pam, Director, Financial Services Regulation, Legal and Technical Operations

THE MONEY MANAGERS LTD
Bailey, Mr Kevin Christopher, Executive Chairman

AUSTRALIAN FINANCIAL MARKETS ASSOCIATION
Cass, Ms Debra Elaine, Chairperson, FSR and Compliance Committee
Farrow, Mr Kenton Geoffrey, Chief Executive
Rappell, Mr John Robert, Head of Policy and Strategy

CHANT WEST FINANCIAL SERVICES
Chant, Mr Warren Roy, Director

ASSOCIATION OF SUPERANNUATION FUNDS OF AUSTRALIA
Clare, Mr Ross, Principal Researcher
Pragnell, Dr Brad, Senior Policy Adviser

SECURITIES AND DERIVATIVES INDUSTRY ASSOCIATION
Clark, Mr Douglas, Policy Executive
Horsfield, Mr David, Managing Director/Chief Executive Officer

INVESTMENT AND FINANCIAL SERVICES ASSOCIATION LTD
Doyle, Ms Suzanne, National Manager, Superannuation and Retirement Policy, AMP
Drummer, Mr Chris, Manager, Government Relations and Policy, MLC Ltd
Ferguson, Ms Carole, Senior Legal Counsel, Colonial First State Investments
French, Mr Philip, Senior Policy Manager, Regulatory Affairs
Rubinsztein, Ms Nicolette, General Manager, Office of the Chief Executive Officer, Colonial First State Investments
Wells, Ms Jenifer, Head, Government and Regulatory Affairs, ING Australia Ltd

INSURANCE COUNCIL OF AUSTRALIA LTD
Drummond, Mr Robert, General Manager

AMERICAN HOME ASSURANCE COMPANY
Kimber, Ms Sarah, Member, Insurance Council of Australia; and Manager, Compliance Risk Management and Corporate Affairs

RAINMAKER INFORMATION PTY LTD
Dunnin, Mr Alex, Director of Research

20/20 FUNDS DIRECTINVEST
Lannon, Mr Michael, Managing Director

CREDIT UNION SERVICES CORPORATION
Lawler, Mr Luke, Senior Adviser, Policy and Public Affairs

DEPARTMENT OF THE TREASURY
Rosser, Mr Michael John, Manager, Investor Protection Unit, Corporations and Financial Services Division
Wilesmith, Mr Brett Anthony, Analyst, Corporations and Financial Services Division

AUSTRALIAN ASSOCIATION OF PERMANENT BUILDING SOCIETIES
Venga, Mr Raj Ashwinn, Director, Policy and Regulatory Affairs

AUSTRALIAN CONSUMERS ASSOCIATION
Wolthuizen, Ms Catherine Nicole, Senior Policy Officer, Financial Services

APPENDIX 3

A SUMMARY OF REGULATIONS CONTAINED IN THE FIRST DOCUMENT OF REGULATIONS IN BATCH 6

- new regulation 7.6.01C—obligation to cite licence number in documents—specifies the FSR-related documents requiring an AFSL number and does not require the number to be included on periodic statement until 1 July 2004;

- new regulation 7.6.02A—obligation to notify ASIC of certain matters—a financial services licensee is required to report breaches or a likely breach of certain financial services laws, this regulation specifies the relevant Commonwealth legislation;

- new regulation 7.6.04A—exemption from obligation to notify ASIC about authorised representatives—the exemptions include a general insurance product; a basic deposit product; a facility for making non-cash payments that is related to a basic deposit product;

- substituted regulations 7.7.05 and 7.7.08—record of advice given by financial services licensee or authorised representative—specifies the period within which a client may request a record of advice is 90 days after the day on which the advice is provided;

- new regulation 7.7.08A—combined Financial Services Guide and Product Disclosure Statement—lists the circumstances and details under which a PDS and FSG can be provided as a single document;

- amendment to regulation 7.7.09—situations in which Statement of Advice is not required: record for further market-related advice;

- new regulation 7.7.14—Amendment to the General Advice Warning—is intended to improve the practical operation of the general advice warning under s 949A by removing the PDS component of the warning when a PDS is not required;

- new regulation 7.7.20—exception from providing the general advice warning—recognises the practical difficulties posed in providing required disclosures instead of a FSGA in advertising delivered to a wide audience through mass media by removing the obligation to issue a general advice warning;

- new regulation 7.8.22A—disclosure during hawking of certain financial products—provides the regulated person with the ability to tailor the giving of information, to that requested by the client rather than to provide a 'block' reading of the information contained within a PDS;

- new regulation 7.9.02C—repeal of the exemption for trustees of self-managed superannuation funds lodging an 'in use' notice—omission of regulation;

- Division 4B, regulation 10.2.81 and amendments to Schedule 10A, clause 10.1—ongoing disclosure of material changes and significant events—are consequential to amendments to s 1017B by the FSR Amendment Act;

- omission of Part 7.9 Division 10—references to responsible person—now redundant in light of amendments by the FSR Amendment Act;

- new regulation 10.2.214—further market-related advice—sets out transitional arrangements in relation to the amendments by the FSR Amendment Act to s 946B;

- new Division 13 and regulation 7.9.96—unsolicited offers to purchase financial products off-market.

APPENDIX 4

A SUMMARY OF REGULATIONS CONTAINED IN THE SECOND DOCUMENT OF BATCH 6

- substituted subregulation 1.0.02(1)—definitions of medical indemnity insurance product and medical practitioner—replaces the current definition of 'medical indemnity insurance product' at subregulation 1.0.02(1) with a new definition;

- new subparagraphs 7.1.06(1)(a)(iv), (v) and (vi)—specific things that are not financial products—Credit Facility—clarifies the scope of the credit facility exemption by having a 'predominant purpose' test to ensure that products that provide both credit and deposit facilities (eg a credit card facility into which deposits may be made) under a single financial product are included in the credit facility exemption;

- substituted paragraph 7.1.06(1)(f)—specific things that are not financial products—Credit Facilities—ensures that the limitations applying to unsecured credit apply also to secured credit;

- amendments to subregulation 7.1.06A(1)—arrangements for certain financial products that are not credit facilities—are consequential to the amendments to regulation 7.1.06;

- new regulation 7.1.07G—specific things that are not financial products: electronic funds transfers—provides an exemption for the FSR regime for electronic funds transfer facilities such as telegraphic transfers and international money transfers provided through ADIs and remittance dealers;

- new regulation 7.1.17B—aggregation of amounts for the 'retail-wholesale' test—designed to improve the practical operation of the 'price-value' test by allowing the aggregation of amounts from connected entities;

- substituted paragraph 7.1.27(1)(a)—once wholesale, always wholesale—provides practical relief to custodial and depository providers to ensure they do not need to continually verify a client's 'wholesale status';

- amendment to paragraph 7.1.29(3)(e)—circumstances in with a person is taken not to provide a financial service—allows relief in circumstances such as when a person transfers shares into their own private company or to their family trust;

- substituted paragraph 7.1.33B(1)(b)—general advice—recognises that a licensed product issuer is the provider of the general advice, not the licensee distributor;

- new regulation 7.1.33F—school banking—provides that a person is not considered to provide a financial service in relation to a school banking product

where that person is either employed by a school or acting on behalf of a school and applies only in relation to general advice and only if the person does not receive any financial benefit for providing the service;

- new regulations 7.1.35A and 7.1.40(g)—lawyers and FSR—supports existing provisions of the Act to exclude a limited range of activities conducted by lawyers in the ordinary course of duties from constituting financial product advice and provides only limited relief that is in line with existing State and Territory regulation of lawyers;

- new paragraph 7.6.01(1)(na) and new paragraph 7.2.01(7)—licensing exemption for overseas financial service providers—provides a licensing exemption for overseas financial service providers where their Australian clients receive only certain financial services through an Australian financial services licensee under certain conditions;

- new paragraph 7.6.01(1)(pa)—need for a Australian financial services license: general—provides an AFSL exemption for financial services provided to wholesale clients by bodies established under a Commonwealth, State or Territory law that is required under the law to carry on any business of insurance or to undertake liability under a contract of insurance;

- substituted subparagraph 7.7.02(4)(d)(i)—exemption from providing a FSG—ensures that the limited exemption from providing a FSG is not unintentionally restricted by making clear that all 'providing entities' giving general advice can use the regulation;

- new subregulation 7.7.02(5A)—advertising disclosure—recognises circumstances where relief is provided from both the FSG and disclosures normally required in place of a FSG;

- new regulation 7.9.80C & D—verbal Product Disclosure Statements—provides flexibility for industry to adapt matters to accommodate client needs by providing the ability for a client to 'opt out' of receiving certain amounts of information subject to particular requirements;

- Division 5AA—general requirements for financial disclosure—permits the exemptions under regulation 7.9.62 to apply to all financial products as originally intended;

- amendments to paragraph 7.9.88(1)(e) and (f), 7.9.89(1)(f), 7.9.93(2), (2)(a) and 7.9.93(2)(b)—payment split notices—addresses certain inconsistencies in relation to the principal regulations dealing with payment split notices;

- substituted paragraph 10.2.799—(c)—technical amendment

- amendments to paragraphs 10.2.202(1)(a),(b), (c) and (d)—documents equivalent to Product Disclosure Statements—clarifies that regulation 10.202 is effective in relation to situations to which PDS requirements do not yet apply;

- amended subregulation 12.7.06(1)—friendly societies—technical amendment;

- regulation 9.7.07J—number of issuers in a single PDS—clarifies that there can be only a single issuer of a PDS. The Explanatory Statement notes that ASIC has modification powers which enable it to provide relief to multi-issuer PDSs in certain circumstances.

APPENDIX 5

A SUMMARY OF REGULATIONS IN BATCH 7

- regulation 7.1.04E—meaning of class of financial services—meaning of class of financial services—recognises that the meaning of 'class of financial service' is not certain, particularly where a representative may act on behalf of more than one licensee and that this wide interpretation may be leading to a reluctance on the part of a licensee to 'cross-endorse representatives;

- regulation 7.1.07H—specific things that are not financial products: Australian Capital Territory Insurance—results in insurance provided by the Australian Capital Territory being treated in the same manner as that of other States and Territories;

- amendment to regulation 7.1.29—risk advice—extends the scope of relief to allow generic risk management advice that is not restricted merely to business clients thus allowing other clients, such as private individuals, to receive basic advice that they should make risk mitigation arrangements, such as take out insurance;

- new regulation 7.1.29A—provides an exemption from the FSRA for recognised accountants making a recommendation that a person acquire or dispose of a self-managed superannuation product;

- regulation 7.6.01(1)(ma)—licensing of overseas derivative counterparties—exempts an overseas entity from the requirement to hold a licence under specified conditions;

- regulation 7.6.04B—notification of authorised representatives: basic deposit products—removes the requirement for the appointment of an authorised representative who gives personal advice about a basic deposit product or a facility for making non-cash payments that relate to a basic deposit product, would not have to be notified to ASIC provided other requirements are met;

- amended regulations 7.7.02, 7.8.17; 7.8.20; 7.8.21 & 7.9.63B—Meaning of able to be traded—recognise that in some cases the breadth of that expression may impose significant regulatory obligations that will be difficult to comply with, particularly where an AFSL holder is not in a position to participate in the licensed market on which the relevant financial product is able to be traded and limits the expression in various provisions;

- amended regulation 7.7.05B—identity of authorised representatives in a FSG—removes the need to disclose the identity of an individual or corporate authorised representative in a FSG where their identity or remuneration is not material in the decision to acquire a financial service;

- regulation 7.7.05—exemption from providing certain information in a FSG—makes clear that a FSG is not required to disclose information about a basic deposit product or non-cash payment facility;

- regulations 7.7.06A and 7.7.11A—Australian Financial Services Licence and authorised representative numbers—makes clear that an authorised representative's FSG and SoA must include the authorising licensee's AFSL number.

APPENDIX 6

WRITTEN QUESTIONS ON NOTICE FOR TREASURY

In preparation for the Committee's hearing on Wednesday, 3 March 2004, the Committee has decided to prepare a number of questions raised in submissions it has received and from submissions received by the Senate Economics Legislation Committee during its inquiry to the regulations last December. The early receipt of answers will assist the Committee in considering and preparing its report.

The regulations in Batch 8 attracted most comment and will be examined thoroughly at the hearing. New regulation 7.1.29A in Batch 7 also drew a strong response and will be the subject of a separate hearing.

In the main the following questions were raised but by only one or two interested parties.

Batch 6

Questions arising out of submissions to the Senate Economics Legislation Committee:

1. **Regulation 7.6.01C**—while generally supporting the regulation, CUSCAL noted what appeared to be an anomaly in the dates specified in this proposed regulation and regulation 10.2.44A(3).

- Could you clarify the reason for the different dates?

Response

- After the amendments to regulation 7.6.01C, Treasury intended omitting the transitional regulation which would have had the effect of requiring periodic statements to cite AFSL number from 1 July 2004.

- Consultation with industry found that this timeframe would be difficult to comply with owing to the system changes involved with periodic statements.

- Consequently, it is intended that the transitional regulation will be omitted and an amendment will be made to the date prescribed in regulation 7.6.01C for periodic statements to 1 January 2005.

2. **Regulation 7.6.02A**— CUSCAL noted that the list contained the Banking Act 1959 and expressed its view that the relevant financial services laws should be limited to those laws administered by ASIC. It explained:

> …we are not convinced there is any benefit in requiring AFSL holders to report to ASIC breaches of laws administered by APRA. The response to any breach of a law administered by APRA is best determined by the

> prudential regulator, APRA, rather than the disclosure-oriented regulator, ASIC.
>
> In our view it would be preferable for APRA to decide what breaches are relevant to ASIC and to notify ASIC about them. We can see no justification for ADIs to report the same information to both regulators.
>
> In your view is there a danger of duplication in having to report to more than one agency or in one agency having to convey reports of breaches to a more appropriate agency?

Response

ASIC and APRA have complimentary regulatory roles and responsibilities. ASIC is responsible for ensuring that services are, and continue to be, provided in compliance with the licensing obligations under FSR. A breach of the Banking Act by an AFSL holder which might call into question the entity's capacity to provide services efficiently, honestly and fairly or of its financial soundness and consequently would be information that is relevant to ASIC's responsibilities. It is important that ASIC should have access to this information from the licensee directly and as soon as possible.

3. **Proposed regulation 7.6.08**

One regulation that aroused some controversy during the Senate Committee's inquiry—proposed regulation 7.6.08—which proposed changes to the use of the words 'independent, impartial or unbiased' by financial services providers has been omitted from the regulations gazetted in December 2003.

- Could you provide information on this proposed regulation?

Response

The regulation has not been progressed due to a lack of comment from industry during the consultative period on the proposed approach it advanced.

The proposed amendments were intended to address practical issues associated with the rebating of commissions that had been raised earlier with the Department earlier in the FSR transitional period.

Questions based on submissions received by the Parliamentary Joint Committee on Corporations and Financial Services

4. Regulations 7.7.02(5A) and 7.7.20—The Insurance Council of Australia was particularly concerned with radio advertisements. While it recognised that these subregulations provide limited exemption from providing a general advice warning and an FSG it noted that s 1018A:

requires identification of the issuer or the issuer and seller of the product (depending on the distribution channel for that product), an indication that a PDS is available for that product and where it can be obtained, and an indication that a person should consider the PDS in deciding whether to acquire, or to continue to hold, the product.

The Council suggested that according to some companies who have calculated the extra time needed in order to comply with the Act is 15 seconds. This equates to an 'additional cost of approximately $1 million relative to current expenditure of approximately $2 million, that is, the additional cost may be in the vicinity of 50%'. It stated further it belief that:

> …even if broadcast time was not extended and current advertisement content was modified to incorporate Section 1019A disclosure, there is significant 'opportunity cost' borne by the advertiser in terms of dilution of marketing impact.

It suggested that its member companies will be forced to consider the prospect of a severe reduction in radio investment and exposure in the event that relief from this requirement is not provided. It asserted that the relief sought would not affect the level and quality of product information possessed by prospective retail clients and 'the rationale for the continued application of Section 1019A to general public radio advertisements is somewhat diminished' It stated further:

The fact is, that in the event a retail client responds to the radio advertisement and contacts the providing entity, that person will receive relevant disclosure, oral and written, at or very soon after that time.

- Could you respond to the Insurance Council's concerns?

Response

A draft regulation is being prepared to address these concerns and will be released for public consultation in the near future.

The proposed regulation envisages limiting the disclosure required under s1018A to the identification of the issuer or the issuer and seller of the product (depending on the distribution channel for that product) for modes of advertising referred to in 7.7.02(5A)(c).

5. CUSCAL raised a related matter about disclosure requirements when providing general advice to a retail client and the obligation to warn the client that the advice does not take account of client's objectives, financial situation or needs. It noted that under s 949A the providing entity must warn the client of a number of matters at the time of, and by the same means as, providing the advice. For example, the providing entity must inform the client that the advice has been prepared without taking account of the client's objectives, financial situation or needs and because of that the client should, before acting on the advice, consider the appropriateness of the advice. It also requires that if the advice relates to the acquisition, or possible acquisition, of a PDS

that the client should obtain a PDS relating to the product and consider the statement before making any decision about whether to acquire the product.

In CUSCAL's view the 'repeated exposure to the advice warning…in relation to simple, well understood products will be tedious and irritating for consumers'.

- Could the Committee please have your response to CUSCAL's concerns?

Response

- Treasury is currently examining this concern, especially in relation to its practical operation.

6. Regulation 7.8.22A—disclosure during hawking of certain financial products

The Association of Financial Advisers sought clarification on the situation involving contacting people with lapsing policies. It stated its belief that where an adviser receives notice from the insurance company that a policy premium has not been paid, a phone call without a forewarning letter is a breach of the current hawking regulations where a recommendation to change the policy to something more suitable occurs.

- Could you clarify the above situation?

Response

The AFA's concerns relate to the operation of sections 992A and 992AA of the Corporations Act 2001 rather than the regulation referred to.

There is insufficient information to comment on whether the hawking prohibitions would or would not operate in the example outlined.

The Australian Securities and Investments Commission has provided guidance on the operation of the subject provisions – 'The Hawking Prohibitions – An ASIC Guide'. The guide includes reference to circumstances related to dealing with existing clients.

7. Regulation 10.2.214—further market-related advice

The Explanatory Memorandum notes that the regulation provides that it will not be a prerequisite to the operation of s 946B that existing clients receive a SOA, 'provided that such clients have been given '"personal securities recommendations"' under s 851 of the Act in force prior to the changes made by the FSR Act and certain conditions are met. The Association of Financial Advisers noted that as the new regulation 10.2.214 should apply to all previous recommendations in both the security and risk side, the Regulation should refer to both recommendations given through both the old Corporations Act and the Agents and Brokers Act.

- Could you clarify the situation raised by the Association of Financial Advisers?

Response

- This regulation applies to entities giving clients further market-related advice as described in subsection 946B (1) of the Act. Further market-related advice refers to recommendations about products that are able to be traded on a licensed market (for example, securities, managed investment products or derivatives). Advice on products not able to be traded would fall outside the scope of the FMRA provisions. The exemption from providing a prerequisite SoA, only applies to entities that have previously fulfilled their disclosure obligations under section 851 of the Act in force prior to the introduction of FSR. This would not apply where section 851 did not apply, for example to insurance products.

Batch 7

The regulations in this batch drew little comment in submissions except for 7.9.07G and 7.7.05B.

8. Regulation 7.9.07G—The American Home Assurance Company drew attention to proposed regulation 7.9.07G. It understood the intention of this regulation was 'to reduce the strict reliance on the Product Disclosure documentation under the Corporations Act by including the current law of the Insurance Contracts Act 1984 as a means by which disclosure could be achieved for existing policyholders. It stated:

If therefore a customer already has a policy which complies with the Insurance Contracts Act, that customer will be treated as having sufficient information, without the requirement for a further Product Disclosure Statement at or before the time at which that policy is actually renewed. This interpretation is based upon the fact that in the draft regulation as set out, sub paragraph (i) indicates that the Product Disclosure Statement and the Policy Document are alternatives for each other.

The commentary accompany the draft regulations made clear that the proposed regulation recognised the existing disclosure obligation under the Insurance Contracts Acts 1984 in determining the extent of disclosure required under Division 2 of Part 7.9 of the Act which deals with Product Disclosure Statements. The American Home Assurance Company suggested that the following sub paragraph be inserted at i) into the proposed regulation:

> a Product Disclosure Statement or a contract of insurance as defined in Section 10 of the Insurance Contracts Act 1984, Including a notice evidencing renewal of such a contract; and …

It concluded that their intended amendment:

> Is to make clear the fact that full disclosure can be achieved through the existing customer's possession of a policy document which complies with the Insurance Contracts Act, and a renewal notice which relates to that policy. It also facilitates the use of the renewal notice as a means by which disclosure information not contained in the policy document may be

provided to a customer, which information, together with the policy itself, satisfies the disclosure requirements of the Corporations Act.

- The Committee would like your response to the suggestion put by the American Home Assurance Company.

Response

Treasury will not be recommending to the Government that the regulation be progressed.

- During the consultation period on the draft regulation concerns were raised in relation to associated enforcement and liability provisions that have not been able to be satisfactorily resolved.

- It should also be noted that a review of Insurance Contracts Act is currently being undertaken and is due to report by the end of May (see icareview.treasury.gov.au).

Regulation 7.7.05B—The Australian Bankers' Association welcomed the amended regulation but was critical that the regulation was limited to cases of general but not personal advice. It submitted that the regulation should be extended to an individual who provides financial product advice irrespective of whether that advice is general or personal advice. It gave the following reasons in support of their submission:

- paragraph 2(c) of the proposed amendment explicitly concerns itself with the materiality of the individual's identity in respect of the decision by the retail client whether to obtain the financial service;

- in the normal course the identity of an authorised representative will be recorded by the licensee or the corporate authorised representative as part of their ordinary record-keeping and that this information would be available should the individual's identity be needed to be verified later on.

The ABA suggested further that for the sake of consistency, the regulation should be broadened to include situations where FSG information is required for advice given on basic deposit products and related non-cash payment facilities. It noted that although a FSG does not have to be given for advice on these classes of products, the identity of the providing entity must be disclosed.

The Committee notes the explanation given in the commentary accompanying the draft regulations (and in the Explanatory Memorandum for the regulations) which stated:

The regulation is also limited to dealing and general advice. This is because in these instances, the identity of the authorised representative is not likely to have a material impact on the decision to acquire the financial service. In contrast, for other financial

services, such as the provision of personal advice, it is more likely that the identity of the authorised representative will be a material consideration for a retail client.

- Does Treasury have any further explanation in response to the ABA's suggestion?

Response

- It is generally considered that where personal advice is given that the identity of the authorised representative will be a material consideration for the retail client. Therefore, the exemption does not apply to personal advice.

- The Treasury is currently considering the ABA’s proposal in relation to the provision of FSG information.

APPENDIX 7

EXTRACTS FROM SUBMISSIONS PROVIDING EXAMPLES OF CASES WHERE, IN THE VIEW OF THE AUTHOR, THERE ARE DIFFICULTIES WITH DOLLAR DISCLOSURE

Extract from Investment and Financial Services Association Ltd, Submission 10

Non-monetary significant benefits

A PDS is required to include information about any significant benefits to which the holder of the product may become entitled. In relation to draft Reg 7.9.15A, there are numerous significant benefits where it would not be possible to either state the benefit in dollar terms or as a percentage of a matter. For example, rights including:

- future distributions (unknown at the date of the PDS – in any event section 1013C(2) would operate to not require dollar amounts, as the amounts are not known to the issuer at the time the PDS is prepared);
- voting rights (eg, applicable to managed funds);
- receiving consolidated reports from wrap providers.

If the law is not changed to reflect this, ASIC will need to provide guidance on the specific types of benefits that need not be disclosed in dollar terms and/or in percentage amounts.

Fees that are calculated as a percentage

Many fees are calculated as percentages, consistent with scheme constitutions and many PDS's, therefore, express these fees as percentages, providing worked dollar examples. In many cases, the only way in which issuers will be able to express these fees in dollar amounts will be to provide descriptions/examples. Where, for example, there is a contribution fee of 3% of an initial contribution, the PDS could include a statement along the lines of "For example, if you make an initial investment of $100,000 you will pay $3,000". Clearly, a statement such as this would not add anything to the worked dollar examples required by, and prepared in accordance with, ASIC's fee model. The question arises, therefore, whether the worked dollar examples (required by the current ASIC fee model) will still be required if issuers also include dollar amounts (by example as outlined above).

The ASIC fee model recommends the use of worked dollar examples. The Batch 8 "dollar amount" regulations overlap with (but are not entirely consistent with) the current ASIC fee model. If the Batch 8 "dollar amount" regulations are implemented it

will be difficult, and unclear as to how, to comply with both the current ASIC fee model and the "dollar amount" regulations.

Fees that have a negotiable range

Some product fees are negotiable as between clients and their advisers. In those situations, in accordance with ASIC's fee model, issuers set out the percentage ranges and state in the fee table that the amount is to be "negotiated between you and your adviser". The only way in which such fees could be expressed in dollar amounts would be to provide descriptions/examples. For example, where there is a contribution fee that is between 0 and 5% of an initial contribution as negotiated between an investor and an adviser, it would be necessary to include a statement like "For example, if you make an initial investment of $100,000 you will pay between $0 and $5,000".

Again, worked dollar examples (as required by the ASIC fee model) assume that an investor negotiates particular percentage fees and shows dollar amounts for those fees, based on the relevant variables. Inclusion of the above (italicised) dollar amount disclosure in addition to the worked dollar examples required by the ASIC fee model will entail significant repetition in the fee disclosure section of many PDSs, which may reduce their clarity and effectiveness, and certainly their conciseness.

Financial Planning Commissions - Statements of Advice

It will not always be possible to provide exact dollar amounts in advance for commissions in the Statement of Advice (SoA) for the following reasons.

A financial planner may not know the exact amount to be invested when the obligation to provide an SoA arises - the planner may well, however, have a good approximation. If, for example, a financial planner recommends that a client roll over his or her superannuation fund to an allocated pension, the superannuation statement will have the balance. Due to unitised pricing, however, an exact amount will be unknown until the funds are actually received by the allocated pension provider. Notwithstanding the exact amount is unknown, the adviser will disclose commissions based on the amount advised by the client.

It is also very difficult to quantify exact disclosure amounts in dollars when financial planners are salaried and have bonus systems that have differing validation thresholds (or conditions). On individual sales, it may be possible to quantify exact commissions in dollars that the licensee (not the authorised representative /representative/ adviser) will receive. It may, however, be impossible to quantify what the authorised representative/ representative/ adviser will receive because whether the licensee pays some of the commission to the authorised representative/ representative/ adviser depends upon whether the authorised representative/ representative/ adviser has met commission conditions at the time of the particular sale.

The practice of many advisers when producing statements of advice is to assume that they are entitled to the maximum commission and to disclose this figure.

Dollar disclosure in periodic statements (Regulation 7.9.75)

Dollar disclosure in periodic statements raises issues different to those applicable to point of sale disclosure. In particular, periodic reporting is very much a function of the operating systems which underpin products, and the ability of such systems to extract meaningful information about individual interests from numerous pooled investment vehicles.

While industry is anxious to improve the comprehensibility of periodic reporting, its ability to move quickly is constrained by a number of factors, including the cost of systems changes and the time taken to implement such changes across multiple systems. There are also significant uncertainties as to the exact scope of the new requirements.

What is a common fund?

The scope of application of the dollar disclosure requirements to periodic statements will remain in doubt as long as the meaning of "common fund" is unclear. The term "common fund" appears to be understood in a variety ways by industry and regulators.

Life insurance

Does the term "common fund", for example, include the statutory funds of a life company? If so, does it automatically include all statutory funds? Life insurance companies operate completely different types of statutory funds and it would be inappropriate to lump all such statutory funds together.

Most life companies will have at least one statutory fund that does not have any investment-linked products - where the statutory fund holds assets backing both "risk" and traditional conventional whole of life, endowment or other "investment" policies which have some form of guarantee or assurance provided by the life company about the return on capital invested. These policies may also give rights to participate in profits of the life company by bonus additions at other accretions. These rights are usually subject to the payment of contract premiums on time over the term of the contract and there may be no contractual right to withdraw; surrender values therefore being discretionary, subject to minimum surrender value rights and the Life Insurance Act.

Statutory funds have a mixture of funds belonging to

- shareholders,
- owners of participating policies (most whole-of-life and endowment policies; policies with an "investment account" eg those policies with crediting rates), and

- owners of non-participating policies (some 'investment' account type policies; 'pure' risk such as death & TPD, disability income cover; immediate annuities).

Policies within some statutory funds could be categorised together in a similar way to a trust fund, so that it could be regarded as a single pool of assets subscribed from multiple sources. With policies from other statutory funds though, it is very difficult to make many generalisations about all policies - or, in FSR terms, "financial products" – issued from these funds.

In our view, therefore, it is not possible to simply characterise statutory funds as "common funds".

One generalisation that can be made about statutory funds, however, is that it is unlikely or unusual if fees and charges can be attributed, even in a generalised way, to individual policies (or "financial products"). The provisions in the Corporations Act and the associated regulations, such as section 1013D(1)(iii) and regulation 7.9.75, simply cannot, and should not, apply to these financial products as:

(i) it is misleading and inaccurate to attempt to attach any particular fees/costs/expenses to those products,

(ii) there are no calculations that a life company could do to satisfy the requirements to disclose the fees/costs/expenses associated with the common funds provision.

Example – term annuity

The structure of an annuity, for example, is that the client accepts a particular rate of interest upon entering the product - much like a term deposit. That is, the client/adviser should have shopped around amongst product providers to obtain the best rate of interest (although there may also be additional factors). Once locked in, this rate of interest it does not change though it can, if agreed, increase in line with inflation. Advising the client of any fees or expenses deducted from the common fund would only serve to confuse, as it in no way impacts their investment return because that was agreed, and guaranteed, when they first entered into the product. The product provider, when determining the rate of interest they will offer on the product, estimates the expenses that will be incurred in administering the product, the possible yield on the underlying investment for the term and any profit margin the product provider hopes to receive on the invested amount. If the product provider's estimate is wrong and costs are greater, or investment yields are lower, then it is the product provider that accepts a lower rate of return (profit) and this does not affect clients' investment returns.

Methodology for disclosing "common fund" fees for unit linked products

For unit linked products such as managed investments and certain accumulation superannuation, "common fund" charges vary from day to day, depending on account

balances held by individual members. While it is not possible with existing systems to extract actual dollar amounts of individual contributions/proportions of common fund charges, industry is working hard towards achieving dollar disclosure of common fund fees via OGFM (Ongoing Fee Measure) and average account balance based calculations.

Even the ability to provide estimates of individual contributions to "common fund" charges through the use of average account balance/MER calculations depends on the implementation of major systems changes for most companies. These changes are both expensive and time consuming and have been delayed by the uncertainty associated with finalisation of the regulations and the scope of their application.

(We expect that 'average account balance' will be calculated no more than monthly. To calculate average balances with any greater frequency will, while providing greater accuracy, increase significantly the time it would take to calculate a common fund charge for each member of a fund. At this stage initial estimates are that more frequent calculations would result in annual periodic statements taking up to a week, and possibly longer, for industry to calculate and produce.)

SCHEDULE

1. Dollar Disclosure on PDS and generally

Sub-sections 1013D (1) (b), (d) and (e) require the PDS to disclose significant benefits of a financial product, costs of the product, amounts to be payable in the future by the holder and the return generated for the holder. These will be required to be disclosed in dollars unless ASIC is satisfied otherwise. The following illustrates where these disclosures in dollars cannot be shown. Applying to ASIC for determination of compelling reason for every affected PDS would be administratively impractical for both issuer and ASIC.

a) Interest on "at call" facilities

It is common practice within the finance industry to convey the interest being paid or charged on a financial product in the form of a percentage rate. This is also a practice which customers are familiar with and understand. As interest is a function of both the amount of money invested and the time over which it is invested, it is not possible to disclose interest as a dollar figure due to the variability of these two factors.

The disclosure then would be the applicable percentage rate to be applied to the amount invested from time to time.

b) Fixed Term Investments - Prepayment Interest Adjustment

Where customers request the withdrawal of money from a fixed term investment, such as term deposit, prior to the end of the contracted term, an interest adjustment is calculated and applied to the investment. The adjustment takes into account the length of time the money was invested relative to the contracted term, and applies a percentage adjustment to the interest rate based on this result. Given this adjustment is a function of the amount of money and more particularly time where the time factor will not be known from the outset it is not possible to disclose this as a dollar figure.

The disclosure then would be the calculation method and a worked example.

c) PDS disclosure for investment based products

The majority of fees for managed investment and superannuation products are based on a percentage of the investor's investment balance. For example they may pay an entry fee of up to 4% of the amount invested and a management fee of say 2% of the investment amount. There is no way to disclose the exact dollar amount an investor

will pay because it is not known how much the investor is going to invest. The only way to disclose these fees in dollar terms is to provide an example assuming certain investment balances (eg. if you invest $1000 and the management fee is 2% you will pay $20 per year in management fees). An investor's fund balance may be nothing like the worked example amount and will fluctuate over the life of the investment.

Disclosure as a percentage is actually the clearest and most concise factor for comparisons on this type of product.

d) Percentage based Fees

Some fees are based as a percentage of a variable amount which cannot be predicted at the time the PDS is issued. For example, the service fee on an overdrawn cheque account may be a percentage of the amount overdrawn.

The disclosure would then be the percentage for calculating the fee together with a worked example.

e) Percentage based Commission

Some products are sold or sourced through third party providers who receive a commission payment for performing these services. Depending upon the product, this payment may be either a fixed dollar figure (generally for at-call/transaction based products), or a percentage rate margin (generally for fixed term products). With reference to the percentage rate margin, this is calculated by reference to the amount of money invested and is used to more appropriately reflect the dollar value of the business being generated (i.e. as opposed to a fixed dollar amount). The dollar value of this figure is based on a combination of the commission percentage rate and the dollar amount being invested by the customer. This will vary between investments so as to be unique to each investment and a fixed dollar disclosure would not be possible.

The disclosure should then be the calculation method together with a worked example.