

Parliamentary Joint Committee
on Corporations and Financial Services

Inquiry into the Corporations Amendment
Regulations 2003 (No. 1), Statutory Rules
2003 No. 31

June 2003

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CHAPTER 1

CORPORATIONS AMENDMENT REGULATIONS 2003

Background

1.1 On 14 May 2003, the Parliamentary Joint Committee on Corporations and Financial Services resolved to inquire into and report on the following regulations before 24 June 2003:

- Corporations Amendment Regulations 2003 (No. 1), Statutory Rules 2003, No. 31 effective from 11 March 2003; and
- regulation 7.1.29 of the Corporations Amendment Regulations 2003 (No. 3), Statutory Rules 2003 No. 85.

1.2 The above regulations were made under section 1364 of the *Corporations Act 2001*.

1.3 The Committee advertised the inquiry on its web site and, on 21 May 2003, in the *Australian*. Invitations to participate in the inquiry were also sent to several financial sector industry associations and individual stakeholders.

Submissions

1.4 The Committee received 11 submissions which are listed in Appendix 1 of this report. Copies are published on the Committee's web site at http://www.aph.gov.au/senate/committee/corporations_ctte/inquire.htm.

Hearing and evidence

1.5 The Committee held a public hearing in Parliament House, Canberra, on 16 June 2003. It took evidence from those in the accountancy and legal profession and from officers from the Department of the Treasury. The transcript of the hearing is available at the web site address above.

Structure of the report

1.6 Submissions to the inquiry were concerned mainly with regulation 7.1.29. The submissions that did comment on the regulations contained in Corporations Amendment Regulations 2003 (No. 1) did not raise any objections to the regulations but rather endorsed specific ones. Because of the different approach taken by submissions to the two sets of regulations, the Committee decided to present two separate reports. The Committee's discussion of the Corporations Amendment Regulations 2003 (No. 1) is contained in this report. The report on regulation 7.1.29 is in a separate report to be tabled shortly after the presentation of this report.

Acknowledgment

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

CHAPTER 2

THE CORPORATIONS AMENDMENT REGULATIONS 2003 (NO. 1), STATUTORY RULES 2003 NO. 31

Conduct of inquiry

2.1 The Corporations Amendment Regulations 2003 (No. 1), Statutory Rules 2003 No. 31, were made on 6 March 2003 and took effect on 11 March 2003. They were tabled in the Senate on 19 March 2003.

2.2 On 14 May 2003, the Committee resolved to inquire into and report on the regulations on or before 24 June 2003.

Corporations Amendment Regulations 2003 (No. 1)

2.3 The provisions of the Corporations Amendment Regulations 2003 (No. 1) seek to clarify the operation and scope of the uniform licensing, conduct and disclosure regime for financial service providers established by the *Financial Services Reform Act 2001* (FSR Act) including the operation of a two-year transition period and the streamlined licensing procedures for the new scheme for financial services.

2.4 The main amendments made by the Corporations Amendment Regulations 2003 (No. 1) are summarised below:

- Warrants conferring legal or equitable interests in underlying managed investment schemes (instalment warrants) are now included in the definition of a warrant and are now covered by the new disclosure regime (**reg 1.0.02**).
- Overseas student health insurance policies, funeral expenses policies and exempt public sector superannuation schemes as defined in the *Superannuation Industry (Supervision) Act 1993* are excluded from the definition of financial product (**regs 7.1.06B – 7.1.07D**).
- Clarification of particular circumstances as to when a managed investment scheme must be registered (**reg 5C.11.05A**).
- Extension of the concept of exempt document (ie a document which is not financial product advice) to include any document, information or statement that does not contain personal advice and that is required, and prepared as a result of a requirement, under an Australian law (eg an annual report) (**regs 7.1.08 and 10.2.87A**).
- Where a general insurance product includes both types of cover that are provided to a person as a retail client and types of cover that are provided to a person as a wholesale client, the product issuer will only be required to provide a Product

Disclosure Statement that relates to those types of cover that are provided to a person as a retail client (**regs 7.1.11 – 7.1.17**).

- For s 941C(4A) the definition of ‘public forum’ now includes a flyer or other promotional material that is displayed or otherwise available in a place that is accessible to the public, as well as events and broadcasts. The note to the regulation gives by way of example, television broadcasts, promotional material in newspapers, radio broadcasts, internet websites and public lectures or seminars (**reg 7.7.02(2)**).
- A Financial Services Guide does not have to be given to a client when he/she makes a telephone inquiry in relation to the rental of a vehicle and as a result it becomes apparent that an insurance product may be issued to the person (**reg 7.7.02(3)(d)**).
- Providing entities who are product issuers, related bodies corporate or product distributors may give general advice without having to provide a full Financial Services Guide (**reg 7.7.02(4)**).
- Licensees and their employees are allowed to acquire risk insurance products (eg directors and officers indemnity insurance) jointly (**reg 7.8.20A**).
- Days on which hawking through telephone calls is not permitted include any Sunday, New Year’s Day, Australia Day, Good Friday, Easter Monday, Anzac Day, Christmas Day and Boxing Day (**reg 7.8.22**).
- A Product Disclosure Statement does not have to be provided to a retail client for a general insurance product where that product would be provided as a part of a contract of insurance offering more than one kind of insurance cover and the seller/issuer believes that the client does not intend to acquire the general insurance product (**reg 7.9.07D**).
- Where a Product Disclosure Statement is defective, the issuer may take remedial action by giving applicants a new Statement that is correct and indicates the changes made (**reg 7.9.13A**).
- Certain types of transactions will not require confirmation (**reg 7.9.62**).
- A client is only able to exercise cooling off rights for managed investment interest products if they exercise the right for all interests in the same scheme (**reg 7.9.65**).
- An applicant for an Australian Financial Services (AFS) licence that has not yet been granted may now apply to ASIC, at any time before a decision is made to grant or refuse the licence, to vary that licence to increase the financial services that it authorises the person to provide (**reg 10.2.37**).
- The categories of persons eligible for streamlining are extended to include Australian Authorised Deposit-taking Institutions (ADIs), general insurers, life insurers and approved trustees of superannuation funds. Holders of licences under the former Corporations Law and registered insurance brokers (who are eligible to streamline activities authorised under those licences/registration) can also streamline any other activities that they lawfully carried on immediately before FSR commencement but which now require authorisation under an AFS

licence. The class of persons excluded from streamlining is narrowed. (**regs 10.2.35A, 10.2.38 and Schedule 10D**).

- Insurance brokers whose registration has lapsed will continue to be regulated principals for 8 weeks after their registration expires (**reg 10.2.38**).
- Certain documents (documents prepared before the person obtains an AFS licence) do not have to cite the licence numbers (**reg 10.2.44A**).

2.5 As noted in the introduction to the report, the inquiry was advertised on the Committee's web site and in the *Australian* on 21 May 2003. The Committee also contacted over twenty individuals or organisations with an interest in the financial services reform legislation alerting them to the inquiry and inviting submissions.

2.6 In the main, submissions to the inquiry were not concerned with the regulations included in the Corporations Amendment Regulations 2003 (No. 1). Only two of the regulations attracted comment. They were :

- allowable hours for the hawking of financial products—amendment to regulation 7.8.22; and
- streamlined licensing procedures for certain regulated principles—regulation 10.2.35A and amendment to regulation 10.2.36.

The following section discusses these two regulations.

Allowable hours for the hawking of financial products

2.7 The Financial Planning Association of Australia Limited (FPA) drew particular notice to the amendment to regulation 7.8.22 which prescribes the allowable times for the hawking of financial services. This regulation had been subject to debate in the Senate during a disallowance motion of the regulation in 2002.

2.8 In the Senate, on 16 September 2002, Senator Stephen Conroy moved that a number of regulations including regulation 7.8.22 be disallowed.¹ He noted that regulation 7.8.22 would allow unsolicited phone calls to market financial products between 8 a.m. and 9 p.m. and on any day other than Christmas Day, Easter Sunday and Good Friday.²

2.9 During debate on the disallowance motion, the Parliamentary Secretary to the Treasurer, Senator the Hon. Ian Campbell, undertook to ensure that as soon as practicably possible the regulation would be made to prohibit the hawking of financial services on days such as Anzac Day, Christmas Day and Easter as well as Sundays.³

1 On 16 September 2002, Senator Conroy moved that regulations 7.9.10 and 7.9.11, Statutory Rules 2001 No. 319; and regulations 7.9.10, 7.9.11(1)(a), 7.9.11(1)(b) and 7.9.11(2), Statutory Rules 2002 No. 16 and Regulation 7.8.22, Statutory Rules 2002 No. 41 be disallowed. Senate Journals, No. 30, 2002.

2 *Senate Hansard*, 16 September 2002, p. 4147.

3 *Senate Hansard*, 16 September 2002, p. 4152.

As a consequence, the Senate on the motion of Senator Conroy agreed to omit regulation 7.8.22 from the motion to disallow and the regulation remained in force.

2.10 The current amendment to regulation 7.8.22 honours Senator Campbell's commitment to extend the current exclusions for allowable hawking times. The regulation governing the hawking of certain financial products now reads:

For paragraph 992A (3) (a) of the Act, the prescribed hours are from 8 am to 9 pm on a day in the State or Territory in which the person to whom the offer is made is located, excluding:

- a) any Sunday; and
- b) New Year's Day; and
- c) Australia Day; and
- d) Good Friday; and
- e) the Monday following Good Friday (Easter Monday); and
- f) Anzac Day; and
- g) Christmas Day; and
- h) 26 December (Boxing Day).

2.11 The FPA welcomed this amendment. It informed the Committee that it is committed to educating its members on 'anti-hawking' provisions of the FSRA and is 'pleased to support the extension of the provision'.⁴

Streamlined licensing procedures

2.12 Section 913 of the FSR Act covers the process for lodging an application for an Australian Financial Services (AFS) licence with ASIC. It also sets down the conditions upon which ASIC must grant an applicant the licence. Section 1433 of the *Corporations Act 2001*, however, permits a regulated principal certain allowances in applying for a licence to streamline the process.

2.13 Regulation 10.2.35A expands the range of 'certain regulated principals' able to take advantage of the streamlined licensing. The new categories include:

- Persons who were insurance brokers registered under the *Insurance (Agents and Brokers) Act 1984* (IABA), whose registration has expired due to subsection 21(3) of that Act, but who have applied for renewal of that registration within 8 weeks of its expiry.
- Persons who hold a licence or authorisation issued by the Australian Prudential Regulation Authority (APRA) and who conduct activities prior to the Financial Services Reform (FSR) commencement which, if carried on after the FSR commencement, would need to be covered by an Australian financial services

4 *Submission 10*, p. 1.

licence—this includes ADIs, registered general insurers and life insurers, and approved trustees of superannuation funds.

- Persons who carry on activities, part of which were subject to licensing by the Australian Securities and Investments Commission (ASIC), or registration under IABA, prior to the FSR commencement, but who also carry on other activities not previously subject to ASIC licensing or registration under IABA, but which will require licensing after the FSR commencement.

2.14 The FPA registered its approval of the provision to allow for the AFS licence streamlining application. It submitted:

The FPA and its licensee members have been systematically working through the key licensing issues in order to expedite an efficient transitioning into new AFSL regime. Again we welcome the amendment to the regulations as these amendments would further enable FPA members to transition into the new regime with alacrity.

Likewise, we also envisage that the amendments will provide those FPA members who have not commenced the transitioning process with an added stimulus to commence working through the key issues involving transitioning.⁵

2.15 The Credit Union Services Corporation (CUSCAL) also strongly supported the regulation allowing ADIs to ‘streamline licensing’. It observed:

Legislative streamlining for ADIs was promised repeatedly by the Minister for Financial Services and Regulation in 2000 and 2001. The regulation allowing streamlining for ADIs delivers on this policy commitment. It is important to note that while removing any doubt that an ADI will be granted an AFSL, streamlining does not in any way diminish the licensee’s obligations.⁶

2.16 The Committee was also interested in the amendment to subregulation 10.2.38(2) which adds to the categories of *regulated principals*. During its examination of Treasury officials, it was noted that some activities were not previously licensed under the old regime but that entities would now be allowed to access streamlined licensing.⁷

2.17 As set out above, the Explanatory Statement notes that one of the categories now allowed to access the streamlined licence process includes persons who hold a licence or authorisation issued by APRA who conduct activities prior to the commencement of FSR but would need to be covered by an AFS licence. These persons will be eligible to make a streamlined licence application, including activities

5 *Submission 10*, p. 1.

6 *Submission 4*, p. 3.

7 *Committee Hansard*, p. CFS 42.

lawfully carried on that may not be regulated under the APRA licence or authorisation.

2.18 Another category is persons who carry on activities, part of which were subject to licensing by ASIC, or registration under IABA, prior to the FSR commencement, but who also carry on other activities not previously subject to ASIC licensing or registration under IABA, but will require licensing after the FSR commencement. According to the Explanatory Statement, ‘These persons will be eligible to make a streamlined licence application in respect of all their activities lawfully carried on which require a licence after the FSR commencement.’

2.19 In essence, this regulation recognises that persons in such categories have been previously regulated or registered with another authority. In order to take advantage of the streamline provisions, section 1433 of the *Corporations Act 2001* requires them, when applying for a licence covering some or all of their regulated activities, to include a statement to the effect that they will, if granted the licence, comply with their obligations as a financial services licensee.⁸

2.20 The Department of Treasury explained further:

The essential difference between a streamlined licence application and a ‘full’ licence application is that ASIC does not need to be satisfied that streamlined licence applicants are of good fame and character, or that they will comply with their obligations under section 912A (which includes matters such as providing financial services efficiently, honestly and fairly, and complying with the financial services laws, as defined in section 761A). Rather the applicant provides a written attestation to this effect.

Following licensing, although applicants for a streamlined licence do not have to demonstrate the above-mentioned matters to ASIC’s satisfaction as part of the licensing process, they of course have to meet these requirements

8 Section 1433 of the Corporations Act 2001 reads

Streamlined licensing procedure for certain principals

(2) If:

(a) a regulated principal to whom this section applies, before the end of their transition period, applies (in accordance with section 913A of the amended Corporations Act) for a licence covering some or all of their regulated activities (but no other activities); and

(b) their application includes a statement (in accordance with the requirements of the application form) to the effect that they will, if granted the licence, comply with their obligations as a financial services licensee; the following provisions apply:

(c) section 913B of the amended Corporations Act applies to their application as if paragraphs 913B(1)(b), (c), (ca) and (d), and subsections 913B(2) to (5), were omitted; and

(d) the licence condition required by subsection 914A(6) of the amended Corporations Act in relation to a licence granted pursuant to their application must specify, as the financial services that the licensee is authorised to provide, financial services that equate (as closely as possible) to the regulated activities in respect of which the application was made.

on an ongoing basis. Further, their licence can be revoked if they fail to meet the relevant obligations in section 912A.

The basis on which streamlined licensing was made available was that certain categories of people (generally those who were previously licensed or registered by ASIC or APRA pre-FSR) would have already demonstrated their good fame and character, and their ability to comply with licensing obligations, as part of that pre-FSR licensing regulation.

However, the streamlined licence application provisions in the Act presently only allowed streamlining where all of the pre-FSR activities were licensed by ASIC (or were subject to registration under legislation administered by ASIC). Thus, even if only small proportions of pre-FSR activities were not subject to ASIC licensing, a person could not make a streamlined licence application. The practical effect of this was that the streamlined licensing procedure was open to only a very small number of applicants.

The regulations widen the scope of the streamlined licensing provisions to include persons who carried on some activities pre-FSR that were subject to ASIC regulation, even though all of their activities may not have been. It also allows persons regulated by APRA prior to FSR to make a streamlined licence application.⁹

Clarification of regulations

2.21 Apart from CUSCAL's and the FPA's endorsement of the streamlined licensing procedures, the regulations attracted little comment with no objections at all being raised about them. In light of this lack of concern, the Committee saw no need to pursue in depth further examination of the regulations during the course of the inquiry. It did, however, seek further information on the following regulations which govern:

- funeral expenses policy;
- bundled insurance contracts;
- the provision of a Financial Services Guide and the giving of general advice; and
- exemption to the obligation to cite the AFS licence number.

Funeral expenses policy—specific things that are not financial products

2.22 During the public hearing, the Committee asked about regulation 7.1.07D which exempts a funeral expenses policy from the definition of financial product under the Act. The Explanatory Statement says that:

⁹ Additional information from the Department of Treasury to the Committee, 18 June 2003. This information is set out in full in appendix 3.

Funeral benefits are excluded from the operation of the Act under section 765A(1). The definition of funeral benefit in section 761 of the Act is based on the definition used in section 11(3)(e) *Life Insurance Act 1995 (LIA)*. However, the Act did not include the second limb of the LIA definition, which related to the payment of money for the purpose of a funeral.

The regulation extends the exemption from the Act to cover this second limb—the payment of money solely for the purpose of financing a person’s funeral. The rationale for relief is that a funeral expense policy, where provided for the sole purpose of paying in the future for a funeral, does not warrant regulation by the licensing and disclosure provisions of the Corporation Act.

Unlike in the LIA, funeral benefits provided by any issuer are to be excluded from the regulation by the FSR Act. This is in line with the purposive approach of the FSR Act, where the activity of providing a funeral expense policy is exempt from the Act. It does not depend on which entity provides the service.

2.23 Mr Andrew Yik, Treasury, also noted that section 761 of the Act refers only to funeral benefit which is the first half of the *Life Insurance Act 1995 (LIA)* definition. He explained that the second part of the LIA exemption was not carried through to the FSR and ‘we were not sure whether you could be certain that the money that you were paying up, which is reflected in the regulation, would actually be for a funeral’.¹⁰ As it stood, there appeared to be the possibility for avoidance.

2.24 He maintained that the regulation rectifies this potential by adopting the definition in the LIA. According to Mr Yik, including anti-avoidance measures such as ‘only’ and ‘solely’ in the regulation ensures that money pre-paid for a funeral ‘must be solely for the purpose of a funeral’.¹¹

2.25 Asked whether a funeral expense policy is an investment product, Mr Mike Rosser, Treasury, noted that the prepayment is for an expected liability—‘that liability is in relation to the funeral expenses only, so there is no investment return. The benefit is the provision of the service.’¹²

Bundled insurance contracts

2.26 The Committee was interested in seeking information on the amendments to regulations 7.1.11 to 7.1.17 which govern bundled insurance contracts. According to the Explanatory Statement bundled risk insurance products may provide varying forms of cover for a number of risks within a single contract of insurance. It explains further that:

10 *Committee Hansard* p. CFS 40.

11 *Committee Hansard*, p. CFS 40.

12 *Committee Hansard*, p. CFS 41.

If these forms of cover were provided on an individual basis in separate contracts some might be considered, when provided to an individual or small business, as general insurance products provided to a person as a retail client and others as the provision to a person as a wholesale client.¹³

2.27 The amendments to the regulations allow product providers to differentiate between the various insurance covers when meeting the disclosure obligations under the Corporations Act. These measures would permit providers of bundled insurance products to provide product disclosure statements (PDS) ‘only in relation to insurance covers that they would have been required to if the insurance cover was provided in a separate contract of insurance’. Previously, there had been an obligation to provide a PDS for all the insurance covers contained with the contract.

2.28 The Committee sought clarification from Treasury about the circumstances where insurers can unbundle insurance contracts and provide a PDS for some insurance covers and not others. Mr Rosser, Treasury, informed the Committee:

The difficulty being addressed by these regulations is that some insurance policies provide a range of covers. Some of those covers would be defined as retail covers underneath FSR and some would not.¹⁴

2.29 He explained that there is a technical issue about whether or not, because there are retail covers being provided, a PDS would have to be provided in relation to all of the covers. According to Mr Rosser, the regulations do not require the provider to unbundle the various insurance covers but rather allows the provider to present them in the form that they think is preferable. Even so, the regulations ensure that the PDS obligation still applies to the retail products.

Exemptions for the provision of a Financial Services Guide when an entity provides general advice

2.30 The Committee also sought advice on regulation 7.7.02(4) which provides relief from the obligation to provide a Financial Service Guide under section 941C(8) of the Act. This regulation allows a providing entity to give general advice without providing a full Financial Services Guide in limited circumstances. The explanatory statement notes that ‘material that contains general advice only needs to incorporate specific information from either section 942B or 942C, such as identification of the providing entity. This provision will be able to be used when communicating (for example, conducting marketing services) with both existing and prospective clients.

2.31 The Committee wanted to know why a FSG would not be required in such circumstances and what the client receives instead of the FSG. Treasury informed the Committee that the regulation is based on an existing exemption from providing a

13 Corporations Amendment Regulations 2003 (No. 1) 2003 No. 31, *Explanatory Statement*, Statutory Rules 2003 No. 31. <http://scaleplus.law.gov.au/html/ess/0/2003/N/20030311031.htm> 13 May 2003.

14 *Committee Hansard*, p. CFS 41.

FSG in relation to material that would constitute general advice when this is provided in a 'public forum' (such as a billboard or newspaper).¹⁵ In additional information to the Committee, Treasury explained further:

There are analogous circumstances where comparable information is available or provided to people but where this does not occur in what has been defined in the legislation as a 'public forum'. Examples include a brochure in a bank or advertising sent to a person by mail. It would not be practical to require a full FSG to be provided where information is provided in such situations. Provision of a FSG in such situations was not contemplated when the FSR was being developed and (on a technical reading of the Act) a requirement to do so is an unintended consequence.

There are several conditions that limit the use of this exemption, such as the advice:

- must only be general advice (ie it cannot be advice that considers a person's personal objectives and financial situation);
- must be provided by a person linked to the product, such as a product issuer;
- cannot be provided during a meeting or telephone call; and
- must be accompanied by certain information required to be included in an FSG namely, the provider's name and contact details, information about remuneration or benefits and information about associations and relationships.¹⁶

2.32 It stated further that if a person 'ultimately chooses to approach the provider directly about a product advertised in this way, then the obligations to provide disclosure documents, such as a FSG and a Product Disclosure Statement would be triggered.'¹⁷

2.33 Mr Yik enlarged on the relevant components that need to be disclosed which are specified in 942B (2)(a), (e) and (f).¹⁸ He stated:

15 The definition of general advice in section 766B of the FSR Act is 'financial product advice that is not personal advice'. Personal advice is defined as 'financial product advice that is given or directed to a person (including by electronic means) in circumstances where:

- (a) the provider of the advice has considered one or more of the person's objectives, financial situation and needs; or
- (b) a reasonable person might expect the provider to have considered one or more of those matters.'

16 Additional Information, draft response from Treasury to the Committee, 18 June 2003. See Appendix 3.

17 *ibid.*

18 The relevant sections of the Act that stipulate the components that need to be disclosed in 942B(2) read:

- (a) a statement setting out the name and contact details of the providing entity;

It is information about remuneration including commissions or any benefits that the providing entity or relating body corporate of the providing entity, directors or so forth are able to achieve, and also information about any associations or relationships between the providing entity and those that might be reasonably expected to provide the service.¹⁹

2.34 He stressed that a person cannot provide general advice without a FSG in situations such as a meeting and telephone call.²⁰

2.35 The Committee notes here that the explanatory statement accompanying this regulation is unhelpful—it is less informative than the regulation itself. The statement provides little understanding of the application of this regulation and indeed is more confusing than enlightening. The Committee believes that explanatory statements should assist both legislators and those affected by the legislation to have a clear appreciation of the purpose of the regulation and the reasons for its implementation as well as providing a thorough understanding of its application and intended effects. It notes that the Federal Executive Council Handbook advises that:

In preparing explanatory statements departments should bear in mind the Senate Standing Committee's concern that the statements should aid parliamentarians' understanding of the legality and impact of the regulations or ordinances. An explanatory statement should therefore:

- give a plain English explanation;
- state the authority for making the regulations/ordinances;
- state the reason for making the instrument;
- summarise the likely impact and effect;
- discuss any unusual aspects of the matter calling for special comment;
- give reasons for any imposition of, or change in, fees;
- advise, that all legal and other requirements have been met, eg. where the enabling Act provides for a mandatory duty to consult a particular authority before such regulations or ordinances are made this action should be confirmed in the explanatory statement; and

-
- (e) information about the remuneration (including commission) or other benefits that any of the following is to receive in respect of, or that is attributable to, the provision of any of the authorised services—the providing entity, a related body corporate of the providing entity, a director or employee of the providing entity, a director or employee of the providing entity or a related body corporate, an associate of any of the above, any other person in relation to whom the regulations require the info to be provided;
 - (f) information about any associations or relationships between the entity, or any related corporate, and the issuers of any financial products, being associations or relationships that might reasonably be expected to be capable of influencing the providing entity in providing any off the authorised services.

19 *Committee Hansard*, p. CFS 42.

20 *Committee Hansard*, p. CFS 42.

- for any regulations or ordinances that commence retrospectively, comment on the application of subsection 48(2) of the Acts Interpretation Act 1901.²¹

2.36 Although a number of explanations contained in the Explanatory Statement for the Corporations Amendment Regulations 2003 (No. 1) 2003 fall short of the Committee's expectation, it particularly singles out the explanation offered for regulation 7.7.02(4) as an example of an unhelpful explanatory statement. With this particular regulation, the Committee would have found it useful to have examples of where the exemption applies and where it does not and the underpinning rationale for making that distinction.

2.37 The Committee found the additional information provided by Treasury after the public hearing was of assistance to its understanding of the application of this regulation and regulation 10.2.38(2).

Exemption to the obligation to cite licence number in documents

2.38 The Committee also looked at regulation 10.2.44A which expands the current exemption from placing an Australian Financial Services Licence (AFSL) number on documents issued before the licence has been granted. The exemption applies to a range of documents including Product Disclosure Statements, Prospectuses, Key Features Statements and Advisory Services Guides.

2.39 The Explanatory Statement makes clear that section 912F, which requires a person's licence number to be placed on all documents, is a strict liability offence. It notes, however, that 'there are situations where a person becomes licensed under the FSR regime but has pre-existing disclosure documents on issue, especially if that person has not opted into the disclosure regime'. It stated:

It would be an unintended consequence to have all pre-licensed documents withdrawn and replaced just because a person has subsequently become licensed and has pre-licensing documents on issue that does not contain their AFSL number.²²

2.40 The Committee sought confirmation that persons are able to issue documents without the AFSL number until the end of the transition period—11 March 2004—but after that date the AFSL would be required.

2.41 Mr Rosser told the Committee that at the moment there is a transitional regulation which relieves the obligation to put licence numbers on documents until the end of the transitional period. He assured the Committee that the regulation runs out

21 Department of the Prime Minister and Cabinet, *Federal Executive Council Handbook*, Section 5.5, <http://www.pmc.gov.au/docs/DisplayContents1.cfm?&ID=1> (18 June 2003).

22 Corporations Amendment Regulations 2003 (no. 1), *Explanatory Statement*, item 28.

so that the requirement to place the AFSL number on all documents ‘will be a legal obligation’.²³

General observations on the FSR regime

2.42 Although submissions did not raise matters about the specific regulations, both the Australian Bankers’ Association and CUSCAL highlighted a number of matters that relate to the broader FSR regime and which the Committee believes warrants a mention.

Compliance costs

2.43 CUSCAL took the opportunity to remind the Committee of the compliance costs associated with the implementation of the FSR Regime. It submitted:

Credit unions are currently diverting significant resources into compliance with the FSR regime. The FRS legislation, regulations and policy statements involve a formidable compliance effort to meet licensing, conduct and disclosure requirements.

...

It is simply a fact that regulatory compliance is a heavier burden for smaller entities because they are less likely than their larger competitors to be able to devote full time resources to the function.²⁴

Stability and certainty

2.44 In drawing attention to the compliance costs it also stressed the importance, especially to smaller entities, to ensure that there is stability and certainty in the regulatory environment.²⁵ The Australian Bankers’ Association also took up this point. It stated:

Between now and 11 March 2004 we expect that further changes to the Corporations legislation will be made...

Importantly, these changes are expected because the financial services industry, in the main, has drawn these matters to the Government’s attention. As such these changes can be built into organisations’ preparation plans...it is important for an orderly transition to full implementation by 11 March 2004 that there is a stable and predictable period ahead until then.²⁶

23 *Committee Hansard*, p. CFS 43.

24 *Submission 4*, p. 2.

25 *Submission 4*, p. 2.

26 *Submission 8*, p. 2.

2.45 The Committee notes the concerns expressed about the importance of certainty and stability for the financial services industry during this period of change in implementing the various reforms.

Post-transition review

2.46 The ABA accepted that further ‘fine tuning’ of the regime would take place but suggested that review of the reforms and their implementation take place after 11 March 2004 when the Committee ‘would have the benefit also of receiving submissions and evidence on how the above regulations are actually working.’²⁷ CUSCAL also entertained the likelihood of the need for review and agreed with the ABA for a post-transition review.

2.47 The Department of the Treasury informed the Committee that it had not taken any decision to conduct a review of the FSRA post implementation.²⁸

Conclusion

2.48 Before making its recommendation on the regulations, the Committee takes this opportunity to comment on the value of the explanatory statements. As noted in the report at paragraphs 2.35 and 2.36, the Committee found that a number of the explanations contained in the Explanatory Statement did not assist members to gain a sound understanding of the purpose, intention or application of the regulations. The Committee suggests that in future, greater attention be given to compiling explanations with a view to aiding both parliamentarians and those affected by the legislation to obtain a better appreciation of the regulation, its purpose and application.

2.49 The Committee notes that no matters of concern were raised in submissions to the inquiry on the regulations set out in Statutory rules 2003, No. 31 and makes the following recommendation.

Recommendation

The Committee recommends that the regulations set out in Corporations Amendment Regulations 2003 (No. 1), Statutory Rules 2003 No 31 remain in force.

Senator Grant Chapman
Chairman

27 *Submission 8*, p. 2.

28 *Committee Hansard*, p. CFS 38.

APPENDIX 1

SUBMISSIONS RECEIVED

1. Hall Jackson Pty Ltd
2. Mr George Lawrence
3. National Tax & Accountants' Association
4. Credit Union Services Corporation (Australia) Limited
5. The Institute of Chartered Accountants in Australia; CPA Australia; National Institute of Accountants, and Taxation Institute of Australia
6. Peter Davis Taxation & Accounting Services
7. Taxpayers Australia Inc
8. Australian Bankers' Association
9. Mr Keith Harvey
10. Financial Planning Association of Australia Limited
11. The Law Council of Australia

APPENDIX 2

PUBLIC HEARING AND WITNESSES

Monday, 16 June 2003, Canberra

National Institute of Accountants

Agland, Mr Reece, Technical Counsel

CPA Australia

Bowler, Ms Kathryn Laurayne, Director, SMEs

Peter Davis Taxation and Accounting Services

Davis, Mr Peter, Principal

Law Council of Australia

Greentree-White, Mr James, Lawyer, Legal and Policy

Simmons, Ms Lisa, Representative

Lawrence, Mr George (Private capacity)

Taxpayers Australia Inc.

McDonald, Mr Peter James, National Director

Mooney, Ms Caroline Faye, Financial Services Adviser

The Institute of Chartered Accountants in Australia

Orchard, Mrs Susan Janet, Superannuation Technical Consultant

Reilly, Mr Keith, Technical Adviser

Taxation Institute of Australia

Payne-Mulcahy, Mr Michael, Tax Counsel

Department of the Treasury

Rosser, Mr Michael John, Manager, Investor Protection Unit, Corporations and
Financial Services Division

Yik, Mr Andrew Yu Chin, Analyst

APPENDIX 3

ADDITIONAL INFORMATION PROVIDED BY THE DEPARTMENT OF THE TREASURY



Telephone: (02) 6263 3962
Facsimile: (02) 6263 3030

THE TREASURY

Corporations and Financial Services Division
The Treasury
Langton Crescent
PARKES ACT 2600

20 June, 2003

Dr Kathleen Dermody
Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
Parliament House
CANBERRA ACT 2600

Dear Dr Dermody

COST OF OBTAINING AN AUSTRALIAN FINANCIAL SERVICES LICENCE AND REGULATIONS 7.7.02 AND 10.2.38

I am writing in response to a question asked by the Parliamentary Joint Committee on Corporations and Financial Services (the Committee) in its public hearing on Monday 16 June 2003. I understand the Committee is interested in the costs associated with obtaining and maintaining an Australian Financial Services Licence (AFSL), especially for accountants. Also, enclosed is some additional information on two regulations raised at the Committee's hearing on 16 June 2003.

A. COST OF FSR LICENSING

Cost of applying for an AFSL

In evidence taken on the evening of the 16th of June, mention was made of a sum of \$20,000 for the cost associated with obtaining an AFSL.

It is difficult to provide an average single dollar amount for the costs incurred for individual applicants applying for an AFSL, and I note that the Australian Securities and Investments Commission (ASIC) does not obtain this data from applicants. As you would appreciate, the cost of obtaining an AFSL will vary widely and depend in part on the scale, nature and type of the particular financial services business. As the number of persons that apply for an AFSL increase, new applicants can (and are) leveraging off the experiences of others and consequently, the time involved and cost of applying for a licence is understood to be falling.

I also note that ASIC has designed its licensing systems and provides guidance to applicants to enable parties to apply for a licence without the need for external assistance. However, given the requirements of licensing, many applicants will engage advisers to assist them. For smaller businesses, we understand from industry participants that such advisers commonly charge in the vicinity of \$3,500 for services such as:

- a review of systems;
- assistance in completing the application; and
- assembling the required documentation.

For a larger business often much of the work will be done in-house, and would among other things involve, full due diligence and legal advice on complex issues with industry consultations having previously cited figures of around \$60,000.

Ongoing costs

I note that licensing costs were also discussed in terms of ongoing requirements. The main determinants of the costs are highlighted below:

1. Insurance

- Complying with the FSR regime may result in Professional Indemnity insurance costs to meet the FSR's compensation requirements as set out in section 912B of the *Corporations Act*.
- The need to ensure adequate compensation arrangements under the FSR should be seen in light of the fact that many applicants already hold professional indemnity insurance cover. This is especially the case for professionals such as accountants.
- It should be noted that Corporations Regulation 10.2.44 relieves licensees of the obligation to provide compensation arrangements for retail clients until the end of the FSR transition period, that is 11 March 2004.

2. FSR Training

- Many professionals already need to meet ongoing competency or professional development requirements, for example, the continuing professional development required by particular accounting bodies. As noted in Attachment A, many courses run by the accounting bodies are recognised by ASIC as part of the training requirements it sets for FSR licensing under ASIC Policy Statement 146.
- Therefore, the FSR training requirements might be expected to sit alongside rather than replace existing requirements and in many cases not result in a need for additional training. Evidence was provided to the Committee by at least some accounting representatives that they had sufficient training to advise to some extent on financial products.

3. Audit provisions

- Many professionals already have pre-existing financial and tax reporting and audit obligations to meet their current professional requirements. In many instances, there will need to be no substantial change to accommodate the FSR's requirements.

4. Systems and procedures

- Similarly, new systems may be required in some cases in others. However, many pre-FSR business systems will be capable of being adapted to meet the requirements under FSR.

B. ADDITIONAL INFORMATION ON SUBREGULATIONS 7.7.02 AND 10.2.38

Subregulations 7.7.02(4) and (5)

This regulation provides an exemption from the requirement to provide a Financial Services Guide (FSG) in limited circumstances. The regulation is based on an existing exemption from providing a

FSG in relation to material that would constitute general advice when this is provided in a ‘public forum’ (such as a billboard or newspaper).

There are analogous circumstances where comparable information is available or provided to people but where this does not occur in what has been defined in the legislation as a ‘public forum’. Examples include a brochure in a bank or advertising sent to a person by mail. It would not be practical to require a full FSG to be provided where information is provided in such situations. Provision of a FSG in such situations was not contemplated when the FSR was being developed and (on a technical reading of the Act) a requirement to do so is an unintended consequence.

There are several conditions that limit the use of this exemption, such as the advice:

- must only be general advice (ie it cannot be advice that considers a person’s personal objectives and financial situation);
- must be provided by a person linked to the product, such as a product issuer;
- cannot be provided during a meeting or telephone call; and
- must be accompanied by certain information required in an FSG namely, the provider’s name and contact details, information about remuneration or benefits and information about associations and relationships.

If a person ultimately chooses to approach the provider directly about a product advertised in this way, then the obligations to provide disclosure documents, such as a FSG and a Product Disclosure Statement would be triggered.

Subregulation 10.2.38(2)

Amendments to this subregulation were made to allow a broader range of persons to take advantage of the streamlined licensing provisions available through the Act. These persons will be eligible to make a streamlined licence application in respect of all activities lawfully carried on pre-FSR, which will require an AFSL after the FSR commencement.

The essential difference between a streamlined licence application and a ‘full’ licence application is that ASIC does not need to be satisfied that streamlined licence applicants are of good fame and character, or that they will comply with their obligations under section 912A (which includes matters such as providing financial services efficiently, honestly and fairly, and complying with the financial services laws, as defined in section 761A). Rather the applicant provides a written attestation to this effect.

Following licensing, although applicants for a streamlined licence do not have to demonstrate the above-mentioned matters to ASIC’s satisfaction as part of the licensing process, they of course have to meet these requirements on an ongoing basis. Further, their licence can be revoked if they fail to meet the relevant obligations in section 912A.

The basis on which streamlined licensing was made available was that certain categories of people (generally those who were previously licensed or registered by ASIC or APRA pre-FSR) would have already demonstrated their good fame and character, and their ability to comply with licensing obligations, as part of that pre-FSR regulation.

However, the streamlined licence application provisions in the Act presently only allowed streamlining where all of the pre-FSR activities were licensed by ASIC (or were subject to

registration under legislation administered by ASIC). Thus, even if only small proportions of pre-FSR activities were not subject to ASIC licensing, a person could not make a streamlined licence application. The practical effect of this was that the streamlined licensing procedure was open to only a very small number of applicants.

The regulations widen the scope of the streamlined licensing provisions to include persons who carried on some activities pre-FSR that were subject to ASIC regulation, even though all of their activities may not have been. It also allows persons regulated by APRA prior to FSR to make a streamlined licence application.

In relation to insurance brokers, their activities are subject to regulation through the *Insurance (Agents and Brokers) Act* (IABA) which provides the statutory basis for consumer protection regulation of insurance companies, agents and brokers. IABA is administered by ASIC.

The general basis for the amendment to the streamlining provisions is that the parties involved are already regulated by ASIC or APRA and in many cases both. Therefore, even though some aspects of a streamlined licensee's pre-FSR activities may not have been regulated by ASIC, the licensee would have been regulated to the extent required by the relevant pre-FSR regime.

It should be noted that the streamlining provisions only apply to activities that were *lawfully* carried on pre-FSR, and only relate to a particular entity or person regulated under existing law. Therefore, if an activity should have been licensed or regulated under a pre-FSR regime and was not, the streamlining provisions do not apply. Similarly, if one company in a corporate group held an ASIC or APRA licence pre-FSR, this does not enable other companies in the group to streamline.

I trust this information will be of assistance to you.

Yours sincerely

Michael Rosser
Manager, Investor Protection Unit
Corporations and Financial Services Division

SOME COURSES PROVIDED BY ACCOUNTING BODIES RECOGNISED AS PART OF FSR TRAINING

(Source: ASIC Training Register)

Training provider	Course or assessment name	Specialist knowledge component	How the course meets ASIC's minimum requirements set out in Appendices A & B of PS 146
CPA Australia	Discovering the options of Securities and Futures Markets	Securities and Futures Markets	Meets requirements for specialist knowledge component
CPA Australia	Managed Investments	Managed Investments	Meets requirements for specialist knowledge component
CPA Australia	Intensive Course in Financial Planning	Financial Planning; Managed Investments; Superannuation	Meets requirements for generic and specialist knowledge components
CPA Australia	Personal Financial Planning and Superannuation (CPA110): CPA Program	Financial Planning; Superannuation	Meets requirements for generic and specialist knowledge components
CPA Australia	Insurance and Risk Management in Financial Planning	Core and General Life Insurance; Insurance Broking	Meets requirements for generic and specialist knowledge component.
Institute of Chartered Accountants in Australia	ICAA Financial Planning Authorised Representative Course (formerly Property Authority Course) PLUS Advanced Financial Planning Course	Financial Planning; Managed Investments; Superannuation	Meets requirements for generic and specialist knowledge components
Institute of Chartered Accountants in Australia	Financial Planning Authorised Representative Course (formerly Proper Authority Course)	Financial Planning; Managed Investments; Superannuation	Meets requirements for generic and specialist knowledge components