

CHAPTER 4

THE CORPORATIONS AMENDMENT REGULATIONS 2003 (NO. 3), STATUTORY RULES 2003 NO. 85

4.1 Although submissions to the inquiry focused on regulation 7.1.29, the Committee sought explanations of the purpose of a number of regulations in Statutory Rules 2003 No. 85 beyond that provided in the Explanatory Statement. In particular the Committee sought clarification on:

- regulation 7.1.33D concerning investment linked insurance products;
- regulation 7.6.01(1)(la) concerning non-cash payment facilities; and
- regulation 12.7.06 concerning the Friendly Societies Code.

Regulation 7.1.33D

4.2 A person who carries on a financial services business must hold an Australian Financial Services Licence covering the provision of the financial services under subsection 911A(1) of the *Corporations Act* (the Act). The term ‘financial services business’ is defined as ‘a business of providing financial services’.¹ The term, ‘financial service’, is in turn defined in section 766A of the Act.

4.3 Section 766A(2)(b) permits regulations to set out the circumstances in which persons are taken to provide, or are taken not to provide, a financial service. Corporations Regulations 7.1.30—7.1.33B in Division 3 of Part 7.1 of the Corporations Regulations specify a number of activities which are taken not to amount to providing a financial service within the meaning of paragraph 766A(1)(a) of the Act. Under regulation 7.1.33A, the provision of a recommendation or statement of opinion about the allocation of funds among certain general asset types is taken not to amount to providing a financial service within the meaning of paragraph 766A(1)(a).

4.4 The Corporations Regulations include new regulation 7.1.33D in Division 3 of Part 7.1 of the Corporations Regulations. Regulation 7.1.33D provides that a person is not taken to provide a financial service if he/she makes a market for a financial product and is the issuer of the product and the product is an investment-linked life insurance policy under an investment-linked contract (within the meaning of the *Life Insurance Act 1995*).

4.5 The Explanatory Statement provided the following explanation:

1 Section 761A.

Unit-linked life insurance products share a number of common features with superannuation products and managed investment schemes, which are listed under an exemption from the definition of ‘making a market’ in subsection 766D(2) of the Act. The regulation will ensure that simply calculating unit prices in relation to their redemption value will not of itself constitute making a market. This will result in a comparable treatment with the exemption currently available to superannuation products and managed investment schemes.

4.6 Mr Mike Rosser, Department of the Treasury, further explained:

The rationale for this regulation is that the way the legislation is framed, the operation of the ‘making a market’ provisions which require licensing can inadvertently capture certain types of investment products that are provided where, each period, the offerer of the product has to provide a price at which it can be redeemed. That could constitute making a market, but the purpose of the regulation is to recognise that what it is doing is actually providing a service to the person to tell them what the value of that would be at a particular point in time. It is not about making generally available the willingness to form part of a making a market transaction. It is not a general offer to the public; it is actually in respect of a specific client.²

Regulation 7.6.01(1)(la)

4.7 Regulation 7.6.01(1) lists services that are exempt from the requirement to hold an Australian financial services licence. Regulation 7.6.01(1)(la) includes in the list of exempt services in regulation 7.6.01(1) a financial service provided by one person to another if the financial service is provided in the ordinary course of the person’s business, the first person holds a licence authorising the provision of financial services other than the financial service provided in the ordinary course of the person’s business or does not hold a licence and the financial service consists of advising in relation to a non-cash payments facility or arranging to deal in a non-cash payments facility to pay for a financial product or service.

The Explanatory Statement provided the following explanation:

Regulation 7.6.01(1)(la) extends the relief from licensing provided by 7.6.01(1) to financial service providers. That is, relief from licensing is provided for financial service providers who, as part of their business, advise their customers or clients on the options available for making payments for goods or services supplied, or make arrangements to put a payment facility in place.

4.8 Mr Rosser further explained:

It is a refinement of the provision that deals with the definition of what a non-cash payment is, to the extent of defining what types of products are subject to FSR licensing obligations. The definition that is in the legislation

2 *Committee Hansard*, 16 June 2003, p. CFS 39.

at the moment talks about a transaction where there is one party involved in the transaction, which gives rise to a difficulty when that party is in effect a joint party—that is, it is an account or facility that is held in the name of more than one person—as it means that, if it were held in the name of more than one person, it would be subject to an exemption. So the refinement is to say that one party can include a jointly held product.³

Regulation 12.7.06

4.9 Regulation 12.7.06 provides for certain provisions of the Friendly Societies code to cease to apply to FSR licensees. The Explanatory Statement provided the following explanation:

This regulation is intended to ensure that a Friendly Society transitioning into the FSR Act's disclosure regime does not have to comply with multiple disclosure requirements. Schedule 4 of the Act concerns the Transfer of Financial Institutions and Friendly Societies. If a body to which this schedule applies transitions to the FSR's disclosure regime, the application of paragraph 36 of Schedule 4 of the Act would mean that two separate disclosure regimes might apply to such products. Therefore, the Schedule 4 disclosure provisions will apply the sooner of 11 March 2004 or opting in to the Part 7.9 disclosure regime.

4.10 Mr Yik, the Treasury, further explained:

That was a transitional amendment as part of coming into the FSR regime. The old schedule 4 applied to friendly societies. There was no method to disapply that provision, so that basically came into the new FSR regime. They had the old regime applying to them as well. All this regulation says is that you have only one regime applying to you—you do not need more than one: it is either FSR or the old schedule 4.⁴

Conclusion

4.11 The Committee notes the information provided by the Department of the Treasury on the above regulations. There is nothing in the evidence to suggest that the regulations should be amended.

Senator Grant Chapman
Chairman

3 *Committee Hansard*, 16 June 2003, p. CFS 40.

4 *Committee Hansard*, 16 June 2003, p. CFS 40.

