PARLIAMENTARY JOINT COMMITTEE HEARING
23 May 2002
Opening Statement – Don Harding, Freehills

Further to our written submission, there are few other points about the regulations in particular.

1 Regulations

We suggest that there be some rationalisation or tidying up of the regulations, their order and remaining apparent gaps in the regulations.

(a) Order of regulations

The placement of some of the regulations is causing significant difficulties and frankly for lawyers a danger of giving incorrect advice. To give a few examples:

There have for a long time been certain exceptions to the insider trading provisions which are now in part 7.10 of the Act on market misconduct.

One would expect in working through the regulations to find that the regulations which provide a few exemptions for example in relation to the obtaining by a director of a share qualification and more importantly one with respect to employee share schemes could be found in effect in

an order which reflects the numbering of the insider trading prohibition in section 1042A following and part 7.10. It is not because of a regulation making power, to be found in regulation 9.12.01 following.

In addition of course on the legislative side there have been significant amendments made by the Amending Act of 2002 which displaced regulations.

(b) Transitional provisions – old licensees

Similarly, with respect to the transitional provisions, there are quite a number of provisions which provide exceptions to the requirement to be licensed, where someone acts through a licensee. One, for example, is where a principal or the ultimate provider of a product, including a foreign entity, is providing it through a locally licensed dealer. Under the old law this used to be possible under an exception in section 93(5) of the old law where the action in Australia was taken by or on behalf of a person whether foreign or in Australia by a licensed securities dealer.

That is important in all sorts of respects, yet, while there are certain specific provisions which during the transitional period from two years from 11 March 2002 provides that a reference to a financial services

licensee includes a so-called "regulated principal", that is, for example, the holder of an old securities dealer's licence, that has not been rationalised in all respects. There is a provision of that sort, for example, in regulation 10.2.39(2). That only relates to a specific provision in section 911A(2)(b) of the legislation in relation to "dealing" - which is dealt with in section 766C. It does not relate to the provision of financial product advice and more specifically "general" financial product advice which is not based on an analysis of the personal needs of the investor. There is a provision in regulation 7.1.33B (which could easily be missed), which in effect provides that general financial product advice given by the holder of a new AFSL may in effect be provided by the holder of that AFSL.

But previously, that could be provided through the holder of a securities dealer's licence. There is no transitional provision to treat the continuing holder of a securities dealer's licence as equivalent to a new holder of an AFSL and as yet there are very few of them.

There are many examples of anomalies and difficulties in the regulations and their placement of this type. I will not endeavour to lengthen this opening statement by reference to them.

The above are in effect in addition to the more specific points principally related to managed investment schemes and related aspects which are made in our written submission.

2 ASIC Policy Statements

Another aspect of the terms of reference relates to the question whether the policy statements are consistent with the stated objectives and principles of the Financial Services Reform Act.

I do not wish to deal with any matter of detail where it might be argued that there is an inconsistency. It seems to me that ASIC has done an extraordinary job in trying to produce the policy statements which it has given the complexity of the legislation.

It has certainly been suggested to us by clients that the way in which the financial services authority in London operates provides reasonably practicable and readily handled requirements.

I am concerned, however, that the ASIC policy statements are designed to ensure that no stone is left unturned and that the huge burden imposed on ASIC in effect of considering applications for financial services licences within the two years to 11 March 2004 has resulted in a

relatively faceless situation where it is difficult to talk to any individual in ASIC about the particular problems which arise or particular circumstances and that ASIC in effect in endeavouring to ensure that it cannot be suggested where there is ever a problem with a financial services licensee that it has not fully regulated the licensee.

Hence the requirements particularly involved in an application for a new AFSL are very burdensome and certainly from the point of view of one who must try and provide services to clients efficiently and at a reasonable cost, the amount of documentation required is now so substantial and the degree of regulation so great, that there must be a significant cost imposed on the industry generally. There was a release recently from Senator Campbell on the cost even of obtaining a "streamlined" licence.

3 ASIC training requirements

It appears under the statements which ASIC has now issued in relation to qualifications for the purposes of obtaining licences, that the requirements although providing three options are relatively inflexible in terms of courses.

Particularly where a licence is being sought merely for wholesale activities, lack of flexibility is a source of some concern. In particular, one does get people wanting a licence to deal or advise only on wholesale investors who have had many years of experience in the industry and do not formally fit within the qualifications particularly under options 1 or 2.

It is suggested that this is too inflexible and that there should be more scope for the exercise of ASIC discretion and submissions in relation to the qualifications which are required particularly where there is substantial experience.

4 Points in written submission

Among the points made in the submission there are some which are highly technical and are outside this particular speaker's area of expertise.

(a) Prospectuses and PDSs - listed trusts

Points 3 and 4 on page 2 are I think significant. We have had a number of instructions where it has been necessary for there to be both a prospectus and a product disclosure statement. That is enormously

expensive and involves different due diligence obligations and different other provisions. That is if, for example, where there is a security stapled to a unit in a listed trust. Our essential submission is that the offer of listed trust units should essentially be treated the same as the offer for securities possibly requiring a prospectus.

(b) Secondary sales

The second main point is with respect to disclosure requirements in the context of secondary sales. That has caused enormous concerns in the private placement market and ASIC has provided some temporary six month relief while it considers the matter further but only in relation to a prospectus and security. There is no equivalent class order relief with respect, for example, to the offer for units in a listed trust. Yet there are significant trusts which are really quite comparable to companies with offer securities and they are retail trusts in the sense that they are registered managed investment schemes. Points made about non-cash payment facilities, superannuation, are highly technical.