

Appendix 7

Extract from additional information provided by ASIC

1. Under 761G(5)(b)(viii) have regulations been made that cover PI and/or PL?

No regulations have been made for the purposes of section 761G(5)(b)(viii).

2. Are there any provisions in FSRA that cover sale of PI and/or PL? (Could also consider ASIC Act provisions here)

Most types of PI and PL insurance will be financial products regulated under FSRA. However they will not be subject to the prescribed disclosure regime and requirements for training of representatives, dispute resolution schemes and compensation arrangements under the Act. The later requirements are applicable only where the transaction is with a retail client. For the reasons set out below, PI and PL insurance do not satisfy the requirements to be classified as products issued to retail clients under the Act.

The principal provisions applicable to PI and PL insurance will thus be the market misconduct provisions that prohibit misleading or deceptive conduct (for example s1041H).

FSRA regulates "financial products". Generally, a product is a financial product if it falls within either the general definition of financial product in s763A or a specific category of financial product in s764A. However, certain products are specifically excluded from these definitions under s765A.

Under FSRA the level of regulation is largely determined by whether the product or service is directed to retail or to wholesale clients. In relation to general insurance products FSRA provides a distinction between 'wholesale' and 'retail' clients as outlined in section 761G(5).

This provides that in order for a consumer to be considered a 'retail' client for the purposes of FSRA the purchaser must be an individual or small business and be purchasing one of the general insurance products listed under 761G(5)(b) being:

- i. A motor vehicle insurance product
- ii. A home building insurance product
- iii. A home contents insurance product
- iv. A sickness and accident insurance product
- v. A consumer credit insurance product

- vi. A travel insurance product
- vii. A personal and domestic property insurance product
- viii. A kind of general insurance product prescribed by the regulations made for the purposes of this paragraph.

Public liability and professional indemnity insurance products do not fall within these listed classes of insurance products and will be categorised as 'wholesale' products for the purposes of FSRA.

In relation to licensing under FSRA an exemption applies under s911A(2)(g) if all of the following apply:

- i. The person is a body regulated by APRA ;
- ii. The service is one in relation to which APRA has regulatory or supervisory responsibilities;
- iii. The service is provided only to wholesale clients.

Insurers or product issuers who meet the above criteria will not be required to obtain an AFS license for wholesale business they provide. However, as noted above the more general market misconduct provisions in FSRA that prohibit misleading or deceptive conduct in regard to financial services or products more generally will continue to apply.

In addition, the provisions of the Insurance Contracts Act 1984 will continue to apply to govern the relationship between insurer and insured for PI and PL insurance

ASIC understands that NIBA have recently made a submission to Treasury outlining their concerns in relation to the licensing requirements for intermediaries involved the distribution of wholesale products. A copy of this submission is attached.

3. How are "not for profit" organisations covered under 761G(5)(a)?

If the not for profit organisation falls within the small business definition under 761G(12) and the product offered is one of the products listed under 761G (5) the not for profit organisation may be a retail client in relation to the purchase of that product. Many, but not all, not for profit organizations will fall within the small business definition. ASIC considers that a business need not exist solely or primarily to make a profit but must involve system, repetition and continuity. When considering whether the activities of a not for profit organization qualify it as a "business" for the purposes of the section 761G(12) definition of "small business", previous legal decisions on the question of what is a "business" may be relevant. Those decisions highlight the following points:

* Anything which is an occupation, trade, profession, vocation, calling or duty that requires attention, as distinguished from a pleasure or social activity, or a purely domestic activity, is likely to be a business;

* Whether a particular activity is a business is a question of degree and depends largely on the character of the activity. For example, purely recreational activities or hobbies would not normally be considered a business. However, such an activity that has a commercial element to it, or that is carried on as a serious undertaking, with a high degree of system, repetition and continuity, pursued for the purpose of fulfilling a social obligation, may constitute a business (even if not undertaken for profit).

As outlined above even if the organization meets the requirements of being a small business, if the insurance product class is not one of those listed under 761G(5) the organization in purchasing it will be classed as a wholesale client.

4. How did the code provision of the Insurance Act (s113) previously operate?

Section 113 (1) of the Insurance Act provided that if

- a) a code or codes of practice have been approved by ASIC in relation to carrying on a class of insurance business prescribed for the purposes of this section; and
- b) a person carries on that class of business on a day when the person is not a party to an agreement to comply with the code or one of the codes
- c) the person is, in respect of that day, guilty of an offence punishable on conviction by a fine of not more than:
- d) if the person is a body corporate – 200 penalty units
- e) if the person is a Lloyd's underwriter and is not a body corporate – 20 penalty units.

The General Insurance Code of Practice (GI Code) was approved by ASIC in August of 2000.

The GI Code applied to general insurers who write certain domestic and personal classes of insurance, such as home, home contents, motor and consumer credit insurance. Prior to FSRA commencement insurers were required by law to be members of an industry based Code of Practice that was approved by ASIC. FSRA repealed s113(1) on 13 March 2002.

The Code did not relate to classes of business such as professional indemnity and public liability insurance.

Insurance Enquiries and Complaints Ltd (IEC) had responsibility for monitoring and administration of the GI Code and report annually on the operation of the Code.

5. Were there problems in ensuring industry participants complied with the General Insurance code under the previous s113 arrangements?

One instance of alleged non-compliance was raised with ASIC, however s113 was repealed prior to action being taken in that instance. Legislative adoption of a Code of Practice is no longer required.

Monitoring of compliance with the Code is administered by IEC Ltd and reference to the IEC's annual report should be made for issues relating to compliance concerns.

6. Can ASIC pls provide its policy statement on code approval?

There is a provision under s1101A of Corporations Act 2001 for financial services industry participants to seek ASIC approval of a Code of Practice, however no such approval has been sought to date.

In June 2001 ASIC released PPP No 9 – 'Approval of Codes' for comment. The period for public

comment on the PPP ended on 5 July 2001. We received few submissions on the PPP. These submissions indicated no fundamental concerns with the proposals in the PPP. Accordingly, the proposals in the PPP stand as our interim policy.

A copy of PPP No 9 is attached. The issue of the enforceability of codes is addressed at clause A2 (discussed at paragraph 6 and 7 on page 10), at clause B4 (discussed at paragraphs 3 to 7 on page 16) and at clause C9.