



Financial Sector Legislation Amendment (Discretionary Mutual Funds and Direct Offshore Foreign Insurers) Bill 2007

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Law and Bills Digest Section

Contents

Purpose.....	3
Background.....	3
What are DFOIs?.....	3
What are discretionary DMFs?	4
History.....	4
HIH Royal Commission.....	4
The Potts Review	5
DMFs.....	5
DOFIs	6
The Government’s Response	6
Treasury Discussion Paper 2005	6
<u>DMFs</u>	6
<u>DOFIs</u>	7
Submissions to the Government’s Discussion Paper	7
Government’s Media Release (May 2007)	7
APRA’s Response to the Government’s Media Release	8
Senate Committee Inquiry into the Bill	8
Position of significant interest groups	9
Underwriting Agencies Council (UAC).....	9

Association of Consulting Engineers of Australia	10
National Insurance Brokers Association	11
Law Council of Australia	12
Insurance Council of Australia.....	13
Financial implications	14
DFOIs	14
APRA	14
Key issues	15
Main provisions	15
Schedule 1	15
Schedule 2	16
Corporations Act.....	16
Concerns of the Senate Standing Committee on Scrutiny of Bills regarding subsection 985D(4).....	17
Insurance Act	17
Concerns of the Senate Standing Committee on Scrutiny of Bills regarding para 3A(3)(a)	18
Concern expressed by the Senate Standing Committee on Scrutiny of Bills regarding subsection 62D(2)	19
Concern expressed by the Senate Standing Committee on Scrutiny of Bills regarding subsection 115AB(2).....	20
Schedule 3	21
Conclusion	21

Financial Sector Legislation Amendment (Discretionary Mutual funds and Direct Offshore Foreign Insurers) Bill 2007

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House: House of Representatives

Portfolio: Treasury

Commencement: Sch 1 – on Royal Assent

Sch 2 – 1 July 2008

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All other provisions - on Royal Assent

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

This Bill aims to:

- bring Direct Offshore Foreign Insurers (DOFIs) under prudential regulation
- enable information to be collected and collated to determine the nature and scope of Discretionary Mutual Funds' (DMFs) operations, and
- support changes to the Corporations (National Guarantee Fund Levies) Amendment Bill 2007.

Background

What are DFOIs?

DOFIs are foreign insurers that are not authorised in Australia. These unauthorised insurers can sell insurance in Australia either:¹

1. See: The Hon. Peter Dutton, Minister for Revenue and Assistant Treasurer, *Enhancing the Integrity of Insurance in Australia*, media release, Parliament House, Canberra, 3 May 2007 p. 2 at <http://assistant.treasurer.gov.au/pcd/content/pressreleases/2007/042.aspx> accessed 25 July 2007; Gary Potts, *Review of Discretionary Mutual Funds and Direct Offshore Foreign*

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- directly by establishing a subsidiary or branch in Australia and applying to the Australian Prudential Regulation Authority (APRA) for authorisation under the *Insurance Act 1973* (the Insurance Act) to conduct insurance business, or
- indirectly through an Australian Financial Services Licence (AFSL) holder that is a general insurance agent or broker, without having to be subject to the provisions of the Insurance Act because they are not regarded as conducting an insurance business in Australia.

What are discretionary DMFs?

DMFs offer discretionary cover, which is an insurance-like product where the DMF will meet the costs of a claim at its discretion. There is no contractual obligation on the DMF to meet the claim.²

This type of cover is regarded as an alternative to insurance. A DMF is said to cover risks for which insurance is not generally available, and if insurance is available, it is not affordable.³

DMFs are not prudentially regulated under the Insurance Act.⁴

History

HIH Royal Commission

The Bill addresses comments made at the HIH Royal Commission into the failure of the HIH Insurance Group.⁵

Insurers, review prepared for the Commonwealth Government, Treasury, Canberra, May 2004 at <http://dmfreview.treasury.gov.au>, accessed on 25 July 2007.

2. See: The Hon. Peter Dutton MP, Minister for Revenue and Assistant Treasurer, op cit; Gary Potts, op. cit.
3. See: The Hon. Peter Dutton MP, Minister for Revenue and Assistant Treasurer, op cit; Gary Potts, op. cit.
4. See: The Hon. Peter Dutton MP, Minister for Revenue and Assistant Treasurer, op cit; Gary Potts, op. cit.
5. The Hon. Peter Costello MP, Treasurer, *Government's Response to the Recommendations of the HIH Royal Commission*, media release, Parliament House, Canberra, 12 September 2003, at <http://www.treasurer.gov.au/tsr/content/pressreleases/2003/082.asp>, accessed on 25 July 2007.

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Justice Owen recommended that prudential regulation be extended to all discretionary insurance-like products, to the extent possible within constitutional limits. Justice Owen also commented upon insurance cover written offshore but did not make any recommendations in relation to that.⁶

The Potts Review

In response to Justice Owen's comments, the Government commissioned a *Review of Discretionary Mutual Funds and Direct Offshore Foreign Insurers* headed by Mr Gary Potts (the Potts Review).⁷

The purpose of the review was to consider what would be appropriate levels of prudential and consumer regulation for DMFs and DOFIs.⁸

The key findings of the Potts Review are as follows:⁹

DMFs

- discretionary mutual cover to be offered only as a contract of insurance under the Insurance Act unless APRA considers that the individual entity poses no contingent risk that would have to be met by additional contributions by members, which are not defined
- APRA to collect and collate information on business that DMFs write under the exemption, and
- it was considered that this approach would only target prudential regulation where it was necessary and not penalise DMFs that fill in market gaps.¹⁰

6. See: <http://www.hihroyalcom.gov.au/finalreport/index.htm>, accessed on 14 August 2007.

7. *ibid.* p. 2; Gary Potts, *Review of Discretionary Mutual Funds and Direct Offshore Foreign Investors – Background Information and Public Submissions*, review prepared for the Commonwealth Government, Treasury, Canberra, May 2004, p. 1 at: <http://dmfreview.treasury.gov.au> .

8. *ibid.*, p. 2.

9. Gary Potts, *Review of Discretionary Mutual Funds and Direct Offshore Foreign Investors – Key Findings of the Review of Discretionary Mutual Funds and Direct Offshore Foreign Insurers*, review prepared for the Commonwealth Government, Treasury, Canberra, May 2004, pp. 2 and 3 at <http://dmfreview.treasury.gov.au> .

10. *ibid.*, p. 7.

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DOFIs

- allow DOFIs that market insurance in Australia to be exempted from prudential regulation if APRA considers that those DOFIs are domiciled in countries with comparable prudential regulation
- DOFIs that do not meet that test would be able to market insurance in Australia as authorised insurers, through branches or subsidiaries
- give APRA the enforcement and investigative powers to perform that role
- APRA to have an information collecting role in relation to DOFI, and
- it was considered that this approach would not disrupt a market that was under strain at the time and improved information disclosure requirements would reduce risks associated with foreign insurers from low status jurisdictions.

The Government's Response

Treasury Discussion Paper 2005

The Department of Treasury (Treasury) published a discussion paper, *Regulation of Discretionary Mutual Funds and Direct Offshore Foreign Insurers*, in December 2005 (the Government's discussion paper) and invited submissions.¹¹

The Government's discussion paper sought to address the following issues relating to prudential regulation of DMFs and DOFIs:¹²

DMFs

- determining a mechanism to prudentially regulate DMFs
- how to define 'contingent risk'
- structuring an exemption for 'no contingent risk'
- eligibility for the exemption
- information to be collected
- transitional arrangements
- APRA's enforcement powers, and
- additional consumer protection measures on exempt DMFs.

11. Department of Treasury, *Regulation of Discretionary Mutual Funds and Direct Offshore Foreign Insurers*, discussion paper, December 2005.

12. *ibid.*, pp. 4 and 5.

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DOFIs

- defining ‘marketing insurance’ in Australia
- assessing eligibility of comparable regimes for exemption
- information to be collected
- what are other possible exemptions
- how to determine and implement the ‘market significance test’
- transitional issues
- determining appropriate enforcement powers for APRA, and
- additional consumer protection measures on exempt DOFIs.

Submissions to the Government’s Discussion Paper

Submissions reflected a variety of responses to the proposals in the Government’s discussion paper.

There was general agreement with the proposals in the Government’s discussion paper.

However, while some submissions provided in-principle support for the proposals in the Government’s discussion paper, those submissions also expressed concerns regarding aspects of those proposals such as costs of implementation¹³ and the difficulty of implementing the measures proposed.¹⁴

A view was also expressed that the objectives of the Potts Review and the Government’s discussion paper — to prohibit commercial arrangements that had worked satisfactorily and to target areas of highest risk — were not met by the proposals outlined in the Government’s discussion paper.¹⁵

Government’s Media Release (May 2007)

On 3 May 2007, the Government announced reforms relating to DOFIs and DMFs after consulting with stakeholders.¹⁶

13. See Victorian Government, *Submission*, p. 1; Medical Indemnity Protection, *Submission*, p. 2; APRA, *Submission*, pp. 1–3.

14. See QBE Insurance Group, *Submission*; APRA, *Submission*.

15. See National Insurance Brokers Association, *Submission*, p. 1.

16. The Hon. Peter Dutton MP, Minister for Revenue, *Enhancing the Integrity of Insurance in Australia*, media release, Parliament House, Canberra, 3 May 2007 at: <http://assistant.treasurer.gov.au>, accessed on 25 July 2007.

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According to the Government, the purpose of these reforms is to protect consumers and businesses buying insurance and to ensure that Australian insurance businesses remain internationally competitive.¹⁷

APRA's Response to the Government's Media Release

APRA stated that it would modify its current prudential framework to clarify how it will apply to different categories of insurers according to their risk profiles and undertook to release a discussion paper and to consult with the insurance industry.¹⁸

Senate Committee Inquiry into the Bill

On 21 June 2007, the Bill was introduced into the House of Representatives by the Parliamentary Secretary to the Treasurer, the Hon. Mr Chris Pearce, MP and the Bill was referred to the Senate Standing Committee on Economics (the Committee) for inquiry and report.¹⁹

Most of the submissions to the Committee's inquiry indicated support for the Bill in principle. However, concerns were expressed regarding:

- ability of professions to obtain adequate levels of professional indemnity insurance²⁰
- access of Australian companies to DOFIs,²¹ and
- lack of clarity regarding exemption provisions in the Bill.²²

The Committee also noted evidence that Treasury is planning further consultation with stakeholders regarding exemptions and that it aims to achieve a balance between maintaining prudential standards with exemptions that are practical, of minimal costs to

17. *ibid.*

18. APRA, *APRA announcement on foreign insurers and discretionary mutual funds*, media release, 3 May 2007.

19. The Senate Standing Committee on Economics, *Financial Sector Legislation Amendment (Discretionary Mutual Funds and Direct Offshore Foreign Insurers) Bill 2007 and Corporations (National Guarantee fund Levies) Amendment Bill 2007*, report to the Senate, 1 August 2007.

20. See Association of Consulting Engineers Australia, *Submission*, p. 3.

21. See Law Council of Australia, *Submission*, p. 2; National Insurance Brokers Association, *Submission*, p. 3; Underwriting Agencies Council, *Submission*, pp. 2 and 3.

22. See Insurance Council of Australia, *Submission*, pp. 3–5; National Insurance Brokers Association, *Submission*, p. 3.

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government and customers, as well as being flexible in adapting to insurance market cycles.²³

In its report released on 1 August 2007, the Committee stated that it is:

satisfied that the consultative mechanism to be implemented by Treasury with regard to DOFI exemptions will produce a set of regulatory provisions that will satisfy the requirements of Australian businesses for access to suitable insurance products, while still maintaining the required prudential standards for the insurance industry. The Committee supports the closure of regulatory gaps identified by the HIH Royal Commission, and the International Monetary Fund. The Committee does not share the fears expressed by some witnesses as to possible significant negative market effects from changes to regulation. Nonetheless, Treasury and APRA should actively monitor market effects to be certain of this.²⁴

The Committee recommended that the Bill be passed.²⁵

Position of significant interest groups

The following organisations' positions on the Bill are contained in their submissions to the Committee's inquiry on this Bill.

Underwriting Agencies Council (UAC)

UAC represents more than 65 full members who are underwriting agencies in Australia.²⁶ These agencies manage insurance transactions on behalf of principal insurers, many of whom are based overseas.²⁷

UAC agrees that

under-capitalised insurers that may be domiciled in jurisdictions that are unregulated or insufficiently regulated are a risk and should not be supported.²⁸

However, UAC pointed out that:

23. The Senate Standing Committee on Economics, op. cit, p. 11.

24. *ibid.*, p. 12.

25. *ibid.*

26. UAC, *Submission*, p. 1.

27. *ibid.*

28. *ibid.*, p. 2.

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Australian insurance buyers need to be able to access offshore markets because the products and services they require are often unavailable in the Australian market, or unavailable at an affordable price ...²⁹

and expressed concern that:

Some UAC members place only small portions of premium income with DOFIs and it is unlikely those DOFIs would agree to fund the cost of being regulated in Australia when their premium income derived from domestic business is very low ... [D]espite the fact that these insurers may offer innovative products, underwriting expertise and capacity, if they view the burden of regulation under the Insurance Act 1973 as too onerous, their skills and abilities will be lost to the Australian market.³⁰

Association of Consulting Engineers of Australia

The Association of Consulting Engineers of Australia (ACEA) is an industry body representing firms that provide engineering technology and management consulting services.³¹

ACEA expressed concern about the effect of the Bill on the ability of the consulting engineering industry to obtain professional indemnity insurance cover, without which, engineering and consultancy services would be unavailable to governments, industry and consumers.³²

According to ACEA:

the proposal in the DOFI Bill will be detrimental for consumers because decreased competition from DOFIs coupled with the requirement to buy locally means that insurers are less likely to provide cover at commercially competitive rates or to insure an adequate range of risks, because they have a captive market. Even if local insurers do attempt to manage larger and more complex risks, previously insured overseas, they will look to spread that risk by increasing the cost of premiums.³³

In addition, ACEA recommended that:

1. ...the Bill be amended to reflect the preferred approach set out in the Potts Review, that is:

29. *ibid.*

30. *ibid.*, p. 3.

31. ACEA, *Submission*, p. 2.

32. *ibid.*, pp. 3, 5–6.

33. *ibid.*, p. 3.

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“Allow DOFIs marketing insurance in Australia to be exempt from prudential regulation in Australia if they are domiciled in a country APRA considers to have comparable prudential regulation, subject to a market significance threshold to prevent established authorised insurers moving offshore. DOFIs not meeting this test would be able to market insurance in Australia as an authorised insurer, through a branch or subsidiary.”

2. If the DOFI Bill progresses unamended then Professional Indemnity Insurance must be exempt from the requirements in the Bill through the regulations.

3. ACEA also recommends that the issues surrounding the contractual behaviour of public and private sector clients and their understanding of risk must be addressed. The adoption of more appropriate risk management processes must be enforced in order to encourage the re-entry of Australian insurers back into the PI market.³⁴

National Insurance Brokers Association

The National Insurance Brokers Association (NIBA) represents insurance brokers in Australia, who handle approximately 90 per cent of insurance premium transactions by insurance brokers across Australia.³⁵

According to NIBA, insurance brokers in Australia must hold an Australian Financial Services (AFS) Licence and the Australian Securities and Investments Commission (ASIC) regulates them.³⁶

NIBA supports the provisions of the Bill relating to DMFs.³⁷

However, NIBA expressed several concerns about provisions relating to the DOFIs. These concerns are:³⁸

- the exemption details, one of the most important aspects of the proposed DOFI requirements, have yet to be determined and there is considerable doubt as to just how extensive they will be and to whom they will apply
- NIBA would not want to see any limiting of access to foreign insurers leading to restricted availability, higher premiums and a significantly lower level of competition in the Australian insurance market, and

34 *ibid.*

35 NIBA, *Submission*, p. 1.

36 *ibid.*

37 *ibid.*, p. 2.

38 *ibid.*, p. 3.

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- under the Bill, insurance brokers are prevented by law from performing functions that their clients are legally able to perform, namely placing insurance with overseas insurance companies not authorised by APRA. The extent of NIBA's concerns in this regard will very much depend on the extent and nature of the exemptions that are put in place.

In addition, NIBA stated that, in relation to larger businesses, global markets:

provide these businesses with consistency of cover particularly for more complex risks and in a hard market cycle are often the only markets offering meaningful cover.³⁹

Law Council of Australia

The Law Council of Australia (the Law Council) is the peak national representative body of the legal profession in Australia.⁴⁰

The Law Council pointed out that DOFIs offer greater scope and specialisation of cover particularly in relation to complex risks and expressed concern that:

the Bill will have an unnecessarily disruptive effect on the insurance markets and its members. It is an effect likely to become even more pronounced upon a return to a hard market cycle.⁴¹

In addition, the Law Council submitted that the proposed exemption provisions would increase the industry's bureaucratic compliance burdens and administration costs, pointing out that this is at odds with the Government's stated aim to streamline compliance costs and burdens of Australian businesses.⁴²

According to the Law Council:

The Bill will increase costs for DOFIs. DOFIs not presently subject to the requirements of the Insurance Act 1973 will incur significant costs ensuring that their arrangements are not caught to come within the proposed regime. Where their practices do bring them within the scope of the Bill's regime, DOFIs will face costs in ensuring their compliance with the new requirements...

39 *ibid.*, p. 4.

40 Law Council of Australia, *Submission*, p. 10.

41 *ibid.*, p. 5.

42 *ibid.*

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However, where the DOFI has already organised its capital and investment strategy and its systems and procedures in compliance with its own regulatory requirements, any changes required to comply with Australia law would be likely to be significant.⁴³

As a result, the Law Council also expressed concern that DOFIs that do not seek to become authorised in Australia may no longer make their products available.⁴⁴

The Law Council argued that the loss of access to these DOFIs will have several detrimental effects including:

Reduce access to global markets that offer diversity, specialisation of products and consistency of cover across market cycles. Such markets also allow sophisticated consumers to develop risk analysis and management skills required to transact globally;

...

Local cover would in an environment of reduced competition become more expensive. The presence of overseas insurers in the market place increases the competitiveness and efficiency of local insurers;

...

Clients at times require their legal advisors to carry high levels of insurance cover. If such cover were not available locally on appropriate terms, it could affect the ability of Australian law firms to act for such clients; ...⁴⁵

Insurance Council of Australia

The Insurance Council of Australia (the Insurance Council), which is the representative body of Australia's general insurance industry,⁴⁶ agreed with the general objectives of the Bill but emphasised that consumer protection and level regulation are paramount.⁴⁷

However, the Insurance Council expressed concern that the proposed exemption regime would not give force to what it considers as being paramount objectives.⁴⁸

43 *ibid.*, p. 7

44 *ibid.*, p. 5.

45 *ibid.*, pp. 7–8.

46 Insurance Council of Australia, *Submission*, Attachment, p. 1.

47 Insurance Council of Australia, *Submission*, p. 1.

48 *ibid.*

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According to the Insurance Council:

Exemptions should be minimal and only where there is a demonstrated inability of Australian insurers to provide cover.⁴⁹

Financial implications

There are likely to be costs implications for all stakeholders of this Bill, including Australian insureds that use DOFIs and Australian authorised insurers. However, those costs are difficult to estimate at this stage.

The Digest will focus on costs to DFOIs and APRA.

DFOIs

There would be significant financial costs to DOFIs as any DOFI wishing to carry on a business in Australia must comply with requirements.

The current application fee for APRA authorisation as a general insurer is \$68 200.⁵⁰

In addition, there would be ongoing reporting costs and for those DOFIs providing professional indemnity cover, a National Claims and Policy Database levy.⁵¹

APRA

There would be significant administrative costs relating to:

- processing applications from DOFIs seeking APRA authorisation
- monitoring compliance, and
- enforcement.

It is stated that APRA's costs in modifying its prudential framework are estimated at between \$500 000 and \$1 000 000.⁵²

49 Insurance Council of Australia, *Submission*, Attachment, p. 3.

50 See: <http://www.apra.gov.au/AboutAPRA/upload/Instrument-fixing-charges-to-be-paid-to-APRA-for-applications-for-authorisation-as-an-ADI-general-insurer-or-life-company>.

51 See: *Explanatory Memorandum*, para 6.49, p. 78.

52 *ibid.* para 6.55, p. 80.

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In addition, there would be the costs involved in monitoring the exemptions and data gathering.⁵³

Key issues

Several key issues have been identified through the consultation process regarding this Bill. These are the need to:

- protect consumers of insurance and insurance-like products
- ensure that Australian businesses remain internationally competitive
- minimise administration costs of compliance with proposed requirements
- ensure that the industries and professions in Australia faced with more complex risks have access to adequate types and levels of cover, and
- ensure that the implementation of proposed provisions of the Bill is not overly burdensome.

Main provisions

Schedule 1

Schedule 1 of the Bill proposes amendments to the *Financial Sector (Collection of Data) Act 2001*.

The proposed provisions in **Schedule 1** enable APRA to collect information about and monitor DMFs.

Item 4 of **Schedule 1** sets out what is and is not a DMF. A DMF is a fund to make discretionary payments when a specified event happens, in circumstances where it is uncertain whether or when that event will happen. A DMF is either:

- a fund to which more than one person contribute. Payments out of a DMF may be made in relation to contributors' liabilities, losses damages or expenses, or
- declared to be a DMF, or is included in a class of funds declared as being DMFs, by regulations.

A fund is not a DMF if:

53 *ibid.* para 6.56, p. 80.

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- a contributor has a legal or equitable right to payment for liabilities, losses damages or expenses, or
- regulations declare that the fund is not a DMF or that the class of funds in which the fund is included are not DMFs.

Item 6A of the Bill proposes that, in relation to DMFs, the Act would not apply to State insurance that does not extend beyond the limits of that State. This is because under the Constitution, Federal Parliament's legislative power does not extend to intra State insurance.

Schedule 2

Schedule 2 of the Bill relates to DOFIs and proposes amendments to the *Corporations Act 2001* (the Corporations Act) and the Insurance Act.

Corporations Act

Item 1 proposes a **new section 985D** to be inserted in the Corporations Act prohibiting Australian Financial Services Licensees and their authorised representatives from dealing in general insurance products that are not obtained from authorised insurers, unless it does not constitute insurance business as defined in section 3A of the Insurance Act.

An insurer is authorised if that insurer is:

- a general insurer or Lloyd's underwriter under the Insurance Act, or
- as otherwise determined by the Insurance Act.

According to the proposed **Note** in **section 985D(2)**, the defendant had the evidentiary burden of proving that it, he or she was not engaged in insurance business as defined. According to subsection 13.3(6) of Schedule 1 of the *Criminal Code Act 1995* (the Criminal Code)

"evidential burden" , in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

According to the proposed **section 985D(4)**, failure to comply is a strict liability offence. Strict liability is defined in section 6.1 of the Criminal Code as liability in which there are no fault elements (in other words, the mere fact that the event has occurred is sufficient to establish liability) and the defence of mistake is available.

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Concerns of the Senate Standing Committee on Scrutiny of Bills regarding subsection 985D(4)

This Committee noted that the Explanatory Memorandum to the Bill does not refer to **subsection 985D(4)** nor explain why it was necessary to create a strict liability offence.⁵⁴

The Committee has sought the Treasurer's advice as to whether matters in Part 4.5 of the *Framing of Commonwealth Offences, Civil Penalties and Enforcement Powers* were considered when creating this provision.⁵⁵

In addition, the Committee stated that:

Pending the Treasurer's advice, the Committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.⁵⁶

Insurance Act

Item 3 proposes amendments to the definition of authorised person in **subsection 3(1)** of the Insurance Act relating to the definition of authorised person. Except for the new **Part VA** of the Insurance Act, authorised person would refer to a person authorised in writing by APRA under section 3(1A) of the Insurance Act. For the purposes of **Part VA**, authorised person would refer to APRA or a person authorised in writing by APRA for the purposes of **Part VA**.

Items 4-6 proposes amendments to the definition of insurance business **subsection 3(1)**.

According to **item 5**, reinsurance business conducted by foreign reinsurers that are not general insurers would not be included in the definition of insurance business.

Item 6 proposes **new subsections 3(5), 3(6) and 3(7)**, which clarify what is meant by 'a business incidental to insurance business' and 'to carry on insurance business in Australia'.

A person's business is incidental to insurance business to the extent that it involves:

- inducing others to enter into insurance contracts with that person as insurer

54 The Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, Report to the Senate, No. 8 of 2007, 8 August 2007, p. 17.

55 *ibid.*

56 *ibid.*

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- publishing or distributing statements that the person is willing to enter into insurance contracts as insurer, and/or
- getting such a statement published or distributed.

A person carries on an insurance business in Australia if that person carries on a business outside Australia, which if it was carried on within Australia, would be regarded as insurance business under the Insurance Act and a second person in Australia acts either:

- directly or indirectly on behalf of the first person
- as an insurance broker of insurance provided by the first person, or
- directly or indirectly on behalf of that insurance broker.

In addition, in determining whether a person carries on insurance business in Australia, the following acts done outside of Australia are taken to occur in Australia to the extent that it has effect in Australia:

- inducing others to enter into insurance contracts with that person as insurer
- publishing or distributing statements that the person is willing to enter into insurance contracts as insurer, and/or
- getting such a statement published or distributed.

Item 7 proposes transitional provisions. **Item 6** amendments would not apply to entities or a class or entities specified in the regulations for a period of time specified in the regulations, which would be less than two years.

Item 8 proposes a **new section 3A**, which refers to the regulations that would specify when insurance contracts do not constitute insurance business. This relates to the exemptions that will be covered by regulations.

Concerns of the Senate Standing Committee on Scrutiny of Bills regarding para 3A(3)(a)

The Committee noted that **proposed para 3A(3)(a)** provides that a determination that would be made under the regulations pursuant to **para 3A(1)(b)** is not a legislative instrument and that the Explanatory Memorandum to the Act did not address this provision.⁵⁷

The Committee sought the Treasurer's advice as to whether:⁵⁸

- the provision is declaratory or substantive, and

57 The Senate Standing Committee for the Scrutiny of Bills, op. cit, pp. 17–18.

58 *ibid.*, p. 18.

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- this information with a rationale for a substantive exemption could be included in the Explanatory Memorandum.

According to the Committee:

it may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.⁵⁹

Item 9 proposes a **new section 11A** that would enable APRA to seek an injunction restraining unauthorised insurance business activity. This includes:

- restraining injunctions to restrain or require an action
- interim injunctions, and
- consent injunctions.

Injunctions may be varied or discharged.

APRA is protected from having to give undertaking as to damages as a condition of granting an interim injunction.

The Court may make an order for damages instead of issuing a restraining injunction.

The effect of these proposed amendments is that DOFIs that carry on insurance business in Australia directly or through agents or brokers will be captured by the Insurance Act. Unless they are subject to an exemption, these DOFIs must become authorised under sections 9 and 10 of the Insurance Act in order to carry on an insurance business in Australia.

Item 12 proposes a **new Part VA**, dealing with investigations of unauthorised insurance. These new provisions would give additional powers enabling APRA to investigate alleged instances of unauthorised insurance business, as well as the aiding and abetting thereof. This includes access to premises, as well as securing the co-operation of another in producing documents and providing assistance.

Concern expressed by the Senate Standing Committee on Scrutiny of Bills regarding subsection 62D(2)

The Committee noted that proposed **subsection 62D(2)** would negate the privilege against self incrimination for a person who must provide information or produce a document under proposed **section 62C**.⁶⁰

59 *ibid.*

Warning:

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The Committee recognises that public benefit in obtaining information may outweigh any breach of civil rights and notes that the circumstances in which such information is admissible as evidence in proceedings is limited. However, the Committee also notes that such limitation only applies to information directly provided by the person, not to information that is obtained indirectly.⁶¹

The Committee sought an explanation from the Treasurer about this and warned that:

Pending the Treasurer's advice, the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.⁶²

Items 13-28 propose amendments to **section 63** relating to the review of certain decisions. These amendments are in particular:

- new definition of 'decision maker'
- new definitions of 'person affected by a reviewable decision' and 'reviewable decision', and
- repealed definition of 'person affected by a reviewable decision of the Treasurer or APRA' and 'reviewable decision of the Treasurer'.

A reviewable decision would mean a decision of the decision maker, in other words, the Treasurer, APRA or whoever makes a determination under **proposed subsection 3A(3)**.

Items 29-33 propose amendments to **section 64** in relation to Statements accompanying notification of decisions. These amendments correspond to the new definition of decision maker in **section 63**.

Item 36 proposes **new sections 115AA and 115AB** that would enable APRA to access information relating to alleged instances of unauthorised insurance business activities.

Concern expressed by the Senate Standing Committee on Scrutiny of Bills regarding subsection 115AB(2)

The Committee expressed concern about the possible abrogation of the privilege of self incrimination in the **proposed subsection 115AB(2)**.⁶³

60 *ibid.*

61 *ibid.*, pp. 18–19.

62 *ibid.*, p. 19.

63 *ibid.*, p. 18.

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Please refer to the same discussion above regarding **proposed subsection 62D(2)**.

Items 37 and 38 propose changes to the procedure relating to obtaining of warrants.

Items 39-52 propose amendments to **section 118** relating to the clarification of the requirements and role of agents in Australia.

In particular, an agent appointed under **section 118** would have to be:

- an individual Australian resident
- a body corporate that is incorporated in Australia, or
- an entity that is specified in the regulations as agent for the purposes of **section 118**.

Schedule 3

Item 1 of Schedule 3 proposes a small change to the **note** at subsection 889J(2) of the Corporations Act, specifying a limit on the amount of levy payable to the Securities Exchanges Guarantee Corporation in a financial year under the *Corporations (National Guarantee Fund Levies) Act 2001*.

This proposed amendment supports the amendments proposed in the Corporations (National Guarantee Fund Levies) Amendment Bill 2007.⁶⁴

Conclusion

The Government has stated that these proposed amendments will

enhance the protection for Australians buying insurance and will encourage competition and innovation in the Australian general insurance market.⁶⁵

However, serious concerns have been expressed by several stakeholders regarding the financial and administrative costs that would be borne by the Government and persons engaged in insurance business in Australia, as well as consumers of services in Australia.

64 See Sharon Scully, 'Corporations (National Guarantee Fund Levies) Amendment Bill 2007', *Bills Digest* no.31, 2007–08, Parliamentary Library, Canberra, 14 August 2007.

65 Chris Pearce, Parliamentary Secretary to the Treasurer, 'Second Reading Speech: Financial Sector Legislation Amendment (Discretionary Mutual Funds and Direct Offshore foreign Insurers) Bill', House of Representatives, *Debates*, 21 June 2007, p. 15 at: <http://parlinfoweb.parl.net>.

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Particular concerns have been expressed regarding potential provisions relating to exemptions that are yet to be clarified. It is understood that these provisions will be subject to further consultation with stakeholders.

Due to the as yet unresolved concerns, Parliament may consider including a provision allowing for a review of the amendments proposed by the Bill within a specified period of time.

Lastly, the Senate Standing Committee for the Scrutiny of Bills has expressed several important concerns regarding provisions of the Bill and has asked for explanation by the Treasurer.

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