



Investment & Financial Services Association Ltd
ACN 080 744 163

15 July 2003

Ms Louise Gell
Acting Secretary
Senate Legal and Constitutional Committee
Room S1.61, Parliament House
Canberra ACT 2600
AUSTRALIA

Dear Ms Gell

**Family Law Amendment Bill 2003 – Schedule 6: Orders and Injunctions
Binding Third Parties**

The Investment and Financial Services Association (IFSA) is writing to the Senate Legal and Constitutional Committee to raise serious concerns with implementation aspects of Schedule 6 of the abovementioned Bill. Having not been consulted on the Bill, and in particular the binding of third parties, we met on 4 July 2003 with officers from Attorney General's, Treasury and Family and Community Services to voice our concerns. Whilst our views were conveyed at that meeting, we remain unclear as to whether they will be taken into consideration, hence this submission.

IFSA is a not-for-profit association representing Australia's largest fund managers, life insurers and public offer superannuation funds. Our members manage some \$620b in assets on behalf of 9 million investors.

Summary of concerns

We state at the outset that as a professional financial services industry we do not wish to impede, or reject outright, the policy aim of providing the Court with some power to direct third parties to facilitate property settlement where needed.

IFSA members are simply concerned with the provisions in Schedule 6 of the Family Law Amendment Bill 2003 (the Bill) that may lead to inequitable treatment of certain products, unclear and uncertain provisions that leave more questions than answers, and excessive implementation costs for both the industry, and parties to proceedings. This schedule provides expansive powers to the Family Court to bind third parties for the purposes of re-distributing the property of parties to a marriage in the event of marriage breakdown.

Schedule 6 to the Bill inserts a new Part VIII A - “Orders and injunctions binding third parties”. The stated object of this Part is to provide the Court with the power to make orders (under s79 or s114 of the Family Law Act 1975 – the Act) or grant injunctions (under s114 of the Act) that are directed to a third party, or that **alter the rights, liabilities and property interests of the third party**.

What third parties are affected?

The third parties against which orders can be made include financial institutions such as life companies, responsible entities of managed investment schemes, banks and other lending institutions as well as other businesses, friends and family. The main focus of IFSA’s concern is the impact on life companies and responsible entities.

How are third parties affected?

The provisions specifically bind third parties for the purposes of re-assignment/division of marital property by allowing the Court to make orders directed to the third party, which may alter contractual arrangements.

The Explanatory Memorandum states “The provision is intended to apply only to the procedural rights of the third party it is not intended to extinguish or modify the underlying substantive property rights of third parties.”

IFSA is doubtful that the law actually reflects this principle. This is particularly so when other statements make it abundantly clear that ownership rights can be altered in favour of one party as against another. We question the stated drafting assumption that the Court would only make orders binding third parties to achieve what the owner of the investment or policy could do of his or her own motion under the contract. The legislation does not stipulate this – the apparent power is far wider and less clear. The orders that the Court may make include:

- Substituting the party, or parties, liable for a debt
- Adjusting the proportion of a debt each party is liable to pay
- Ordering directors of a company to accept a transfer of shares between the parties to the marriage
- **Any** other order that:
 - directs a third party do a thing concerning the property of a party to the marriage
 - alters the rights, liabilities or property interests of a third party concerning the marriage.

Furthermore, s90AD provides that proposed Part VIII A overrides any other law (whether written or unwritten) of the Commonwealth, a State or Territory, and anything in a trust deed or other instrument.

IFSA believes that this clearly enables the Court to make orders binding third parties that are more than merely procedural or administrative in nature.

What are some of the practical implications?

The obligations and liabilities of third parties in meeting court orders with respect to other laws, for example PAYG tax withholding, tax reporting, issuance of disclosure documents to non-contracting parties and social security implications, is unclear. IFSA understands that relevant Commonwealth departments have committed to undertaking analyses to determine whether and what consequential changes may be needed to give proper and clear effect to the Government's policy with regard to binding third parties for this purpose.

Many of the products likely to be impacted by this Bill include contracts that are similar in nature to superannuation savings and pension benefits, which were the subject of extensive changes coming into effect from 28 December 2002 (under Part VIII B of the Act). IFSA understands that these new proposals are intended to create a fundamentally different regime for similar financial products. It is not IFSA's intention at this point to debate the merits of such an approach, but we do believe this will lead to arbitrage and confusion.

This Bill, should it become law, will also require substantial business and compliance changes, which will take some time to determine and implement. The time frame of 28 days from Royal Assent, for example, is too short a timeframe for such substantial and uncertain change. IFSA strongly urges an extension to 12 months from date of Royal Assent to enable companies to prepare.

Does the Bill afford third parties any protection?

Although there are limits on the Family Court's powers under Part VIII A A, IFSA questions whether these provisions are sufficient to protect the rights of third parties.

An order or injunction must be "reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage". Without significantly clearer provisions, IFSA is unconvinced that this adequately protects third parties. The largely unfettered scope of the provisions makes it difficult to confidently state when it would be reasonable to:

- Prevent or restrain a third party from enforcing a legally binding contract
- Alter the rights, liabilities or property interests of a third party
- Change the party or parties with whom the third party originally contracted.

Similarly, the provision which provides that the Court may make an order where a debt exists if it determines that it is reasonably foreseeable that the debt will be repaid, fundamentally changes the legal and business relationship between the third party and the contracting party (parties). The provision effectively requires the Court to exercise commercial judgement and we are strongly opposed to the effective substitution of the court's credit risk assessment/decision for that of the commercial operator. The approach essentially increases the legal risk for the third party without satisfactory protection.

The "procedural fairness" protection is insufficient in the context of the scope of power afforded to the court by the Bill. There is no impediment to the court making

orders to which the third party has objected. We note that the Explanatory Memorandum, states that procedural fairness only operates primarily to give the third party the right to be notified of orders and the right to be heard. Whilst, in part, this may be a positive change in that third parties are enjoined at an earlier stage (prior to orders being finalised), given the scope of the power accorded the court by these proposals, IFSA recommends consent by the third party be a prerequisite. We acknowledge that such a provision would need to be subject to a caveat such that a third party could not deliberately or unreasonably obstruct the court for the purposes of settling property in a matrimonial cause.

What are the consequential issues?

The consequences of the scope of provisions and the imprecision regarding the powers of the court are that:

- Third parties are not sufficiently protected from being bound by orders which are inappropriate or overly difficult to implement;
- It is not possible to determine, with any reasonable precision, the consequential impact of orders made in respect of various financial products/instruments under taxation, corporations and social security laws.

This will inevitably lead to unpredictable and potentially costly outcomes for the third parties as well as the Court and the affected parties.

What is IFSA seeking?

IFSA recommends that:

- Schedule 6 be excised from the Bill to enable full and open consultation with the financial services (and banking) industry. The Bill was tabled in Parliament without consultation taking place (for these sectors). IFSA would like the opportunity to discuss the provisions in the interests of ensuring a practical, equitable and robust regime.
- Failing excision, the Bill should not be debated until full consultation has been undertaken and amendments are moved in the House.
- The Bill should not be progressed without the tabling (or at least final drafting) of consequential amendments to relevant laws such as tax, corporations and social security law. IFSA believes this should co-ordinated through the Department of Treasury.
- Consideration be given to expanding the protection afforded to third parties by limiting orders that can be made by the court without the consent of affected third parties.
- Should the Bill become law, IFSA strongly urges an extension to 12 months from date of Royal Assent to enable companies to prepare.

We state again that this industry does not wish to impede, or reject outright, the policy aim of providing the Court with some power to direct third parties to facilitate property settlement where needed. In fact, the financial services sector's co-operation in such matters is evidenced by its extensive involvement and commitment to the implementation of the superannuation and family law regime.

We wish to work with relevant departments and Government to achieve the most appropriate, simple yet robust outcome possible within the broader policy framework in a considered and mutually beneficial manner. I can be contacted on (02) 8235 2514 for further questions or discussions.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'J. Bloch', with a long, sweeping horizontal stroke underneath.

Jo-Anne Bloch
Deputy Chief Executive Officer