

# BUZZ

## AON CONSULTING LEGAL NEWS

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## Superannuation

### Short and simple product disclosure statements

The regulations prescribing the new Product Disclosure Statement (PDS) requirements for margin loans, superannuation funds and simple managed investment schemes have been released in Corporations Amendment Regulations 2010 (No.5).

#### Commencement

These regulations commenced on 22 June 2010.

#### Transitional period

The provisions for superannuation and managed investment scheme PDSs provide for a transitional period of 24 months for implementation. After the initial 12 months, businesses will have to comply with the new regime if they amend an existing PDS or offer new products requiring a new PDS. After 24 months, all PDSs will need to comply with the new regime.

The margin loan PDS provisions apply from 1 January 2011, coinciding with the date when margin loans come under Commonwealth regulation.

#### Format

The regulations state that the total length of the PDS (not including any matter in writing that is applied, adopted or incorporated) must not exceed:

- ↘ if it is printed on A4 pages — 8 pages; or
- ↘ if it is printed on A5 pages — 16 pages; or
- ↘ if it is printed on DL pages — 24 pages; or
- ↘ otherwise — if it is formatted to be printed on A4 pages, 8 A4 pages.

The PDS may include additional sections after sections 1 to 9 provided that it does not exceed the lengths above.

The minimum font size for text is:

- ↘ for the name, address, ABN and AFSL of the person giving the Statement — 8 points; and
- ↘ for all other text — 9 points.

### Content requirements

The PDS must include sections which must be numbered and titled as follows:

1. About [name of superannuation product]
2. How super works
3. Benefits of investing with [name of superannuation product]
4. Risks of super
5. How we invest your money
6. Fees and costs
7. How super is taxed
8. Insurance in your super
9. How to open an account.

The PDS must also include:

- a table of contents that set out the titles above; and
- the telephone number of the superannuation trustee.

The PDS must advise that:

- it is a summary of significant information and contains a number of references to important information (each of which forms part of the Statement); and
- the person should consider that information before making a decision about the product; and
- the information provided in the Statement is general information only and does not take account of the person's personal financial situation or needs; and
- the person should obtain financial advice tailored to the person's personal circumstances; and
- display the advice:
  - o at or near the beginning of the document; and
  - o in a prominent position and style.

### Incorporation by reference

If a PDS applies, adopts or incorporates a matter, the matter must be:

- in writing; and
- clearly distinguishable from the other content of the PDS

Source

Corporations Amendment Regulations 2010 (No.5)

[http://www.comlaw.gov.au/ComLaw/legislation/LegislativeInstrument1.nsf/0/EE214006E82FDBFCA2577450015B870/\\$file/0927254A100607EV.pdf](http://www.comlaw.gov.au/ComLaw/legislation/LegislativeInstrument1.nsf/0/EE214006E82FDBFCA2577450015B870/$file/0927254A100607EV.pdf)

## AUSTRAC's observations on reporting entities that provide only Item 54 designated services

The Australian Transaction Reports and Analysis Centre (AUSTRAC) has released Information Circular No. 71 containing its observations on compliance by reporting entities that provide only Item 54 designated services (e.g. reporting entities that are AFSL holders and that make arrangements for a person to receive a designated service such as opening an account with a superannuation fund).

While the report is specific to Item 54 services, it provides guidance for superannuation funds on AUSTRAC audit focus areas and may assist funds in determining money laundering and terrorism financing (ML/TF) risks when providing financial advice.

The report notes several practices that, if adopted, would benefit reporting entities. It also includes an annexure that provides examples of ML/TF indicators to assist Item 54 Providers when assessing the risks they might reasonably face and also when determining the appropriate conditions for identifying when a suspicious matter arises.

Examples of AUSTRAC's recommendations are as follows:

1. AUSTRAC has encountered AML/CTF programs that merely recite the AML/CTF Act and the AML/CTF Rules. AUSTRAC indicates that while the legislation often outline the requirements for appropriate risk-based systems and controls or procedures to be established, the reporting entities still need to specify what the controls and procedures should be. They should do so having regard to the nature, size and complexity of the Item 54 Provider.
2. AUSTRAC also indicates that it encountered reporting entities that failed to conduct adequate risk assessment. For example, they would attribute a low risk to all customers but provide no criteria or reason to explain why such a risk rating was given.
3. AUSTRAC indicates that apart from including a procedure for minimum KYC information to be collected and verified for each customer type, special AML/CTF programs that complied were able to determine what situations arose to collect more KYC information or refer to a higher authority if required.
4. Some Item 54 Providers were unable to explain what further training would take place or at what frequency refresher training would occur.
5. Whilst the AML/CTF legislation do not specifically require an Item 54 Provider to establish a procedure to assist it in lodging a suspicious matter report, AUSTRAC considers that it is good practice to do so. This procedure may address:
  - ✦ The conditions to identify a suspicious matter
  - ✦ The escalation process
  - ✦ The investigation process and its outcomes
  - ✦ The steps once an opinion has been formed regarding a suspicious matter
6. The timeframes for reporting to AUSTRAC.
7. AUSTRAC indicates that better AML/CTF programs will typically outline the role and functions of those responsible for its oversight.
8. AUSTRAC also indicates that it is good practice for an Item 54 Provider to have procedures to conduct a regular review of its special AML/CTF program to ensure its compliance with the legislation and the effectiveness of its procedures and controls.

Source

Australian Transaction Reports and Analysis Centre, Information Circular No. 71, June 2010.

[http://www.austrac.gov.au/files/aic71\\_item54.pdf](http://www.austrac.gov.au/files/aic71_item54.pdf)

## Westpac ASFA Retirement standard

The Westpac ASFA Retirement Standard has been revamped to reflect changes in living standards, new expectations of retirees and their evolving spending patterns.

The Standard is available from the Association of Superannuation Funds of Australia (ASFA) website.

Westpac has also announced its decision to pay superannuation on unpaid parental leave for all permanent employees, effective 1 July 2010. Under the new initiative, Westpac will pay up to 39 weeks in employee superannuation contributions in addition to its existing parental leave entitlements of 13 weeks superannuation and 13 weeks full pay. This means employee superannuation contributions will now be paid for the full year of their parental leave.

Source

Association of Superannuation Funds of Australia, Media release - Revamped Westpac ASFA Retirement Standard - A better picture of retirement needs, 28 June 2010.

Westpac, Media release - Westpac announces 12 months superannuation payments for employees, 29 June 2010.

## Insurance

### Insurance Contracts Act changes finally introduced into Parliament

Five years after the review of the Insurance Contracts Act by Alan Cameron and Clayton Utz consultant Nancy Milne, and three years after the exposure draft bill was released, the Insurance Contracts Amendment Bill 2010 has been introduced into Parliament. Although most of the Bill is similar to the exposure draft of 2007, there have been some changes as a result of industry consultation which we'll briefly highlight below.

#### The main areas of the Insurance Contracts Act being changed

The Bill amends the Insurance Contracts Act in these areas:

- duty of utmost good faith
- bundled contracts and unbundling contracts
- electronic communication
- powers of ASIC, including to take representative actions by ASIC on behalf of third party beneficiaries
- disclosure and misrepresentations, including remedies
- cancellation of contracts
- third parties' rights and obligations
- insurers' defences in actions by third party beneficiaries
- subrogation.

### What's changed since the exposure draft Insurance Contracts Amendment Bill

Clayton Utz indicates that two new sections have appeared since the exposure draft. There is now a right in section 55A for ASIC to take representative actions on behalf of third party beneficiaries, and a new section 59A deals with the cancellation of life insurance contracts by the insurer.

There have also been some drafting changes to the sections dealing with:

- ✎ expiration and renewal
- ✎ e-communications
- ✎ unbundling of life insurance contracts
- ✎ the rules for requests by third party beneficiaries for information from insurers.

Please refer below for more important changes.

### Disclosure requirements - some changes

Clayton Utz explains that section 21A which deals with the duty of disclosure before the original entering into of an "eligible" contract of insurance now precludes open ended requests for disclosure. Insurers must ask specific questions.

A new section 21B deals with the duty of disclosure before an "eligible" contract of insurance is renewed. The key issue here is that insurers must ask the insured before renewal to answer specific questions relevant to the decision to renew and the terms of renewal.

However in addition to this insurers can ask the insured to confirm or update previous disclosure. There will be no duty to disclose beyond these two options on renewal.

### Claims made and notified policies - changes since the exposure draft

Clayton Utz indicates that the biggest change is the removal of proposed changes to non-notification and relief under section 54. The exposure draft proposed giving insureds a 28-day window from the end of the policy period to notify the insurer of known facts that might give rise to a claim. If they did not do so, the insurer could then refuse the claim.

### Claims against insurer in respect of liability of insured or third party beneficiary

Clayton Utz indicates that if a person:

- ✎ is owed damages by an insured under a contract of liability insurance;
- ✎ that contract provides insurance cover in respect of the liability;
- ✎ and the insured is either dead or cannot be found.

That person currently can sue the insurer to recover an amount equal to the insurer's liability under the contract in respect of the liability of the insured.

The exposure draft bill proposed to expand this right to sue an insurer in two ways:

- ✎ first, the provision would cover not only insureds who owe damages, but also third party beneficiaries under the contract of insurance; and
- ✎ secondly, the person could sue the insurer not only when the insured or third party beneficiary is dead or missing, but also if the person has obtained judgment against the insured or third party beneficiary and they have no money or assets to pay the damages.

This second route has been dropped in the final version of the bill - obtaining judgment against a broke insured or third party beneficiary won't entitle you to sue the insurer.

### **“A contract” versus “the contract”**

Clayton Utz also indicates that currently an insurer can avoid a life insurance contract where there has been misrepresentation or a failure to comply with the duty of disclosure “if the insurer would not have been prepared to enter into a contract of life insurance with the insured on any terms if the duty of disclosure had been complied with or the misrepresentation had not been made [emphasis added]”. This has been interpreted to mean any contract at all. The draft bill would change section 29(3) to refer to “the contract” so that even if an insurer would have entered into a slightly different contract, it can still avoid the contract where there has been misrepresentation or a failure to comply with the duty of disclosure.

### **Next steps**

The Bill is expected to be debated in the Winter Parliamentary session of 2010.

#### Source

Australian Government, Review of the Insurance Contracts Act  
<http://icareview.treasury.gov.au/content/default.asp>

Clayton Utz, Insurance Contracts Act changes finally introduced into Parliament, 18 March 2010

[http://www.claytonutz.com/publications/news/201003/18/insurance\\_contracts\\_act\\_changes\\_finally\\_introduced\\_into\\_parliament.page](http://www.claytonutz.com/publications/news/201003/18/insurance_contracts_act_changes_finally_introduced_into_parliament.page)

## **Lost insurance policy – how to prove what is said or what is covered?**

If an insurance policy was in place at a particular time but the copy cannot be found, who has to establish its terms or any limits on the level of indemnity? The rules were set out in the High Court (*Wallaby Grip Limited v QBE Insurance (Australia) Limited*; *Stewart v QBE Insurance (Australia) Limited* [2010] HCA 9).

### **The employee, the employer, and the lost workers’ compensation policy**

Mr Angus Stewart (Stewart) held a workers’ compensation policy of insurance with the predecessor of QBE. The policy was held some 40 years before the trial, so the policy itself was not produced by either party. One of the preliminary issues was whether the policy was unlimited, as Stewart argued, or whether it was limited to the statutory minimum level of cover (\$40,000) under the Workers Compensation Act 1926, which was applicable at the time.

At first instance, the NSW Dust Diseases Tribunal held that the onus of proving the limit of liability rested with the party asserting the limit on the policy. No evidence was put forward by the insurer and it was therefore held that there was no limit of liability.

### **High Court decision**

Clayton Utz indicates that the High Court said that a contract of insurance normally has three elements: an insured event, the subject matter (such as the class of people being insured) and the cause of the loss (ie. the risk). With indemnity insurance, the word “indemnity” implies payment for the loss suffered, which is to say the whole loss. An insurer can try to limit it with a cap on the amount payable under the indemnity, but if that cap is not in place with statutory forms of policies, the insurer is on the hook for the entire amount awarded by a judgment against the insured.

### **So what does this mean for Mrs Stewart, Pilkington, Wallaby Grip and QBE?**

Clayton Utz explains that in this case, the policy said that the indemnity given by the insurer attached to the liability of the employer, which therefore extended to payment of the amount for which the employer was liable, according to a judgment or other determination.

Mrs Stewart had to establish that a contract of insurance under the Act was in existence at the relevant time and that Pilkington was liable to her husband for his injuries, both of which she did. That meant that the claim was within the terms of the cover provided and the insurer's obligation arose.

Clayton Utz concludes that the burden of proof then switched to QBE to show what limit, if any, had been placed upon its liability to indemnify. It did not do so, and so it is liable to pay the full amount awarded to Mrs Stewart.

### **What does this mean for insureds?**

Clayton Utz says that the High Court's reasoning is generally consistent with general insurance principles – that the insured bears the burden of proving the existence of a policy and that the loss falls within the insuring clause, while the insurer has to prove an exclusion or other restriction on the scope of indemnity – so in that sense it's no great surprise.

Clayton Utz further adds that although this might seem to make life easier for insureds whose policies have gone missing, there are still practical problems which were not present in this case, as the existence of the policy, its scope, and the liability were all known. For example, Wallaby Grip might have greater problems if it needed to show its insurance policies during the period of exposure included product liability cover, as it would not be able to point to standard terms in any legislation.

Source

[http://www.claytonutz.com/publications/news/201003/31/the\\_dog\\_ate\\_my\\_insurance\\_policy-\\_so\\_who\\_has\\_to\\_prove\\_what\\_it\\_said\\_or\\_what\\_it\\_covered.page](http://www.claytonutz.com/publications/news/201003/31/the_dog_ate_my_insurance_policy-_so_who_has_to_prove_what_it_said_or_what_it_covered.page)

## **Financial Planning**

### **Future of Financial Advice Taskforce**

The Financial Planning Association (FPA) has established a dedicated taskforce to respond specifically to the FPA's consultation program with Federal Treasury.

FPA indicates that the new taskforce, to be known as Future of Financial Advice (FoFA) Taskforce, will be building strong positions on each of the reform proposals that affect planners, ensuring members voices are clearly and directly carried through to government.

To attend the public information sessions which are designed to provide an overview of the reforms and give stakeholders an opportunity to ask questions and raise issues, visit <http://futureofadvice.treasury.gov.au> and to send an email to the FPA Taskforce drop a line to [futureofadvice@fpa.asn.au](mailto:futureofadvice@fpa.asn.au).

Source

Financial Planning Association, FPA Taskforce: Members' voice for Government, 17 June 2010.

[http://www.fpa.asn.au/FPA\\_LatestNews.aspx?EventGroup=1&EventItem=297](http://www.fpa.asn.au/FPA_LatestNews.aspx?EventGroup=1&EventItem=297)

## Seminars

### July – November 2010

#### July 13

ASFA NSW, Luncheon, The Cooper Pull Apart

Sydney Go to [www.superannuation.asn.au](http://www.superannuation.asn.au)

#### July 20

ASFA QLD, Luncheon, The Cooper Pull Apart

Brisbane Go to [www.superannuation.asn.au](http://www.superannuation.asn.au)

#### July 21

ASFA WA, Luncheon, The Cooper Pull Apart

Perth Go to [www.superannuation.asn.au](http://www.superannuation.asn.au)

#### July 21

AILA NSW, Twilight Seminar, Sports Insurance

Sydney Go to [www.aila.com.au](http://www.aila.com.au)

#### July 22

ASFA VIC, Luncheon, The Cooper Pull Apart

Melbourne Go to [www.superannuation.asn.au](http://www.superannuation.asn.au)

#### July 27

AILA NSW, Insurance Fundamentals Series – Liability Policies

Go to [www.aila.com.au](http://www.aila.com.au)

#### July 28

AILA NSW, Twilight Seminar, Financial Institutions Insurance

Sydney Go to [www.aila.com.au](http://www.aila.com.au)

#### July 29

ASFA VIC, Comms Forum/ Awards

Go to [www.superannuation.asn.au](http://www.superannuation.asn.au)

#### August 11

AILA NSW, Twilight Seminar, Rising to the Challenge

Sydney Go to [www.aila.com.au](http://www.aila.com.au)



### August 25

ASFA NSW, Trustee InFocus Seminar One

Norton Rose Group Go to [www.superannuation.asn.au](http://www.superannuation.asn.au)

### October 19

AILA NSW, Insurance Fundamental Series – Life Insurance Policies

Go to [www.aila.com.au](http://www.aila.com.au)

### November 10-12

ASFA SA, National Conference and Super Expo

Adelaide Go to [www.superannuation.asn.au](http://www.superannuation.asn.au)

### [aonmastertrust.com.au](http://aonmastertrust.com.au)

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