

Do You Need to be Licensed to Operate Your Internet Discussion Site?

Matthew McMillan and Howard Cheung discuss the ASIC's recent proposals on regulating internet discussion sites.

Operators of internet discussion sites on which users post information, recommendations or opinions about financial products will need to take heed of the latest proposals being put forward by the Australian Securities & Investments Commission (ASIC) – including, most notably, the requirement for some operators (regardless of whether or not they are financial services professionals) to hold an Australian financial services (AFS) licence.

ASIC's proposals are set out in its Consultation Paper 104: Internet discussion sites (CP104) released on 2 March 2009.

Internet discussion sites

ASIC's proposals affect operators of "internet discussion sites" (IDSs).

IDSs are defined in CP104 to mean:

internet websites that provide a forum for people who are not financial services professionals to display information, recommendations and opinions about financial products.¹

This includes web-based bulletin boards, blogs and chat rooms.

A shift in ASIC policy

Currently, under Regulatory Guide 162: Internet discussion sites (RG162), operators of IDSs who are not financial services professionals are not required to be licensed provided they comply with certain guidelines. These include:

- having appropriate disclosures and warnings for the benefit of readers (eg disclosures that the IDS operator does not endorse the accuracy of the postings on the site and that the postings are general information at best, and not professional advice);
- having appropriate disclosures and warnings for the benefit of persons making postings on the sites (eg warning that the person posting is personally responsible for their posting and should, therefore, ensure that it is not misleading or deceptive); and
- ensuring the IDS operators regulate the use of their sites (eg by keeping information about the identity of persons making postings and the contents of actual postings).

These guidelines were developed in 2000 and are based on the Corporations Law as it

stood. Since then, however, the Corporations Law has been replaced by the *Corporations Act 2001* (Corporations Act). The Corporations Act has also been amended by the *Financial Securities Reform Act 2001*, which introduced the current financial services licensing regime.

In reviewing its policy on IDSs, ASIC has formed the view that IDS operators should not be granted relief from the financial services licensing regime introduced by reforms to the Corporations Act. Under the new CP104 proposals, therefore, operators of IDSs will be required to hold an AFS licence if they are providing advice about financial products.

As to what constitutes "financial product advice", ASIC errs on the side of caution and takes the view that informal commentary posted on IDSs about financial products may constitute such advice – that is, a recommendation or a statement of opinion that is intended to influence users in the process of making decisions in relation to financial products.

This view is consistent with the case of *ASIC v Matthews* [2000] NSWSC 201 where Windeyer J found that certain postings about securities in an online chatroom facility, although informal in nature, constituted "reports about securities" and, as such, amounted to the giving of investment advice.

Whether statements posted on an IDS do, in fact, amount to "financial product advice" will ultimately depend on the particular circumstances in question and the extent of the operator's involvement in the postings. For example, an operator which is involved in contributing, editing, modifying or filtering postings on its site (as opposed to merely providing an online forum), or which authorises or arranges others to make postings, which involve recommendations or opinions about financial products, is likely to require an AFS licence. As holder of an AFS licence, the operator will be liable for ensuring that the advice is efficient, honest and fair and otherwise in compliance with its obligations under the *Corporations Act 2001*.

What exemptions apply?

Under the new CP104 proposals, an IDS operator may operate an IDS without a licence if it falls into one of the exemptions. These exemptions can be found in the Corporations Act and are the same as those which apply to the requirement of holding an AFS licence in general.

Two exemptions of relevance to IDS operators are the following:

- The "media" exemption under section 911A(2) of the Corporations Act, which provides that a person is exempt from holding an AFS licence if it provides general advice in a:

- (i) newspaper or periodical;
- (ii) news or information broadcast; or
- (iii) sound, video or data recording,

which is publicly available and where the sole or principal purpose is not to provide financial product advice.

An IDS which is a part of a broader communication medium, such as an online newspaper, is likely to fall within this exemption.

- The "passing on" exemption under regulation 7.1.31 of the Corporations Regulations which provides that a person is not to be considered as providing a "financial service" if that person:

- (i) is not a holder of an AFS licence; and
- (ii) merely "passes on" documents (which would likely also include postings) containing financial advice,

and a reasonable person would not consider that person to have provided, endorsed or otherwise assumed responsibility for the financial advice.

An IDS operator who merely provides a forum and does not contribute, edit, modify, or filter any postings on its IDS is likely to fall within this exemption.

What minimum standards are to be imposed on IDS operators?

CP104 also proposes introducing minimum standards in relation to operating an IDS, regardless of whether the operator requires an AFS licence or not.

an operator which is involved in contributing, editing, modifying or filtering postings on its site which involve recommendations or opinions about financial products, is likely to require an AFS licence

Compliance with these standards requires an IDS operator to:

- maintain the IDS in a fair and efficient manner, which includes:
 - (i) having the ability to identify people making or altering postings, and withdrawing posting rights if necessary;
 - (ii) having the ability to review content in postings on a regular basis, and removing any postings that are illegal or likely to be misleading or deceptive; and
 - (iii) displaying warnings that postings will be archived for at least 2 years, that copies of postings may be provided to the ASIC, and that serious penalties apply for posting material that is misleading or deceptive;
- have good record-keeping practices, which includes keeping records of:
 - (i) information about the identity of people making or altering the postings for at least 2 years; and
 - (ii) actual postings and session information for at least 2 years; and
- display appropriate warnings and disclosures, which include:

CP104 sends a clear message that ASIC intends to regulate the provision of financial product advice through social media and the self-publishing capabilities of the internet

- (i) for IDS operators which do not require an AFS licence: a warning to users that the IDS operator does not endorse or vouch for the accuracy or authenticity of the postings on the site and that readers should not rely on advice contained in the postings alone; and
- (ii) for IDS operators which do require an AFS licence: an additional warning to users that any advice given is general advice only, and that the advice does not take into account the user's personal circumstances.

What do the proposals mean for IDS operators?

CP104 sends a clear message that ASIC intends to regulate the provision of financial product advice through social media and the self-publishing capabilities of the internet in the same way it regulates other means of giving advice.

Under the proposed reforms, current unlicensed operators of an IDS will need to check whether they:

- fall into any of the exemptions; or
- are required to obtain an AFS licence in order to continue to operate the IDS.

In any case, all IDS operators, whether licensed or unlicensed, will need to ensure that they comply with the new minimum standards set out in CP104.

ASIC is currently seeking the views of IDS operators and users on the proposals. Submissions on the proposals closed on 27 April 2009.

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(Endnotes)

1 Australian Securities & Investment Commission, March 2009, Consultation Paper 104: Internet discussion sites, page 6.

Government Focuses on Consumer Law Changes

Nick Abrahams and Kylie Howard provide an update on recent proposals to reform Australian Consumer Protection Laws.

February and March has been busy reading for those interested and affected by consumer protection law – and ultimately, that is everyone. Not all of us sell products and services to the consumer market however, all of us at some point, are consumers. As to whether the changes are good or bad, it really depends on which hat you are wearing – one thing is for sure, there are likely to be some noticeable changes to the current state of play.

On 17 February 2009, the Minister for Competition Policy & Consumer Affairs released an information and consultation paper, *An Australian Consumer Law: Fair market – Confident consumers*. Only two weeks later, the Minister announced a review of the adequacy of statutory conditions and warranties. This article will provide an update on both of these initiatives and help you make an assessment on how these changes might impact you.

Australian Consumer Law – Reforms and Consultation Paper

The information and consultation paper, *An Australian Consumer Law: Fair market – Confident consumers* (**Consultation Paper**) is a step toward the reform process to develop a new national consumer law for Australia. The Consultation Paper, prepared by the Standing Committee of Officials of Consumer Affairs, shares the Council of Australian Governments' agreed consumer reforms and seeks to obtain public and stakeholder comment on further suggestions for reform (however, the deadline for responses was by 17 March 2009). The Minister is looking to fast track these amendments with legislation to go before Parliament mid-year and be in operation by 1 January 2010.

There are some key themes in the Consultation Paper – enhancing consumer protection, reducing regulatory complexity and having

a consistent national approach to facilitate a seamless national economy. The key components of the framework involve a new national consumer law, to be called the *Australian Consumer Law*, based on the existing consumer protection provisions of the *Trade Practices Act (TPA)*. In addition, there will be some new consumer laws including:

- a new national product safety regulatory system;
- provisions which regulate unfair terms in consumer contracts; and
- new penalties, enforcement powers and redress options for consumers (ultimately, what every supplier *doesn't* want to hear).

There are strong reasons to have a national approach to consumer protection in Australia. The obvious reason is to ensure a consistent approach for both suppliers and consumers. Many organisations that supply consumer products and services, supply to consumers nationally and this is an increasing trend. It can become a logistical nightmare to manage different regimes in different states, not to mention the compliance costs associated. In