

THE IMPACT OF THE FSR REFINEMENTS REGULATIONS ON DISCLOSURE

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The Corporations Amendment Regulations 2005 (No. 5) (Cth) ('the FSR Refinement Regulation') came into effect on 20 December 2005.¹ The FSR Refinement Regulations make many significant changes to the financial services disclosure requirements applying to product issuers and licensees. For example, the regulations allow product issuers (other than general insurance issuers) to give consumers a new type of disclosure document – referred to as a 'short form PDS' - instead of a full Product Disclosure Statement (PDS). Further, the PDS requirements have been changed for general insurance issuers while basic deposit product issuers are no longer required to prepare PDSs at all. Under the regulations providing entities (follow up) advice. The Financial Service Guide (FSG) provisions have also been changed to reduce the required level of remuneration disclosure, to avoid the need for information already disclosed in the PDS to be repeated in the FSG and to allow FSGs to be tailored to the specific information needs of clients. In general, the changes brought about by the FSR Refinements Regulations appear to facilitate the production of shorter disclosure documents. However, it is not clear whether all these changes necessarily serve consumers' interests. For example, it is not clear whether short form PDSs would, in fact, help consumers understand and compare financial products given that they are not required to be in a prescribed standard format or to contain a standard list of matters. Furthermore, the FSR regulations contain uncertainties which may reduce their effectiveness. For example, aspects of the short form PDS regime are not clear, including the requirement to include a 'summary' of certain information and the liability regime applying in relation to material incorporated by reference.

It should be noted that in April 2006 the Government issued a Consultation Paper which foreshadows further possible changes to the financial services regulatory regime². It is likely that this consultation process will lead to further changes to the financial services disclosure regime.

Introduction: FSRA and disclosure

The Financial Services Reform Act introduced sweeping regulatory reform to the Australian financial services industry. Amongst other things it introduced a single financial services licensing and conduct regime administered by a single regulator (ASIC) to replace the various different regulatory regimes that previously applied in relation to securities, futures, life and general insurance, superannuation and bank deposit products. The changes brought about by the Financial Services Reform Act are largely contained in Chapter 7 of the Corporations Act.

¹ These regulations implement proposals contained in *Refinements to Financial Services Regulation: Proposals Paper* (May 2005), Commonwealth of Australia

² *Corporate and Financial Services Regulation Review- Consultation Paper* (April 2006), Commonwealth of Australia

Disclosure was a critical area of reform. The policy objective of the Financial Services Reform Act was to create a disclosure regime under which retail clients would receive information enabling them to comprehend and compare functionally similar financial products and services, thereby promoting informed consumer choice and competition between product and service providers.³ The Financial Services Reform Act also sought to reduce compliance costs for business by allowing entities that provide a wide range of financial products and services to comply with a single set of disclosure obligations under a single Act (rather than comply with a range of disparate disclosure regimes previously applying to different product and service types).

Three key types of disclosure documents were introduced by the Financial Services Reform Act:

- (a) *Financial Service Guide (FSG)* – this is a disclosure document which is designed to help a retail client decide whether to obtain a financial service (eg financial product advice or dealing). It must include, amongst other things, specific information about how the provider of the service will be paid (for example, by charging the client a fee or by receiving commissions from product issuers);
- (b) *Statement of Advice (SOA)* – this is a disclosure document which is designed to help a retail client decide whether to rely on personal advice. It must include, amongst other things, an explanation of why the advice is appropriate for the client as well as specific information about any conflicts of interest faced by the adviser;
- (c) *Product Disclosure Statement (PDS)* – this is a disclosure document which is designed to help a retail client decide whether to buy a financial product (other than shares and debentures, which continued to require a prospectus under Chapter 6D). It must include, amongst other things, information about the benefits and risks of buying the product as well as specific information about fees and charges.

The goal of comprehensibility was intended to be achieved, in part, by requiring these disclosure documents be presented in a 'clear, concise and effective' manner. The goal of comparability was intended to be achieved, in part, by requiring these disclosure documents to contain certain prescribed information, such as information about fees and costs payable by consumers.

In addition to the FSG, SOA and PDS, other disclosure obligations were imposed in various circumstances.⁴

The changes to the Corporations Act brought about by the Financial Services Reform Act commenced on 11 March 2002. Existing financial product and service providers were given a transitional period of up to two-years to comply with it. Over the past four years, however, the new regime has been subject to frequent change, through the Financial Services Reform Amendment Act 2003 (Cth) as well as numerous amendments to the Corporations

³ Refer to the Explanatory Memorandum to the Financial Services Reform Bill 2001 (Cth).

Further background is contained in the following:

- (a) *Financial System Inquiry Final Report* (1997), Commonwealth of Australia (commonly referred to as the 'Wallis Inquiry Report');
- (b) *Financial Markets and Investment Products* (1997), Commonwealth of Australia (the 'CLERP 6 Position Paper');
- (c) *Financial Products, Service Providers and Markets – An Integrated Framework* (1999), Commonwealth of Australia (the 'CLERP 6 Consultation Paper');
- (d) *Financial Services Reform Bill - Exposure Draft Provisions and Commentary* (2000), Commonwealth of Australia.

⁴ For example:

- (a) a warning was required to be given to a retail client where they are provided with general advice -that is, advice which does not consider the client's objectives, financial situation or needs (Corporations Act 2001 (Cth), s949A);
- (b) certain information was required to orally communicated to the client where a financial product was to be issued to the client before they had received a PDS (Corporations Act 2001 (Cth), s1012G);
- (c) ongoing disclosure obligations were imposed on issuers of financial products (Corporations Act 2001 (Cth), Division 3 of Part 7.9).

Regulations 2001 (Cth) including, most recently, the FSR Refinements Regulations. The purpose of this article is not to consider all these changes in detail but rather to focus on the impact of the FSR Refinement Regulations.

The FSR refinements process

The FSR Refinements Proposals Paper contained 25 proposed refinements to the financial services regulatory regime contained in Chapter 7 of the Corporations Act and associated regulations. Many of these proposals relate to disclosure. The proposals were designed to address the perceived concern that disclosure documents being prepared by industry participants were too long and complex, making them difficult for consumers to understand and unnecessarily costly to prepare.

The refinements proposed in the FSR Refinements Proposals Paper have now been substantially implemented, in part through the FSR Refinements Regulations⁵ and, in part, through ASIC action.

The FSR Refinements Regulations were accompanied by an Explanatory Statement which provides useful insight into the intended operation of the Regulations.⁶ Unfortunately, however, the Explanatory Statement does not justify the changes made through any cost-benefit analysis.

This article considers only the proposals which were implemented through the FSR Refinements Regulations and which impact significantly on the disclosure obligations of financial service providers and product issuers.⁷ Accordingly, this article considers the matters set out in the following table:

⁵ Corporations Amendment Regulations 2005 (No. 5) (Cth)

⁶ Explanatory Statement to Select Legislative Instrument 2005 No. 324. Note also that ASIC has indicated that it does not intend providing 'formal, detailed guidance' on the FSR Refinement Regulations: ASIC Information Release 06-02: *ASIC provides guidance on compliance with FSR Refinements regulations* – January 2006.

⁷ Accordingly, this article does not consider Proposals 2.2 and 9.1, which have not been implemented. Nor does it consider Proposal 12.1, which relates to the ability of authorised representatives to 'sub-authorise'. Further, this article does not consider the following matters, which have been addressed by ASIC rather than by the FSR Refinement Regulations:

- (a) Proposal 5.1 – relating to simple general advice warnings: see ASIC Information Release 05-45: *ASIC provides guidance about giving general financial product advice* – August 2005; see also ASIC Information Release 05-62: *ASIC announces simpler warnings for oral general advice* – November 2005;
- (b) Proposal 5.2 – relating to general advice warnings in advertisements: see ASIC Information Release 05-47: *ASIC grants relief for advertising by product issuers* – August 2005;
- (c) Proposal 10.2 – relating to the meaning of personal advice: see ASIC Information Release 05-45: *ASIC provides guidance about giving general financial product advice* – August 2005;
- (d) Proposal 10.3 – relating to online calculators: see ASIC Information Release 05-64: *ASIC releases policy on calculators* – December 2005; see also Section F of *ASIC Policy Statement 167: Licensing: Discretionary Powers*.
- (e) Proposal 12.2 – relating to the requirement for general insurance agents to be authorised: see ASIC Information Release 05-59: *ASIC offers general insurance dealers choice on how to appoint their distributors* – October 2005;
- (f) Proposal 13 – relating to staff training: see *ASIC Policy Statement 146: Training of financial product advisers* – Updated August 2005;
- (g) Proposal 14 – relating to non-cash payment facilities: see *ASIC Policy Statement 185: Non-cash payment facilities* – November 2005);
- (h) *Example Statement of Advice (SOA) for a limited financial advice scenario for a new client* – *An ASIC Guide* (August 2005).

TABLE: OVERVIEW OF FSR REFINEMENTS PROPOSALS			
Topic	Proposal Number	Brief Description	Where primarily dealt with in the Corporations Regulations 2001⁸
Financial Services Guide	1.1	Tailored Financial Services Guides	Regs 7.7.10AA and 7.7.10AB
	1.2	Removing FSG/PDS Duplication	Reg 7.7.02A
	1.3	FSG Remuneration Disclosure	Regs 7.7.04, 7.7.04A, 7.7.07 and 7.7.07A
Statement of Advice	2.1	SOA Relief for further advice	Regs 7.7.09, 7.7.10AC, 7.7.10AD, 7.7.10AE and 7.7.10AG
Product Disclosure Statement	3	Short-Form Product Disclosure Statements	Reg 7.9.61AA and Schedule 10BA
Oral Disclosure	4	Oral disclosure where PDS to be provided later	Reg 7.9.15H
Basic Deposit Products	6	PDS Relief for Basic Deposit Products	Reg 7.9.07FA
	-	FSG and SOA Relief for Interests in Cash Management Trusts	Regs 7.7.02(1)(c) and 7.7.10(c)
General Insurance Products	7.1	Tailored General Insurance Product Disclosure Statements	Regs 7.9.15D, 7.9.15E and 7.9.15F
	7.2	PDS relief for general insurance renewals	Reg 7.9.07FC
	-	SOA relief for personal advice about certain general insurance products	Regs 7.7.10(d)-(i)
Retail/Wholesale Distinction	8.1	Companies and trusts controlled by wholesale clients and related bodies corporate of wholesale clients	Regs 7.6.02AB, 7.6.02AC and 7.6.02AD
	8.2	The Definition of 'Professional Investor'	Reg 7.6.02E
	8.3	Accountants' Certificates	Reg 7.6.02F
Secondary Services 'Look Through'	9.2	Intermediary tells client how to obtain the secondary service provider's FSG	Reg 7.7.02(7)
General Advice Definition	10.1	Unlicensed Product Issuers Persons not linked to a financial product	Regs 7.1.33G and 7.1.33H
Jurisdictional Reach	11	Clarifying the jurisdictional reach of the law	Regs 7.6.02AG, 7.6.02AH, 7.7.21, 7.9.07FB and 7.9.98

⁸ This table does not contain a complete list of all relevant regulations.

Financial Services Guide

Tailored Financial Services Guides - Proposal 1.1

Proposal 1.1 of the FSR Refinements Proposals Paper was to clarify that licensees may 'tailor' their FSGs to specific products or services. The policy objective of this proposal was to allow industry to produce shorter FSGs which are 'focused' or 'tailored' to the specific information needs of the consumers who read them⁹.

This proposal has been addressed by Part 1 of Schedule 1 to the FSR Refinements Regulations. Two situations need to be considered:

- (a) *FSG provided by a licensee* - Reg 7.7.10AB(1) of the Corporations Regulations 2001 (Cth) deals with the case where an FSG is given by a licensee;
- (b) *FSG provided by an authorised representative* - Reg 7.7.10AB(2) deals with the case where an FSG is given by an authorised representative.

(a) FSG provided by a licensee

Reg 7.7.10AB(1) allows a providing entity (being a licensee) to give a client an FSG (a 'tailored FSG') covering only those services that the licensee will be, or is likely to be, providing to *that* client. Alternatively, the licensee may give that client an FSG (a 'generic FSG') relating to *all* the services that the licensee is authorised by its Australian financial services licence to provide whether those services are likely to be provided to that client or not

For example, consider the case where a client is considering acquiring services relating to a deposit product from a licensee. The licensee is also authorised by its Australian financial services licence to provide various other financial services, but the client is not considering acquiring those other services. The intended effect of reg 7.7.10AB(1) is that the client may be given either:

- (i) a tailored FSG covering only the services it provides in relation to deposit products; or
- (ii) a generic FSG covering all the services that the licensee is authorised by its Australian financial services licence to provide.

While Reg 7.7.10AB(1) allows licensees to tailor the information they provide to the specific needs of the client, it does not compel licensees to do so. A client wishing to compare the services provided by two licensees may receive a generic FSG from one licensee and a tailored FSG from the other licensee. There is a risk that this may be confusing for consumers and may make it more difficult for them to compare the services being provided by the two licensees.

There may be technical reasons why some licensees may be reluctant to produce tailored FSGs. A licensee wishing to give a tailored FSG must determine those services that 'will be' or which are 'likely to be' provided to that client. The FSG provided to that client must cover *all* such services. Licensees will need to have a reliable basis for their assessment as to which services will be or are likely to be provided to each of their clients if they wish to provide 'tailored' FSGs.

In any event, if a tailored FSG is given to a client but sometime in the future further financial services (not covered by that tailored FSG) are provided to the same client, it will be necessary to provide another FSG to the client covering those further services.¹⁰

⁹ *Refinements to Financial Services Regulation: Proposals Paper* (May 2005), Commonwealth of Australia, p4

¹⁰ The Corporations Act 2001 (Cth), s941C(1) would not provide relief from the obligation to give the client a new FSG in these circumstances because the tailored FSG which had previously been given to the client would not contain all the information that an FSG relating to the further financial services would be required to contain.

The Explanatory Statement¹¹ deals with the case where a client is referred from one part or channel of a licensee's business (for example, 'deposit taking') to another part or channel (for example, 'financial planning'). The Explanatory Statement asserts that the obligation to give an FSG covering the 'financial planning' services does not arise under s941D at the time of the referral (but arises instead when the client makes contact with the financial planning channel). It would have been preferable if the Regulations had been made to produce this intended policy result.

(b) FSG provided by an authorised representative

Reg 7.7.10AB(2) makes similar provision in the case where the providing entity is an authorised representative rather than a licensee.

For example, consider the case where an authorised representative (AR) acts on behalf of two licensees, A and B. The client is considering acquiring all the services which AR provides while acting on behalf of A. The client is not considering acquiring any of the services provided by AR acting on behalf of B. The intended effect of Reg 7.7.10AB(2) is that the client may be given either:

- (i) a tailored FSG covering only the services that AR provides on behalf of A; or
- (ii) a generic FSG covering all the services that AR provides (whether acting on behalf of A or B).

Removing FSG/PDS Duplication - Proposal 1.2

Proposal 1.2 of the FSR Refinements Proposals Paper was to provide that where a licensee (or authorised representative) sells or arranges to sell a financial product, the FSG does not need to include information that will be provided in the PDS. The policy objective of this proposal was to allow industry to produce shorter FSGs which do not repeat information which the consumer will receive in a PDS¹².

This proposal has been addressed by Part 2 of Schedule 1 to the FSR Refinements Regulations¹³. However, while the FSR Refinements Proposals Paper envisaged that the obligation to provide an FSG (albeit with reduced content) would remain, the FSR Refinement Regulations provide complete relief from the obligation to provide an FSG where the providing entity instead gives the client both a 'Statement' and a PDS which, together, contain all the information which would have been required to be in an FSG for the service being provided.

Where this relief is being relied on, the 'Statement' must be provided at the same time as the PDS, and within the time limits set out for the provision of an FSG¹⁴. It would seem that the 'Statement' and PDS may be provided to the client in different formats.

While an FSG must be titled 'FSG'¹⁵ and while a combined FSG/PDS must be entitled 'Combined Financial Services Guide and Product Disclosure Statement'¹⁶, there is no obligation to give a 'Statement' any particular title.

The FSG record-keeping obligations imposed by ASIC would not appear to apply to 'Statements'¹⁷.

The FSR Refinement Regulations do not allow a providing entity to comply with its FSG obligations by giving the client a 'Statement' together with a Short-form PDS¹⁸.

¹¹ Explanatory Statement to Select Legislative Instrument 2005 No. 324

¹² *Refinements to Financial Services Regulation: Proposals Paper* (May 2005), Commonwealth of Australia, pp4-5

¹³ Refer, in particular, to Corporations Regulations 2001 (Cth), reg 7.7.02A

¹⁴ Corporations Act 2001 (Cth), s941D

¹⁵ Corporations Act 2001 (Cth), s942A

¹⁶ Corporations Act 2001 (Cth), reg 7.7.08A(2)(c)

¹⁷ ASIC Pro Forma 209 *Australian financial services licence conditions*, condition 57(a)

¹⁸ See Proposal 3

A 'statement' must be worded and presented in a clear, concise and effective manner¹⁹, which arguably means that it must make its purpose clear (that is, to help a retail client decide whether to obtain financial services from the providing entity) and must contain adequate cross references to the places in the PDS where information relevant to that purpose is contained.²⁰

Various amendments have been made by reg 7.7.10AF of the Corporations Regulations 2001 which are designed to ensure that a 'Statement' is subject to the same liability regime as an FSG. The providing entity (and not the product issuer) will be responsible to ensure that the 'Statement' and PDS together contain all the information that an FSG would have been required to contain. The providing entity will be responsible for any misleading or deceptive statement in the 'Statement', whereas the issuer will be responsible for any misleading or deceptive statement in the PDS.

While providing entities will now be permitted to give their clients a 'Statement' and PDS in certain circumstances, it does not compel them to do so. A consumer wishing to compare the products and services offered by a number of entities may receive any of the following documents (or packages of documents):

- (a) an FSG and PDS;
- (b) an FSG and short form PDS;
- (c) a combined FSG/PDS (Reg 7.7.08A); or
- (d) a 'Statement' and a PDS.

There is a risk that this may be confusing for consumers and may make it more difficult for them to compare products and services.

FSG Remuneration Disclosure - Proposal 1.3

Proposal 1.3 of the FSR Refinements Proposals Paper was to provide that where a licensee is authorised to provide personal advice, the FSG need only contain brief, generic information about remuneration and conflicts of interest. The policy objective of this proposal was to allow industry to produce shorter FSGs which do not contain detailed information about remuneration which the consumer will receive later in an SOA²¹.

This proposal has been addressed by Part 3 of Schedule 1 to the FSR Refinements Regulations. However, while the FSR Refinements Proposals Paper dealt only with the case of FSG/SOA duplication, the FSR Refinements Regulations also provide relief from the obligation to disclose remuneration information in the FSG where services other than personal advice are to be provided to the client.

Under the FSR Refinements Regulations, the FSG must disclose the remuneration (including fees, commissions and other benefits) payable to it (or certain other persons) in respect of financial services provided by the providing entity where that remuneration is ascertainable at the time the FSG is provided to the client²². However, where the remuneration is not ascertainable at the time the FSG is given to the client, the new FSG disclosure requirements vary depending on whether the providing entity reasonably believes that personal advice will be provided or not.

(a) Where the providing entity reasonably believes that personal advice will be provided

¹⁹ Corporations Act 2001 (Cth), s941C(7B)(c) as inserted by Corporations Regulations 2001 (Cth), reg 7.7.02A

²⁰ See also Corporations Regulations 2001 (Cth), reg 7.7.03.

²¹ *Refinements to Financial Services Regulation: Proposals Paper* (May 2005), Commonwealth of Australia, p5

²² Corporations Regulations 2001 (Cth), regs 7.7.04(3) and 7.7.07(3)

Where the remuneration is not ascertainable and the providing entity reasonably believes that personal advice will be provided to the client, the FSG must contain particulars of the remuneration or general information about the remuneration together with:

- (i) if the remuneration will be calculable at the time the personal advice is given - a statement that the remuneration received on specific financial products to which the personal advice relates will be disclosed at the time the personal advice is given or as soon as practicable after that time; or
- (ii) if the remuneration will not be calculable at the time the personal advice is given - a statement that the manner in which the remuneration will be calculated will be disclosed at the time the personal advice is given or as soon as practicable after that time²³.

The intended meaning of 'general information' about remuneration and 'particulars' of remuneration are set out in the Explanatory Statement²⁴. 'General information' about remuneration means a description of the nature of the remuneration (for example, commission or volume bonuses) and the manner in which the remuneration will be calculated. 'General information' about remuneration does not, however, encompass ranges, rates or worked examples. 'Particulars' about remuneration requires a more detail to be disclosed about the remuneration including, to the extent relevant, ranges or rates of remuneration together with one or more worked examples.

The information that must be included in an FSG under regs 7.7.04(4) and 7.7.07(4) of the Corporations Regulations 2001 are minimum requirements only. These regulations are made under ss942B(7) and 942C(7) of the Corporations Act 2001, which allow for regulations to mandate the inclusion in FSGs of *more detailed information* about remuneration. These regulations do not reduce a providing entity's obligation to disclose information which would otherwise be required to be disclosed under ss942B(2)(e) and (3) or ss942C(2)(f) and (3) in a clear, concise and effective manner. As a result, and depending on the circumstances, it may be argued that communication tools (such as ranges, rates, tables and worked examples) may still need to be included in an FSG to clearly explain the remuneration, regardless of whether the providing entity elects to disclose 'general information' or 'particulars' under the FSR Refinement Regulations²⁵.

It should also be noted that regs 7.7.04(4) and 7.7.07(4) do not affect the providing entity's SOA disclosure obligations. So, while the inclusion of the statement referred to in regs 7.7.04(d)(i) and 7.7.07(4)(d)(i) suggests to the client that only remuneration received 'on' the 'specific' financial products to which the personal advice relates will be disclosed to the client in the future, the legal test of what in fact needs to be disclosed in the SOA is not limited in that way.

(b) Where the providing entity reasonably believes that personal advice will not be provided

Where the remuneration is not ascertainable and the providing entity reasonably believes that personal advice will not be provided to the client, the FSG must contain either:

- (a) particulars of the remuneration; or
- (b) general information about the remuneration together with a statement that the client may request particulars of the remuneration but only if the request is made within a reasonable time after the client is given the FSG and in any event before any financial service identified in the FSG is provided to the client²⁶.

²³ Corporations Regulations 2001 (Cth), regs 7.7.04(4) and 7.7.07(4)

²⁴ Explanatory Statement to Select Legislative Instrument 2005 No. 324

²⁵ Refer also to *ASIC Policy Statement 175: Licensing: Financial product advisers – Conduct and Disclosure*, para 175.39

²⁶ Corporations Regulations 2001 (Cth), regs 7.7.04(5) and 7.7.07(5). The obligation to provide particulars of remuneration to a client on request is implied by Corporations

The Explanatory Statement does not set out any reason why it was considered appropriate to allow providing entities to place the onus on the client to request particulars of the remuneration, rather than simply require the particulars to be set out in the FSG.

Notwithstanding the FSR Refinement Regulations, the obligation to set out remuneration information required by retail clients²⁷ in a clear, concise and effective manner would arguably continue to impose an obligation on providing entities to include communication tools (such as ranges, rates, tables and worked examples) in their FSGs.

Statement of Advice

SOA Relief for further advice - Proposal 2.1

Proposal 2.1 of the FSR Refinements Proposals Paper was to provide an exemption from the obligation to give an SOA where further advice is given to an existing client provided there are no significant changes to the client's relevant personal circumstances or the basis of the advice since the last Statement of Advice was given. In these circumstances the providing entity would instead be required to keep a record of the subsequent advice for seven years and provide it to the client on request.

The policy objective of this proposal was to save industry (and ultimately consumers) the cost of producing SOAs for advice given to existing clients whose personal circumstances have not significantly changed²⁸.

This proposal has been addressed by Schedule 2 to the FSR Refinements Regulations which omits and replaces s946 of the Corporations Act 2001.

If a providing entity wishes to rely on the further advice exemption when providing advice (new advice) to a client it will be necessary to ensure that:

- (a) the client has at some stage been given a statement of advice by the providing entity in respect of *previous advice* that sets out the client's relevant personal circumstances²⁹. (This is not a pre-requisite, however, if the client already had a relationship with the providing entity before Part 7.7 of the Corporations Act 2001 started to apply³⁰);
- (b) the client's relevant personal circumstances with respect to the new advice are not significantly different from those in relation to the previous advice³¹;
- (c) the basis on which the new advice is given is not significantly different from the basis on which the previous advice was given³²;
- (d) any information about conflicts of interest required by ss947B(2)(d) and (e) or 947C(2)(e) and (f) of the Corporations Act 2001 is given to the client at the same time, or as soon as practicable, after the further advice is given³³;

Regulations 2001 (Cth), regs 7.7.04A and 7.7.07A. No requirements as to the form in which particulars are to be provided, or the time by which they must be provided, are prescribed.

²⁷ Corporations Act 2001 (Cth), ss942B(2)(e) and (3) and 942C(2)(f) and (3)

²⁸ *Refinements to Financial Services Regulation: Proposals Paper* (May 2005), Commonwealth of Australia, pp5-8

²⁹ Corporations Act 2001 (Cth), s946B(2)(a) as inserted by Corporations Regulations 2001 (Cth), reg 7.7.10AE

³⁰ Corporations Act 2001 (Cth), s946B(2A) as inserted by Corporations Regulations 2001 (Cth), reg 7.7.10AE

³¹ Corporations Act 2001 (Cth), s946B(2)(b) as inserted by Corporations Regulations 2001 (Cth), reg 7.7.10AE. (Where advice is given to a client with whom the providing entity already had a relationship with before Part 7.7 applied, see Corporations Act 2001 (Cth), s946B(2A)(c) as inserted by Corporations Regulations 2001 (Cth), reg 7.7.10AE).

³² Corporations Act 2001 (Cth), s946B(2)(c) as inserted by Corporations Regulations 2001 (Cth), reg 7.7.10AE. (Where advice is given to a client with whom the providing entity already had a relationship with before Part 7.7 applied, see Corporations Act 2001 (Cth), s946B(2A)(d) as inserted by Corporations Regulations 2001 (Cth), reg 7.7.10AE).

- (e) any information about switching required by s947D is given to the client at the same time, or as soon as practicable, after the further advice is given³⁴;
- (f) a record of the further advice is kept for 7 years³⁵; and
- (g) a copy of the record of the advice is provided to the client on request³⁶.

The Explanatory Statement³⁷ says that determining whether a client's relevant personal circumstances are 'significantly different' from those in relation to earlier advice may vary from client to client. So, for example, it asserts that a change in the client's annual income of \$20,000 may be significant for a client with an annual income of \$50,000, but may not be significant for a client with an annual income of \$200,000. The Explanatory Statement also states that it is envisaged that the further advice exemption will apply only where the SOA for the earlier advice covered classes of products to which the further advice relates.

The record of advice that must be kept for 7 years and provided to the client on request must comply with reg 7.7.09 of the Corporations Regulations 2001 which provides that it must either:

- (a) set out the further advice given to the client together with any information or statement required by ss947D(2) or(3) (which relates to disclosure of the costs of switching where the providing entity recommends replacing one financial product with another financial product); or
- (b) set out:
 - (i) brief particulars of the recommendations and the basis on which the recommendations are made;
 - (ii) brief particulars of any information required by s947D(2); and
 - (iii) an acknowledgement that the statement required by s947D(3) has been given (if applicable).

However, more onerous requirements are imposed by regs 7.7.10D and 7.7.10E, the effect of which is that a record of advice must contain all the information required by ss947D(2) and (3). Accordingly, it would not seem sufficient for the record of advice to merely contain 'brief particulars' of information required by s947D(2) or an acknowledgement that the statement required by s947D(3) has been given.

A providing entity that provides further advice must include in its FSG certain disclosures about a client's right to obtain a record of advice on request in respect of the new advice³⁸.

³³ Corporations Act 2001 (Cth), s946B(3) as inserted by Corporations Regulations 2001 (Cth), reg 7.7.10AE. This information must comply with the dollar disclosure regime to the same extent as if the information were contained in an SOA: see *ASIC Policy Statement 182: Dollar Disclosure*, para 182.17, note 4.

³⁴ Corporations Act 2001 (Cth), s946B(3) as inserted by Corporations Regulations 2001 (Cth), reg 7.7.10AE. The obligation to disclose information required by s947D is a new obligation which was not part of the previous further market related advice (FMRA) regime under omitted s946B. It would seem that this information must comply with the dollar disclosure regime to the same extent as if the information were contained in an SOA. (As a matter of interest, note that the SOA exemption for personal advice about basic deposit products and related non-cash payment facilities has not been amended to require s947D disclosure to be provided: Corporations Act 2001 (Cth), s946B(6) as inserted by Corporations Regulations 2001 (Cth), reg 7.7.10AE)).

³⁵ Corporations Regulations 2001 (Cth), reg 7.7.09(3)

³⁶ Corporations Act 2001 (Cth), s942B(8) as inserted by Corporations Regulations 2001 (Cth), reg 7.7.10AC; Corporations Act 2001 (Cth), s942C(8) as inserted by Corporations Regulations 2001 (Cth), reg 7.7.10AD

³⁷ Explanatory Statement to Select Legislative Instrument 2005 No. 324

³⁸ Corporations Act 2001 (Cth), s942B(2)(g) as inserted by Corporations Regulations 2001 (Cth), reg 7.7.10AC; Corporations Act 2001 (Cth), s942C(2)(h) as inserted by Corporations Regulations 2001 (Cth), reg 7.7.10AD

A providing entity that provides further advice must, of course, ensure that the advice is appropriate for the client³⁹.

Depending on the circumstances, providing entities that provide personal advice to an existing client now have the following three disclosure options:

- (a) rely on the further advice exemption introduced by the FSR Refinement Regulations;
- (b) give the client an SOA for the subsequent advice; or
- (c) give the client a document known as a 'Statement of Additional Advice' or 'SOAA'⁴⁰.

The further advice relief introduced by the FSR Refinement Regulations replaces the more limited further market related advice (FMRA) exemption⁴¹. The new 'further advice' exemption is broader than the FMRA exemption in various ways, notably:

- (a) the new relief is not confined to advice given in a 'live market context. Specifically, it is not limited to advice given by, or on behalf of, a participant in a licensed market in respect of market-traded financial products, but instead extends to advice given by any providing entity about any financial product. Further, the new relief is not confined to advice that the client requires promptly;
- (b) the new relief does not require the providing entity to check, at least once a year, whether the client's relevant personal circumstances have changed (although the obligation under s945A to make reasonable inquiries into the client's relevant personal circumstances continues to apply).

The former FMRA regime came into effect as recently as 18 December 2003 when the Financial Services Reform Amendment Act 2003 commenced. The FMRA exemption replaced an earlier, even more limited exemption, known as 'execution-related telephone advice'. It may be noted that the Explanatory Memorandum to the Financial Services Reform Amendment Bill 2003 stated that it was a 'critical element of the ...[FMRA relief]...that the advice is given in the context of a 'live' financial market.' Yet, just two years later, regulations have been passed which provide relief which appears to be clearly inconsistent with this relatively recent statement of legislative intent. Further, the requirement for 12 monthly checking of the client's relevant personal circumstances was an amendment made by the Senate, yet has now been removed by regulation without any justification in the Explanatory Statement to the FSR Refinement Regulations. It would seem to be more appropriate for changes to the FMRA regime to have been implemented by legislation than regulations.

Product Disclosure Statement

Short-Form Product Disclosure Statements - Proposal 3

Proposal 3 of the FSR Refinements Proposals Paper was to allow issuers of financial products to provide a Short-Form PDS that contains core information about the product, with full product information available on request or through an easily accessible forum, such as the internet. The policy objective of this proposal was to facilitate the production of shorter and simpler product disclosure documents which are more likely to be read and understood by consumers⁴².

³⁹ Corporations Act 2001 (Cth), s945A

⁴⁰ See ASIC Class Order [04/1556] *Statements of Additional Advice*. The further advice relief reduces, but does not eliminate, the usefulness of the ASIC relief. For example, where subsequent advice is given to the client by a different providing entity (but acting under the same licence as the providing entity that gave the earlier advice), the further advice exemption is not available, whereas the ASIC class order may apply.

⁴¹ Corporations Act 2001 (Cth), s946B, as in force immediately prior to the commencement of the FSR Refinement Regulations

⁴² *Refinements to Financial Services Regulation: Proposals Paper* (May 2005), Commonwealth of Australia, pp9-12

This proposal has been addressed by Schedule 3 to the FSR Refinements Regulations which inserts a new Division 5AB of Part 7.9 and Schedule 10BA into the Corporations Regulations 2001 which allow product issuers to give their clients a Short-Form PDS instead of a 'full' PDS, except where the product is a general insurance product⁴³.

A Short-Form PDS must contain:

- (a) a summary of the statements and information that would be required in a full PDS by virtue of ss1013D(1)(a), (b), (c), (d), (e), (g) and (i) of the Corporations Act 2001; and
- (b) a statement telling the client that they may ask for a full PDS and setting out the means by which the client may ask for it⁴⁴.

A Short-Form PDS may (but need not) contain additional information. Thus, while there are minimum content requirements for a Short-Form PDS, there is no standard list of contents or prescribed form.

The term 'summary' is not defined. A full PDS is required to contain only that level of detail about a matter that a retail client would reasonably require for the purpose of making a decision whether to acquire the relevant financial product⁴⁵ (although it *may* contain more detail). It would seem that a 'summary' necessarily implies a lesser level of detail. In other words, a Short-Form PDS must contain some information about matters referred to in ss1013D(1)(a), (b), (c), (d), (e), (g) and (i), but less than a retail client would reasonably require for the purpose of making a decision whether to acquire the relevant financial product. Exactly how much detail is needed is not clear. While the clear, concise and effective disclosure obligation⁴⁶ does not expressly apply to Short-Form PDSs, it is arguable that in such an obligation is implied in the requirement to include a 'summary' of certain information.

The obligation to disclose certain information in a PDS as amounts in dollars⁴⁷ does not expressly apply to Short-Form PDSs, although the Explanatory Statement⁴⁸ asserts that the requirement to include a 'summary' of the information in ss1013D(1)(b), (d) and (e) means that dollar amounts must be disclosed. It is, however, an express requirement that a Short-Form PDS must comply with regulations relating to the disclosure of fees and costs⁴⁹.

A Short-Form PDS can be updated by a Supplementary Short-Form PDS. The Supplementary Short-Form PDS provisions are based on the Supplementary PDS provisions⁵⁰.

Product issuers are not compelled to use the Short-Form PDS regime. It is possible that some issuers may prepare a Short-Form PDS as well as a full PDS, whereas others will continue to rely solely on a full PDS.

The liability regime applying to Short-Form PDSs is complex. In general, the approach taken by the FSR Refinement Regulations is to apply the PDS liability regime to Short-Form PDSs.

⁴³ PDS requirements for general insurance products are dealt with in Proposal 7: see below.

⁴⁴ Corporations Act 2001 (Cth), s1071(1) as inserted by Corporations Regulations 2001 (Cth), Schedule 10BA. In relation to s10171(1)(b), it is arguably insufficient for a Short-Form PDS to simply tell the client to go to the issuer's website in order to obtain the full PDS. However, it would seem to be sufficient for a Short-Form PDS to require the client to use electronic means (such as email) to make a request for the full PDS. This may disadvantage consumers who do not have ready access to modern communication methods.

⁴⁵ Corporations Act 2001 (Cth), ss1013D(1) and 1013F

⁴⁶ Corporations Act 2001 (Cth), ss1013C(3)

⁴⁷ Corporations Act 2001 (Cth), ss1013D(1)(m); Corporations Regulations 2001 (Cth), reg 7.9.15A

⁴⁸ Explanatory Statement to Select Legislative Instrument 2005 No. 324

⁴⁹ Corporations Act 2001 (Cth), s10171(2), as inserted by Corporations Regulations 2001 (Cth), Schedule 10BA. Accordingly, Short-Form PDSs must comply with the Corporations Amendment Regulations 2005 (No.1) (Cth) (the Enhanced Fee Disclosure Regulations) as if the Short-Form PDS was a PDS.

⁵⁰ Corporations Act 2001 (Cth), Division 3B of Part 7.9, as inserted by Corporations Regulations 2001 (Cth), Schedule 10BA.

So, for example, the definition of 'defective' in s1022A has been amended to cater for the case where there is an omission of a matter required to be in a Short-Form PDS.

A critical issue to consider is the extent to which liability is affected where a document is incorporated by reference. A Short-Form PDS may refer to other information that is contained in the full PDS or FSG for the product⁵¹. The reference in the Short-Form PDS must identify the document (or part of the document) that contains the information⁵². That document (or part) is taken to be included (incorporated by reference) in the short form PDS⁵³. While the Explanatory Statement says that the person reading the Short-Form PDS will be 'taken to have read' the full PDS in these circumstances, the FSR Refinement Regulations do not make any such provision.

For example, suppose that a Short-Form PDS contains some (but not all) of the information required by 1013D(1)(c) (risks attaching to the product) but which is misleading on its face. Assume that it incorporates the full PDS by reference and that when the Short-Form PDS is read together with the full PDS, the information about risk is not misleading. Assume further that a client reads and relies on the Short-Form PDS and does not obtain the full PDS. In this example it is submitted that the better view is that the Short-Form PDS is 'defective' under s1022A because it does not comply with s1017I⁵⁴. This is because a misleading statement of risk cannot constitute a summary, and a 'summary' is required by s1017I(1)(a) regardless of whether the full PDS (which provides a complete view of risk which is not misleading) is effectively incorporated by reference. This may lead to certain consequences, such as the imposition of a stop order by ASIC⁵⁵ in respect of the Short-Form PDS. It may arguably also lead to civil action being brought by a client under s1022B if a causal link could be established between the defective Short-Form PDS ([which was read and relied on by the client](#)) and any loss or damage suffered by the client. [Unfortunately, the Explanatory Statement does not clearly support this interpretation. On the contrary, the Explanatory Statement casts doubt on whether a client would be able to bring action in these circumstances as it states that a client is taken to have read the full PDS \(which, in this example, corrects the misleading statement contained in the Short-Form PDS\).](#)

To take another example, suppose a Short-Form PDS is fully compliant except to the extent that it incorporates by reference a defective full PDS. Assume further that a client reads and relies on the Short-Form PDS and does not obtain the full PDS. The full PDS is clearly 'defective' under s1022A. Because the full PDS is taken to be included in the Short-Form PDS, the short form PDS is also 'defective' under s1022A. This may lead to certain consequences, such as the imposition of a stop order by ASIC in respect of both the full PDS and the Short-Form PDS. It would seem that civil action could be brought by the client under s1022B only if a causal link could be established between the defective Short-Form PDS and any loss or damage suffered by the client, which may be difficult if the client had not in fact read and relied on the defective information. The view which seems to be implied in the Explanatory Statement is that the client may be able to recover loss or damage in these circumstances because they would be taken to have read the information in the full PDS.

It will be interesting to see the extent to which industry will utilise the Short-Form PDS regime. While there may be some advantages associated with Short-Form PDSs (for example, reduced printing costs), there are also some significant disadvantages, including the following:

- (a) the additional costs involved in preparing two disclosure documents;

⁵¹ Corporations Act 2001 (Cth), s1017I(3)(b), as inserted by the Corporations Regulations 2001 (Cth), Schedule 10BA

⁵² Corporations Act 2001 (Cth), s1017I(4), as inserted by the Corporations Regulations 2001 (Cth), Schedule 10BA. For example, a Short-Form PDS for a managed fund product would not need to include information about the extent to which labour standards or environmental, social or ethical considerations are taken into account in investing the fund (s1013D(1)(k)). However, the Short-Form PDS may refer to the part of the full PDS where such information can be found.

⁵³ Corporations Act 2001 (Cth), s1017I(5), as inserted by the Corporations Regulations 2001 (Cth), Schedule 10BA

⁵⁴ As inserted by the Corporations Regulations 2001 (Cth), Schedule 10BA

⁵⁵ Corporations Act 2001 (Cth), s1020E

- (b) the uncertainty as to the meaning of the requirement to include a 'summary' in the Short-Form PDS;
- (c) the uncertainty as to the liability regime applying to material incorporated by reference into a Short-Form PDS;
- (d) the fact that issuers wishing to use their product disclosure document to partly satisfy their FSG obligations (Proposal 1.2) cannot do so by giving their client a Short-Form PDS – they must instead give their client a full PDS (together with a 'Statement');
- (e) the fact that provisions allowing a combined FSG/PDS do not allow a combined FSG/Short-Form PDS.

Assuming that at least some issuers utilize the short form PDS regime, it is not clear whether short form PDSs will, in fact, help consumers understand and compare financial products given that short form PDSs are not required to be in a prescribed standard format or to contain a standard list of matters. On the other hand, if it is assumed that short form PDSs will help consumers, it is not clear why the regulations do not make the preparation of short form PDSs mandatory. Because issuers can choose whether or not to prepare a short form PDS, it is possible that consumers wishing to compare financial products may receive short form PDSs from some issuers and 'full' PDSs from other issuers. This may confuse consumers.

Oral Disclosure

Oral disclosure where PDS to be provided later - Proposal 4

Proposal 4 of the FSR Refinements Proposals Paper was to provide that where a PDS is to be given to the client *after* the product is issued, that the matters that must be orally communicated to the client *before* the issue of the product can be limited to referring to the availability of a cooling off period and stating that a PDS will be provided later. The policy objective of this proposal was to 'streamline' the oral disclosure required to be provided to consumers who buy financial products (such as general insurance products) over the telephone before they have received a PDS⁵⁶.

This proposal has been addressed by Part 1 of Schedule 4 to the FSR Refinements Regulations. Under reg 7.9.15H of the Corporations Regulations 2001⁵⁷, a PDS (or Short-Form PDS⁵⁸) can be given to the client *after* the product is issued provided:

- (a) the client requests that the product be issued immediately or by a specific time; and
- (b) it is not reasonably practicable to give the client a PDS (or Short-Form PDS) while complying with the client's instructions;
- (c) certain matters are orally communicated to the client before the issue of the product.

This typically arises in the case of telephone sales of general insurance products.

In essence, the matters that must be orally communicated to the client before the issue of the product under reg 7.9.15H are:

- (a) the name and contact details of the product issuer;
- (b) information about the client's cooling off rights;
- (c) a statement to the effect that the client should consider the information in the PDS or Short-Form PDS that will be provided;
- (d) a statement to the effect that the client can ask for further information about the product;

⁵⁶ *Refinements to Financial Services Regulation: Proposals Paper* (May 2005), Commonwealth of Australia, pp12-13

⁵⁷ Which omits and replaces s1012G of the Corporations Act 2001 (Cth)

⁵⁸ A reference in s1012G to a PDS includes a reference to a Short-Form PDS: Corporations Act 2001 (Cth), s1017K, as inserted by the Corporations Regulations (Cth), Schedule 10BA

(e) any further information so requested by the client⁵⁹.

These matters must be communicated in a clear, concise and effective manner.

Basic Deposit Products

PDS Relief for Basic Deposit Products - Proposal 6

Proposal 6 of the FSR Refinements Proposals Paper was to exempt basic deposit products from the PDS requirements subject to appropriate oral disclosure and adequate and accessible disclosure of information on fees and charges. The policy objective of this proposal was to relieve industry of the obligation to continue to prepare PDSs for basic deposit products on the basis that consumers are familiar with these relatively simple products and because they are already subject to various industry codes of conduct as well as the *ASIC Guide to Good Transaction Fee Disclosure for Bank, Building Society and Credit Union Deposit and Payment Products*.⁶⁰

This proposal has been addressed by Part 2 of Schedule 4 to the FSR Refinements Regulations. Reg 7.9.07FA of the Corporations Regulations 2001⁶¹ provides that a PDS is not needed in respect of the issue of a basic deposit product (or a related noncash payment facility or a travellers' cheque) where the regulated person (that is, the person who would otherwise be required to give the client a PDS) gives the client the following information:

- (a) information about the cost of the product;
- (b) information about whether or not any amounts will be or may be payable by client after buying the product;
- (c) a statement to the effect that the client can ask for further information about the amounts mentioned in (b); and
- (d) any further information so requested by the client.

There is no express requirement for this information to be communicated in any particular manner. Nor does the clear, concise and effective obligation apply to disclosure of this information. However, the Explanatory Statement⁶² states that it is expected that information about fees and costs provided to a client on request will be communicated in a clear, concise and effective manner. The Explanatory Statement also says that it is expected that issuers will keep relevant information available to consumers on request, at branch outlets and on their website. Further, the Explanatory Statement states that the relief is 'subject to' industry's continued compliance with the *ASIC Guide to Good Transaction Fee Disclosure for Bank, Building Society and Credit Union Deposit and Payment Products* as well as relevant industry codes, such as the Code of Banking Practice and the Credit Union Code of Practice.

As a result of this new relief, basic deposit products are not subject to the PDS, FSG or SOA disclosure obligations. However, persons providing financial services in respect of basic deposit products must generally operate under an Australian financial services licence and

⁵⁹ These requirements replace the more extensive oral disclosures required before the FSR Refinement Regulations came into effect. Under the previous regime clients were required to be told the essential features of the product as well as the information required by ss1013D(1)(c),(d),(g) and (i) unless the client elected not to receive such information: Corporations Regulations 2001 (Cth), regs 7.9.80C and 7.9.80D as in force immediately prior to the commencement of the FSR Refinement Regulations.

⁶⁰ *Refinements to Financial Services Regulation: Proposals Paper* (May 2005), Commonwealth of Australia, pp15-16

⁶¹ Which inserts a new s1012D(7) into the Corporations Act 2001 (Cth)

⁶² Explanatory Statement to Select Legislative Instrument 2005 No. 324

comply with various licensee obligations including training obligations⁶³. Further, the prohibition against hawking continues to apply⁶⁴.

FSG and SOA Relief for Interests in Cash Management Trusts

Although not contained in the FSR Refinements Proposals Paper, the FSR Refinements Regulations provide relief from the FSG and SOA obligations (but not the PDS obligation) in respect of services provided in respect of interests in cash management trusts⁶⁵. However, a PDS is still required in relation to the issue of interests in cash management trusts. The Explanatory Statement⁶⁶ says that FSG and SOA (but not PDS) relief is justified because the 'more important information' about cash management trusts is contained in a PDS.

Personal advice relating to cash management trusts must continue to comply with the reasonable basis for advice rule⁶⁷. Despite the SOA exemption, it is still a requirement that the client must be given the information about conflicts of interest that would, but for the exemption, have been required to be included in an SOA⁶⁸.

General Insurance Products

Tailored General Insurance Product Disclosure Statements - Proposal 7.1

Proposal 7.1 of the FSR Refinements Proposals Paper was to tailor the PDS requirements so that general insurance PDSs need only disclose certain core information, including that required to comply with the Insurance Contracts Act 1984. The policy objective of this proposal was to improve the quality of disclosure for consumers of general insurance products⁶⁹.

This proposal has been addressed by Part 1 of Schedule 5 to the FSR Refinements Regulations. Under the new requirements general insurance PDSs will no longer be required to comply with matters considered to be of no, or limited, relevance in the general insurance context, namely ss1013C(1)(a)(ii), 1013D(1)(c), (d)(iii), (e), (h), (j) or (l) and s1013E of the Corporations Act 2001⁷⁰.

Further, under the new requirements a general insurance PDS must comply with all other PDS content obligations and must, in addition, include:

- (a) the terms and conditions of the policy document (other than matters provided in a Schedule to the policy document – typically containing details specific to the particular insured); and

⁶³ Corporations Act 2001 (Cth), s912A(1)(f). Refer also to *ASIC Policy Statement 146: Training of financial product advisers*.

⁶⁴ Although the exceptions to the hawking prohibition in s992A(3) have been modified: Corporations Act 2001 (Cth), s992(3AA) as inserted by Corporations Regulations 2001 (Cth), reg 7.8.21A

⁶⁵ Corporations Regulations 2001 (Cth), regs 7.7.02(1)(c) and 7.7.10(c)

⁶⁶ Explanatory Statement to Select Legislative Instrument 2005 No. 324

⁶⁷ Corporations Act 2001 (Cth), s945A

⁶⁸ Corporations Act 2001 (Cth), s946B(6) as inserted by Corporations Regulations 2001 (Cth), reg 7.7.10AE

⁶⁹ *Refinements to Financial Services Regulation: Proposals Paper* (May 2005), Commonwealth of Australia, pp16-18

⁷⁰ Corporations Regulations 2001 (Cth), regs 7.9.15D and 7.9.15F. Note that a general insurance PDS may (but need not) include information not required by the law, such as information relating to taxation implications.

- (b) information relating to standard cover and unusual terms (as required by ss35(2) and 37 of the Insurance Contracts Act 1984)⁷¹.

All information in a PDS must be worded and presented in a clear, concise and effective manner⁷². This means, for example, that exclusions from liability contained in the terms and conditions of the policy document included in the PDS must be worded and presented in a clear, concise and effective manner.

The extent to which the PDS must provide information relating to the insured's duty of disclosure (see Division 1 of Part IV of the Insurance Contracts Act 1984) is not entirely clear. While a PDS does not need to include information relating to significant risks⁷³, it does need to include information about significant characteristics or features of the product⁷⁴.

The Short-Form PDS option⁷⁵ is not available to general insurance issuers.

All general insurance PDSs must comply with the new requirements within 18 months of the commencement of the FSR Refinement Regulations. Until that time, general insurance issuers can choose to comply either with the new requirements or the law applying immediately before the commencement of the FSR Refinement Regulations

PDS relief for general insurance renewals (Proposal 7.2)

Proposal 7.2 of the FSR Refinements Proposals Paper was to provide that a PDS does not need to be given to a client in relation to the renewal of a general insurance product where no material changes to the policy have occurred (other than the premium payable). The policy objective of this proposal was to save industry (and ultimately consumers) the cost of providing PDSs to persons renewing general insurance contracts where the PDS would not contain any material information not already provided to those persons⁷⁶.

This proposal has been addressed by Part 2 of Schedule 5 to the FSR Refinements Regulations. However, rather than give complete relief from the requirement to give the client a PDS where a general insurance contract is being renewed, reg 7.9.07FC of the Corporations Regulations 2001⁷⁷ merely seeks to clarify, in effect, that where an existing client is renewing a general insurance contract, he or she can be given a Supplementary PDS (instead of a full PDS). The Supplementary PDS must contain any information that would be required to be in a full PDS other than information that has previously been disclosed to that client through an old PDS. The extent (if any) to which reg 7.9.07FC provides relief which goes beyond the existing supplementary PDS provisions⁷⁸ is doubtful.

SOA relief for personal advice about certain general insurance products

Although not contained in the FSR Refinements Proposals Paper, the FSR Refinements Regulations provide relief from the obligation to give a client an SOA for personal advice about certain general insurance products⁷⁹. This relief applies in respect of advice concerning specific categories of insurance, namely motor vehicle insurance, house and contents insurance and travel insurance, personal and domestic property insurance and medical indemnity insurance. The relief does not, however, apply in respect of advice relating to sickness and accident insurance or consumer credit insurance. The new SOA exemption

⁷¹ Corporations Regulations 2001 (Cth), reg 7.9.15E

⁷² Corporations Act 2001 (Cth), s1013C(3)

⁷³ Corporations Act 2001 (Cth), s1013D(1)(c)

⁷⁴ Corporations Act 2001 (Cth), s1013D(1)(f)

⁷⁵ Proposal 3

⁷⁶ *Refinements to Financial Services Regulation: Proposals Paper* (May 2005), Commonwealth of Australia, p18

⁷⁷ Which inserts s1014EA into the Corporations Act 2001 (Cth)

⁷⁸ Corporations Act 2001 (Cth), s1014E

⁷⁹ Corporations Regulations 2001 (Cth), regs 7.7.10(d) – (i)

does not provide any relief from the reasonable basis for advice rule⁸⁰. Further, the SOA exemption does not relieve the providing entity from the obligation to give the client the information about conflicts of interest that would, but for the exemption, have been required to be included in an SOA⁸¹.

The Explanatory Statement states that industry is expected to keep records of advice they provide under this exemption⁸².

Retail/Wholesale Distinction⁸³

Companies and trusts controlled by wholesale clients and related bodies corporate of wholesale clients - Proposal 8.1

Proposal 8.1 of the FSR Refinements Proposals Paper was to provide that a company or trust should be treated as a wholesale client if it is controlled by a person who is a wholesale client and that related bodies corporate of wholesale clients should be treated as wholesale clients. The policy objective of this proposal was to improve the retail/wholesale test (which is 'necessarily... somewhat arbitrary'⁸⁴) by resolving inconsistencies and inequities.

This proposal has been addressed by Part 1 of Schedule 6 to the FSR Refinements Regulations which provides that for the purposes of Parts 7.6, 7.7, 7.8 and 7.9 of the Corporations Act 2001:

- (a) a company or trust is taken to be a wholesale client if it is controlled by a person specified in s761G(7)(c)(i) or (ii) of the Corporations Act 2001, that is, a person who holds certificate from a qualified accountant stating that they have at least \$2.5 million in net assets or \$250,000 of gross income: Reg 7.1.28⁸⁵. However, the FSR Refinement Regulations go further than Proposal 8.1 by also providing that the net assets and gross income of any company or trust controlled by a person may be taken into account determining whether that person has the net assets or gross income specified in Reg 7.1.28⁸⁶;
- (b) any related body corporate of a person who is, or would be, a wholesale client in respect of the provision of a financial product or service is taken to be a wholesale client in relation to the provision of that product or service⁸⁷.

For example, if an individual holds net assets of \$500,000 in their own name and controls a company with net assets of \$2 million, then:

- (a) the individual can be treated as a wholesale client under s761G(7)(c) if they obtain a certificate from a qualified accountant; and
- (b) the company can be treated as a wholesale client if the individual can be treated as a wholesale client under s761G(7)(c).

⁸⁰ Corporations Act 2001 (Cth), s945A.

⁸¹ Corporations Act 2001 (Cth), s946B(6) as inserted by Corporations Regulations 2001 (Cth), reg 7.7.10AE. Note that s946B contains erroneous paragraph numbering – the reference in s946B(6) to s946B(4) should instead be a reference to s946B(5).

⁸² An interesting issue is whether this general record-keeping expectation applies, or should apply, only to advice about general insurance products, or whether it does or should also extend to other advice exempt from the SOA obligations under Reg 7.7.10, such as advice about basic deposit products.

⁸³ Alterations to the retail/wholesale client distinction are significant for the disclosure regime because most FSRA disclosure obligations apply only where financial products or services are provided to retail clients.

⁸⁴ *Refinements to Financial Services Regulation: Proposals Paper* (May 2005), Commonwealth of Australia, p20

⁸⁵ Corporations Regulations 2001 (Cth), reg 7.6.02AB.

⁸⁶ Corporations Regulations 2001 (Cth), reg 7.6.02AC

⁸⁷ Corporations Regulations 2001 (Cth), reg 7.6.02AD

To determine whether a company or trust is controlled by a person for the purposes of regs 7.6.02AB and 7.6.02AC of the Corporations Regulations 2001, refer to s50AA of the Corporations Act 2001. To determine whether a body corporate is related to a wholesale client, refer to the definition in s50 of the Corporations Act 2001.

The Explanatory Statement⁸⁸ does not consider the question whether reg 7.6.02AB may adversely affect holders of minority interests in companies or trusts controlled by wholesale investors, although that issue was noted in the Proposals Paper. This concern is arguably a significant one where some or all of the minority interests in the company or trust are held by unsophisticated investors. To overcome this problem, an alternative to reg 7.6.02AB would have been to provide that a company or trust is taken to be a wholesale client only where all the interests in the company or trust are held by persons specified in s761G(7)(c)(i) or (ii).

The Definition of 'Professional Investor' - Proposal 8.2

Proposal 8.2 of the FSR Refinements Proposals Paper was to amend the definition of 'professional investor' in s9 of the Corporations Act 2001. Again, the policy objective of this proposal was to improve the retail/wholesale test by resolving inconsistencies and inequities⁸⁹.

This proposal has been addressed by Part 2 of Schedule 6 to the FSR Refinements Regulations under which, for the purposes of Parts 7.6, 7.7, 7.8 and 7.9 of the Corporations Act 2001, paragraph (e) of the definition of 'professional investor' is amended to mean a person that has or controls gross assets of at least \$10 million, including any assets held by an associate or under a trust that the person manages⁹⁰.

The definition of 'control' in s50AA is not relevant for the purpose of determining whether a person controls gross assets (as opposed to determining whether a person controls an entity). The Explanatory Statement⁹¹ says that 'control' for the purposes of Reg 7.6.02AE is to be given its 'ordinary meaning'.

Accountants' Certificates (Proposal 8.3)

Proposal 8.2 of the FSR Refinements Proposals Paper was to extend the life of accountants' certificates under s761G(7)(c) of the Corporations Act 2001 from 6 to 24 months. The policy objective of this proposal was to extend the life of accountants' certificates 'without undermining the integrity of the wholesale client criteria'⁹².

This proposal has been addressed by Part 3 of Schedule 6 to the FSR Refinements Regulations⁹³.

Increasing the life of accountants' certificates from 6 to 24 months increases the risk that a person holding a certificate may be inappropriately characterised by the law as a wholesale client, that is, if the person's net assets or gross income falls below the level prescribed in Reg 7.1.28 of the Corporations Regulations 2001 within the life of the certificate. The Explanatory Statement⁹⁴ states, in effect, that a licensee that provides a financial service to a client will breach the requirement to act 'efficiently, honestly and fairly'⁹⁵ if it treats the client as wholesale where the client tells the licensee that he or she no longer has the net assets or gross income required by reg 7.1.28. It may be noted that the Explanatory Statement deals only with the case where the client tells the licensee about his or her changed circumstances

⁸⁸ Explanatory Statement to Select Legislative Instrument 2005 No. 324

⁸⁹ *Refinements to Financial Services Regulation: Proposals Paper* (May 2005), Commonwealth of Australia, pp20-21

⁹⁰ Corporations Regulations 2001 (Cth), reg 7.6.02AE

⁹¹ Explanatory Statement to Select Legislative Instrument 2005 No. 324

⁹² *Refinements to Financial Services Regulation: Proposals Paper* (May 2005), Commonwealth of Australia, p21

⁹³ Corporations Regulations 2001 (Cth), reg 7.6.02AF

⁹⁴ Explanatory Statement to Select Legislative Instrument 2005 No. 324

⁹⁵ Corporations Act 2001 (Cth), s912A(1)(a)

– it does not consider whether the licensee has a positive duty to make inquiries of the client to find out whether the client’s circumstances have changed or not.

Secondary Services ‘Look Through’

Intermediary tells client how to obtain the secondary service provider’s FSG - Proposal 9.2

A secondary service is a financial service that is provided to a client by a secondary service provider through, or by arrangement with, another person (the intermediary). For example, where advice is provided to a client, the intermediary providing the advice may arrange for another person (the secondary service provider) to provide other services (secondary services) to the client, such as dealing services. In the absence of relief, the issue arises as to whether the secondary service provider is required to provide an FSG to the client in these circumstances. Compliance with the FSG obligations may be impractical for the secondary service provider because, typically, the client will have direct contact only with the intermediary.

Proposal 9.2 of the FSR Refinements Proposals Paper was to provide relief for secondary service providers from the obligation to provide an FSG where the intermediary tells the client how to obtain the secondary service provider’s FSG. The policy objective of this proposal was to relieve secondary service providers from obligations of ‘questionable benefit’⁹⁶.

Proposal 9.2 as been addressed by Part 1 of Schedule 7 to the FSR Refinements Regulations which provides, in essence, that a secondary service provider does not need to provide an FSG to a client in respect of a secondary service where:

- (a) the secondary service provider causes or authorises a licensee or authorised representative (the intermediary) to ‘provide or pass on the service’;
- (b) but for s52 of the Act, the secondary service provider would not be taken to have provided the financial service to the client;
- (c) the intermediary does not act on behalf of the secondary service provider in providing or passing on that service;
- (d) the intermediary is a licensee or authorised representative (Reg 7.7.02(7)(d)); and
- (e) there is a written agreement between the secondary service provider and the intermediary under which the intermediary agrees to either give the client the secondary service provider’s FSG or tell the client where to obtain a copy of it⁹⁷.

The meaning of the expression ‘provide or pass on’ in reg 7.7.02(7)(a) of the Corporations Regulations 2001 is not completely clear. For example, the sense in which an intermediary can be said to ‘provide or pass on’ a dealing service is not clear.

General Advice Definition

Unlicensed Product Issuers and Persons not linked to a financial product – Proposal 10.1

Proposal 10.1 of the FSR Refinements Proposals Paper was to provide that financial product advice does not include general advice from either:

- (a) an unlicensed product issuer; or
- (b) a person not linked to a specific financial product,

⁹⁶ *Refinements to Financial Services Regulation: Proposals Paper* (May 2005), Commonwealth of Australia, pp21-23

⁹⁷ Corporations Regulations 2001 (Cth), reg 7.7.02(7)

but only where no remuneration or other benefit is received.

The policy objective of this proposal was to facilitate 'conversations with consumers'⁹⁸ by narrowing the circumstances in which obligations attaching to the provision of general advice will be triggered.

Proposal 10.1 has been addressed by Schedule 8 to the FSR Refinements Regulations.

(a) An unlicensed product issuer

Reg 7.1.33H of the Corporations Regulations 2001 provides, in essence, that an unlicensed product issuer is not taken not to provide a financial service if the issuer gives advice (other than personal advice) to another person (the client) about the issuer's own products, but only if the issuer provides the following information to the client at the time the advice is provided:

- (a) the client must be advised that the issuer is not licensed to provide financial product advice about those products⁹⁹;
- (b) the client must be advised to obtain and read the PDS, if appropriate¹⁰⁰; and
- (c) the client must be advised about the availability or otherwise of any cooling off regime (if the advice relates to the offer, issue or sale of a financial product)¹⁰¹.

Contrary to the FSR Refinements Proposals Paper, the relief under reg 7.1.33H is not limited to the case where the person providing the advice does not receive remuneration or other benefit in respect of the advice.

The main implications of this relief are that the product issuer does not need to hold an obtain an Australian financial services licence in order to provide advice subject to reg 7.1.33H and does not need to provide the client with an FSG in respect of the advice.

Unlike the licensing exemption for product issuers in respect of general advice in the media¹⁰², the relief in Reg 7.1.33H is not conditional on the provision of a warning to the client to the effect that the advice does not take into account the client's objectives, financial situation or needs. Issuers may nevertheless wish to provide such a warning because to do so may help ensure that any advice they give is construed to be general advice (rather than personal advice)¹⁰³.

Where advice is provided to an existing client and is limited to providing advice about a product that they already hold, the conditions relating to obtaining and read the PDS and cooling off do not apply.

(b) A person not linked to a specific financial product

Reg 7.1.33G of the Corporations Regulations 2001 provides, in essence, that a person (the advisor) is taken not to provide a financial service if the advisor gives advice (other than personal advice) to another person (the client) where:

- (a) the advice is not about a particular financial product;
- (b) the advice is not intended to influence a person to make a decision about a particular financial product;

⁹⁸ *Refinements to Financial Services Regulation: Proposals Paper* (May 2005), Commonwealth of Australia, pp24-25

⁹⁹ Corporations Regulations 2001 (Cth), reg 7.1.33H(c)(i)

¹⁰⁰ Corporations Regulations 2001 (Cth), reg 7.1.33H(c)(ii). Note that this regulation does not expressly deal with the case where the issuer elects to make available a Short-Form PDS.

¹⁰¹ Corporations Regulations 2001 (Cth), reg 7.1.33H(c)(iii)

¹⁰² Corporations Regulations 2001 (Cth), reg 7.6.01(1)(o)

¹⁰³ In this regard see *ASIC Policy Statement 175: Licensing: Financial product advisers – Conduct and Disclosure*, para 175.11

- (c) the advice could not reasonably be regarded as being intended to influence a person to make a decision about a particular financial product; and
- (d) by giving the advice neither the advisor, nor any associate of the advisor, receives any benefit that is related to the advice apart from a benefit that the advisor would have received even if the advice had not been provided¹⁰⁴.

Unfortunately, the expression 'particular financial product' is not defined.

The main implications of this relief are that the advisor does not need to hold an Australian financial services licence in order to provide advice subject to reg 7.1.33G and does not need to provide the client with an FSG in respect of the advice.

This relief is not conditional on the advisor giving a warning to the client to the effect that the advice does not take into account the client's objectives, financial situation or needs. Again, persons wishing to rely on this exemption may nevertheless wish to provide such a warning because to do so may help ensure that any advice they give is construed to be general advice (rather than personal advice).

Jurisdictional Reach

Clarifying the jurisdictional reach of the law – Proposal 11

Proposal 11 of the FSR Refinements Proposals Paper was to clarify the jurisdictional reach of the law so that an Australian financial services licence is not required in certain defined situations. The policy objective of this proposal was to ensure that the law did not apply beyond its intended jurisdictional scope¹⁰⁵.

Proposal 11 has been addressed by Schedule 9 to the FSR Refinements Regulations which provide various exemptions from the requirement to hold an Australian financial services licence in respect of certain financial services provided by persons not in this jurisdiction (referred to in this article as 'offshore service providers'). Specifically, Schedule 9 deals with the following:

- (a) A service provided to an Australian citizen or resident from outside this jurisdiction;
- (b) A market-related service provided to a person not in this jurisdiction;
- (c) A service provided to a licensee acting as principal;
- (d) A service provided by an overseas product issuer to a person in this jurisdiction;
- (e) A service provided to a professional investor;
- (f) A service for which an Australian financial services licensee assumes responsibility;
- (g) Disclosure relief where the client is not in this jurisdiction.

(a) A service provided to an Australian citizen or resident from outside this jurisdiction

Under s911A(2A) of the Corporations Act 2001¹⁰⁶, a person not in this jurisdiction (an offshore service provider) is exempt from the obligation to hold an Australian financial services licence for a financial service they provide to an Australian citizen or resident where:

- (i) the offshore service provider does not engage in conduct that is:
 - (A) intended to induce people in this jurisdiction to use the service; or
 - (B) likely to have that effect; and
- (ii) the service is provided from outside this jurisdiction.

¹⁰⁴ Corporations Regulations 2001 (Cth), reg 7.1.33G

¹⁰⁵ *Refinements to Financial Services Regulation: Proposals Paper* (May 2005), Commonwealth of Australia, pp26-28

¹⁰⁶ As inserted by Corporations Regulations 2001 (Cth), reg 7.6.02AG

The Explanatory Statement¹⁰⁷ does not provide any guidance as to the circumstances in which an offshore service provider may be said to engage in conduct which is intended to, or likely to, induce people in this jurisdiction to use a financial service, other than to note that the circumstances are broader than the circumstances in which a offshore service provider may be said to 'actively solicit' persons in this jurisdiction¹⁰⁸.

An offshore service provider (whether licensed or not) who provides a financial service in the circumstances set out in s911A(2A) is also exempt from Parts 7.7, 7.8 and 7.9 of the Corporations Act 2001 in relation to the provision of that service¹⁰⁹. For example, an offshore service provider that provides general advice in the circumstances specified in s911A(2A) would not need to comply with any FSG obligations in Part 7.7 that may otherwise apply.

(b) A market-related service provided to a person not in this jurisdiction

Under s911A(2B)¹¹⁰ a person not in this jurisdiction (an offshore service provider) is exempt from the obligation to hold an Australian financial services licence for a financial service they provide to a client where:

- (i) the offshore service provider believes on reasonable grounds that the client is not in this jurisdiction;
- (ii) the offshore service provider is a participant in a licensed financial market¹¹¹; and
- (iii) the service relates to a financial product traded on that market.

An offshore service provider (whether licensed or not) who provides a financial service in the circumstances set out in s911A(2B) is also exempt from Parts 7.7, 7.8 and 7.9 of the Corporations Act 2001 in relation to the provision of that service¹¹². For example, an offshore service provider that provides personal advice to a client in the circumstances specified in s911A(2B) would not need to comply with the FSG or SOA obligations in Part 7.7¹¹³.

(c) A service provided to a licensee acting as principal

Under s911A(2C)¹¹⁴ a person not in this jurisdiction (an offshore service provider) is exempt from the obligation to hold an Australian financial services licence for a financial service they provide to a client where the client:

- (i) is the holder of an Australian financial services licence (or is exempt from the obligation to hold a licence under s911A(2)(h)); and
- (ii) acting as principal.

An offshore service provider (whether licensed or not) who provides a financial service in the circumstances set out in s911A(2C) is also exempt from Parts 7.7, 7.8 and 7.9 of the Corporations Act 2001 in relation to the provision of that service¹¹⁵.

¹⁰⁷ Explanatory Statement to Select Legislative Instrument 2005 No. 324

¹⁰⁸ Corporations Act 2001 (Cth), s911A(2D)(d), as inserted by inserted by Corporations Regulations 2001 (Cth), reg 7.6.02AG. This is provision is discussed below.

¹⁰⁹ Corporations Regulations 2001 (Cth), reg 7.9.98

¹¹⁰ As inserted by Corporations Regulations 2001 (Cth), reg 7.6.02AG

¹¹¹ That is, a market licensed under Corporations Act 2001 (Cth), s795B(2)

¹¹² Corporations Regulations 2001 (Cth), reg 7.9.98

¹¹³ The FSG and SOA obligations may not apply in these circumstances in any event: Corporations Regulations 2001 (Cth), reg 7.7.21

¹¹⁴ As inserted by Corporations Regulations 2001 (Cth), reg 7.6.02AG. This exemption replaces the relief contained in Corporations Regulations 2001 (Cth), reg 7.6.01(1)(ma) immediately prior to the commencement of the FSR Refinement Regulations..

¹¹⁵ Corporations Regulations 2001 (Cth), reg 7.9.98

(d) A service provided by an overseas product issuer to a person in this jurisdiction

Under s911A(2D)¹¹⁶ a person not in this jurisdiction (an offshore service provider) is exempt from the obligation to hold an Australian financial services licence for a financial service they provide to a person in this jurisdiction (a client) where:

- (i) the service relates to a product:
 - (A) issued by the offshore service provider following an application by, or inquiry from, the client¹¹⁷;
 - (B) issued by the offshore service provider and acquired by the client when the client was not in this jurisdiction¹¹⁸;
 - (C) that supplements a financial product mentioned in (A) or (B)¹¹⁹; or
 - (D) that is of the same kind as, and is issued in substitution for, a financial product mentioned in (A) or (B)¹²⁰; and
- (ii) the offshore service provider does not 'actively solicit' persons in this jurisdiction in relation to the financial products mentioned in (A).

According to the Explanatory Statement, an offshore service provider does not 'actively solicit' merely by having a website (accessible in Australia) which promotes its financial products unless it is clear to a reasonable person that the promotion is directed specifically or primarily to people in Australia. Nor does an offshore service provider 'actively solicit' merely by placing advertisements in overseas newspapers (which are also available in Australia) which promote its financial products unless it is clear to a reasonable person that they are primarily directed to people in Australia. On the other hand, an offshore service provider would be regarded as actively soliciting if the advertisements were placed in newspapers which are published and primarily circulated in Australia. Further, an offshore service provider would be regarded as actively soliciting if it contacted persons in Australia directly (whether by email, telephone, letter or other means) to promote its financial products.

Where a financial product is issued in circumstances that fall within s911A(2D), the offshore service provider will be exempt from the obligation to hold an Australian financial services licence for any service they provide that 'relates to' that product. For example, where a managed discretionary account is issued to a client, any financial product advice provided to the client by the offshore service provider about underlying investments would appear to fall within the licensing exemption.

An offshore service provider (whether licensed or not) who provides a financial service in the circumstances set out in s911A(2D) is also exempt from Parts 7.7, 7.8 and 7.9 of the Corporations Act 2001 in relation to the provision of that service¹²¹.

¹¹⁶ As inserted by Corporations Regulations 2001 (Cth), reg 7.6.02AG

¹¹⁷ Corporations Act 2001 (Cth), s911A(2D)(c)(i). For example, this would cover the case where the client applied for, and acquired, insurance from an offshore service provider in respect of property located overseas.

¹¹⁸ Corporations Act 2001 (Cth), s911A(2D)(c)(ii). For example, this would cover the situation where a person acquires a financial product (such as a deposit account) while temporarily working overseas.

¹¹⁹ Corporations Act 2001 (Cth), s911A(2D)(c)(iii). A noncash payment facility being a cheque facility is an example of a product that 'supplements' an existing transaction or investment account: Corporations Act 2001 (Cth), s911A(2D), Note 1

¹²⁰ Corporations Act 2001 (Cth), s911A(2D)(c)(iv). For example, where a general insurance policy product is issued by the offshore service provider following an application by, or inquiry from, the client, a renewal of that policy would fall within s911A(2D)(c)(iv): Corporations Act 2001 (Cth), s911A(2D), Note 2. However, the replacement of an insurance policy with a deposit account would not fall within s911A(2D)(c)(iv).

¹²¹ Corporations Regulations 2001 (Cth), reg 7.9.98

(e) A service provided to a professional investor

Under s911A(2E)¹²² a person not in this jurisdiction (an offshore service provider) is exempt from the obligation to hold an Australian financial services licence for a financial service they provide to a professional investor (as defined in s9) where the service consists of any or all of the following:

- (i) dealing in derivatives or foreign exchange contracts;
- (ii) providing advice on derivatives or foreign exchange contracts;
- (iii) making a market in derivatives or foreign exchange contracts.

An offshore service provider (whether licensed or not) who provides a financial service in the circumstances set out in s911A(2E) is also exempt from Parts 7.7, 7.8 and 7.9 of the Corporations Act 2001 in relation to the provision of that service¹²³. For example, an offshore service provider that provides personal advice to a professional investor about derivatives and foreign exchange contracts in the circumstances specified in s911A(2E) would not need to comply with the FSG or SOA obligations in Part 7.7¹²⁴.

(f) A service for which an Australian financial services licensee assumes responsibility

Under reg 7.6.01(1)(na) of the Corporations Regulations 2001, a person not in this jurisdiction (an offshore service provider) is exempt from the obligation to hold an Australian financial services licence for a financial service they provide to a person in this jurisdiction (a client) where:

- (i) the service consists only of providing financial product advice to the client, making a market or providing a custody or depository service to the client;
- (ii) the offshore service provider is:
 - (A) related to an Australian financial services licensee whose licence covers the provision of the service; or
 - (B) a party to a business joint venture with an Australian financial services licensee whose licence covers the provision of the service;
- (iii) the licensee arranges for the offshore service provider to provide the service;
- (iv) the licensee's licence is subject to a condition requiring it to assume responsibility for the conduct of the offshore service provider¹²⁵.

(g) Disclosure relief where the client is not in this jurisdiction

Part 7.7 does not apply in respect of a financial service provided to a retail client who is not in this jurisdiction¹²⁶.

Further, a PDS does not need to be given for a financial product if the client is not in this jurisdiction¹²⁷. However, no relief has been provided from the other obligations in Part 7.9, such as s1017B¹²⁸.

¹²² As inserted by Corporations Regulations 2001 (Cth), reg 7.6.02AG

¹²³ Corporations Regulations 2001 (Cth), reg 7.9.98

¹²⁴ The FSG and SOA obligations would not apply in any event in these circumstances because a professional investor is a retail client (Corporations Act 2001 (Cth), s761G(7)(d)) and the FSG and SOA obligations apply only in respect of services provided to retail clients.

¹²⁵ Corporations Regulations 2001 (Cth), reg 7.6.01(1)(na). Immediately prior to the commencement of the FSR Refinement Regulations, the exemption in reg 7.6.01(1)(na) applied only where the client was a wholesale client. See also ASIC Pro Forma 209 *Australian financial services licence conditions*, condition 59.

¹²⁶ Corporations Regulations 2001 (Cth), reg 7.7.21

¹²⁷ Corporations Regulations 2001 (Cth), reg 7.9.07FB

Conclusion

The FSR Refinement Regulations make significant changes to the disclosure requirements for product issuers and providing entities. While the changes are described as 'refinements', many of them are more significant than this description would suggest.

In general, the FSR Refinements Regulations appear to facilitate the production of shorter disclosure documents. For example, the FSR Refinement Regulations:

- (a) allow providing entities to give a client a 'tailored' FSG covering only those services they envisage providing to that client (Proposal 1.1);
- (b) allow providing entities to give the client a 'Statement' instead of an FSG where they also give the client a PDS (Proposal 1.2);
- (c) allow providing entities to give only general information about their remuneration (rather than more detailed particulars) in their FSG when offering financial services (other than personal advice) provided the extra detail is provided to consumers on request (Proposal 1.3);
- (d) allow issuers to give a client a short form PDS instead of the full PDS, provided a full PDS is made given to the client upon request. Issuers are not, however, compelled to prepare a short form PDS (Proposal 3).

However, it is not clear whether these changes will necessarily serve consumers' interests. For example, it is not clear whether short form PDSs will, in fact, help consumers understand and compare financial products given that they are not required to be in a prescribed standard format or to contain a standard list of matters. On the other hand, if it is assumed that short form PDSs will help consumers, it is not clear why the regulations do not make the preparation of short form PDSs mandatory. Because issuers can choose whether or not to prepare a short form PDS, it is possible that consumers wishing to compare financial products may receive a short form PDS from some issuers and a 'full' PDS from other issuers. This may confuse consumers.

To take another example, it may be confusing for consumers wishing to compare different products or services to receive different documents (or packages of documents) with different titles from different issuers or providing entities (Proposals 1.2). In this regard, a consumer wishing to compare the products and services offered by a number of entities may receive any of the following documents (or packages of documents):

- (a) an FSG and PDS;
- (b) an FSG and short form PDS;
- (c) a combined FSG/PDS (Reg 7.7.08A); or
- (d) a 'Statement' and a PDS.

Furthermore, the FSR Refinement Regulations contain uncertainties, including the following:

- (a) the requirements applying to records of advice are not clear, particularly the extent to which they need to include information required by s947D (Proposal 2);
- (b) aspects of the short form PDS regime are not clear, including the requirement to include a 'summary' of certain information and the liability regime applying in relation to material incorporated by reference (Proposal 3);
- (c) the scope of the licensing and disclosure exemptions for overseas product issuers¹²⁹ is not clear.

In April 2006 the Government issued a Consultation Paper which foreshadows further possible changes to the financial services regulatory regime. It is likely that this consultation process will lead to further changes to the financial services disclosure regime.

¹²⁸ Although refer to Corporations Act 2001 (Cth), s1017B(1)(b)

¹²⁹ Corporations Act 2001 (Cth), s911A(2D) as inserted by Corporations Regulations 2001 (Cth), reg 7.6.02AG; Corporations Regulations 2001 (Cth), reg 7.9.98