

EXPLANATORY STATEMENT

Select Legislative Instrument 2008 No. 281

Issued by authority of the Treasurer

Insurance Act 1973

Insurance Amendment Regulations 2008 (No. 2)

Section 132 of the *Insurance Act 1973* (the Act) provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Act regulates insurance in Australia and was recently amended by the *Financial System Legislation Amendment (Financial Claims Scheme and Other Measures) Act 2008* (the Amendment Act) which put in place the Financial Claims Scheme (FCS).

The FCS provides a formal, targeted and efficient arrangement to ensure that depositors have timely access to their funds in the event of the failure of an authorised deposit-taking institution. It supplements the longstanding depositor preference arrangements that give depositors a priority claim to assets over all other creditors in liquidation, but under which (in the absence of the FCS) it could take many months or years before depositors receive any funds. The Australian Prudential Regulation Authority (APRA) is the administrator of the FCS.

In relation to insurance, the FCS arrangements will facilitate the expedited payment of valid claims for eligible general insurance policyholders. This will mean that if an institution fails policyholders (or certain third parties) will continue to receive payment for claims equivalent to the value of their claims less any excess or deductible amounts. Policyholders will also retain 'notional' insurance coverage for a 28 day period to enable them to find an alternative insurer.

The Regulations facilitate the practical aspects of the FCS in the event that a general insurer fails. The Regulations address a number of issues, including which insurance policies would not be protected by the FCS, the time period for making a claim under the FCS, eligibility criteria for policyholders and third parties, and recovery of monies by the APRA in the event of erroneous overpayments to claimants.

Details of the Regulations are included in the Attachment.

The Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations have a variable commencement: regulation 4 and Schedule 2 commence on the day after they are registered, while regulations 1 to 3 and Schedule 1 are taken to have commenced on 1 July 2008.

Due to the Regulations being required as a matter of urgency, extensive consultation on the Regulations was considered inappropriate in the circumstances. As a result only limited consultation was undertaken.

Authority: Section 132 of the *Insurance Act 1973*

ATTACHMENT**Details of the Insurance Amendment Regulations 2008 (No. 2)****Regulation 1 – Name of the Regulations**

This regulation provides that the title of the Regulations is the *Insurance Amendment Regulations 2008 (No. 2)*.

Regulations 2 – Commencement

This regulation provides that Schedule 1 and regulations 1 to 3 are taken to have commenced retrospectively on 1 July 2008, and that Schedule 2 and regulation 4 commenced on the day after the Regulations were registered.

Regulation 3 – Amendment of the Insurance Regulations 2002

This regulation provides that the *Insurance Regulations 2002* (the Principal Regulations) are amended as set out in Schedule 1.

Regulation 4 – Amendment of the Insurance Regulations 2002

This regulation provides that the Principal Regulations are amended as set out in Schedule 2.

Schedule 1 – Amendments**Item [1] – Definitions**

Item 1 omits the reference to ‘this Part’ in paragraph (c) of the definition of unauthorised foreign insurer in regulation 4 of the Principal Regulations, and replaces it with ‘Part 2’.

This clarifies the definition of unauthorised foreign insurer, by correcting paragraph (c), so that unauthorised foreign insurers do not commit an offence under sections 9 or 10 of the Act if they supply insurance in Australia in accordance with the limited exemption arrangements in Part 2 of the Principal Regulations.

The regulation commenced retrospectively to ensure that an unauthorised foreign insurer has not committed an offence under sections 9 or 10 of the Act since 1 July 2008 due solely to the previous erroneous wording in paragraph (c) of the definition of unauthorised foreign insurer in regulation 4 of the Principal Regulations. Because unauthorised foreign insurers are the only entities directly affected by the regulation, the retrospective aspect of the regulation does not contravene 12(2) of the *Legislative Instruments Act 2003*.

Schedule 2 – Amendments**Item [1] – New Part 4A (new Regulations 7A to 7F)**

Item 1 inserts a new Part 4A into the Principal Regulations, including new regulations 7A to 7F.

Regulation 7A

This regulation includes definitions of a *family trust*, *non-profit body* and *small business entity*.

Family trusts and small business entities have the meaning given by section 272-75 of Schedule 2 to the *Income Tax Assessment Act 1936* and section 328-110 of the *Income Tax Assessment Act 1997*, respectively.

A non-profit body is defined as a body that is not carried on for the purposes of profit or gain to its individual members and is prohibited by its constitution from making any distributions in money, property or otherwise, to its members.

Regulation 7B

Paragraph (a) of the definition of protected policy in subsection 3(1) of the Act, as inserted by the Amendment Act, permits regulations to be made prescribing certain policies to not be protected policies for the purposes of the Act. This means that certain categories of insurance policies can be excluded from coverage under the FCS where this is appropriate; for example where the insurer was not regulated by APRA at the time the policy was issued. This mechanism will ensure that the FCS is targeted to those individuals and businesses least able to assess risk and promote market discipline by those excluded from the FCS.

This regulation excludes State or Territory mandated policies that are already protected through arrangements administered by the State or Territory. Also excluded are policies that are pre-authorisation liabilities and policies that are reinsurance or a retrocession of another policy.

Regulation 7C

Subparagraphs 62ZZF(1)(b)(i) and 62ZZF(1)(b)(ii) of the Act, as inserted by the Amendment Act, enable regulations to be made to prescribe the date at which an eligible claimant can lodge a claim under the FCS, and the date at which no further claims under the scheme can be made.

This enables the Principal Regulations to set a predetermined date at which the scheme is open to take claims. The subregulation 7C(1) indicates that the FCS is open to receive claims from the day on which the Minister makes a declaration in relation to the general insurer. The subregulation 7C(2) sets the final date at which eligible claimants make claims under the FCS at 12 months from the date that the Minister made a declaration in relation to the general insurer. In the event that 12 months is an insufficient length of time, the Australian Prudential Regulation Authority (APRA) has the power under section 62ZZA of the Act to extend the final day for making claims under the FCS.

Regulations 7D and 7E

Paragraph 62ZZF(3)(b) of the Act permits regulations to be made setting the eligibility criteria for persons who may be entitled to claim under the FCS for insurance claims worth more than \$5,000. Paragraph 62ZZG(3)(b) does the same for entitlements in respect of payments to third parties.

It is intended that eligibility criteria be set so as to include those policyholders least able to effectively assess the prudential stability of the general insurers with whom they deal. Other policyholders will be eligible to recover claims in the normal course of liquidating the insurer.

Regulations 7D and 7E restrict who is eligible to make a claim under the FCS in respect of claims greater than \$5,000 to individuals, certain Australian small businesses and family trusts, and Australian-based non-profit bodies.

In the case of individuals, Australian citizens and permanent residents with valid claims are eligible under the FCS, as well as individuals who are not citizens or permanent residents who have insurance against a risk which is located in Australia.

Regulation 7F

Section 62ZZS of the Act permits regulations to be made to make provision for and in relation to the recovery by the APRA of the excess of an amount paid to, or applied for the benefit of, a person purportedly to meet an entitlement under the FCS.

APRA may be required to recover overpayments in the event that an erroneous payment under the FCS is made to a person in regard to the quantum of a payment or because of an error as to the person's eligibility.

Regulation 7F makes an excess payment of a person's entitlement under the FCS a debt due to APRA. APRA is able to recover the amount of the debt in court, by withholding the amount of the debt from another payment that would otherwise be made to the person under the FCS, or from any amount payable to the person upon the winding up of a declared general insurer that provided insurance cover to the person under a protected policy.