



Corporations Amendment Regulation 2012 (No. 6)¹

Select Legislative Instrument 2012 No. 172

I, QUENTIN BRYCE, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulation under the *Corporations Act 2001*.

Dated 12 July 2012

QUENTIN BRYCE
Governor-General

By Her Excellency's Command

WILLIAM RICHARD SHORTEN
Minister for Financial Services and Superannuation

1 Name of regulation

This regulation is the *Corporations Amendment Regulation 2012 (No. 6)*.

2 Commencement

This regulation commences on the day that is six months after it is registered.

3 Amendment of *Corporations Regulations 2001*

Schedule 1 amends the *Corporations Regulations 2001*.

Schedule 1 Amendments

(section 3)

[1] Regulation 5C.11.01

substitute

5C.11.01 Certain schemes not managed investment schemes

- (1) For paragraph (n) of the definition of *managed investment scheme* in section 9 of the Act, each of the following schemes is declared not to be a managed investment scheme:
- (a) an approved benefit fund within the meaning given by subsection 16B (1) of the *Life Insurance Act 1995*;
 - (b) a scheme that has all of the following features:
 - (i) the dominant purpose of the scheme is for each of its members to seek remedies to which they may be legally entitled;
 - (ii) the possible entitlement of each of the members of the scheme to remedies arises out of:
 - (A) the same, similar or related transactions or circumstances that give rise to a common issue of law or fact; or

- (B) different transactions or circumstances but the claims of the members can be appropriately dealt with together;
 - (iii) the possible entitlement of each of the members of the scheme to remedies relates to transactions or circumstances that occurred before or after the first funding agreement (dealing with any issue of interests in the scheme) is finalised;
 - (iv) the steps taken to seek remedies for each of the members of the scheme include a lawyer providing services in relation to:
 - (A) making a demand for payment in relation to a claim; or
 - (B) lodging a proof of debt; or
 - (C) commencing or undertaking legal proceedings; or
 - (D) investigating a potential or actual claim; or
 - (E) negotiating a settlement of a claim; or
 - (F) administering a deed of settlement or scheme of settlement relating to a claim;
 - (v) a person (the *funder*) may provide funds or indemnities under a funding agreement (including an agreement under which no fee is payable to the funder or lawyer if the scheme is not successful in seeking remedies) to enable the members of the scheme to seek remedies;
 - (vi) the lawyer mentioned in subparagraph (iv) and the funder mentioned in subparagraph (v) are not members of the scheme;
- (c) a scheme that has all of the following features:
- (i) the scheme relates to an externally-administered body corporate;
 - (ii) the creditors or members of the body corporate provide funds (including through a trust) or indemnities to the body corporate or external administrator;

- (iii) the funds or indemnities enable the external administrator or the body corporate to:
 - (A) conduct investigations; or
 - (B) to seek or enforce a remedy against a third party; or
 - (C) to defend proceedings brought against the body corporate in relation to the external administration of the body corporate (other than in relation to allegations, made by creditors or members of the body corporate, of negligence or non-performance of duties by the external administrator);
- (iv) if a remedy is sought or enforced against a third party, the remedy will benefit the external administration of the body corporate but will not directly benefit the creditors or members.

(2) In paragraph (1) (c):

external administrator includes an administrator, a liquidator (including a provisional liquidator) and a controller.

[2] Sub-subparagraph 7.6.01 (1) (la) (iii) (B)

omit

service.

insert

service;

[3] Sub-subparagraph 7.6.01 (1) (oa) (iii) (C)

omit

authority.

insert

authority;

[4] Subparagraph 7.6.01 (1) (w) (ii)

omit

client.

insert

client;

[5] After paragraph 7.6.01 (1) (w)

insert

- (x) a financial service provided by a person in relation to a scheme mentioned in paragraph 5C.11.01 (1) (b) or (c);
- (y) a financial service provided by a lawyer under an agreement under which no fee is payable to the lawyer if proceedings are not successful.

[6] After regulation 7.6.01AA

insert

7.6.01AB Obligation on persons providing exempt financial service

- (1) For paragraph 926B (1) (c) of the Act, Part 7.6 of the Act applies as if section 911A of the Act were modified to insert the following subsection after subsection (5A).
 - ‘(5B) If the regulations prescribe an exemption under paragraph (2) (k) that covers the provision of a service by a person in relation to a litigation scheme (within the meaning given by the regulations), the regulations may require the person to have adequate arrangements, and follow certain procedures, for managing conflicts of interest in relation to the scheme.’
- (2) For subsection 911A (5B) of the Act:
 - (a) a *litigation scheme* means a scheme mentioned in paragraph 5C.11.01 (1) (b) or (c); and

(b) if a person is providing, or has provided, a financial service covered by the exemption mentioned in paragraph 7.6.01 (1) (x), the person must:

(i) maintain, for the duration of the scheme, adequate arrangements for managing any conflict of interest that may arise in relation to activities undertaken by the person, or an agent of the person, in relation to the scheme; and

(ii) follow the written procedures mentioned in subregulation (4) for the duration of the scheme.

(3) A person commits an offence if the person contravenes paragraph (2) (b).

Penalty: 50 penalty units.

(4) For paragraph (2) (b), a person has adequate arrangements for managing a conflict of interest that may arise if the person can show through documentation that:

(a) the person has conducted a review of the person's business operations that relate to the scheme to identify and assess potential conflicting interests; and

(b) the person:

(i) has written procedures for identifying and managing conflicts of interest; and

(ii) has effectively implemented the procedures; and

(c) the written procedures are regularly reviewed; and

(d) the written procedures include procedures about the following:

(i) monitoring the person's operations to identify potential conflicting interests;

(ii) how to effectively disclose conflicts of interest to:

(A) for a scheme mentioned in paragraph 5C.11.01 (1) (b)—members and prospective members of the scheme; and

(B) for a scheme mentioned in paragraph 5C.11.01 (1) (c)—the creditors or members of the body corporate who provided funds or indemnities, and any other entity that

-
- provided indemnities, to the body corporate or external administrator;
- (iii) managing situations in which interests may conflict;
 - (iv) protecting the interests of:
 - (A) for a scheme mentioned in paragraph 5C.11.01 (1) (b)—members of the scheme; and
 - (B) for a scheme mentioned in paragraph 5C.11.01 (1) (c)—the creditors of the body corporate;
 - (v) for a scheme mentioned in paragraph 5C.11.01 (1) (b):
 - (A) how to deal with situations in which the lawyer acts for both the funder and members; and
 - (B) how to deal with situations in which there is a pre-existing relationship between any of the funder, lawyer and members; and
 - (C) reviewing the terms of the funding agreement to ensure the terms are consistent with the *Competition and Consumer Act 2010*; and
 - (D) recruiting prospective members;
 - (vi) for a scheme mentioned in paragraph 5C.11.01 (1) (c)—asking creditors of the body corporate to provide funds or indemnities; and
 - (e) for a scheme mentioned in paragraph 5C.11.01 (1) (b)—the terms of the funding agreement are regularly reviewed to ensure the terms are consistent with the *Competition and Consumer Act 2010*; and
 - (f) the matters mentioned in paragraphs (a) to (e) are implemented, monitored and managed by:
 - (i) if the person is an entity other than an individual—the senior management or partners of the person; or
 - (ii) if the person is an individual that represents an entity—the senior management or partners of the entity.

[7] Regulation 7.7.21, except the heading

substitute

For paragraph 951C (1) (a) of the Act, Part 7.7 of the Act does not apply to:

- (a) a financial services licensee or an authorised representative of a financial services licensee to the extent that the licensee or authorised representative is providing a financial service to a retail client who is not in this jurisdiction; and
- (b) a person to the extent that the person is providing a financial service in relation to a scheme mentioned in paragraph 5C.11.01 (1) (b) or (c).

Note Regulation 7.9.98 also contains exemptions from the operation of Part 7.7 of the Act.

[8] After regulation 7.8.25

insert

7.8.26 Exemption from application of section 992A of the Act

For paragraph 992C (1) (a) of the Act, section 992A of the Act does not apply to a person to the extent that the person is offering a financial product for issue or sale in relation to a scheme mentioned in paragraph 5C.11.01 (1) (b) or (c).

[9] After regulation 7.9.98

insert

7.9.98A Exemption from application of Part 7.9 of the Act

For paragraph 1020G (1) (a) of the Act, Part 7.9 of the Act does not apply to a person to the extent that the person is doing any of the following in relation to a scheme mentioned in paragraph 5C.11.01 (1) (b) or (c):

- (a) issuing or selling a financial product;
- (b) making a recommendation to acquire a financial product;

- (c) making an offer relating to the issue or sale of a financial product;
- (d) advertising a financial product.

[10] After regulation 7.10.02

insert

7.10.03 Exemption from application of Part 7.10 of the Act

For paragraph 1045A (1) (a) of the Act, Part 7.10 of the Act does not apply to a person to the extent that the person is providing a financial service in relation to a scheme mentioned in paragraph 5C.11.01 (1) (b) or (c).

Note

1. All legislative instruments and compilations are registered on the Federal Register of Legislative Instruments kept under the *Legislative Instruments Act 2003*. See www.comlaw.gov.au.