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January 2014-EDITION #115

Stop Press – FOFA Amendments open for consultation

The Government has just released the following draft documents for public consultation:

- **Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014**
- **Corporations Amendment (Streamlining of Future of Financial Advice) Regulation 2014.**

Explanatory material for these proposed reforms is also available.

The draft legislation is intended to give effect to the FOFA changes announced by the Government on 20 December 2013.

The closing date for submissions is 19 February 2014.

Comment or Question? 

Financial services licensees receiving information on behalf of clients

Some financial services licensees would like to be able to receive, on behalf of their clients, ongoing disclosure from product issuers about financial products.

This is often not possible under the *Corporations Act 2001*.

Managed investment products, superannuation products, margin lending facilities and some other products require periodic statements to be provided by the product issuer to the client. The client may appoint an agent to receive this information on their behalf but not an agent who is acting in the capacity of financial services licensee or a representative or employee of such a licensee. See section 1015C(3) of the *Corporations Act 2001*. This also goes for ongoing disclosure of material changes and significant events for these kinds of products.

These restrictions, however, do not apply to securities.

Also, confirmation of transactions that must be provided by a product issuer may be provided to a financial services licensee receiving them on behalf of a client. In this case, the financial services licensee must provide the confirmation to its client as soon as reasonably practicable after the transaction occurs.

Tip: If you have further questions about receiving information on behalf of your clients, contact **Michelle Chasser** of *Holley Nethercote*.

Comment or Question? 

ASIC enforcement of FOFA repeal provisions

In December, we alerted you to the Government's announcement that it would repeal various elements of the FOFA legislation.

These include:

- Fee Disclosure Statements for pre-2013 clients



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- opt-in requirements
- the ban of conflicted remuneration so far as it relates to general advice.

It also plans to amend grandfathering provisions to facilitate advisers moving between licensees with continued access to grandfathered benefits.

In light of the Government's announcement, **ASIC** says it:

will not take enforcement action in relation to the specific FOFA provisions that the Government is planning to repeal. For example, we will not take action for breaches of current section 962S of the Corporations Act 2001, which requires fee disclosure statements to be provided to retail clients with ongoing fee arrangements entered into before 1 July 2013.

ASIC also says it will review and consult in relation to its regulatory guides once the proposed amendments have been made.

Tip: For more information and practical advice on this topic, read our **blog post**, if you have not already done so.

Comment or Question? 

Advice – replacing one insurance policy with another

The New South Wales Court of Appeal recently decided an appeal by Commonwealth Financial Planning Ltd seeking a retrial of a case brought against it by Teghan Couper – **Commonwealth Financial Planning Ltd v Couper [2013] NSWCA 444 (16 December 2013)**.

Ms Couper brought the action in her capacity of executrix of her father's estate. Her father, Noel Stevens, died from pancreatic cancer.

Before he died, he attempted to make a claim under his life and trauma insurance policy through The Colonial mutual Life Assurance Society Limited (CommInsure) but the insurer avoided the policy on the basis of non-disclosure – in particular in relation to the amount Mr Stevens drank each day. The right of an insurer to avoid a policy for non-fraudulent non-disclosure exists under section 29(3) of the *Insurance Contracts Act 1984*. The right only lasts up until three years after the contract is entered into and can only be exercised if the insurer would not have entered into the contract on any terms if the duty of disclosure had been complied with.

Mr Stevens had taken out the CommInsure policy after a recommendation to do so by Andrew Galloway, employee and representative of Commonwealth Financial Planning. Mr Galloway recommended the replacement of a life policy Mr Stevens held with Westpac Life Insurance Services Limited. Mr Stevens had held the policy with Westpac for more than three years, meaning that, even if there had been non-disclosure at the time of applying for that policy, by the time Mr Stevens came to make a claim, that insurer would no longer have had the option to avoid the policy for non-disclosure.

The Court found that no retrial was necessary.

The evidence was sufficient to support a finding of misleading and deceptive conduct on the part of Commonwealth Financial Planning, pursuant to section 1041H of the *Corporations Act 2001* and section 12DA of the *ASIC Act 2001*, both of which give rise to an entitlement to recover loss.



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Financial planning firms should take note that the following were seen as grounds for a finding of misleading and deceptive conduct.

1. The advice given by Mr Galloway wrongly supposed that a comparison could be made between the CommInsure and Westpac policies when it was not yet known whether CommInsure would insure Mr Stevens and on what terms.
2. Mr Galloway was not allowed (by his employer) to recommend that Mr Stevens retain his Westpac policy. Therefore it was misleading for the advice to say that all considerations pointed to cancelling the Westpac policy and taking out the CommInsure one.
3. Such comparison as existed between the policies in the advice given was incomplete. For example, the Statement of Advice omitted a consideration of level premiums under the CommInsure policy and considered only stepped premiums, confining its consideration to the first year of the policy rather than the longer term.
4. The advice failed to disclose the effect of section 29(3) of the *Insurance Contracts Act 1984*. The adviser was unaware of the existence and effect of this provision and the Statement of Advice, prepared from a template by a paraplanning team, did not refer to it either.

The Court noted that there would have been scope for Ms Couper to argue that the advice given was not appropriate under section 945A but this argument was not pursued. It also noted that the events in question predated the advent of the statutory requirement to act in the best interests of the client.

This case gives an excellent insight into how a

Court responds to certain practices which are regarded as “the norm” in the financial planning industry.

Tip: Read the case and consider what changes should be made to your systems and templates. For example, advisers could be trained on the effect of section 29(3) of the *Insurance Contracts Act 1984* and an explanation of the effect of this section could be built into your templates for recommendation of an insurance product.

Comment or Question? 

Retail OTC derivatives issuer

Retail OTC derivatives issuers must comply with stricter NTA requirements from 31 January 2014.

They will need to hold net tangible assets of \$1,000,000 or 10 per cent of average revenue – whichever is greater.

For more details, see:

- **ASIC Class Order [CO 12/752] Adequate financial resources for financial services licensees that issue OTC derivatives to retail clients**
- **ASIC Regulatory Guide 166 Licensing: Financial requirements.**

These impending requirements were first published in August 2012.

Comment or Question? 



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Responsible Entities of hedge funds

We remind you that, from 1 February 2014, Responsible Entities of hedge funds must ensure that their PDSs comply with **ASIC RG 240 Hedge funds: Improving disclosure**.

Comment or Question? 

Responsible Entities and mFund Settlement Service

ASIC has issued **Class Order [CO 13/1621]**.

The Class Order:

- exempts Responsible Entities of managed investment schemes available through mFund from the the need to issue interests only in response to an application form that was included in or accompanied by a PDS
- allows Responsible Entities to issue interests on the basis of an electronic message through mFund stating that the investor has been given the current PDS.

In order to take advantage of the relief, a Responsible Entity must:

- within five business days after the issue of the interest, notify the acquirer in writing that there is a PDS with the date specified in the electronic confirmation in relation to the acquirer's application that has information about the interest that should have been given to the acquirer and that if the acquirer has not received that PDS, the acquirer should inform the Responsible Entity whereby the acquirer

may obtain an electronic or paper copy from the Responsible Entity free of charge – and keep records for seven years demonstrating that it has complied with this requirement

- notify ASX in writing within 10 business days if it has reason to believe that a person who acquired an interest in the scheme as a retail client as a result of an application through mFund had not been given, before making the application, the PDS for the interest that was specified in the electronic confirmation in relation to the application
- keep for seven years a copy of all applications received through mFund and any statement made by an acquirer implying they may not have received the PDS relevant to their application.

ASIC says:

mFund is a facility operated by ASX Ltd and ASX Settlement Pty Ltd that allows investors to electronically apply for or redeem units in simple managed investment schemes that have been admitted to the service through brokers who are authorised to participate.

Comment or Question? 

Market participants – impending deadlines for compliance

Market participants of the ASX, ASX 24 or Chi-X must:

- comply with Market Integrity Rules 7.4.1 and 7.5.1 by 10 February 2014



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- if they operate a crossing system, comply with Market Integrity Rules 4A.3.2, 4A.3.3, 4A.4.1, 4A.4.2 and 4A.4.3 by 10 February 2014.

Market participants of the ASX or Chi-X must, by 1 March 2014, comply with short sale tagging requirements.

These deadlines have been set for some time.

Comment or Question? 

ASIC Market Integrity Rules (FEX Market) 2013

ASIC has made **ASIC Market Integrity Rules (FEX Market) 2013**, which apply to the operator of the market and its participants.

Participants in the market may enter into trades in commodity derivatives, energy derivatives and environmental derivatives.

These Market Integrity Rules are modelled on the *ASIC Market Integrity Rules (ASX 24 Market) 2010*. According to the **Explanatory Statement**:

The ASIC Market Integrity Rules (FEX) differ from the ASIC Market Integrity Rules (ASX 24) only as far as is necessary to reflect the differences between products traded on, and the market mechanics of, the FEX Market in relation to the ASX 24 Market.

Comment or Question? 

Credit providers – watch out for new Credit Reporting code

Although it is separate to your credit licensing obligations, credit providers should be aware of the recent registration of the **Credit Reporting Privacy Code**. It may impact the way you meet your credit licensing obligations.

The Code is intended to replace the Credit Reporting Code of Conduct issued under Section 18A of the *Privacy Act 1988*.

The Code adds to obligations already existing under Part IIIA of the *Privacy Act 1988* and the *Privacy Regulation 2013*.

It affects the types of information which may be disclosed to credit reporting bodies and which such bodies may disclose to credit providers.

The new Code takes effect from 12 March 2014.

Tip: Review the Code and update your procedures. Also read our Commercial Corner article on the more general changes to the privacy rules that take effect at the same time.

Comment or Question? 

AUSTRAC Information Circular No. 85 – Listing of terrorist organisations

AUSTRAC has released **Information Circular No. 85**. This directs readers to the Government's **list of terrorist organisations** and provides some information about the list.

AUSTRAC says:

Regulated entities should take the listings and



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related media releases into account when considering whether a particular transaction should be reported to AUSTRAC as... a suspicious matter under the Anti-Money Laundering and Counter-Terrorism Financing Act 2006.

The **Attorney-General George Brandis** says that the listing of the Islamic State of Iraq and the Levant replaces the listing of Al-Qa'ida.

Although they are one and the same organisation, the new name reflects the expansion of the organisation's operating area.

Tip: Review the Government's list and update your systems as necessary.

Comment or Question? 

AUSTRAC fact sheets for remittance businesses

AUSTRAC, along with other Commonwealth, State and Territory organisations with which it makes up the Eligo National Task Force, has released four fact sheets for remittance businesses.

The fact sheets contain information about the Task Force and "guidance for entities on detecting and deterring money laundering activity."

According to AUSTRAC:

The Eligo National Task Force is a special investigation into the misuse of remittance and information value transfer systems by serious and organised crime.

The fact sheets are:

- **Task Force Eligo: Fact sheet**
- **Task Force Eligo: Identifying suspicious behaviour**
- **Task Force Eligo: Money laundering**
- **Task Force Eligo case study: Consistently inconsistent.**

Comment or Question? 

Consultation

The following draft provisions and discussion papers have been open for consultation in January.

Draft AML/CTF Rules relating to customer due diligence. These draft Rules, prepared following earlier consultation, relate to customer due diligence. Comments were due by 24 January 2014.

ASIC Consultation Paper 218 Employee incentive schemes. This Consultation Paper flags changes to ASIC policy and to the scope of relief currently offered by **ASIC Class Order CO 03/184**. Comments were due by 31 January 2014.

ASIC Consultation Paper 219 Keeping superannuation websites up to date. This Paper looks at the requirements under section 29QB of the *Superannuation Industry (Supervision) Act 1993* to keep certain website information up to date at all times. Comments are due by 3 February 2014.

Better regulation and governance, enhanced transparency and improved competition in superannuation. This Paper, released by



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Treasury, looks at ways to improve governance, increase transparency of information provided by superannuation funds and boost competition an transparency in the selection process of default superannuation funds in modern awards. Comments are due by 12 February 2014.

Draft Corporations Amendment (Streamlining of future of Financial Advice) Bill 2014 and draft Corporations Amendment (Streamlining of Future of Financial Advice) Regulation 2014. These draft provisions are intended to give effect to the changes announced by the Government in December 2013. Comments are due by 19 February 2014.

Statutory Review of the Anti-Money Laundering and Counter-Terrorism Financing Act (Cth) 2006. This review has been opened pursuant to a requirement, in section 251 of the Act, for review of the operation of the Act and extends also to consideration of the AML/CTF Regulations and AML/CTF Rules. Comments are due by 24 February 2014.

Comment or Question? 

Other developments

The following other developments have occurred since the last edition of T-REX:

The **Markets Disciplinary Panel** issued an infringement notice to Macquarie Bank Limited for failing, across two separate occasions, to deposit a total of \$23 million received from a client into client accounts maintained by Macquarie and designated as clients' segregated accounts.

ASIC accepted an **Enforceable Undertaking** from Commonwealth Securities Ltd and Australian Investment Exchange Ltd under which an independent expert will review their handling of client money.

ASIC made a **fourth submission** to the Senate Inquiry into ASIC's performance, describing changes to practices at Commonwealth Financial Planning Limited following its entry into an Enforceable Undertaking with ASIC.

ASIC issued an infringement notice to SMSF Property Capital in relation to statements on its website referring to "ASIC approved" financial products, which ASIC considered potentially misleading.

ASIC accepted an **Enforceable Undertaking** from National Australia Bank relating to potential market misconduct on the part of is contractor – in particular, possible breaches of sections 1041A or 1041B(1) of the *Corporations Act 2001*.

ASIC accepted an **Enforceable Undertaking from UBS AG** and an **Enforceable Undertaking from BNP Paribas** in relation to potential market misconduct linked to their respective roles as panel members making submissions to the Australian Financial Markets Association in relation to the Australian Bank Bill Swap Rate.

ASIC issued an infringement notice to Media Super Limited after it became concerned that fact sheets comparing the costs and benefits of self-managed super funds with the Media Super fund were potentially misleading.

ASIC announced that as part of its funeral insurance industry review, it had raised with TAL Direct Pty Limited concerns about its



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advertising that may lead to consumers being misled and that TAL Direct has since withdrawn the advertisements and released a new range of products with features less likely to cause confusion to consumers.

The **Markets Disciplinary Panel** issued an infringement notice to Citigroup Global Markets Australia Pty Limited for failing to demonstrate prudent risk management procedures by not setting and documenting appropriate maximum price change limits.

ASIC banned Key Person and sole Responsible Manager of Equity Financial Management Pty Ltd, Anthony Bergin, from engaging in credit activities for three years after it found that he failed adequately to supervise and monitor the activities of staff and failed to understand the licensee's obligations under the credit legislation.

ASIC released **Report 382 Overview of decisions on relief applications (June to September 2013)**, which provides information about the exercise of ASIC's discretionary powers to grant relief from the provisions of the *Corporations Act 2001*, *National Consumer Credit Protection Act 2009*, and *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*.

Treasurer Joe Hockey announced the final terms of reference for the Government's Financial System Inquiry (which differ very little from the draft released for public consultation in 2013) and the names of the four panel members for the Inquiry and said that there will be an interim report due mid-2014 and a final report due in November 2014 from the Inquiry.

AUSTRAC has released an **updated list of people authorised as external auditors** and

therefore able to be appointed by reporting entities given notices under subsections 161(2) and 162(2) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*.

FOS released a number of **decisions** relating to disputes in areas including personal loans, home loans, property funds, business loans, line of credit / overdraft, domestic insurance, small business / farm insurance, accident and sickness insurance, professional indemnity insurance and investment property loans.

COSL made a **determination** in relation to alleged misappropriation of a client's funds and a **decision** in relation to an allegation of misleading or deceptive conduct and other issues.

Comment or Question? 

Commercial corner

Are You Ready for the Privacy Act Changes?

On 12 March 2014, significant changes to the Privacy laws come into force – if your organisation has not addressed them yet, now is the time to do so, or you risk significant consequences.

Do the changes apply to me?

Most subscribers to T-REX will be impacted by the Privacy Reforms. If you are a small business, you may be excluded – see the **9 step checklist** produced by the Office of the Australian Information Commissioner (OAIC) to determine the relevance of the reforms. If you are a business that provides goods or services for personal purposes, whilst allowing payment



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to be deferred for 7 days, there are additional credit reporting reforms you need to comply with.

What are the changes?

The privacy reforms introduce a new set of privacy principles called the Australian Privacy Principles (APPs). These now apply to most companies and government agencies that handle personal information. Changes to the existing National Privacy Principles (NPPs) are significant and affect most of the privacy obligations.

The APPs have an increased focus on transparency. In most cases, a business will need to publish its privacy policy on its website, and address whether personal information will be disclosed to an overseas recipient. There are also changes to what organisations can do with regard to unsolicited personal information, collection, use and disclosure of personal information, and direct marketing.

What are the consequences?

Under the reforms, the OAIC has increased powers and can apply to the court for penalties of up to \$1.1 million for serious or repeated breaches of the APPs by an organisation. This significantly increases the potential consequences of poor privacy compliance.

What do I need to do?

1. Review: revise your privacy documents and procedures before 12 March 2014 if you have not done so already.
2. Implement: ensure that your website, customer documentation and internal control processes are updated to reflect the new

requirements.

3. Train: new procedures require staff training. Ensure staff are familiar with the changes and equipped to comply with them.

Holley Nethercote and Compact can assist with either or all of the above – don't hesitate to get in contact.

Comment or Question?

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This newsletter briefly summarises a complex area of law and one that is dependent upon the precise facts that would apply. It is not a substitute for legal advice.