Market Bulletin

LLOYD'S

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FROM:	Director, Worldwide Markets
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EXTENSION:	5998
DATE:	5 March 2004
REFERENCE:	Y3259
SUBJECT:	AUSTRALIA: FINANCIAL SERVICES REFORM ACT 2001
SUBJECT AREA(S):	Changes in Lloyd's trading rights in Australia
ATTACHMENTS:	1. Appendix 1 – Lloyd's Licensing Position 2. Appendix 2 – 'Day One' Obligations that apply from 11 March 2002 3. Appendix 3 – Identification of Retail Client business
ACTION POINTS:	**Immediate Action**
DEADLINE:	**Immediate**

1. Purpose of Bulletin

This Bulletin is designed to remind the Market about the key features of the Financial Services Reform Act 2001 (FSRA) in Australia and to provide new and updated information on recent developments which will affect underwriters, brokers and coverholders transacting Australian business at Lloyd's.

Please note this Bulletin and its attachments are summaries only and do not cover all of the relevant requirements of the FSRA which is complex legislation. Managing agents, syndicates and underwriters are encouraged to consider taking professional advice on the specific application of this legislation to their respective business(es).

Further Regulations may be issued and it is the responsibility of market practitioners to make themselves aware of these as they emerge.

Further information on the FSRA can be obtained by viewing the Australian Treasury and ASIC websites at www.treasury.gov.au and www.asic.gov.au .

2. Background

With effect from 11 March 2002, the FSRA became effective in Australia. The FRSA is the most important piece of legislation for the general insurance industry since the Insurance Contracts Act 1984 (Cth) and Insurance (Agents & Brokers) Act 1984 (Cth) (IABA) were introduced in Australia.

The FSRA consolidated the regulation of financial services providers by introducing:

- a single licensing regime under the Corporations Act 2001 (Cth) (the Corporations Act), requiring those that provide financial services to either obtain a licence or avoid this by falling under one of the exemptions that apply. *Lloyd's underwriters should in most cases be exempt from the licensing requirements provided they act within the scope of certain exemptions* (see Appendix 1*)*; and

- new conduct and disclosure requirements, in particular in relation to "retail clients". *These can still apply to Lloyd's underwriters doing retail client business even though they may not need a licence and need to be considered carefully* (see Appendix 3 for the definition of a retail client)

Previous communication on the FSRA has been issued as follows:

- Market BulletinY2737, issued 22 February 2002
- Market Bulletin Y2795, issued 21 May 2002
- Market Bulletin Y2995, issued 20 February 2003

3. Transition Period and 'Day One' Obligations

The IABA, which covers the obligations of insurance intermediaries, and in particular the registration of insurance brokers, is repealed and replaced by the FSRA. However, Lloyd's underwriters and their Australian distributors (i.e. coverholders, other agents and insurance brokers) have been able to take advantage of a transition period (due to end on 10 March 2004), during which time the provisions of the IABA continue to apply.

However, despite the transition period, certain new requirements became immediately effective from 11 March 2002. These are known as the 'Day One' obligations and further and fuller details can be found in Appendix 2. In brief, the 'Day One' obligations relate to requirements and standards for:

- receipt of monies from the insured
- prohibitions on solicitation
- consumer information requirements
- "cooling-off period"
- new products.

The new regime, which is to be regulated by the Australian Securities and Investment Commission (ASIC), does not remove obligations under:

- The Insurance Act 1973 (Cth) (**Note:** Lloyd's underwriters will remain authorised and regulated by APRA under this legislation).

- The Insurance Contracts Act 1984 (Cth) and Marine Insurance Act 1909 (Cth), although some minor amendments have been made.

This means that insurers and insureds will be subject to the obligations imposed by this legislation in addition to the FSRA requirements.

Lloyd's has continued dialogue with the Australian Treasury and Australian regulators, and this dialogue has clarified the impact on Lloyd's trading rights in Australia of the new licensing regime. The revised procedures for writing Australian business are set out at Appendix 1. In brief, these changes affect retail business only and require underwriters to accept business only via intermediaries properly licensed under the FSRA.

4. New FSRA regime measures applicable to Lloyd's with effect from 11 March 2004

Relevant to insurance, a person (in this context a legal person, i.e. a broker, coverholder, insurer or underwriter) will provide a 'financial service' if they are seen to be 'dealing' and/or 'advising' in a 'financial product'.

A person will be seen to be "dealing" in a financial product where they issue, vary or dispose of a product or arrange for this.

A person will be seen to provide "advice" where they make a recommendation or give a statement of opinion to a client that is intended to influence their decision in relation to a policy, or it could reasonably be seen as such. These are complex areas that require detailed consideration.

Insurers and their agents and brokers usually do both of the above but various exemptions can apply. For example, the provision of advice or dealing in relation to the handling or settlement of insurance claims are exempted from the regime and certain persons who act as clerks and cashiers or mere referrers will not be caught.

Most (if not all) general insurance policies provided by Lloyd's in Australia will be caught as a "financial product". However, reinsurance is not caught and there are exemptions for certain State, Territory and Commonwealth insurance and health insurance, which are essentially the same as under the IABA.

Since Market Bulletin Y2995, ASIC has released new material which includes:

- Class Orders relating to licensing exemptions and the issue of product disclosure statements.

- Frequently Asked Questions – these set out answers to questions posed by industry to ASIC and the ASIC responses.

- Policy Statements – these set out ASIC's view on how it will interpret and regulate the new regime. (PS 175 Licensing: Financial Product Advisers – Conduct and Disclosure is the most important of these.)

- Guides – these provide guidance on various aspects of the legislation such as how to apply for a licence and how to meet certain licensing requirements.

All of the above documents are readily available on the ASIC web site at www.asic.gov.au in the 'FSR' section.

In addition, there have been a wide variety of changes to the legislation by way of regulation which seek to "fine tune" certain obligations and requirements of the FRSA. These have impacted on the licensing exemptions, the obligations of a licensee regarding the reporting of breaches and authorised representatives, the anti hawking prohibitions and the retail client disclosure obligations. A summary of recently issued Regulations and draft Regulations issued by Treasury can be obtained, on request, from Lloyd's Australia. The attachments to this document have been updated to take account of the new Regulations.

However, if you have any general queries with regard to this Bulletin, please contact any of the following:

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This Bulletin has been sent to compliance officers, active underwriters, Lloyd's brokers and managing agents.

Julian James
Director
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APPENDIX 1

LLOYD'S LICENSING POSITION

Please note: the information in this Appendix was first issued in Y2795 and only the relevant changes made to this appendix since the last update are underlined.

WHEN IS A LICENCE REQUIRED?

The new Financial Services Reform legislation contained in the Corporations Act has been drafted in a way that means it is not practical for Lloyd's underwriting members/syndicates to obtain their own Australian Financial Services Licences (AFSL). Fortunately, there are a number of exemptions that mean Lloyd's underwriters will not require a licence in certain circumstances.

What this means is that from 11 March 2004, Lloyd's underwriters need to ensure that business procedures for their retail and wholesale client business are amended to fall within the relevant licensing exemptions.

- **Wholesale client business**

  Wholesale client business is essentially everything that is not prescribed as being retail client type business under the Corporations Act (see Appendix 3 for the definition of a retail client).

  Lloyd's underwriters

  As Lloyd's underwriters are authorised by APRA under the Insurance Act 1973 (Cth) to carry on insurance business in Australia, they do not need an AFSL to conduct business directly or through a coverholder or insurance broker, with "wholesale clients".[1]

  Coverholders

  Coverholders who provide financial services in Australia as a representative[2] of Lloyd's who **only** provide services to wholesale clients and not to retail clients, may not need to hold an AFSL depending on their authority and who else they act for.

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[1] This is because of an exception to the licensing requirement in 911A(2)G.

[2] The definition of "representative" in section 910A includes, if the principal is a licensee, a person "acting on behalf of the licensee", and in any other case "any other person acting on behalf of the person".

If they only provide the relevant financial service to wholesale clients as a representative of Lloyd's underwriters who are already exempt from licensing in relation to wholesale clients[3], they should also be exempt if the services provided by them are only done on behalf of the Lloyd's underwriter.

This is a narrow exemption and needs to be carefully considered. Coverholders who provide services to retail clients or act for non-Lloyd's principals in addition to their dealings with Lloyd's will need an AFSL.

Lloyd's Accredited Broker

A Lloyd's accredited broker will not usually be caught in relation to wholesale clients as a number of different licensing exemptions will usually apply to their conduct.

Any conduct performed for Lloyd's underwriters is exempt in the same way as a coverholder's conduct would be.

Where the Lloyd's accredited broker acts for an insured or coverholder or insurance broker in Australia, the situation is different.

Lloyd's accredited brokers dealing with wholesale clients only, will be exempt from the need to hold an AFSL if they operate solely outside this jurisdiction and they are only inducing Australian insureds to use their services (the agreement for which is entered into outside Australia). Some good examples would be the provision of the broker's services via an internet web site, telephone or the sending of marketing material etc. (See ASIC Class Order 03/824).

If an overseas Lloyd's accredited broker has been asked by a licensee in Australia (e.g. a coverholder or insurance broker) to provide a 'dealing' service (as opposed to an 'advice' service) to a person in this jurisdiction (i.e. arrange for the application for, issue, variation or disposal of insurance) and the service is covered by the licensee's AFSL, the Lloyd's broker will also be exempt under Regulation 7.6.01(n)).

If a non-Australian Lloyd's broker does come to Australia, they need to:

- avoid providing a financial service (i.e. advising and/or dealing) when they do; or
- avoid being seen to carry on a financial services business in Australia. When a person carries on a business is a complex one and needs to be considered on a case by case basis. Typically yearly or ad-hoc visits should not be caught but the issue is far from clear. Section 21 of the Corporations Act provides some guidance on when a person is seen to carry on a business but the common law on the matter will also be relevant; or

[3] This is because of an exception to the licensing requirement in 911A(2)G.

- act as the authorised representative of a licensee in doing so.

A Lloyd's accredited broker that is situated and operates in Australia, who acts for an insured or coverholder or insurance broker in Australia will need to ensure that they hold an AFSL. The exemptions described above only apply in relation to foreign financial service providers with limited connection to Australia.

A Lloyd's accredited broker that operates in Australia and provides a financial service regulated by the FSRA must be licensed (unless an exemption applies). Pursuant to section 911A, a person who carries on a financial services business in this jurisdiction **must** hold an AFSL covering the provision of the financial service. Failure to comply is an offence under section 1311(1). For individuals, this is punishable by up to 200 penalty units (A$22,000) or imprisonment for 2 years, or both. For corporations, the financial penalty is up to 5 times that for individuals.

- **Retail client business**

The position is different for "retail client" type business (see Appendix 2 for the definition of a retail client). The Corporations Act imposes new obligations in relation to what is retail client business.

Lloyd's underwriters

This business cannot be transacted directly with retail clients. Lloyd's underwriters can only trade with retail clients through a licensed coverholder, licensed insurance broker or other licensed entity in Australia. By following these rules the Lloyd's underwriter is exempt from the requirement to obtain a licence.

Where Lloyd's underwriters conduct retail client business in Australia, they should confirm that there will be a licensee involved in the arrangement of the insurance between them and the client, be it their coverholder or an insurance broker. It doesn't matter if the broker is acting on behalf of the client and not the underwriter as long as the broker is a licensee (see section 911A(2)(b)).

Lloyd's underwriters selling insurance to retail clients directly (i.e. not through a licensed entity in Australia such as a licensed insurance broker or licensed coverholder) will not be exempt. They will need to restructure their distribution chain to ensure a licensee is placed between them and the client to ensure the exemption will apply. Internet sales operations and in some cases master policy type arrangements need to be aware of this matter and restructure their agreements accordingly.

Coverholders

Generally, coverholders who provide advice and/or dealing services to a retail client will require an AFSL. Coverholders will need to seek their own advice about whether they need to obtain a licence, the type and when.

Lloyd's underwriters who transact business through a coverholder that deals directly with clients must ensure that the coverholder obtains a licence before 11 March 2004. If not, the Lloyd's underwriter would not fall under the relevant licensing exemption.

The consequence of providing a financial service in Australia where the coverholder is not licensed may mean that the Lloyd's underwriter will be providing a financial service in Australia without a licence and therefore be in breach of section 911A. Failure to comply with this section is an offence under section 1311(1). For individuals, this is punishable by up to 200 penalty unit (A$22,000) or imprisonment for 2 years, or both. For corporations, the financial penalty is up to 5 times that for individuals.

Lloyd's accredited Broker

For retail client business, the position of the Lloyd's accredited broker is different from that when they deal with wholesale clients.

Generally, Lloyd's accredited brokers that provide advice and/or dealing services directly to a retail client will require an AFSL unless they act as an authorised representative on behalf of a licensee.

This will be the case even if the Lloyd's broker is located overseas, as the inducement of a person in this jurisdiction is sufficient to be caught in relation to retail client business under section 911D.[4] The above means that the direct marketing of services to retail clients over the internet could be caught and trigger the need for a licence. Managing agents, syndicates and underwriters should seek case-by-case legal advice on the specific application of this legislation to their respective business(es).

However, if an overseas Lloyd's broker has been asked by a licensee in Australia (e.g. a coverholder or insurance broker) to provide a dealing service (as opposed to an advice service) to a person in this jurisdiction (i.e. arrange for the application for, issue, variation or disposal of insurance) and the service is covered by the licensee's AFSL, the Lloyd's broker will be exempt under Regulation 7.6.01(n)).

Using this exemption, a Lloyd's Broker could still sell its services to retail clients in Australia provided a licensee is used to direct the client to the broker and the broker does not provide advice.

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[4] The position is different for wholesale clients because of the operation of ASIC Class Order 03/824 which provides that this section has no application

WHAT FSRA REQUIREMENTS APPLY TO LLOYD'S UNDERWRITERS?

Even where a licence isn't needed, certain requirements of the FSRA can still apply to Lloyd's underwriters.

The current position can be summarised as follows:

- **Wholesale client business**

  Whilst Lloyd's underwriters are exempt from the licensing requirements, the following requirements still apply when Lloyd's underwriters conduct wholesale client business:

  - Trust account requirement for premium received before the policy is issued. (s1041E-H)
  - The general prohibitions relating to false or misleading statements and dishonest conduct (s 1041E-H).
  - The Insurance Contracts Act 1984 (Cth) and Marine Insurance Act 1909 (Cth) continues to apply despite the FSRA.
  - The Insurance (Agents & Brokers) Act 1984 (Cth) (IABA) still applies to Lloyd's in its dealings with registered insurance brokers, coverholders and other agents, until these distributors obtain their licence (no later than 11 March 2004). After that the IABA no longer applies.

- **Retail client business**

  For retail client business where a Lloyd's underwriter is exempt from licensing because it is issuing through a licensee, a number of obligations can still apply:

  - The Part 7.9 Product Disclosure Statement Requirements will usually only apply from 11 March 2004 unless:
    - the relevant syndicate chooses to opt in earlier; or
    - it has not issued a product that provides the same kind of cover, or cover in relation to the same kind of asset, before 11 March 2002.
    - New requirements apply immediately to:
      - New syndicates
      - Syndicates offering a product of a class not previously issued by them

      Managing Agents need to determine if any of the syndicates supporting coverholder business fall within these categories. In certain cases ASIC may be prepared to provide exemptions during the transition period, on application, given the unique nature of Lloyd's arrangements. If you have any queries please contact the Lloyd's Australia office.

Up until 11 March 2004 when the Part 7.9 requirements will apply in full, only the 'Day One' obligations apply and a Lloyd's Underwriter will need to ensure these are currently being met.

- Any licensee (coverholder, insurance broker or other agent) that the Lloyd's underwriter is relying on to arrange its retail client product needs to fall into one of the following:

    - If they are subject to the transition period, the IABA continues to apply as well as the FSRA 'Day One' obligations until they get a licence, at which time the FSRA licensee requirements apply;

    - If they are not subject to the transition period, they will be subject to the obligations of a FRSA licensee. All of the FSRA licensing and retail client obligations under Part 7.6, 7.7 and 7.8 apply to that licensee.

Lloyd's underwriters and their representatives need to determine, what changes are required to existing practices and documentation to ensure they meet the above obligations.

APPENDIX 2

‘DAY ONE’ OBLIGATIONS THAT APPLY FROM 11 MARCH 2002

The ‘Day One’ Obligations are as follows:

- receipt of monies from the insured
- prohibitions on solicitation
- consumer information requirements
- “cooling-off period”
- new products.

1. Money received before policy is issued s1017E (applies to all business)

Only a minor change has been made to this requirement since the last release and this has been underlined.

This section provides that:

- where a product issuer (i.e. the insurer) is paid money by a client (whether retail or wholesale) to acquire an insurance policy (money paid to a representative of an insurer would be seen as being received by the insurer); and

- the policy is not *entered into* before, at the time, or immediately after they receive the money (remember an insurer may have entered into a contract even though they are not on risk until a later time),

the insurer must ensure that the money is paid on the day that it is received or the next business day, into an account (or accounts) that meet(s) a number of particular requirements (see sub section 1017E(2), (2A), (5) and Regulation 7.9.08 – 7.9.08B for details of all of these requirements such as the designation requirement and dealing with interest, which can be accessed at www.treasury.gov.au).

If a payment is made by cheque, the payment will only be seen as made or received when the cheque is honoured (see Regulation 7.9.61C).

Insurance brokers acting as agents of insurers can either comply with this section or can place the money into their s 981B account and deal with it in accordance with the requirements of Part 7.8.

They only need to continue complying with the requirements regarding their insurance broking accounts and insurance monies under the IABA during the transition period (i.e. until they get a licence or 11 March 2004).

Section 1017E requires the product provider to return the money or issue the policy within a month after the day on which the money was received, or if this is not reasonably practicable, by the end of such longer period as is reasonable in the circumstances (see subsection 1017E (4)). If this cannot be done, the money must be transferred to ASIC in accordance with regulation 7.9.61A.

Where the money has been paid to acquire an insurance product and the product provider issues another product which is the same as the new product, except for the date on which it ceases to have effect (i.e. cover note) and the product provider has not issued the new product, then this money may be taken out of the account provided after doing so the product provider:

- issues the new product before the date on which the other cover ceases to have effect; or

- returns the money to the person by whom it was paid before the date on which the other product ceases to have effect

(See Regulation 7.9.61B).

You should refer to the section and relevant regulations for full technical details of the requirements.

Lloyd's underwriters need to - determine if their agents that are not insurance brokers in Australia receive money from the insured where no policy has been entered into. Where this occurs, procedures should be changed to ensure the agent deposits the money into the relevant prescribed account within the required time period.

2. Confirmation of transactions s1017F (applies to retail clients only – see Appendix 3 for definition)

Only a minor change has been made to this requirement since the last release and this has been underlined.

The section requires **insurers to confirm** any transactions by which a retail client acquires a policy or one which occurs while they hold the policy (i.e. cover notes, new business, variations, renewals and cancellations).

It is relevantly not required for:

- a variation of the terms of all financial products in the class to which the financial product belongs;

- the debiting for fees or charges in respect of the financial product or other transactions involving the product;

- a transaction required or authorised by a law of the Commonwealth or of a State or Territory;

- a transaction consisting solely of an additional contribution towards the product;

- the acceptance or settlement of a claim.

The confirmation must:

- provide information that the product issuer reasonably believes the insured needs (having regard to the information the insured has received before the transaction) to understand the nature of the transaction, including but limited to;

  (a) the identity of the issuer and insured; and

  (b) give details of the transaction including:

    (i) the date of the transaction; and

    (ii) a description of the transaction; and

    (iii) any amount paid or payable by the insured; and

    (iv) any taxes and stamp duties payable;

  (c) if it is an acquisition or disposal [see Regulations 7.9.63F and G]:

- identify the financial product and the number and amount of financial products that are the subject of the transaction; and

- provide the amount the insured is required to pay or that is payable to acquire or dispose of the product.

  (d) if the transaction involves more than one financial product (i.e. separate contracts only), the price per unit of the products.

[See the section and Regulation 7.6.63B, E, F and G for full details].

The above obligation applies to insurers, however, an insurer can use their agents to meet the requirement on their behalf in two ways (or a combination of the two):

- Option 1 – by giving the customer or their representative (e.g. broker) *access to* a confirmation facility where the client or their insurance broker can ask for the relevant confirmation if necessary (this will usually be a call centre or electronic facility); or

- Option 2 – by *giving actual* confirmation electronically or in writing to the client or its agent (e.g. an insurance broker) e.g. in the schedule or renewal or cancellation notice etc.

A broker, unless acting as agent of the insurer, cannot provide the confirmation or facility. A Lloyd's coverholder is deemed to be an agent of the insurer and therefore can provide the confirmation or facility.

Lloyd's underwriters and their distributors need to - determine which method suits their business arrangements and implement the appropriate changes where required.

3. Cooling off period s1019A and B (applies to retail clients only – see Appendix 3 for definition)

A 14-day statutory cooling off period has been brought in for new business and renewals subject to certain restrictions as to when an insured can exercise the right.

In summary, insurers must give an insured a right to return an insurance product at least in accordance with the requirements of the FSRA.

The FSRA provides that the relevant client is not able to exercise the cooling off right if:

- they have exercised a power or right under the policy (e.g. made a claim) or the policy has ended; or

- the policy covers an event that will start and end within the cooling off period (e.g. a trip overseas, a race or a delivery voyage etc) and the event has started.

The cooling off period starts at the earlier of:

- the time when the confirmation requirement was complied with by the product issuer; or

- the end of the fifth day after the day on which the product was issued (ie contract entered into).

The cooling off period does not apply to:

- interim contracts of insurance;

- any general insurance product that is:

    - of less than 12 months duration; and

    - a renewal of an existing product on the terms and conditions to which the product is currently subject.

Other than the above it will apply to new business and renewals. When the right is exercised, the product issuer is obliged to refund the relevant money paid to acquire the product to the client in accordance with its directions. A right of return may be exercised in relation to a risk insurances Regulation 7.9.64A]

The following amounts may be deducted from monies returned to the client on exercise of its cooling off right:

- an amount representing the insurer's period of time on risk;

- any tax or duty paid or owing for which the insurer is unable to obtain a refund; and

- any reasonable administrative and transaction costs incurred by the insurer (other than commission etc) reasonably related to the acquisition of the policy and termination of the relationship and which do not exceed the true cost of an arm's length transaction.

[See Regulation 7.9.67(8)]

Insurers need to provide all insureds who enter into a contract from 11 March 2002 with at least the minimum cooling off rights.

Lloyd's underwriters and their distributors need to - determine if their policies or practices need to be changed to ensure that insureds at least receive the minimum benefits provided by the section.

4. Part 7.9 New Product Disclosure Requirements (This includes the requirement to provide a **Product Disclosure Statement** which summarises the benefits and risks of a product (applies to retail clients only – see Appendix 3 for definition))

Changes made to this requirement since the last release are underlined.

Other than the exceptions referred to below, these new requirements will only apply to Lloyd's syndicates underwriting retail client general insurance business in Australia from the earlier of the following times:

- 11 March 2004; and

- the time the relevant Lloyd's underwriters choose to opt into the new product disclosure requirements in Part 7.9 in relation to a product or a class of financial products by providing a notice to ASIC in an approved form.

However, these new requirements will apply to a Lloyd's syndicate providing retail client insurance in Australia in the following scenarios:

- the relevant named syndicate (or one of the syndicates or other insurers on risk in the case of co-insurance) had not before 11 March 2002 offered the an insurance product which provides the same kind of cover or cover in relation to the same kind of asset, as the one they propose to offer;

- the relevant named syndicate is one that was not in existence pre 11 March 2002. ASIC has informed Lloyd's that there would be an ability for certain syndicates which may be reconstituted under a new name or merged to avoid the requirements on application. This would need to be considered on a case by case basis.

Where a syndicate of underwriting members is caught, the new requirements under Part 7.9 will apply in full (i.e. the Product Disclosure Statement obligations apply). Each syndicate will need to seek advice on this in its own capacity.

Further information with regard to the Product Disclosure Statement requirements can be found by using the following link:

http://www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/PS168.pdf/$file/PS168.pdf

5. The basic hawking prohibition (applies to retail clients only – see Appendix 3 for definition)

5.1. Anti-hawking requirements

Please read the whole of this section's update as a number of changes have been made to it since the last update.

The basic prohibition against hawking financial products (other than securities or managed investments[5]) is in section 992A of the Act (see also ASIC, *The Hawking Prohibitions: An ASIC Guide* (2002), ASIC, Sydney, available from the ASIC web-site, see www.asic.gov.au).

An offeror must not offer financial products for issue or sale in the course of, or because of, an unsolicited meeting with a retail client (subsection 992A(1)). A reference to offering a financial product for issue or sale includes a reference to 'inviting' an application for issue or inviting an offer to purchase the financial product (subsection 992A(5)).

In addition, an offeror must not make an offer to issue or sell (or invite an application for issue or invite an offer to purchase) a financial products in the course of, or because of an unsolicited telephone call with a retail client unless certain procedural and disclosure requirements are met (subsection 992A(3)).

Put another way, a breach of the hawking prohibition will occur if:

(a) the offeror[6] makes:

(i) an offer; or

(ii) invites an application for the issue of; or

(iii) invites an offer to purchase, a financial product; and

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5 An offering of securities, the hawking of which is prohibited by section 736 and the offering of managed investment products, the hawking of which is prohibited by section 992AA are excluded from operation of section 992A by subsection (2).

6 An offeror is a "person" to whom section 992A applies. ASIC lists as offerors, issuers and sellers of financial products as well as their agents and representatives. In the insurance context, this would include insurers, agents and their intermediaries and representatives.

(b) the offer or invitation is made in the course of (i.e. during), or because of:

(i) a meeting with a retail client or potential retail client that is unsolicited; or

(ii) an unsolicited telephone call to a retail client or potential retail client that is not made in accordance with certain procedural and disclosure requirements (set out below).

Underwriters, brokers and coverholders are all subject to the anti-hawking requirements in relation to retail clients.

5.2. Penalities for breaking the anti-hawking rules

An offeror faces criminal penalties under the Act for breaches of the hawking prohibition (for each offence, in the case of individuals, a fine of up to 25 penalty units for individuals (i.e. $2,750) or six months imprisonment, or both, or fines up to 5 times that amount for corporations (i.e. $13,750) (Sch. 3 of the Act)).

The anti-hawking prohibition commenced on 11 March 2002 and there is no transitional relief. This means you must already be compliant with the prohibition in section 992A.

5.3. Customer rights/cooling off period

Another consequence of a breach of section 992A is that the consumer may have a right to:

(a) return the product and obtain a refund exercisable within 1 month after the expiry date of the cooling off period[7], or one month and fourteen days in the event that no cooling off period applies to the insurance policy (section 922A(4)); or

(b) commence civil proceedings against the offeror (section 1324).

Regulation 7.8.24 relevantly provides that the right of return does not apply to:

(a) an interim contract of insurance within the meaning of subsection 11(2) of the *Insurance Contracts Act 1984* (Cth); or

(b) a risk insurance product that is of less than 12 months duration, and a renewal of an existing product on the terms and conditions to which the product is currently subject (i.e. the renewal of monthly insurance).

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7 Under the Act, retail clients have the benefit of a 14-day cooling-off period within which they may cancel their insurance in exchange for a refund of the premium (section 1019B). The cooling-off period does not begin to run until the licensee satisfies its obligation to provide confirmation of the transaction under section 1017F, or else at the end of five days after the transaction, whichever is earlier.

5.4. ***Lloyd's underwriters and their agents*** should:

- avoid offering or selling a product in an unsolicited meeting to a retail client. Contact insureds other than by way of a meeting (e.g. unsolicited telephone call) and arrange for a solicited meeting with their consent; and

- for unsolicited telephone contact which is not prohibited make sure your telephone sales procedures meet the requirements of the section and if not, determine what needs to be done.

5.5. Further information

ASIC has recently issued a guidance paper on how it believes the anti-hawking provisions should operate, and this can be found on the ASIC web site. It is recommended that this guidance paper be carefully studied by any underwriters, brokers or coverholders dealing in Australian business.

APPENDIX 3

IDENTIFICATION OF RETAIL CLIENT BUSINESS

The new Financial Services Reform legislation set out under the Corporations Act imposes a number of new obligations in relation to what is commonly referred to as "retail client" business.

WHO IS A RETAIL CLIENT?

There are two tests which ***BOTH*** must be met for a person to be seen as a retail client.[8]

The 'Who' Test

The general insurance product must:

- be provided to an *individual*; or
- be or would be, for use in connection with a *small business* (i.e. a manufacturing business employing 100 employees or less, other business – 20 employees or less).

If the "insured" under the policy is not within the above categories then they will not be retail clients. A client who does not qualify as a retail client will be a wholesale client.

ASIC takes the view that a policy provided to an insured where third parties are automatically covered as interested third parties (i.e. parties that are not contracting parties such as section 48 parties under the Insurance Contracts Act 1984 (Cth)) will be seen as provided to the contracting insured and not the third parties for the purpose of this test.

The 'Coverage' Test

A person who meets the 'who' test will not be a retail client unless they are provided with a policy which provides cover of the type specified in Regulations 7.1.11 to 7.1.17A. They will only be a retail client for the cover that is caught and not any cover that isn't (this is the case even if it is a bundled product).

The listed covers are:

- A motor vehicle insurance product (as defined in Regulation 7.1.11); or
- Home building insurance product (as defined in Regulation 7.1.12; or
- A home contents insurance product (as defined in Regulation 7.1.13); or
- A sickness and accident insurance product (as defined in Regulation 7.1.14); or
- A consumer credit insurance product (as defined in Regulation 7.1.15); or
- A travel insurance product (as defined in Regulation 7.1.16); or

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[8] Subsection 761G(5) of the FSRA sets out when a person will be seen as a retail client in relation to general insurance products.

- A personal and domestic property insurance product (as defined in Regulation 7.1.17); or
- A kind of general insurance product prescribed by regulations made for the purposes of this subparagraph – a medical indemnity insurance product has recently been added (as defined in Regulation 7.1.17A).

To review the definitions as set out in the Corporations Regulations 2001, please use the following link
http://scaleplus.law.gov.au/html/pastereg/3/1682/pdf/Corporations2001Vol02.pdf

What do Underwriters need to do?

Underwriters need to identify if their policy provides ***cover*** of the type listed in each Regulation. The legislation (which will be subject to further amendment) will consider that any part of a contract of insurance which provides cover of the type defined, will be treated as caught by the retail client definition.

The other parts of the cover not related to the cover which is caught, will not however be treated as retail. This means that packaged products may be part retail and part wholesale depending on whether any cover section includes the retail client type cover.

Some useful things to consider are:

- If a policy (whether stand alone or a section of a package cover) covers a 'motor vehicle' as defined in the Regulation for loss or damage or liability for loss of, or damage to, property caused by or resulting from impact of a motor vehicle with some other thing, then the cover in relation to that motor vehicle is caught.

  Heavy motor policies which cover motor vehicles with a carrying capacity of less than 2 tonnes will be caught for those vehicles. Fleet policies will also be caught, depending on the status of the insured.

- With the personal and domestic property type of cover:

  - the property must be wholly or predominantly used for personal and domestic purposes **AND** ordinarily used for that purpose.

  - it must also be used by the insured, a relative of the insured or any person with whom the insured resides. This means that if the property covered is not used by such a person then the cover is not caught. A good example might be employees' personal effects under a cover where they are not the insureds, a relative of the insured or some one with whom the insured resides. This cover would not bring you within the definition.