



ASIC

Australian Securities & Investments Commission

REPORT 140

Report on submissions for CP 80 Group insurance arrangements

September 2008

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 80 *Group insurance arrangements* (CP 80) and details our responses to those issues.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy. Please see Regulatory Guide 195 *Group purchasing bodies for insurance and risk products* (RG 195).

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A Overview

Key points

In May 2007, we consulted on providing conditional licensing and managed investments relief to certain group purchasing bodies.

While there was widespread support for some relief for certain group purchasing bodies, we have made some changes to the relief in our final policy in response to the submissions we received.

- 1 In Consultation Paper 80 *Group insurance arrangements* (CP 80), we consulted on the proposal to provide conditional relief to certain group purchasing bodies from the requirement to hold an Australian financial services (AFS) licence and to register a managed investments scheme under Ch 5C of the *Corporations Act 2001* (Corporations Act).

Note: In CP 80 and in this report we define ‘group purchasing bodies’ as persons who arrange or hold risk management products to cover others persons’ risks but neither issue risk management products (other than interests in a risk management scheme) nor provide any financial product advice other than as a result of providing certain general information that would be required under our proposed relief.

- 2 The proposal was made on the basis that:
 - (a) group purchasing bodies may be subject to the AFS licensing requirements of Ch 7 of the Corporations Act; and
 - (b) arrangements under which group purchasing bodies acquire risk management products on behalf of clients might constitute a managed investment scheme attracting the provisions of Ch 5C.
- 3 We suggested that compliance with the AFS licensing and managed investment scheme registration provisions will be disproportionately burdensome for certain group purchasing bodies, which are more akin to the buyers of risk management products than issuers or insurance brokers.
- 4 This report highlights the key issues that arose out of the submissions we received on CP 80 and our responses to those issues.
- 5 This report is not meant to be a comprehensive summary of all submissions received. It is also not meant to be a detailed report on every question from CP 80. We have limited this report to the key issues.
- 6 For a list of the non-confidential respondents to CP 80, see the Appendix.

Responses to consultation

- 7 We received responses to CP 80 from several sources including insurance industry bodies, not-for-profit associations and commercial entities. We thank respondents for taking the time to send us their comments.
- 8 There was widespread support for some relief for certain group purchasing bodies. The main concerns raised by respondents related to:
- (a) which group purchasing bodies should be eligible for relief; and
 - (b) the conditions of the relief.
- 9 We have accepted several of the points raised and have therefore decided to implement relief based on the proposals in CP 80 but subject to:
- (a) a revised definition of the group purchasing bodies to which relief may apply; and
 - (b) a revised set of conditions designed to protect consumers.
- 10 Our final policy is set out in Regulatory Guide 195 *Group purchasing bodies for insurance and risk products* (RG 195).

B Who should receive relief?

Key points

This sections covers:

- whether relief should be confined to independent group purchasing bodies (see paragraphs 11–13);
- whether employers who provide multinational pooling arrangements should be exempt from the independence requirement (see paragraphs 14–17); and
- whether not-for-profit organisations that arrange for cover incidentally should be exempt from the independence requirement (see paragraph 18).

Should relief be confined to independent group purchasing bodies?

- 11 Some feedback suggested that our proposal that only independent group purchasing bodies should receive the benefit of relief was too restrictive. Some parties suggested that if group purchasing bodies were required to be completely independent of issuers and insurance brokers and forbidden from receiving and retaining any form of remuneration from them (e.g. commissions), then group purchasing bodies would be disinclined to provide the group purchasing arrangements.
- 12 Some respondents suggested that, instead of an independence requirement that would bar receipt of any form of remuneration, the relief should be conditional on full disclosure of remuneration payments.
- 13 Another submission noted that a conflict of interest could arise even if the group purchasing body's clients provided the remuneration. This is because it would be necessary to have cover available for the remuneration to be earned. A further submission expressed concern at relief being given that would enable commercial provision of financial services to the public, even if on a fee-for-service basis, without there being competitive neutrality with AFS licensees' regulatory burden.

ASIC's response

Putting aside multinational pooling arrangements and not-for-profit bodies, which are discussed below, there is a real risk that group purchasing bodies that receive and retain benefits may be acting in the interests of the sellers of risk management products rather than the buyers. The AFS licensing provisions are the

appropriate form of regulation for managing such potential conflicts.

While a potential conflict may also exist if remuneration is received from the group purchasing body's clients, if the clients are members of the group purchasing body and the remuneration is not merely an unidentified part of the amount paid for cover, the body is less likely to choose which risk management products it will arrange based on the benefits it will receive rather than the clients' interests.

We have made it clear in RG 195 that being independent is one of the two situations in which a group purchasing body will be eligible for relief.

Should employers retaining remuneration under a multinational pooling arrangement be excluded from relief?

- 14 A multinational pooling arrangement (MPA) is an arrangement under which life, total and permanent disability (TPD) or income protection insurance is arranged or held that:
- (a) is substantially arranged outside Australia and where most of the persons covered are outside Australia;
 - (b) covers employees of, or persons contracted to provide services to, the group purchasing body or another entity in the economic entity of which the group purchasing body forms part; and
 - (c) provides for payments to be received by the group purchasing body based on claims experience for all those covered under the arrangement.
- 15 Employers use these arrangements to provide employees and contractors of the relevant corporate group with benefits that assist in attracting and retaining staff. In many cases, the premium is charged back to the employee (e.g. by way of salary sacrifice).
- 16 Some respondents pointed out that employers providing their employees with cover under MPAs could be excluded from the benefits of relief under the independence requirement on the basis that, typically, a part of any rebate resulting from claims experience for the multinational pool may be paid to the employer group purchasing body directly or indirectly by other group purchasing bodies that are part of the MPA. It would be practically difficult to rebate any amount received to the persons who benefited from the cover.
- 17 Two of the respondents recommended that employers who provide MPAs to their employees should be allowed to receive and retain remuneration under the MPA.

ASIC's response

We think that MPAs provided to employees by their employer groups may confer benefits on the employees. We recognise that it would be unreasonable to expect cover applying under an MPA that is substantially arranged outside Australia, and where most of the persons covered are outside Australia, to be structured to meet requirements that relate specifically to Australian regulation.

On that basis, we do not consider that employers who provide MPAs to their employees should be excluded from our relief merely because they receive and retain remuneration from an issuer under an MPA.

Should not-for-profit bodies have to be independent?

- 18 Some of the respondents suggested that relief should be given to group purchasing bodies that are not independent if they are a not-for-profit body and the cover was arranged in conjunction with the provision of other services provided by the group purchasing body and not on a stand-alone basis. This would apply if the financial services provided to the client are incidental to another relationship between the group purchasing body and the client. It was argued that, in this case, it is unlikely that the group purchasing body would be primarily motivated by the remuneration it receives from the financial services. In the absence of a profit-making motive, the group purchasing body is likely to be acting in way that is fair to its members.

ASIC's response

We consider that relief should be extended to not-for-profit bodies that arrange for cover under risk management products incidentally to another relationship between the body and the client. We will take a body that does not carry on business to make payments (e.g. dividends) to its members as a not-for-profit body for this purpose.

This test provides a practical rule-of-thumb to identify when a group purchasing body is likely to be acting in the interests of the persons to be covered and reflects our understanding of the practice of not-for-profit bodies. It also maintains a distinction that would preclude commercial financial services providers employing the relief to gain a regulatory advantage.

For example, a sporting club may arrange insurance for the members of a team it fields, and receive some form of gain from doing so which potentially may be applied to promote the sport. However, we consider that in providing the service the club is likely to be primarily motivated by the object of ensuring its members are protected on reasonable terms and so are willing to continue playing the sport. In contrast, we believe that a company established for profit, even when providing the group insurance arrangement on an incidental basis, is more likely to be subjected

to a more significant conflict of interest by any remuneration it retains from issuers or insurance brokers so that there is a higher risk that it may not act for the benefit of those to be covered if the AFS licensing requirements do not apply.

C Conditions of relief

Key points

In CP 80, we also proposed that the relief for group purchasing bodies be subject to conditions relating to:

- basic information about the product (see paragraphs 19–21);
- sources of advice about the product (see paragraphs 22–24);
- receipt of money (see paragraphs 25–30); and
- cancellation or non-renewal of cover (see paragraphs 31–36).

Basic information about the product

- 19 In CP 80, we proposed that, before a person is covered by a policy, the group purchasing body must disclose:
- (a) the nature of the cover;
 - (b) any individual amounts payable by the person to obtain cover; and
 - (c) if the group purchasing body will receive payments from the issuer or any insurance broker, the amount to be paid to the person to be covered from those amounts (e.g. the amount of any rebate).
- 20 Some of the respondents suggested that requiring the group purchasing body to inform members or prospective members to be covered of the individual rebate amounts was impractical. It was suggested that in some cases, the rebate amount was unknown at the time of cover.
- 21 Submissions argued that it would be impractical or disadvantageous to those to be covered for their cover to be delayed pending disclosures, especially when the cover was automatic.

ASIC's response

We consider that it is sufficient for group purchasing bodies to give information that payments will be received, together with general information about how the amount will be determined when the amount cannot be determined in advance (e.g. under an MPA).

We consider that it is adequate for group purchasing bodies to provide disclosure within a reasonable time of automatic cover applying. However, when the person to be covered has a choice whether to be covered, the information will be more effective if it is provided so that it can be considered when the decision about cover is to be made. The information can generally be prepared in

advance of any particular offer of cover, so it can be provided at the time the cover is offered without causing delay.

Sources of advice about the product

- 22 In CP 80, we proposed that before a person is covered, the group purchasing body must disclose to the person that it:
- (a) does not hold an AFS licence; and
 - (b) cannot provide any opinions or recommendations about the insurance and that members should contact the relevant issuer or broker for further advice or information.
- 23 The intention of this proposal was to ensure that a person who might be covered by a group insurance policy is directed to obtain advice about the product from an entity with an AFS licence (i.e. the issuer or a broker).
- 24 A respondent suggested we clarify that if a broker is acting in the group insurance arrangement, the broker should be the first point of contact and the issuer should be contacted only if there is no broker. This suggestion was made on the basis that, currently, if intermediated issuers are contacted in the first instance, they refer the matter to the broker.

ASIC's response

We have clarified in RG 195 that it will be sufficient to meet the requirements for relief for the group purchasing body to disclose that the person should consider taking advice from a person who is able to give that advice under an AFS licence. If the group purchasing body wishes, it can nominate a particular licensee, such as a particular insurance broker, as a suggested contact.

Receipt of money

- 25 In CP 80, we proposed a condition that was intended to have an effect similar to s985B of the Corporations Act, i.e. any money paid by a person for insurance cover is to be taken to be at the issuer's risk when received by the group purchasing body—even though the group purchasing body does not hold an AFS licence. We proposed to effect this by requiring the issuer to acknowledge that when the group purchasing body receives payments for insurance cover, the issuer will treat the funds as having been received by it from the insured person.
- 26 This condition was intended to ensure that persons who pay money for insurance cover are not denied cover because of a failure by the group purchasing body to pay the issuer.

- 27 The submissions recognised that there is a risk to clients from group purchasing bodies failing to make payments to issuers. There was support for the condition in its application to general insurance.
- 28 However, some respondents raised concerns about the proposal in the context of group insurance policies. Under a traditional group risk arrangement, an issuer calculates and invoices the holder annually based on the characteristics of the class covered. Respondents argued that it would not be possible to say that an individual's contribution reflected the individual costs of their cover since the cover would be based on a pooling of risks over the relevant class. Also, there would often be some element of subsidisation by the holder, such as an employer, who might contribute part of the costs of cover themselves. Even if a particular person's payments to the group purchasing body were deemed to be received by the issuer, the issuer would be able to deny cover if any other persons in the class did not make contributions or the group purchasing body did not make a contribution that it was going to fund, so that the total premium was not paid. The circumstances in which the group purchasing body failed to pay the issuer amounts received from clients would be those where it would be likely that the body would also fail to pay any amount it was required to pay. In those circumstances, deeming receipt by the issuer would not achieve the purpose of our proposed requirement but would add complexity and potentially provide false comfort for employees.
- 29 Some respondents argued that to apply the proposed condition to employer group life policies created an unreasonable exposure for the issuer that could be exploited opportunistically by employers, who would have one of their primary motivations to pay the issuer removed because non-payment might not prejudice insurance coverage.
- 30 Another submission argued that requiring an issuer to assume the risk of non-payment would discourage placing business with group purchasing bodies and would add complexity.

ASIC's response

We believe that in the context of individual or master arrangements where the group purchasing body arranges cover for members on an individual basis, if the issuer allows the group purchasing body to collect the payments from clients for cover, the group purchasing body should be required to ensure that the issuer agrees that premium payments by the group purchasing body will be taken as having been received by the issuer. The group purchasing body would, in this case, be acting like an insurance broker and the conduct is analogous to that contemplated under s985B. An issuer is better placed to assess

and price the risk that the group purchasing body will not pass on payments than the clients to be covered.

Similarly, we consider that the requirement could still be applied in the context of arrangements that extend cover under group insurance to a person as a named individual for a specified premium, as it will be possible to clearly identify particular cover with particular receipts from the person covered.

If the issuer does not wish to assume the risk of non-payment by the group purchasing body, it can insist that payments be made directly to it rather than the group purchasing body for cover to apply.

However, we recognise that, in the context of other group purchasing arrangements where members are subject to a group policy as a class, the proposed requirement is likely to be ineffective and we will not require it.

Cancellation or non-renewal of cover

- 31 In CP 80, we proposed that the relief would only apply when the issuer entered into an obligation, enforceable by each person covered by an insurance contract, that where it is aware a person has a right under s48 of the *Insurance Contracts Act 1984* to take action to enforce a group policy, the issuer would take reasonable steps to ensure that the person is notified of the cancellation or non-renewal of the policy as soon as practicable. It was proposed that this would not apply if the issuer believed that the group purchasing body:
- (a) arranged other similar cover for those persons; or
 - (b) informed the persons of the cancellation or non-renewal.
- 32 This was intended to provide comfort that a person covered by the insurance will not lose cover as a result of a policy being cancelled or not renewed by an issuer without the person having reasonable notice.
- 33 In CP 80, we also proposed a condition that required the group purchasing body to promptly notify the issuer of the contact information for all the persons it is aware of who were covered by a policy that was cancelled or not renewed and not replaced by similar cover, unless it has notified those persons itself of the cancellation or non-renewal.
- 34 Several respondents were of the view that the proposed requirement for the issuer to give notice to each insured person for an insurance policy that was not renewed was not workable, as the issuer may not know that the insurance policy was not being renewed for some weeks after the actual due date for premiums. They argued that it was often genuinely difficult for issuers to directly contact the clients who would expect they were covered (where they are covered by a group policy) because issuers generally only receive broad

information about the insured group on an infrequent basis. Submissions suggested that issuers do not rely upon this information to administer or underwrite these types of policies, except for the purposes of managing claims. Indeed, in the case of group policies, the issuer generally only becomes aware of substantive details of an insured party upon commencing the claims application process.

35 Another respondent pointed out that, typically, issuer in such arrangements do not have responsibility to notify the beneficiary of such matters and usually state in the documentation that the group purchasing body will do so. This respondent supported requiring the group purchasing body to provide the relevant notices.

36 One submission proposed that the group purchasing body should be required to ensure there was a facility under which clients could check for themselves the currency of specific financial products.

ASIC's response

We accept that the group purchasing body is the most appropriate body to provide its clients with notices about the status of cover. We consider this obligation needs to be supported by establishing a facility whereby members can check with an AFS licensee the status of their risk management product to address the case where the group purchasing body is not complying with its obligations. We do not think that establishing such a facility would be burdensome, and industry feedback confirms this.

This option could be implemented by allowing inquiries over the internet or a 'phone-in' service by which clients could simply telephone the issuer to check the status of the relevant financial product after supplying appropriate information to identify themselves and the relevant financial product. To support this, the group purchasing body would need to provide information about the relevant financial product and the availability of the facility to enable the facility to be used.

D Relief from s1012H

Key points

This section covers whether ASIC should give relief from s1012H to make clear that, when the client covered under a financial product held by another would have acquired it as a wholesale client if they had acquired it directly, the issuer need not take reasonable steps to ensure that a Product Disclosure Statement is given to the client.

Should relief be given from s1012H?

- 37 In CP 80 we asked whether it would be appropriate to provide relief to issuers from s1012H for general insurance products that would be acquired as a wholesale client if they were acquired directly. Submissions supported giving relief if required.

ASIC's response

We consider that the proper interpretation of s1012H does not require the issuer to take reasonable steps to ensure the client is given a PDS in the circumstances when relief was proposed.

On this basis, we will not proceed with any exercise of our relief powers because we consider it is unnecessary.

Appendix: List of non-confidential respondents

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- Council of Social Service of New South Wales (NCOSS)
 - Financial Planning Association of Australia Limited (FPA)
 - ING Australia Limited
 - Insurance Council of Australia (ICA)
 - Investment and Financial Services Association Limited (IFSA)
 - National Insurance Brokers Association (NIBA)
 - Paraplegic Benefit Fund (PBF)
 - Vero Insurance Limited (part of the Suncorp Group)
-