



Thursday, 18 February 2010

Mr Tony D' Aloisio
ASIC Chairman
ASIC
GPO BOX 9827
Sydney NSW 2001

Dear Mr D' Aloisio

Group Purchasing Bodies For Risk Insurance Products

Introduction

The purpose of this letter is to inform you of some major concerns that the National Insurance Brokers Association (NIBA) and the insurance industry generally has in relation to Class Order CO 08/01 Group purchasing bodies and Regulatory Guide 195 Group purchasing bodies for insurance and risk products.

On 16 June 2009 NIBA met with ASIC officials in order to discuss whether the Class Order relief covers the key scenarios that were of concern to members and that NIBA believes should be covered by the relief. As a result of the discussions NIBA is extremely concerned about a number of issues and would appreciate ASIC's urgent response to them.

Group purchasing bodies are organisations such as community associations, sporting groups, employers and businesses that provide access to liability and accident insurance for members and associates. The insurance is usually specifically developed for the particular association or organisation. For example a local pony club may have its own insurance policy to cover risks involved when undertaking club activities.

This method of distribution is an efficient low risk method of distribution and because it is cheap and yet very effective, it is used extensively. Without it many in the community would not be able to receive the insurance protection that they currently enjoy.

NIBA was pleased when on 30 September 2008 ASIC issued Class Order CO/08/1 and

indicated that it had granted the relief in order to provide certainty and to remove unnecessary regulatory burden that impeded the provision of risk insurance cover through group purchasing bodies. The relief provided group purchasing bodies from AFS licensing requirements and the need to register the as a management investment scheme.

As NIBA members had identified areas of uncertainty in relation to the Class Order it arranged the meeting with ASIC on 16 June 2009 to seek clarification of ASIC's intent on various aspects of the relief.

NIBA was, however, surprised and very disappointed as a result of its discussion with ASIC officials at the meeting when those officials explained the likely ASIC position on these issues.

ASIC's likely position means that a large number of existing schemes will be operating illegally when the due date for the compliance for the Class Order comes into effect on 30 September 2009. Major restructuring and significant additional costs will be necessary in order to comply with the Class Order. The costs in many cases will be prohibitive and will result in the current insurance protection being withdrawn.

In the circumstances NIBA requests an immediate review of the Class Order and an extension of the due date for compliance. In this regard NIBA is supported by the insurance industry in general.

Outlined below are the particular areas of concern to NIBA in relation to the Class Order that arise as a result of the meeting.

Independence test remuneration restriction

In relation to group policies (of the type referred to in ASIC RG 195.41(a)) the remuneration restriction (see paragraph 6(a)(i)) as it applies to the Independence test (see paragraph 5 (b)(ii)) is too narrow.

This is because it is limited to payments received from "members", which will not catch payment by other types of covered persons who will not fall within the definition of "members" of Group Purchasing Bodies (**GPB**) but are persons such arrangements commonly apply to.

A "member" in relation to a GPB is defined in the Class Order to mean:

- where the body is a company—a member of that company; and
- otherwise—a person who is treated as a member of the body under its constituent documents and has agreed to be a member of the body.

The ASIC Regulatory Impact Statement (**RIS**) clearly identifies that the aim of the relief is to extend to persons covered as beneficiaries under a group policy, rather than the limited concept of member actually included in the Class Order relief. For example:

- Para 1 "It is common for a variety of organisations to arrange cover under life or general insurance products or facilities for managing financial risk (risk management products) for the benefit of their members *or other persons connected to the organisation*.
- Para 18 "The parties that would be affected by ASIC's proposals are:...*persons for whom group purchasing bodies arrange cover*;..."
(see also paras 1,2,16,19,20-24 all of which refer to the broad concept of covered persons or clients).

At no point in the RG of RG 195 is the impact of limiting the remuneration fee exemption to a limited class of defined "members" examined or reported on.

At no point in discussions with NIBA on the proposed relief did ASIC raise this as a potential restriction or seek comment on its likely impact.

It appears this may be an unintended error. If this is not the case and the choice to limit it was deliberate, NIBA is of the view that this will have a significant detrimental consequences for its members, consumers and insurers that the Class Order should be designed to avoid.

By way of example only, this will result in the following scenarios noted by ASIC (see RIS paragraph 2)) not being covered by the relief:

- "commercial organisations that secure insurance which *benefits people and entities outside the organisation but with some connection to it* (e.g., construction companies whose policies may extend to subsidiaries, contractors and sub-contractors or shopping centre owners whose policies may cover tenants)"; None of these entities would fall within the current definition of member in the Class Order.
- "employers who arrange insurance for *employees*"
Apart from the limited life exemption employees are unlikely in most cases to be within the definition of member; and
- "commercial organisations that provide services to *clients* and arrange insurance for clients to cover the cost of additional services if required in certain circumstances".

Many such clients would not fall within the member definition.
(See also RG 195.40)

The above is likely to result in (amongst other things):

- Such arrangements being terminated given the compliance costs involved in obtaining the relevant authorities required if no relief is available;
- Increased cost of insurance to the community as such arrangement are designed to reduce insurance costs to covered persons (which ASIC has acknowledged). This may in turn result in persons not insuring for the relevant risk (which is clearly not in the public interest).

- Unnecessary compliance costs and loss of business to industry.

We refer ASIC to RIS paragraphs 30-35 and RG 195.23-25 which set out ASIC's own view of the adverse impact if the relief were not to apply to currently existing group insurance arrangements.

The above is clearly at odds with ASIC's RIS and Government's stated intention to avoid such results.

Can ASIC as a matter of urgency please clarify its position on this issue and whether it intends to address this issue.

ASIC position on Custodial or Depositary services

NIBA is also extremely concerned to clarify what group policy arrangements ASIC believes will result in the GPB carrying on a financial services business of providing a custodial or depositary service for which the Relief would be required.

Based on our discussion ASIC appears to be taking a very broad view which has the potential to result in GPBs having to meet the disclosure obligations in the Class Order where it is not appropriate to do so and is likely to result in extreme consequences for the industry and consumers if not properly addressed (despite what ASIC suggests in RIS paragraph 34 of the limited compliance costs involved).

The following are examples of group purchasing arrangements which NIBA believes should not be required to comply with the relevant relief but run the risk of being caught depending on ASIC's view on whether the conduct is the carrying on of a financial services business of providing a custodial or depositary service:

- A motor vehicle or home insurance policy taken out annually where cover is provided to the contracting insured and also automatically provided to persons who are not contracting insureds that are specified in the policy as being entitled to cover for loss or damage to their property or liability. Such persons do not pay an amount for this automatic inclusion of their interest in the policy. They may or may not be aware of this right.
- Any policy which covers a business insured and other specified persons as non contracting beneficiaries (e.g public liability, contract works or ISR policies covering sub contractors or financiers) either automatically or on request at no separate cost (e.g may be incorporated in contract pricing).

Whilst RG 195 is not clear on the issue, ASIC appears to be of the view that in a group policy arrangement a *custodial or depositary service* is likely to be provided where:

- the party covered is *aware* of the arrangement in place between the GPB and insurer relevant to their access to cover (even if automatic) (awareness will of course vary depending on the covered person's knowledge of insurance); and

- the GPB is the insured under the contract of insurance that provides the access to cover (ie the insured holds either the policy or interest under the policy on trust for or on behalf of the covered person).

This means that if ASIC believes that such arrangements are likely to result in the carrying on of a business, the Class Order relief must be relied on and relevant disclosures made per the Class Order conditions. The costs of complying with the Class Order Relief disclosure conditions would be prohibitive (despite what ASIC suggests in RIS paragraph 34 of the limited compliance costs involved).

What is carrying on a financial services business is open to argument (e.g. profit component is not required and analysis of whether arrangement is "substantial" and/or has elements of "system, repetition and continuity" are required amongst other things). The cost of insureds undertaking such an analysis in group insurance arrangements would also be prohibitive given the number of arrangements that could be affected. It is unrealistic to expect small business and consumers (many of whom are not represented by insurance brokers to undertake such a review).

NIBA is of the view that the above arrangements should not be seen as carrying on such a business and a specific exemption should be provided that results in such arrangements not being seen as the provision of custodial or depository services.

Relief would not appear to be required for advice (as such persons should not be providing advice) nor for dealing as it appears from the meeting that ASIC's view is likely to be that GPBs under group policies will not be seen as arranging or issuing any Financial Product (i.e they do not arrange for the issue of the insurance policy or an interest in it).

As NIBA noted at the meeting with ASIC, whilst ASIC does not give legal advice, it makes sense for ASIC to provide clarification of ASIC's views on unclear issues that are likely to have the effect of avoiding confusion and inconsistency in the market. NIBA would like the opportunity to discuss with ASIC the various alternatives to address this issue.

For example, ASIC may want to consider exempting any group policy arrangement from being a custodial or depository service where the beneficiary is not required to pay a separate amount for the insurance cover. In such a case, for the arrangements of the type we are concerned with, the Class Order relief would not apply along with its disclosure obligations.

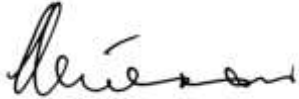
Extension of Relief until matters resolved

We are preparing further examples of the likely results of ASIC not changing the definition of member or not providing for the custodial or depository services exemption, which we intend to provide as soon as reasonably possible in conjunction with other associations.

In the circumstances, NIBA requests that ASIC extend the due date for compliance in the Class Order beyond 30 September 2009 so as to enable the industry to resolve the issue with ASIC and to provide sufficient time for compliance.

Given the importance and the urgency of the matter NIBA would appreciate an early response so that ASIC and NIBA can work together in order to provide an effective solution.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Noel Pettersen', written in a cursive style.

Noel Pettersen
Chief Executive Officer