

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2009 No.**

Issued by the Authority of the Minister for Financial Services, Superannuation  
and Corporate Law

*Corporations Act 2001*

*Corporations Amendment Regulations 2009 (No. )*

The *Corporations Act 2001* (the Act) makes provision in relation to corporations and financial products and services.

Section 1364 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by that Act to be prescribed, as necessary or convenient to be prescribed for carrying out or giving effect to that Act.

These Regulations apply to general insurance intermediaries who are required to be Australian financial services licensees that are authorised under the Act to deal in general insurance products. These Regulations require general insurance intermediaries to provide data about their dealings in general insurance business, particularly their dealings with unauthorised foreign insurers (UFIs).

UFIs are foreign domiciled insurers that are not authorised by the Australian Prudential Regulation Authority (APRA) to carry on insurance business in Australia. However, licensees are able to place insurance business with UFIs under limited exemption arrangements established by the *Financial Sector Legislation Amendment (Discretionary Mutual Funds and Direct Offshore Foreign Insurers) Act 2007*, which amended the *Insurance Act 1973*. The limited exemption arrangements recognise that there are some circumstances where insurance risk cannot be appropriately placed with an APRA-authorised general insurer or a Lloyd's underwriter and thus needs to be insured with an UFI.

Information on the role played by UFIs in the Australian insurance market is limited. The data collection arrangements implemented by these Regulations significantly increase the available data on the level and nature of insurance business placed with UFIs.

The data collection will enable ongoing monitoring of insurance business flowing offshore under exemption arrangements and assist in the modification of those arrangements over time. The data collection will also enable a better understanding of the Australian general insurance market by obtaining data on the intermediation of general insurance products. Noting recent financial market turmoil, the data will also enable a greater understanding of the impact of an insurance failure on the Australian community.

The Regulations require specified licensees to submit data to APRA on general insurance products entered into in the specified period. Additional information is required where the insurance product is placed with an UFI or the insurance product relates to an atypical risk, for example terrorism or aviation liability. The data is to be

provided to APRA in a form prescribed in the Regulations. In this instance, APRA is acting solely in its role as a national statistical collection agency for the Australian financial sector, not as a prudential regulator.

The first form requires general insurance intermediaries to provide aggregate data on contracts of insurance, entered into during the reporting period as a result of dealing by the intermediary, with all APRA authorised general insurers, Lloyd's underwriters and UFIs.

The second form requires general insurance intermediaries to provide transaction level data on contracts of insurance, entered into during the reporting period as a result of dealing by the intermediary with UFIs, using the limited exemption arrangements. In addition, general insurance intermediaries will be required to provide transaction level data on every contract of insurance, entered into during the reporting period as a result of dealing by the intermediary, that relates to an atypical risk, irrespective of whether it is placed with an APRA authorised insurer, Lloyd's underwriter or UFI.

Although the data to be submitted is not required to be audited, the data collection is designed to produce data that is as complete as possible, reliable and verifiable. The data to be collected is not otherwise available to APRA, the Australian Securities and Investments Commission (ASIC) or the Australian Government in a suitable form.

The requirement for licensees to report on all general insurance products entered into, rather than just those entered into with UFIs is essential in order to ensure the integrity of the data provided. This could, in turn, affect the quality of assessments made about the activities of UFIs and the exemption arrangements.

Details of the Regulations appear in the Attachment.

The Act does not specify any conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commence on the day after registration.

## ATTACHMENT

### **DETAILS OF THE CORPORATIONS AMENDMENT REGULATIONS 2009 (No. )**

#### Regulation 1 – Name of Regulations

Regulation 1 provides that the name of the Regulations is the *Corporations Amendment Regulations 2009 (No. )*.

#### Regulation 2 – Commencement

Regulation 2 provides that the Regulations commence on the day after they are registered.

#### Regulation 3 – Amendment of *Corporations Regulations 2001*

Regulation 3 provides that the *Corporations Regulations 2001* (Corporations Regulations) are amended as provided for in Schedule 1 to the Regulations.

#### Schedule 1 – Amendments

##### Item [1]

Part 7.6B Provision of information to APRA about contracts of insurance

##### *Regulation 7.6.08A Definitions*

Regulation 7.6.08A specifies the definitions of ‘general insurer’, ‘Lloyd’s underwriter’ and ‘unauthorised foreign insurer’ (UFI) used in this Part.

A general insurer is defined by subsection 3 (1) and section 11 of the *Insurance Act 1973* to be a body corporate that is authorised by the Australian Prudential Regulation Authority (APRA) under section 12 of that Act to carry on insurance business in Australia.

A Lloyd’s underwriter is defined by subsection 3 (1) of the *Insurance Act 1973* to be an underwriting member of Lloyd’s (which is the society of that name incorporated by the Act of the United Kingdom known as the Lloyd’s Act 1871).

An UFI is defined in regulation 4 of the *Insurance Regulations 2002* and is a foreign domiciled insurer that is not authorised by APRA to carry on insurance business in Australia.

##### *Regulation 7.6.08B Application*

Regulation 7.6.08B specifies that Part 7.6B applies only to financial services licensees authorised by the Act to deal in general insurance products. This provision is required as not all financial services licensees are authorised to deal in general insurance products.

- It is a requirement under section 911A of the Act that any person carrying on an insurance business in Australia hold an Australian financial services licence.

Section 761A and paragraph 764A(1)(d) of the Act define a 'general insurance product' to be a contract of insurance that is not a life policy, or a sinking fund policy, within the meaning of the *Life Insurance Act 1995*.

Section 766C of the Act defines 'dealing' in a financial product (of which a general insurance product is one) to include conduct that involves (whether engaged in as principal or agent) applying for, issuing, varying or disposing of a financial product. It can also include arranging for a person to engage in such conduct.

*Regulation 7.6.08C Modification of section 912CA of the Act*

The power to modify the Act by regulation is provided by Paragraph 926B (1) (c) of the Act, which states that regulations may vary provisions in Part 7.6 of the Act.

APRA is to act as the agent of the Australian Securities and Investments Commission (ASIC) in the data collection process. In order to enable APRA to act as ASIC's agent, Regulation 7.6.08C provides APRA with equivalent powers to those provided to ASIC.

Regulation 7.6.08C has the effect of modifying section 912CA of the Act to provide APRA with powers to require that financial services licensees supply it with data on the financial services they provide and the financial services business they conduct. Regulation 7.6.08C also provides APRA with the powers to require that the information be lodged in the prescribed form and that it be accompanied by all information or material required by the form along with any further related information requested by APRA.

Data is to be submitted to APRA on Form 701 and Form 702. Form 701 is to be populated with aggregated data on intermediated business with APRA-authorized general insurers, Lloyd's underwriters and unauthorized general insurers. Form 702 is to be populated with transaction level data on intermediated business relating to unauthorized foreign insurers and/or atypical risks.

Licensees that only have aggregated data to submit may do so either in paper form or electronically. However, licensees that are also required to provide transaction level data must submit all data electronically. All submissions must include both Form 701 and Form 702 irrespective of whether the intermediary has data to submit.

Licensees lodging data in paper form can submit by mailing the document, delivering it in person, or emailing a PDF of the document to APRA.

It is a requirement that the data submitted in paper form must be signed in accordance with the requirements set out in Subregulation (3).

Documents delivered in person or by mail must include original signatures. If a PDF document is emailed to APRA, the signed originals must be retained by the licensee for their records.

Licensees lodging data electronically must do so using APRA's existing 'Direct to APRA' (D2A) system. The D2A system facilitates manual entry of data or direct importation of data from business information systems. The D2A system is

considered to represent the most efficient method of electronic data lodgement for both licensees and APRA. D2A is available for download from APRA's website, together with an extensive D2A helpguide. APRA maintains a D2A helpdesk which is contactable by telephone or email.

Where data is lodged with APRA electronically, the condition that data submitted be signed will be met by requiring that 'challenge letters' be so signed. The challenge letters, which are to be signed by licensees to gain access to D2A, seek a security certificate which must be installed on the licensee's computer system. Licensees need a security certificate to download and decrypt forms from APRA, and to encrypt and send data to APRA. An individual challenge letter is to be provided by the licensee once in respect of each individual within the organisation that will be using D2A to send data to APRA. Subregulation (3) sets out the signatory requirements applying to the person from the licensee who is authorising an individual to send data to APRA, for each challenge letter.

APRA will assess the lodged data (paper form and electronic) for validity. Any issues identified with the data will be referred back to the licensee and it will be expected that the licensee provide any additional information that may be requested by APRA. The licensee may subsequently be required to resubmit the data if any errors are identified. All responses and resubmissions will be required to be provided within 5 business days of notification from APRA, or by a later date specified by ASIC or APRA.

If the licensee fails to submit data (including additional data and resubmissions requested by APRA), or fails to correct errors or omissions in the data, APRA will advise ASIC of the issue. This situation will be a breach of the licensee's Australian financial services licence obligations. All the existing legislative enforcement powers for such a breach will apply.

In addition, a failure to provide the data required will be a strict liability offence with a maximum penalty of 10 penalty units for an individual (that is, \$1,100) or 50 penalty units for a corporation (that is, \$5,500). APRA's preferred policy with regard to reporting entities who are sincerely attempting to comply, but encountering difficulties in doing so, is to provide guidance rather than to commence enforcement action.

#### *Regulation 7.6.08D Information about general insurance products*

Regulation 7.6.08D specifies which general insurance products are to be reported on under these arrangements, the licensees required to report on them, the form in which the data is to be provided, and the reporting periods.

Subregulation (1) requires licensees to report on all general insurance products entered into as a result of a dealing in the product, either wholly or partially, by a person, with general insurers, Lloyd's underwriters and UFI's. This group encompasses all of the insurers from which general insurance products can be lawfully obtained. Subregulation (1) excludes reinsurance and retrocession contracts.

The *Insurance Contracts Act 1984* uses the phrase ‘entered into’ to describe the process of executing a contract of insurance. A licensee might issue a general insurance product because they are the insurer/underwriter (where they are executing the contract on their own behalf) or because the licensee is acting as an underwriting agent for the insurer/underwriter (in this latter case, the licensee may be executing the contract as an agent of the insurer/underwriter under a binder agreement).

The data must relate to contracts of insurance entered into ‘either partially or wholly as a result of’ dealing by the licensee with an insurer. There must be a causal relationship between the conduct of the licensee and the contract being entered into.

The requirement for licensees to report on all general insurance products entered into, rather than just those entered into with UFIs is essential in order to ensure the integrity of the data provided.

It is essential that the data collection arrangements established ensure that all dealings with UFIs are reported in order to enable an accurate assessment of the effectiveness of the foreign insurer exemption arrangements.

Subregulation (2) specifies certain exceptions to the reporting requirements so as to avoid the duplicate provision of data.

Firstly, paragraph 7.6.08D (2) (a) specifies that general insurers are not to provide data on general insurance products they issue. This exception is because they already provide this data to APRA under the *Financial Sector (Collection of Data) Act 2001*.

This exception does not apply, however, where a licensee that is a general insurer arranges insurance on behalf of a client with another insurer. This may occur, for example where the general insurer and another insurer are co-insurers on the same insurance contract. In this case the licensee that is a general insurer would only report the data relating to the part of the insurance contract arranged with another insurer, as the data relating to the part of the contract issued by the general insurer would be provided to APRA under the *Financial Sector (Collection of Data) Act 2001*.

Secondly, paragraph 7.6.08D (2) (b) seeks to avoid duplicate reporting where two or more licensees are dealing in the same insurance contract. It does so by specifying that the licensee who is not a general insurer and who has dealt directly with the insurer or underwriter report on the insurance contract.

- For example, where a transaction involves dealing by two licensees, where one is an agent for a Lloyd’s underwriter (or similarly an agent for a general insurer) and the other is a broker for the client, only the agent for the Lloyd’s underwriter (or the agent for the general insurer) would report the contract as they are the party that has dealt directly with the Lloyds underwriter (or general insurer).

- For example, where a general insurer and an insurance broker are dealing in respect of an insurance contract (the general insurer issues the contract and the broker acts on behalf of the client), the broker must report this contract. The licensee that is a general insurer should not report on insurance contracts that it has issued.

Subregulation (3) specifies that data must be provided to APRA in accordance with Form 701 no later than 20 business days after the end of the reporting period specified in subregulation (5), or within a reasonable time specified by ASIC or APRA. This is in line with other statistical collections of unaudited data.

Form 701 requires the provision of aggregate data on premiums and number of policies issued by general insurers, Lloyd's underwriters and UFIs, for each APRA class of business.

Subregulation (4) requires licensees to provide further information to APRA relating to the information provided in accordance with Form 701 that APRA requests in writing. The information must be provided to APRA no later than 5 business days after receiving the request, or by a later date specified by ASIC or APRA.

Subregulation (5) spells out the reporting periods to apply. Data is to be collected on a biannual basis.

There is also to be a formal collection of Form 701 data from 1 November to 31 December in 2009. This collection is aimed at providing both licensees and APRA with an opportunity to verify systems and procedures prior to the collection of six month period data.

Subregulation (6) specifies that it is a strict liability offence for a licensee that is required to provide Form 701 data in accordance with subregulation (3) or further information in accordance with subregulation (4) to fail to provide that data. The maximum penalty for the offence is to be 10 penalty units. APRA's preferred policy with regard to reporting entities who are sincerely attempting to comply, but encountering difficulties in doing so, is to provide guidance rather than to commence enforcement action.

*Regulation 7.6.08E Information about general insurance products — unauthorised foreign insurers and atypical risks*

Regulation 7.6.08E specifies additional reporting requirements applying to general insurance products where an UFI is a party to the contract or where the product insures against an atypical risk.

Subregulation (1) specifies that the regulation applies to a general insurance product that is entered into as a result of a dealing in the product with a general insurer or a Lloyd's underwriter where an UFI is a party to the contract or where the product insures against an atypical risk (regardless of whether an unauthorised foreign insurer is or is not a party to the contract). The specified exceptions to this are reinsurance and retrocession contracts.

The *Insurance Contracts Act 1984* uses the phrase ‘entered into’ to describe the process of executing a contract of insurance. A licensee might issue a general insurance product because they are the insurer/underwriter (where they are executing the contract on their own behalf) or because the licensee is acting as an underwriting agent for the insurer/underwriter (in this latter case, the licensee may be executing the contract as an agent of the insurer/underwriter under a binder agreement).

The data must relate to contracts of insurance entered into ‘either partially or wholly as a result of’ dealing by the licensee with an insurer. There must be a causal relationship between the conduct of the licensee and the contract being entered into. However, it should not be necessary for entering into the contract to be solely due to dealing by the licensee.

Under the exemption arrangements established by Regulation 4 of the *Insurance Regulations 2002*, insurance business can be placed with an UFI where:

- at least one policyholder is a high-valued insured;
- an atypical risk is being insured against;
- the risk being insured against cannot reasonably be placed in Australia; or
- it is required by the law of a foreign jurisdiction.

The exemption for high-value insureds recognises that they are likely to be sophisticated purchasers of general insurance products with complex risks that may not be able to be covered solely through authorised insurers.

The exemption for atypical risk recognises that there are a number of limited specific atypical insurance risks that currently cannot be placed, on a stand-alone basis, with authorised insurers. Some risks are offered in a global market by a very limited number of global insurers. For other risks, while there may be a very limited cover available, there may not be sufficient capacity to satisfy local demand or the cover may only be available if bundled with other risks.

Atypical risks are defined in Regulation 4C of the *Insurance Regulations 2002* to be:

Nuclear	loss or liability arising from the hazardous properties (including radioactive, toxic or explosive properties) of nuclear fuel, nuclear material or nuclear waste
Biological	loss or liability arising from the hazardous properties of biological material or biological waste
War	loss or liability arising from war or warlike activities (within the meaning given by subregulation 2(1) of the <i>Insurance Contracts Regulations 1985</i> )
Terrorism	loss or liability arising from a terrorist act (within the meaning given by section 5 of the <i>Terrorism Insurance Act 2003</i> )
Medical clinical trials	liability arising from health-care related research
Space	loss of, or liability arising from the operation of, a space object (within the meaning given by section 8 of the <i>Space Activities Act 1998</i> )
Aviation liability	liability arising from the ownership or operation of an aircraft (but not loss of the aircraft or its cargo)
Protection & indemnity for ships other than for pleasurecraft	liability and expenses arising from a person owning, chartering, managing, operating or being in possession of a vessel other than a pleasure craft (within the meaning given by subsection 9A(2) of the <i>Insurance Contracts Act 1984</i> )
Equine other than equestrian packages	<p>loss or liability arising from equine mortality or fertility and related risks</p> <p>An equestrian package is an insurance policy that covers risks such as personal injuries and veterinary fees associated with the ownership or use of a horse, and loss of or damage to saddlery, tack and horse floats.</p>
Incidental cover	<p>loss or liability incidental to other atypical risks set out in paragraphs (a) to (i) inclusive.</p> <p>An incidental risk being covered by the contract must be of lesser importance than, and covered in conjunction with, the other atypical risks.</p>

The exemption for risks that cannot reasonably be placed in Australia recognises that there will be a range of circumstances where a business or consumer has a unique risk that cannot be placed with an authorised insurer or with an UFI under the high-value insured or atypical risk exemptions. This may include where an authorised insurer does not offer the necessary terms and conditions to cover a particular risk, or where

the capacity of the Australian market in a particular line has been exhausted, or where there are benefits that accrue to an insured through a longstanding on-going relationship with an insurer.

The exemption for arrangements with an UFI that are required by the law of a foreign jurisdiction recognises that such circumstances may occur. For example, an Australian business operating in Country A that is required by the law of Country A to take out workers' compensation insurance with an insurer authorised in Country A will be able to place this business with the UFI in Country A without the UFI or an AFSL holder being in breach of the prohibitions.

Subregulation (2) specifies certain exceptions to the reporting requirements so as to avoid the duplicate provision of data. These exceptions are the same as those specified in subregulation 7.6.08D (2).

Firstly, paragraph 7.6.08E (2) (a) specifies that general insurers are not to provide data on general insurance products they issue. This exception is because they already provide this data to APRA under the *Financial Sector (Collection of Data) Act 2001*.

This exception does not apply, however, where a licensee that is a general insurer arranges insurance on behalf of a client with another insurer. This may occur, for example where the general insurer and another insurer are co-insurers on the same insurance contract. In this case the licensee that is a general insurer would only report the data relating to the part of the insurance contract arranged with another insurer, as the data relating to the part of the contract issued by the general insurer would be provided to APRA under the *Financial Sector (Collection of Data) Act 2001*.

Secondly, paragraph 7.6.08E (2) (b) seeks to avoid duplicate reporting where two or more licensees are dealing in the same insurance contract. It does so by specifying that the licensee who is not a general insurer and who has dealt directly with the insurer or underwriter report on the insurance contract.

- For example, where a transaction involves dealing by two licensees, where one is an agent for a Lloyd's underwriter (or similarly an agent for a general insurer) and the other is a broker for the client, only the agent for the Lloyd's underwriter (or the agent for the general insurer) would report the contract as they are the party that has dealt directly with the Lloyds underwriter (or general insurer).
- For example, where a general insurer and an insurance broker are dealing in respect of an insurance contract (the general insurer issues the contract and the broker acts on behalf of the client), the broker must report this contract. The licensee that is a general insurer should not report on insurance contracts that it has issued.

Subregulation (3) specifies that reports must be provided to APRA in accordance with Form 702 no later than 20 business days of the end of the reporting period specified in subregulation (5), or within a reasonable time specified by ASIC or APRA. This is in line with other statistical collections of unaudited data.

Form 702 requires the provision of transaction level data on the use of UFIs and issuance of atypical risk insurance products, by APRA class of business.

Subregulation (4) requires licensees to provide further information to APRA relating to the information provided in accordance with Form 702 that APRA requests in writing. The information must be provided to APRA no later than 5 business days after receiving the request, or by a later date specified by ASIC or APRA.

Subregulation (5) spells out the reporting periods to apply. Data is to be collected on a bi-annual basis. The reporting requirements are identical to those required for Form 701 (refer to subregulation 7.6.08D (5) above).

Subregulation (6) specifies that it is a strict liability offence for a licensee that is required to provide Form 702 data in accordance with subregulation (3) or further information in accordance with subregulation (4) to fail to provide that data. The maximum penalty for the offence is to be 10 penalty units.

#### Item [2] – Listing of Forms 701 and 702

This item specifies that Form 701 ‘Aggregate data on intermediated business with APRA-authorized general insurers, Lloyd’s underwriters and unauthorized foreign insurers’ and Form 702 ‘Transaction level data on intermediated business relating to unauthorized foreign insurers and atypical risks’ be added to the list of forms in Schedule 1 of the *Corporations Regulations 2001*. This lists the forms that are included in Schedule 2 of the *Corporations Regulations 2001*.

#### Item [3] – Insertion of Forms 701 and 702

This item specifies that Forms 701 and 702 be inserted in Schedule 2 to the *Corporations Regulations 2001*.