

EXPLANATORY STATEMENT

Select Legislative Instrument 2008 No. 123

Issued by the authority of the Minister for Superannuation and Corporate Law

Subject - *Cross-Border Insolvency Act 2008*
Cross-Border Insolvency Regulations 2008

Section 9 of the *Cross-Border Insolvency Act 2008* (the Act) provides that entities prescribed by the regulations are designated for the purpose of paragraph 2 of Article 1 of the Schedule 1 to that Act, as applied and modified by Part 2 of that Act. Section 23 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by that Act to be prescribed; or that are necessary or convenient to be prescribed for carrying out or giving effect to that Act.

The Act provides that Schedule 1 to the Act (which reproduces the text of the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law as set out in the Annex to United Nations General Assembly Resolution A/RES/52/158 (1997) (the Model Law)), as modified by Part 2 of the Act, has the force of law in Australia.

The Model Law will facilitate cross-border economic activity by reducing the risks, complexities and costs associated with recovering funds and rehabilitating businesses in the event of the external administration of trans-national businesses.

The purpose of the *Cross-Border Insolvency Regulations 2008* (the Regulations) is to exclude authorised deposit-taking institutions, general insurers and life companies from the operation of the Model Law.

Special insolvency arrangements apply to authorised deposit-taking institutions and insurance companies. These arrangements are contained in the *Banking Act 1959*, the *Insurance Act 1973* and the *Life Insurance Act 1995*. The application of the Model Law to Australia will not disturb the special insolvency arrangements for such entities. Other foreign jurisdictions which have implemented the Model Law, such as the United Kingdom and the United States of America, have excluded these classes of entity from its operation.

Details of the Regulations are set out in the Attachment.

The Act does not fall within the definition of the 'national law' in clause 102 of the *Corporations Agreement 2002*. The Commonwealth was therefore not required to obtain the approval of the Ministerial Council for Corporations for the Regulations and has not done so.

The Act arose out of the Corporate Law Economic Reform Program, Proposals for Reform: Paper No. 8 (CLERP 8), which was subject to extensive public consultation. Proposal 4 of CLERP 8 proposed that corporate entities currently subject to special insolvency regimes at Commonwealth level (including financial institutions) should be excluded from the scope of the Model Law. The exclusion of such entities was therefore subject to extensive public consultation.

The Act specifies no conditions that needed to be met before the power to make the Regulations could be exercised.

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

The Regulations commence immediately after the commencement of Parts 2, 3 and 4 of the Act.

Details of the Cross-Border Insolvency Regulations 2008

Regulation 1 – Name of Regulations

This regulation provides that the title of the Regulations is the *Cross-Border Insolvency Regulations 2008*.

Regulation 2 – Commencement

This regulation provides for the Regulations to commence immediately after the commencement of Parts 2, 3 and 4 of the Act.

Regulation 3 – Definitions

This Regulation defines a number of terms used in the Regulations.

Regulation 4 – Prescribed Entities (Act s 9)

This regulation provides that, for the purpose of section 9 of the Act, the entities listed in Schedule 1 to the Regulation are prescribed entities. Entities that are so prescribed are, by operation of section 9, designated for the purposes of paragraph 2 of Article 1 of the Model Law. Paragraph 2 of Article 1 provides that the Model Law does not apply to a proceeding concerning entities that are so designated.

The effect of the regulation is to exclude the entities prescribed in Schedule 1 from the operation of the Model Law.

Schedule 1– Prescribed Entities

Item [1]

Item 1 to Schedule 1 specifies that “ADIs” are a prescribed entity and therefore are excluded from the operation of the Model Law (as it has force of law in Australia).

The term “ADI” is defined in regulation 3 as having the same meaning as in the *Banking Act 1959*. Section 5 of the *Banking Act 1959* defines "ADI" as meaning an authorised deposit-taking institution, which in turn is defined as meaning a body corporate in relation to which an authority under subsection 9(3) of the *Banking Act 1959* is in force. Subsection 9(3) deals with the granting by the Australian Prudential Regulation Authority (APRA) of authorisations to carry on banking business in Australia.

ADIs are subject to section 11F and Part II Division 2 of the *Banking Act 1959* which provide a specialised regime for dealing with ADI’s that are in financial difficulty or are insolvent. The exclusion of ADI’s from the Model Law (as it has force of law in Australia) ensures that its operation does not displace the operation of this specialised regime.

Item [2]

Item 2 to Schedule 1 specifies that “general insurers” are a prescribed entity and therefore are excluded from the operation of the Model Law (as it has force of law in Australia).

The term “general insurer” is defined in regulation 3 as having the same meaning as in the *Insurance Act 1973*. Section 11 of the *Insurance Act 1973* defines "general insurer" as meaning a body corporate that is authorised under section 12 to carry on insurance business in Australia. Section 12 deals with the granting by APRA of authorisations to carry on insurance business in Australia.

General insurers are subject to section 116 of the *Insurance Act 1973* which provide special rules that apply in the event that a general insurer is being wound up. The exclusion of ADI's from the Model Law (as it has force of law in Australia) ensures that its operation does not displace the operation of these rules.

Item [3]

Item 3 to Schedule 1 specifies that “life companies” are a prescribed entity and therefore are excluded from the operation of the Model Law (as it has force of law in Australia).

The term “life company” is defined in regulation 3 as having the same meaning as in the *Life Insurance Act 1995*. Section 8 and the Schedule to the *Life Insurance Act 1995* provides that “life company” means a company that is carrying on life insurance business in Australia.

Life companies are subject to Part 8 of the Life Insurance Act 1995 which provides a special regime for dealing with life companies that are in danger of becoming insolvent, are insolvent or are being wound up. The exclusion of life companies from the Model Law (as it has force of law in Australia) ensures that its operation does not displace the operation of this special regime.