

## REINSURANCE REGULATION IN AUSTRALIA – AN OVERVIEW

### 1. EXECUTIVE SUMMARY

#### 1.1 Overview

- (a) Any regulation of re/insurance in Australia can be essentially broken down as follows:
  - (i) **prudential regulation** - ie regulation ensuring a re/insurer has systems to help ensure there are sufficient assets available to meet its contractual promises to insureds; and
  - (ii) **consumer protection regulation** - ie regulation governing the conduct of re/insurers towards the re/insureds.
- (b) Australia has a 'federal' system of government. Under a federal system, powers are divided between a central government and individual states. In Australia, power is divided between the Australian Government and the six state governments.

#### 1.2 Prudential regulation of re/insurance

- (a) Prudential regulation of re/insurance is managed at a Federal level not a State level. The main areas subject to prudential regulation can be summarized as follows.
- (b) *General insurance:*
  - (i) Most general insurance (including reinsurance) is managed under the Insurance Act 1973 (Cth) by the Australian Prudential Regulation Authority (**APRA**). The Act does not apply to life insurance and private health insurance and some other specific types of insurance and arrangements.
  - (ii) The Act can catch reinsurers carrying on general insurance business in Australia which are not otherwise exempt.
  - (iii) The scope of what is seen to be carrying on general insurance business in Australia was broadened in 2008 but the tests do differ in important respects for reinsurers as opposed to insurers (e.g certain activities such as dealing with an insurance broker or agent in Australia which catch a foreign insurer won't catch a foreign reinsurer) and there are a range of carve outs (e.g for hard to place business or high value insureds).
  - (iv) Effectively, reinsurers have choice to structure their business so as to:
    - (A) effectively operate offshore and avoid being caught; or
    - (B) operate within the jurisdiction and comply with the significant prudential obligations of the Act.

- (c) *Life insurance:*
- (i) Life insurance (including reinsurance) is managed under the Life Insurance Act 1995 (Cth) by APRA.
  - (ii) It can catch reinsurers carrying on life insurance business in Australia which are not otherwise exempt.
  - (iii) The scope of what is seen to be carrying on life insurance business in Australia is also broad.
  - (iv) As with general insurance, reinsurers have choice to structure their business so as to:
    - (A) effectively operate offshore and avoid being caught; or
    - (B) operate within the jurisdiction and comply with the significant prudential obligations of the Act.
- (d) *Other*
- (i) Specific prudential legislation governs health insurance business but this is not covered in this paper.

### **1.3 Consumer protection regulation**

- (a) Consumer protection regulation is also effectively managed at a federal level by the Australian Securities and Investments Commission (**ASIC**).
- (b) There is significant specific insurance consumer protection legislation in place for general and life insurance under the Insurance Contracts Act and the Corporations Act 2001(Cth) but neither of these applies their consumer protections to reinsurance. The Life Insurance Act also contains some limited consumer protection provisions.
- (c) Marine Insurance is subject to the operation of the Marine Insurance Act but the protections are less than under the above Act and not applicable to reinsurance.
- (d) The reinsurance Prudential Standards imposed by APRA on authorised insurers can impact on the required terms of a reinsurance contract requiring the governing law to be Australian law and any disputes under the reinsurance to be determined by a court being heard in an Australian court (e.g.see GPS 230 para 31-14) governing law and jurisdiction if courts to with such insurers in certain cases.
- (e) There is limited State based legislation that may, depending on the circumstances, have an impact on reinsurance (e.g Instruments Act (Victoria)) that reinsurers need to consider.
- (f) There is also general consumer protection law which can apply to reinsurers depending on the circumstances e.g. in relation to misleading and deceptive conduct and competition.

- (g) However, the end result is essentially that, in Australia, a reinsurance contract between a reinsurer and cedent will principally be covered by the common law. Where there is no Australian common law the Australian courts will typically look to the decisions of other common-law jurisdictions, in particular the United Kingdom.

## 2. GENERAL INSURANCE PRUDENTIAL REGULATION

### 2.1 Background

- (a) The *Insurance Act 1973 (Cth)* is the only significant prudential form of regulation of general re/insurers in Australia. It only applies to re/insurers that carry on insurance business in Australia as defined in the Act and has a number of carve outs.
- (b) The regulator of the Act is the Australian Prudential Regulatory Authority (**APRA**). APRA is the prudential regulator of general and life re/insurance companies, banks, credit unions, building societies, friendly societies and superannuation funds. APRA has been responsible for the prudential supervision of general insurers in Australia since 1 July 1998.
- (c) The choices of a re/insurer wishing to do general insurance business with an Australian insured/cedent are:
- (i) obtaining authorisation under the Act as an authorised general insurer – such insurers are subject to significant initial and ongoing prudential obligations.

A foreign-incorporated applicant may seek to:

- (A) establish a locally incorporated subsidiary to carry on insurance business in Australia (foreign-owned subsidiary).
- (B) obtain an authority to operate in Australia through a branch (foreign re/insurer).

Foreign-owned subsidiaries and foreign re/insurers are subject to similar legislative and prudential requirements to Australian-owned and incorporated re/insurers.

For APRA's authorisation guidelines for general insurers, [click here](#). For a list of General insurers authorised by APRA under the Insurance Act 1973 see [Register of Authorised Insurers](#).

- (ii) operating as a Lloyd's underwriter pursuant to the general insurance Lloyd's registration in Australia under the Act;
- (iii) operating within one of the carve outs from carrying on of insurance business in Australia, which can be summarized as:
- (A) *exempt insurance* – the Act does not apply to certain listed type of insurance such as life insurance and State insurance.

- (B) *jurisdictional avoidance* - The Act applies a very broad definition of carrying on insurance business under the Act (with certain parts of the test not applicable to reinsurers). re/insurers can avoid being seen to carry on business in Australia if they structure their business accordingly.
- (C) *policy /circumstances carve outs* – this exempts the re/insurer is specified circumstances only and not for all business done by the re/insurer (e.g if they issue a policy in a non-exempt scenario they would be caught in that non-exempt scenario. The exceptions are currently:
  - (1) Insurance contracts for high-value insured (Regulation 4B of the Insurance Regulations);
  - (2) Insurance contracts for atypical risks (Regulation 4C of the Insurance Regulations);
  - (3) Insurance contracts for other risks that cannot reasonably be placed in Australia (Regulation 4D of the Insurance Regulations); and
  - (4) Insurance contracts required by foreign laws (Regulation 4E of the Insurance Regulations).
- (d) If a re/insurer carries on general insurance business in Australia without obtaining proper authorisation, significant fines apply.
- (e) A re/insurer operating from overseas and not caught by the Act is called an unauthorised foreign insurer (**UFI**).
- (f) General insurance intermediaries are required under the Corporations Amendment Regulations 2009 (No.11) to provide data to APRA about their dealings in general insurance business, particularly their dealings with UFIs.
- (g) APRA collects and monitors the level of UFI business in Australia to ensure the carves outs remain appropriate and releases a report on the information – see <http://www.apra.gov.au/GI/Publications/Pages/Intermediated-General-Insurance-Statistics.aspx>
- (h) In summary, to obtain and maintain an authorisation, APRA requires the re/insurer (unless a Lloyd’s underwriter to which different requirements apply) to meet significant prudential standards, being:

Applicable to general insurers and parent entities of Level 2 insurance groups:

- (i) [GPS 110 Capital Adequacy](#)
- (ii) [GPS 112 Capital Adequacy: Measurement of Capital](#)
- (iii) [FAQs](#)

- (iv) [GPS 113 Capital Adequacy: Internal Model-based Method](#)
- (v) [GPS 114 Capital Adequacy: Asset Risk Charge](#)
- (vi) [FAQs](#)
- (vii) [GPS 115 Capital Adequacy: Insurance Risk Charge](#)
- (viii) [GPS 116 Capital Adequacy: Insurance Concentration Risk Charge](#)
- (ix) [GPS 117 Capital Adequacy: Asset Concentration Risk Charge](#)
- (x) [GPS 118 Capital Adequacy: Operational Risk Charge](#)
- (xi) [GPS 120 Assets in Australia](#)
- (xii) [GPS 220 Risk Management](#)
- (xiii) [GPS 230 Reinsurance Management](#)
- (xiv) [GPS 310 Audit and Related Matters](#)
- (xv) [GPS 320 Actuarial and Related Matters](#)
- (xvi) [GPS 410 Transfer and Amalgamation of Insurance Business for General Insurers](#)

Applicable to general insurers, Authorised Insurance NOHCs and parent entities of Level 2 insurance groups:

- (xvii) [CPS 231 Outsourcing](#)
- (xviii) [CPS 232 Business Continuity Management](#)

Applicable to general insurers and Authorised Insurance NOHCs:

- (xix) [CPS 510 Governance](#)
- (xx) [CPS 520 Fit and Proper](#)

## **2.2 Insurance Act Exceptions**

- (a) Business can be underwritten by an insurer without an authorisation under the Act if they can establish that they do not carry on insurance business in Australia as defined under the Act in Section 3(1).
- (b) The Act does not define what is meant by "carrying on insurance business in Australia", but does define what is meant by "insurance business".
- (c) It defines "insurance business" as follows:

**"insurance business"** means the business of undertaking liability, by way of insurance (including reinsurance), in respect of any loss or damage, including liability to pay damages or compensation, contingent upon the happening of a specified event, and includes any business incidental to [insurance business](#) as so defined, but does not include:

(a) [life insurance business](#); or

(b) [accident insurance business](#) undertaken solely in connexion with [life insurance business](#); or

(c) [pecuniary loss insurance business](#) carried on solely in the course of carrying on banking business and for the purposes of that business by an ADI; or

(d) business in relation to the benefits provided by a [friendly society](#) or trade union for its members or their dependants; or

(e) business in relation to the benefits provided for its members or their dependants by an association of employees or of employees and other persons that is registered as an organisation, or recognised, under the [Fair Work \(Registered Organisations\) Act 2009](#); or

(f) business in relation to a scheme or arrangement under which superannuation benefits, pensions or payments to employees or their dependants (and not to any other persons) on retirement, disability or death are provided by an employer or an employer's employees or by both, wholly through an organization established solely for that purpose by the employer or the employer's employees or by both; or

(g) business in relation to a scheme or arrangement for the provision of benefits consisting of:

(i) the supply of funeral, burial or cremation services, with or without the supply of goods connected with any such service; or

(ii) the payment of money, upon the death of a person, for the purpose of meeting the whole or a part of the expenses of and incidental to the funeral, burial or cremation of that person;

and no other benefits, except benefits incidental to the scheme or arrangement; or

(h) business undertaken by a person, being a carrier, carrier's agent, forwarding agent, wharfinger, warehouseman or shipping agent, relating only to the person's liability in respect of goods belonging to another person and in the possession, or under the control, of the first-mentioned person for the purpose of the carriage, storage or sale of those goods; or

(i) business undertaken by a person, being an innkeeper or lodging-house keeper, relating only to the person's liability in respect of goods belonging to another person and in the possession or under the control of a guest at the inn or lodging-house of which the first-mentioned person is the innkeeper or lodging-house keeper or deposited with the innkeeper or lodging-house keeper for safe custody; or

(j) the business of insuring the property of a registered religious institution (within the meaning of the [Fringe Benefits Tax Assessment Act 1986](#) ) where the person carrying on the business does not carry on any other [insurance business](#); or

(ja) health-related business within the meaning of section 131-15 of the Private Health Insurance Act 2007 carried on by a private health insurer within the meaning of that Act through a health benefits fund within the meaning of section 131-10 of that Act; or

(k) health [insurance business](#) within the meaning of Division 121 of the Private Health Insurance Act 2007 carried on by a private health insurer within the meaning of that Act.

*Note:* Some contracts of insurance may be excluded from this definition under section 3A.

(d) As a result of concerns about the operation of unauthorised foreign insurers in Australia, amendments were made to the Act in July 2008 which broadened the definition of carrying on insurance business in a way that restricted the ability of unauthorised foreign insurers to carry on insurance business from a foreign jurisdiction.

(e) Subsection 3(5) was added to relevantly provide:

*(5) Without limiting the scope of what is **incidental to insurance business** for the purposes of the definition of insurance business in subsection (1), a business of a person is taken, for the purposes of that definition, to be a business incidental to insurance business to the extent that it involves one or more of the following kinds of acts: [our bold]*

*(a) inducing others to enter into contracts of insurance with the person as the insurer;*

*(b) publishing or distributing a statement relating to the person's willingness to enter into a contract of insurance as an insurer;*

*(c) procuring the publication or distribution of such a statement.*

(f) However, subsection 3(5A) of the Insurance Act provides an exception to all reinsurers in relation to subsection 3(5) of the Insurance Act.

(g) Subsection 3(6) of the Insurance Act was also added to provide:

*(6) Without limiting the circumstances in which a person is taken, for the purposes of this Act, to carry on insurance business in Australia, a person is **taken to carry on insurance business in Australia** if: [our bold]*

*(a) the person carries on a business outside Australia that, under this Act, would constitute insurance business if it were carried on in Australia; and*

*(b) another person in Australia acts:*

*(i) directly or indirectly on behalf of the first-mentioned person; or*

*(ii) as a broker of insurance provided by the first-mentioned person, or directly or indirectly on behalf of such a broker;*

*in relation to the business carried on outside Australia.*

(h) Subsection 3(6A) also provides an exception to all *reinsurers* in relation to subsection 3(6) of the Insurance Act.

(i) Subsection 3(7) then provides:

*(7) In considering for the purposes of this Act whether a person **carries on insurance business in Australia**, an act of a kind referred to in paragraph (5)(a), (b) or (c) done outside Australia is taken to occur in Australia to the extent that it has, or is likely to have, its effect in Australia.[our bold]*

(j) The effect of the above can be summarised as follows – A re/insurer would be caught by the broad definition of carrying on insurance business (subject to the other carve outs not applying) if:

(i) it directly undertakes liability under a policy (ie enters into the policy) or undertakes any pre contractual incidental activities *in Australia*;

(ii) any person acts in Australia in relation to the insurance business of the insurer carried on outside Australia:

(A) directly or indirectly on behalf of the insurer (which undertakes liability overseas); or

(B) as a ‘broker of insurance’ provided by the insurer (which undertakes liability overseas), or directly or indirectly on behalf of such a broker.

*[This trigger is N/A if the business is solely a business of reinsurance]*

(iii) the insurer (undertaking liability overseas) directly or indirectly from outside Australia:

(A) induces others to enter into contracts of insurance with the person as the insurer;

(B) publishes or distributes a statement relating to the person's willingness to enter into a contract of insurance as an insurer; and/or

(C) procures the publication or distribution of such a statement

*[This trigger is N/A if the business is solely a business of reinsurance]*

(k) Paragraph 2.31 of the Explanatory Memoranda specifically stated that “Where an Australian initiates contact with a DOFI (for example, through the Internet or by calling or visiting the DOFI directly), the DOFI will not

be carrying on insurance business in Australia and will not be required to become APRA authorised. This is because, even under the strengthened and clarified definition of 'insurance business' the DOFI has not been deemed to carry on insurance business in Australia.

- (l) Additional exceptions were added at the same time via section 3A in regulations being Regulations:
- 4B. Insurance contracts for high-value insured
  - 4C. Insurance contracts for atypical risks
  - 4D. Insurance contracts for other risks that cannot reasonably be placed in Australia
  - 4E. Insurance contracts required by foreign laws

**Insurance contracts for high-value insured**

- (m) If the policy covers at least 1 policyholder that is a high-value insured the policy is not caught.
- (n) A policyholder is a high-value insured if the policyholder, alone or as part of a related group meets any of the following:
- has operating revenue derived in Australia for a financial year of at least \$200 million, worked out by averaging the amount of its operating revenue derived in Australia for each of the previous 3 financial years.
  - has gross assets in Australia at the end of a financial year valued at least \$200 million, worked out by averaging the value of those assets at the end of each of the previous 3 financial years.
  - has at least 500 employees in Australia at the end of a financial year – worked out by averaging the number of its employees in Australia at the end of each of the previous 3 financial years. If the policyholder was not in existence at the end of each of the previous 3 financial years, its revenue, assets and employees are worked out by reference to the most recent completed financial years in which it was in existence.

**Insurance contracts for atypical risks**

- (o) If the policy covers an atypical risk specified in the Act it is not caught. For example "loss or liability arising from the hazardous properties (including radioactive, toxic or explosive properties) of nuclear fuel, nuclear material or nuclear waste; loss or liability arising from the hazardous properties of biological material or biological waste; loss or liability arising from war or warlike activities (within the meaning given by subregulation 2 (1) of the Insurance Contracts Regulations 1985 )"

**Insurance contracts for other risks that cannot reasonably be placed in Australia**

- (p) A policy will be exempt if an Australian insurance broker certifies in writing that the risk insured under that contract cannot reasonably be placed with an Australian insurer.

- (q) To decide whether the risk insured under the policy cannot reasonably be placed with an Australian insurer, the Australian insurance broker must be satisfied, on reasonable grounds, that:
- (i) there is no Australian insurer that will insure against the risk; or
  - (ii) the terms (including price) on which any Australian insurer will insure against the risk are substantially less favourable to the insured than the terms on which the unauthorised foreign insurer will insure against the risk; or
  - (iii) insurance with an Australian insurer would be substantially less favourable to the insured than with an unauthorised foreign insurer because of other circumstances. Example - The insured and the unauthorised foreign insurer have a pre-existing relationship, and the maintenance of that relationship will have significant benefits for the insured.

**Insurance contracts required by foreign laws**

- (r) A policy is exempt if a law of a foreign country requires that the contract be issued by an insurer, or a kind of insurer, authorised or permitted under the laws of that country to issue that kind of contract.

**2. LIFE INSURANCE PRUDENTIAL REGULATION**

**2.1 Background**

- (a) Companies carrying on the business of life insurance in Australia must be registered under the Life Insurance Act or fall within a relevant exception.
- (b) Under section 11 of the Act, “Life insurance business” effectively consists of the business of issuing life policies (as defined in section 9), the undertaking of liability under such policies and any business that relates to this business.
- (c) The Act provides in section 19 that certain persons will be taken to carry on life business:
  - (i) a person who publishes or distributes, or procures the publication or distribution of, a statement relating to the willingness of the person to do something that constitutes the carrying on of life business
  - (ii) A person in the situation where :
    - (A) business that, under this Act, would constitute life business is carried on by another person outside Australia; and
    - (B) the first-mentioned person acts, in Australia, as the agent of that other person in relation to the business carried on outside Australia.

- (d) There are some specified exemptions for particular types of business. Certain activities are not regarded as carrying on life business. A person is not taken to be carrying on life business merely because the person:
  - (i) collects premiums under a policy issued outside Australia to a person who was resident outside Australia at the time of issue of the policy; or
  - (ii) makes payments due under such a policy.
- (e) APRA can also declare certain business to be life insurance business under sections 12A and 12B of the Act.
- (f) Life insurance business is treated as including reinsurance so a reinsurer will be caught unless it can avoid being seen to carry on life insurance business in Australia.
- (g) A foreign-incorporated entity may seek to:
  - (i) establish a locally incorporated subsidiary to carry on life insurance business in Australia.
  - (ii) if it is a life company from a jurisdiction covered by the Life Insurance Regulations 19952 (the regulations), seek to operate in Australia through a branch as an Eligible Foreign Life Insurance Company (EFLIC).
- (h) Foreign-owned subsidiaries and EFLIC's are subject to similar legislative and prudential requirements to Australian-owned and incorporated life companies.
- (i) APRA has responsibility for the prudential aspects of the Act whilst ASIC has responsibility for some limited consumer protection provisions contained in the Act.
- (j) Under section 234, a life company must not intentionally carry on any insurance business other than life insurance business.
- (k) The Act only allows life insurance business in Australia to be carried on by a company (ie not partnerships or unincorporated entities).
- (l) For APRA's registration guidelines for life insurers  
<http://www.apra.gov.au/lifs/Pages/registration-of-life-companies-and-non-operating-holding-companies-of-life-companies.aspx> .
- (m) For a list of registered life insurers see  
<http://www.apra.gov.au/lifs/Pages/registered-life-insurers.aspx>
- (n) As with general insurance significant Prudential obligations apply, being:
 

Applicable only to life companies:

  - (i) [LPS 100 Solvency Standard](#)
  - (ii) [LPS 110 Capital Adequacy](#)

- (iii) [LPS 112 Capital Adequacy: Measurement of Capital](#)
  - (iv) [LPS 114 Capital Adequacy: Asset Risk Charge](#)
  - (v) [LPS 115 Capital Adequacy: Insurance Risk Charge](#)
  - (vi) [LPS 117 Capital Adequacy: Asset Concentration Risk Charge](#)
  - (vii) [LPS 118 Capital Adequacy: Operational Risk Charge](#)
  - (viii) [LPS 220 Risk Management](#)
  - (ix) [LPS 230 Reinsurance](#)
  - (x) [LPS 310 Audit and Related Matters](#)
  - (xi) [LPS 320 Actuarial and Related Matters](#)
  - (xii) [LPS 340 Valuation of Policy Liabilities](#)
  - (xiii) [LPS 360 Termination Values, Minimum Surrender Values and Paid-up Values](#)
  - (xiv) [LPS 370 Cost of Investment Performance Guarantees](#)
  - (xv) [LPS 600 Statutory Funds](#) (incl forms)
  - (xvi) [LPS 700 Friendly Society Benefit Funds](#) (incl forms)
- Applicable to life companies and registered life NOHCs:
- (xvii) [CPS 231 Outsourcing](#)
  - (xviii) [CPS 232 Business Continuity Management](#)
  - (xix) [CPS 510 Governance](#)
  - (xx) [CPS 520 Fit and Proper](#)

### **3. CONSUMER PROTECTION REGULATION**

- (a) Consumer protection regulation is also effectively managed at a federal level by the Australian Securities and Investments Commission (**ASIC**) with limited State legislation having application depending on the circumstances.

#### **3.2 Specific re/insurance based legislation**

- (a) There is significant specific insurance consumer protection legislation in place affecting general and life insurance under the:
  - (i) [Insurance Contracts Act](#); and

- (ii) [Corporations Act](#) and its Chapter 7 requirements which imposes licensing and disclosure and conduct requirements on financial services providers (including insurers)
- (b) Neither of these and their protection applies to reinsurance.
- (c) Under s 562A of the Corporations Act, the liquidator of an Australian insurer is required, unless the Court orders otherwise, to pay the proceeds of reinsurance received by them (net of expenses incidental to collecting those proceeds) to certain of the reinsured's insureds in priority to other creditors.
- (d) The Life Insurance Act also contains some limited consumer protection provisions in Part 10.
- (e) Marine Insurance is subject to the operation of the Marine Insurance Act but the protections are less than under the above Act and not applicable to reinsurance.
- (f) It should be noted that Australian authorised insurers are subject to obligations regarding reinsurance taken out by them as part of their Prudential obligations designed to protect Australian insureds – see [GPS 230 Reinsurance Management](#) and [LPS 230 Reinsurance](#).
- (g) For example, under APRA Prudential Standard GPS 230 Reinsurance Management, an authorised insurer must ensure that its reinsurance contracts provide that the governing law of the reinsurance contract is Australian law, and that any dispute that falls to be determined by a court is to be heard in an Australian court.
- (h) There is also the General Insurance Code of Practice, a voluntary code most insurers in Australia belong to and agree to be bound by. It is not a legislative requirement and it does not apply to reinsurance.

### 3.3 State based re/insurance legislation

- (a) In Australia, the court's approach has been to treat reinsurance contracts as being covered by the words "contract of insurance", where reinsurance is not expressly excluded.
- (b) There is various state legislation which could impact reinsurance (This will depend on the circumstances and can be subject to various jurisdictional issues). For example:
  - (i) The Instruments Act 1958 (Victoria)
    - (A) Section 25 provides that "No contract of insurance (other than a contract of life insurance) shall be avoided by reason only of any incorrect statement made by the proponent in any proposal or other document on the faith of which such contract was entered into revived or renewed by the insurer unless the statement so made was fraudulently untrue or material in relation to the risk of the insurer under the contract."

- (B) Section 27 protects an insured against a failure “to give any notice or make any claim in the manner and within the time required by the contract of insurance” where:
  - (a) the failure was due to an “accident mistake or other reasonable cause”; and
  - (b) the insurer has not “been so prejudiced by such failure that it would be inequitable if such failure were not a bar to the maintenance of such proceedings”.
- (C) Section 28(2) entitles an insured to bring court proceedings notwithstanding any arbitration clause in the insurance contract.
- (ii) Section 6 of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW) (s 6), or its equivalent in the ACT or NT (statutory charging provisions) are likely to be found to apply to contracts of reinsurance. These sections effective give a third party claiming against an insured (whether as part of a class action or individual proceedings) access to those same insurance moneys subject to certain qualifications.
- (c) Given the differences in State law noted above, re/insurers also need to be careful to specify which jurisdiction in Australia is the governing law of the re/insurance contract, and it is important that they become familiar with the applicable laws in each State and Territory and the impact that those laws could have on resolving a dispute under the contract of reinsurance.

### 3.4 General consumer protection legislation

- (a) There is also general consumer protection law which can apply to reinsurers depending on the circumstances. For example:
  - (i) **Australian Consumer Law/ASIC Act** – misleading and deceptive conduct provisions and provisions relating to restrictive trade practices e.g. third line forcing.
  - (ii) **Discrimination** - there is various anti-discrimination legislation applicable in Australia.

### 3.5 Common law

- (a) Apart from the potential impact of the above mentioned legislation, a reinsurance contract between a reinsurer and cedent in Australia will principally be covered by the common law.
- (b) Where there is no Australian case law on a matter the Australian courts will typically look to the decisions of other common-law jurisdictions, in particular the United Kingdom and United States as persuasive

## 4. OVERVIEW

- (a) In terms of prudential regulation it is effectively a reinsurer’s choice as to whether it wishes to be subject to the prudential regulation in Australia

(subject to the practical commercial realities of their business model which may require authorisation/registration in Australia).

- (b) There is no doubt that cedents and their insureds are better protected where the reinsurer is subject to Australia's prudential regime.
- (c) A key question for debate is whether this can impose unnecessary duplication or burden on foreign reinsurers and/or make local reinsurers uncompetitive in relation to reinsurers not subject to the same degree of prudential regulation.
- (d) In terms of consumer protection regulation, it is principally a common law approach.
- (e) A key question for debate is whether there is a significant imbalance in the rights of cedents and reinsurers that would justify more specific consumer protection legislation for reinsurance.

#### **IMPORTANT NOTICE**

**This document is designed to provide helpful general guidance on some key issues relevant to this topic. It should not be relied on as legal advice. It does not cover everything that may be relevant to you and does not take into account your particular circumstances. It is only current as at the date of release. You must ensure that you seek appropriate professional advice in relation to this topic as well as to the currency, accuracy and relevance of this material for you.**