FEDERAL COURT OF AUSTRALIA

Progressive Direct Insurance Company, application under the *Insurance Act 1973* (Cth) [2017] FCA 1106

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| File number(s): |   |
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| Judge(s): | **FARRELL J** |
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| Date of judgment: | 19 September 2017 |
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| Catchwords: | **INSURANCE** – application for transfer of insurance business pursuant to *Insurance Act 1973* (Cth) – application to dispense with requirements of s 17C(2)(c) of *Insurance Act 1973* (Cth) under s 17C(5) |
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| Legislation: | *Corporations Act 2001* (Cth)*Insurance Act 1973* (Cth) Div 3A Pt 3,ss 17C, 121  |
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| Cases cited: | *ACE Insurance Ltd, in the matter of ACE Insurance Ltd* [2016] FCA 997*Application of Medical Insurance Australia Pty Limited under the Insurance Act 1973 (Cth)* [2014] FCA 1015 |
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| Date of hearing: | 18 September 2017 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Commercial Contracts, Banking, Finance and Insurance |
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| Category: | Catchwords |
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| Number of paragraphs: | 17 |
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| Counsel for the Applicant: | Mr J J M Ahmed |
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| Solicitor for the Applicant: | Clayton Utz |
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| Counsel for The Hollard Insurance Company Pty Ltd: | Mr M F Newton |
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| Solicitor for the Australian Prudential Regulation Authority: | Ms S Neumueller of Australian Prudential Regulation Authority |

ORDERS

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|  | NSD 1452 of 2017 |
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| APPLICATION OF PROGRESSIVE DIRECT INSURANCE COMPANY UNDER THE INSURANCE ACT 1973 (CTH) |
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|  | PROGRESSIVE DIRECT INSURANCE COMPANY (ABRN 140 389 528) |
|  | Applicant |

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| JUDGE: | FARRELL j |
| DATE OF ORDER: | 18 SEPTEMBER 2017 |

THE COURT ORDERS THAT:

1. Pursuant to section 17C(5) of the *Insurance Act 1973* (Cth) (**Act**) the need for the applicant to comply with section 17C(2) of the Act is dispensed with on condition that the applicant complies with orders 2-6 below.
2. The applicant, prior to the date on which the scheme documents are to be made available for public inspection, cause a copy of the communication in the form annexed as Annexure DMT-09 to the affidavit of Daniel Mark Trudgen sworn on 8 September 2017 (**Policyholder Communication)** to be sent by email to all persons identified, as at that date, as affected policyholders that have been identified from records of the applicant and for whom the applicant has an email address.
3. In the event that any email sent in accordance with Order 2 results in a transmission failure notice, the applicant, prior to the date on which the scheme documents are to be made available for public inspection, send a copy of the Policyholder Communication by pre-paid post to any policyholder that is the subject of the transmission failure notice and for whom the applicant has a postal address.
4. The applicant, prior to the date on which the scheme documents are to be made available for public inspection, cause an advertisement substantially in the form annexed as Annexure DMT-07 to the affidavit of Daniel Mark Trudgen sworn on 8 September 2017 (**Notice of Intention**) to be placed in the following publications:
	1. The *Government Gazette*;
	2. *The Australian Financial Review*;
	3. *The Australian*; and
	4. any other publication as reasonably requested by APRA on or before 29 September 2017, if any.
5. The applicant, prior to the date on which the scheme documents are to be made available for public inspection, cause to be displayed on its website (progressiveonline.com.au) a link substantially in the form annexed as Annexure DMT-10 to the affidavit of Daniel Mark Trudgen sworn on 8 September 2017, including a link to:
	1. an explanation of the proposed scheme;
	2. a copy of the scheme summary substantially in the form annexed as Annexure DMT-05 to the affidavit of Daniel Mark Trudgen sworn on 8 September 2017;
	3. a copy of the notice of intention;
	4. a copy of the scheme; and
	5. a copy of the actuarial report prepared by Mr Tim Andrews of Finity Consulting Pty Ltd dated 8 June 2017 and the supplementary letter dated 15 September 2017.
6. The applicant make a copy of the proposed scheme and any report on which it is based available for public inspection for a period of at least 15 business days (between the hours of 9 am and 5 pm Monday to Friday), prior to the date on which the proposed scheme is to be confirmed by the Court, at the locations approved by APRA under Prudential Standard GPS 410 in each State and Territory in which an affected policyholder resides.
7. The applicant provide, upon request, to any policyholders that identify themselves as such, a copy of the scheme documents free of charge.
8. The applicant pay the costs of the proceedings of APRA to date, as agreed or assessed.
9. The application be stood over to a date to be fixed and the applicant through its solicitors have liberty to approach the Associate to the Chief Justice or the National Operations Registrar to fix a date for hearing.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

FARRELL J:

1. Progressive Direct Insurance Company (**PDIC**) proposes to cease underwriting insurance business in Australia and transfer the rights and obligations under all contracts of motor vehicle insurance that it has issued, renewed, underwritten or assumed through its Australian branch to The Hollard Insurance Company Pty Ltd (**Hollard**) pursuant to a **scheme** under Div 3A of Pt 3 of the *Insurance Act 1973* (Cth) (**Act**). If the proposed scheme is confirmed, PDIC intends to apply to the Australian Prudential Regulation Authority (**APRA**) to have its authorisation to carry on insurance business in Australia revoked.
2. PDIC commenced business in Australia in 2009 and it is a registered foreign company under the *Corporations Act 2001* (Cth). In calendar year 2016, PIDC wrote approximately $30 million worth of business in Australia. PDIC’s activities through its Australian branch are limited to marketing, issuing and administering motor vehicle policies. Customers of PDIC purchase insurance products and manage claims primarily online, through PDIC’s website. PDIC communicates with its customers by email, but maintains a telephone line for policy holders who wish to contact it by telephone. When customers purchase a policy, they are required to provide a valid email address, mobile telephone number and physical postal address. Policies are renewed annually, at which time customers are asked to update these contact details. Contact details are maintained on PDIC’s SQL (Structured Query Language) computer system.
3. To facilitate the implementation of the proposed scheme and PDIC’s exit from the Australian market, in March 2017, PDIC, Hollard, PD Insurance Agency Pty Ltd (**PDIA**) and various other parties entered into an **Implementation Deed** which contemplated a number of transactions. Those transactions included the appointment of PDIA as PDIC’s agent and authorised representative in Australia to issue, renew and administer motor vehicle policies issued by PDIC before transfer under the scheme and for Hollard after transfer.

## Interlocutory application

1. By an application lodged on 18 August 2017, PDIC seeks interlocutory orders pursuant to s 17C(5) of the Actdispensing with compliance with s 17C(2)(c), which requires that PDIC provide an APRA approved summary of the scheme to every affected policyholder.
2. This Court may make such an order if it is satisfied that, because of the nature of the scheme or the circumstances attending its preparation, it is not necessary that the paragraph be complied with: s 17C(5). As has been observed by Yates J, the policy intention is that every affected policy holder should be given a summary of the proposed scheme and an opportunity to make submissions to the Court in respect of it on a confirmation application under s 17F. The grant of dispensation under s 17C(5) is a matter of considerable importance and should not be regarded as a matter of course: see *Application of Medical Insurance Australia Pty Limited under the Insurance Act 1973 (Cth)* [2014] FCA 1015 at [34] and the cases there cited. Further, as observed by Gleeson J, the fact that additional steps will be taken to draw the scheme to the attention of affected policyholders has been held to favour the granting of a dispensation under s 17C(5): see *ACE Insurance Ltd, in the matter of ACE Insurance Ltd* [2016] FCA 997 at [32] and the cases there cited.
3. Section 121 of the *Insurance Act* requires communications with policyholders to be by personal service or sent by registered post. PDIC proposes that the primary method of delivery will be by email and that the order under s 17C(5) would be conditional on:
4. Before the date on which scheme documents are to be made available for public inspection:
	1. PDIC causing an email in the form of Annexure DMT-09 to the affidavit of Mr Daniel Mark Trudgen sworn on 8 September 2017 to be sent to all persons identified as **affected policyholders** for whom PDIC has an email address. The email will contain an embedded link to a summary of the proposed scheme approved by APRA (**scheme summary**). If an email is unsuccessfully transmitted, the dispensation will be conditional on PDIC sending by pre-paid post a communication in the form of Annexure DMT-09 to the relevant affected policyholder at their last known postal address;
	2. PDIC causing an advertisement substantially in the form of Annexure DMT-07 to Mr Trudgen’s affidavit be placed in the *Government Gazette*, *The Australian*, *The Australian Financial Review*, and any other publication requested by APRA on or before 29 September 2017 (if any);
	3. PDIC causing to be displayed on its website a communication substantially in the form of Annexure DMT-10 to Mr Trudgen’s affidavit including a link to: an explanation of the proposed scheme; a copy of the scheme summary; a copy of the notice of intention to make the application for confirmation of the scheme; a copy of the scheme; and a copy of the **Actuarial Report** prepared by Mr Tim Andrews of **Finity** Consulting Pty Ltd dated 8 June 2017 and a copy of the supplementary letter dated 15 September 2017; and
5. PDIC making a copy of the proposed scheme and any report on which it is based available for public inspection for a period of at least 15 business days (between the hours of 9 am and 5 pm Monday to Friday), prior to the date on which the proposed scheme is to be confirmed by the Court, at locations approved by APRA under Prudential Standard GPS 410 in each State and Territory in which an affected policyholder resides.

## Evidence

1. In support of the application, the affidavits referred to below were read. Factual matters in these reasons are taken from those affidavits and submissions of PDIC’s counsel dated 14 September 2017 as clarified by counsel at the hearing on 18 September 2017.
2. Richard Henry John Enthoven affirmed his affidavit on 6 September 2017. Mr Enthoven is the Chief Executive Officer of Hollard. Mr Enthoven attests to Hollard’s commitment to the proposed scheme and the commissioning of an actuarial report by Finity in relation to the impact of the proposed scheme on PIDC policyholders. Finity issued its ActuarialReport dated 8 June 2017 in which Mr Tim Andrews expressed the opinion that the interests of policy holders of PDIC’s Australian branch and Hollard will not be adversely affected in a material way as a consequence of the proposed scheme. Mr Enthoven also attests to the fact that on 31 August 2017, Hollard received a supplementary letter from Finity concerning further analysis undertaken by Finity in relation to changes in Hollard’s capital position and stating that Mr Andrews’ opinion had not changed. The letter of 31 August 2017 has been superseded by Mr Andrews’ supplementary letter of 15 September 2017 (see below).
3. Affidavits of Lucy Louise Terracall affirmed on 7 September 2017 and 15 September 2017 respectively. Ms Terracall is a partner of Clayton Utz, PDIC’s solicitors. She attests to communications with APRA on behalf of PDIC in relation to the proposed scheme.
4. Ms Terracall attests that APRA requested that Finity provide more information in its supplementary letter in relation to Hollard’s capital position and its impact on policyholders. Annexed to Ms Terracall’s affidavit of 15 September 2017 is an updated supplementary letter from Finity dated 15 September 2017 in which Mr Andrews provides more detailed analysis concerning Hollard’s capital position, that is, the reduction of Hollard’s Capital Adequacy Multiple (CAM) as stated in Finity’s Actuarial Report from 1.63 to 1.44. Mr Andrews concluded, in short, that the risk to policyholders as a result of the scheme would be short-lived. In the context of the short period, in his view the capital buffer is sufficient, albeit lower than it previously was. Further, Mr Andrews is comfortable that further capital will be injected by Hollard’s parent, if needed.
5. Ms Terracall also attests that copies of the proposed scheme will be available for public inspection at offices of Clayton Utz in New South Wales, Victoria, Queensland, Western Australia and the Australian Capital Territory. Finity’s offices will be used in South Australia and Aon’s offices will be used in Tasmania (Aon is Hollard’s insurance broker).
6. Mr Simon Greger Lindsay affirmed his affidavit on 8 September 2017. Mr Lindsay is the former country manager for PDIC in Australia, he is PDIC’s agent in Australia and he is now the chief executive officer of PDIA. Mr Lindsay attests to the Implementation Deed and the operation of related agreements, his role in managing PDIC’s portfolio (as an employee of PDIA), the process for identifying affected policyholders and the test exercise referred to at [14] below, contracts entered into with service providers, the intention to provide notification to all network repairers and insured repairers as described in his affidavit, and his responsibilities as PDIC’s representative in Australia if the scheme is confirmed by this Court.
7. Mr Daniel Mark Trugden swore his affidavit on 8 September 2017. Mr Trugden is PDIC’s Director of Management Reporting and Planning and he gives evidence as to the nature and operation of PDIC’s motor vehicle insurance business through the Australian branch and the proposed implementation of the scheme. Annexed to his affidavit are the draft scheme document (DMT-01); the draft transfer agreement (DMT-02); the Implementation Deed (DMT-03); a Reinsurance Treaty, Agency Agreements, Business Asset Sale Agreement, Transitional Services Agreement and License Agreement as contemplated by the Implementation Deed (DMT-04); scheme summary (DMT-05); the Actuarial Report and supplementary letter dated 31 August 2017 (DMT-06), notice of intention to apply to the Court (DMT-07); appointment of Mr Lindsay as PDIC’s Australian agent (DMT-08); the proposed email to affected policy holders with embedded link to the scheme summary (DMT-09); and the text of the homepage on PDIC’s website containing a link to relevant documents (DMT-10).

## Efforts undertaken to identify policyholder details

1. PDIC submits that, having regard to the nature of its business model, it can be expected that policyholders’ details in its system will have a high degree of currency. This is likely to have been heightened by steps taken in April 2017, when PDIC and PDIA interrogated PDIC’s computer system to identify contact details of all current policyholders for the purpose of sending communications designed to introduce them to PDIA. As a result of that process, approximately 42,000 current policyholders were identified, emails were sent to them and only approximately 600 bounced back. PDIC sent SMS communications to those policyholders, prompting them to update their email contact details. At the hearing, the Court was advised that not many of the 600 updated their email contact details.
2. In March 2017, PDIC formed a team which included business analysts, IT team members and members of the product team who are familiar with PDIC’s Australian business. Together with PDIA, that team worked to identify a list of policyholders who would be affected by the proposed scheme. On the basis of this work and acceding to a request by APRA that all persons who held a policy in the past two years be included, the affected policyholders will be:
3. Any person who is or has been a policyholder since 18 September 2015, whether or not they have made a claim; and
4. Former policyholders who have made a claim, including policyholders who have an expired policy but have an open claim and former policyholders who have a Lifetime Repair Guarantee and to whom a claim was paid.
5. To identify individuals who meet the categories referred to at [15], PDIC has created a computer script or query that can be run across its database. PDIC proposes to run this query immediately before sending notice of the proposed scheme to affected policyholders to ensure that the list is current at that time. The Court notes that the script will require updating to take account of APRA’s request that any person who has been a policyholder since 18 September 2015 be treated as an affected policyholder.

## Consideration

1. I am satisfied that it is appropriate in this case to make an order dispensing with compliance with s 17C(2)(c) of theAct so as to permit PDIC to give the approved scheme summary in the ways it proposes. Having regard to PDIC’s business model, communication by email will be a timely and cost efficient method of ensuring that the approved summary is drawn to the attention of affected policyholders so as to enable them to make any submissions any of them may wish to make to the Court on a confirmation application under s 17F. It may also be that email communications will not reach a small number of affected policy holders, such that the condition requiring service by pre-paid post is required in relation to email transmissions which fail. The further steps envisaged in relation to employing PDIC’s website as a resource in relation to relevant documents is also appropriate for this purpose.

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| I certify that the preceding seventeen (17) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Farrell. |

Associate:

Dated: 19 September 2017