Financial Rights LEGAL CENTRE

Submission by the

Financial Rights Legal Centre

The Treasury

Insurance Claims Handling: Taking action on recommendation 4.8 of the Banking, Superannuation & Financial Services Royal Commission, Consultation paper

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About the Financial Rights Legal Centre

The Financial Rights Legal Centre is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander Peoples with credit, debt and insurance matters. Financial Rights took close to 25,000 calls for advice or assistance during the 2017/2018 financial year.

Financial Rights also conducts research and collects data from our extensive contact with consumers and the legal consumer protection framework to lobby for changes to law and industry practice for the benefit of consumers. We also provide extensive web-based resources, other education resources, workshops, presentations and media comment.

This submission is an example of how CLCs utilise the expertise gained from their client work and help give voice to their clients' experiences to contribute to improving laws and legal processes and prevent some problems from arising altogether.

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Monday – Friday 9.30am-4.30pm

Introduction

Thank you for the opportunity to comment on the Treasury's Consultation Paper re: Insurance Claims Handling Taking action on recommendation 4.8 of the Banking, Superannuation & Financial Services Royal Commission..

Proposal

Removing Regulation 7.1.33 and Make 'handling and settling an insurance claim' a new financial service

Financial Rights supports the removal of Regulation 7.1.33 of the *Corporation Regulations 2001* and using existing legislative powers to define the activity of handling or settling an insurance claim as a 'financial service' for the purposes of the *Corporations Act 2001*.

Treasury raises the issue that the:

> *removal of the exemption would trigger a number of requirements under the Corporations Act that would apply to AFS licensees where they provide financial advice in the course of handling or settling an insurance claim.*

Subsequently Treasury assert that

> *some requirements could be difficult to apply or could impose a heavy compliance burden on either insurers or third parties who may be involved in insurance claims handling, the cost of which would ultimately fall on consumers but without providing significant benefits to them.*

Treasury then use the example of imposing training requirements in relation to providing advice.

Financial Rights believes increased training requirements on insurers and claims handling is justified. The consultation paper itself notes that:

> *…implementing an inadequate system to train case managers and inadequate systems to oversee the actions of case managers …*

was a finding of the Commissioner where insurers fell below community standards. Increased obligations to train claims managers is not a burden it is one of the key points of the exercise.

If there are any requirements that are fundamentally irrelevant to claims managers in the training standards set by ASIC or other regulators, these can and should be adjusted to ensure that claims managers are trained appropriately with respect to the extent that their roles involves any personal or general advice. This is not an insurmountable challenge and the threat of "regulatory burden" should not be used as a red herring to prevent reform and improved standards.

Third, we do not accept that the cost of compliance should fall on consumers. Insurers' and their shareholders profits have been propped up by a system that has provided significant advantage to them against the interests of their customers. The cost burden should therefore be placed upon shareholders and executives who have profited from business models and a regulatory system that have acted against the consumer interest.

We notes that the Consultation paper quotes the Final Report in this regard and we wish to reiterate it here:

> *there can be no basis in principle or in practice to say that obliging an insurer to handle claims efficiently, honestly and fairly is to impose on the individual insurer, or the industry more generally, a burden it should not bear. If it were to be said that it would place an extra burden of cost on one or more insurers or on the industry generally, the argument would itself be the most powerful demonstration of the need to impose the obligation.*[1]

We expect that in reality insurers will fall back on greed and self interest and will look to pass on the cost to consumers. However we recommend that APRA and ASIC take an active oversight role to ensure that to the greatest extent possible, insurers do not act to pass unjustified costs on to consumers when implementing this and any other reform emerging from the Royal Commission.

Financial Rights do not support the option put forward by Treasury that:

> *the Corporations Regulations specify that documents that are given to a consumer as part of the new financial service, in certain circumstances, do not constitute financial product advice.*

If the documents contain elements of general or personal advice – which they do - they should be deemed as such and regulated. Financial Rights do not wish to see the continuation of exemptions and loopholes. We direct Treasury to Recommendation 7.3 of the Royal Commission Final Report:

> *As far as possible, exceptions and qualifications to generally applicable norms of conduct in legislation governing financial services entities should be eliminated.*

We strongly recommend that Treasury keep Recommendation 7.3 front and centre of all proposals, considerations and deliberations of implementing the Royal Commission.

In this case if the exception were to be put in place there would be less oversight of the creation and impact of these documents.

Scope of the proposal

Who would be covered?

Financial Rights supports covering:

- Insurers that provide a claims handling service

[1] Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Vol 1, page 309, https://financialservices.royalcommission.gov.au/Pages/reports.aspx

- Certain third party representatives of insurers that provide a claims handling service on behalf of the insurer; and
- Other persons that ASIC declares are included.

Treasury raise the issue of whether trustees of superannuation fund should be included. Financial Rights believes strongly that trustees of superannuation fund should be included.

Firstly as Treasury point out, trustees of superannuation fund play a key role in claims handling and could reasonably be considered to be handling and settling insurance claims, although they are not acting on an insurer's behalf.

Secondly not including them would constitute the continuation of yet another exception and qualification – the removal of which is very much expected by Commissioner Hayne: Recommendation 7.3.

Third, while the Royal Commission Final Report may not have raised trustees and claims handling as a specific issue, it is far from silent on the nature of conflicting interests of trustees when engaged with related parties such as insurers. With respect to related parties, the Report states:

> *my concerns about the conflicts that arise where related parties are engaged … have equal force in the context of group life insurance. Entities that elect to integrate their businesses do so, overwhelmingly, for their own reasons. The entity's motivation will usually be to increase market share, to increase revenue, to increase profit, to place commercial pressure on its competitors, or some combination of those factors. That is not to deny that benefits may ultimately flow to consumers from the integrated arrangement. But because the motivation for the integration is, ordinarily, a self-interested one, the congruence of the arrangement with the duty to act in the interests of the other must be closely examined.*
>
> *… Entities in the position of conflict described above can reasonably, and should, be subjected to a higher degree of regulatory scrutiny. As the number and nature of conflicts increases, so too should the intensity of regulatory supervision.*

Financial Rights believes that Trustees are hopelessly conflicted in their dealings with trustees – either where they are related parties or they simply have contractual arrangements.

Superannuation funds have substantial negotiating power and owe statutory[2] and common law obligations to act in the best interest of fund members. This however has not been sufficient to protect consumer interests.

Despite a best interests duty, superannuation trustees have a series of fundamental conflicts of duty. It is unclear whether a retail superannuation trustees can act both in the best interests of members and the best interests of their shareholders. It is also unclear whether any superannuation trustees can act in the best interest of their membership as a whole and individual members at the same time.

We regularly see superannuation funds not acting in the best interests of their individual members all the time. Callers to the Insurance Law Service frequently report stories of

[2] Section 52 of the *Superannuation Industry (Supervision) Act 1993*

superannuation representatives not actively ensuring that they are, for example, up to date with where the insurer is in the group insurance claims process, nor actively engaging with an insurer when there are significant delays. We also see behaviour from superannuation companies that do not align with the expectation that the super fund go into bat for their member. There are very few determinations at FOS/AFCA (if any) based on a superannuation trustee disputing a decision on behalf of a member.

There are also fundamental conflicts of interest embedded in the provision of group insurance itself, i.e. superannuation companies could save money by not engaging enough staff to advocate on behalf of member claims.

Trustees also regularly benefit in negotiating for cheaper group insurance by lowering the levels of coverage and accepting unfair contract terms as outlined above. Superannuation trustees would argue that this is in the best interests of their members by preserving higher levels of retirement income. But it significantly lowers the ability of member beneficiaries making a successful claim on a product that they pay for.

Consequently, we strongly believe that superannuation trustees must be covered in the scope of the reforms being proposed.

Impact on the licensing framework

Treasury raises the possibility of

> *Restricting the financial service to where a person is acting on behalf of an insurer (or an intermediary acting on behalf of an insurer). This means that certain persons who contribute to assessments, such as medical practitioners, are unlikely to be acting in the capacity of a representative of the insurer;*

And

> *Whether a new category of person could be created that is entitled to engage in specified financial services in a representative capacity without being an authorised representative.*

We believe this may be the most straightforward approach.

Financial Rights notes that the *work* undertaken by persons who contribute to the claims handling process should be subject to appropriate regulation to ensure that their involvement for the insurer in the claims handling process are captured and overseen by ASIC. The insurer however should be licensed and held accountable for any work that they produce and should therefore be incentivised to ensure that they only obtain work of the highest standard.

We believe third party claims handling service businesses should be separately licensed and subject to oversight. However, we do not believe that an individual medical assessor or a smash repairer or loss adjustor does need to be separately licensed. We do think their contribution to the claims handling process needs to be able to be examined when it is directly contributing to the handling of an insurance claim, but we envisage this responsibility falling to the insurer. That is, they have an obligation to ensure that service providers they contract with are being fair and transparent. If they are not ASIC should be able to intervene.

We note too that insurers that currently operate without an AFS licence on the basis of the 'intermediary authorisation' exemption in section 911A(2)(b) of the *Corporations Act* are mentioned. This exemption should be removed.

Application to insurance products and Application to retail clients

Financial Rights supports the proposal applying to all insurance products including general insurance products, life risk products and investment life insurance products and group life insurance products.

We note that while the Royal Commission and ASIC have focussed on the handling and settling of insurance claims of retail clients, there is no reason at all that the same issues arise and should apply to all policies commonly acquired by individuals or small businesses.

Both the Royal Commission and ASIC have had limited resources and have made decisions to concentrate on retail clients as the largest and most important cohort. Their lack of explicit regard to other areas of the sector does not mean that the same issues do not apply, nor does it mean that the same regulatory oversight should not apply to all.

The impact of section 761G(5) of the *Corporations Act*, being restricted to specified kinds of general insurance means that yet another exception/gap will remains. It must be closed by applying generally norms of conduct in legislation governing financial services entities.

Consultation questions

1. **Are there additional issues that have not been identified? If so, are there potential options for addressing them within the proposal?**

No comment

2. **Are there other approaches that can be taken in designing the legislative amendments that would further improve consumer outcomes (including by reducing compliance costs)?**

We do not accept that reducing compliance costs necessarily improves consumer outcomes if it means consumers are less protected. Any approach proposed that will reduce compliance costs but decrease or limit the consumer protections expected to be brought by eliminating the claims handling exception should be rejected out of hand.

3. **Are there any obligations, besides the existing AFS licencing obligations, that would provide further useful consumer protections in respect claims handling activities and so should also apply to them?**

No comment

4. **How could the activity of handling or settling an insurance claim (in relation to both life and general insurance products) be defined as a financial service for the purposes of the Corporations Act?**

The definition should be expansive to ensure that the obligation of s 912A of the Corporations Act apply to all aspects of the provision of insurance, including claims handling and settlement.

Financial Rights does support including all the aspects of claims handling as identified by the Final Report ie.

- *make a decision about a claim, including investigating claims and interpreting policy provisions;*
- *conduct negotiations in respect of settlement amounts;*
- *prepare estimates of loss or damage, or likely repair costs; and*
- *make recommendations about mitigation of loss.*[3]

However the definition should not be limited to these aspects. They can be used as a non-exhaustive list of aspects of claims handling and settlement but should not limit the definition as such.

[3] Page 308, Royal Commission Final Report

5. **What penalties should apply to insurers breaching the general obligations of s912A in the specific instance of insurance claims handling? Should the penalties attaching to insurance claims handling, be the same that attach to other financial services?**

Again there should be no exceptions. The penalties attaching to insurance claims handling, be the same that attach to other financial services.

Concluding Remarks

Thank you again for the opportunity to comment. If you have any questions or concerns regarding this submission please do not hesitate to contact Financial Rights on (02) 9212 4216.

Kind Regards,

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