



Law Council
OF AUSTRALIA

Legal Practice Section

8 April 2019

Manager
Insurance and Financial Services Unit
Financial System Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: claimshandling@treasury.gov.au

Dear Manager

Inquiry into Insurance Claims Handling taking action on recommendation 4.8 of the Banking, Superannuation and Financial Services Royal Commission.

The Law Council is grateful for the opportunity to make a submission in regard to the Inquiry into Insurance Claims Handling taking action on recommendation 4.8 of the Banking, Superannuation and Financial Services Royal Commission.

Please find attached the Law Council's submission which has been prepared by the Superannuation, Australian Consumer Law & National Insurance Law Committees of its Legal Practice Section.

For further comment or clarification on any of the matters raised in the submission please contact Luke Barrett, Chair, Superannuation Committee on (T) 03 9910 6145 or at (E) luke.barrett@unisuper.com.au, Ben Slade, Chair, Australian Consumer Law Committee on (T) 02 8267 0914 or at bslade@mauriceblackburn.com.au & Andrew Sharpe, Chair, National Insurance Lawyers Group on (T) 02 9018 9915 or at asharpe@meridianlawyers.com.au.

Yours sincerely

Jonathan Smithers
Chief Executive Officer



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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12-month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2019 Executive as at 1 January 2019 are:

- Mr Arthur Moses SC, President
- Mr Konrad de Kerloy, President-elect
- Ms Pauline Wright, Treasurer
- Mr Tass Liveris, Executive Member
- Dr Jacoba Brasch QC, Executive Member
- Mr Tony Rossi, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

About the Section

The Legal Practice Section of the Law Council of Australia was established in March 1980, initially as the 'Legal Practice Management Section', with a focus principally on legal practice management issues. In September 1986 the Section's name was changed to the 'General Practice Section', and its focus broadened to include areas of specialist practices including Superannuation, Property Law, and Consumer Law.

On 7 December 2002 the Section's name was again changed, to 'Legal Practice Section', to reflect the Section's focus on a broad range of areas of specialist legal practices, as well as practice management.

The Section's objectives are to:

- Contribute to the development of the legal profession;
- Maintain high standards in the legal profession;
- Offer assistance in the development of legal and management expertise in its members through training, conferences, publications, meetings, and other activities.
- Provide policy advice to the Law Council, and prepare submissions on behalf of the Law Council, in the areas relating to its specialist committees.

Members of the Section Executive are:

- Ms Maureen Peatman, Chair
- Mr Michael James, Deputy Chair
- Mr Geoff Provis, Treasurer
- Ms Tanya Berlis
- Mr Dennis Bluth
- Mr Mark Cerche
- Ms Peggy Cheong
- Mr Philip Jackson SC
- Dr Leonie Kelleher OAM
- Ms Christine Smyth

Acknowledgement

The Law Council is grateful to the following committees for their assistance with the preparation of this submission:

- Australian Consumer Law Committee;
- Superannuation Committee; and
- National Insurance Lawyers Group of the Legal Practice Section.

Part A – Australian Consumer Law Committee

1. The Australian Consumer Law Committee (**ACL**) of the Legal Practice Section from the Law Council of Australia appreciates 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.
2. The ACLC supports Removing Regulation 7.1.33 and Make 'handling and settling an insurance claim' a new financial service.
3. We make the following comments:

Who would be covered under the definition of 'handling or settling insurance claims', in particular whether this would apply to superannuation trustees?

4. In Australia approximately 70% of life insurance is held in a Superannuation environment. The claims practices of funds vary greatly from fund to fund. Some Trustees play a substantive role in the claims assessment process, others do not (despite their obligations under s.52(7)(d) *Superannuation Industry (Supervision) Act 1993* (**SIS**) (**Cth**)).
5. The ACLC is concerned that if a Super Trustee were not included, then you could have a situation where a vertically integrated retail insurer could avoid the obligation and oversight by simply moving the substantive claims assessment process from the insurer to the trustee.
6. Trustees may assert that their fiduciary obligation already obligates them to act honestly, efficiently and fairly, and that they therefore ought not be included. We would respectfully submit that if the obligation already exists, then it will make little, if any, difference to a trustee's obligations.
7. We are of the view trustees ought to be covered.
8. We note that the current voluntary Insurance in Super code, which is not binding on the trustees oblige them to, amongst other things:
 - be fair, transparent, respectful, honest and timely (Objective 2.2);
 - be visible in the claims process (cl 2.5);
 - provide communication in respect of how to claim (cl 5.10 and 5.17); and
 - work with consumers in the claims process (cl6.6).
9. The Code is not binding and voluntary and there are some superannuation funds which are not governed by the code. The ACLC believes there should not be regulatory gaps, and that all Superannuation Trustees (except for SMSF Trustees) should be covered.
10. The extent of a trustee's role in the claim's assessment process can be significant, and thus leaving them out of the definition would risk a potential arbitrage of claims handling being provided by trustees who are not captured by the *Corporations Act 2001* (**Cth**) and who do not have a binding code of practice.

11. Trustees statutory and common law obligations are insufficient protections for consumers, and ASIC should have oversight of their conduct in claims handling.
12. The ACLC is of the view that insurers as a condition of their license should be responsible for entities or persons who they engage who contribute to the claims handling process, across the entire chain.
13. If a licensed entity uses an external claims assessor, or outsources claims handling and/or assessment to 3rd parties the licensed entity must either agree to be responsible for that entities action or only use a separately licensed entity that is subject to oversight by Australian Securities & Investments Commissions (**ASIC**).
14. The ACLC agree with the Treasury proposal of restricting the financial service to where a person is “acting on behalf of an insurer, or an intermediary of an insurer”. In coming to a definition, it should be worded to meet the intended purpose which is:
 - ASIC to have oversight over the consumers claims journey; and
 - the insurer is responsible for any entity where they delegate their obligation in relation to an aspect of the claim journey, whether through provision of information, decision making.
15. Lastly, at present there is an exemption in relation to Financial Product Advice for lawyers (766B (5) Corporations Act). If Insurance Claims handling and assessment were to become a new financial service, then it would be necessary to create an appropriate exemption along the same lines as the existing exemption under s.766B(5) such that a lawyer engaged to act on behalf of an insurer in relation to an insurance claim is not considered to be providing a “financial service”.

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)?

No comment

3. Are there any obligations, besides the existing AFS licencing obligations, that would provide further useful consumer protections in respect of 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. As Treasury has proposed, such obligations should apply only to

insurers and representatives of insurers, and should not apply to consumer representatives.

The ACLC notes the Royal Commission Final Report states:

- 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.¹

The ACLC recommends that the list above should form a non-exhaustive list and enable for ASIC to declare via regulation or by a catch-all provision to ensure that there are no unintended gaps.

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?

The penalties attaching to insurance claims handling, be the same that attach to other financial services, and include:

- civil penalties;
- suspend or cancel licenses;
- direct insurers to remediate affected consumers; and
- direct insurers not to use certain 3rd party providers or entities.

Contact

16. The Committee would welcome the opportunity to discuss its submission further and to provide additional information in respect of the comments made above. In the first instance, please contact:

- Mr Ben Slade, Chair, Australian Consumer Law Committee T: 02 8267 0914
E: BSlade@mauriceblackburn.com.au

¹ Page 308, Royal Commission Final Report.

Part B - Superannuation Committee

17. The Superannuation Law Committee of the Legal Practice Section from the Law Council of Australia appreciates 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.
18. The Superannuation Committee did not agree with all of the views expressed by the ACLC and raised concerns about duplication of regulation for superannuation fund trustees who must already comply with statutory covenants and Australian Prudential Regulation Authority (**APRA**) prudential standards affecting how they manage insurance arrangements.
19. If a superannuation fund offers interests in the fund that include an insured component – the entire interest is already taken to be a superannuation interest covered as a financial product by the Financial Services Laws under the Corporations Act. It would be a perilous approach for superannuation trustees to rely on the current exemption so as to assume that their insurance claims-handling activities connected to superannuation interests could be isolated and entirely exempt.
20. For superannuation funds, clearly those activities are connected with arranging, dealing or advising on a financial product (being the superannuation product – where any insured component is typically arranged and held by the trustees on a group policy basis and not by individual members). As such, Division 3, Part 7.6 of the Corporations Act would already typically extend to most superannuation funds in their offering of insured superannuation benefits – so obligations under s 912A to act efficiently, honestly and fairly already extend to superannuation products including any insured component. Accordingly, the Superannuation Committee doubts that any superannuation trustees would have ever sought to rely on the current exemption under regulation 7.1.33 with respect to their internal claims handling for insured components of their superannuation products.
21. In the view of the Superannuation Committee, it is therefore difficult to see how the changes, if expressed to extend specifically to claims-handling by superannuation trustees, would provide added protection to consumers dealing with insured benefits through their superannuation funds.
22. The Committee is concerned that such position may cause confusion and unnecessary complexity in the application of financial services laws and the SIS legislation as they apply to superannuation with underlying insured benefit components.
23. Further, it would be important that the proposed changes did not adversely affect the work that has taken place in the industry to date with respect to the Insurance in Superannuation Voluntary Code.
24. The Superannuation Committee has less difficulty with the operation of the provisions to insurance administrators who provide claims handling services to superannuation funds and may be expected to have direct dealings with retail clients, though it is submitted there also remains scope for confusion in this area.
25. A further issue that may require consideration relates to whether the change might unintentionally capture trustees of exempt public sector superannuation schemes who are not currently required to hold an Australian Financial Service (AFS) licence

because the superannuation products they issue are excluded from the definition of “financial product”. It would seem sensible that they are not inadvertently required to obtain an AFS licence for handling any insurance-related aspects of their superannuation products.

Contact

26. The Committee would welcome the opportunity to discuss its submission further and to provide additional information in respect of the comments made above. In the first instance, please contact:

- Mr Luke Barrett
Chair, Superannuation Committee
T: 03 8831 6145
E: luke.barrett@unisuper.com.au
- Ms Lisa Butler Beatty
Deputy Chair, Superannuation Committee
T: 0477 753 941
E: BeattyLi@cba.com.au.

Part C – National Insurance Law Group

27. The National Insurance Law Group (**NILG**) of the Legal Practice Section from the Law Council of Australia appreciates 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.

28. The NILG supports Removing Regulation 7.1.33 and Make ‘handling and settling an insurance claim’ a new financial service.

29. The NILG endorses the submission of the Insurance Council of Australia’s (ICA) submission that:

‘...care should be taken not to inadvertently extend the licensing and financial advice rules to claims handling. This would have a substantial impact by requiring the range of providers involved in the claims management chain (including loss, adjusters, loss assessors, investigators and builders) to be licensed...’²

Claims handling should not be subject to requirements which apply to the provision of financial service advice

30. Claims handling should not be subject to requirements which apply to the provision of financial service advice including:

² Insurance Council of Australia, Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry – Insurance Hearings (25 October 2018) p20.

- (a) disclosure provisions (e.g. provision of general advice warnings or provision of a Financial Services Guide or provision of a Statement of Advice);
- (b) conduct obligations applicable to personal advice.

31. Any training requirements placed on claims handlers should be:

- (a) carefully tailored to the claims handling role undertaken by the licensee; and
- (b) other persons noted in the Regulations³.

Who would be covered under the definition of ‘handling or settling insurance claims’?

32. Care needs to be taken in relation to the treatment of third-party representatives of insurers who provide a claims handling service on behalf of the insurer (**Claims Handling Service Providers**).
33. The NILG supports the inclusion of provisions making a licensee responsible for the claims handling services provided on its behalf by Claims Handling Service Providers.
34. The NILG does not support an approach which would require Claims Handling Service Providers to hold a Financial Services License.
35. Instead, the NILG considers that a new form of representative should be created to apply to Claims Handling Service Providers.
36. The NILG does not consider that the current Authorised Representative framework would be appropriate for application to Claims Handling Service Providers because such approach would:
- (a) be unduly onerous;
 - (b) add unnecessary costs;
 - (c) limit claims handling flexibility which operates to the benefit of consumers (for example, by granting small authorities to loss adjusters and builders particularly following natural disasters so as to speed up claims processing);
 - (d) the cross-liability provisions of the Corporations Act would be onerous in this context.
37. The NILG considers that:
- (a) the relevant Codes of Conduct should be reviewed to ensure that adequate principles regarding insurers’ oversight of Claims Handling Service Providers are established;
 - (b) notes that individual licensees are likely to review their service agreements with Claims Handling Service Providers to reflect the amendments referred to above and the relevant Code provisions including to pass on liability to such Claims Handling Service Providers.

³ to provide a mechanism to extend the obligations in the event that problematic conduct is identified.

38. In relation to superannuation trustees, the NILG endorses the submissions of the Superannuation Committee at Part B above.
39. In relation to lawyers (to the extent that a specific exemption is required having regard to the NILG's submissions as to Claims Handling Service Providers generally), the NILG endorses the submission of the Australian Consumer Law Committee at paragraph 15 above.

Application to retail clients

40. The NILG considers that the definition of claims handling activity should be limited to claims handling activity to retail clients.
41. This achieves a consistency with the relevant laws applicable to the provision of other financial services and is consistency with achieving a consistency in financial services laws as endorsed by the Royal Commission. Final Report.

Contact

42. The Committee would welcome the opportunity to discuss its submission further and to provide additional information in respect of the comments made above. In the first instance, please contact:

- Mr Andrew Sharpe
Chair, National Insurance Law Group
T: 02 9018 9915
E: asharpe@meridianlawyers.com.au