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

By email: claimshandling@treasury.gov.au

Dear Sir/Madam,

Thank you for the opportunity to provide comment on issues raised in Treasury's consultation paper in relation to taking action on recommendation 4.8 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Royal Commission).

Please do not hesitate to contact me and my colleagues on 07 3014 5051 or at JMennen@mauriceblackburn.com.au if we can further assist with Treasury's important work.

Yours faithfully,

Josh Mennen
Principal Lawyer
Maurice Blackburn

Submission in Response to the Consultation Paper regarding Taking Action on Recommendation 4.8 of the Royal Commission Into Misconduct in the Banking, Superannuation and Financial Services Industry

March 2019

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Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 32 permanent offices and 32 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions.

Maurice Blackburn employs over 1000 staff, including approximately 330 lawyers who provide advice and assistance to thousands of clients each year. The advice services are often provided free of charge as it is firm policy in many areas to give the first consultation for free. The firm also has a substantial social justice practice.

Our Submission

We note that Commissioner Haynes' wording of recommendation 4.8[1] reads as follows:

> "*The handling and settlement of insurance claims, or potential insurance claims, should no longer be excluded from the definition of 'financial service'*"

We also note the Government's response[2] to this recommendation:

> *"The Government agrees to remove the exemption for the handling and settlement of insurance claims from the definition of a financial service. Inappropriate claims handling practices can cause significant consumer detriment as highlighted through the Royal Commission's round six hearings into insurance".*

Maurice Blackburn supports Treasury's two-pronged approach[3] to implementing recommendation 4.8, namely:

1. Remove Regulation 7.1.33 of the *Corporations Act 2001* (Corporations Act), thereby extending the general obligations of section 912A of the Corporations Act to insurance claims handling; and

2. Use 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.

Maurice Blackburn believes that those covered under the definition of 'handling or settling insurance claims' should be extended to include:

- Insurers;
- Healthcare professionals such as medical officers that provide a claims handling service on behalf of the insurer;
- Trustees of regulated superannuation funds; and
- reinsurers.

We add our voice to those of other consumer advocates who argue that the current behaviours of insurers would not satisfy the current obligations applicable to financial services.

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[1] https://financialservices.royalcommission.gov.au/Pages/reports.aspx, p.33
[2] https://static.treasury.gov.au/uploads/sites/1/2019/02/FSRC-Government-Response-1.pdf, p.25
[3] https://static.treasury.gov.au/uploads/sites/1/2019/02/t364638-consultation-paper.pdf, p.9

We also agree that neither the utmost good faith requirements, nor the requirements of the industry codes currently in place are adequate to change behaviours to what the Royal Commission, or the community, would find acceptable.

We encourage Treasury to ensure that the broad legislative framework ensures that civil remedy provisions are made to enable consumers to claim any loss or damages attributed to a statutory breach.

We also believe that and adjustments to legislation should ensure that obligations on insurers do not cease upon commencement of court proceedings or upon the commencement of an External Dispute Resolution scheme dispute.

Above all, Maurice Blackburn believes that insurers and their claims processes should be held to the same standards as other financial service providers. Exemptions which have historically been afforded to insurers should be removed to give the regulators sufficient teeth to engender behavioural change within these organisations, and help instil within them a more consumer-centred culture in decision making.

The Proposal

1. Removing Regulation 7.1.33

Maurice Blackburn supports the Royal Commission's findings that insurance claims handling should be regarded as a financial service[4].

The general principles enshrined in the Corporations Act, from which insurance claims are currently exempt under regulation 7.1.33, include obligations relating to efficient, honest and fair delivery of services, conflict of interest arrangements and taking reasonable steps to ensure representatives comply with financial services laws[5]. The current regulation restricts ASIC's capacity to hold insurers to the same levels of accountability in these areas as other financial services.

We agree with the observations of other consumer advocates that a number of current practices of insurance companies would not satisfy the obligations placed on financial services. This is evidenced in observed practices of:

- Taking an adversarial approach to claims assessment;
- Misusing data to deny claims;
- Utilising unnecessary or unethical surveillance or investigative activities to deny claims;
- Applying medically obsolete policy definitions;
- Using delaying tactics in the settlement of claims in an attempt to 'freeze the claimant out'.

We also agree with the observations of consumer advocates that reliance on the duty of utmost good faith in isolation is inadequate, as it can only be applied on a case by case basis.

The industry codes of practice which set out expectations in relation to insurer behaviour also fail to adequately hold trustees of regulated superannuation funds and life insurers to account. Maurice Blackburn has written extensively on the inadequacies of the Financial Services Counsel's Life Insurance Code of Practice and the yet to commence Insurance in Superannuation Code of Practice – with our highest order concern being that they are unenforceable by external agencies, an issue that is also the subject of ongoing inquiry and reform following on from the Royal Commission's recommendations[6].

Maurice Blackburn agrees with Treasury's assessment that, whilst removing Regulation 7.1.33 would remove the exemption which currently inhibits ASIC's capacity to scrutinise insurer behaviours, this action alone would not be sufficient to bring the behaviours of insurers in line with those expected of other financial services.

2. Make 'handling and settling an insurance claim' a new financial service

The Consultation paper notes the following[7]:

[4] https://financialservices.royalcommission.gov.au/Pages/reports.aspx, p.309
[5] https://static.treasury.gov.au/uploads/sites/1/2019/02/t364638-consultation-paper.pdf, p.5
[6] Currently the subject of separate inquiry by Treasury: https://treasury.gov.au/consultation/c2019-t368566
[7] https://static.treasury.gov.au/uploads/sites/1/2019/02/t364638-consultation-paper.pdf, p.10

> *"While the precise definition would need to be further developed, 'handling or settling of an insurance claim' could be defined to cover all conduct of the insurer (or its representatives) in relation to claims handling, including ways in which insurers:*
> - *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".*

Whilst supporting the above, Maurice Blackburn believes that the definition of 'handling or settling of an insurance claim' should be expanded to include matters relating to the handling of any insurance dispute or significant insurance issue, regardless of whether it is classified as a formal insurance claim for benefits.

For example, the following matters should be included:

- Commutation negotiations (or policy 'buy outs') between insurers and consumers;

- Insurers exercising rights under Part IV of the *Insurance Contracts Act 1984* (ICA) to avoid a policy.

Matters such as those listed above do not necessarily relate to any *claim* for insurance and may arise outside of the claim context. For example:

- an income protection claimant who has returned to work and is not currently in receipt of benefits may engage in a 'buy out' negotiation with an insurer to bring the policy to an end in consideration of a lump sum based on an actuarial analysis of future risk to the insurer;

- a life insurer purports to avoid a policy on the basis of alleged non-disclosure / misrepresentation pursuant to s.29(2) of the ICA before any claim has been opened.

They are, however, of crucial significance to the consumer.

The actions of insurers in these situations should, therefore, come within the scope of the legislative protection such as the general obligations at s.912A including to 'do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly'.

Scope of proposal

The consultation paper raises a number of consequential issues relating to Treasury's proposed course of action. Maurice Blackburn adds its contribution to these discussions below:

1. <u>Who would be covered?</u>

   i. Insurers

Maurice Blackburn agrees that life and general insurers should be included under the proposal.

ii. Third party agents or representatives of insurers

We also agree that certain third party representatives of insurers that provide a claims handling service on behalf of the insurer – such as investigators, loss adjustors, loss assessors, collection agents and claims management services – should be included.

We believe that this should also be extended to include any health care professionals such as medical officers that provide a claims handling service on behalf of the insurer.

This life insurance industry problem featured prominently in the Royal Commission. It was revealed that CBA routinely ignored the medical advice of its own employed doctors (including its chief medical officer Dr Benjamin Koh who blew the whistle on the company's misconduct in 2016, in utilising outdated medical definitions to deny claims), and routinely rejected related claims because it would cost the company more money[8].

Maurice Blackburn also has concerns regarding instances where insurers have sought to use in-house or retained health care professionals to contact claimants' treating doctors, ostensibly to discuss treatment issues. We have seen this result in treating doctors feeling pressured to give an opinion that suits the insurer's commercial interests but risks the integrity of the treatment relationship, for example by pushing claimants back to work prematurely. We contend that sort of conduct, if proven, should constitute a breach of s.912A[9].

The risk of this type of claims handling strategy has been heightened in recent years through the writing of policies that expressly allow the insurer to decline a disability claim if it decides the claimant has not fully participated in an occupational / rehabilitation program to the insurer's satisfaction[10].

Extending this claims handling duty to such health care professionals would encourage greater care and accountability in the claims assessment process resulting in fairer outcomes.

iii. Superannuation Fund Trustees

Maurice Blackburn further submits that the legislative obligations for claims handling should also extend to Trustees of regulated superannuation funds.

Data would suggest that more than 70% of Australian life insurance policies – more than 13.5 million separate policies – are held through superannuation funds[11].

Usually, Trustees must independently assess insurance claims by members, even where an external insurer has underwritten the member's cover. Therefore Trustees

[8] See for example https://www.theaustralian.com.au/business/banking-royal-commission/banking-royal-commission-cba-rejected-heart-attack-claims-misled-ombudsman/news-story/3fcab50aa16c65d99fb48402f981b705

[9] Such conduct may be a breach of the provisions of the *Life Insurance Act 1995*, *Private Health Insurance Act 2007*, Private Health Insurance (Health Insurance Business) Rules 2013, *Health Insurance Act 1973* and *Superannuation Industry (Supervision) Regulations 1994*.

[10] E.g. SunSuper Pty Ltd/AIA Australia Limited TPD Assist policy.

[11] https://www.ricewarner.com/insurance-through-superannuation/

should be held to no lesser a standard than insurers, including Trustees of government superannuation funds.

Furthermore, historically, some Trustees have provided cover through self-insurance arrangements[12], without formally creating a licenced insurance business. We would submit that there is no reason why their members should not be afforded with equivalent legal protections – indeed, lessened protections could create a moral hazard whereby self-insurance arrangements are preferred for the wrong reasons.

In that regard, we would suggest an approach consistent with s.10 of the ICA which affords consumer with the Act's benefits even where, for example, the cover is provided by contract that 'would not ordinarily be regarded as a contract of insurance' but 'includes provisions of insurance'.

Including the Trustees of superannuation funds would also provide consistency in the context of Trustee fiduciary and statutory obligations. For example, Trustees are bound by a covenant in the SIS Act which compels them to '… do everything that is reasonable to pursue an insurance claim for the benefit of a beneficiary, if the claim has a reasonable prospect of success.'[13]

iv. Reinsurers

Maurice Blackburn also suggests that the proposal should extend to reinsurers. Reinsurers also have active and at times decisive involvement in claims assessment and resolution processes, particularly in high quantum claims, and therefore should be subject to the same statutory obligations to consumers.

Maurice Blackburn refers Treasury to the outcomes of *MX v FSS Trustee Corporation as Trustee of the First State Superannuation Scheme & Anor* [2018][14]. This case is instructive in relation to the central role a reinsurer may play. The court found that the life insurer Metlife was influenced by its reinsurer in exercising its opinion.

In coming to a view on this issue, the Court extensively reviewed both the reinsurance treaty and the reinsurer's 'close involvement' in the management of the claim. The critical provision of the treaty was a claim approval provision which stated:

> '*For any Sum Insured above the Claim Handling Limit…the Cedant must before accepting liability for a claim under that Reinsured Policy, obtain [the reinsurer's] prior approval…*'

In that context, the reinsurer declined the claim, which was in turn declined by the life insurer Metlife.

Maurice Blackburn suggests that Treasury could consider the introduction of a new category of 'interested person' to encompass entities such as third party representatives of insurers and reinsurers.

2. <u>Whether it should apply to all insurance claims or only services provided to retail clients.</u>

[12] E.g. TelstraSuper; QSuper.
[13] s.52(7)(d) SIS Act http://www5.austlii.edu.au/au/legis/cth/consol_act/sia1993473/s52.html
[14] NSWSC 923

The 'retail client' verses 'sophisticated investor' / 'wholesale client' distinction in the Corporations Act where directed towards protecting unsophisticated consumers receiving financial advice from financial services licences. In those circumstances, sophisticated or wholesale investors were carved out as not requiring the same level of disclosure and other legal protections as so called 'retail' clients.

At least in hindsight, the wisdom of such a carve out is dubious (high net worth is not a reliable proxy for financial literacy and in our experience many high net worth consumers classed as 'wholesale clients' who were in fact vulnerable, inexperienced or risk averse suffered serious investment losses in the global financial crisis due to market overexposure).

In any case, the fact is that such distinctions are neither relevant nor appropriate in the context of insurance claims handling.

It is submitted that the general obligations should not be limited to 'retail clients' as currently defined by the Corporations legislation, insofar as they relate to insurance claims handling. Limiting the obligations in this way may inadvertently exclude:

- Consumers who have over a certain net worth or gross income threshold, or a sophisticated/professional investor;
- Members of superannuation products and RSA products[15], noting the majority of life insureds (who obtain cover through their superannuation funds).

3. <u>Incentives and performance measurements for claims handling staff.</u>

ASIC Report 498 - Life insurance claims: An industry review, dated 12 October 2016[16] noted that:

'p.20 Some insurers have included incentives and performance measurements for claims handling staff and management that are in apparent conflict with their obligation to assess each claim on its merit.'

'325 Our review of insurers' claims systems, including staffing and technological systems, found that:

(b)….conflicts of interest in remuneration could be an issue for insurers with incentives and performance measures for staff based on declined claim rates.'

'381 The exclusion of claims handling from the definition of financial services in reg 7.1.33 limits ASIC's capacity to seek changes in insurer conduct from inappropriate incentives or the way an investigator operates. Our view is that removing the exemption in reg 7.1.33 would enhance our capacity to seek improvements in claims handling practices.'

[15] see Corporations Act 2001 – s.761G(6) http://www8.austlii.edu.au/au//legis/cth/consol_act/ca2001172/s761g.html

[16] https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-498-life-insurance-claims-an-industry-review/

Maurice Blackburn submits that the Corporations Act should expressly prescribe for 'ASIC's capacity to seek changes in insurer conduct from inappropriate incentives or the way an investigator operates'.

Penalties

Maurice Blackburn encourages Treasury to ensure that the broad legislative framework ensures civil remedy provisions are made for consumers to claim any loss or damages attributable to a statutory breach.

Maurice Blackburn notes the enhanced penalties embedded in the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018,* which would apply to insurance claims handling once defined as a 'financial service'.

Specifically, these amendments provide that a contravention of certain s.912A general obligations will now invoke a civil penalty provisions[17]. However s.912A is *not* classed as a 'financial services civil penalty provision' pursuant to s.1317E[18] which means it does not provide a right to compensation orders by a consumer against the financial services licensee pursuant to s.1317HA or elsewhere.

Maurice Blackburn recommends that the s.912A general obligations ought to be classed as 'financial services civil penalty provisions' pursuant to s.1317E (as opposed to its current 'uncategorised' classification) so as to give consumers civil recourse to claim loss or damage resulting from breach.

Further or alternatively, the Corporations Act should specifically prescribe remedies for civil action for loss or damage caused by a breach of the insurance claims handling provisions including under s.912A (as is the case for other Corporations Act contraventions such as a breach of the best interests obligations owed by financial advisers providing personal advice[19]).

We further submit that Treasury should consider expanding the prescribed provisions to dovetail with the enforcement provisions contained in Part VI of the *Competition and Consumer Act 2010* (CCA)[20].

That regime includes provisions relating to:

- pecuniary penalties;
- injunctions;
- damages;
- non-punitive orders, including community service orders, probation orders, disclosure orders and corrective advertising orders;
- punitive orders relating to adverse publicity;
- disqualification from managing a corporation;

[17] via s.76 of the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill* 2019 which passed both houses on 18 February and was assented to on 12 March 2019 as Act no.17 made 2019: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6213

[18] http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r6213_aspassed/toc_word/18223b01.docx;fileType=application%2Fvnd.openxmlformats-officedocument.wordprocessingml.document

[19] s.961M of the Corporations Act.

[20] http://www5.austlii.edu.au/au/legis/cth/consol_act/caca2010265/

- other compensation orders; and
- enforceable undertakings.[21]

Such remedies would give s.912A the teeth it deserves so as to ensure public confidence in its legitimacy as an effective deterrent to financial services providers engaged in claims handling.

Other Matters

Maurice Blackburn submits that any new or adjusted legislation should clarify that any new obligations on insurers do not cease upon the commencement of proceedings in an External Dispute Resolution (EDR) scheme such as AFCA, or Court.

Often, a claim process is ongoing throughout the litigation process, particularly in the context of claims of the well-publicised issue unreasonable delay[22] or constructive denial[23].

The current life insurance code of practice[24] contains that inexplicable limitation despite the fact that:

- Claims handling and resolution persists beyond the commencement of proceedings; and
- A consumer should not be disadvantaged in their rights as a claimant due to their decision to exercising their rights to have their dispute heard by AFCA or a court.

We point to the following examples from the Royal Commission that exemplify the bellicose approach taken by financial service providers involved in disputes with consumers after the claim or internal dispute resolution process has failed to resolve the matter:

- The CommInsure case study wherein CommInsure accepted that it misled the Financial Ombudsman Service (FOS), made inappropriate challenges to its jurisdiction, and failed to provide information requested by FOS in breach of FOS's Terms of Reference[25];
- The TAL case studies wherein TAL accepted that it failed to engage with FOS in a frank and cooperative way in a number of respects, and that this was conduct that fell below community standards and expectations including TAL making a misleading and incorrect statement to FOS.[26]

Maurice Blackburn submits that the Corporations Act should state that the obligations imposed regarding claims handling should persist throughout any EDR scheme or litigation.

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[21] CCA, ss 76, 80, 82, 86C, 86D, 86E, 87 and 87B respectively.
[22] See for example ASIC Report 498 at [41]: '…*deficiencies in claims procedures are adversely affecting policyholders' experiences and claims outcomes, particularly the evidence required to assess a claim and delays in claims decisions and payments'.*
[23] See for example *Wheeler v FSS Trustee Corporation as trustee for the First State Superannuation Scheme* [2016] NSWSC 534 where the court held that the life insurer Metlife breached its obligations of good faith because it took three years to complete the investigation, but then only gave the Plaintiff 14 days to respond to the procedural fairness letter, whilst litigation was on foot.
[24] https://www.fsc.org.au/policy/life-insurance/code-of-practice/life-code-of-practice.pdf p.5
[25] https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-2-final-report.docx. p.330.
[26] Ibid at p.349.

Finally, whist we do not propose that the claims handling amendments should regulate claims assessment conduct at a granular level, such as would be the case in a properly functional code of practice, we do recommend an explicit provision that a breach of an 'enforceable code provision' related to claims handling amounts to a breach of s.912A and related Corporations Act obligations.

That is consistent with Commissioner Hayne's Recommendation 1.15 that the law should be amended to provide that industry codes of conduct approved by ASIC may include 'enforceable code provisions', which are provisions in respect of which a contravention will constitute a breach of the law.

Our Recommendations:

1. That any definition of 'handling or settling of an insurance claim' should be broadened to 'handling of any insurance claim, settlement, dispute or significant insurance issue', regardless of whether it is classified as a formal insurance claim for benefits, to ensure that, for example:

    (a) commutation negotiations (or policy buy-outs) outside the claim context should be included covered.

    (b) insurers exercising their rights under Part IV of the *Insurance Contracts Act* 1984 to avoid or vary a policy outside the a claim context should be covered.

2. That the legislative obligations for claims handling should extend to any healthcare professionals such as medical officers that provide a claims handling service on behalf of the insurer.

3. That the legislative obligations for claims handling should extend to Trustees of regulated superannuation funds.

4. That the legislative obligations for claims handling should extend to reinsurers.

5. That Treasury consider the introduction of a new category of those bound by claims handling obligations entitled 'interested person' to encompass entities such as third party representatives of insurers and reinsurers.

6. That the legislative obligations for claims handling should not be limited to 'retail clients' as currently defined within the Corporations Act.

7. That the Corporations Act should expressly prescribe for 'ASIC's capacity to seek changes in insurer conduct from inappropriate incentives or the way an investigator operates'.

8. That Treasury ensure that the broad legislative framework ensures civil remedy provisions are made for consumers to claim any loss or damages attributable to a statutory breach.

9. That the s.912A general obligations ought to be classed as 'financial services civil penalty provisions' pursuant to s.1317E so as to give consumers civil recourse to claim loss or damage resulting from breach.

10. That Treasury should consider expanding the prescribed provisions to dovetail with the enforcement provisions contained in Part VI of the *Competition and Consumer Act* 2010.

11. That the Corporations Act should state that the obligations imposed regarding claims handling should persist throughout any EDR scheme or litigation.

12. That an explicit provision that a breach of an 'enforceable code provision' related to claims handling amounts to a breach of s.912A and related Corporations Act obligations.