

1 April 2019

Manager  
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The Treasury  
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PARKES ACT 2600

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Dear Sir/Madam

**Insurance Claims Handling Taking action on recommendation 4.8 of the Banking, Superannuation & Financial Services Royal Commission January 2019 - Consultation paper**

The National Insurance Brokers Association of Australia (**NIBA**) appreciates the opportunity to make this submission in response to the Consultation paper.

NIBA is the industry association for insurance brokers across Australia. The association has around 350 member firms, employing over 4,000 insurance brokers in all States and Territories, in the cities, towns and regions of Australia.

**ABOUT INSURANCE BROKERS**

Insurance brokers work with their clients to assist them to:

- understand and manage their risks, including the risk of loss or damage to property as a result of adverse weather or other climate related events;
- obtain appropriate insurance cover for their risks and their property; and
- pursue claims under their policies when an insured event occurs, in which case the insurance broker becomes the advocate for the client during the assessment and resolution of the claim.

Insurance brokers act primarily for and on behalf of their client, and they owe legal duties to their clients for the nature and quality of the work they perform on their behalf. When acting for and on behalf of the client, insurance brokers do not SELL insurance policies – they PURCHASE insurance policies on behalf of their clients from the markets available to them.

In some cases, insurance brokers may provide services for insurers under agency arrangements.

**EXECUTIVE SUMMARY**

NIBA supports:

- the extension of the operation of parts of Chapter 7 of the Corporations Act to certain claims services provided by insurers and their representatives (not to brokers acting for the insured in relation to claims);

- consideration being given to the claims service applying beyond retail client business where warranted;
- better clarification of the proposed claims service definition given it is likely to catch many persons that may not be worthy of regulation after a cost benefit analysis is conducted;
- consideration of licensing streamlining for existing AFSL holders;
- consideration of the best way to manage insurers relying on AFSL exemptions where many of their claims agents won't be in a position or be likely to obtain a claims AFSL themselves – subject to there being an even playing field for all concerned;
- consideration of a special type of claims representative status that does not require the authorised representative requirements in Part 7.6 to apply;
- limitation of the Chapter 7 requirements to special claims related licensing and representative rules and the obligations in Part 7.6 Division 3; and
- clarification on what other Divisions of Part 7.6 are to apply arising from the above.

As always, with any legislative reform, care needs to be taken that the cost of such changes does not outweigh the end benefits for consumers.

NIBA notes that there is significant protection and incentive for sound claims behaviour by insurers given:

- a breach of the duty of utmost good faith in section 13(2A) gives rise to a new and significant civil penalty; and
- where an insurer has failed to comply with the duty of the utmost good faith in the handling or settlement of a claim or potential claim under an insurance contract, s14A of the Insurance Contracts Act triggers a breach of the general licensing obligations in Part 7.6 of the Corporations Act also gives rise to a new and significant civil penalty.

NIBA sets out its comments below on the proposed changes set out in the consultation paper.

### **SHOULD A NEW CLAIMS SERVICE TO APPLY TO INSURERS AND THEIR REPRESENTATIVES?**

NIBA supports the application of the new service to “insurers that provide a claims handling service, including the insurer’s employees (broadly defined to include contractors) and related body corporates of the insurer and their employees (broadly defined to include contractors) if they provide a claims handling service on behalf of the insurer”.

Insurance brokers acting for insureds act as claims advocates for customers in any claims dispute with insurers and should not be caught. This should be acknowledged in any explanatory materials. To do so would potentially increase the cost of such service for customers (which for retail client business is usually incorporated a part of the standard commission) beyond what they would be willing or able to pay.

### **WHAT INSURANCE PRODUCTS ARE TO BE CAUGHT?**

NIBA supports the proposal that the changes apply to all insurance products including:

- general insurance products;
- life risk products and investment life insurance products; and
- group life insurance products.

## **WHETHER NEW CLAIMS SERVICE SHOULD BE LIMITED TO RETAIL CLIENTS?**

NIBA agrees that the Issues identified by the Royal Commission and ASIC on the handling and settling of insurance claims have generally related to retail clients.

NIBA supports consideration being given to whether the definition of retail client in relation to general insurance products would result in claims handling conduct requirements not applying to a significant number of policies commonly acquired by individuals or small businesses. NIBA notes that AFCA's coverage is greater than the retail client definition.

The AFCA rules catch any **Life Insurance policy** which includes any product or service offered by a life insurance company.

It covers complaints about a General Insurance Policy that is a:

- (i) Retail General Insurance Policy;
- (ii) Residential Strata Title Insurance Product;
- (iii) Small Business Insurance Product;
- (iv) Medical Indemnity Insurance Product; or
- (v) Title Insurance Policy.

[subject so some other carve outs].

**Insurance Policy** means a contract of general insurance within the meaning of that expression in the Insurance Contracts Act 1984 or part of such a contract.

**Retail General Insurance Policy** means:

- a) an insurance product specified in section 761G(5)(b) of the Corporations Act;
- b) where a Complainant (other than a Small Business) has a complaint with a General Insurance Broker pertaining to a product that includes an insurance product specified in section 761G(5)(b) of the Corporations Act – also includes any other insurance cover provided by that product, with the exception of cover under an Excluded Product.

**Residential Strata Title Insurance Product** means an insurance policy insuring the body corporate of a strata title or company title building that is wholly occupied for residential or small business purposes including:

- a) Strata Building;
- b) Common Contents;
- c) Personal Accident or Sickness for voluntary workers in or about the strata building or common property;

**but excluding:**

- a) Professional Indemnity;
- b) Public Liability;
- c) Workers Compensation

**Small Business Insurance Product** means:

- a) where the complaint is between a Small Business and a General Insurance Broker – a General Insurance Policy other than an Excluded Product;
- b) for other types of complaints involving a Small Business - a policy or part of a policy that provides insurance cover (whether or not the cover is limited or restricted in any way) in respect of one or more of the following:

- (i) Computer and Electronic Breakdown;
- (ii) Fire or Accidental Damage – but, in a complaint about an insurance claim that has been made by the Complainant, only to the extent that the insurance cover relates to a Specified Defined Event;
- (iii) Loss of Profits/Business Interruption;
- (iv) General Property;
- (v) Glass;
- (vi) Land Transit;
- (vii) Machinery Breakdown;
- (viii) Money; and
- (ix) Theft,

**but excluding** cover in relation to any of the following:

- (x) Contractors All Risks;
- (xi) Fidelity Guarantee;
- (xii) Legal Liability (including Public Liability and Products Liability);
- (xiii) Professional Indemnity; and
- (xiv) Industrial Special Risks.

**Small Business** means a Primary Producer or other business that had less than 100 employees at the time of the act or omission by the Financial Firm that gave rise to the complaint.

**Title Insurance product** means an indemnity insurance product that principally manages financial risk or loss arising from defects in the title of real property

**Medical Indemnity Insurance Product** has the meaning in the Corporations Regulation 1.0.02.

#### **HOW TO DEFINE THE ACTIVITY OF HANDLING OR SETTLING AN INSURANCE CLAIM (IN RELATION TO BOTH LIFE AND GENERAL INSURANCE PRODUCTS) FOR THE PURPOSES OF THE CORPORATIONS ACT?**

The proposal; is that ‘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.

To catch all conduct of the insurer or its representatives *in relation to claims handling* seems very broad and would apply to a number of persons acting as representatives of insurers whose conduct may not be worthy of regulation, after a cost benefit analysis is conducted.

The types of persons likely to be worthy of regulations would include:

- Persons who make a decision about whether the claim is one for which the insured can claim a benefit under the insurance product;
- Persons who provide a service in relation to a claim under an insurance product where the person making the claims settlement decision will rely on the results of that

service in making a decision e.g investigators, loss adjustors and assessors, hydrologists and repairers; and

- Persons who may provide advice or recommendations in relation to a claim to a person that may:
  - seek to influence the person's decision on whether to proceed to make or accept a claim settlement
  - relate to increases in limits or different cover options to protect against the same loss in the future; and
  - relate to claims strategy such as the making of claims under alternate policies.

It may not be worth catching persons that don't fall within the above categories unless their conduct is likely to have a detrimental impact on a consumer worthy of regulation after a costs benefit analysis is conducted.

Special exemptions will be needed for classes of persons equivalent to those applied in relation to advice conduct such as lawyers See s766B(5) Meaning of financial product advice:

If used, the proposed inclusions need to be more precisely defined and aligned with the relevant categories above. By way of example:

**“make a decision about a claim, including investigating claims and interpreting policy provisions”**

Most insurers or their representatives will make some form of decision “about a claim” in a broad sense e.g which repairer to refer a customer to from the approved repairer list, which expert to use, when to conduct an assessment or when to process an accepted claim payment.

It seems sensible to clarify that the focus is on making a decision about whether the claim is a valid one under the policy or not. Words such as “making a decision on whether the claim is one for which the insured is entitled to claim a benefit (whether in whole or part) under the insurance product.” Would clarify things.

NIBA notes that “investigating claims” and “interpreting policy provisions” would catch a very broad range of persons.

**“prepare estimates of loss or damage, or likely repair costs”**

NIBA queries whether such persons should be caught in cases where the insurer will not rely on the information provided in making a claims decision.

**“make recommendations about mitigation of loss”**

This needs a link to a claim made under an insurance product as insurers can require insureds to implement risk mitigation practices as part of determining the cover to offer and its price that are unrelated to any claim.

We assume the intent is likely to be that such persons should only be caught to the extent they make a recommendation about mitigation of loss *in relation to a claim made under an insurance product* and where the recommendation:

- is intended to influence a person or persons in making a decision in relation to mitigation of the loss; or
- could reasonably be regarded as being intended to have such an influence.

## WHAT REQUIREMENTS OF CORPORATIONS ACT SHOULD APPLY?

The Consultation paper provides that the **key requirements** that would apply to this financial service would be Division 3, Part 7.6 of the Corporations Act (Licensing of providers of financial services). In particular, the application of general obligations under s912A to claims handling conduct would improve consumer outcomes by:

- ensuring AFS licensees are required to act efficiently, honestly and fairly when handling an insurance claim;
- requiring AFS licensees to have adequate measures in place to manage conflicts between representatives' own interests in refusing claims; and
- requiring AFS licensees to adequately supervise claims handling conduct and ensure that representatives are adequately trained and competent to engage in those services.

NIBA comments on each of the requirements in Division 3 of Part 7.6 below, noting that the focus should be on reducing any obligation that creates unnecessary cost for little added consumer protection or benefit, given costs are likely to be passed on to consumers.

### Licensing generally

NIBA supports the proposal that consideration be given as to whether existing mechanisms in the Corporations Act could mitigate any impacts on licensing requirements including whether s926B of the Corporations Act could provide a mechanism that would allow claims handling to be included under the current authorisations held by AFS licensees.

If possible, there should be a streamlined process for all existing AFSL holders and those ASIC wishes to regulate.

### Exempt insurers

The Consultation paper notes that introduction of a new financial service could potentially affect insurers that currently operate without an AFS licence on the basis of the 'intermediary authorisation' exemption in s911A(2)(b) of the Corporations Act. Consideration will be given to the number of insurers operating under this exemption and how they manage their claims handling processes.

NIBA notes this is an issue and believes some form of relief is necessary as many exempt insurers (e.g Lloyd's underwriters) will use claims agents not reasonably likely (or practically able) to obtain or act under their own AFSL e.g motor repairers, loss assessors and adjusters, hydrologists, investigators and internal claims and IDR services etc.

Some form of relief is needed but this must not create an unfair playing field for insurers that obtain an AFSL.

### Section 912A General obligations

(1) A financial services licensee must [*relevant to insurers and their claims representatives*]:

(a) do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly

NIBA has no concerns with this beyond the current lack of clarity that exists for this provision.

(aa) have in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee or a representative of the licensee in the provision of financial services as part of the financial services business of the licensee or the representative

NIBA has no concerns with this.

(b) comply with the conditions on the licence

No issues unless special conditions are proposed which would need to be considered at that time.

(c) comply with the financial services laws

NIBA has no concerns with this.

(ca) take reasonable steps to ensure that its representatives comply with the financial services laws

NIBA has no concerns with this.

(d) subject to subsection (4)--have available adequate resources (including financial, technological and human resources) to provide the financial services covered by the licence and to carry out supervisory arrangements

NIBA has no concerns with this. NIBA notes that this is N/A to an APRA authorised insurer with a claims AFSL but will apply to a claims representative that obtains its own AFSL for claims services.

(e) maintain the competence to provide those financial services

NIBA has no concerns with this.

(f) ensure that its representatives are adequately trained (including by complying with section 921D), and are competent, to provide those financial services

NIBA has no concerns with this.

(g) if those financial services are provided to persons as retail clients:

- (i) have a dispute resolution system complying with subsection (2); and
- (ii) give ASIC the information specified in any instrument under subsection (2A)

NIBA has no concerns with the scenario in which an insurer acts under a claims AFSL or persons acting under that AFSL.

If a claims representative that obtains its own AFSL for claims services, it will need to have its own IDR process and join AFCA.

NIBA queries whether this could cause confusion/duplication as they act for the insurer? How would s911B(3) operate in such a case?

(h) subject to subsection (5)--have adequate risk management systems

NIBA has no concerns with this. NIBA notes that this is N/A to an APRA authorised insurer with a claims AFSL but will apply to a claims representative that obtains its own AFSL for claims services.

(j) comply with any other obligations that are prescribed by regulations made for the purposes of this paragraph.

No issues unless other obligations are proposed which would need to be considered at that time.

### **s912B Compensation arrangements if financial services provided to persons as retail clients**

NIBA has no concerns subject to insurance availability issue.

#### **Remaining sections of Division 3:**

- **912C Direction to provide a statement**
- **912CA Regulations may require information to be provided**
- **912D Obligation to notify ASIC of certain matters**
- **912E Surveillance checks by ASIC**
- **912F Obligation to cite licence number in documents,**

NIBA has no concerns with these.

#### **OTHER DIVISIONS OF PART 7.6**

The Consultation Paper focuses mainly on Division 3 but does refer to issues arising under Division 2 (Requirement to be licensed or authorised) which links to other Divisions such as Division --Australian financial services licences, Division 5--Authorised representatives, Division 6--Liability of financial services licensees for representatives, Division 8--Banning or disqualification of persons from providing financial services and so on.

The most important comment relates to “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.”

NIBA supports this approach as many of the authorised representative requirements that apply are not practical or necessary.

We provide some examples and comments below and are happy to engage further as required.

#### **Section 916A How representatives are authorised**

This requires the AFSL holder to give a written notice authorising the person, for the purposes of this Chapter, to provide a specified financial service or financial services on behalf of the AFSL holder.



NIBA notes that this would require the reissuing of new authorisations to all claims representatives when they have already been appointed to act as representative of insurers for the services. This would create unnecessary costs that could be passed to consumers for no real benefit.

### **Section 916B Sub-authorisations**

There are restrictions on the ability of authorised representatives (ARs) to sub authorise corporate ARs. This restriction is not likely to be practical in many claims situations. NIBA does not see any obvious reason for such a restriction provided there is a clear documented line of authorisation from the licensee down.

### **Section 916C Authorised representative of 2 or more licensees**

This requires cross endorsement from all AFSL holders the claims AR acts for. This would be a significant cost impost on industry and of little real value.

### **Section 916D Licensees cannot authorise other licensees and exemption for 916E Licensees acting under a binder**

Section 916D prevents an AFSL insurer appointing a claims representative that holds an AFSL without a claims authority, as its AR. An exemption applies where there is a binder.

*"s761A binder" means an authorisation given to a person by a financial services licensee who is an insurer to do either or both of the following:*

*(a) enter into contracts that are risk insurance products on behalf of the insurer as insurer; or*

*(b) deal with and settle, on behalf of the insurer, claims relating to risk insurance products against the insurer as insurer;*

*but does not include an authorisation of a kind referred to in paragraph (a) that is limited to effecting contracts of insurance by way of interim cover unless there is also in existence an authority given by the insurer to the person to enter into, on behalf of the insurer and otherwise than by way of interim cover, contracts of insurance.*

The current exception is too narrow as most claims agents won't have a binding authority. ASIC has given relief to AFSL holders that only arrange but not bind. If these sections were to apply to claims services, a carve out should be built in.

### **Section 916F Obligation to notify ASIC etc. about authorised representatives**

This requires notification to ASIC of certain ARs and would have a real cost impact on industry for little, if any, consumer benefit given the types of persons caught. The exemptions that apply to the section won't work for claims services.

### **Section 916G ASIC may give licensee information about representatives**

NIBA has no concerns with this.

### **Division 6--Liability of financial services licensees for representatives**

- **917A Application of Division**
- **917B Responsibility if representative of only one licensee**
- **917C Representatives of multiple licensees**

- **917D Exception if lack of authority is disclosed to client**
- **917E Responsibility extends to loss or damage suffered by client**
- **917F Effect of Division**

Section 917C applies where a claims agent acts for more than one AFSL holder, and its operation depends on the definition of a particular “class of financial service” which is contained in the regulations and does not work in the context of claims services. This would need to be amended to reflect the new class of financial service.

**Division 8--Banning or disqualification of persons from providing financial services**  
**Subdivision A--Banning orders**

- **920A ASIC's power to make a banning order**
- **920B What is a banning order?**
- **920C Effect of banning orders**
- **920D Variation or cancellation of banning orders**
- **920E Date of effect and publication of banning order, variation or cancellation**
- **920F Statement of reasons**
- **Subdivision B--Disqualification by the Court**
- **921A Disqualification by the Court**

NIBA has no concerns with this.

We look forward to discussing the proposed changes further and are happy to answer any queries you may have.

Yours sincerely,

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