FSC FINANCIAL SERVICES COUNCIL

Making insurance claims handling a financial service

FSC submission

10 January 2020

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1. About the Financial Services Council

The FSC is a leading peak body which sets mandatory Standards and develops policy for more than 100 member companies in Australia's largest industry sector, financial services.

Our Full Members represent Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks and licensed trustee companies. Our Supporting Members represent the professional services firms such as ICT, consulting, accounting, legal, recruitment, actuarial and research houses.

The financial services industry is responsible for investing almost $3 trillion on behalf of more than 15.6 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange, and is the fourth largest pool of managed funds in the world.

The FSC does not represent general insurers, therefore our comments in this submission relate to life insurers only.

2. Background

On 1 February 2019, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry Royal Commission (**Royal Commission**) released its Final Report wherein the Commissioner recommended:

"The handling and settlement of insurance claims, or potential insurance claims, should no longer be excluded from the definition of 'financial service'."[1]

(**Recommendation 4.8**)

In its response to the Final Report, the Government agreed with the Recommendation.[2]

On 1 March 2019, Treasury released its Consultation Paper on the implementation of Recommendation 4.8. The FSC provided a submission to this Consultation Paper in support of this implementation.

On 29 November 2019, Treasury, in response to these developments, released

(a) an Exposure Draft (**ED**) of the *Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2020 Measures)) Bill 2020*,
(b) an Explanatory Memorandum to the Bill (**EM**);
(c) an Exposure Draft of the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers) (Claims Handling and Settling Services) Regulations 2020: claims handling*; (**Regulation**), and

[1] Recommendation 4.8 of the RC's Final Report.
[2] See: https://treasury.gov.au/publication/p2019-fsrc-response

(d) an Exposure Draft Explanatory Statement (**ES**) relating to the Regulation.

(collectively, for convenience, **proposed legislation**).

3. FSC Comments

The FSC continues to wholly support Recommendation 4.8 and welcomes the opportunity to submit a response to the proposed legislation.

Our response provides suggestions and seeks clarification on the proposed legislation in line with our understanding of the policy intent. Our key points are as follows:

- We seek **clarification and certainty on the timing** that obligations would be expected to commence on 1 July 2021 for those that provide *claims handling and settling services* (**CHS services**). It is important that ASIC and industry work in a collaborative and streamlined manner during the licensing application process to ensure consumers have confidence that CHS services will be provided efficiently, honestly and fairly;
- We suggest **any persons acting in their professional capacity to provide an 'expert' opinion be excluded** from those who provide CHS services in respect of insurance products; and
- We seek clarification that **statements of a factual basis** that are designed to inform and assist the claimant be regarded as a necessary part of providing CHS services.

The successful implementation of Recommendation 4.8 will require industry to act immediately and invest significant resources in order to ensure that legislative requirements are satisfied on both an initial and ongoing basis.

We understand that ASIC will be releasing an Information Guide (**IG**) to clarify the regulatory expectations under the regime. A timely release of this IG would greatly assist industry to more effectively implement the appropriate changes. We do appreciate however that ASIC will be unable to consult fully with industry on this IG, until such time as the proposed legislation is enacted.

3.1. Application of the Financial Service

We have set out below our comments on the scope of application of the CHS service and, where applicable, its associated obligations. To give context to our comments and suggestions, we have provided a brief outline of our understanding of how the proposed new rules operate in Appendix A.

A. Scope of definition

The new financial service of handling and settling an insurance claim clearly captures all persons who are involved in a traditional claims process, except for certain activities performed by a lawyer. Importantly, the scope extends beyond what ordinarily would be considered to be CHS services or claims management in a traditional sense. Thus, an insurance fulfilment provider with delegated authority to accept or decline a claim within

a certain amount will fall within the group of people required to either hold an Australian Financial Services Licence (**AFSL**) or become an Authorised Representative (**AR**)[3].

We also note that the definition of loss assessor is drafted extremely broadly. The definition, compared with that of fulfilment providers, does not contain a requirement that a loss assessor have authority to reject a claim. We understand the policy intent of these suggestions. However, the outcome of this definition appears to be that all persons involved in assisting the insurer in their claims process would be caught by the proposed legislation. This has the potential to include persons who reasonably could be regarded as external to the substantive CHS process.

Sections 766G (1) (a), (c) and (d) proposed to be included to the *Corporations Act 2001* (**Act**) can be read as implying that any professional stating an opinion that is used to assess the potential liability under an insurance product is providing a claims handling service. Life insurers should be able to rely on the expert capabilities of specialists and service providers when considering a claim. While they may have a supporting role in the claims process, these experts, specialists and service providers are external to the insurer and hold no delegated authority to make a claims decision. An example would be a medical practitioner providing an opinion on the nature of the potential injury which itself could be the subject of an insurance claim. This scenario could equally apply to other professionals, such as physiotherapists, occupational therapists and accountants, who act in the capacity of providing an 'expert' opinion. Presumably, it is not the Government's intention for the proposed legislation to apply in such circumstances as the conduct and compliance of these professionals would already be governed by their own professional body and the associated licensing arrangements.

Further, the Consultation Paper recognises that imposing heavy compliance burdens on third parties would make existing claims handling processes more costly, with the absence of anticipated benefits for consumers. In a practical sense these obligations would also be difficult to implement and oversee, particularly in a situation where AFSL holders are responsible for the activities of a number of ARs.

The outcome if the proposed legislation did apply in this manner is likely to be a withdrawal of services by such professionals and a deterioration in the efficiency and quality of the CHS service which would be provided to the claimant. Accordingly, we suggest that any persons[4] acting in their professional capacity to provide an 'expert' opinion be excluded from those who provide CHS services. This may be appropriately addressed in either the Bill and/or the Regulation.

In addition to the treatment of professionals outlined above, we suggest the existing carve-out for lawyers be considered further:

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[3] Noting that the EM indicates that such fulfilment providers will not require a licence if insurers have delegated authority to accept or decline a claim only following natural disasters.

[4] Excluding professionals that are governed by professional organisations that directly relate to CHS services such as ALUCA

- The existing carve-out contemplates the external lawyer scenario but does not currently fit with or sufficiently exclude internal lawyers. Section 766G (2) (e) (iii) of the Act could be amended to ensure in-house lawyers are also within the lawyer exemption. The reference to professional charges, could be (for internal lawyers) a reference to remuneration as an employed lawyer. One approach may be to consider a definition of lawyer which encompasses both external and internal lawyers, i.e. in the latter case, a lawyer who is acting in a professional capacity for the insurer or an associate of the insurer.

  The draft Bill also excludes from the definition of CHS services most (but arguably not all) services provided by a lawyer (e.g. providing advice, assessing liability under an insurance contract, negotiation the settlement of a claim or dealing in a financial product on behalf of the client). It is unclear whether this exemption would capture a lawyer preparing or making an insurance claim on behalf of a client. This is not uncommon and accordingly we suggest that this be clarified in the proposed legislation as falling within the exemption.

B. Obligations

The obligations imposed on a CHS AFSL holder and ARs are wide-ranging and complex, including general disclosure and conduct obligations, with the overarching obligation to provide the CHS services efficiently, honestly and fairly.

The Bill contemplates that additional disclosure obligations are required for providing financial product advice relating to recommendations or opinions that are **not** considered reasonably necessary as part of handling and settling an insurance claim.

We note that the proposed Sub-Regulation 7.1.08AA of *Corporations Regulations 2001* states that certain types of advice will not be considered a necessary part of a CHS service and accordingly will constitute financial product advice:

(a) how an amount is to be paid to a person in settlement of a claim under an insurance product is to be structured;

(b) the management or use of an amount paid, or to be paid, to a person in settlement of a claim under an insurance product; and

(c) advice that is given in response to a claim, or potential claim, made under an insurance product and which relates to other insurance products or financial products.

This wording indicates that statements of a factual nature could potentially be caught within the scope of financial product advice, which is intended to cover personal advice.

It is established industry practice and to the claimant's benefit for the insurer to assist in the provision of information on matters including, but not limited to:

- how the benefit is calculated or the structure under which it will be paid in accordance with the terms and conditions;
- the potential eligibility to claim on other insurance products; and

- Any applicable offsets between benefits paid on multiple insurance products.

Imposing additional disclosure obligations for **factual statements** would unreasonably hinder the quality and efficiency of the CHS service provided to the claimant. We suggest all factual statements are expressly considered to be a reasonably necessary part of the CHS service. This could be achieved through including additional examples within the EM.

3.2. Effective date of commencement

We believe the proposed transitional arrangements across and within entities would, in practice, be inconsistent with the policy intent. We suggest the following principles be considered so that consumers and industry benefit from a fail-safe implementation process:

- *Entities should be given consistency and certainty on the date from which obligations would be expected to commence*

  The proposed legislation appears to suggest that obligations commence once an entities' application is approved by ASIC, expected to be no later than 30 June 2021. This seems to suggest that ASIC approval may be granted prior to 30 June 2021. As a consequence, entities would be disincentivised from submission of their application any date prior to 31 December 2020 as they potentially risk having their relevant licensee obligations commence prior to all staff fully completing training.

  Linking the date of commencement of obligations to the ASIC approval date also introduces a key dependency risk on the licensing application process. We understand that the processing time for licence variations is currently 6-12 months. We estimate that approximately 50 life and general insurers will apply for licence variations, in addition to an unknown number of claims handling service providers. Any delays in the approvals of licence variations after 30 June 2021 would create confusion for the licensee over the nature of their obligations when continuing to provide the CHS service. This could detriment consumers who are in the process of having their claims handled and settled. The FSC calls on the Government to ensure that ASIC is appropriately resourced to manage this unprecedented workload.

  To further manage this workload, a streamlined license variation process should be considered for existing licensees who are insurers or who currently hold an AFSL authorising them to deal in, or provide financial product advice, in respect of life insurance products. The process would result in the additional license class being added to the AFS licensee where the licensee lodges an application supported by prescribed declarations. There is precedent for this approach in Section 1433 of the Corporations Act, which operated to facilitate the transition to the new AFS license regime in 2004.

- *Obligations should apply in whole to an entity or an entity group*

We understand that the intent of the legislation is for all general obligations associated with the removal of the claims handling exemption (e.g. efficient, honest and fair which will become a civil penalty) will apply in whole at a certain date (rather than staggered over a transition period). This is necessary as a claims handling authorisation also requires the licensee to meet all AFSL related obligations (including section 912A licensee obligations) and such obligations need to be embedded in the licensee's policies, procedures, training and on-boarding requirements for all relevant staff. There is an additional layer of complexity for the roll-out of training for insurers who are required to apply for multiple licences due to their corporate structure.

We suggest further clarity be included within the legislation to make clear that all obligations (under the new claims handling financial service regime) would apply on 1 July 2021 irrespective of early issue of licences or technical delays in the licensing process, provided the applicant lodges the licence application or variation with ASIC by 31 December 2020.

It is also important that the licensing of applications be a streamlined, iterative and collaborative process to ensure CHS services can continue to be processed smoothly in the event of any possible delays in the licensing process i.e. illness, fires and car crashes don't stop because of licencing rules, processes, backlogs and issues.

3.3. Treatment of Superannuation Trustees

We understand that the regulation of claims handling by Registrable Superannuation Entity (**RSE**) licensees will be addressed as part of the Government's response to the Financial Services Royal Commission recommendations related to superannuation regulators. Consultation on that legislation will take place in early 2020. This legislation needs to be consistent with the proposed legislation. If it is not, there is a significant risk that there would be inconsistencies in the legislative requirements between the application of insurance claims within and outside a superannuation structure. This would cause complexity for both insurers and the claimant. However, we note that neither the Bill nor the Regulation contain any specific reference to or exclusion of superannuation trustees. Further, the current wording is broad enough to capture superannuation trustees within the legislation.

We note that RSE Licensees are already subject to numerous SIS Act covenants (and fiduciary obligations) including ensuring that insurance benefits made available are in the best interest of members, do not inappropriately erode retirement savings and the obligation 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.

We **suggest** that wording in the final legislation clarify that RSE licensees are wholly excluded from the proposed legislation. Further, this exclusion should also clarify that the activities of the administrator, which has been appointed by the trustee, would be addressed as part of the regulation for RSE licensees.

Appendix A: Outline of the Proposed Rules

To give context to our comments and suggestions, the following is a brief outline of our understanding of how the proposed new rules will operate.

(a) The handling and settling of an insurance claim will be characterised as a 'financial service'. Thus, insurers, loss assessors, insurance claims managers, insurance brokers and others who provide CHS services in respect of insurance products will be required to hold an Australian Financial Services Licence (AFSL) covering such services or otherwise become an Authorised Representative (AR) of an AFSL;

(b) There is to be a modification in the case of CHS services of the general conduct and disclosure obligations. It is proposed that the obligation to provide a Financial Services Guide will not apply if CHS services are the only financial services provided. Nevertheless, there is to be an obligation for general insurers to provide a Statement of Claims Settlement if a cash settlement offer is made. Importantly, recommendations or opinions that are reasonably necessary as part of the handling and settlement of an insurance claim will not constitute financial product advice under the Corporations Act 2001 (Act);

(c) In addition, the general obligation under Section 912A of the Act to provide the relevant CHS services efficiently, fairly and honestly applies; and

(d) The proposed legislation applies to general insurance products, life risk insurance products, and investment life insurance products. The proposed changes do not apply to handling and settlement of claims under contracts of insurance that are not 'financial products'.

The proposed legislation provides that a person will be taken to provide a CHS service if they:

(a) make a recommendation or state an opinion in response to an inquiry about a potential insurance claim that could reasonably be expected to influence a decision whether to make an insurance claim;

(b) assist another person to make an insurance claim;

(c) assess whether an insurer is liable under an insurance product;

(d) make a decision to accept or reject all or part of an insurance claim;

(e) quantify an insurer's liability under an insurance product;

(f) offer to settle all or part of an insurance claim; or

(g) satisfy a liability of an insurer under an insurance claim.

We note that the rules will apply under the proposed legislation where a relevant CHS service is provided to a third-party beneficiary under an insurance contract.

We also note that the effect of the definition is to extend the scope of the CHS service, subject to exceptions, **beyond solely the decision-making aspects** of the claims management process.

However, the provision of a CHS service does not automatically require the provider to obtain an AFSL with appropriate authorisation or become an AR of an AFSL holder. The proposed legislation envisages that only the following people handling and settling an insurance claim will be required to have an AFSL Licence with the requisite authorisation or become an AR:

(a) the insurer who issued the insurance product;

(b) a loss assessor or loss adjustor acting on behalf of an insurer (defined so as to include those who investigate the **validity of a claim** and those who assess the **insurer's liability** for such a claim); and

(c) an insurance fulfilment provider who has authority to reject all or part of a claim (this is defined to include those who carry on the business of providing goods or services to claimants in satisfaction of the insurer's liability e.g. smash repairers or builders);

(d) an insurance claims manager (broadly defined as those who carry on a business of handling and settling claims for one more insurers);

(e) an insurance broker who handles an insurance claim on behalf of the insurer; and

(f) a person who provides financial advice to a claimant and also handles and settles an insurance claim on behalf of the insurer.

There is an exemption provided from the AFSL requirements for product issuers who provide CHS services to wholesale customers under an arrangement between the issuer and an AFSL Licensee.

It is proposed the new regime will commence on 1 July 2020 and apply to claims or a potential insurance claims that occur after 1 July 2020 under an existing insurance product. However, entities will be given a transitional period allowing them to perform CHS services without an AFSL while they make the necessary arrangements up until 31 December 2020. This may be extended to no later than 30 June 2021 where a licence application has been lodged by 31 December 2020.