



Australian Government  
The Treasury

**TSY/AU**

# Insurance Claims Handling

Taking action on recommendation 4.8 of the  
Banking, Superannuation & Financial Services  
Royal Commission

Consultation paper

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# Consultation Process

## Request for feedback and comments

Interested parties are invited to comment on this consultation paper. While submissions may be lodged electronically or by post, electronic lodgement is preferred. For accessibility reasons, please submit responses sent via email in a Word or RTF format. An additional PDF version may also be submitted. All information (including name and address details) contained in submissions will be made available to the public on the Treasury website unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails are not sufficient for this purpose. If you would like only part of your submission to remain confidential, please provide this information clearly marked as such in a separate attachment.

Closing date for submissions: 29 March 2019

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# Introduction

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry made a number of recommendations relating to the insurance industry in its Final Report published on 4 February 2019. One of these recommendations, Recommendation 4.8, was that the “handling and settlement of insurance claims, or potential insurance claims, should no longer be excluded from the definition of ‘financial service’”. This relates to claims for both life and general insurance products.

The Government response to the Royal Commission on 4 February 2019, *Restoring trust in Australia’s financial system*, agreed to action the recommendation.

Currently, the exclusion arises in two ways. Firstly, many claims handling activities do not fall within the current definition of providing a ‘financial service’. Secondly, and more obviously, even where they do fall within the definition, Regulation 7.1.33 of the *Corporations Regulations 2001* (Corporations Regulations) expressly excludes these activities from the definition.

The Royal Commission found that there was no basis in principle for the exclusion to continue, and that insurance claims handling is as much the provision of a financial service as any other financial service.

The need for this reform was demonstrated through a number of case studies examined in the Royal Commission’s sixth round of hearings that concerned insurance. Because claims handling is currently excluded, the Australian Securities and Investments Commission (ASIC) is limited in the regulatory interventions it can take. Furthermore, the Final Report indicated that insurers should be obliged to handle claims efficiently, honestly and fairly.<sup>1</sup>

This issue has also been reviewed in the March 2018 Joint Parliamentary Committee on Corporations and Financial Services. The Committee recommended that the Government review Regulation 7.1.33 to ascertain whether the current exemption limits ASIC’s oversight of the claims handling processes of insurance companies.<sup>2</sup>

In October 2016, ASIC also conducted a review into claims handling practices in the life insurance industry following media claims of the mishandling of life insurance claims by CommInsure.<sup>3</sup> ASIC’s subsequent report recommended that ASIC’s oversight of insurance claims handling should be enhanced by removing Regulation 7.1.33.<sup>4</sup>

This Consultation Paper discusses the removal of the insurance claims handling exclusion, how to bring claims handling into the definition of ‘financial service’ and subject to oversight by ASIC, and seeks feedback on the options and ramifications of doing so.

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

2 Joint Parliamentary Committee on Corporations and Financial Services March 2018, Life Insurance Industry report [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Corporations\\_and\\_Financial\\_Services/LifeInsurance/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/LifeInsurance/Report)

3 Australian Securities and Investments Commission, Report 498: Life Insurance Claims: An Industry Review, <http://asic.gov.au/regulatory-resources/find-a-document/reports/rep-498-life-insurance-claims-an-industry-review/>

<sup>4</sup> Ibid.

## Existing regulatory framework

ASIC plays a key role in the oversight of both the life and general insurance sectors. Broadly, ASIC is responsible for licensing, conduct, product distribution, product disclosure and marketing, and dispute resolution in the insurance industry.

The regulatory framework for ASIC's oversight role is largely provided by Chapter 7 of the *Corporations Act 2001* (Corporations Act).<sup>5</sup> However, at the moment insurance claims handling largely falls outside of this framework as:

- Many of the activities undertaken in relation to insurance claims handling would not fall within the current definition of providing a 'financial service' under the Corporations Act; and
- Those activities carried on in the course of handling an insurance claim that would normally be considered a financial service are in effect excluded by Regulation 7.1.33 of the Corporations Regulations.

Regulation 7.1.33 states that a person is not taken to be providing financial advice or dealing in an insurance product (as defined in the Corporations Act), where these actions are taken in the course of and is a necessary or incidental part of:

- Handling of a claim or potential claim in relation to an insurance product; and
- The settlement of a claim or potential claim in relation to an insurance product.

Providing financial advice and dealing in an insurance product are otherwise regulated as providing a 'financial service' under the Corporations Act.

Regulation 7.1.33 also provides a number of examples of services to which the exemption applies, including:

- Negotiations on settlement amounts;
- Interpretation of relevant policy provisions;
- Estimates of loss or damage;
- Estimate of value or appropriate repair;
- Recommendations on mitigation of loss;
- Recommendations, in the course of handling a claim, on increases in limits or different cover options to protect against the same loss in the future; and
- Claims strategy such as the making of claims under alternate policies.

Outside the Corporations Act, both insurers and insureds are subject to the duty of "utmost good faith" in the *Insurance Contracts Act 1984* (IC Act). This applies to an insurer managing, administering and processing claims.

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<sup>5</sup> ASIC currently uses its jurisdiction under the consumer protection powers in Division 2 of Part 2 of the *Australian Securities and Investments Act 2001* (ASIC Act) to exercise some regulatory oversight of insurance claims handling conduct. However, these powers have limits and do not help to address poor consumer outcomes resulting from conduct that is not a financial service (for example, unreasonable investigations and failure to make a decision in a timely way). It also does not assist where the conduct is not clearly a breach of the ASIC Act provisions, but may otherwise be contrary to the general obligations.

ASIC has the power to issue banning orders or to vary, suspend or revoke an insurer's licence if an insurer breaches the duty of utmost good faith in handling claims. Following the recent passage of the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018*, civil penalties also now apply to the breach of this duty.

Finally, while the issue of claims handling procedures and timeframes is addressed in the insurance industry codes of conduct (including the new Life Insurance Code of Practice) and will hopefully assist consumers in the immediate future,<sup>6</sup> this is separate to ASIC having sufficient power to take action on claims handling conduct. It is important for ASIC to have a clear mandate over these activities and have the regulatory tools necessary to adequately supervise claims handling.

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6 See the Financial Services Council's Life Insurance Code of Practice (<https://www.fsc.org.au/policy/life-insurance/code-of-practice/>) and the Insurance Council of Australia's General Insurance Code of Practice (<http://codeofpractice.com.au/>).

# Current Issue

## Claims handling is the provision of a financial service

Recommendation 4.8 of the Royal Commission’s Final Report, that insurance claims handling should not be excluded from the definition of ‘financial services’, reflected issues arising from a number of case studies examined in the sixth round of hearings.

The Final Report made clear that the underlying rationale for the recommendation was that “[claims handling] is as much the provision of a financial service as any other financial service”.<sup>7</sup>

There were several areas of concern regarding claims handling that were identified by the Royal Commission, relating to declined claims rates and claim handling procedures for policies, insurers and consumer disputes.

In general insurance, this was demonstrated by the Youi and AAI case studies, which related to the handling of home insurance claims following natural disasters or severe weather events. In particular, poor conduct included:

- Failing to handle claims in a fair and transparent manner, failing to act in an efficient, professional and practical manner, and breaching the insurer’s duty of utmost good faith;<sup>8</sup>
- Delays in claims that resulted in consumer detriment. The cause of the insurer’s poor conduct was “was largely attributed to its internal systems and processes for handling claims and dispute arising from those claims”.<sup>9</sup>

In the life insurance context, the Royal Commission examined CommInsure and TAL case studies and identified numerous occasions where these insurers breached their duty of utmost good faith.

Further, the Commissioner highlighted several instances where insurers fell below community standards and expectations, these included:<sup>10</sup>

- Implementing an inadequate system to train case managers and inadequate systems to oversee the actions of case managers; and
- A lack of robust systems to avoid potential conflicts of interest; and
- A failure to have adequate systems in place to ensure that its Internal Dispute Office conducted a robust analysis of declined claims, in a way that was independent of the claims team; and
- A failure to engage with external dispute resolution in a frank and cooperative way.<sup>11</sup>

For these reasons, the Royal Commission took the view that ASIC’s regulatory oversight of claims handling should be enhanced. As ASIC said in its submission to the Royal Commission, “the intrinsic value of an insurance product lies in the ability to make a successful claim when an insured event occurs”.<sup>12</sup> As insurance claims are also often made in periods of financial or personal distress for retail clients, poor outcomes during the claims process can have a heightened impact on individuals.

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

8 Ibid., Volume 2, pg 416

9 Ibid., Volume 2, pg 455

10 Ibid., Volume 2, pg 347-349

11 Ibid., Volume 2, pg 349

12 Australian Securities and Investment Commission, Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry – Insurance Hearings (25 October 2018), pg 27



Furthermore, it is counterintuitive to identify the performance of contractual obligations under a contract of insurance as not providing a financial service which is subject to the high-level conduct principles in the Corporations Act. These principles 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 (for example, subsections 912A(a), (aa) and (ca) of the Corporations Act). For insurance products in particular, post-contractual obligations are critical, and ensuring fair and timely claims handling and settling are central to ensuring appropriate consumer outcomes.

## Stakeholder views

The submissions to sixth round of hearings demonstrated there was broad based support for removing insurance claims handling exclusion.

The Consumer Action Law Centre’s (CALC) submission strongly supported the application of the requirements of section 912A Corporations Act to insurance claims handling. CALC indicated that current claims handling practices of insurers would not meet the general obligations of Australian Financial Services Licence (AFSL) holders, including:

- Significant problems with compelling medical information for claims handling that are not relevant to the claimed condition, and surveillance of claimants with mental illness;
- Claims delays and very poor dealings with consumers highlighted by the CommInsure, TAL, AAI and Youi case studies, which point to a failure to provide a financial service ‘honestly, efficiently and fairly’;
- Claims teams being responsible for resolving claims, but also having KPIs relating to the time in which claims should be resolved, irrespective of the claims outcomes, which could mean the arrangements for managing conflicts of interest in claims handling are inadequate.<sup>13</sup>

The Financial Rights Legal Centre (FRLC) were in support of ASIC having jurisdiction in respect of the handling and settlement of insurance claims for the following reasons:

- Although the “duty of utmost good faith” applies to claims handling, the nature of the duty is that it is applied on an individual/case-by-case basis and cannot be applied widely or in a systemic manner. ASIC is restricted by the current legal framework, to taking on case after case to address claims handling issues.
- The only regulation of claims handling is through the two self-regulatory insurance Codes of Practice. These have been self-evidently ineffective at protecting consumers. Code monitoring bodies do not have the resources or remedies available to effectively monitor and impose penalties when insurers fail on a systemic basis to deal with clients honestly and fairly.<sup>14</sup>

Insurance industry stakeholders such as Westpac Banking Corporation also supported ASIC having regulatory oversight of insurance claims handling. However it raised concern that the removal of the exemption in Regulation 7.1.33 “may inadvertently lead to claims handling staff being deemed to be providing personal financial advice to customers in the ordinary course of handling an insurance claim (which Westpac understands was the reason for Regulation 7.1.33 being implemented)”.<sup>15</sup>

Similarly the Insurance Council of Australia’s (ICA) submission outlined that “we [ICA] are not in-principle opposed to extending the general obligations under section 912A to claims handling. However, 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...”<sup>16</sup>

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13 Consumer Action Law Centre, Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry – Insurance Hearings (25 October 2018), pg 3 and 24

14 Financial Rights Legal Centre, Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry – Insurance Hearings (25 October 2018), pg 18-19

15 Westpac Banking Corporation, Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry – Insurance Hearings (25 October 2018), pg 16

16 Insurance Council of Australia, Submission to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry – Insurance Hearings (25 October 2018), pg 20

Removing the exclusion of insurance claims handling from the definition of 'financial service' should take into account all stakeholder concerns, both maximising consumer protection and minimising any unintended consequences of the reform.

# Proposal

In implementing the Royal Commission's Recommendation 4.8, Treasury proposes a two-pronged approach:

1. Remove Regulation 7.1.33; 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. The definition could be enacted in primary legislation or regulations using a variety of provisions.

## 1. Removing Regulation 7.1.33

In implementing the Royal Commission's Recommendation 4.8, Treasury proposes to amend the Corporations Regulations by removing Regulation 7.1.33. This will remove the insurance claims handling exemption completely.

However, Treasury identifies two main issues with only removing Regulation 7.1.33.

Firstly, many of the activities carried on by an insurer in relation to claims handling are unlikely to meet the current definitions of providing a financial service. This is likely to create uncertainty as to which activities are or are not regulated, as well as significantly limiting ASIC's ability to increase its regulatory oversight of claims handling.

Secondly, removal of the exemption would trigger a number of requirements under the Corporations Act that would apply to AFS licensees where they provide financial advice in the course of handling or settling an insurance claim. The requirements that could apply differ depending on the type of advice provided (general versus personal) and the insurance product. Examples of requirements that could apply include:

- general obligations on an AFS licensee that apply to the financial services that it provides;
- providing a Financial Services Guide;
- general advice warnings;
- conduct obligations (which apply to the provision of personal advice to retail clients);
- conflicted remuneration;
- providing a Statement of Advice when providing personal advice to retail clients; and
- training obligations.

While the application of some of these requirements is clearly part of achieving the broader consumer protection objective, some requirements could be difficult to apply or could impose a heavy compliance burden on either insurers or third parties who may be involved in insurance claims handling, the cost of which would ultimately fall on consumers but without providing significant benefits to them.

For example, imposing training requirements in relation to providing advice, especially in relation to tier 1 products (which will rise further with the commencement of professional standards requirements) could be particularly onerous for claims managers, who have far narrower roles compared to financial advisers.

## 2. Make ‘handling and settling an insurance claim’ a new financial service

To address these concerns, existing legislative powers could be used to define the activity of handling or settling an insurance claim (in relation to both life and general insurance products) as a ‘financial service’ for the purposes of the Corporations Act. The definition could be enacted in primary legislation or regulations.

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.<sup>17</sup>

The benefit of extending the definition of ‘financial services’ to include claims handling activities is that it brings these within high-level conduct obligations as well as improving ASIC’s regulatory oversight, without imposing requirements that are not specifically tailored to these activities (such as those applying to advising or dealing).<sup>18</sup>

On this basis, it is envisaged that the key requirements that would apply to this financial service would be Division 3, Part 7.6 of the Corporations Act. This is consistent with the view of the Royal Commission, that “there can be no basis in principle or in practice to say that obliging an insurer to handle claims efficiently, honestly and fairly is to impose on the individual insurer, or the industry more generally, a burden it should not bear. If it were to be said that it would place an extra burden of cost on one or more insurers or on the industry generally, the argument would itself be the most powerful demonstration of the need to impose the obligation”.<sup>19</sup>

Particularly, the applications of general obligations under section 912A to all claims handling conduct engaged in on behalf of insurers would improve consumer outcomes, for example by:

- Ensuring that AFS licensees are required to act efficiently, honestly and fairly when handling an insurance claim, potentially enabling ASIC to take action to address systemic misconduct such as delaying decisions on claims;
- Requiring AFS licensees to have adequate measures in place to manage conflicts between representatives’ own interests in refusing claims, and legal obligations owed to clients (including obligations under s912A, the contract terms or industry Codes of Conduct); and
- Requiring AFS licensees to adequately supervise claims handling conduct engaged in by their representatives and ensure that representatives are adequately trained and competent to engage in those services.

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17 Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Vol 1, pg 308, <https://financialservices.royalcommission.gov.au/Pages/reports.aspx>

18 The *Australian Securities and Investments Act 2001* (ASIC Act), in particular section 12BAB, should be amended to include the new definition of ‘insurance claims handling activities’ as a ‘financial service’. This amendment will enable ASIC to utilise its powers in the ASIC Act to address poor consumer outcomes resulting from conduct that is an ‘insurance claims handling activity’ and constitutes a ‘financial service’.

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

This proposal would also improve ASIC's toolkit in relation to claims handling, for example by improving ASIC's ability to request information, receive notifications on key matters, and ability to undertake surveillance.

If insurance claims handling was brought within the Corporations Act definition of 'financial service', ASIC could apply a licence condition, or suspend or cancel a licence, if an insurer breached section 912A obligations when undertaking claims handling.

In addition to these penalties, the recent passage of the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018* increases penalties which would apply to insurance claims handling once defined as a 'financial service'. These include:

- Civil penalties for a breach of some of the section 912A obligations;
- Enabling courts to make relinquishment orders to prevent unjust enrichment associated with the breach of a civil penalty provision; and
- New civil penalties and increased criminal penalties for breach of the requirement under section 912D of the Corporations Act to notify ASIC of a breach of a section 912A.

One option which could provide certainty in relation to the provision of financial advice in insurance claims handling processes, is that the Corporations Regulations specify that documents that are given to a consumer as part of the new financial service, in certain circumstances, do not constitute financial product advice.

Subsection 766B(1) of the Corporations Act defines what constitutes "financial product advice", and subsection 766B(1A) excludes "exempt documents or statements" from this definition. The Corporations Regulations could prescribe documents or statements which are "exempt documents or statements", to include certain documents or statements given to consumers in the provision of claims handling services.<sup>20</sup>

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<sup>20</sup> *Corporations Act 2001*, subsection 766B(9)

## Scope of proposal

While the proposal allows for a more tailored application of requirements, it does raise a number of issues, including:

- Who would be covered under the definition of ‘handling or settling insurance claims’, in particular whether this would apply to superannuation trustees;
- The impact of this new financial service on the licensing framework; and
- Whether it should apply to all insurance claims or only services provided to retail clients.

### Who would be covered?

Given the scope of the proposed new financial service, it is expected that the following persons would be covered:

- Insurers that provide a claims handling service. This would include 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;
- Certain third party representatives of insurers that provide a claims handling service on behalf of the insurer. It is likely that third party representatives (which could be identified using a title such as ‘claims handling service providers’) would need to include service providers such as investigators, loss adjustors, loss assessors, collection agents and claims management services; and
- Other persons that ASIC declares are included. This would give ASIC the power to include other entities if problematic conduct is identified in the future.

One issue that requires further consideration, and that was not raised by the Royal Commission, is the extent to which this approach excludes entities such as trustees of superannuation fund who play a key role in claims handling. Trustees of superannuation funds have an obligation to do all that is reasonable to pursue insurance claims with reasonable prospects of success for beneficiaries. As part of this role, trustees engage in activities (such as overseeing the progress of claims and reviewing insurers’ decisions) that could reasonably be considered to be handling and settling insurance claims, although they are not acting on an insurer’s behalf.

### Impact on the licensing framework

The introduction of a new financial service could impact the AFS licensing framework, including:

- Requiring existing AFS licences to be varied;
- Requiring AFS licensees to vary existing authorisations given to their approved representatives (which could also trigger certain notification requirements); and
- Whether persons not currently subject to AFS licensing requirements may be required to comply with them.

As previously stated, a key objective is to enhance ASIC’s ability to regulate claims handling activities while minimising compliance costs. On this basis, consideration could be given as to whether existing mechanisms in the Corporations Act could mitigate the impacts of this option on licensing requirements, including:

- Whether section 926B of the Corporations Act could provide a mechanism that would allow claims handling to be included under the current authorisations held by AFS licensee;

- Restricting the financial service to where a person is acting on behalf of an insurer (or an intermediary acting on behalf of an insurer). This means that certain persons who contribute to assessments, such as medical practitioners, are unlikely to be acting in the capacity of a representative of the insurer; and
- Whether a new category of person could be created that is entitled to engage in specified financial services in a representative capacity without being an authorised representative.

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 section 911A(2)(b) of the Corporations Act. Consideration will be given to the number of insurers operating under this exemption, and how those insurers manage their claims handling processes.

### Application to insurance products

Consistent with the recommendation of the Royal Commission, the proposal will apply to all insurance products including general insurance products, life risk products and investment life insurance products and group life insurance products.

### Application to retail clients

The issues identified by the Royal Commission and ASIC on the handling and settling of insurance claims have generally related to retail clients. An option would be to limit the definition of claims handling activity to services provided to retail clients.

However, consideration would need to be given to whether the definition of retail client in relation to general insurance products (which, under section 761G(5) of the Corporations Act, is restricted to specified kinds of general insurance product) would result in claims handling conduct requirements not applying to a significant number of policies commonly acquired by individuals or small businesses.



## Consultation questions

1. Are there additional issues that have not been identified? If so, are there potential options for addressing them within the proposal?
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)?
3. Are there any obligations, besides the existing AFS licencing obligations, that would provide further useful consumer protections in respect claims handling activities and so should also apply to them?
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?
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?