THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: BLC:EElb1655290

29 March 2019

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

By email: claimshandling@treasury.gov.au

Dear Sir/Madam,

Insurance Claims Handling

The Law Society of NSW appreciates the opportunity to comment on the consultation paper "Insurance Claims Handling: Taking action on recommendation 4.8 of the Banking, Superannuation & Financial Services Royal Commission". The Law Society's Business Law Committee contributed to this submission.

We support the Treasury's proposed two-pronged approach in implementing recommendation 4.8 of the Royal Commission's Final Report.[1] We agree that, in the case of insurance products, post-contractual obligations are critical, and ensuring fair and timely claims handling and settling are central to ensuring appropriate consumer outcomes.

We note that there are a number of other initiatives being progressed to address the issues identified in the Royal Commission's Final Report, such as extending the unfair contract term provisions to contracts of insurance. The Government has also agreed to the recommendation to provide the Australian Securities and Investments Commission ("ASIC") with additional powers to approve and enforce financial sector code provisions.[2] We support these measures which together with the current proposal will improve consumer outcomes.

Our responses to the questions in the consultation paper are set out below.

1. **Are there additional issues that have not been identified? If so, are there potential options for addressing them within the proposal?**

We consider that the consultation paper identifies the relevant issues.

Under the proposed two-pronged approach, Regulation 7.1.33 of the *Corporations Regulations 2001* would be removed and the general obligations under section 912A of the

[1] Commonwealth, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, *Final Report* (2019) Vol 1, https://financialservices.royalcommission.gov.au/Pages/reports.aspx#final

[2] Commonwealth Government, *Restoring Trust in Australia's Financial System*, February 2019, 11. https://treasury.gov.au/publication/p2019-fsrc-response

Corporations Act 2001 ("Act") extended to claims handling. This would be effected by inserting a definition of the activity of claims handling as a 'financial service' for the purposes of the Act. The key requirements that would apply to this financial service are the obligations under Division 3, Part 7.6 of the Act.

This approach, subject to the terms of the new legislative provisions, appears to avoid the problems that would be caused by inadvertently extending the licensing and financial advice rules to claims handling.

We support the consumer protection provisions being extended to both retail and wholesale clients and see no reason, in principle, to differentiate between them for this purpose.

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)?

Compliance costs may increase if the proposal is enacted. This is a matter for commentary by other industry stakeholders.

3. Are there any obligations, besides the existing AFS licencing obligations, that would provide further useful consumer protections in respect of claims handling activities and so should also apply to them?

No. We consider that, in general, the obligations under section 912A of the Act are very wide, especially the obligation to act "efficiently, honestly and fairly" in section 912A(1)(a), which the courts have interpreted broadly.[3]

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?

We consider that for the purpose of defining the activity of handling or settling an insurance claim, there is no relevant difference between life and general insurance products. The difference in the nature of the product does not affect the insurer's obligations of utmost good faith under sections 13 and 14 of the *Insurance Contracts Act 1984* or under section 912A of the Act.

The activity should focus on acts or omissions by insurers or their representatives. The Act already defines "representatives" widely in section 910A and makes the appointor liable for them under section 917B.

However, care needs to be taken in deciding whether every activity carried out by each outsourced contractor in its part of the claims handling chain should constitute a "financial service". For example, if a glass supplier gets a "straight-through" claim referred to it by an insurer, which enables the supplier to simply organise glass replacement with the insured where the value is within the insurer's authorised limit (as between the insurer and the supplier), we do not consider that the act of supplying glass as part of claims fulfilment should be a financial service.

By way of contrast, we would expect that the actions currently regulated under the industry codes and the types of conduct set out in the first four bullet points listed on page 10 of the consultation paper would be included in any definition of handling or settling an insurance

[3] See, for example, *Australian Securities and Investments Commission v Westpac Securities Administration Limited, in the matter of Westpac Securities Administration Limited* [2018] FCA 2078.

claim as a "financial service". We agree that it is crucial to provide this definition, if Regulation 7.1.33 is removed, to avoid triggering unintended obligations on a wide range of claims handling participants.

We agree that ASIC should have power by regulation to amend the definition of handling or settling an insurance claim as a 'financial service' to allow for changes such as, for example, advances in technology, or if problematic conduct is identified in the future. Any such changes should be the subject of broad consultation with industry and other stakeholders, however.

We also agree that it may be necessary as a result for existing Australian financial services licences to be varied to include insurance claims handling as a new financial service.

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 as other financial services?

The penalties applying to insurers for breaching the general obligations of section 912A have recently been substantially increased by the *Treasury Laws Amendment (Strengthening Corporate and Financial Penalties) Act 2019.* We consider that the penalties attaching to insurance handling should be the same as for other financial services.

These penalties plus contractual and statutory protections for the insured (such as section 54 of the *Insurance Contracts Act 1984*), in our view, provide the appropriate level of consumer protection.

If you have any questions about this submission, please contact Liza Booth, Principal Policy Lawyer, at liza.booth@lawsociety.com.au or on (02) 9926 0202.

Yours faithfully,

Elizabeth Espinosa,
President