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Insurance Claims Handling

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

Submission by MDA National Limited & MDA National Insurance Pty Ltd

MDA National Limited (MDAN) is a nationally operating mutual of medical practitioners and students with a primary purpose of supporting and protecting its Members in their practice and study of medicine. MDA National Insurance Pty Ltd (MDANI) is a wholly owned subsidiary of MDAN and as an authorised general insurer offers medical indemnity insurance solely to medical and dental practitioners and students and healthcare practices.

MDAN and MDANI thank Treasury for giving stakeholders the opportunity to comment on the consultation paper on Insurance Claims Handling which follows Recommendation 4.8 of the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry in proposing that the handling and settlement of insurance claims not be excluded from the definition of Financial Service for the purposes of regulation under the Corporations Act.

We agree with ASIC's commentary in its submission to the Royal Commission that "the intrinsic value of an insurance product lies in the ability to make a successful claim when an insured event occurs". We also accept that it is appropriate for insurers to act efficiently honestly and fairly in fulfilling their obligations under an insurance policy.

This submission does not comment on the proposal as it relates to general insurance as a whole but seeks only to explain the specific concerns we have regarding the proposal in the context of medical indemnity insurance and why we do not support removing the exclusion of claims handling from the definition of financial service in the medical indemnity setting.

BACKGROUND

Medical Indemnity Insurance

The Royal Commission case studies relating to general insurance were in the main related to retail insurance products. Medical indemnity insurance is a retail product but differs from other products in this category in a number of material aspects not least of which being that it is already subject to a suite of regulation designed to protect the interests of health practitioners and which is currently under government review.

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Typically, medical indemnity policies at their core provide cover for civil liability for third party claims but also include varied covers to support the practice of the relevant healthcare professional. Among these other covers is likely to be indemnity for defence / response costs of investigations and inquiries by regulators such as AHPRA, complaint bodies, professional associations or hospitals relating to the insured's clinical practice.

Cover for medical malpractice claims is amongst the most long tail of all insurance covers. Claims may be notified to the insurer years, and in rare cases, decades after the alleged incident or course of treatment. Following notification resolution of the third party claim and hence the underlying insurance claim may also take several years.

Coverage for the costs of investigations and inquiries while on average will be resolved in a shorter period may also involve lengthy periods before the claim under the policy is finalised.

Claims handling in these circumstances can be very complex involving both internal and external resources and expertise.

Definition of a Financial Service

The following extracts from the Consultation paper suggest a broad brush approach to what conduct might be regulated as a financial service and who may fall within the regulatory scope as a representative of the insurer in that context.

“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”*

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

- *...*
- *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; ... “

Decisions relating to cover and interpretation of policy wording aside, the application to medical indemnity of a number of other concepts set out above is potentially complex. As an example, “estimates of loss or damage” are very unlikely to be contemporaneous with a decision to accept a claim under the policy. Estimates may also vary substantially over a number of years as the understanding of the merits and prospects of success of a third party claim or the speed of an investigatory process develops and alternatives for resolution are examined.

Similarly, “negotiations in respect of settlement amounts” are more likely to be conducted with a third party than with the insured.

If either of these concepts were to be regulated as a financial service and directly applied to medical indemnity the representatives of the insurer may include for example specialists opining on clinical standard of care, lawyers managing the defence or settlement of the third party claim and investigators reviewing the third party claimant. If the work undertaken by any of these were to be regulated claims handling the boundary between clinical, legal and other professional service and advice and financial service and advice may become blurred.

Group Services

As part of a mutual group the management of a claim by MDANI may be part of a continuum of services which are provided to insureds as Members of MDAN but which are not covered by insurance. These may include medico-legal advice, risk management services, education and peer support. If these services are interlinked with claims handling an even broader range of activities and people may be inadvertently drawn into financial services regulation.

OUR SUBMISSION

1. We accept that enhanced regulation of claims handling is indicated by the findings of the Royal Commission. We accept that claims handling by all insurers should be conducted efficiently, honestly and fairly, that effective processes for managing conflicts of interest should be in place and that complaints should be managed appropriately and cooperatively with AFCA
2. We do not however support removing the exemption for claims handling as a financial service in the medical indemnity setting for the following reasons.
 - a. Medical Indemnity insurance is already highly regulated in Australia with the Medical Indemnity Act 2002 (Cth) and Medical Indemnity (Prudential Supervision and Product Standards) Act 2003 (Cth) being the primary legislation. For insurers who provide access to certain government schemes further contractual obligations are in place to ensure access to cover for medical practitioners. A significant review of regulation and of government support schemes is currently underway with a new suite of legislation and regulation expected to be introduced this year. The interaction of this revised regulation with the current proposal is unclear and we would prefer that implementation of the proposal is delayed until that interaction can be examined.
 - b. Regulation of claims handling under the Corporations Act as a financial service would create a significant compliance burden on MDANI particularly if professionals involved in the management or investigation of third party claims or investigations were deemed to be our representatives for the purposes of the Act and subject to licensing and advice requirements. While distribution and dealing in medical indemnity products is not dissimilar to other retail insurance products claims handling is less able to be directly compared.
 - c. Claims handling in a medical indemnity setting is multi-faceted and may take place over a long period of time and the approach may differ significantly between individual claims. It is unlikely that benchmark timeframes or methodologies could be used to easily assist assessment for compliance purposes.

- d. A broad definition of claims handling may see a disconnection with, or discontinuation of, other services designed to support and protect insured consumers outside of policy coverage.
 - e. Medical indemnity has been recognised as differing from other retail insurance products in certain circumstances as demonstrated by Treasury's agreement to exclude medical indemnity insurance from application of proposed general insurance product design and distribution requirements.
3. If Treasury does not consider it appropriate to exclude medical indemnity from the application of any finalised legislation or if the proposal extends beyond retail insurance, we ask Treasury to consider the following.
- a. That regulation be limited to those obligations which speak directly to conduct including the duty to handle claims efficiently, honestly and fairly and to have systems in place to manage conflicts of interest and complaints effectively.
 - b. That definitions be drawn clearly to distinguish and exclude from regulation those activities and persons who are engaged to perform activities which fulfil the insurer's obligation once a claim is accepted but are removed from the underlying insurance claim e.g. the lawyers and clinicians engaged in assessing and managing the defence of a third party claim against the insured or in supporting the insured in an investigation.
 - c. That the advice provided in connection with claims handling not be subject to the current regulatory requirements in relation to financial advice.
 - d. In the case of medical indemnity cover, that any application of revised legislation be delayed until thereview of medical indemnity legislation is complete and the impact of regulatory changes are assessed in the context of the proposal.

If you have any queries in relation to our submission or would like any further information please contact Dianne Browning at dbrowning@mdanational.com.au or by telephone on (08) 64613400

Yours sincerely


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