MinterEllison

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

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Dear Sir/Madam

Insurance Claims Handling – Consultation Paper

We appreciate the opportunity to respond to the Treasury's Insurance Claims Handling consultation paper (**the Consultation Paper**).

MinterEllison is a leading Australian law firm. We advise major financial institutions, including banks, insurance companies and superannuation funds, as well as specialist fund managers, platform operators, financial advice firms, stockbrokers, and other financial intermediaries in Australia and overseas.

We support the need for a strong regulatory regime to maintain and enhance trust and confidence in the financial system by consumers and market participants. We therefore support the extension of financial services to capture certain claims handling and settlement activities.

We do however have some reservations regarding the proposal in its current form and believe that there are a number of issues requiring careful consideration before it is legislated.

1. Form of the regime

We believe that it would be more appropriate to regulate claims handling relating to retail insurance products by imposing relevant obligations and duties on insurance companies directly, rather than requiring them to seek a Australian financial services licence authorisation to engage in this activity. The reality is that insurance companies must all engage in claims handling activities. It is not therefore appropriate to create a licensing regime which is separate from their core authorisation to engage in insurance business. It is not, for example, feasible for ASIC to suspend or remove an authorisation for an insurance company to handle insurance claims. If the company is unable to engage in this activity, it is unable to carry on its core business. This is ultimately a prudential matter and in circumstances where an insurance company is unable to handle insurance claims it should not be authorised to continue to enter into new insurance contracts and APRA should be taking appropriate action accordingly.

We support ASIC being the regulator responsible for enforcing the duties and obligations of insurance companies relating to claims handling for retail insurance contracts. Imposing these duties on insurance companies under insurance statues does not prevent ASIC from performing this role. ASIC is currently the regulator responsible for administering and supervising insurance companies under the *Insurance Contracts Act 1984*, which would be a very sensible place to include duties and obligations relating to claims handling as payment of claims is an obligation that arises under the insurance contract.

Alternatively, claims handling duties and obligations could be included in the *Insurance Act 1973* for general insurers and the *Life Insurance Act 1995* (**Life Act**) for life companies. There is nothing to prevent ASIC sharing responsibility with APRA for the administration of parts of these Acts and in fact that

occurs now under the Life Act.[1] Furthermore, the Final Report of the Banking, Superannuation and Financial Services Royal Commission proposes that ASIC and APRA should share responsibility for the executive accountability regime which currently applies to banks and will apply to other financial institutions in the future.[2]

ASIC should have powers to require insurance companies to comply with their claims handling duties and obligations for retail insurance products. Where ASIC has concerns regarding the ongoing ability of an insurance company to complies with those duties and obligations, it should have the ability to require APRA to consider whether to terminate or suspend the company's insurance authorisation and APRA should have the power to do so if it is satisfied that the company is not complying, and is not likely to be able to comply, with its claims handling duties and obligations and must be required to give appropriate weight to ASIC's findings in this regard and to consult with ASIC before making its decision whether to suspend or cancel the insurance authorisation.

Imposing claims handling duties and obligations for retail insurance products directly on insurance companies will ensure that any outsourcing of activities relating to claims handling will be subject to the CPS 231 Outsourcing Prudential Standard, requiring insurance companies to take certain steps before outsourcing any material claims handling activity. We believe that this would be an appropriate outcome.

We do not believe that there should be any requirement for a person to be regulated for claims handling activities relating to retail insurance contracts unless they are undertaken for or on behalf of an insurance company. Where that is the case, the regime we have proposed will be highly effective in regulating the conduct such a person engages in on behalf of the insurance company because the insurance company will be responsible for ensuring that those that engage in claims handling activities on its behalf comply with the claims handling duties and obligations imposed on the insurance company. Any additional steps that insurance companies should be taking before appointing or in relation to the appointment of a third party to engage in claims handling activities on its behalf (for example, ensuring the person(s) engaging in the activity on its behalf are appropriately qualified, experienced and competent) can be included in the claims handling duties and obligations imposed on insurance companies under the relevant insurance statute.

We believe that imposing claims handling duties and obligations relating to retail insurance contracts directly on insurance companies is a simpler solution involving less regulatory complexity. it means that adjustments will not need to be made to the financial services regime in the *Corporations Act 2001* (**Corporations Act**) to ensure that claims handling is regulated appropriately. For example, the obligation to give a financial services guide (**FSG**) under sections 941A and 941B of the Corporations Act – we submit that either this obligation should not apply to claims handling or should be modified so that it is more suitable.

2. Defining any new financial service

If claims handling and settlement is to be regulated as a financial service under the Corporations Act and Regulations, then we agree that a new 'claims handling and settlement' financial service should be included in the financial services regime. Conduct that falls within this definition should not be considered to be the provision of an existing financial service (see our comments on Regulation 7.1.33 below).

It is important to ensure that the definition of 'claims handling and settlement' does not capture persons or activities that are not intended to be caught by the regime.

We believe that the definition should only catch insurance companies in relation to retail insurance products and people that engage in claims handing activities on behalf of the insurance company. It should not catch third party service providers who are engaged to provide services in connection with an insurance claim, such as doctors, therapists, repairers and builders who are subject to separate duties and obligations and who should not be required to obtain an Australian financial services licence, otherwise there is likely to be significant reduction in the availability of these services in connection with insurance claims to the detriment of claimants.

The definition should apply to the insurance company and those who engage services providers in connection with retail insurance claims on behalf of the insurance company.

[1] For example, ASIC is responsible for Part 10 of the Life Act, apart from sections 206 to 210.
[2] Recommendation 6.6.

The regime should only apply to the following retail insurance products:

- the products defined as retail general insurance products under Corporations Regulations 7.1.11 to 7.1.17 (we query whether it is appropriate for medical indemnity insurance claims to included in the claims handling regime); and

- life risk insurance products as defined in section 764A(1)(e) of the Corporations Act.

We have had a chance to see a draft of the Financial Services Council (FSC) submission and support the proposal that the financial service of claims handling should be defined as deciding whether to paid a retail insurance claim and the process for making that decision. This is intended to catch not only the actual decision-maker within an insurance company, but also staff who work on the insurance claim, appoint service providers, have contact with the claimant and prepare case notes, etc to assist the decision maker to make their decision on the claim.

3. Retain Regulation 7.1.33

We do not support the removal of Regulation 7.1.33. If it is removed, claims handling and settlement activities may be considered to amount to the provision of financial product advice and would give rise to unintended consequences and obligations (for example, the obligations to give and FSG and/or an SOA when personal advice is provided, and to meet advisor training requirements).

Retaining 7.1.33 will not undermine the addition of the new financial service but rather ensure that claims handling and settlement services are treated as a separate financial service and reduce confusion and uncertainty in the implementation of the regime.

4. Licensing of representatives not required

The Royal Commission's concerns related primarily to the conduct of insurance companies in relation to claims of retail customers. As indicated above, we believe that the regulation of claims handling should apply directly to insurance companies which should be responsible for ensuring that those engaged in claims-related activities for them do so appropriately and in accordance with the insurance company's duties and obligations.

We do not believe that there is any need for others engaged in the claims process to hold their own Australian financial services licence. This would result in unnecessary red tape with no consumer benefit.

People engaged in retail insurance claims handling activities on behalf of an insurance company should be able to do so as a representative of the insurance company as is currently permitted for other financial services. This would mean that employees of the insurance company and its related company could engage in claims handling activities on behalf of the insurance company without requiring separate appointment which we believe would be appropriate. Licensed insurance companies will remain responsible and liable for their conduct under Division 6 of Part 7.6 of the Corporations Act.

Licensed insurance companies should also be able to appoint others to engage in claims handling activities on its behalf. Where they are engaged in regulated conduct, the insurance company can and should appoint them as authorised representatives as is case for other financial services under Division 5 of Part 7.6 of the Corporations Act. It should be possible for insurance companies to appoint other licensees to engage in claims handling activities on behalf of the insurance company which is consistent with the ability of insurance companies to appoint a licensee as an authorised representative if the representative acts under binder under section 916E of the Corporations Act.

5. Trustees

We do not believe that superannuation trustees should be caught by the regime due to the comprehensive fiduciary and statutory obligations to which they are already subject to, which offer substantial protections to fund members. This should either be made clear from the definition or be the subject of a specific exemption.

6. Transition period

There should be an appropriate transition period for insurance companies to make the necessary arrangements to comply with the new retail insurance claims handling duties and obligations. This will

require insurance companies to review existing procedures, systems, training, compliance arrangements, etc. It is important that this review be undertaken properly and not rushed. We therefore submit that the transition period should be at least two years.

Please contact us if you have any questions about any aspect of our submission. We would be very happy to meet with you to discuss proposals for the claims handling regime.

Yours faithfully
MinterEllison

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