



NATIONAL INSURANCE BROKERS ASSOCIATION OF AUSTRALIA (NIBA)

SUBMISSION ON CORPORATIONS AMENDMENT (STREAMLINING OF FUTURE OF FINANCIAL ADVICE) BILL 2014

ABOUT NIBA

NIBA is the voice of the insurance broking industry in Australia. NIBA represents 400 member firms and over 3000 individual Qualified Practising Insurance Brokers (QPIBS) throughout Australia.

Brokers handle almost 90% of the commercial insurance transacted in Australia, and play a major role in insurance distribution, handling an estimated \$18 billion in premiums annually and placing around half of Australia's total insurance business. Insurance brokers also place substantial insurance business into overseas markets for large and special risks.

Over a number of years NIBA has been a driving force for change in the Australian insurance broking industry. It has supported financial services reforms, encouraged higher educational standards for insurance brokers and introduced a strong independently administered and monitored code of practice for members. The 400 member firms all hold an Australian financial services (AFS) licence under the Corporations Act that enables them to deal in or advise on risk insurance products.

NIBA appreciates the opportunity to be able to provide comments on the *Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014*.

ABOUT INSURANCE BROKERS

The role of insurance brokers

The traditional role of insurance brokers is to:

- assist customers to assess and manage their risks, and provide advice on what insurance is appropriate for the customer's needs;
- assist customers to arrange and acquire insurance; and
- assist the customer in relation to any claim that may be made by them under the insurance.

In doing the above the insurance broker acts on behalf of the customer as their agent. Insurance brokers offer many benefits to customers and consumers:

- assistance with selecting and arranging appropriate, tailored insurance policies and packages



- detailed technical expertise including knowledge of prices, terms and conditions, benefits and pitfalls of the wide range of insurance policies on the market;
- assistance in interpreting, arranging and completing insurance documentation;
- experience in predicting, managing and reducing risks; and
- assistance with claims and a higher success rate with settlements (about 10 per cent higher than claims made without a broker).

In limited cases insurance brokers may act as agent of the insurer not the insured but where such a relationship exists the customer is clearly advised up front.

EXECUTIVE SUMMARY

NIBA supports any reduction in compliance costs for small business, financial advisers and consumers who access financial advice.

The role of an insurance broker is and should be distinguished from other financial services advisers given the specialised nature of the insurance market in which they operate. It is a common cause of concern for NIBA members that they are misunderstood by Government and bundled with other financial services advisers.

The trend unfortunately continues with the Regulation Impact Statement Future of Financial Advice amendments November 2013 Chart 1, which incorrectly summarises the Financial Services industry that is described as including insurance.

The FOFA reforms were a good example of this where insurance brokers were indirectly caught up in the review of issues arising in relation to financial planners. Ultimately the Government and Treasury and other key stakeholders acknowledged insurance brokers advising on general and life risk insurance should be treated differently as there was no evidence of any market issues of significance.

Whilst NIBA would have preferred the status quo to be maintained this was the best result it could expect in the circumstances giving rise to the FOFA reforms.

NIBA generally supports the proposed changes in the Bill. However, there are a number of areas of concern which need to be addressed. The can be summarised as:

- **prioritising client's interests s961J**– The previous Government failed to properly amend the general insurance carve out in the FOFA legislation regarding the prioritisation of clients' interests to ensure that where personal advice is given on more than just general insurance, the general insurance aspect of the advice will not be caught by the relevant obligation.



The same issue was identified and fixed by way of regulations in relation to the best interest duty and conflicted remuneration sections but not for the prioritising clients' interest section.

The omission could not be fixed by reason of the change in Government and should now be addressed in the current Bill to achieve the intended original result.

- **Scaling of advice** – NIBA supports the best interest duty changes whilst noting they remain by their nature somewhat unclear. In relation to the ability to agree on the scope of advice, NIBA notes any attempts by product issuers or related product distributors to provide scaled personal advice should be monitored given the special conflicts of interest that may arise in such cases.
- **ADI changes relating to Consumer Credit Insurance (CCI)** – The proposed ADI changes made in relation to the best interest duty and conflicted remuneration provision put other advisers in life CCI at a disadvantage to ADI advisers as they do not get the same relief as ADI advisers providing the same services. There is no explanation for this special treatment in the Draft Explanatory Memorandum. An even playing field should be created for all advisers in relation to life CCI.
- **Conflicted remuneration changes**– NIBA supports these proposals, other than the proposal affecting ADI advisers providing personal advice on CCI which creates an uneven playing field.
- **Timing** – NIBA has no issue with the proposed timing assuming the changes are implemented in an enforceable way.

INSURANCE BACKGROUND TO FOFA REFORMS

The FOFA reforms arose as a result of issues identified in the Parliamentary Joint Committee in its Inquiry into financial products and services in Australia (PJC Inquiry) which were clearly focussed on the investment and superannuation industries and financial planners.

The general insurance and stand-alone non-investment linked life insurance industries (risk insurance) were never intended to be and were not a focus of the Inquiry.

Any recommendations arising from the Inquiry relating to risk insurance were limited in nature and arose in circumstances where an appropriately focussed review of risk insurance and relevant stakeholders had not taken place.



The risk insurance industry is different to the investment and superannuation industries in significant ways. This has been shown in the insurance specific amendments made since the introduction of Chapter 7 of the Corporations Act which was originally enacted as a intended to be “a one size fits all” regime. Such changes were all made once the reality of the specialised nature of risk insurance was understood by Government.

NIBA is opposed to any “one size fits all” approach to the regulation of financial services in Australia, especially where proper analysis and consideration of the issues unique to the risk insurance Industry have not been properly undertaken by Government.

Such a model involves implementing broad requirements based on a rushed political agenda, typically on the basis that “tidy ups” can be made in regulations afterwards to manage anything not identified in the rushed process.

NIBA’s position is consistent with the principles of sound regulation promoted by the OECD and in Australia by the Productivity Commission and the Council of Australian Governments.

Like the Corporations Act, the FOFA reforms were originally developed on a “one size fits all” approach, affecting all areas of financial advice, even though the PJC Review concentrated primarily on investments, superannuation and financial planning. NIBA is pleased the Government eventually recognised the issues and unintended consequences that would occur if the original proposals were applied to risk insurance.

NIBA sets out the main issues identified by its members in relation to the proposed Bill.

PRIORITISATION OF CLIENTS’ INTERESTS SECTION 961J

The previous Government failed to properly amend the general insurance carve out in the FOFA legislation regarding the prioritisation of clients’ interests to ensure that where personal advice is given on more than just general insurance, the general insurance aspect of the advice will not be caught by the relevant obligation.

The use of the word “solely” in the section does not appear to carve out personal advice in relation to general insurance in circumstances where other advice or remuneration may have been received in relation to non-excluded products.

The same issue was identified and fixed by way of regulations in relation to the best interest duty and conflicted remuneration sections but not for the prioritising clients’ interest section.

NIBA raised this with Government which acknowledged that the intent was for the prioritising clients’ interests obligation not to apply to any personal advice on general insurance even if advice was being given on other financial products. However due to the upcoming election no change could be made.



The new amendments now present an opportunity to fix this problem.

STATUTORY BEST INTERESTS OBLIGATION (S961B)

The changes seek to facilitate scaled advice by limiting the scope of investigations required of a personal adviser and explicitly allowing clients and advisers to agree on the scope of any scaled advice provided.

The intent of the change as described is to ensure “[p]roviders need only investigate the client’s objectives, financial situation and needs that are relevant to the scaled advice to be provided.”

The concerns with the current requirements are that:

- providers are required to undertake a fulsome investigation into the client’s objectives, financial situation and needs before any scaled advice can be provided; and
- there is uncertainty on whether clients and advisers can agree on the scope of the advice to be provided.

The scaled advice changes are designed to reduce the current obligations applicable to both general and life risk insurance brokers/advisers providing personal advice to retail clients.

The Bill specifically notes that clients and advisers are explicitly permitted to agree on the scope of any scaled advice provided.

What is scaled advice is not defined in the Bill but the Draft Explanatory Memorandum states by way of explanation that:

“Scaled advice is advice about a specific area of a client’s needs, such as insurance or superannuation. This contrasts ‘holistic advice’ which is another advice model offered by providers. Under the holistic model, a provider makes extensive enquiries about their client’s circumstances, needs and objectives and provides advice to their client on all aspects of their financial circumstances in a full financial plan.

Given that scaled advice is about a specific issue or issues, it is often cheaper than traditional holistic advice and, as a result, enables many consumers to access advice that they could otherwise not afford.

It follows that, because the scope of advice is limited under a scaled advice model, the investigations required to be undertaken by an advice provider in order to provide scaled advice be also limited to what is relevant to providing advice that is in the client’s best interests on the particular issue or issues.



A provider and their client will discuss the scope of any scaled advice to be sought by the client as part of their initial discussion. This discussion may occur at the same time the client discloses some preliminary information to the provider on their objectives, financial situation and needs, but before the provider commences their investigation into the client's relevant circumstances in order to formulate the advice".

NIBA notes that the changes will be useful in reducing the potential exposure of advisers under the legislation, but care will need to be taken to ensure appropriate investigations and advice is provided and the general law obligations on advisers must not be ignored.

This is especially the case in relation to advisers acting for or related to product issuers.

NIBA notes that it would be a brave product issuer that sells a product and at the same time gives advice on whether it is appropriate to the client or not (given the inherent conflict of interest and liability exposure that would arise for the advice over and above the contract terms).

NIBA believes the EM could be better qualified to avoid confusion, as the end advice must still be appropriate and other obligations beyond the Corporations Act (e.g. misleading and deceptive conduct and duty of care etc) would need to be considered by any insurer/bank giving personal advice to a customer, as is the case for insurance brokers.

CLARIFICATION OF THE CIRCUMSTANCES WHEN AN AGENT OR EMPLOYEE OF AN ADI MAY ACCESS THE REDUCED BEST INTERESTS DUTY

An agent or employee of an ADI is currently in the same position as an insurance broker/adviser when the only subject matter of the advice sought by the client is in relation to a basic banking product, a general insurance product or both.

The application of the limited best interest duty for ADI employees is proposed to be extended to include a consumer credit insurance (CCI) product in the mix, as defined in the Insurance Contracts Act 1984 (Cth). The definition in the Insurance Contracts Act includes CCI that is life or general insurance.

The restriction of the duty in this regard does not appear to have been applied to other advisers in *life* CCI (who are subject to the full duty for such products) which seems to create an uneven playing field that needs to be addressed. There is no explanation or justification for this special treatment in the Draft Explanatory Memorandum or Regulation Impact Statement.

CONFLICTED REMUNERATION BAN – MONETARY AND NON MONETARY (s963A etc)

NIBA supports the limitation of the ban in relation to personal advice to retail clients and not general advice, a position NIBA had taken in original consultation on FOFA.



NIBA supports all of the other changes other than those in relation to the Basic banking product exemption.

Section 963D currently provides that a benefit is exempt from the ban on conflicted remuneration if the benefit relates to a basic banking product and the agent or employee of an ADI, at the time of providing advice on the basic banking product, does not provide financial product advice on any other financial product. Regulation 7.7A.12H of the Corporations Regulations allows access to the exemption where the agent or employee also provides financial product advice on a general insurance product.

The basic banking product exemption in the Act is proposed to apply if, at the time of providing advice on a basic banking product, the agent/employee of an ADI also provides financial product advice on a general insurance or a consumer credit insurance product.

Therefore, in order to have access to the exemption, the agent or employee, at the time of providing advice on the basic banking product, must not provide advice on financial products other than a general insurance or a consumer credit insurance product. Again, the ADI's appear to be receiving special treatment regarding CCI.

NIBA notes that the Government refers to CCI as a simple well understood product which is consistent with NIBA's view.

LIFE RISK INSURANCE GENERALLY

In relation to stand alone life risk insurance products (ie those without any investment component), NIBA believes they should be treated in the same way as general insurance, as conceptually they are extremely similar and do not have the same characteristics of investment products.

NIBA's position (as put to the previous Government) can be summarised as follows:

- The FOFA reforms arose as a result of issues identified in the Parliamentary Joint Committee in its Inquiry into financial products and services in Australia (PJC Inquiry) which were clearly focussed on the investment and superannuation industries and financial planners.
- The risk insurance industries were never intended to be and were not a focus of the Inquiry.
- Any recommendations arising from the Inquiry relating to risk insurance were limited in nature and arose in circumstances where an appropriately focussed review of risk insurance and relevant stakeholders had not taken place.



- Under FOFA, life risk insurance is subject to the same:
 - best interest duty and obligation to give priority to the interests of clients as investment products; and
 - monetary conflicted benefits carve outs as general insurance but not for non-monetary conflicted benefits.
- NIBA believes there is no logical reason why life risk insurance products (without any investment component) should not be treated in the same way as general insurance products, especially given:
 - the customer risk is not the same as under an investment based product. Investment advice and planning deals with assets, risks associated with the investment of those assets, and the potential rates of return on the investment of those assets. The outcome of the transaction is the eventual return of the capital invested together with the expected interest accrued.
 - Risk insurance deals with the assessment and management of risk, and the transfer of risk to other parties in appropriate circumstances. The nature of the transaction, the nature of the products, and applicable law and the nature of the advice that is provided are all very different to the nature of any investment transaction. The outcome of the transaction in most circumstances is no further action – if an insured event has not occurred, the policy expires and the cover concludes. Where an insured event has occurred, the insurance promise is honoured and the insurance policy responds, normally with the payment of an amount far greater than the insurance premium.
 - life risk insurance was not the subject of the PJC Inquiry;
 - the Government's agenda was clearly to push through broad reforms in reaction to the investment industry's impact on consumers without any real focus or understanding of risk insurance and its unique issues;
 - consideration of whether to catch risk insurance was added as an aside without a proper review (which investment products had the benefit of) and caught up in the process;
 - no evidence has been provided by the PJC Inquiry or Federal Government of any fundamental or systemic problems with the provision of advice in relation to the risk insurance industry that are of a nature that would justify the introduction of a new



suite of statutory reforms, and the resulting costs and market impact associated with it;

- there was no consultation with NIBA in relation to the sudden shift in position that saw life risk insurance being caught. This was despite the fact that NIBA had been the entity principally lobbying in the consultation process in this regard. Other entities such as the Financial Planning Association of Australia were principally (and understandably) focussed on the investment product issues which affected the majority of its members. NIBA's principal concern was for members that offered stand alone life risk insurance and the significant effect the new duties and obligations and prohibitions regarding remuneration would have.
- the application of the new obligations to insurance brokers for life risk products:
 - results in a significant increase in the compliance burden carried within insurance broking offices, resulting in additional costs (in particular there is real potential for an increase in the cost of professional indemnity);
 - may result in less personal advice being provided for no real consumer benefit;
 - will most likely cause an increase in under/non insurance which is of real detriment to the community;
 - will most likely cause a reduction in competition in the market and the choices available to consumers that insurance brokers bring to the equation; and
 - will most likely cause any increased costs to be passed to consumers for little added benefit.

NIBA believes that because of the above, insurance brokers providing personal advice on life risk insurance should at least be treated in the same way as general insurance.

NIBA has never had any objection to the issue of financial advice in risk insurance being monitored by the Government or ASIC, and if necessary having a proper review within an agreed period of time. To date, however, there has been no evidence of any need for such a review.

If any issues of concern with the operation of the current retail client protections in relation to risk insurance are identified, proper and appropriate proposals for reform could then be developed in consultation with the industry.

If you would like to discuss any aspect of this matter further do not hesitate to contact us.

Dallas Booth



Chief Executive Officer

National Insurance Brokers' Association of Australia