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**Committee Secretary
Senate Economics References Committee
PO Box 6100
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Canberra ACT 2600**

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National Insurance Brokers Association of Australia (NIBA) submission on the Inquiry into consumer protection in the banking, insurance and financial services

The National Insurance Brokers Association of Australia (**NIBA**) appreciates the opportunity to make a submission in response to the Inquiry.

NIBA member firms include large multinational corporations, large Australian broking companies, and over 300 medium and small brokerages operating in the cities, towns and regions right across Australia.

Insurance broking firms provide traditional insurance broking and risk management advice in all areas of property and liability insurance, and in many cases broking firms also provide advice in relation to life risk insurance (as opposed to life investment products).

NIBA RESPONSE

NIBA has considered the terms of reference of the Inquiry in the context of insurance brokers and summarises its conclusions in relation to the terms as follows:

- **Regulatory Regime effectiveness** - whilst there is always opportunity for improvement (in particular red tape reduction), the evidence shows that the current laws and regulatory framework affecting the conduct of insurance brokers is on the whole comprehensive and working effectively.

In summary, insurance brokers are on the whole subject to:

- the robust Australian Financial Services obligations under Chapter 7 of the Corporations Act which require them to be licensed or otherwise authorised, meet specific conduct and disclosure requirements in relation to dealings with consumers (including the best interests duty) and be a member of the independent Financial Ombudsman Service Limited (FOS). Special protections are also applied in relation to insurance brokers for consumers in relation to money handling.
- the Insurance Contracts Act;
- the unfair contracts legislation in relation to any standard form agreements entered into with clients/consumers;
- general consumer protection legislation such as the ASIC Act and Australian Competition and Consumer Act which manages risks such as misleading or deceptive or unconscionable conduct;
- a significant duty of care and fiduciary obligations arising under general law; and
- the Insurance Brokers Code of Practice (if a member). This industry leading and consumer friendly Code aims to build professional competence in the broking profession and increase consumer confidence in insurance brokers

and the role they play in the insurance process. It is administered and enforced by an externally administered Code Compliance Committee comprising consumer and industry representatives and an independent Chair.

- **Effectiveness of Regulation** – NIBA has real concerns that the core principles that must be applied whenever consideration is being given to regulatory intervention in markets and the economy are not in all cases being followed by Government or the regulators. Broad recommendations for change are being made as a result of reviews of specific areas where no attempt has been made to identify if the issues arise for the other areas the broad recommendations apply to.

The recent Government External Dispute Resolution Review (on which NIBA has recently made a submission), Review of the Four Major Banks and ASIC's Life insurance claims: An industry review ASIC Report 498 are obvious examples. NIBA provides further detail in its submission.

- **Misconduct** - There is little if any evidence of any significant impact of misconduct in this sector on victims and on consumers. This is shown in the low numbers of:
 - Financial Ombudsman Service Limited (FOS) disputes;
 - Insurance Brokers Code of Practice complaints;
 - ASIC actions against insurance brokers; and
 - litigation involving insurance brokers.
- **Remuneration arrangements and culture** - The current law applicable to insurance brokers is working effectively to avoid or properly manage any risks associated with executive and non-executive remuneration, incentive-based commission structures, and fee-for-no-service or recurring fee structures. There is no evidence of these being issues of concern in relation to insurance brokers.
- **Culture** - In relation to the culture and chain of responsibility in relation to misconduct the current law applicable to insurance brokers is working effectively and there is no evidence of this being an issue of concern in relation to insurance brokers.
- **Redress** – The availability and adequacy of redress and compensation to victims of misconduct by insurance brokers is sufficient having regard to the low numbers of FOS disputes, Insurance brokers Code of Practice complaints, ASIC actions against insurance brokers and litigation. Insurance brokers do not for this reason have any issues regarding obtaining professional indemnity insurance, as is the case in other sectors. There is no evidence of any non-payment of FOS determinations by insurance brokers that would justify any retrospective compensation scheme of last resort applying to them. NIBA has already made detailed submission to Government in this respect on the review of External Dispute Resolution Schemes.

Given the low level of disputes with insurance brokers and the existence of the free independent FOS service, there is no evidence of any issues regarding legal advice and representation for consumers and victims of misconduct.

- **Social impact** – There is no evidence of any consumer protection failures in the sector that would create increased reliance of victims on community and government services.

NIBA's constant concern is that risk insurance and insurance brokers not be caught up in processes and reforms directly aimed at resolving issues which have arisen principally in unrelated areas of the financial services industry. This occurred when the Financial Services

Reforms were initially implemented in Chapter 7 of the Corporations Act and also in relation to the more recent Future of Financial Services Reforms.

In both cases, it was only after the reforms were proposed and in some cases implemented, that the Government came to appreciate the real differences between the investment products and advice, and risk products and advice, and proceeded to include appropriate carve outs to take this reality into account.

Areas for improvement

Disclosure - There is no doubt the quality of insurer disclosure documentation is in need of improvement. Current Government and ASIC initiatives in this regard (Design and Distribution obligations and product intervention power government proposals paper December 2016 - the impact on insurance) are addressing this issue already.

In summary, we do not believe the proposals as drafted are likely to address the underlying problems identified and further recommendations for change are needed.

Ultimately, given the nature of insurance, better communication of terms etc from insurers by itself is unlikely to change the adverse impact of low consumer financial literacy and low probability of consumers reading the information.

We will be making a submission in response but are happy to provide our views and thought on possible solutions to you on this topic if you believe it is helpful.

Setting better minimum cover requirements and enabling better access to or recommending consumers seek personal advice from insurance brokers are likely to better reduce the risk to consumers and the community.

Any proposal to allow the product issuer or their agents to give consumers a limited form of advice is fraught with danger.

THE ROLE OF INSURANCE BROKERS – CONSUMER ADVOCATES

Insurance brokers in Australia hold an Australian Financial Services Licence under the Corporations Act, which enables them to deal in or advise on risk insurance products. Brokers are regulated by the Australian Securities and Investments Commission.

At a high level, the presence of insurance brokers in the intermediated insurance sector achieves three important and significant outcomes:

1. Insurance brokers are the distribution mechanism for insurers who operate in the intermediated insurance sector. Because insurance brokers provide the distribution process for these insurers, the insurers do not incur the expense of maintaining their own sales and distribution processes for the sale of product to clients of insurance brokers.
2. Insurance brokers provide advice and assistance to their clients in relation to the purchase of insurance products – see further comments below.
3. The fact that insurance brokers can access a number of suppliers or sources of cover, they create and perform the operation of the insurance market for intermediated insurance. Insurers know they must be competitive in relation to the terms and conditions of the policies they offer, and in relation to the price they charge for the cover being supplied. Insurance brokers maintain competitive pressure by being able to select from competing insurance suppliers.

In relation to advising and assisting clients, the traditional role of insurance brokers is to –

- Assist customers to assess and manage their risks, and provide advice on risk financing and risk transfer, including 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 that has been arranged.

In doing the above, the insurance broker acts for and on behalf of the customer as their agent. In essence, insurance brokers do not SELL insurance to their clients, they PURCHASE insurance on behalf of their clients. They act in the client's best interest when doing so.

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, with higher success rates for clients who use a broker than those who do not.

Insurance brokers also assist clients with refunds and cancellations, and also assist with the removal of errors in transactions.

In limited cases, the insurance broker may act as agent of the insurer not the insured, but where such a relationship exists the customer is clearly advised up front. This is a key requirement of the Insurance Brokers Code of Practice.

NIBA CONCERNS REGARDING RECENT REGULATORY RECOMMENDATIONS AFFECTING INSURANCE

NIBA considers that Australia has been well served by insurance brokers who provide significantly different services to those involved in the investment and superannuation industries.

NIBA believes it is important, in developing any legislation and reform proposals, to consider up front whether there is any detriment that needs addressing, rather than catching all and after the fact seeking to carve out those who are in reality not the focus of the change.

NIBA notes that the OECD, the Council of Australian Governments, the Productivity Commission and many others have identified, confirmed and agreed on the core principles that must be applied whenever consideration is being given to regulatory intervention in markets and the economy.

They include:

- a clear statement of what actually is the issue being addressed
- is there a sound legal and empirical basis for this issue
- have all potential options for dealing with the issue been identified and assessed, including the option of no further action
- a clear statement of the proposed regulatory intervention, including the governing principles that will be used to guide the development of the regulatory intervention
- a sound legal and empirical basis for the proposed intervention, including a clear assessment of the nature and value of benefits to be derived, and the nature and level of costs (including compliance costs) that will be incurred as a result of the intervention
- a careful analysis and assessment that the proposed intervention will produce benefits that justify the costs, considering the distribution of effects across society, and taking into account economic, environmental and social impacts of the intervention
- assurance that the proposed intervention will minimise costs and market distortions
- strategies to ensure the regulation will promote innovation through market incentives and promote global approaches to strong and effective community outcomes
- be clear, simple and capable of practical adoption
- be consistent with other regulations and policies
- be compatible as far as possible with competition, trade and investment-facilitating principles at domestic and international levels.

The history of financial services regulation in Australia, including the FOFA reforms, does not show strong and consistent observance of these key principles. A stated preference for principles based regulation has been followed by hundreds of pages of statutes, regulations, regulatory guides and other instruments. The “one size fits all” approach has resulted in regulations designed for one sector being applied inappropriately in other areas, where there were no issues or concerns in the first place.

Ultimately, we should all reasonably expect of the Government and regulators that if a problem is identified, the problem should be fixed in a reasonable manner having regard to the relevant circumstances.

NIBA has noticed a possible trend developing in some reviews conducted by Government and regulators that does not appear to be conducive to the above result.

By way of example:

House of Representative’s Standing Committee on Economics Review of the four major banks

The House of Representative’s Standing Committee on Economics (the Committee) undertook a review of the Four Major Banks and has released its first report.

The terms of reference were to conduct an annual inquiry into:

- the performance and strength of Australia’s banking and financial system;
- how broader economic, financial, and regulatory developments are affecting that system; and
- how the major banks balance the needs of borrowers, savers, shareholders, and the wider community.

The review was clearly focussed on the conduct of the banks and their services (including insurance) and was not an industry wide review.

Despite this fact, the Committee issued Recommendation 2 - Make Executives Accountable under which the Committee recommended that by 1 July 2017, ASIC should require Australian Financial Services License holders to publicly report on any significant breaches of their licence obligations within five business days of reporting the incident to ASIC, or within five business days of ASIC or another regulatory body identifying the breach.

This report should include:

- a description of the breach and how it occurred;
- the steps that will be taken to ensure that it does not occur again;
- the names of the senior executives responsible for the team/s where the breach occurred; and
- the consequences for those senior executives and, if the relevant senior executives were not terminated, why termination was not pursued.

Despite the review being focussed on issues of concern within the banking sector, the recommendation appears to be in relation to the whole financial services industry. How such a recommendation can be made in the context of such a limited review is concerning.

The effect of this approach is to tar the rest of the financial services sector industry with the same brush.

Life insurance claims: An industry review ASIC Report 498

The Australian Securities & Investments Commission (ASIC)'s review examined 15 life insurers covering more than 90% of the market.

The six-month review analysed data from the three-year period from 1 January 2013 to 31 December 2015 on the four major life insurance policy types – term life cover, total and permanent disablement (TPD), trauma, and income protection.

ASIC concluded that the “review did not find evidence of cross-industry misconduct across the life insurance sector in relation to life insurance claims payments and procedures... and ... 90% of claims are paid in the first instance”. Para 18.

Despite this, ASIC made the following Recommendation to Government to strengthen the legal framework covering claims handling:

“Currently ‘handling insurance claims’ is explicitly exempted from the conduct provisions of the Corporations legislation. ASIC is recommending that this exemption be removed by the Government and that more significant penalties for misconduct in relation to insurance claims handling are also included in the review of ASIC’s penalty powers.” Para 48.

This recommendation is not limited to life insurance.

In the life insurance context, it is concerning why such a significant recommendation should be made where ASIC concludes 90% of claims are paid in the first instance.

It is more concerning that the recommendation is extended to the general insurance industry where the review was limited to life insurance.

Public pronouncements on broad ranging recommendations which purport to fix industry issues that go beyond the sector(s) the subject of the actual review, whilst great for public perception of “action”, do not convey a fair message to the public.

They also don't allow for industry participants to be involved in the recommendation review at an early stage – Industry instead only becomes involved after the recommendation is made and often once it is at enactment stage.

Industry is constantly and appropriately advised that it is misleading or deceptive conduct to not appropriately qualify a dominant message.

Conduct such as the above merely serves to undermine consumer confidence in the financial services sector and industry confidence in the Government and regulators.

EVIDENCE OF THE INSURANCE BROKING MARKET OPERATING EFFECTIVELY AND LACK OF CONSUMER DETRIMENT

Code - This industry leading and consumer friendly Code aims to build professional competence in the broking profession and increase consumer confidence in insurance brokers and the role they play in the insurance process. It is administered and enforced by a Code Compliance Committee comprising consumer, industry and independent representatives.

The [Insurance Brokers Code Compliance Committee Annual Review 2015-16](#) - shows extremely low incidence of Code breaches or issues of significance

FOS - The [FOS Annual Review 2015-16](#) also shows a low incidence of disputes involving insurance brokers. In the domestic insurance category, the vast majority of disputes (94%) were lodged against an insurance company and 4% involved general insurance brokers. In 2015-16, there were 344 disputes between general insurance brokers and their customers. The most common insurance products in these disputes were personal and domestic property, home building and motor vehicle (comprehensive). The main issue was denial of claim.

ASIC – ASIC actions involving insurance brokers have been very limited. In NIBA's regular meetings with ASIC, no significant issues of concern regarding insurance brokers have been identified. Special provisions in the Corporations Act (derived from the old Insurance (Agents and Brokers) Act provisions which that Act replaced, mean that in the limited cases involving a broker business failure there is no consumer loss. This is because money paid by consumers to the broker is deemed received by the insurer and money paid by the insurer to the broker for payment to the consumer is not deemed received by the consumer.

Professional indemnity – The availability of professional indemnity insurance at a reasonable price is a good indicator of the performance of a market. Insurance brokers have not had any significant issues in this regard, unlike other areas of the finance services sector.

Government reforms – The Government has already effectively acknowledged the above good performance by agreeing to distinguish general insurance brokers in the recent FOFA reforms regarding the best interests duty and remuneration bans and the new professional Standards for Financial Advisers and Financial Adviser register. Nothing has changed to justify a new approach in this regard.

It is important to note in conclusion that insurance brokers when acting for clients, typically act as the consumer's advocate when a claim is made. Their expertise in insurance and knowledge of the insurers and their practices helps reduce the number of claims otherwise rejected. The cost of any rejected claim is ultimately borne by the community.

Please do not hesitate to contact us if you would like to discuss any aspect of this submission.

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