13 January 2020

Ms Kathryn McCrea
Manager
Financial System Division
Treasury
Level 29, 201 Kent Street
SYDNEY NSW 2000

Submitted by email: ClaimsHandling@treasury.gov.au

Dear Ms McCrea

Insurance Australia Group Limited (**IAG**)[1] welcomes the opportunity to make a submission to the exposure draft legislation and regulations (**Exposure Draft**) and explanatory materials to the Exposure Draft (**Explanatory Materials**) to implement Recommendation 4.8 of the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**FSRC**) to make handling and settling an insurance claim, or potential insurance claim, a 'financial service' under the *Corporations Act 2001* (Cth).

IAG's purpose is to "make your world a safer place". We recognise that our role extends beyond transferring risk and paying claims. Our purpose drives our business to work collaboratively with communities to understand, reduce and avoid risk, and to build resilience and preparedness. This results in better outcomes for the community and means fewer claims and lower costs for our business.

We work collaboratively with government, industry bodies and Australian and international organisations on a range of topics and issues that relate to our customers, our people and the community. These include climate change, disaster response and resilience, and diversity, inclusion and belonging.

Since the beginning of September 2019, IAG has received more than 5,000 bushfire-related claims and finalised over 20% of these claims as at 10 January 2020. In response to this unprecedented crisis, IAG:

- has recently set up claims teams to support customers in recovery centres across the country in New South Wales, South Australia and Victoria (we will also deploy our Major Event Rapid Response Vehicles (MERRVs) at sites around the New South Wales South Coast to give customers the ability to lodge their claim and receive emergency support at a location convenient to them)
- has identified and called customers potentially impacted by the bushfires
- has prioritised claims for vulnerable customers

[1] IAG is the parent company of a general insurance group with controlled operations in Australia and New Zealand. Our businesses underwrite over $11 billion of premium per annum, selling insurance under many leading brands, including: NRMA Insurance, CGU, SGIO, SGIC, Swann Insurance and WFI (in Australia); and NZI, State, AMI and Lumley Insurance (in New Zealand). With more than 8.5 million customers and information on the majority of motor vehicles and domestic residences in our markets, we use our leadership position to understand and provide world-leading customer experiences, making communities safer and more resilient for the future.

- will, wherever possible, use qualified tradespeople from the local areas impacted, ensuring customers' homes can be efficiently assessed and repaired
- has donated its NRMA Insurance helicopter to the NSW RFS to trial a new biodegradable, non-toxic fire retardant to help protect homes and properties this bushfire season
- has introduced additional paid leave for employees who are emergency service volunteers, and extra counselling support.

Our response to this crisis demonstrates our commitment to ensuring claims are handled and settled in an efficient manner and providing immediate assistance to affected customers.

For that reason, we support in principle the Government's approach to make handling and settling an insurance claim, or potential insurance claim, a 'financial service' under the *Corporations Act 2001* (Cth).

We have, however, made some recommendations in our submission that we believe will provide greater clarity and certainty around how these laws are intended to operate.

Yours sincerely

Luke Gallagher
Executive General Manager
Short Tail Claims

1. Clarity on the meaning of the words 'on behalf of…'

The phrases 'on behalf of the insurer' and 'on behalf of one or more insurers' are used in several sections of the proposed legislation, notably:

- definition of 'insurance claims manager' and 'loss assessor'
- proposed s 911A(2)(ek)(v) in respect of an insurance broker.

It is also used in the definition of 'representative' in s 910A to describe a person who acts on behalf of an Australian financial services licence (**AFSL**) holder.

We acknowledge the use of these phrases for insurance claims managers, loss assessors and insurance brokers. In our view, these parties are providing services to insureds on behalf of insurers as the insurers' agent (in essence, insurers have outsourced their core insurance services / functions to these parties). However, we would like clarification on the application of these phrases for certain insurance fulfilment providers (**IFPs**) and experts (e.g. medical practitioners, engineers, hydrologists, forensic accountants, etc).

In our view, services provided by experts are incidental to the main services / functions of an insurer being the assessment and settlement of the claim. Experts do not act on behalf of insurers (as the insurers' agent) when providing their services. Rather, those services are provided to the insurers (and not the insureds) by the experts as independent contractors. As such, we do not believe they are 'representatives' within the meaning of s 910A. Therefore, the requirements in ss 911B(1)(b) and 912A(1) (as they relate to representatives) do not apply.

We believe this is also true for services provided by IFPs that do not have any delegated authorities from insurers. For example, if an insured chooses a smash repairer to repair their damaged vehicle (under a choice of repairer policy) and their insurer authorises repairs with that repairer, we would argue the repairer is providing repair services to the insurer (and not the insured) as an independent contractor. We do not believe they are 'representatives' within the meaning of s 910A.

On the other hand, where the insurer has given the IFP delegated authority to accept a claim (for example, certain insurer preferred smash repairers have the authority to approve a claim and commence repairs if the damage meets certain criteria and is below the agreed monetary threshold), it is arguable the IFP is acting on behalf of the insurer (as the insurer's agent) in accepting the insured's claim. Under these circumstances, the IFP may be deemed to be a 'representative' (within the meaning of s 910A) triggering the requirements in ss 911B(1)(b) and 912A(1) (as they relate to 'representatives').

For these reasons, we request the Government clarify its intention regarding the use of the phrase 'on behalf of…'

2. General obligations of an AFSL holder as they relate to representatives

Section 912A states that an AFSL holder must (among other things):

- do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly (s 912A(1)(a));
- take reasonable steps to ensure that its representatives comply with the financial services laws (s 912A(1)(ca)); and
- ensure that its representatives are adequately trained… and are competent, to provide those financial services (s 912A(1)(f)).

Having regard to our views in Part 1 above, if the Government requires all IFPs and experts to be 'representatives', then the insurers will need to meet the general obligations (as they relate to representatives) in respect of those persons. However, we believe this is not necessary for the following reasons:

- In relation to experts:
  - Insurers need to rely on the professional advice of experts (and insurers have no control, authority or expertise over the services provided by experts)
  - Experts operate under independent accreditation and regulatory frameworks
- In relation to IFPs:
  - Insurers are subject to the obligation in s 912A(1)(a) which will require them to provide the new financial service of handling and settling an insurance claim (including fulfilment services) efficiently, honestly and fairly
  - Insurers will generally be responsible for the quality of the work performed by these IFPs (and some insurers offer a lifetime guarantee on the workmanship of repairs)
  - Insurers will generally have contractual arrangements with these IFPs
  - IFPs (and their staff) also operate under independent accreditation and regulatory frameworks.

As such, we believe the proposed legislation should make it clear that IFPs (that do not have the authority to reject a claim) and experts will not be 'representatives' for the purposes of s 912A.

However, if the Government requires insurers to meet the general obligations (as they relate to representatives), then we believe these obligations should apply in a proportionate manner and reflect the relevant representative's role in the claims handling process.

For example, it may be appropriate for an insurer to do the following in respect of an IFP contracted by an insurer (e.g. an insurer preferred smash repairer):

- include provisions in the contract that sets out the supplier's key responsibilities (e.g. timing around the provision of reports, escalation of issues, notification of complaints made by insureds) and minimum training standards for their staff (e.g. I-CAR® Gold Class™ designation[2] in the smash repair industry)
- establish an operations manual that governs matters such as how insurers expect their suppliers to interact with their insureds
- establish processes such as a contractor OHS/WHS prequalification process (e.g. Cm3) that assists insurers in meeting their legislative duty of care to ensure

[2] I-CAR® Gold Class™ designation is the highest role-relevant training accreditation recognised by the collision repair industry in Australia: http://i-car.com.au/gold-class-collision/

contractors they engage have processes to safely conduct work and confirm they have the relevant licences and insurances to provide the services.

On the other hand, for an IFP that is nominated by an insured, the insurer may only require evidence of appropriate licences and verification that the IFP has the necessary plant and equipment to perform the services in a safe manner.

We believe these matters should be clarified in the Explanatory Materials.

3. Representatives of insurers that provide claims handling and settling service must be authorised representatives

Having regard to our views in Part 1 above, if the Government requires all IFPs and experts to be 'representatives', then insurers will need to appoint these persons as their authorised representative. This is because a 'representative' (under s 910A) can only provide a financial service on behalf of an AFSL holder if they are an authorised representative of that AFSL holder (s 911B(1)(b)).

We do believe it is the Government's intent to require all IFPs and experts to be appointed as an authorised representative (or to be licensed[3] for that matter). As such, we believe a modification to the law is required.

One option is to create a new class of representatives that can engage in the new financial service of handling and settling an insurance claim without holding an AFSL or being an authorised representative (similar to 'product distributors' under ASIC Corporations (Basic Deposit and General Insurance Product Distribution) Instrument 2015/682).

The second option is to remove the requirement to lodge with ASIC a written notice of the authorisation (s 916F). While this option would enable insurers to appoint IFPs and experts as authorised representatives without triggering the notification requirement, we believe it would only be effective if the requirement to cross-endorse (and associated cross-liability issues) are removed.[4]

In our view, both approaches may be acceptable on the basis that ASIC may not necessarily require ongoing visibility of these IFPs and experts including the number of persons acting in this capacity. However, the first option is favourable as it would allow insurers to onboard IFPs and experts in an expeditious manner following a natural disaster (and since the requirement to cross-endorse authorised representatives and associated cross-liability issues are not triggered).

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[3] We note paragraph 1.14 of Explanatory Materials confirms that "insurers may provide fulfilment providers with delegated authority to accept a claim and begin immediate repair, under which the fulfilment providers would not require licensing."

[4] The issues associated with cross-endorsement and cross-liability are discussed later in our submission.

4. Insurance fulfilment provider

An 'insurance fulfilment provider' is defined in the updated s 761A as a "person who carries on a business of providing goods or services to persons insured under insurance products in satisfaction of the liability of the insurers under those products". We believe this definition is incorrect because services are (generally) provided to the insurer, not the insured. This is also the case where the insured elects their own repairer (under a choice of repairer policy). The underlying contract for the provision of repair services is between the repairer and the insurer (with the insured being the beneficiary of those services).

Therefore, we believe the definition of 'insurance fulfilment provider' should be amended to read:

> *An 'insurance fulfilment provider' is defined as a person who generally carries on a business of providing goods or services to an insurer in satisfaction of an insurance provider's liability to the insured person under an insurance product*

As noted earlier, many insurance fulfilment providers have the delegated authority to accept claims. At IAG, many of our preferred smash repairers can accept claims and proceed with repairs if the damage meets certain criteria and is below the agreed monetary threshold. However, we are not aware of any circumstances in our business where an IFP would have the delegated authority from an insurer to reject all or part of a claim. Generally speaking, any decision to reject all or part of a claim rests with the insurer (and this is also the case for end-to-end claims management services provided by certain IFPs e.g. automotive glass suppliers for glass-only claims). As such, we would like clarity in the Explanatory Materials as to when these situations may arise.

We also query the following sections set out in the Explanatory Materials:

- Paragraph 1.14 (definition of 'insurance fulfilment provider') – As already noted above, many insurers have (under contract) delegated authority to insurance fulfilment providers to accept a claim and begin immediate repairs provided the damage meets certain criteria and is below the agreed monetary threshold. These arrangements are not limited to natural disasters
- Example 1.11 (car insurance claim) – This example suggests that an insurer would be in breach of s 912A(1)(a) for defective repairs performed by an IFP. We do not necessarily agree with this view. However, we acknowledge the outcome may be different if the insured brought the issue to the insurer's attention and the insurer failed to investigate and rectify the issues in a timely manner (as highlighted in the FSRC case studies).

5. Loss assessor

There are numerous independent loss assessing businesses operating in Australia.[5] Some are large sophisticated businesses[6] and many are small businesses (including sole proprietors).

Under the proposed laws, loss assessors will need to be licensed or authorised to provide the new financial service of handling and settling an insurance claim to insureds. While the large loss assessing businesses may have the financial resources and appetite to apply for an AFSL and meet the ongoing compliance requirements (including appointing a responsible manager) associated with this new financial service, we query the ability for small loss assessing businesses to do the same.

Given the burden associated with licensing, many loss assessors will seek to be appointed as an authorised representative of an insurer in order to continue to provide their services. However, given the issues associated with cross-endorsement and the obligations to train, monitor and supervise the conduct of authorised representatives, it is possible that many insurers will decide not to appoint external loss assessors as their authorised representative. This will inevitably result in the possible exit of some loss assessors from the industry and the process of consolidation will inevitably result in delays in claims handling times, particularly in regional and rural areas and during natural disasters.

For these reasons, we do not believe it is fair or necessary to extend the licensing / authorisation requirements to such external loss assessors, particularly in circumstances where smash repairers that also perform the assessing function and have the authority to approve claims are not subject to the same requirements.[7]

We believe this issue can be resolved with modifications to the law by removing:

- the requirement to lodge with ASIC a written notice of the authorisation (s 916F);
- the cross-endorsement requirement i.e. the requirement for each licensee to consent to the authorised representative being authorised to act for multiple licensees (s 916C); and
- the application of the cross-liability provisions associated with cross-endorsement (s 917C(3)).

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[5] There are over 45 loss assessors operating in NSW and ACT alone: https://aicla.org/loss-adjusters-new-south-wales/

[6] We understand the two largest loss assessing businesses are Sedgwick and Crawford & Company (Australia) Pty Ltd.

[7] This is consistent with the submission made by the Financial Rights Legal Centre to the Insurance Claims Handling Taking action on recommendation 4.8 of the Banking, Superannuation & Financial Services Royal Commission Consultation paper. In its submission, the FRLC stated that loss adjustors (and smash repairers) do not need to be separately licensed. They also stated "[w]e do think their contribution to the claims handling process needs to be able to be examined when it is directly contributing to the handling of an insurance claim, but we envisage this responsibility falling to the insurer. That is, they have an obligation to ensure that service providers they contract with are being fair and transparent." This is also consistent with the Finity submission which stated that "[t]he scope of the requirements should extend to… insurance companies, third party claim managers and underwriting agencies with claim authority. It is preferable that the provisions do not extend to others involved such as loss adjustors, investigators, medical examiners, builders or car repairers."

Importantly, these modifications would not impact the insurers' obligations to provide the financial service efficiently, honestly and fairly and to ensure that its loss assessors (as representatives) comply with the financial services laws. To the extent there are issues with the assessment (e.g. delays caused by the loss assessor), the insurer (who holds an AFSL that covers handling and settling an insurance claim) would be primarily responsible for the loss assessor's negligent acts or omissions.

We also note many of the issues identified by FSRC arose because of the negligent acts or omissions of insurers and insurance fulfilment providers, not loss assessors necessarily.

6. Statement of Claim Settlement Options

(a) Purpose

Given the recent review[8] of the effectiveness of disclosure for financial products and services on consumer outcome and the substantial penalties associated with non-compliance relating to Statement of Claims Settlement Options (**SCSO**), we believe it is important to establish a clear rationale for adding a further onerous disclosure document to the financial services disclosure regime.

We note the concerns around cash settlement identified by the FSRC centred primarily around issues associated with AAI Ltd's marketing of AAMI's Complete Replacement Cover policy. It is not clear how the provision of a SCSO as currently proposed would address these issues.

On the other hand, we believe a SCSO may be helpful in highlighting the subject of underinsurance.[9] We believe a SCSO could inform insureds that underinsurance is a possibility. It could inform them that the cash settlement sum is based on what it would cost the insurer to perform the repairs and this sum may be insufficient for insureds to repair or rebuild themselves. This is relevant:

- where the insurer has the discretion to provide cash settlement under the terms of the PDS; or
- if the insured elects cash settlement in circumstances where the insurer does not have an obligation to provide cash settlement.

Of course, this option does not address the underlying risk of underinsurance where the insurer has the discretion to cash settle a claim under the terms of the insurance contract but that is a separate issue. We note one of the final recommendations (**Final**

[8] REP 632 Disclosure: Why it shouldn't be the default, A joint report from the Australian Securities and Investments Commission (ASIC) and the Dutch Authority for the Financial Markets (AFM), October 2019. This report outlines why disclosure and warnings can be ineffective in influencing consumer behaviour.

[9] The subject of underinsurance was discussed because AAI could choose to cash settle a claim based on what is would cost AAI to perform the repairs being a lesser sum than what it would cost a policyholder to arrange repairs (i.e. the cash settlement is not sufficient to cover the actual expenses incurred by the policyholder).

Recommendation) in the second update report[10] to the Northern Australia insurance inquiry[11] addresses both issues.[12]

(b) Content requirements

In addition to the content requirements noted above and contained in the proposed s 948F, we believe it may be appropriate to include the following information where the insured elects cash settlement (consistent with the Final Recommendation):

- if cash settlement is accepted, the insurer would no longer be required to manage or guarantee the quality, cost or timeliness of any works the insured decides to carry out
- the insured should consider obtaining independent quotes for repairing / rebuilding their property before making their decision.

In our view, these content requirements are consistent with the requirement under paragraph 79 of the new General Insurance Code of Practice 2020[13] which states that insurers will "provide you with information to help you understand how they work and how decisions are made on cash settlements."

Any additional guidance on content requirements would be welcomed.

7. Commencement date

Where a person has lodged on or before 31 December 2020 a complete application for an AFSL or to vary an existing AFSL seeking an authorisation to handle and settle an insurance claim, we believe the application of the existing financial services regime to the new financial service of handling and settling an insurance claim should commence on 1 July 2021 and not when the AFSL or authorisation is granted.

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10 https://www.accc.gov.au/system/files/Northern%20Australia%20Insurance%20Inquiry%20Second%20Update%20Report.pdf

11 https://www.accc.gov.au/focus-areas/inquiries-ongoing/northern-australia-insurance-inquiry

12 The final recommendation is entitled "Final recommendation: Giving consumers more control over how home (building) claims are settled" and is set out on page 27 of the second update report. IAG's submission can be found here.

13 http://codeofpractice.com.au/2020/ICA001_COP_Literature_Code_D4.1.pdf