NIBA
National Insurance Brokers Association.

25 October 2018

The Hon. Kenneth Hayne AC QC
Commissioner
Royal Commission into Misconduct in the Banking,
Superannuation and Financial Services Industry

Dear Commissioner

Policy Questions Arising From Module 6

I attach the submission from the National Insurance Brokers Association of Australia to the policy questions arising from Module 6. The Association appreciates the opportunity to provide these comments in response to the issues raised by the Royal Commission.

Please do not hesitate to contact me if you or your officers have any questions in relation to the matters contained in the attached submission.

Yours sincerely,

Dallas Booth
Chief Executive Officer

Email: dbooth@niba.com.au
Tel: 0488 088 478

NIBA
National Insurance Brokers Association.

25 October2018

ROYAL COMMISSION INTO MISCONDUCT IN THE BANKING, SUPERANNUATION AND FINANCIAL SERVICES INDUSTRY

SUBMISSION BY NATIONAL INSURANCE BROKERS' ASSOCIATION OF AUSTRALIA (NIBA) ON POLICY QUESTIONS ARISING FROM MODULE 6

1. ABOUT NIBA

a. The National Insurance Brokers Association of Australia (**NIBA**) appreciates the opportunity to make this submission on the important policy questions raised in relation to Module 6.

b. NIBA is the industry association for insurance brokers across Australia and has around 350 member firms, employing over 4,000 insurance brokers in all States and Territories, in the cities, towns and regions of Australia.

c. Over many years NIBA has been a driving force for change in the Australian insurance broking profession. It has supported financial services reforms, encouraged higher educational standards for insurance brokers and introduced an independently administered and monitored code of practice for members.

2. ABOUT INSURANCE BROKERS

Types of insurance brokers

a. In Australia an insurance broker will generally fit within one of the following types of business model:
   i. large multinational broker;
   ii. cluster group broker – a small to medium sized broker belonging to a network or group of broking firms; and
   iii. independent broking firms acting outside the above model e.g. smaller to medium size brokerages not part of a group.

Role of insurance brokers

a. The primary role of an insurance broker is to:
   i. advise customers on risk and insurance, including what insurance is appropriate for the customer's needs;
   ii. assist customers to arrange and buy insurance; and

iii. assist the customer in relation to any claim that may be made by them under the insurance.

b. Insurance brokers offer many benefits to customers in playing this role:

i. assistance with selecting and arranging appropriate, tailored insurance policies and packages;
ii. detailed technical expertise including knowledge of prices, benefits and pitfalls of the wide range of insurance policies on the market;
iii. assistance in interpreting, arranging and completing insurance documentation;
iv. experience in identifying and reducing risks; and
v. assistance with claims and a higher success rate with settlements.

c. In doing the above, the insurance broker acts on behalf of the customer and when doing so, they owe legal duties to them for the nature and quality of the work they perform on their behalf. There is no current information arising from the Royal Commission or more generally that supports the view that the insurance broking profession is not meeting these obligations to customers. In most cases an insurance broker helps reduce the issues of concern that have been identified.

d. In limited cases, insurance brokers may act as agent of the insurer and not the insured, but where such a relationship exists, the customer is clearly advised up front and this is a requirement under both the Corporations Act and the Insurance Brokers' Code of Practice.

e. Whilst insurance brokers continue to provide valuable personal advice to many retail clients, especially in the rural and small business space, the provision of insurance services by insurers directly or through their agents on a no advice or general advice model has restricted the ability of insurance brokers to competitively provide personal advice in the retail client space.

f. Under the current Australian financial services model, consumers are not properly made aware of the value of personal advice and the reality is that a direct no advice or general advice sale is invariably cheaper, and price is usually the most significant determining factor in any purchasing decision, which can lead to unintended consequences. Some of the issues raised by the Royal Commission in relation to insurer and agent misconduct are likely to result in actions to reduce this imbalance, as are recommendations by the Productivity Commission in relation to advice models.

3. MAIN ISSUE FOR NIBA

a. NIBA is making this submission on behalf of its members in relation to the policy questions raised because any recommendations made by the Royal Commission in relation to these matters have the ability to both positively and negatively impact NIBA members and their customers.

b. NIBA's main issue relates to the questions regarding the ban on conflicted remuneration and in particular whether the general insurance exclusion should be removed, and whether the life risk insurance limited carve outs should be removed. NIBA does not support any proposal for change in this regard.

c. NIBA is strongly of the view that there has been nothing identified in the Royal Commission hearings or otherwise regarding insurance broker conduct that would reasonably support a recommended change from the exemption as it applies to general insurance brokers given:

    i. the significant adverse impact this would be likely to have on consumers, the community, insurance brokers and the insurance industry generally; and

    ii. FOS, Code and other information currently available to NIBA supports the view that the insurance broking profession is generally acting professionally in the interest of customers, relevant law and community standards and expectations. Insurance brokers have not been the subject of any specific case study or concerns during the Round 6 hearings of the Royal Commission and recommendations for change based on a principle alone would not be likely to be in the community interest.

d. Were a ban applied there would most likely be significant adverse effects on consumers (in particular small businesses) and the community arising from any alternative fee for service type model in terms of:

    i. affordability of advice especially for lower income earners;
    ii. reduction in access to advice (especially in country/remote areas);
    iii. lower claims settlements;
    iv. more restrictive policy covers;
    v. reduction in cover for unusual risks;
    vi. higher insurance prices;
    vii. a reduction in competition;
    viii. an increase in under or non-insurance levels;
    ix. a reduction in comparability;

x. business failures of insurance brokers many of which are small businesses;
xi. adverse impact on intermediated insurer business models; and
xii. loss of State tax revenue.

e. The following are good examples that show the insurance broking profession is generally acting professionally in the interest of customers, relevant law and community standards and expectations:

i. **The low incidence of Financial Ombudsman Service Limited** (**FOS**) **complaints and disputes by consumers regarding insurance brokers**.

FOS has not indicated to NIBA that it has any significant concerns with insurance broker conduct or complaints. In recognition of this, a lower limit has been applied to general insurance broker complaints and disputes in the FOS Terms of Reference and also in the new Australian Financial Complaints Authority Rules effective from 1 November 2018.

ii. **The sound operation of NIBA's self-regulatory Insurance Brokers' Code of Practice and lack of significant consumer complaints.**

Complaints are not at any significant level or showing any significant increase. The Code is under review as required by its terms and will take into account issues raised by the Royal Commission. An own motion inquiry on professionalism by the Insurance Brokers Code Compliance Committee (which has an independent Chair and consumer and industry representatives), did not identify any significant concerns.

iii. **The lack of material Government, public or ASIC identified concerns with the conduct of insurance brokers (as opposed to financial advisers involved in the provision of investment and non-risk insurance advice).**

NIBA has not identified any such concerns. NIBA notes that in recognition of the conduct of the insurance broking profession:

- lesser regulatory costs have been applied in the ASIC supervisory levy regime for general insurance brokers than those that apply to other financial advisers;

- following on from the Financial System Inquiry and other Government and ASIC reviews and after careful consultation and consideration by stakeholders, general insurance brokers

have deliberately not been subjected to the same additional ASIC registration and training obligations, conflicted remuneration ban or best interest duty provisions that are applied to financial advisers; and

- the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018 has included carve outs for personal advice services providers.

f. NIBA notes that irrespective of the matters listed above, a robust protection regime applies for consumers in relation to the conduct of insurance brokers at general law, the Corporations Act (2001) Cth and other relevant legislation. There is no evidence that these mechanisms are not working**.**

g. The additional obligations that have been applied to financial advisers were applied because of identified misconduct that supported a need for further protection. This is not the case for insurance brokers. The fact that the insurance broking profession does not have the same issues as financial planners in obtaining professional indemnity insurance protection also supports this view.

h. In the insurance hearings, had insurance brokers been representing consumers, many of the significant issues identified regarding insurer misconduct in the direct and agency space (especially regarding claims handling and lack of consumer understanding) most likely would have been avoided.

i. Internationally relevant jurisdictions such as the US, UK, Ireland, Canada, South Africa and New Zealand do not apply a ban on commissions received by insurance brokers, principally because of the adverse impact this would have on consumers and the market as noted below.

j. NIBA has not identified any evidence to support the making of such a significant change. NIBA's view, which is consistent with previous Australian and international reviews, is that any such a proposed change will not provide a net consumer/client/community benefit, having regard to the significant adverse effects likely to arise which are summarised above.

k. To the extent reasonably possible in the available time, we have provided a more detailed response in **Attachment A** to the remuneration-based questions. We also provide in **Attachment B** a response to the other questions raised as relevant to insurance brokers and their customers.

We hope this assists the Royal Commission.

ATTACHMENT A

REMUNERATION RELATED QUESTIONS 7-9 AND 16

1. ***Question 7. Should monetary and non-monetary benefits given in relation to general insurance products remain exempt from the ban on conflicted remuneration in division 4 of part 7.7A of the Corporations Act 2001 (Cth)? If so, why?***

a. NIBA's response is yes. NIBA is strongly of the view that there has been nothing identified in the Royal Commission hearings or otherwise regarding insurance broker conduct that would reasonably support a recommended change from the exemption as it applies to general insurance brokers. In NIBA's view, the information shows that the insurance broking profession is generally acting professionally in the interest of customers, relevant law and community standards and expectations and recommendations for change based on a principle alone would not be likely to be in the community interest.

1.1. Low incidence of Financial Ombudsman Service Limited (FOS) complaints and disputes by consumers regarding insurance brokers

a. Retail clients can access FOS (soon to be AFCA), a free and independent external dispute resolution process, if they have a dispute with an insurance broker about their conduct, including appropriateness of advice, remuneration or conflicts of interest. NIBA is not aware from its consultation with FOS (or in any FOS publication) of any FOS concerns of significance regarding the insurance broking profession.

b. In the FOS Annual Review:

   i. General insurance disputes as a whole were 8,603 being 32% of total FOS member disputes. Of these, only 181 were general insurance broker disputes (reducing from 216 in 2016/17) compared with insurer disputes of 7,552. Financial Planner/adviser disputes were 585. There were only 3 Life insurance broker disputes (reducing from 6 in 2016/17) as compared against 840 life insurer disputes. This low percentage of insurance broker disputes has been consistent across the years.

   ii. Insurance brokers were themselves responsible for submitting the highest number of disputes with FOS for the benefit of their clients in the Financial Counsellor category.

c. FOS's submission to the Royal Commission in relation to General Insurance disputes and Life Insurance Disputes does not mention insurance broker conduct as being of concern.

d. In recognition of insurance broker performance, a lower limit has been applied to general insurance broker complaints in the FOS Terms of Reference and also in the new Australian Financial Complaints Authority Rules effective from 1 November 2018 after detailed review.

1.2. The sound operation of NIBA's self-regulatory Insurance Brokers' Code of Practice and in particular, the lack of significant consumer complaint numbers regarding insurance broker conduct

a. In NIBA's view, the Code is the only one specifically designed to operate on line in a consumer-focussed manner: see here for the Code. It is monitored by the Insurance Brokers Code Compliance Committee (**IBCC**) which is made up of an independent chair and an industry and consumer representative. FOS/AFCA assist in the administration of the Code.

b. The number of Code complaints have remained relatively stable. In 2017-18, 1,047 complaints were received by insurance brokers as compared with 1026 in 2016. Significant breaches decreased more markedly, down from 34 to 17 in 2017-18. The IBCC Annual Report stated that "…the outcomes achieved suggest a positive relationship between insurance brokers and clients. Around half of all complaints were resolved with an apology and explanation (26%) or by mutual agreement (23%)."

c. The Code is currently under its scheduled independent review and consultation is occurring with key stakeholders, including ASIC, industry and consumer and small business representatives. The review will take the issues identified by the Royal Commission and final recommendations made into account.

d. The IBCC is proactive in pursuit of improved practices and conducts its own motion enquiries. In 2017/18 it conducted an own motion inquiry 'Professionalism and competency'. The report concluded "It is clear from the responses to this Inquiry that the vast majority of Code Subscribers take competency very seriously. They demonstrate a commitment to professionalism by developing competency frameworks; drawing on a range of data sources to proactively monitor staff performance; requiring staff to meet – and often exceed – minimum training and qualification requirements; and supporting on-the-job competency development with a broad range of

competency-based training activities." It also identified good practices for all members to embrace.

1.3. The lack of material government, public or ASIC identified concerns with the conduct of insurance brokers (as opposed to financial advisers involved in the provision of investment and non-risk insurance advice).

a. The Financial System Inquiry did not identify issues of concern regarding the conduct of the insurance broking profession – the focus was, as has been the case with the Royal Commission and other subsequent Government and ASIC reviews, on issues arising in relation to financial advisers in the investment space, advisers vertically integrated with product issuers and product issuer conduct.

b. NIBA consults with ASIC on a regular basis and in recent engagement with ASIC after the issue of the Round 6 questions, no significant concerns regarding the conduct of the insurance broking profession were identified.

c. In recognition of the sound performance, quality and professionalism of the insurance broking profession, the following has occurred *after detailed Government and key stakeholder consultation and a proper cost benefit analysis*:

    i. Under 7.7A of the Corporations Act:

        - general insurance brokers were provided with an exemption from the conflicted remuneration ban as part of the general insurance exemptions; and

        - the best interest duty applicable to general insurance brokers (which still provides robust protection in the form it applies to general insurance brokers) was distinguished from that applicable to life and investment advisers that merited additional obligations;

    ii. the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018* specifically carves out insurance brokers providing personal advice (i.e. exempt conduct). This was in recognition of the view that general insurance brokers providing personal advice to retail clients are not responsible for the issues these important reforms are seeking to address, and in any event remain subject to the "best interest duty" obligations in the FOFA legislation.

iii. Regulatory costs applied to general insurance brokers under the ASIC supervisory levy regime are less than those for financial advisers – to reflect the lesser regulatory time and effort spent by ASIC on insurance broking related matters; and

iv. General insurance brokers have not been made subject to the additional financial adviser specific professional register (Part 7.6 Div 9), education and training standards and associated provisions (Part 7.6 Div 8A, 8B and 8C) that were warranted by reason of the publicly identified financial adviser concerns. Despite this, NIBA is, on its own initiative, working with ASIC to increase the existing minimum insurance broker training qualifications under ASIC RG 146 to a diploma level.

d. NIBA acknowledges and submits that whilst general insurance brokers are treated differently in some respects, this is justified as the protection regime that applies to insurance brokers is working and properly protects clients and consumers.

e. Insurance brokers have a long history with regulation and compliance. The same can be said for self-regulation and the Code to which NIBA members belong. Insurance brokers have been effectively licensed as a profession by the Commonwealth Government for over thirty years.

f. In terms of existing protection and by way of basic summary:

i. The Corporations Act requires insurance broker licensees (amongst other things):
- to act in the best interests of a retail client (s961B);
- only provide personal advice to a retail client if it would be reasonable to conclude that the advice is appropriate to the client;
- meet general licensing conditions e.g. to provide financial services efficiently, honestly and fairly, have in place adequate arrangements for the management of conflicts of interest and have for retail clients, an internal dispute resolution scheme that meets ASIC requirements and belong to the external dispute resolution scheme AFCA (s912A);
- to be responsible for the training, compliance and and conduct of their representatives;
- disclose important information in the Financial Services Guide to retail clients about their services, role, remuneration and relevant associations;

- to disclose its remuneration to retail clients when providing personal advice along with other important information;
- notify ASIC of any significant breach of its obligations; and
- to be bound by the determination of AFCA;

ii. The general law duty of care, fiduciary obligations and other legislation such as the ASIC Act supplement the above protections; and

iii. NIBA brokers also belong to the self-regulatory Insurance Brokers Code of Practice which imposes additional obligations and provides the right for consumers to seek sanctions via the IBCCC.

g. If the above were not working, this would have been identified by FOS, the IBCCC and/or ASIC. The additional obligations that apply to financial advisers were applied because of identified misconduct that supported a need for further protection.

h. The scenarios of concern identified by the Royal Commission regarding conflicted remuneration that related to advisers acting for the customer:

i. were only in a non-general insurance context (i.e. financial advisers and mortgage brokers); and

ii. can be distinguished in various respects (e.g. issuer vertical integration/aggregator ownership, the nature of the industry and complexity of product offering leading to less direct sales).

i. There is no equivalent evidence of systemic failings of a similar nature in the general insurance broking profession that would justify treating it in an equivalent manner.

j. In relation to misconduct identified in risk insurance scenarios there are important distinctions that need to be noted. In particular:

i. The advisers or sales representatives accused of misconduct were agents of insurers, not insurance brokers and operated in a different cultural, legal and regulatory environment. They were acting in the interest of the insurer not the insured. This non-customer centric model contributed to the misconduct;

ii. Where general insurance conflicted remuneration was considered, it was only in relation to:

- insurer sales or claims agents who were not obliged to act in the best interest of customers; and
- specific markets that are very different to an insurance broking service offering. For example:
    1. direct telephone marketing by life agents involving pressure sales techniques; and
    2. the add-on insurance issues were focussed on the very distinct motor dealer market where:
        a. the dealers operated at a loss or on very small margins which contributed to poor sales practice in the insurance space;
        b. the add-on products were sold as a third order consideration;
        c. there was an unusual environment of high reverse competition and lack of competition leading to the ability to apply high mark ups.

k. In the typical insurance broking service offering:

i. the insurance broker acts on behalf of the client and has a duty of care, fiduciary duty and under the Corporations Act, must act in their best interests. An insurance broker's business procedures are developed around these core principles. It is a customer centric model;

ii. the insurance offering is the primary offering;

iii. it is the insurance broker's job to consider the value of the product they are recommending in light of the insured's individual circumstances, not the generic circumstances of a target market;

iv. general insurance policies are typically annual and not subject to trail commissions and the risk of churning. Life risk trail commissions have been subjected to restrictions since 1 January 2018;

v. insurance brokers providing personal advice to retail clients have the obligation to disclosure their remuneration (including as a dollar amount where known). Insurance agents who give general or no advice are still subject to a remuneration disclosure obligation in the Financial Services Guide, but depending on the circumstances, it can be more general;

vi. there is not a closed market and existing competition effectively manages any risk of excessive commissions. This is especially the case

where direct insurers market price heavily to the public. Unlike the home loan industry, the nature of the insurance product is not seen as complex. There is no motivator for a consumer to choose insurance brokers over direct issuers, especially where price is a prime consideration. As a result, commission rates are kept competitive.

vii. Consumers are able to exercise their normal competitive pressure on prices and quality.

l. The accepted view of those who have undertaken a detailed review of the general insurance market is that remuneration of insurance brokers on a commission basis, whilst not perfect, is still the most appropriate form of remuneration in the general insurance context for the majority of consumers (as opposed to large business) and leads to a number of consumer benefits.

m. The nature of the premium market cycle, the penchant for clients to look at premium cost only and to consistently make insurance purchase decisions on premium and the ever-growing competitive nature of insurance delivery, through insurance brokers, direct insurers on line and their agents and other partners such as supermarkets and banks, all help to keep insurance broker commissions at a competitive level.

n. This position is accepted in equivalent jurisdictions such as the US, UK, Ireland, Canada, South Africa and New Zealand. This is for many important reasons that have been recognised for many years. We discuss the adverse impact of a fee-based model for consumers and others further below.

o. NIBA is not aware of information that shows insurance brokers are generally not properly managing such conflicts in the interest of their clients. A ban on commission would give rise to significant detriment to consumers, the community, insurance brokers and the insurance industry that is likely to be significant and outweigh any benefits that may arise. We provide further information on this below.

p. In NIBA's view, in circumstances where there is no evidence of any significant or systemic misconduct, the existing regulatory and self-regulatory regime as it applies to general insurance brokers provides appropriate protection and remedies in relation to clients (See **Attachment B** question 1 for an overview of the key regulatory and self-regulatory regime as it applies to general insurance brokers). Any recommendation that the ban be applied to general insurance brokers could not reasonably be justified. Insurance brokers should not be unfairly tarred with the same brush as others in the financial services industry.

1.4. No ban internationally

a. Internationally relevant jurisdictions such as the US, UK, Ireland, Canada, South Africa and New Zealand do not apply a ban on commissions received by insurance brokers, principally because of the adverse impact this would have on consumers and the market as noted below. Any such ban would result in Australia being inconsistent with most equivalent jurisdictions.

1.5. Overview of key adverse impacts of removing the exception

a. Insurance brokers play a key role in the market place by:

   i. identifying the risks faced by consumers;
   ii. reducing insurance distribution costs;
   iii. reducing search costs for consumers;
   iv. reducing uncertainty about the reliability and financial robustness of insurance companies;
   v. reducing asymmetric bargaining power as between clients and insurers;
   vi. supporting consumers when filing a claim, and acting as their advocates; and
   vii. more generally, supporting and promoting competition in the insurance market by virtue of the "broking" of the client's insurance market to insurance suppliers.

b. The services provided by insurance brokers to customers are valuable for consumers, especially in an environment where issues have been identified with the sales practices of insurers and their agents.

c. The Royal Commission has shown in a general insurance context that consumers may not be as well protected in situations where they deal directly with insurers. Advice and other services provided by insurance brokers assists in addressing such issues. Recent disaster events have shown the value to customers of having ready access to personal advice and claims advocacy from insurance brokers.

d. Banning of commission-based remuneration for insurance brokers in general insurance is likely to result in the following detriment to industry stakeholders:

   i. fewer sources of advice and other services of insurance brokers (especially in country/remote areas);
   ii. higher insurance prices, adversely affecting lower income consumers;
   iii. lower claims settlements;

iv. increase in under or non-insurance;
v. less innovation;
vi. more restrictive policy cover;
vii. lack of access to certain covers;
viii. reduced ability to claw back remuneration on cancellation;
ix. reduced ability to compare for no cost;
x. a reduction in competition;
xi. distorted competition between distributors;
xii. failure of insurance broking businesses and associated businesses;
xiii. adverse impact on intermediated insurer business models; and
xiv. lower state tax revenue.

e. We provide further detail in the sections below.

1.6. Reduction in access to personal advice service and other broker services such as claims advocacy

a. Insurance brokers offer many benefits to consumers, which include:

i. assessment of risk and determining appropriate ways to manage this risk;
ii. assistance with selecting and arranging appropriate, tailored insurance policies and packages or alternative risk transfer arrangements;
iii. detailed technical expertise, including knowledge of prices, benefits and pitfalls of the wide range of insurance policies on the market;
iv. assistance in interpreting, arranging and completing insurance documentation;
v. assistance with claims and a higher success rate with settlements (generally considered to be higher than claims made without a broker).

b. The number of individuals who access the benefits of an insurance broker's services is not as high as it should be in the retail client market. Insurance brokers still play a strong role in the provision of retail insurance services to small business consumers.

c. Anything that reduces the likelihood of consumers and small businesses using the services of insurance brokers should be avoided given the benefits that could be lost.

d. A broker will provide a broad range of valuable services for the commission paid by the insurer. Whether negotiating the inclusion of a special clause in a

policy necessitates one client visit or five or involves a phone call or countless hours of argument, there is no extra cost to the client.

e. If there was a change to a "fee" regime, commercial attitudes and behaviour being what they are, there is little doubt that an important element in the client agreeing the fee would be to equate what it perceives to be the time spent by the broker on that client's affairs. Many insureds would not so freely ask for broker advice or overview of a problem as this would no doubt impact, if not on the present year's fees, then next years.

f. In the present “commission” regime, part (and arguably the most important) of the broker's duties for which no additional or significant charge is usually applied, is assisting the client when a major claim occurs. There is little argument that a competent broker is of immense value to their client in these circumstances, with services ranging from "holding the client's hand", assisting in adjuster negotiations and reducing the time from claim to admission of liability (the key to good claims settlements).

g. For example, a $400,000 fire in a timber mill or a clothing factory could well involve the conscientious broker in 30 plus hours work not contemplated in the fee struck. There would be major difficulties in coming to a further arrangement at this time when the broker is most needed and the client can least afford it. The brokerage on that account might well have been $500. Currently it is taken for granted that if a claim occurs, the broker is at the client's disposal for any assistance required. A fee-based system would reduce the degree of service presently available to consumers.

h. Though some clients may be happy to pay a fee equivalent to brokerage, a considerable proportion of clients would opt for the fee for service concept and a direct result would be that brokers would seek to contract out of many of their current responsibilities to the detriment of the insured. In many cases, where it is not possible to contract out of such responsibilities, the insurance broker may need to cease the service altogether.

i. Particularly for the smaller commercial and personal lines, it is not realistic to suggest that small brokers can compete with large direct placement insurers if customers continue to purchase insurance principally on the basis of price, unless consumers are better educated about the level of insurance cover (or rather lack of it) provided for the price and the risks of not having an adviser providing advice in their interests.

j. Not all brokerage relates to advice services. All intermediaries provide services for insurance companies and some part of the commission received by an intermediary is for such services.

k. Depending upon the arrangements with the insurer, the services could include, data entry, premium collection, underwriting, reinsurance, payment of taxes and charges and claims servicing.

l. Banning brokerage or other similar remuneration received from product issuers that could be considered “conflicted” remuneration would significantly alter the way many insurance companies operate in Australia. The change will put the onus to pay for these services on insureds without a significant reduction in product cost. Consumers are unlikely to want to pay the additional amount.

m. There is a complete marketplace imbalance between such insurers and small brokers so far as the ability to afford marketing and advertising is concerned. Unless these matters are addressed first, there can be no comparison shopping for both terms of cover or price. Consumers will ultimately be disadvantaged.

n. Those insureds who buy through an agent of, or direct with an insurer, have no benefit of personal advice being provided by an adviser acting for them, are offered no alternative, and thus when claims are subsequently made, may not have the necessary cover, and may pay the ultimate penalty of bankruptcy.

o. One of the unique aspects of insurance is that it is not guaranteed that every person will be offered cover, if at all. Under the commission model, the broker is not entitled to any remuneration until a valid and binding contract of insurance has come into existence which covers the required or appropriate risk. The fact that the broker has expended time, effort and skill in attempting to place insurance is irrelevant, and the broker is only paid by result. Under fee only arrangements, the customer would be required to pay a significant upfront fee for advice on their insurance or charges at an hourly rate for time spent.

p. If the customer was subsequently declined cover by the insurer, they would have incurred significant expense and arguably received no benefit in that they were declined cover. This is clearly an undesirable outcome for both the consumer and for insurance broker. It is also an additional reason as to why consumers may baulk at a fee-based structure for insurance.

q. Such up-front costs and the risk associated with them would result in considerably less insurance being sold through insurance brokers and a significant reduction in the number of people receiving advice on their insurance needs.

r. The end result for consumers is likely to be that they will end up paying the same price, or more, for cover without the assistance of professional personal advice as to the terms, cover and price of the policy available through insurance brokers.

1.7. Reduction in competition

a. Insurers will certainly be advantaged, perhaps unintentionally, should a fee only regime apply. If, as argued above, brokers become less involved in the insurance process as a result of fee only remuneration, there will be less competitive pressure resulting from the "broking" of client risks, and insurers will have a stronger capacity to dictate price increases.

b. The Productivity Commission Inquiry Report: Competition in the Australian Financial System identified that general insurance is dominated by four major insurers (which vary per type of insurance) and white labelling practices create an illusion of competition. Insurance broker help increase competition.

c. Direct market insurers will probably strategically take advantage of such a change. They could infer that they can offer a cheaper product to consumers, but this would generally be associated with a lower level of insurance cover. Given the state of financial literacy and failure of the disclosure regime, many consumers would not have the ability to understand what they are losing. Insurance brokers help manage this risk.

d. In a market where price is significant, consumers will initially move away from brokers to avoid paying what they will perceive as an additional amount and be forced to accept whatever the insurer has to offer with regard to price, cover and claims settlement.

e. Competitive forces will inevitably dictate that cover will be restricted to achieve greater price reductions, a factor that unsophisticated consumers will be unable to evaluate. It follows that the consumer most affected will mainly be the low-income earner who, by necessity, will attempt to save on premiums and will not have the commercial understanding to evaluate the insurance contract, apart from the question of price.

f. Consumer complaints will then escalate (as is occurring even now) as more people become disillusioned with dealing direct with insurers. Ultimately, this will also lead to less competition in the marketplace and policy covers will become more restrictive.

g. From a market perspective, brokers also encourage sustained and spirited competition amongst insurers and ensure a fair and reasonable price for consumers. This is essential to a competitive industry in Australia because the size of the market and solvency requirements create a real barrier for the entry of new competitors.

h. Under the current system, insurance brokers have ensured that the Australian market has been both competitive and of benefit to consumers in Australia. Insurance brokers have the skills to ensure the client has the correct level of cover for the lowest premium and, that insurers do not combine to restrict competition.

1.8. Under insurance or non-insurance risk

a. Consumers perceive risk insurance in a very different way to investment-based products. Risk insurance is seen as a grudge purchase and insureds are less likely to pay a fee for advice in relation to such products. This may lead to an increase in under or-non-insurance, with general detriment to the community. Affordability for those on low incomes has been consistently recognised as an impediment to greater uptake of insurance.

b. The existence of multiple charges e.g broker fee and premium as against just premium, may complicate comparison across competing products. If a consumer is focused on finding the most competitive price for a particular product, one would expect their focus to be on the final price of the product, and not the split of payments between provider and distributors. Providing this split through upfront fees may therefore not improve shopping around, and could, in fact, be detrimental if it caused confusion. Furthermore, the disclosure of multiple prices may cause the consumer to focus only on a subset of the price and not quality of cover.

1.9. Increase in price and affordability of insurance and advice for consumers

a. Commission arrangements insurance brokers have with insurers help make access to insurance broker services by consumers more affordable.

b. This is clear when you compare APRA pricing figures in the non-retail market (where insurance brokers play a greater role) against the retail market (where they play a lesser role) which shows less upwards premium movement in the non-retail market.

c. This is principally because insurance brokers have a negotiating power and knowledge consumers do not. In retail insurance lines, insurers are generally unlikely to negotiate directly with the insured on reductions in premiums on

an individual basis. Relative to the amount of the premiums, the expense of doing so would be high and the total expenses of direct selling in such a case could exceed the commission that would be paid to insurance brokers.

d. A large proportion of small business insurance in Australia is effected through a broker. This is the most price sensitive sector of the market. It is this sector that will be most affected if commission were to be banned.

e. Fee-based models are usually more affordable to the wealthy. Some consumers would not have the financial means to pay upfront fees for financial advice resulting in the benefits of personal advice being only available to certain sectors. Commission-based remuneration helps manage this imbalance.

f. Other direct pay arrangements, such as hourly fees, are likely to require more controls and oversight as firms would need to review invoices and monitor the time each advisor spent on each of their accounts and ensure that the charges are appropriate. Furthermore, at the front entrance point, the set-up time of such accounts would be quite significant. This potential increase in administrative costs could result in higher fees and end costs for consumers.

g. Consumer protection is not free. The result of any significant reform is a more expensive product or service. Governments should avoid raising standards to levels which are excessively high, in the sense that consumers will be either unable or unwilling to pay for them.

1.10. Reduction in innovation and availability of certain covers

a. Insurance brokers are also responsible for most of the innovation in policy extensions and new types of cover. The importance of the services of a broker must not be underestimated and anything which might reduce broker service (e.g. by virtue of the paucity of the fee negotiated), or cause the broker to restrict its liabilities or duties, would be counterproductive for commerce and the consumer.

b. Insurance brokers work with insurers to develop specific products and to enable the manufacture of niche products to respond to the needs of consumers.

c. The remuneration generated from commission arrangements facilitate insurance brokers in delivering such products in a cost effective and efficient manner for the benefit of consumers: keeping prices down, enhancing choice and delivering professional service and advice to customers. A consequence

of any ban would be a severely restricted market for niche products that are not provided by mainstream insurers.

d. The role of the insurance broker in researching the market and finding the product either nationally or elsewhere has the potential to be seriously compromised by a ban on commissions.

e. Reduced cost and improved cover resulting from legitimate business development of intermediaries is in everyone's interest. Insurers may not be interested in providing cover for 'difficult' sectors (such as childcare, sports clubs, non-standard houses or certain motor risks – the list is extensive) and the gap has been filled by insurance broker initiatives, providing consumers and small business with access to products and prices that simply would not be available in the absence of such facilities.

1.11. Likely reduction in claw back for consumers

a. Brokers commission, unless stated otherwise in the contract, may be permitted to be clawed back in whole or part if a policy is cancelled. The approach taken in relation to fees is likely be different in this regard because they would need to be directly attributable to a particular service e.g. administration costs and the consumer may have more trouble getting this fee back when cancelling their policy.

1.12. Reduction in consumer comparability

a. In a fee-based model, a consumer would not have the opportunity to compare and contrast financial propositions without incurring costs.

1.13. Damage the insurance broking profession, especially small broking businesses

a. Insurance broking firms in Australia vary from small operations with one or two personnel up to multinational corporations. The majority of all commercial insurance in Australia is placed through insurance brokers.

b. The majority of brokers are small, local, Australian-owned operations employing 10 people or less.

c. Commission represents a high proportion of the income of those brokers who tend to deal in the personal and small commercial lines of business.

d. Any banning of commission/conflicted type remuneration received from product issuers would have a significantly adverse effect on such insurance brokers and would lead to:

    i. business hardship and in many cases, closure;
    ii. loss of income;
    iii. reduced earnings; and
    iv. unemployment.

e. The issue for insurance brokers is whether retail clients will be prepared to remunerate them by way of fees.

f. Behavioural economics suggests that when consumers are unsure about the value or quality of a particular product, an upfront fee for advice or other intermediation services could have a larger negative impact on consumer demand than a payment spread over time, particularly if the continued payment depends on the continued provision of services.

g. Consumers may be reluctant to engage with financial services in the first place (due to inertia and optimism bias), and be even more unwilling to pay upfront for services (due to present bias).

h. It would also be unreasonable to leave brokers with no choice but to adopt a fee-based system of remuneration when a proportion of their work is effectively being performed for the benefit of the insurer as well as the client. For example, an insurance broker effectively acts as a form of distribution system for an insurer, saving them costs they would otherwise incur in this respect (e.g. were they to use an agent). Insurance brokers also play a data input role that save insurers costs in this respect. Were a fee to be charged, a client may not be inclined to pay for the services that also benefit the insurer.

i. The indeterminate nature of the broker's service as to time involvement, responsibility and the precise composition thereof, means that at the time the broker receives its remuneration, it cannot calculate whether that remuneration will be adequate.

j. There is also the risk that with a time cost-based model:

    i. of overcharging or taking longer than should be the case; and
    ii. as policy issuance is not guaranteed, a waste of client money if the insurance is not accepted.

k. Payment by commission has proven to be the most effective form of remuneration given the distinct nature of insurance and the role played by

and service provided by brokers. This fact was acknowledged by the Australian Law Reform Commission when it did not recommend the implementation of a fee-based system for remuneration of brokers in its Report no 16 Insurance Agents & Brokers. Nothing has changed in the market to justify any change to this view.

l. The removal of brokerage and/or non-fee-based remuneration will inevitably force many small indigenous and rural brokers out of the insurance broking profession in Australia. The cost and administration of systems to implement and manage such a model can be costly.

m. The multi-national broker is likely to continue to service multi-national clients, but medium sized and small business houses as well as private consumers will be deprived of many of their present choices as to a broker.

n. Many smaller brokers will find it difficult to remain in business in a market where there will become diminishing reasons for client loyalty.

o. Typically, large international broker income is derived more from fees than commission, based on their larger corporate client base. By contrast, the smaller broker is very dependent upon commission. Larger brokers would therefore not be as affected by any commission removal as the small to medium brokers.

p. Further, the large broking firms are predominantly overseas-owned, so the impact will be felt most severely by Australian owned small businesses.

q. Loss of income, reduced salary earnings, business closure and additional unemployment would result, especially in circumstances where there is little, if any, substance or backing from the general community.

1.14. Distorted competition between distributors

a. It is difficult to achieve a level playing field between in-house distributors of an issuer's products and insurance brokers acting for clients. Providers of financial products who also provide advice may have an incentive to treat some of their distribution costs as product costs. The resultant artificially low cost for advice could price brokers out of the market.

1.15. Impact on insurers

a. History has shown that the broker plays a dynamic role in assisting clients to obtain the best policy to suit their needs. However, brokers also provide a vital and cost-effective link with the insurer. The broker acts as a

complementary part of the insurer's sales function and pro-actively seeks new accounts. As well as distribution of their products, brokers collect premiums, handle queries and endorsements, assist with claims and generally provide a legitimate service to insurers which justifies remuneration by commission from the insurer.

b. A change in this arrangement may have a negative impact on intermediated businesses when compared to direct business.

c. A shift from commission-based arrangements could put under pressure established and accepted distribution arrangements and disrupt the profession when it is already subject to other pressures. A loss of business by insurance brokers will have a flow on effect to those that the insurance brokers outsource services to.

1.16. Taxation impact

a. With the removal of commission, the State Government income on stamp duty and other relevant taxes will decrease significantly.

2. ***Question 8. Should monetary benefits given in relation to life risk insurance products remain exempt from the ban on conflicted remuneration in Division 4 of Part 7.7A of the Corporations Act 2001 (Cth)? Why shouldn't the cap on such benefits continue to reduce to zero?***

a. NIBA believes that for insurance brokers engaging in life risk insurance the current position should remain unchanged for similar reasons noted above for general insurance brokers. The existing restrictions on upfront and trail commissions only came into effect from 1 January 2018. We believe the impact of these changes is likely to substantially address the identified life risk specific misconduct such as churning and they should, as is planned, be reviewed by ASIC at a future time and the position revisited if misconduct is identified.

3. ***Questions 9. Is banning conflicted remuneration sufficient to ensure that sales representatives do not use inappropriate sales tactics when selling financial products? Are other changes, such as further restrictions on remuneration or incentive structures, necessary?***

a. NIBA assumes the reference to "sales representatives" is not to persons providing personal advice on behalf of the client. NIBA does not support a ban on conflicted remuneration in the general or life risk insurance space. NIBA notes that any ban would most likely drive the market towards a direct

insurer model as an insurer could more easily manage the issue through adjusted product pricing than a distributor separate to the insurer.

b. NIBA is of the view that current reform proposals (regulatory and self-regulatory) and current laws, if complied with and enforced properly, are more likely than not to sufficiently manage the risk of inappropriate sales conduct.

4. ***Question 16. If the ban on conflicted remuneration is not extended to apply to general insurance products, should the payment of commissions for the sale of add-on insurance by motor dealers be limited or prohibited?***

a. NIBA is of the view it should be limited, not banned and the performance of insurers and motor dealers in this space should be monitored by ASIC.

ATTACHMENT B

OTHER POLICY QUESTIONS ARISING FROM MODULE 6

1. Is the current regulatory regime adequate to minimise consumer detriment? If the current regulatory regime is not adequate to achieve that purpose, what should be changed?

The regulatory regime provides extensive protection for consumers, especially when you consider current reforms that have been implemented or which are proposed such as:

- Design and distribution proposals;
- ASIC Enforcement Review reforms,
- Government initiatives Insurance specific standard contract and definitions; and
- Unfair contract law proposals.

That said, there is always room for improvement in certain areas. NIBA is of the view that change should only be made where there is evidence of a systemic industry failing and the costs benefit analysis justifies the change. The subjective nature of certain provisions of the Corporations Act (e.g breach reporting under section 912D and some general licensing conditions) and product disclosure regime are two good examples identified.

Complexity and lack of clarity of certain areas of the law can result in unnecessary consumer detriment if not considered and applied with core consumer protection principles in mind.

NIBA supports simplification and clarity of the existing law where possible to avoid this. The inclusion of core appropriate and clear principles by which decisions must be made regarding compliance with provisions identified as problematic is also worth considering. Detailed consultation with all stakeholders is required in order to achieve a fair and reasonable balance. Change comes at a cost for the consumer, and NIBA is concerned that consumers do not pay for change that is of little real end benefit. Knee jerk reactions have led to poor consumer results with the Key Facts Sheet being a prime example of this.

NIBA comments on the disclosure regime issues below.

Despite criticism of the regulators, NIBA is of the view, in the insurance context, that whilst specific issues have been identified in the Royal Commission that can be improved, a major shift is not justified. NIBA does not support a hardline enforcement approach for many reasons, many of which are for the benefit of the

consumer. This should only be appropriate where industry does not react appropriately to an issue of concern by the regulator in an appropriate and reasonable manner.

NIBA also believes that sector-specific industry codes should continue to play an important role in adding to consumer protection provided by the law and reacting to shifting community standards and expectations.

In NIBA's view, the law, as it applies to insurance broker services provided on behalf of their retail clients, is on the whole operating effectively. NIBA has not identified any evidence of a systemic or significant industry failure that would justify a major change regarding insurance broker specific obligations. NIBA has however, commented above and in answers to questions below, on other areas of the law that may justify change where there is real benefit to consumers.

The Royal Commission has set out the relevant law in various Background papers. However, we provide a basic overview of some key obligations that apply to insurance brokers providing personal advice to retail clients.

Under the **Corporations Act** an insurance broker needs to obtain a licence or act on behalf of a licensee - s911A and s911B.

A licensee in providing personal advice must where applicable:

- meet the general licensing conditions, such as:
    - the obligation to do all things necessary to ensure that their financial services are provided efficiently, honestly and fairly (s912A(1)(a));
    - the obligation to have adequate risk management systems (s912A(1)(h));
    - the obligation to comply with financial services laws and to take reasonable steps to ensure their representatives do likewise (s912A(1)(c) and (ca));
    - the obligation to ensure that its representatives are adequately trained and are competent, to provide those financial services;
    - the obligation to have to have adequate compliance arrangements (reg 7.6.03(g) and Pro Forma [PF 209]);
    - the obligation to implement and maintain adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities it or its representatives undertake in the provision of financial services to retail and wholesale clients, as part of the financial services business of the insurance broker or its representatives (s912A(1)(aa) and ASIC Regulatory Guide at RG 181.1 and 44);
- hold acceptable professional indemnity insurance in relation to retail clients per section 912B;

- report any significant breaches to ASIC under section 912D;
- meet and take reasonable steps to ensure that their representatives meet the:
    - best interest duty under s961B – to act in the best interests of the client in relation to the advice they provide to the client.
    - the appropriate advice requirement under s961G – to only provide advice if it is reasonable to conclude that the advice is appropriate for the client, assuming the best interests duty has been complied with.
    - warn the client in accordance with section 961H if the resulting advice is based on incomplete or inaccurate information;
    - the obligation to give priority to the client's interests under section 961J) – to place the interests of the client ahead of any interests they have or those of their related parties.
- comply with Division 3—charging ongoing fees to retail clients requirements;
- comply with any of the applicable conflicted remuneration provisions (different regime for general insurance (no ban) and life risk insurance (special requirements);
- provide a Financial Services Guide (FSG) explaining their services and remuneration amongst other things;
- provide a Statement of Advice (SoA) or otherwise meet certain record keeping and disclosure obligations if the SoA requirements do not apply;
- meet the additional training requirements for personal advice;
- ensure that a Product Disclosure Statement (PDS) created by the issuer is provided before or at the time the advice is provided;
- be registered on the financial advisers register where applicable (this catches life risk insurance not general insurance);
- not mislead or otherwise engage in unfair conduct in relation to consumers such as under sections 1041E False or misleading statements; 1041F Inducing persons to deal; 1041G Dishonest conduct; 1041H Misleading or deceptive conduct (civil liability only); 1041I Civil action for loss or damage for contravention of sections 1041E to 1041H;
- 991A Financial services licensee not to engage in unconscionable conduct
- not breach the anti hawking provision in s 992A;
- not describe themselves as 'independent', 'impartial' and 'unbiased' if receiving commission per s923A;
- only use the term insurance broker if permitted under their AFSL licence;
- meet the special trust account requirements of s981B; and
- keep appropriate financial records and provide financial statements and appoint an auditor;

In addition, insurance brokers are also:

- required to comply with other relevant legislation e.g unfair contracts provisions of the ASIC Act, Privacy Act, Spam Act; Do Not Call Register Act; various secret commissions legislation; discrimination legislation etc;
- subject to a duty of care to adopt due care, diligence and competence in preparing the advice;
- usually subject to a fiduciary duty to act in the best interests of the client. When acting as fiduciary, a broker is generally required to:
    - not receive a secret commission, bribe or secret profit from a third party with whom it is dealing without the knowledge or consent of the client, or which was not contemplated by the client at the time of creation of the agency; and
    - not be placed in a position where its personal interests conflict with the clients unless the client, with full knowledge of the circumstances (i.e. the nature and extent of the interest), consents;
    - keep their client's information confidential, except to the extent otherwise agreed by the client.
- required to comply with contractual terms – subject to unfair contracts legislation protections; and
- if a member, comply with the NIBA Insurance Brokers Code of Practice.

A. PRODUCT DESIGN

2. Are there particular products – like accidental death and accidental injury products – which should not be sold?

This is principally an issue where the insurer sells directly or through an agent and an insurance broker is not involved in acting on behalf of the client in providing personal advice. A person providing personal advice considers the client's individual needs, objectives and financial situation against the product.

Insurers do not typically do this. If they did, they would be providing personal advice. This is an important point to note as statements that insurers should meet customer needs and expectations gives an impression that they should in effect be conducting a personal needs analysis i.e. personal advice or alternatively provide products that should meet all needs and expectations no matter how unreasonable.

An insurer sells a product. The starting point must be that a product should not be sold if it has no value to anyone buying it (but this would breach existing law in any case). It should be designed to be of reasonable value to the identified target market they are seeking to sell it to and reasonable protections should be put in place to stop persons not in the target market from acquiring it.

A fair balance must be reached, or the cost of products may be come unaffordable to lower income consumers.

The hard questions are:

- what is a target market and at what level does it need to be set at? e.g car owner or a car owner of particular type and characteristics and so on.
- what is value and to what extent must value be provided for it to be a worthwhile product? Who should make this determination and on what basis? It is not simple as the level of value can vary depending on choices made by a consumer as to sum insured or excesses and optional covers etc. If there is value to a target market, a product should be permitted. The next question becomes important.
- what distribution controls are reasonable to stop non-target market persons from buying a product of little or no value to them? At what level must this be done? Logically it should be at the generic target market level (once determined – it cannot be too granular or affordability becomes an issue).

The reality at the end of the day is that if a person is in a target market at a generic level, the value of a product could still be nothing if the retail client's individual circumstances mean an exclusion would apply. An insurer could not reasonably be expected to determine this in all cases in the application process (or at least without additional significant cost). This is why personal advice is a valuable protection for consumers.

We believe current Government initiatives (if implemented properly to address the above important questions) are likely to be more than sufficient to manage the issue going forward, notably:

- The Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Bill 2018 which imposes obligations on insurers regarding product design and distribution controls as well as providing ASIC with a product intervention power.

- The proposals to extend unfair contracts laws to insurance that would provide consumers with rights in the case of products providing little or no value.

- The standard cover and standard definition proposals Government is to release relating to the Insurance Contracts Act.

3. Should the requirements of the Life Insurance Code of Practice in relation to updating medical definitions be extended to products other than on-sale products?

The Code currently provides:

3.2 The medical definitions in our on-sale policies for benefits that are payable after a defined medical event will be reviewed at least every three years and updated where necessary to ensure the definitions remain current. This will be done in consultation with relevant medical specialists. When medical definitions in your Life Insurance Policy are updated by us as a result of this, we will let you know.

NIBA notes that this is a matter for insurers but will ultimately be both a practical and pricing issue. The risk is insureds could find their cover unaffordable after such a change.

B. DISCLOSURE

4. Is the current disclosure regime for financial products set out in Chapter 7 of the Corporations Act 2001 (Cth) and Division 4 of Part IV of the Insurance Contracts Act 1984 (Cth) adequately serving the interests of consumers? If not, why not, and how should it be changed? In answering these questions, address the following matters:

4.1 the purpose(s) that the product disclosure regime should serve;
4.2 whether the current regime meets that purpose or those purposes; and
4.3 how financial services entities could disclose information about financial products in a way that better serves the interests of consumers. (Despite the reference to the Insurance Contracts Act 1984 (Cth), this question is not limited in scope to contracts of insurance.)

The purpose of a "disclosure" regime should be to make available to a consumer in plain language, the reasonable information needed to decide on whether to buy the product. The issue is how far does an insurer need to go to protect consumers from themselves in the disclosure process and in what ways? Statements are being made at present that insurers should *meet customer needs and expectations* that are too broad.

Disclosure documents, no matter how clear or concise will not protect a consumer that does not read them or if financial literacy is an issue.

Disclosure is only one part of the solution. The Insurance Council of Australia has proactively engaged in valuable research, reviews and other initiatives to help improve things.

Insurance is a complex product and without the full terms an insured is not fully or properly informed (one exclusion can be significant).

A summary may reduce the risk of key things being missed but this can never cover all important matters. The Key Facts Sheet is a good example of this, where no stakeholder believes the end result is a good one for consumers.

A matter can be more important to some consumers as opposed to others depending on their circumstances. Improved disclosure as part of the sales process comes at a cost and too much time spent on disclosures can lead to non-insurance.

Insurers can only reasonably be expected to go so far in protecting people from themselves, beyond which affordability becomes an issue. The design and distribution proposals and standard cover/definitions initiatives are likely to assist.

Personal advice services of insurance brokers help reduce these issues and should be promoted more.

There are a number of options that cannot be covered in the available time. NIBA notes that the Government design and distribution proposals and standard cover/definitions initiatives provide a valuable opportunity in this regard to achieve the right balance, but there must be a focus on the big picture end result as all initiatives are connected and can impact on the others.

Disclosure regime

5. Is the standard cover regime in Division 1 of Part V of the Insurance Contracts Act 1984 (Cth) achieving its purpose? If not, why not, and how should it be changed?

NIBA has made previous submission on the importance of this particular area of reform to Government and other review bodies.

The provisions are out of date and the Government is undertaking a review that should resolve the issues after proper consultation with stakeholders.

Insurers, insurance brokers and consumers all appear committed in this respect.

6. Is there scope for insurers to make greater use of standardised definitions of key terms in insurance contracts?

Whether this is appropriate depends on whether there is an identified issue of concern adversely affecting consumers and the cost benefit analysis justifies imposition of a standardized definition, as was done with flood.

C. SALES

Questions 7-9 covered in Attachment A.

10. Should the direct sale of insurance via outbound telephone calls be banned? If not, is the current regulatory regime governing the direct sale of insurance via outbound telephone calls adequate to avoid consumer detriment? If the current regulatory regime is inadequate, what should be changed?

NIBA assumes "outbound" telephone calls is referring to unsolicited (as opposed to solicited calls). NIBA does not believe unsolicited outbound sales should be banned but better protection is required to avoid pressure sales by product issuers and their agents. This could be done by way of a deferred sales model.

We understand that in the life insurance context, ASIC will be engaging in consultation on outbound sales. Greater clarity could also be provided on where the line is drawn between express and inferred consent as there is currently a lack of clarity in this respect.

11. Is Recommendation 10.2 from the Productivity Commission's report on "Competition in the Australian Financial System", published in June 2018, sufficient to address the problems that can arise where financial products are sold under a general advice model (for example, the sale of financial products to consumers for whom those products are not appropriate)? If not, what additional changes are required? Are there some financial products that should only be sold with personal advice?

NIBA supports Recommendation 10.2 that the term "general advice" should be renamed so it is clear that advice is only provided in personal advice circumstances.

Customers need to be made aware that the general advice provider does not consider their individual needs objectives or financial situation and whether the product is appropriate for these needs i.e. the customer is obliged to do this.

Any consideration of requests to permit limited personal advice by product issuers should be considered very carefully given the clear misalignment of interests that will always exist.

NIBA recommends consumers be advised of the alternative of seeking personal advice services if needed. NIBA does not believe that in the insurance context customers should be forced to obtain personal advice.

12. Should all financial services entities that maintain an approved product list be required to comply with the obligations contained in FSC Standard No 24: Life Insurance Approved Product List Policy?

There is no evidence of insurance brokers failing to act properly in this regard that would justify an imposition of these standards. NIBA is currently reviewing its Code and will consider the appropriateness of these standards in the context of insurance broking businesses.

D. ADD-ON INSURANCE

13. Should the sale of add-on insurance by motor dealers be prohibited?

This is a very discrete marketplace. NIBA does not believe they should be prohibited if they provide value to relevant target markets.

However, appropriate consumer protection mechanisms such as deferred sales proposed by ASIC and the Productivity Commission should be considered.

14. Alternatively, should add-on insurance only be sold via a deferred sales model? If so, what should be the features of that model?

This appears to be a reasonable approach to NIBA, with the main concern being to ensure consumers are not left uninsured for a risk by reason of the model as the burden is passed to the community.

15. Would a deferred sales model also be appropriate for any other forms of insurance? If so, which forms?

If evidence is identified of systemic poor sales practices, such as pressure sales, a deferred sales model may be an appropriate way to manage this risk. Any decision must be based on clear evidence that it would improve consumer outcomes, and should be designed to apply appropriately having regard to the particular market.

16. If the ban on conflicted remuneration is not extended to apply to general insurance products, should the payment of commissions for the sale of add-on insurance by motor dealers be limited or prohibited?

See **Attachment A** for our response to this question.

E. CLAIMS HANDLING

17. Should the obligations in section 912A of the Corporations Act 2001 (Cth) apply to all aspects of the provision of insurance, including the handling and settlement of insurance claims?

NIBA notes that the claims handling issues identified by the Royal Commission in its hearings related to agents of insurers and not insurance brokers acting on behalf of consumers. The support of insurance brokers helps limit any insurer claims misconduct.

Any changes should be limited to agents of insurers, as any increased compliance burden on insurance broker may lead to a reduction in claims representation to the detriment of consumers.

The application of such obligations and their relevance to agents of insurers would need to be subject to a proper review and cost benefit analysis given the significant cost impact this is likely to have.

Not all obligations under Chapter 7 will be appropriate for a claims agents. NIBA notes that there were specific examples of claims misconduct identified in the hearings, but it is unclear to NIBA whether this evidence for an industry wide issue warranting significant and costly change. Ultimately the end cost to a consumer is likely to increase.

18. Should ASIC have jurisdiction in respect of the handling and settlement of insurance claims?

Currently it does have jurisdiction under the Insurance Contracts Act. ASIC has powers to:

- take licensing action for a breach of the duty of utmost good faith in relation to claims handling - see section 14A;
- take representative action on behalf of third-party beneficiaries (as well as policyholders) – see section 55A; and
- intervene in any proceedings under the Insurance Contracts Act – see section 11F.

In addition, under the Treasury Laws Amendment (ASIC Enforcement) Bill 2018 currently before Parliament, civil penalties can be applied for breaches of utmost good faith. In relation to the Corporations Act, refer to the comment above.

Life insurance

19. Should life insurers be prevented from denying claims based on the existence of a preexisting condition that is unrelated to the condition that is the basis for the claim?

We believe that where a pre-existing condition exclusion approach is adopted, it should only be applied if the claim is related in some direct manner to the earlier condition.

20. Should life insurers who seek out medical information for claims handling purposes be required to limit that information to information that is relevant to the claimed condition?

NIBA is happy to see reasonable restrictions imposed but notes that the duty of utmost good faith in section 13 of the Insurance Contracts Act would cover any unfair conduct in this respect.

21. Should life insurers be prevented from engaging in surveillance of an insured who has a diagnosed mental health condition or who is making a claim based on a mental health condition? If not, are the current regulatory requirements sufficient to ensure that surveillance is only used appropriately and in circumstances where the surveillance will not cause harm to the insured? If the current regulatory requirements are not sufficient, what should be changed?

As above.

General insurance

22. Should the General Insurance Code of Practice be amended to provide that, when making a decision to cash settle a claim, insurers must:
22.1 act fairly; and
22.2 ensure that the policyholder is indemnified against the loss insured (as, for example, by being able to complete all necessary repairs)?

Such restrictions will have an impact on insurer pricing which needs to be considered carefully.

F. INSURANCE IN SUPERANNUATION

23. Should universal:

23.1 minimum coverage requirements; and/or

23.2 key definitions; and/or

23.3 key exclusions, be prescribed for group life policies offered to MySuper members?

NIBA is happy to consider any appropriate recommendations in this regard and notes that a cost benefit analysis will be crucial.

24. Should group life insurance policies offered to MySuper members be permitted to use a definition of "total and permanent incapacity" that derogates from the definition of "permanent incapacity" contained in regulation 1.03C of the Superannuation Industry (Supervision) Regulations 1994 (Cth)?

25. Should RSE Licensees be obliged to ensure that their members are defaulted to statistically appropriate rates for insurance required to be offered through the fund under section 68AA(1) of the Superannuation Industry (Supervision) Act 1993 (Cth)?

26. Should RSE Licensees be prohibited from engaging an associated entity as the fund's group life insurer?

27. Alternatively, should RSE Licensees who engage an associated entity as the fund's group life insurer be subject to additional requirements to demonstrate that the engagement of the group life insurer is in the best interests of beneficiaries and otherwise satisfies legal and regulatory requirements, including the requirements set out in paragraphs 22 to 24 of Prudential Standard SPS 250, Insurance in Superannuation?

28. Are the terms set out in the Insurance in Superannuation Voluntary Code of Practice sufficient to protect the interests of fund members? If not, what additional protections are necessary?

G. SCOPE OF THE INSURANCE CONTRACTS ACT 1984 (CTH)

29. Is there any reason why unfair contract terms protections should not be applied to insurance contracts in the manner proposed in "Extending Unfair Contract Terms Protections to Insurance Contracts", published by the Australian Government in June 2018?

Refer to NIBA's formal submission to Treasury on these proposals.

30. Does the duty of utmost good faith in section 13 of the Insurance Contracts Act 1984 (Cth) apply to the way that an insurer interacts with an external dispute resolution body in relation to a dispute arising under a contract of insurance? Should it?

NIBA believes it is likely to be seen as applicable to the extent the EDR process involves engagement with an insured to which a duty is owed.

31. Have the 2013 amendments to section 29 of the Insurance Contracts Act 1984 (Cth) resulted in an "avoidance" regime that is unfairly weighted in favour of insurers? If so, what reform is needed?

NIBA has not identified any evidence of this but is happy to consider any specific concerns identified.

32. Does the duty of disclosure in section 21 of the Insurance Contracts Act 1984 (Cth) continue to serve an important purpose? If so, what is that purpose? Would the purpose be better served by a duty to take reasonable care not to make a misrepresentation to an insurer, as has been introduced in the United Kingdom by section 2 of the Consumer Insurance (Disclosure and Representations) Act 2012 (UK)?

NIBA is not aware of any identified major issues with the current duty but is happy to consider any specific concerns identified.

H. REGULATION

33. Should the Life Insurance Code of Practice and the General Insurance Code of Practice apply to all insurers in respect of the relevant categories of business?

NIBA supports this, as it does for the NIBA Code of Practice.

34. Should a failure to comply with the General Insurance Code of Practice or the Life Insurance Code of Practice constitute:

> **34.1 a failure to comply with financial services laws (for the purpose of section 912A of the Corporations Act 2001 (Cth));**
>
> **34.2 a failure to comply with an Act (for example, the Corporations Act 2001 (Cth) or the Insurance Contracts Act 1984 (Cth))?**

NIBA supports self-regulation and does not support this proposal. If pursued, it would not be appropriate without significant redrafting, given the Codes were clearly not drafted with this in mind. A number of obvious inconsistencies would arise e.g significant breach tests.

35. What is the purpose of infringement notices? Would that purpose be better achieved by increasing the applicable number of penalty units in section 12GXC of the Australian Securities and Investments Commission Act 2001 (Cth)? Should there be infringement notices of tiered severity?

NIBA makes no comment other than to support any regulatory tool that avoids unnecessary and costly litigation.

I. COMPLIANCE AND BREACH REPORTING

36. Is there sufficient external oversight of the adequacy of the compliance systems of financial services entities? Should ASIC and APRA do more to ensure that financial services entities have adequate compliance systems? What should they do?

NIBA believes the current balance is a reasonable one in the insurance industry.

37. Should there be greater consequences for financial services entities that fail to design, maintain and resource their compliance systems in a way that ensures they are effective in:

> **37.1 preventing breaches of financial services laws and other regulatory obligations; and**
>
> **37.2 ensuring that any breaches that do occur are remedied in a timely fashion?**

Recent amendments arising from the ASIC Enforcement Review are in NIBA's view likely to be sufficient.

38. When a financial services entity identifies that it has a culture that does not adequately value compliance, what should it do? What role, if any, can financial services laws and regulators play in shaping the culture of financial services entities? What role should they play?

NIBA believes current powers exist and are adequate for a regulator to manage this issue, if and when it arises.

39. Are there any recommendations in the "ASIC Enforcement Review Taskforce Report", published by the Australian Government in December 2017, that should be supplemented or modified?

NIBA has no additional suggestions and has made submissions in this regard as part of the review.