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Regulatory issues in Insurance - a year in review

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2019 has been a milestone year for the regulation of insurance.

It has followed the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission) and the Federal Government election.

Generally, regulatory action has superseded legislative change in the insurance sector.

The bancassurance model is likely doomed after the Royal Commission, as banks seek to offload life insurance arms and class actions hit the banks over the sale of "junk" general insurance.

The product design and intervention power and the introduction of BEAR to insurance will consume a lot of management time (with, in our view, questionable benefit to insurers or the market).

The wave of regulation will likely lead to a highly constrained product environment. Criticism of the PDS regime suggests that the regulator will press the legislature to move away from the disclosure plus freedom of contract/*caveat emptor* regime.

The recent Westpac decision on personal advice has raised some eyebrows in the industry, as entrenched distribution models have to be reconsidered.

The product intervention power will allow ASIC to ban products of which it does not approve.

Unfair contract terms legislation will allow courts to retrospectively rewrite policies and, together with the proposed regulation of claims handling as a financial service, will further constrain products.

The net effect will likely be a limited list of uniform retail products, with insurers forced to a corridor loss ratio - too low means the product is not "good value" to ASIC, and too high means that APRA will intervene as the insurer's ability to do business is at stake.

Uniformity means that insurers can compete on distribution and claims efficiencies alone. The problem here is that ill-thought out piecemeal regulation of these will constrict insurers' ability to devise new models and lead to adverse macro consumer outcomes.

The regulation of claims handling as a financial service will put further friction costs pressure on insurers, with arguably limited consumer benefit.

The flaws in this approach are obvious, but Australia's current consumer climate (following the Royal Commission) appears to prefer quasi-*dirigiste* complacency and lack of innovation over anything else.

Just how insurers can operate at acceptable returns on capital in this environment is not entirely clear. We foresee another insurance crunch, not at the level of capacity (unlike in the early 2000s after the HIH collapse) but in terms of a willingness to do business in certain lines as insurers see ROE fall further.

At the more complex end, we expect to see greater ART as the corporate market seeks access to the vast return-chasing post-QE pools of liquidity that are available in the Caribbean and Channel Islands and in OTC markets.

As 2019 draws to a close, we provide a summary of regulatory themes for the insurance sector from 2019 and relevant to the coming year.

Sector themes

General insurance	2019 has been dominated by a tightening of capacity in the Australian market. A combination of factors rather than a single factor provide a basis for this. ▪ a trend in deteriorating claims experience following a significant year on year increase in class actions ▪ the ongoing effect of the Royal Commission, which has hit Bankers Crime & PI insurers hard over multiple years ▪ Lloyd's increasing its vigilance over loss making syndicates ▪ underperforming syndicates with exposure in Australia. A number of syndicates have had to revamp their strategy to regain profitability or exit the market altogether More distant reverberations form the Royal Commission are being felt, due to potential threats to commission based distribution models, and the imminent introduction of unfair contracts terms and the removal of the claims handling exemption. Retail policies have been hit by a spate of natural disaster claims. Seasonal and decadal weather related patterns have coincided with increased insured values and the sea change/ tree change phenomenon, meaning that higher value risks are being hit in areas where traditionally few people lived.
Life insurance	The Royal Commission continues to impact on this sector. ▪ press reporting seems to have caused (or at least is temporally correlated with) a downturn in written premiums and new applications ▪ ASIC has been actively policing products which appear to provide low consumer reward (eg accident and funeral policies) ▪ changes to the conflicted remuneration regime (for personal financial advice to retail clients) have had a significant effect on distribution models A robust approach by AFCA (the Australian Financial Complaints Authority) to claims has led to a perception of increased risk at the claims level.
PHI	On 1 April 2019 the Australian Government introduced a fundamental private health insurance (PHI) reform package to improve consumer choice. One critical change is to reclassify all hospital policies into Basic, Bronze, Silver and Gold tiers, with each tier having different clinical categories that are covered in full. Other regulatory reforms included: ▪ age-based premium discounts for hospital cover ▪ allow private health insurers to cover travel and accommodation costs for regional Australians as part of a hospital treatment ▪ strengthen the powers of the Private Health Insurance Ombudsman Discounted insurance for 18-29 year-olds ▪ allow insurers to terminate products and transfer affected policy-holders to new products ▪ improve consumer transparency by removing the use of benefit limitation periods in private health insurance policies ▪ increase maximum voluntary excess levels for products providing individuals an exemption from the Medicare levy surcharge

PHI (cont.)	The reforms will be reviewed by the Federal Government following 12 months of implementation. We anticipate further reforms to the current design features of the PHI system (such as incentives, penalties and regulation and financial support) as the Federal Government struggles in formulating a policy response to: ▪ rising health costs ▪ the dual role of private health care as a complement to, and substitute for public care ▪ the desired role of PHI in the overall health system ▪ the allocation and indexation of PHI rebates and regulatory control of premiums ▪ the retention of community rating in the regulations in contrast to the introduction of opposed to risk-rating On 3 December the Australian Prudential Regulation Authority (APRA) issued Discussion paper: Private Health Insurance Capital Standards Review which reflects the commencement of consultation aimed at updating and strengthening the capital framework for private health insurance. APRA has been reviewing the prudential framework for private health insurers to build insurer resilience across three key dimensions - risk, governance and capital. The Discussion Paper reflects the third and final phase of APRA's PHI Policy Roadmap to transition the capital framework. APRA has stated that it does not consider that the current levels of capital held in the private health insurance industry are too high, or should be reduced. The starting point for the review is consistent with that position. The proposed structure for the future PHI capital framework includes: ▪ aligning the PHI capital framework with the framework applying to life and general insurers ▪ integrating changes stemming from the Australian Accounting Standards Board's new standard AASB 17 Insurance Contracts (AASB 17) ▪ applying the capital framework to the insurer's entire business which captures the whole licensed health insurer rather than just the health benefits fund ▪ lifting the probability of sufficiency to 99.5 per cent over a 12 month period on a going concern basis ▪ specifying rules and thresholds for capital instruments that can be included in the prudential capital base Written submissions on the proposals in the Discussion Paper are due by 27 March 2020.

Innovation and insurtech	Lloyd's identified in its recent white paper that lack of smart automation and heavy manual handling means that the cost of insurance capital is significantly higher than large corporations can obtain on the alternative risk transfer and international money markets. This means that insurers will find it ever harder to justify what they offer, at least at the larger end of the risk spectrum, other than by cutting premium, or cutting costs. Neither of these are sustainable in the medium to long term. Insurers continue to investigate and contract with telematics solutions providers, especially at the high volume/low margin end of the market (eg motor vehicle property damage risks). There are also significant costs savings to be had with automation of customer insurer interfaces, especially for larger insurers with multiple legacy systems that are not truly interoperable. Blockchain technologies continue to proliferate, although we see the cryptocurrency craze of the last few years subdividing. Where we see a real future is in back office settlements and contract closing technologies. Parametric and particularly weather insurance will also benefit from blockchain technology solutions. Importantly, in the fintech area, given the dominance of the Australian Big Four banks, new financial entrants are all technology or app based (wholly or partially). Risks to insurers involve a perception that these are technology plays, which can lead to tech policies with under-priced and unintended/unknown financial institutions PI risks. Further, all tech-based entities face privacy and data breach risks. While the (still immature) cyber insurance market has some capacity, the recent ACCC report into digital platforms recommended a private cause of action be legislated for privacy breaches. The ACCC recently launched proceedings against a health information aggregator, but privacy breach lass actions could cause some real risks to tech liability/FIPI insurers.

The effect of the Westpac decision on distribution models

Most AFSL holders thought they understood the distinction between general and personal advice, until the Full Federal Court handed down its decision in the Westpac superannuation transfer case.

The facts in *Australian Securities and Investment Commission v Westpac Securities Administration Limited* [2019] FCAFC 187 involved a marketing campaign by Westpac and BT to encourage customers to roll over superannuation accounts into their account held with Westpac and BT.

The campaign consisted of:

(i) a written communication offering Westpac customers a free search for other superannuation accounts they might hold other than Westpac; and

(ii) a telephone call in which customers were offered a further service of arranging a rollover of those other superannuation accounts into the customer's BT account regardless of whether or not they had accepted the free search offer.

By adopting the marketing approach recorded in the Westpac QM Framework, Westpac provided 'financial product advice' comprising the implied recommendation to accept the rollover service without explaining that a prudent customer may wish to consider matters of the kind that would be considered if the recommendation had been given as personal advice. The QM Framework also involved encouraging customers to accept the rollover service with the use of 'social proofing' by which customers were told that their beliefs or reasons were commonly held.

ASIC argued that the QM Framework encouraged the Super Activation Team to provide advice to customers in a way which sought to use the client's personal circumstances to drive an outcome of the customer rolling over their external superannuation accounts into their BT account and thus constituted personal advice.

Although the Court held that the marketing approach and the telephone calls involved the provision of general financial product advice within the meaning of s 766B(1) of the *Corporations Act*, it ultimately concluded that Westpac had given 'personal advice' within the meaning of 766B(3).

We are somewhat more sanguine than many in the industry over this decision for the following reasons:

- Westpac had premised the call to the customer as being one of assistance
- there was an existing relationship between Westpac and the customer
- in some instances, the call was a follow-up to an existing engagement by correspondence about consolidation
- the customer was asked to enunciate their concerns and these concerns were explored during the call
- potential advantages to consolidation were discussed and statements of opinion (even though characterised as general statements of opinion) were made about the advantages
- Westpac was correct that in the abstract, having more superannuation accounts leads to fee attrition and a worse outcome
- Westpac has established an aggressive telephone sales model that was intended to close the call with the customer agreeing to transfer her or his accounts to Westpac
- Westpac had no way of knowing whether this was in the customer's best interest (as it may have been better for the customer to roll balances into another fund, eg an industry one)
- this calculation is (as the court pointed out) exceedingly complex

As a matter of general advice, we see nothing forbidden in pointing out that multiple superannuation accounts are less than optimal - as a general proposition only.

We think that had Westpac contacted customers, either by mail or telephone about their multiple accounts, and then sent documents explaining the general proposition above, then Westpac would have remained on the right side of the general/personal advice border.

However, in a telephone call, a customer has no time to properly reflect on personal circumstances (even where the general advice warning is read out). In the circumstances described above, a reasonable customer could assume that at the final 'nudge" stage of the call Westpac was recommending a roll over into Westpac's account.

We think that it was at this last stage where the barrier was crossed and that it is understandable why the court considered that this is where Westpac moved into providing advice that was personal to the customer.

The lesson is that customers must be given some time to ponder.

In insurance, cross selling and upselling, where a customer speaks to a provider for one product, and the provider mentions other products, must be very tightly scripted to avoid the Westpac issue.

Regulatory themes

Australian Government

Conflicted and other banned remuneration

- The *Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Act 2019* (Cth) has been enacted and will bring to an end the grandfathering of conflicted remuneration and other banned remuneration (for example payments or benefits that have the potential to influence financial advice) paid to financial advisers in relation to financial advice provided to retail clients[1]. The law means the grandfathering comes to an end on 1 January 2021.

Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

- insurers can also expect an ongoing focus on the distribution arrangements for their products. A recommendation from the Royal Commission was for a review in 3 years' time (preferably by 30 June 2022, no later than 31 December 2022) by government, in consultation with ASIC, into the effectiveness of measures that have been implemented by the Australian Government, regulators and financial services entities to improve the quality of financial advice (Recommendation 2.3). Forming part of the review, there should be consideration of the removal of the "safe harbour" for when the best interests duty is satisfied (Recommendation 2.3), reducing the cap on commissions in respect of life risk insurance products to zero (Recommendations 2.5) and whether the exemptions to banned conflicted remuneration for general insurance commissions and consumer credit insurance commissions remains justified (Recommendations 2.6).
- ASIC will also undertake a review into conflicted remuneration for life insurance products in connection with Recommendation 2.5 and the operation of ASIC Corporations (Life Insurance Commissions) Instrument 2017/510. The instrument provides for commission caps and clawback amount limitations where a life insurance policy is cancelled.

Australian Securities and Investments Commission

The Australian Securities and Investments Commission (ASIC) has been active across poor sales and distribution practices with regulatory action for non-compliance with anti-hawking obligations and financial services licensing for financial advice.

Conflicted and other banned remuneration

- ASIC has been directed by the Treasurer to review the steps taken by industry from 1 July until 1 January 2021 to transition away from grandfathered conflicted remuneration arrangements for financial advisers.[2]

Personal financial advice (in distribution)

- insurance intermediaries and agents should carefully consider how they engage with consumers, especially over the telephone (also see further matters below). Although specific to superannuation products, the Full Federal Court decision to uphold ASIC's appeal that Westpac subsidiaries had in their telephone campaigns provided personal advice and failed to comply with the "best interests duty" and licensing obligations under the law, as well as other financial services laws. [3] The campaigns involved recommendations to customers to roll out of their other superannuation funds and into their Westpac-related superannuation accounts.
- ASIC also commenced civil penalty proceedings against a number of businesses selling life insurance in breach of broader conduct obligations relating to unconscionable conduct, undue harassment, coercion and making false or misleading representations. [4] The proceedings originated through ASIC's report into the sale of insurance without personal advice.

Anti-hawking

- ASIC has proposed banning unsolicited telephone sales of life insurance and consumer credit insurance [5].
- ensuring financial services licensees act "fairly, efficiently and honestly" as required by the law continues to be a broad regulatory focus. ASIC raised concerns with CommInsure (Colonial Mutual Life Assurance Society Limited)[6] relating to unfair telephone sales of life insurance. CommInsure conducted a remediation program resulting in refunds to policyholders who were Commonwealth Bank customers between 2010 and 2014 of $12 million. The total number of customers affected was around 30,000. A key ASIC concern was the sales conduct involving inadequate or unclear product descriptions, completed in a short time frame and almost half being cancelled overall being "unfair" conduct. Licensees have a statutory obligation to act "fairly, efficiently and honestly".

- non-compliance with the anti-hawking obligations formed part of the proceedings brought by ASIC against CommInsure.[7] CommInsure plead guilty to a number of counts of hawking, through offering to sell insurance products in the course of unlawful, unsolicited telephone calls.

Design and distribution obligation

- ASIC has taken initial steps for compliance with licensee's design and distribution obligation for the offer of financial products.
  - ASIC had released several reports on "add-on insurance" (in 2016) which found that the insurance was expensive, poor value and provided consumers little or no benefit.[8] A number of sellers of this form of insurance (including Allianz, Swann, Suncorp, QBE, Virginia Surety and National Warranty Company) undertook significant refund programs for this form of insurance, with refunds of over $130 million. ASIC's engagement has also seen changes in the "add-on insurance" market including to lower commissions paid to dealers, increase loss ratios (so the value of claims paid compared to premiums paid has increased), improvements to product design and some insurers exiting the sector.
  - ASIC also reported on industry wide problems with the design of total permanent disability insurance and claims handling processes.[9]

Consumer credit insurance

- ASIC will have high compliance and conduct expectations for consumer credit insurance (CCI) post-2019. In 2019, ASIC reported on unacceptable sales practices and poor product design, with significant remediation costs by major banks and lenders of CCI. [10]

Life-insurance data

- ASIC and APRA jointly released several publications and an online tool for life insurance.[11] The online tool allows policy holders to compare life insurers' performance in handling claims and disputes.

Innovation and insurtech

- ASIC has been live to technology developments in the financial services sector, including insurance, and regulatory action for market misconduct. It has taken action to raise concerns with an online (digital) advice tool and the adequacy of consumer inquiries necessary for the provision of advice.[12]

Australian Prudential Regulatory Authority

APRA wants standards of governance, culture, remuneration and accountability (GCRA) to be lifted and has expressed a strong expectation for the improvement of compliance in the life insurance sector for individual disability income insurance.

Governance, culture, remuneration and accountability

- APRA will intensify its approach to GCRA post-2019 with the aim to strengthen the resilience of financial institutions. In 2019, APRA reported that it plans to significantly upscale its efforts to lift standards in GCRA across the industries it regulates, including addressing, and ideally preventing, issues such as poor risk governance, misaligned incentives and misconduct that have undermined public confidence in the financial sector over recent years.[13]

Life insurance sector - individual disability income insurance

- Insurers should have addressed concerns about the sustainability of individual disability income insurance (DII).[14] APRA reported on shortcomings in the sector with insurers' strategy and risk governance, and pricing and product design, as well as inadequate data and resourcing dedicated to dealing with DII.

Claims handling as a financial service

Claims handling has to date been excluded from the regulated financial service regime, for two reasons. Firstly, the *Insurance Contracts Act* regime covered the field. Secondly, and conceptually, claims handling often involves a degree of contention between insurer and insured, and the common law has traditionally tried to avoid having obligations owed across a contentious relationship.

The Royal commission uncovered various difficulties with claims handling, and the recommendation was that it be included as a regulated financial service.

Treasury and ASIC have grappled with how to do this, as merely removing the exemption would not make it obviously clear what activities fell within the definition of financial service.

The draft legislation has adopted the other approach discussed, namely to remove the exemption and enumerate what activates will be included. The draft is currently in the consultation period.

The main areas that will be covered are:

(a) insurer communications with insureds about claims;

(b) loss assessing;

(c) an insurer's decision whether to pay a claim;

(d) an offer of settlement.

Any offer to settle must be accompanied by a Statement of Claim Settlement Options which must contain:

(a) a statement outlining the options for settlement legally available under the insurance product; and

(b) a statement setting out the amount of the cash settlement being offered and the sum insured under the insurance product; and

(c) a statement that the client should obtain independent financial advice before settling; and

(d) any other information prescribed by the regulations.

We see a number of conceptual flaws in this:

(a) the statement will be couched carefully so as not to constitute legal advice

(b) many insurers, particularly in lump sum life policies, will merely pay the amount due or decline for a stated reason. Will this be a "settlement" under the new regime?

(c) while a loss assessor is a known quantity, does the definition extend to rehabilitation providers and assessors in respect of life insurance?

(d) if an insured sues an insurer for indemnity, and after legal advice negotiates a settlement to be recorded in a deed of release, must the insurer issue the Statement?

(e) the entire disclosure regime has been criticised in that it seems clear that consumers do not read (and struggle to read if they try) disclosure documents. Quite how this new disclosure style document will remedy that appears not to have been thought through in detail

In brief, the draft appears to have been written via the lens of consumer home and property policies, where the Royal Commission uncovered cases where the insurer delayed settlement to the extent that insured desperately accepted whatever was eventually paid, to the insured's detriment. It is unclear how the proposed new system will work in other areas of insurance.

Other regulators

The Australian Competition and Consumer Commission (ACCC) was active in 2019 for misleading and deceptive conduct for sales and distribution practices in the insurance sector.[15] Of interest to us was the alleged misuse of patient data and manipulation of reviews in the insures sector.[16]

AUSTRAC has maintained key indicators for suspicious activities in the insurance sector of requests for payments to third parties, cashing an insurance policy outside the jurisdiction of purchase, large amounts of cash used to purchase a policy, immediate surrender of a policy following purchase, using an intermediary or offshore company (for a policy for private individuals) to make policy payments.

Consumer engagement

Unfair contract terms

The insurance industry has become comfortable with the contractual regime laid out in the *Insurance Contracts Act 1984* (Cth) (**ICA**). The introduction of an unfair contracts regime (especially against the background of the product intervention power) will upend that comfort.

At the start of 2019 we identified that the unfair contract terms regime administered by the ACCC will apply independently of good faith provisions in the ICA. Recommendation 4.7 of the Royal Commission recommended that the unfair contract terms provisions now set out in the *ASIC Act 2001* (Cth) should apply to contracts regulated by the ICA. The Australian Government's response to the Royal Commission provided for consultation and the introduction of legislation for this by the end of 2019. To date, Australian Treasury has consulted on the implementation and no draft law has been provided. Critically for insurers will be any classification of the main subject of the contract, which is an excluded term for the purposes of the current unfair contracts regime.

All indications are that this will be extremely narrow, allowing courts to retrospectively amend contract terms, leading to significant price and claims experience distortions for insurers.

Consumer data right and privacy

A major development in 2019 was the introduction of the Consumer Data Right (**CDR**).

The CDR will apply in the open banking regime at first, but will be rolled out to other areas of the economy as it develops.

The CDR aims to provide consumers with rights to direct the business to transfer data on the consumer to a third party in a useable, machine readable form as well as to provide product data to facilitate an economy wide consumer directed data transfer system and reduce barriers to change of suppliers, increasing consumer rights and competition.

The CDR will require new thinking from those in designated services and likely lead to innovative, disaggregated intermediaries, especially on app-based architecture in an ever deepening IoT (InternetofThings) environment.

We expect the energy and telecommunication sectors to follow but it is likely that retail insurance will also be considered as a potential industry to which CDR will be applied.

The CDR mirrors the data portability right in GDPR Article 20, and provides for a robust privacy protection regime, administered by the ACCC.

Privacy continued to be a major issue for regulators and corporations and we note the June 2019 ACCC Digital Platforms Inquiry report.

In the report, the ACCC highlighted a lack of consumer protection and a lack of effective deterrence under laws governing data collection.

The ACCC recommended increased penalties:

- including any technical data relating to an identifiable individual in the definition of "personal information" in the privacy regime;
- improving the robustness of the consent regime;

- introducing a right of erasure (ie a right to be forgotten);
- introducing direct rights for individuals to bring actions or class actions for compensation for any interference with privacy.

The proposal to introduce direct rights, in the context of an increasing class action climate in Australia, could have a significant impact on insurers both in terms of their own privacy compliance, and also in respect of their liability and tech policies.

Australian Financial Complaints Authority

AFCA took over functions from various ombudsman and complaints schemes in November 2018.

Initial news reports were that AFCA had been "swamped" by complaints, probably capitalised by media following the Royal Commission.

AFCA has adopted a robust approach to its interpretation of jurisdiction and the law.

Insurers and other financial institutions will need to carefully consider whether AFCA is acting within its jurisdiction, noting that AFCA only obtains power pursuant to a contract between it and the relevant AFSL holder. While the AFSL holder must contract with AFCA, AFCA does not have regulatory authority or similar.

Further, although AFCA has taken an expansive view of its powers and rights, insurers and other AFSL holders should robustly set out their legal defences, to protect their position in the event that it is necessary to bring any further proceedings in respect of AFCA's application of its contractual powers.

Innovation and insurtech

The wave of disruptive tech interventions continued, as insurers behind the scenes worked with process and distribution based apps to streamline their products.

Marketplace apps that will mimic the Lloyd's model but for retail risks, AI compliance solutions, and consumer product microinsurance are all on the agenda.

One thing that remains in question is the ability for "regulatory sandbox" initiatives to support innovation and insurtech.

- in July this year, the *Treasury Laws Amendment (2018 Measures No.2) 2019* Bill was introduced to Parliament with the intention to broaden ASIC's power to provide regulatory relief to establish an enhanced "regulatory sandbox" to support fintech businesses. The proposal under the Bill is for financial services and credit licensing relief that is broader in application than that available under the ASIC "regulatory sandbox". ASIC's "regulatory sandbox" has been largely unattractive to industry with barriers to its use considered to be a result of its narrow product application and short period of relief.
- the balance of business innovation and consumer protection are a difficult task to manage. Appropriately, the Australian Government has taken the step to propose broadening regulatory relief powers to allow for an enhanced sandbox framework to encourage participation. This is the basis for the Bill.
- the UK Financial Conduct Authority has reported that it has supported nearly 700 firms with its innovate initiative, which includes a regulatory sandbox.[17] Without complete market knowledge it is not possible to say if this figure is high or low. If the Australian Government and ASIC efforts to support innovation, including regulatory sandboxes, were to achieve better participation, then this could lead to substantive change and development in the Australian insurance market (and broader) for the better - in our view these regulatory relief opportunities should be maximised by the technology and insurance industries.

Endnotes

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