



NATIONAL INSURANCE BROKERS ASSOCIATION OF AUSTRALIA (NIBA)

SUBMISSION ON:

- **CORPORATIONS AMENDMENT (FUTURE OF FINANCIAL ADVICE) BILL 2011 AND**
- **CORPORATIONS AMENDMENT (FURTHER FUTURE OF FINANCIAL ADVICE MEASURES) BILL 2011**

22 December 2011

ABOUT NIBA

NIBA is the voice of the insurance broking industry in Australia. NIBA represents 500 member firms and over 2000 individual qualified practising insurance brokers (QPIBS) throughout Australia. Brokers handle almost 90% of the commercial insurance transacted in Australia, and play a major role in insurance distribution, handling \$10 billion in premiums annually and placing around half of Australia's total insurance business.

Over a number of years NIBA has been a driving force for change in the Australian insurance broking industry. It has supported financial services reforms, encouraged higher educational standards for insurance brokers and introduced a strong independently administered and monitored code of practice for members. The 500 member firms all hold an Australian financial services (AFS) licence under the Corporations Act that enables them to deal in or advise on Risk Insurance products.

EXECUTIVE SUMMARY

NIBA's position can be summarised as follows:

- The FOFA reforms arose as a result of issues identified in the Parliamentary Joint Committee in its Inquiry into financial products and services in Australia (**PJC Inquiry**) which were clearly focussed on the investment and superannuation industries and financial planners.
- The general insurance and stand alone non-investment linked life insurance industries (**Risk Insurance**) were never intended to be and were not a focus of the Inquiry.



- Any recommendations arising from the Inquiry relating to Risk Insurance were limited in nature and arose in circumstances where an appropriately focussed review of Risk Insurance and relevant stakeholders had not taken place.
- The Risk Insurance industry is distinctly different to the investment and superannuation industries in significant ways. This has been shown in the insurance specific amendments made since the introduction of Chapter 7 of the Corporations Act which was originally enacted as a “a one size fits all” regime. Such changes were all made once the reality of the specialised nature of Risk Insurance was understood by Government.
- NIBA is opposed to the “one size fits all” approach to the regulation of financial services in Australia, especially where proper analysis and consideration of the issues unique to the Risk Insurance Industry has not been properly undertaken by Government. NIBA’s position is consistent with the principles of sound regulation promoted by the OECD and in Australia by the Productivity Commission and the Council of Australian Governments.
- The FOFA reforms were originally developed on a “one size fits all” approach, affecting all areas of financial advice, even though the PJC Review concentrated primarily on investments, superannuation and financial planning. NIBA is pleased the Government has recognised the issues and unintended consequences that would occur if the original proposals were applied to Risk Insurance. NIBA remains concerned that the proposals will have unfortunate and unintended consequences for stand alone life risk insurance products.

NIBA sets out below specific detail on the FOFA reforms and its principal concerns.

NIBA first deals with the Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011 as it has most relevance to Risk Insurance.

CORPORATIONS AMENDMENT (FURTHER FUTURE OF FINANCIAL ADVICE MEASURES) BILL 2011

The key changes affecting insurance are:

- **Imposition of a new best interests duty** – the current proposal is that persons providing personal advice to retail clients on:
 - *general insurance products* (like basic banking products) will be subject to a more limited best interests duty when compared to other products which is essentially similar to current obligations. Whilst NIBA would have preferred the status quo to be maintained given the reasons noted further below, it is satisfied that this approach is not inappropriate in the circumstances.



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- stand alone life Risk Insurance products will be subject to the more onerous new duty that will apply to advisers of investment products
- **New obligation to give priority to the interests of clients** – this requirement will:
 - not apply if the subject matter of the advice sought by the client is solely a general insurance product.
 - There is no carve out for life Risk Insurance.
- **New conflicted remuneration ban** – a carve out from the ban applies for conflicted remuneration benefits:
 - *whether monetary or non-monetary* given to a licensee or representative solely in relation to a general insurance product. Remuneration that is mixed may be an issue.
 - *which are monetary* for stand-alone life Risk Insurance (ie excluding a group life policy for members of a superannuation entity as defined or a life policy for a member of a default superannuation fund). Life Risk Insurance is *caught in relation to conflicted non-monetary benefits* to which new rules apply.

In relation to general insurance, NIBA is pleased that the Explanatory Memorandum specifically notes that general insurance products are more widely understood by customers, leading to a lower risk of customer detriment. Whilst NIBA would have preferred the status quo to be maintained given the reasons noted further below, it is satisfied that this is the best result it could expect in circumstances where:

- general insurance was not the subject of the PJC Inquiry
- the Minister and Government's agenda was clearly to push through broad brush reforms in reaction to the investment industry's impact on consumers without any real focus or understanding of Risk Insurance and its unique issues
- consideration of whether to catch general insurance was added as an aside without a proper review (which investment products had the benefit of) and caught up in the process.

NIBA believes there is no logical reason why stand alone life Risk Insurance products should not be in the same position as general insurance products. NIBA sets out further below why it believes the current approach is not appropriate. NIBA believes there is no logical reason as to why this should be the case given the nature of such products and submits the position be reconsidered.



PRINCIPAL NIBA CONCERNS AGAINST THE FOFA PROPOSALS BEING APPLIED TO RISK INSURANCE (IE GENERAL INSURANCE AND STAND ALONE LIFE RISK INSURANCE)

Federal Government had not conducted a Risk Insurance market review or cost benefit analysis of the Risk Insurance market

The PJC Inquiry was clearly focussed on a review of non-Risk Insurance type products and services, in particular, investment products and services. There was no identified market failure, and no identified need to reform the obligations that currently exist in relation to Risk Insurance advisers.

Investment advice and planning deals with assets, risks associated with the investment of those assets, and the potential rates of return on the investment of those assets. The outcome of the transaction is the eventual return of the capital invested together with the expected interest accrued.

Risk insurance deals with the assessment and management of risk, and the transfer of risk to other parties in appropriate circumstances. The nature of the transaction, the nature of the products, and applicable law and the nature of the advice that is provided are all very different to the nature of any investment transaction. The outcome of the transaction in most circumstances is no further action – if an insured event has not occurred, the policy expires and the cover concludes. Where an insured event has occurred, the insurance promise is honoured and the insurance policy responds, normally with the payment of an amount far greater than the insurance premium.

The Minister stated very clearly in relation to the FOFA reforms “this is about building confidence in financial advice and the wealth management industry, such that all Australians who work hard their whole life, pay their taxes, save their money, will have a decent nest egg along with their house when they retire” (Inside Business, ABC TV, 4 September 2011).

The entire focus of these reforms has been financial planning and wealth management, not Risk Insurance.

It is contrary to good public policy, and good regulatory policy in particular, to apply such proposals to an area of activity that is totally different to the area where concerns have been identified. The Risk Insurance industry has not had the opportunity of a review similar to that undertaken in relation to financial planning and wealth management, or to make submissions in relation to perceived issues or concerns to the same extent as the financial advisory industry has during the PJC Inquiry process.

Whilst NIBA notes that the Federal Treasury FOFA process has generally been consultative, the main focus of that consultation has always been on investment products and superannuation.



In addition, during these discussions, the scope of the proposed statutory best interests duty has remained unclear until the recent release of the draft legislation. Whilst NIBA has been part of the Treasury FOFA consultation process, the fact that the Risk Insurance industry has not been the subject of the same detailed review as financial planners puts it at a significant disadvantage.

NIBA's view is that the perceived benefits for retail clients advised by insurance brokers in relation to Risk Insurance are likely to be outweighed by the detriments associated with the imposition of a statutory duty on insurance brokers.

There is no evidence of any problem in the Risk Insurance market akin to that identified for financial planners on which the PJC Inquiry was actually focussed and there are significant differences between the Risk Insurance market and investment products

No evidence has been provided by the PJC Inquiry or Federal Government of any fundamental or systemic problems with the provision of advice in relation to the Risk Insurance industry that are of a nature that would justify the introduction of a new suite of statutory reforms, and the resulting costs and market impact associated with it.

A recent industry review by ASIC found no such problems and the regime (effectively Chapter 7 of the Corporations Act and general law) is working well for insurance brokers and their retail clients. In particular, this is evidenced by the low level of disputes referred to the Financial Ombudsman Service (FOS) in relation to insurance brokers. Insurance brokers are effectively being tarred by the same brush as financial advisers for no good reason.

The Risk Insurance (in particular general insurance) and investment and superannuation industries and their products, structure and risks are in reality significantly different. For example, insurance is generally a short term product and is often seen as a grudge purchase given it protects a retail client from future risk that in most cases will not occur rather than potentially earning them money. This distinction has been acknowledged in all comparable regulatory regimes worldwide and has also been recognised in the Federal Government's decision not to extend the financial adviser's ban on conflicted remuneration to Risk Insurance advisers (save for life insurance mixed with superannuation).

By applying the new obligations to insurance brokers for Risk Insurance products:

- **there will be a significant increase in the compliance burden carried within insurance broking offices, resulting in additional costs (in particular there is real potential for an increase in the cost of professional indemnity)**
- **there will be less personal advice being provided for no real consumer benefit**



Recent disaster events have shown that there is real value in retail customers having ready access to personal advice provided by Australian Financial Services Licensees such as insurance brokers. There is no substitute for the provision of advice from qualified advisers such as insurance brokers, and where an unfortunate event occurs in having an insurance claim proactively managed.

Despite Federal Government attempts to simplify insurance documentation (which have continued since the introduction of the financial services reform legislation), the reality is that an insurance product is, by its very nature, complex and difficult for many to understand. Many consumers are not inclined/or well equipped to read/understand them.

The services of a professional adviser can go a long way to ensuring retail customers have good advice and get the coverage they need at a proper price, and in reducing claims issues.

Retail customers have access to this advice without having to pay fees or charges. The insurance broker is only remunerated if the customer decides to proceed and purchase a policy. Most importantly, the insurance broker acts as the representative of the policyholder in these transactions, and is not the representative of the insurance company (unless this is made very clear to the client prior to the transaction proceeding). It would be extremely unfortunate if these proposals were to operate in a way that reduces access to competent and professional advice for retail customers. NIBA's assessment of the proposals is that this is likely to occur.

Risk Insurance is already subject to substantial legislative and regulatory intervention -

- Prudential regulation of insurers (Insurance Act)
- Protection of policyholder interests (Insurance Contracts Act), including the statutory obligation of Utmost Good Faith
- Regulation of risk insurance advice and intermediaries (Corporations Act, previously the Insurance (Agents and Brokers) Act).

The adequacy (or otherwise) of these regulatory regimes has not been examined as part of the current FOFA reform program. Unless and until this examination occurs, NIBA believes it is not appropriate to add further regulatory burden in this area of financial services.

- **there is likely to be an increase in under/non insurance which is of real detriment to the community**
- **there is likely to be a reduction in competition in the market and the choices available to consumers that insurance brokers bring to the equation; and**



- **any increased costs may be passed to consumers for little added benefit.**

NIBA believes that because of the above, insurance brokers providing personal advice on Risk Insurance products should not be caught by the new requirements.

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

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

This would also allow time for the impact of any proposed statutory duty to be better analysed, would no doubt reduce the cost impact of any new statutory duty on the market and would hopefully avoid any reduction in the provision of personal advice services to the community.

CORPORATIONS AMENDMENT (FUTURE OF FINANCIAL ADVICE) BILL 2011

Ongoing fee requirements

The proposed ongoing fees requirements apply where the adviser provides personal advice to a retail client and the client pays a fee which falls within the definition of an “ongoing fee arrangement”.

In the Risk Insurance context, fees paid to insurance brokers for arranging general and stand alone life risk insurance should not be caught as either the total of any fee is specified in the arrangement or is not dependent on any amount invested or the amount in relation to which personal advice is given.

The origins of the Opt in provisions is clearly noted as being to address the issue of “getting people more engaged with their investment activities” J Murphy (Department of Treasury) Evidence to the Economics Legislation Committee Senate Estimates Hansard 19 October 2011 p 104. The Explanatory memorandum reinforces this in Chapter 3 Regulatory impact statement which only talks of investment advice see in particular 3.5 where the focus is not on pure risk insurance.

It was never intended to apply to Risk Insurance and although no express carve out has been included it appears at this stage that Risk Insurance will not be affected.



ASIC Banning Powers

NIBA's principal concern is that there is no definition of "likely to contravene" or "likely to breach" which is likely to cause confusion for industry. More guidance is required from Government or ASIC on this. There is no clear standard or proof and ASIC at a minimum should be required to set out how it intends to apply these new powers.

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

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