Life Insurance Draft Code of Practice 2.0

Legal Aid NSW submission to the Financial Services Council

January 2019

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Legal Aid NEW SOUTH WALES

About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW Civil Law Division focuses on legal problems that impact most on disadvantaged communities, such as credit, debt, housing, employment, social security and access to essential social services. Consumer issues constitute the largest category of service for our Civil Law Division, with over 8,000 services in the 2017-18 financial year.

Legal Aid NSW welcomes the opportunity to make a submission to Financial Services Council on the Consultation Draft of the Life Insurance Code of Practice. Should you require any further information, please contact:

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Introduction

Legal Aid NSW welcomes the opportunity to provide a written submission on the Financial Services Council's (**FSC**) consultation draft of the Life Insurance Code of Practice (**Code of Practice**).

Legal Aid NSW made a submission on the first iteration of the Code in 2016. We have limited our submission to the aspects of the draft Code of Practice which affect Aboriginal and Torres Strait Islander consumers of funeral insurance products. The narrow focus of our submission is in part due to the expertise we have developed through our dedicated Civil Law Service for Aboriginal Communities which delivers advice, casework and education services to specific Aboriginal and Torres Strait Islander communities (**Aboriginal communities**, for brevity) across New South Wales (**NSW**). Due to the prevalence of funeral insurance matters in Aboriginal communities, Legal Aid NSW now employs a dedicated solicitor working solely on these matters. Our submission is directly informed by our casework in this area. The narrow focus of our submission is also unfortunately due to the limited timeframe set for consultation on the draft Code of Practice, which also coincided with the end of year holiday period.

We support many of the new additions to the provisions of the draft Code of Practice that apply to funeral insurance, and believe that they go some way to addressing the concerns of consumers, regulators and government. However, we are of the view that, on the whole, they do not go far enough.

The first part of our submission focuses on the funeral insurance provisions within the draft Code of Practice (section 3.6). The second part of our submission focuses on the sales provisions (section 4), as they apply to funeral insurance. In the third part of our submission, we have included some general comments on the draft Code of Practice and suggest possible additional areas for amendment. We have not responded to those questions that raise issues that fall outside our casework experience.

Funeral Insurance – Section 3.6

Question: The Consultation Draft Code has significantly more protections for people taking out funeral insurance than the current Code. Do these go far enough and, if not, what further protections are needed?

While the draft Code of Practice goes some way to increasing protections for people taking out funeral insurance, we consider that it does not go far enough. In this submission, we propose a number of additional provisions and safeguards that, if included in the Code of Practice, would further strengthen consumer protections and lift funeral insurance industry standards.

The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Royal Commission**) recently examined the funeral insurance industry. Evidence emerged of predatory sales practices, policies providing little value and products that were unsuitable considering the needs of the consumers purchasing them. In our experience, these issues are common across the funeral insurance sector and the impact of this conduct leads to particularly harsh outcomes for vulnerable Aboriginal people and communities.

Further, the Royal Commission heard evidence that Aboriginal people rely on funeral insurance products because of the cultural significance of funerals, the cultural obligation to ensure that sorry business occurs in culturally appropriate ways, the cost of funerals, and the number of funerals to which Aboriginal people are obligated to contribute. [1] The large amount of funeral insurance related casework that Legal Aid NSW conducts confirms the high incidence of issues in the industry for Aboriginal people and the significant impact of these problems on them.

Given the cultural significance and obligations around sorry business, it is clear that funeral insurance products need to be better regulated. The Code of Practice has an important role to play in the suite of policy and law reform that will be initiated in response to the findings of the Royal Commission. The Code of Practice should lead the way for reform of the standards and expectations set for the funeral insurance sector's dealings with Aboriginal people.

Draft clause 3.6 – Should include a prescribed cap on premiums

A cap on premiums should be prescribed in the Code of Practice that prevents payment above the total benefit amount. This would ameliorate some of the problems associated with the provision of insurance in circumstances where the consumer is likely to pay a significant amount over the agreed benefit. There are already products like this in the market place that have been developed following ASIC Report 454, *Funeral insurance: A snapshot* (2015).

CASE STUDY

Rita is an Aboriginal woman who took out a funeral insurance policy believing that it was a savings plan or funeral fund type product. She thought that her payments would be capped at her benefit amount. Recently, Rita contacted the insurer to find out how much she had paid in total. The insurer refused to tell her the amount, but told Rita that she could stop paying premiums and retain her benefit amount. Legal Aid NSW assisted Rita to ascertain that she had paid over $4,000 more than her benefit amount.

[1] Financial Services Royal Commission, Transcript of Proceedings, Nathan Boyle, 3 July 2018, P-3749, at 20-35.

Draft Clause 3.6(i) – Disclosure requirements should be strengthened and their impact audited

Clause 3.6(i) should contain additional information to that contained in the draft Code of Practice. Based on our extensive casework in this area, we know that current disclosure practices are insufficient, and Aboriginal consumers are particularly vulnerable to signing up to funeral insurance products that are inappropriate, unsuitable and fundamentally misunderstood. Common misunderstandings caused by lack of disclosure, misrepresentations and common misconceptions about funeral insurance products include:

- that the product is a savings plan or a fund
- that premiums are fixed
- that premiums are capped at the benefit amount
- that lump sum benefits are provided (as opposed to expenses only)
- that the benefit will be sufficient to cover the cost of their funeral, and
- that the company selling the product is Aboriginal owned or managed where that is suggested in marketing materials.

Upfront disclosure at the point of sale may address some of the problems associated with inappropriate sales practices. Therefore we welcome the draft Code of Practice requirement for insurers to provide a key facts sheet in plain language to consumers.

However, we recommend that clause 3.6(i) is amended to require disclosure by funeral insurers about the following matters (in addition to those listed on page 10 of the draft Code of Practice):

- estimated total cost based on life expectancy
- risk that the cost could likely exceed the benefit (if the product is not capped – addressed below)
- an estimate of the cost of the policy at ten year age bands (i.e. 40, 50, 60, 70 etc.)
- the date when the premiums paid will exceed or equal the benefit amount to be paid out (if the product is not capped – addressed above)
- details about how, or if, the premiums will increase over time, and a comparison of the total cost of the product over time if the consumer has a choice between stepped and fixed premiums, and
- the risk that the benefit might not cover the cost of a funeral.

Also, in order to improve consumer understanding of funeral insurance products, particularly for consumers with lower levels of financial or English literacy we recommend that the draft Code of Practice should require disclosure in a prescribed form. That form should include:

- both visual and verbal disclosure
- disclosure that is specific to the individual consumer, including about associated risk and costs

- plain language expression or easy English, and
- infographics.[2]

Fact sheets/infographics should be co-designed with Aboriginal communities so they are more likely to be appropriate to meet the needs of the community.

Funeral insurers should also be required to undertake audits to ensure that disclosure requirements are being met and the information disclosed by insurers is being understood by consumers. These audits would measure compliance with performance standards for consumer comprehension or suitable consumer product use as part of a 'performance based regulation'[3] framework to improve consumer comprehension. Providers of financial products would be motivated to ensure that customers understand products and purchase appropriate products, in order to comply with regulation. Such an approach can align the interests of industry with the goals of regulators and consumer advocates.

Disclosure requirements on their own are often insufficient to protect some vulnerable consumers, particularly those with poor financial and English literacy. This is why we also support a suitability test to provide adequate protection, which we address below.

Draft Clause 3.6 – Deferred sales process

A deferred sales model for funeral insurance should be prescribed in the Code of Practice. Legal Aid NSW supports a ban on outbound calls to sell funeral insurance, which we address further in the section below about general sales clauses. The Code of Practice should include a deferred sales model for funeral insurance for inbound calls as well.

We note that where a consumer contacts the insurer via an inbound call, it is often argued that the consumer is a motivated customer. However, based on our casework experience, the consumers are often under various misapprehensions about the nature of the product (including that funeral insurance is a savings plan, that premiums are fixed, that benefits are capped, etc.) and are consequently seeking an entirely different product than that offered by the insurer.

After complying with the disclosure requirements, life insurers should not complete a sale until at least four business days, later upon initiation by the consumer. The adoption of a suitability assessment requirement would also assist in addressing some of these issues (see below).

[2] By way of example, see factsheet produced by the Insurance in Super Working Group which utilises infographics at page 32 https://www.superannuation.asn.au/ArticleDocuments/270/ISWG_Consultation_Paper_Draft_Code_of_Practice_150917.pdf.aspx?Embed=Y

[3] See for example: Willis, LE 'Performance Based Consumer Law' (2015) 82 University of Chicago Law Review 1309.

Question: Should the Code include age limits below which funeral insurance should never be available?

Yes. Funeral insurance for people aged under 50 years should be generally excluded under a suitability assessment framework, due to the comparatively lower mortality rate[4] and availability of more suitable products for people in this age bracket.[5] This could be clarified through the introduction into the draft Code of Practice of a presumption that policies for people under the age of 50 are unsuitable.

We acknowledge there may be some cases where taking out a funeral insurance policy for someone aged under 50 may be appropriate (for example, where the insured has a short life expectancy). Therefore, this presumption should be rebuttable.

If a suitability assessment framework is not adopted, Legal Aid NSW supports a total prohibition on selling funeral insurance to people under the age of 50 years.

The need for a suitability assessment for funeral insurance

A suitability assessment or 'fit for purpose' test should be incorporated into the Code of Practice, and be supported by the introduction of enforceable sanctions and appropriate remedies for breach. The funeral insurance case studies examined by the Royal Commission[6] highlighted the need for an obligation on insurers to conduct an assessment of the suitability of an insurance product for an individual consumer. Any such suitability assessment could be modelled on provisions set out in the *National Consumer Credit Protection Act 2009* (Cth) (**NCCPA**) such that the insurer is required to:

- assess the suitability of the product for the consumer prior to the provision of insurance
- make reasonable enquiries and obtain verification as part of the assessment, such as enquiries about the consumer's financial circumstances (bank statements) and their requirements and objectives in obtaining the policy (whether they want a savings plan or fund type product or an insurance product, whether they have any other funeral or life insurance policies)

[4] For example, the mortality rate for Indigenous people aged 35-44 in 2017 was 399.2 per 100,000 and for Indigenous people aged 45-54 was 779.5 per 100,000. Whereas the mortality rate for Indigenous people aged 55-64 in 2017 was 1336 per 100,000 (dataset related to Deaths, Australia (cat. no. 3302.0), available from the ABS website). Also, the average life expectancy for Aboriginal males aged 50-54 is 26.7 years, which means the average Aboriginal male aged 50-54 will live until the age of 76 – 80. The average Aboriginal woman aged 50-54 will live until the age of 79 – 83. Data accessed online via ABS, 2018 Life tables for Aboriginal and Torres Strait Islander Australians, 2015-2017. ABS Cat. No. 3302.0.55.003.

[5] ASIC recommends that if a person lives longer than 5-10 years, other funeral products (such as pre-paid funerals) are likely to be better value than funeral insurance. See 'Paying for your Funeral', ASIC, accessed online on 7 January 2019 via: https://www.moneysmart.gov.au/life-events-and-you/over-55s/paying-for-your-funeral.

[6] Financial Services Royal Commission*, Interim Report*, vol. 2 page s443-469.

- presume the product is unsuitable in specified circumstances such as where the contract is likely to cause the consumer substantial financial hardship, where the policy will insure the life of someone aged under 50, where the consumer already has life/funeral insurance, and where the insurance fails to meet the requirements and objectives stated by the consumer.

Alternatively, the 'fit for purpose' test contained in section 12ED of the *Australian Securities and Investments Commission Act 2001* (Cth) could be used as a model in the draft Code of Practice to prohibit insurance products being sold that are not fit for their purpose and are a liability to those who have purchased them.

The protection that would be afforded by the introduction of a suitability test needs to be supported by clearly articulated relief that is available to consumers through easily accessible forums. If not, there is a risk that it will have little value in practice. Breach by an insurer of a suitability requirement or a fit for purpose test should give rise to clear and readily enforceable remedies through the insurer and sanctions through the Life Insurance Code Compliance Committee (**Life CCC**). We recommend that Clause 4.13(a) includes a remedy of reasonable compensation where appropriate, and that Clause 25.15 includes an additional sanction of fines to encourage compliance.

CASE STUDY

After a funeral insurance sales representative knocked on her door, Karen, a 29 year old Aboriginal woman signed up for funeral insurance for herself, her partner and her five children, the youngest of whom was under 1 year old. Karen's education was limited having left school in Year Nine, and she has difficulty reading and understanding complex documents. Karen was not given the opportunity to read the contractual documents before signing them, nor was she given the opportunity to get legal or financial advice. Karen relied on the brief verbal explanation of the terms of the contract provided by the sales representative.

Before she signed up for the policy, Karen did not know that she had to continue to pay premiums until the death of each person listed on her policy. The insurer did not tell Karen that she could end up paying more than her benefit amounts, particularly for the children who had long life expectancies. When she signed up, Karen was receiving Centrelink benefits. Eventually, Karen cancelled her funeral insurance policies as she was in financial hardship and could no longer afford the premiums, which had increased since she signed up. Karen lost approximately $30,000 in the premiums she had paid over the life of the policies.

Draft Clause 3.6(d) – promotion to under 40s

We welcome the limitation on knowingly promoting funeral insurance policies to people under a certain age. This would complement the adoption of a suitability assessment (as proposed

above) and goes some way to addressing the limited value of funeral insurance. However, as previously stated, we recommend that funeral insurance is not promoted to anyone under the age of 50, rather than people under the age of 40 as proposed. There does not appear to be any rationale for setting the limit at 40 years of age, which is still too young for a person to be knowingly marketed funeral insurance, given the comparatively lower mortality rate,[7] and availability of more suitable products for people in this age bracket.[8]

Draft Clause 3.6(e) – additional disclosure to under 40s

If a suitability assessment is adopted, this clause would not be necessary as the insurer would presume that the insurance was unsuitable and would have to make further inquiries to rebut this presumption.

However, if either a suitability assessment or presumption that funeral insurance is unsuitable for people aged under 50 are not adopted, it is unclear how the very general terms of the additional disclosure contained in draft Clause 3.6(e) provides any useful information to assist a consumer to make an informed choice. A more beneficial disclosure would be as follows:

> *For people under the age of 50, as part of the sales process we will tell you that generally funeral insurance is not recommended for people under the age of 50 because you are likely to end up paying more than your benefit amount; and we will make further enquiries about your health, lifestyle and objectives to ensure that the product is suitable for you.*

Draft Clause 3.6(g) – Design and distribution obligations

Clause 3.6(g) should provide more detailed guidance on best practice design and distribution principles, similar to the Insurance Council of Australia's draft Guidance for the Design and Distribution of Add-on Insurance Distributed through Motor Dealer Intermediaries.[9]

The proposed draft of Clause 3.6(g) appears to summarise the legal obligations that insurers will be subject to following the enactment of the *Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Power) Bill 2018.* While there is obvious benefit if the draft Code of Practice does not conflict with impending legislative requirements, additional guidance is required due to the potentially exploitative nature of funeral insurance

[7] The mortality rate for Indigenous people aged 35-44 in 2017 was 399.2 per 100,000 and for Indigenous people aged 45-54 was 779.5 per 100,000. Whereas the mortality rate for Indigenous people aged 55-64 in 2017 was 1336 per 100,000 (dataset related to Deaths, Australia (cat. no. 3302.0), available from the ABS website).

[8] ASIC recommends that if a person lives longer than 5-10 years, other funeral products (such as pre-paid funerals) are likely to be better value than funeral insurance. See 'Paying for your Funeral', ASIC, accessed online on 7 January 2019 via: https://www.moneysmart.gov.au/life-events-and-you/over-55s/paying-for-your-funeral.

[9] *Final Report: Review of the General Insurance Code of Practice,* Insurance Council of Australia, June 2018, page 101.

and the potential harmful effects identified by the Australian Securities and Investment Commission (**ASIC**) and the Royal Commission.

We recommend that the draft Code of Practice include at least the following further guidance:

1. the product design process should prevent negative value products being offered (that is, where the total cost to the consumer is more than the maximum amount claimable), and
2. where the premium/excess is flexible and negative value could arise in some circumstances, the negative value threshold must be identified and safeguards put in place to prevent sales where it is clear that such circumstances could arise.

Draft Clause 3.6(h) – Premium arrears

The safeguards currently contained in clause 3.6(h) of the Code of Practice should be expanded to enable consumers in financial hardship to be provided with flexible arrangements and allowed to retain their cover.

The options available under clause 3.6(h) are not exhaustive, and it should be mandatory that consumers who are behind in their payments are offered more flexible arrangements, including being able to retain cover and eligibility to claim while catching up on arrears, rather than having their policies cancelled. This is especially so given the large drop-out rates of funeral insurance products,[10] and the potential implications of cancellation, which is typically a significant loss of investment to the consumer, loss of benefit of the policy and/or limited refunds (if any).

Question: Should funeral insurance only be available with level premiums?

Draft Clause 3.6(c) – Stepped premiums should be prohibited under the Code

The draft Code of Practice should prohibit stepped premiums under draft Clause 3.6(c), so that premiums are fixed for the life of a funeral policy.

In our experience, stepped premiums are confusing, are often not properly disclosed or explained, and make it extremely difficult for consumers to calculate whether the funeral product they are purchasing is suitable for them over the life of the policy. Stepped premiums often result in the product becoming unaffordable, which in turn results in consumers becoming 'trapped' in an unsuitable product that they cannot cancel without significant loss of investment, or product cancellation. The ASIC Report *Funeral insurance: A snapshot* found that funeral insurance policies have a very high rate of cancellation - 55% in the first year of the policy, with cancellation rates for Indigenous consumers being even higher.[11]

[10] ASIC Report 454: *Funeral insurance: A snapshot* (October 2015), page 6.
[11] ASIC Report 454: *Funeral insurance: A snapshot* (October 2015), page 6.

Further, we have found that our clients with funeral insurance products often have poor English literacy, limited education and poor financial literacy. In the vast majority of cases, the likely total cost of a funeral insurance product is not discussed with the consumer at the point of sale. In many cases, the risk that the cost of the funeral insurance might exceed any benefit paid, and the estimated total cost of the product only becomes clear to our clients upon receiving legal advice. In our view, insurers making level premiums available as an option (as proposed by clause 36(c)), will not address the above issues as vulnerable consumers lack the ability to compare the two premium options in order to make an informed decision.
If the Code of Practice does not prohibit stepped premiums, we recommend that the disclosure requirements about stepped/level premiums are significantly strengthened. We have discussed this above in relation to the proposed disclosure requirements.

CASE STUDY

Samantha, a 27 year old Aboriginal woman, signed up for a funeral insurance policy for herself, her partner and her five children (the youngest of whom was 3 years old). Samantha signed up as a result of an unsolicited call from an insurer who told her that she previously held funeral insurance with them and asked if she would like to re-join.

When she signed up, Samantha was initially paying monthly premiums of $21.12 for her partner's policy, which after six years has increased to $32.60. If Samantha continues to pay for her partner's policy for another 20 years (until he is 64 years old) the monthly premiums will increase to $231.43. Samantha's policy is a stepped premium policy, with the premiums increasing every year according to the age of the oldest person covered under the policy and the ages of any adult children covered. Samantha's policy also includes inflation protection, which means the cover amount increases every year and correspondingly her premiums increase every year according to the cover amount under the policy. This made it extremely difficult for Samantha to calculate the amount that she was likely to pay over the life of the policy. The policy has stepped and level premium options, however, the sales representative did not mention the level premium option to Samantha during the sales call. The sales representative told Samantha that a stepped premium applies, and then told her that this means the premiums are stepped, but did not provide any further explanation of what that means.

Even if the sales representative had told Samantha about the fixed premium option, it would have been extremely difficult for her to compare these two options without the insurer disclosing the likely total cost of each option.

Sales – Section 4

Question: The Consultation Draft Code introduces additional protections to ensure that people are not pressured into taking out life insurance they do not want. Do these go far enough and, if not, what further protections are needed?

Draft clause 4.1(h) – Incentives in advertising and marketing

We support the introduction of draft Clause 4.1(h). However, we recommend strengthening this clause to totally prohibit the use of short term customer incentives.

Draft clause 4.2A – remuneration practices

Legal Aid NSW recommends that the draft Code of Practice prohibit all forms of conflicted remuneration, as this is the likely key driver of the poor conduct and culture identified by the Royal Commission. In the case study of Ms Marika presented to the Royal Commission, the evidence reflected that the system of remuneration and incentives used by the provider most likely contributed to the conduct of their sales representatives which might properly be described as unconscionable.[12] The provider offered incentives that induced its representatives to sell policies at all costs and pushed its agents with productivity targets.[13]

This type of conduct occurred despite legislative obligations to ensure that insurers do 'all things necessary to ensure that the financial services are provided … honestly and fairly'; have 'in place adequate arrangements for the management of conflicts of interest' between the interests of its policy holders, or potential policy holders, and the interests of its sales representatives; and take 'reasonable steps to ensure that its representatives comply with the financial services laws' (section 912A of the *Corporations Act 2001*). In its interim report, the Royal Commission stated that it is at least arguable the provider in the above case failed to comply with section 912A. Therefore, nothing short of a total prohibition on conflicted remuneration will remove the risks of poor consumer outcomes.

Draft clause 4.2B – distributors should be contractually bound by code

We recommend that life insurers commit to ensuring that all distributors of their products meet the applicable standards of the draft Code of Practice. This can and should be included in all insurer/distributor contracts, as it is in the General Insurance area with respect to service suppliers. For example, Section 6.4 of the General Insurance Code of Practice (**General Code**) states:

[12] Financial Services Royal Commission, *Interim Report*, vol. 2 page 469.

[13] Financial Services Royal Commission, Transcript of Proceedings, Russell Howden, 4 July 2018, 3909; and Financial Services Royal Commission, *Interim Report*, vol. 2 page 469.

Our contracts with our Service Suppliers entered into after we have adopted this Code must reflect the standards of this Code as they relate to the services of the Service Supplier.

Draft Clauses 4.3 – documented sales rules

We support draft Clause 4.3(a), as it is vital to have procedures to prevent pressure selling occurring. However, the Code of Practice lacks a clear and unequivocal statement that insurers will not engage in pressure selling. There should be a stand-alone provision prohibiting pressure selling.

We also recommend that the following amended Example 5 be converted into an actual Code commitment:

We will have clearly documented sales rules that require sales staff and Authorised Representatives we employ to end a sales meeting or telephone call if the person clearly expresses the view that they do not want to take out an insurance policy.

Question: The Consultation Draft Code has a placeholder for cold calling (at section 4.3A), which is already subject to legal restrictions – see section 992A of the *Corporations Act 2001* (Cth) commonly known as the "anti-hawking provisions". What further restrictions, if any, should apply to outbound unsolicited calls?

In our experience, many Aboriginal consumers who have products through Australian Community Benefit Fund (**ACBF**) entered these contracts as a result of unsolicited sales including door-to-door sales, phone calls and meetings at Aboriginal community based organisations. The evidence of the ACBF CEO, Mr Bryn Jones, at the Royal Commission suggested that while ACBF had ceased door-to-door sales, their employees continued to look for sales opportunities 'in the field', including through land councils.[14]

Given the concerns raised in evidence about misrepresentations as to ACBF's ownership and the benefits of the product to Aboriginal people, this kind of unsolicited sales practice is concerning. By aligning the sale of their product with community based organisations and events, they may increase the perception in the community that the product is for the benefit of Aboriginal people.

In the case study of Ms Marika presented to the Royal Commission,[15] it appears from the evidence that Select avoided the prohibition on unsolicited sales for insurance products by

[14] Financial Services Royal Commission, Transcript of Proceedings, Bryn Jones, 4 July 2018, at P-3834 and P-3836.

[15] Financial Services Royal Commission, *Interim Report*, vol. 2 pages 458-461.

engaging a third party to first contact Ms Marika to participate in a survey.[16] In the course of that contact the representative obtained her consent to contact her in relation to the sale of funeral insurance.[17] This example demonstrates the need for anti-avoidance provisions to ensure that financial service providers are not establishing systems for the sole or predominant purpose of avoiding the application of unsolicited sales provisions.

The unsolicited selling of financial products, including through door-to-door sales, is prohibited by the anti-hawking provisions contained in section 992A of the *Corporations Act 2001.* Where this section is breached, section 992A(4) gives the consumer a right of return and refund within one month of the relevant cooling off period. Breach of the provision is an offence but this provides no relief to a consumer seeking to remedy their detriment, and no relief at all beyond the one month cooling off period.

For financial products subject to the *Australian Securities and Investments Commission Act 2001*, section 12DMA provides that a consumer has no liability to pay for a product sold to them by way of unsolicited sales. The *Australian Consumer Law* and the *NCCPA* also have provisions seeking to regulate and provide relief from unsolicited sales. In addition, the language used to encompass unsolicited sales varies across legislation including 'door to door' sales, 'anti-hawking', 'canvassing' and 'unsolicited' sales.

There is a lack of consistency and coherence in the regulation of unsolicited sales of financial products. The existing protections cause confusion, do not have sufficient remedies and produce inequitable results for consumers. Therefore, the draft Code of Practice should introduce a clear, comprehensive prohibition on unsolicited sales for the funeral insurance sector. This should be coupled with clear remedies and sanctions in the event of breach.

Other general comments

Plain Language

The first Key Code promise in the draft Code of Practice states:

> *We will be honest, fair, respectful, transparent, timely, and where possible we will use plain language in our communications with you.*

Despite this, the draft Code of Practice uses complex legal and technical language throughout. We submit that the draft Code of Practice should be amended so that plain language is used and it is accessible for consumers. We strongly encourage the FSC to obtain the assistance of a Plain English drafting expert in re-drafting the Code to ensure it is accessible and useful for consumers.

[16] Exhibit 4.171, Witness statement of Kathy Marika, 19 June 2018, 2 [6] and [7].
[17] Exhibit 4.171.2 - SAF.0001.0001.0080 - Exhibit KBM -2 - Transcript Kathy Marika to [Redacted].

Australian Securities and Investments Commission Approval

At the launch of the first iteration of the Code, the FSC stated that it will consider making an application for ASIC approval of the second iteration of the Code. We support the FSC seeking approval of the draft Code of Practice from ASIC in accordance with ASIC's *Regulatory Guidance 183: Approval of financial sector codes of conduct, March 2013* (**RG 183**).[18]

As well as increasing consumer confidence in the Code of Practice, code approval would also mean that:

- ASIC can undertake investigative or enforcement action if misrepresentations are made about the Code of Practice
- ASIC can monitor the Code of Practice, and
- the insurance sector is making a strong public statement in its confidence in the Code of Practice and enable it to stand up to scrutiny against regulator standards.

Seeking ASIC approval would also send a strong message to consumers, subscribers and the funeral insurance sector that the funeral insurance industry is willing and able to stand up to regulator scrutiny, which would be of considerable value in the wake of the Royal Commission.

Australian Competition and Consumer Commission approval

There are a number of commitments under a sector-wide Code of Practice that may have an impact on competition. This was acknowledged by the FSC at the launch of the first iteration of the Life Code:

> *In response to recent ASIC reports on funeral insurance and consumer credit insurance, the industry will address the issues raised including through limitations on sales and premium structures. These standards would require the second iteration of the Code to be submitted for ACCC approval.*[19]

It is not clear whether these discussions have taken place. If not, the FSC should begin discussions with the ACCC as soon as possible so that funeral insurers can implement strong sector-wide commitments on funeral insurance sales and products.

[18] Accessed at http://download.asic.gov.au/media/1241015/rg183-published-1-march-2013.pdf?_ga=1.175469355.84513953.1449719296

[19] Family Services Council, Media Release Life Insurance Code Of Practice, 11 October, 2016 https://www.fsc.org.au/_entity/annotation/fe078546-30a7-e611-80c9-00155d252c17

Remedies – clause 4.13 - Investigating your concerns

Clause 4.13(a) lists a number of remedies for the inappropriate sale of a life insurance products. We recommend that the draft Code of Practice also includes provision for reasonable compensation.

Clause 6.3 – Communication during the term of your policy

We recommend that the draft Code of Practice include a commitment for funeral insurers to disclose the prior premium when increasing the premium, in order to provide more context to the information provided under clause 6.3(b) – an explanation for any increase in your premiums. We note that General Insurers have agreed to include a similar obligation in the General Insurance Code, that is, to disclose last year's premium at renewal.

Funeral insurers should also be required to disclose the total amount the consumer has paid under the policy to date, whether the consumer is entitled to a refund and the amount of that refund.

Draft Clause 6.5 – Life Insurance changes and financial hardship

The draft Code of Practice financial hardship clauses would significantly be improved and strengthened by including the following clauses that are contained in the Code of Banking Practice (**Banking Code**):

- Encouraging policyholders to contact insurers if they are experiencing financial difficulty (Banking Code Clause 158)
- Act compassionately in trying to understand consumers situations and discuss ways to help (Banking Code Clause 161)
- Recommend and work with a financial counsellor (Banking Code Clause 162), and
- Work with consumers and give them information about our financial difficulty processes (Banking Code Clauses 167-8).

Draft Clause 6.6A – Cancellation Rights

Draft Clause 6.6A states:

> *We will not try to coerce you into keeping a policy you no longer want.*

The use of the phrase 'try to' places an emphasis on the actual intention of the insurer, which may not be sufficient to catch the kind of coercive practices highlighted in the Royal Commission, such as in the example of Ms Marika.[20]

[20] Financial Services Royal Commission, *Interim Report*, vol. 2 pages 460-461.

The clause should be re-drafted to focus on the conduct of the insurer, rather than the insurer's intention, that is likely to coerce an insured into keeping an unwanted policy. This amendment is consistent with our recommendation at draft Clause 4.3 to include a stand-alone prohibition against pressure selling.

Alternatively, the clause should capture conduct that has coerced an insured, even if that was not the insurer's actual intention. This could be achieved by amending the clause to, *"We will not coerce you, or try to coerce you, into keeping a policy you no longer want."*

Draft Clause 7.1 – Supporting vulnerable consumers

We recommend that the draft Code of Practice includes guidance notes on supporting the distinct categories of vulnerable consumers, including Aboriginal consumers. For example, we understand that the Insurance Council of Australia intends to introduce a Guidance on Family Violence attached to the new version of the General Code.[21] We recommend a similar approach is applied in the draft Code of Practice.

Draft Clause 7.4 and 7.5 – Aboriginal and Torres Strait Islander peoples

We welcome the commitments made to working with Aboriginal people, including flexibility when requiring consumers to meet identification requirements (Clause 7.4), flexibility in timeframes to provide documents (Clause 7.5) and the general commitment to take reasonable measures to ensure support for vulnerable consumers (Clause 7.1).

However, given the cultural significance of, and obligations for, funerals of Aboriginal people, the draft Code of Practice needs to go further. Specifically, we recommend that the draft Code of Practice includes a commitment by funeral insurers to undertake cultural awareness training, which specifically addresses the issues around gratuitous concurrence and the cultural significance of, and obligations for, funerals.

Clause 25.9 – Life Insurance Code Compliance Committee responsibility

We recommend the following responsibilities are included in Clause 25.9 of the draft Code of Practice:

- promote awareness and specifically encourage non-members to become members, especially funeral insurers that have had multiple complaints made to external dispute resolution bodies, ASIC, and the courts
- monitor and enforce compliance
- investigate serious or systemic breaches

[21] Insurance Council of Australia, *Final Report, Review of the General Insurance Code of Practice,* June 2018, Recommendations 4 and 5, page 7.

- apply sanctions
- provide guidance - help industry understand and comply with our Code obligations
- provide reports - identify areas for improvement of insurance practices, and
- drive improvements to the funeral insurance industry.

Clause 25.11 – Definition of breach

We are concerned that breaches of the draft Code of Practice can only occur if there has been a failure to "correct a Code breach" in accordance with Clause 13.10 and draft Clause 25.11. The draft Code of Practice needs to be amended so that a breach of the Code is defined as a breach of the Code, rather than a failure to correct a breach of the Code. Without such an amendment, the deterrence effect, and consequently the effectiveness of the Code as a whole, is significantly diminished.

Clause 25.15 – Possible sanctions should include compensation

We recommend that the Code of Practice also include a sanction which enables the Life CCC to award compensation for any direct financial loss or damage cause to an individual, in line with ASIC Regulatory Guide RG 183:

> *(f) Compensation for any direct financial loss or damage caused to an individual.*

We note that the Insurance Council of Australia has similarly recommended that an additional sanction be included in the General Code:

> *Clarify that the sanctions in the Code enable compensation for any direct financial loss or damage cause to an individual, in line with ASIC Regulatory Guide (RG) 183.*[22]

Clause 26.2 – Access to Information

Clause 26.2 states:

> *Subject to section 26.5, you can ask us for the information about you that we relied on in assessing your application for insurance cover, your claim or your Complaint.* (emphasis added)

In contrast, the equivalent former clause (14.2) stated "you can access the information…" The inclusion of "you can ask us" in the new clause diminishes the current obligation as it does not require the insurer to act on a request for information. The failure of funeral insurers to provide documents to consumers is a serious ongoing concern arising from our casework. We

[22] Insurance Council of Australia, *Final Report, Review of the General Insurance Code of Practice,* June 2018, Recommendation 26, page 11.

recommend a return to the former iteration of the clause so that insurers are required to provide access to information.

Furthermore, we recommend that subclause (e) is removed. Insurers not providing documents on the basis that they are ‘commercial-in-confidence’ could effectively prevent a large range of documents from being provided, and result in a denial of natural justice to the consumer. We note that this clause does not appear in the equivalent clause in the General Insurance Code of Practice: clause 14.4. There is no significant qualitative difference between the general insurance sector and the funeral insurance sector that would justify the continued inclusion of subclause (e) in the draft Code of Practice.