SUBMISSION ON POLICY ISSUES RAISED IN ROUND 6

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Do you agree to your submission being published: Yes
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Introduction:

1. This submission focusses on para 1 of the "Policy Questions Arising from Module 6" with particular suggestions for Sections B, C, E, H and I. The purpose of this submission is to address that evidence in Round 6 from insurers, particularly [redacted] which suggest a culture issue and, to borrow from the FSRC Interim Report, an apparent "*... pursuit of short term profit at the expense of basic standards of honesty.*"

2. There is no reason for insurers, banks and financial institutions to behave differently if they are not punished. I agree with the sentiment in the Interim Report that passing more laws may not be enough. But there should be a punishment that is severe and quick enough to hurt the entity enough to force correct behaviour. There is too much power and too much money involved to trust financial institutions to do the right thing. Their primary motivations are to look after their own shareholder interests, which is understandable. But the evidence during Round 6 is that there are no fetters on that and that they will willingly and deliberately pursue those interests at the expense of the consumer.

3. Bearing in mind the attendant imbalance of power and resources between an institution and a consumer, and the Interim Report's conclusions on the current state of regulatory inaction ("*When misconduct was revealed, it either went unpunished or the consequences did not meet the seriousness of what had been done.*"), I propose the commission to look at two potential options for addressing the apparent gap between insurer conduct and community standards:

    1. Different regulatory powers;
    2. Wider whistleblower protection;
    3. Claims handling oversight; and
    4. Examples being made of individuals who clearly fall below the requisite standards.

Different Powers:

4. I refer to this example of how one particular regulator exercised powers when it found non-compliant operational matters:

    1. https://bbj.hu/business/national-bank-fines-allianz-hungaria-huf-125-mln_156508

5. The regulator fined the company the equivalent of AUD642,000 for operational matters. The key issues are (i) the apparent ease with which the MNB's could impose the fine; and (ii) the categories for the fines being for oversight and for consumer protection. There was no need to get into any discussion with the offender about prudential issues or any apparent harm to consumers. It simply appeared sufficient for the MNB to find that the market conduct breached the relevant standards.

6. There are other examples of regulators actively punishing unsavory behaviour as set out below, but the Hungarian example caught the eye with the apparent confidence with which the regulator acted:

    1. https://www.fca.org.uk/news/news-stories/2016-fines
    2. http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/587401/IPOL_IDA(2017)587401_EN.pdf

Substantive Powers?

7. Do ASIC or APRA have similar powers? If not, should they? If they already do have sufficient powers, why are they are not actively exercising them against institutions? If not them, should there be a separate body with that power whose primary interest is promoting and protecting the customer viewpoint? What regulatory body is tasked with taking up the fight against the financial institutions on suspected unlawful or immoral conduct? The regulatory power should be quick, efficient and severe enough to directly threaten someone's job or performance metrics in order to make the incentive real enough to supersede any sub-standard internal imperatives.

8. The current paradigm is too passive and permissive for financial institutions who have no fear of any sanction against immoral behaviour: either because there is no enabling regulation on that front or because the current regulators are more concerned with, for example, maintaining registers as opposed to looking for and punishing misconduct.

Same or New Powers but Different Thresholds?

9. Given, for example, the potential scope of "misleading and deceptive conduct" provisions, there are surely current sanctions with a low enough threshold to trigger regulatory action and place the onus of disproving back onto the institution. Where that institution is a global entity, it should have sufficient resources to defend itself with respect to the marketing, product and sales planning behind the infraction. That is, regulators should have the right in certain circumstances to take advantage of a lower level of proof to impose a sanction. That may not be a bad thing given the inherent imbalance that a customer faces against an institution over an issue that for the consumer may not be worth it on its own to fight, only to have to wait for, say, a Royal Commission to be able to voice their concerns about what turns out to be a billion dollar and widespread morass of misconduct that only benefits the institutions. These financial institutions do not have the customers' interest at heart: they are in an inherent conflict of interest . When a dispute occurs, why should the institution be given the whole benefit of the doubt when it is the institution's marketing, product and sales strategy that placed the consumer in the dispute scenario in the first place?

Punishing the Chain of Command

10. If an adviser or employee is involved and is operating under a licence, in order to change culture at the top of the chain of command, any penalty arising from the employee's conduct should flow to the employer / licensee.

Wider Scope of Regulatory Powers:

11. The attempts by [redacted] to force [redacted] to change initial reports points to a problem in trying to rely on external auditors as a check in the system. I submit that the regulator's scope for investigating conduct which will harm consumers should extend to the external consultants who facilitate that and the consumer protectionist provisions should therefore extend to the professional standards espoused by, for example, accountants and lawyers.

12. While those professions should have to maintain client confidentiality and do the best they can for their client, they should feel free to explicitly point out that conduct that breaches community standards have a probability of attracting serious regulatory censure. At the same time, there should be whistle-blower protection for external consultants who, if they personally feel they are being forced to endorse sub-standard conduct, should be able to report to regulators about that conduct. The scope of the protection could be limited to maintain the integrity of the professional relationship for example if the client is asking the consultant to endorse a course of action that the consultant has a reasonable belief would cause harm to a class of consumers or would result in a substantial regulatory fine or would be criticised or viewed unfavourably by this FSRC or some other related or similar threshold.

Claims Handling:

13. Section E of the "Policy Questions Arising from Module 6" concerns the issue of claims handling. Given the evidence in Round 6 and the following reported articles, the short answer to para 17 of those "Policy Questions" has to be "Yes":

    1. https://www.smh.com.au/business/companies/crazy-decision-injured-motorcyclist-locked-in-battle-with-insurers-for-months-20180820-p4zyji.html

    2. https://www.smh.com.au/money/insurance/delay-deny-don-t-pay-how-ctp-insurance-turned-into-a-nightmare-20180817-p4zy5s.html

14. To echo some of the above points about "Different Powers", the insurer is in a far better position than the consumer in controlling the outcome of the claim. The consumer is in an unfair fight when trying to force the insurer to do its job.

15. An ensuing question is how to oversee those claims decisions. The regulator does not necessarily have to be a judge to second guess the substantive outcome of the decision but surely the regulator can oversee the process involved and the reasonableness of that. The regulator can either do that with respect to (i) the insurer's own service level agreements or (ii) whether the rationale put forward by the insurer is potentially misleading or deceptive (the above articles cite examples of such tactics being used by insurers; or (iii) impose some parameters that force the onus of proof onto the insurer and places the onus instead to pay first and then recover or defend later on.

16. The more difficult question is whether the regulatory oversight should be ASIC given its current self imposed role of spectator rather than regulator.

Calling out Moral Behaviour:

17. The second suggestion is that the industry and its regulators should do more to look at some of the moral indicators in publicly available evidence to impose a more stringent requirement on becoming a director or senior official in a financial institution.

18. In the HIH Royal Commission for example, there was evidence led about the involvement of [redacted] in certain [redacted] arrangements and the consequences of those arrangements for HIH:

    1. https://www.smh.com.au/business/fai-bosses-point-finger-at-each-other-20030130-gdg6rf.html

    2. https://www.theage.com.au/national/auditor-doubted-hih-account-20021004-gdunmw.html; https://www.highbeam.com/doc/1G1-83291975.html

19. [redacted] went on to [redacted] before become [redacted] from 2013 until 2018. The FSRC has since heard that, in that period, an [redacted] misleading website was left up over years attracting millions of policies and billions in revenue. That led to some interesting dialogue with external consultants about internal risk processes. In both episodes ([redacted] preparing [redacted] statements and [redacted] maintaining a deliberately deceptive website), there is a pattern of doing what is necessary to get an external consultant to agree with a position that subsequently proves highly unfavourable to consumers but quite favourable to the institution in the short term. Given evidence of this nature (see: [redacted]), how could [redacted] rise to become [redacted] There may have been a "dirty job" that needed doing, but was that an indicator about the kind of behaviour that became acceptable at [redacted] but which has since proven to require correction? Whatever [redacted] did at [redacted] before it's sale to HIH and then at [redacted] when [redacted] obtained HIH's business, the episode highlights a gap I suggest in the ability of senior executive to rise through the ranks with no independent requirement for any external party to have a check over prior immoral behaviour in order to be a senior business executive.

20. A message has to be sent about culture and correcting the imbalance that exists when large institutions make deliberate choices to make money via underhanded means. For example, even now, despite the FSRC evidence about the deliberate choice to keep misleading the public about travel products and deliberately putting pressure on external consultants for favourable reports and deliberately selling worthless add-on insurance through car dealerships, [redacted] needs to go some way to demonstrate appropriate contrition if this statement from its written submissions is anything to go by: [redacted]. While it is true that the customers made decisions to buy products that proved faulty, that was only because [redacted] produced those faulty products and then deliberately marketed them to those customers in a way to hide the inherent product defects. The above quote is a clear example of the distance between an insurer and the customers best interests and reflects the power imbalance between the two that requires regulatory oversight.