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Dear Sir/Madam,

We welcome the opportunity to provide feedback in relation to the Life Insurance Code of Practice 2.0 (the Draft Code).

Maurice Blackburn Pty Ltd is a plaintiff law firm with 33 permanent offices and 30 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions. The firm also has a substantial social justice practice.

We are grateful for the opportunity to provide input to the Draft Code, and congratulate the FSC on their commitment to consultation in its development.

Maurice Blackburn was pleased to provide feedback to the earlier draft of the Code in 2019.¹ We acknowledge that some significant enhancements to the Draft Code have been made since that initial consultation, especially in relation to its layout and the adoption of plain language throughout. We are also pleased to note the adoption of more appropriate terminology around the consumers' duty not to make a misrepresentation in paragraphs 4.1 to 4.4 of the Draft Code.

In our earlier submission, we drew FSC's attention to a number of omissions from the draft, in particular issues which had arisen as a result of the recommendations from the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (the Royal Commission), and the Parliamentary Joint Committee on Corporations and Financial Services' Inquiry into the Life Insurance Industry (the PJC Inquiry).²

There a number of issues highlighted in that earlier submission which we still believe are relevant to consultation on the current draft of the Code.

¹ <https://fsc.org.au/web-page-resources/fsc-life-insurance-draft-code-of-practice-2-0-1/1660-maurice-blackburn-lawyers-fsc-life-insurance-code-of-practice-2-0-submission>

² https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/LifeInsurance

Approved Product Lists (APLs)

The Draft Code remains silent on the proper use of APLs.

We believe that the section entitled ‘Staff and Authorised Representatives Will Follow Good Sales Practices’³ should be enhanced by the addition of a provision related to the use of APLs.

We note that there is currently no reference to APLs in the Draft Code. We see this as an oversight. A passive response is inappropriate given the industry’s poor track record of self-regulation and its manifest commercial interest in continuing to sell in-house products.

We note that the Australian Lawyers Alliance (the ALA) provided significant input on this issue in their submission to the 2019 draft.⁴ We endorse these comments.

We believe that such an addition would be beneficial both for consumers and insurers, and help satisfy Recommendations 6.1 and 6.2 of the PJC Inquiry.

Unfair Contract Terms (UCT)

We note that there is no mention in the Draft Code of the new requirements applicable to insurance contracts that have come about since changes to UCT legislation.⁵

Those reforms make the term of an insurance contract unfair if each of the below criteria are met:

- the term forms part of a standard form contract;
- the insured is a consumer or small business;
- the term would cause a significant imbalance in the parties’ rights and obligations arising under the contract;
- the term is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- it would cause financial or other detriment to a party if it were to be applied or relied on.

The Draft Code should set out, in plain language, the legal obligations on insurers under UCT and how those obligations function in practice.

We appreciate the additional provisions in the Draft Code that relate to requirements in supporting customers experiencing vulnerability and financial hardship.⁶ We believe it would be beneficial to add a paragraph within that section which creates a clear link between these provisions and UCT requirements.

Maurice Blackburn further suggests that UCT provisions should be deemed to be enforceable code provisions under paragraph 8.6.

³ Paragraphs 2.10 – 2.15 of the Draft Code

⁴ Ref:

<https://www.fsc.org.au/web-page-resources/fsc-life-insurance-draft-code-of-practice-2-0-1/1651-australian-lawyers-alliance-ala-fsc-life-insurance-code-of-practice-2-0-submission>: paragraphs 29 to 32.

⁵ Ref: *Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2019 Measures)) Act 2020*

⁶ Re: Section 6: p.21

Rehabilitation

We note the provisions related to rehabilitation in the Draft Code, in particular paragraphs 5.4 (c), 5.44 and paragraph 13 (c) of Appendix B (related to mental health).

Consumer advocates have expressed considerable concern about the nature of the relationship between insurers and those that determine rehabilitation eligibility and benefits.⁷

Maurice Blackburn believes that the standards for lawful rehabilitation programs should be, at a minimum, consistent with the representations made by the FSC to the PJC⁸. Specifically, the FSC Code should state that such rehabilitation programs should be subject to the following minimum standards:

- a. It will only be proposed 'when the [rehabilitation] is cost effective for both the customer and the insurer';*
- b. Any rehabilitation proposal 'would always be arranged through the customer's treating physician, and would be dependent on the customer's agreement and participation';*
- c. 'No consumer will be forced to receive [rehabilitation] they don't want'; and*
- d. Any patient who does not wish to receive [rehabilitation] 'will not have their income protection and TPD insurance payments stopped'.*

We note that the 2019 draft of the Code featured the following excerpt:

3.5A: Variations to our standard terms and conditions

*If **we** ask **you** questions about **your** health and personal circumstances or ask **you** for medical evidence (such as a blood test) when **you** apply for the policy:*

- a) On the basis of **your** disclosure or information about **your** health **we** receive, **we** may not offer **you** insurance or may offer it with changes to **our** standard terms, for example, with a higher premium or excluding cover due to **your** circumstances or medical history (an **Individually Agreed Special Term or Exclusion**). If **we** do this, **we** will ask **you** to agree to the changes. If **you** take out the policy, **we** will take this as **your** agreement to the changes.*
- b) **We** will not apply a **pre-existing condition exclusion clause** in relation to any condition **you** fully and accurately disclose, unless **we** agree this with **you** and confirm it **in writing** when **your** policy is issued.*

We note that 3.5A(b) has been completely dropped from the Draft Code. If this was an oversight then we urge FSC to rectify the situation by reinstating this crucial consumer protection. If it was dropped intentionally, Maurice Blackburn notes our strong objection.

⁷ See for example <https://www.lawyersalliance.com.au/documents/item/2004>: paragraphs 82 to 87

⁸ Mr Allan Hansall of the FSC <https://parlinfo.aph.gov.au/parlInfo/download/committees/commjnt/49094fee-6d97-4fb3-b5b2-18e6f649e791/tocpdf/Parliamentary%20Joint%20Committee%20on%20Corporations%20and%20Financial%20Services201806196247Official.pdf;fileType=application%2Fpdf#search=%22committees/commjnt/49094fee-6d97-4fb3-b5b2-18e6f649e791/0000%22> at page 25

Code Enforceability

We note the wording of paragraph 8.6 of the Draft Code, which reads:

The Code only creates legal or other rights between the entities bound by it and the FSC. It does not create rights for any other parties, except where it identifies enforceable provisions. The enforceable provisions of the Code are: [Placeholder to identify ECPs]

We are concerned by the wording of this provision. As it stands, it reads as an attempt to avoid responsibility to consumers for anything in the Draft Code which is not an enforceable provision. We submit that all obligations under the Code should carry legal weight and standing. Any Code provision that does not accord legal rights to consumers is of little value to consumers.

We draw FSC's attention to case law⁹ which confirms that industry code provisions can and do have contractual effect as between a code member and its customers.¹⁰ The principles underpinning these decisions in relation to the finance sector would, we believe, be held as applicable to insurance contracts. Hence paragraph 8.6 of the Draft Code sets a standard that falls below the common law rights of consumers, which is the antithesis of the purpose of a Code of Practice.

Furthermore, it is not possible to responsibly offer support for the Draft Code without knowing which of the provisions will be deemed to be an ECP. We assume further consultation will occur on this point in due course.

In our 2019 submission, Maurice Blackburn argued that the Code needs external enforceability and regulatory approval (as is the case for the ASIC approved Banking Code of Practice). This is reflected in the PJC's recommendation 4.2. We remain of the view that the Draft Code still does not anticipate this, which, in our view, is short sighted. We agree with the PJC's Recommendation 4.3 which suggests that the Code should apply to all relevant industry participants, without exemptions. There is currently no suggestion in the redraft that FSC is moving in this direction.

We believe that the Life CCC is generally doing a good job of triaging and managing reported code breaches, but the Code is deficient from a governance perspective as long as it operates without ASIC's approval.

We note that Recommendation 4.9 of the Royal Commission, which deals with issues related to the enforceability of the Code, is already behind in its stated timeframes.

Maurice Blackburn believes that the section of the Draft Code entitled 'Entities will comply with both the law and the Code'¹¹ would benefit from the addition of a statement outlining FSC's commitment to external enforceability and satisfying the related recommendations from the PJC and Royal Commission.

Maurice Blackburn further supports the submissions of the Australian Lawyers Alliance in their response to the 2019 draft of the Code.¹² We make specific reference to a number of paragraphs from their submission which remain unaddressed or under-addressed by the Draft Code:

⁹ See for example *National Australia Bank v Rose* [2016] VSCA 169; *Doggett v Commonwealth Bank of Australia* [2015] VSCA 351

¹⁰ https://www.greenslist.com.au/images/stories/zoo/uploads/NAB_v_Rose_casenote.pdf

¹¹ Re paragraphs 8.6 to 8.9: p.25

¹² Op. cit. 4.

- Paragraphs 28, and 112 to 115 in relation to the use of offset clauses
- Paragraphs 34 and 44 in relation to setting time boundaries on the seeking of family and personal medical history¹³
- Paragraphs 57 to 59 in relation to the prevention of 'doctor shopping'¹⁴
- Paragraphs 62 to 66 in relation to the circumstances where surveillance is acceptable¹⁵

Maurice Blackburn urges the FSC to revisit these sections of the ALA submission, and ensure these important issues are appropriately covered by the Draft Code.

Should you wish to discuss any of the matters raised above in further detail, please do not hesitate in making contact via JMennen@mauriceblackburn.com.au, or on 07 3014 5051.

Yours faithfully,



Josh Mennen
Principal Lawyer
Maurice Blackburn

¹³ This should form part of the section of the Draft Code entitled "Mental health, family medical history and genetics": paragraphs 4.18 to 4.21

¹⁴ We note that paragraph 4.15 of the Draft Code covers this to some degree, but with less specificity

¹⁵ This should form part of the section of the Draft Code entitled "Restricting the use of surveillance": paragraphs 5.35 to 5.38