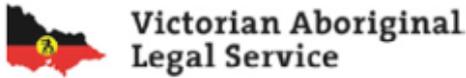




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22 October 2019

Manager
Financial Services Reform Taskforce
The Treasury
Langton Crescent
PARKES ACT 2600

By email: FuneralExpenseReforms@treasury.gov.au

Dear Manager

Removal of the exemption for funeral expenses policies– Exposure draft legislation

Our organisations welcome the opportunity to comment on the proposed removal of the exemptions for funeral expenses policies, specifically the:

- Financial Services (Improved Consumer Protection) (No. 1) Bill 2019: funeral expenses facilities— Exposure Draft (**Draft Bill**);
- Financial Services (Improved Consumer Protection) (No. 1) Regulations 2019: funeral expenses facilities (**Draft Regulations**);
- Financial Services (Improved Consumer Protection) (No. 1) Bill 2019: Funeral Expenses Facilities: Exposure Draft Explanatory Materials (**Explanatory Materials**); and
- Exposure Draft Explanatory Statement: Financial Services (Improved Consumer Protection) (No. 1) Regulations 2019: funeral expenses facilities (**Explanatory Statement**).¹
(collectively, the **Exposure Draft Materials**).

The following organisations have contributed and endorsed this submission: Consumer Action Law Centre (**Consumer Action**); Financial Rights Legal Centre; Victorian Aboriginal Legal Service (**VALS**); Financial Counselling Australia; and CHOICE. Information about our organisations is available at **Appendix A**.

¹ Consultation documents available at: <https://www.treasury.gov.au/consultation/c2019-23114>.

Summary of our submissions

This submission:

- notes our concern relating to existing claim holders;
- supports the proposed commencement date of the Draft Regulations;
- supports sections 1 and 4 of the Draft Bill;
- recommends a further amendment to the *Australian Securities and Investments Commission Act 2001 (ASIC Act)*;
- supports section 2 of the Draft Bill;
- supports section 3 of the Draft Bill;
- strongly supports section 2 of the Draft Regulations;
- objects to the inclusion of Item 3 of Schedule 1 of the Draft Regulations and related definitions;
- if Item 3 remains in the Draft Regulations, recommends that Item 3 of Schedule 1 be amended;
- recommends that Attachment A of the Explanatory Statement be amended to reflect the amendment to Item 3 of Schedule 1;
- strongly recommends that the *Life Insurance Act 1995 (Cth)* and *Insurance Contracts Act 1984 (Cth)* be amended so that funeral expenses policies are regulated by these Acts.

Our comments are detailed below.

Background

Consumer advocates have held long standing concerns over the inadequate regulatory framework for funeral expenses products. Funeral expenses policies are currently defined as a scheme or arrangement for the provision of a benefit consisting of the payment of money, payable only on the death of a person, for the sole purpose of meeting the whole or part of the expenses of, and incidental to the person's: (a) funeral; and (b) burial or cremation (*Corporations Regulations 2001 (Cth)*, r 7.1.07D).

Funeral expenses policies are currently:

- not covered by the financial services licensing and conduct regime of the *Corporations Act 2001 (Cth)* (**the Corporations Act**) due to their exemption as financial products pursuant to section 765A of the Corporations Act and regulation 7.1.07D of the *Corporations Regulations 2001 (Cth)* (**the Corporations Act Exemption**);
- not regulated as life insurance pursuant to s 11(3)(e)(ii) of the *Life Insurance Act 1995 (Cth)* (**LIA**) (**the LIA Exemption**); and
- not regulated as insurance policies, noting s 8 of the *Insurance Contracts Act 1984 (Cth)* (**ICA**) (**the ICA Exemption**) (collectively, **the Exemptions**).

We have held concerns over the way the Exemptions have caused harm to Aboriginal and Torres Strait Islander peoples through the business operations of the Aboriginal Community Benefit Fund (**ACBF**) (now trading as Youpla). One person harmed by the operations of ABCF was Ms Tracey Walsh, an Aboriginal and Torres Strait Islander woman living in Victoria. Ms Walsh provided evidence of her experiences to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**the FSRC**). The ACBF case study resulted in Recommendation 4.2 of the FSRC.

Since the FSRC, our organisations continue to take enquiries about ACBF and hear stories of harm. Case studies 1 and 2 (attached as **Appendix B**) exemplify some of these experiences.

The case for action is irrefutable and we strongly support the Government's attempts to remove some of the loopholes that currently exist under the laws relating to funeral expenses only products. However, we have some concerns about the Draft Bill and Draft Regulations as they currently stand. Our concerns are set out below.

Existing claim holders

While there is no doubt that the exemptions for funeral expenses policies need to be removed, the legal loopholes have been permitted to fester for so long that, unfortunately, people now stand to lose from this long overdue legislative correction.

These issues are best exemplified by our concerns around the operations of ACBF. ACBF has operated since around 1994 with limited conduct regulation by Australian Securities and Investments Commission (**ASIC**) and no prudential regulation by Australian Prudential Regulation Authority (**APRA**). This regulatory vacuum has created fertile ground upon which poor business practices have flourished. Consumer Action understands that ACBF may be in a precarious financial situation. If so, existing policy and legal claim holders stand to lose out on their claims. The clear majority, if not all, people affected by ACBF are Aboriginal and Torres Strait Islander peoples who purchased ACBF's products because of the cultural significance of sorry business (funerals and related cultural activities) and their wish to try to avoid the financial burden on their families.

Without commenting on the appropriateness or otherwise of ACBF obtaining a licence when the new regime commences, the fact that ACBF may not obtain a licence because of past poor conduct and possible deficient business practices, puts ACBF's financial situation in greater doubt.

The Government has been on notice of ACBF's concerning conduct for some time. In 1992, an injunction obtained by the NSW Department of Consumer Affairs caused the cessation of ACBF's original fund and prompted ACBF to establish its second fund. In 1999 and again in 2004, ASIC took action against ACBF.² In 2009, the Financial Ombudsman Service (now the Australian Financial Complaints Authority) required ABCF to refund contributions to a member of the ACBF fund as ACBF did not at the time hold a licence to sell financial products. FOS found that the complainant, an Aboriginal and/or Torres Strait Islander person, was vulnerable and ACBF "exploited this situation by using sales practices and high pressure sales tactics."³ In 2015, a decision was made by the Commonwealth Department of Human Services to remove the ability for insurance payments, including those to ACBF, to be made through Centrelink's Centrepay because of 'the particular risks funeral insurance raises for vulnerable customer.'⁴ This prompted the Federal Court action commenced by ACBF in the first instance and later appealed by the Chief Executive of Centrelink.⁵

If ACBF goes out of business, it may leave claim holders facing the loss of past contributions and no future coverage for the costs of their funerals. It would be a perverse outcome if communities, rather than the government, were to bear the cost of the poor legal drafting, inappropriate legal loopholes and policies of previous governments. For this reason and given the unique and exceptional set of circumstances raised here, we urge the Government to take urgent action to ensure that an appropriate redress scheme is established for existing claim holders. We note that the experiences of Aboriginal and Torres Strait Islander peoples are diverse. It is therefore critical that any redress scheme be tailored to reflect the specific needs within Aboriginal and Torres Strait Islander communities

² FSRC. (2018). *Interim Report*. Retrieved from <https://financialservices.royalcommission.gov.au/Documents/interim-report/interim-report-volume-2.pdf> (hereafter, **the Interim Report**), pp. 444 and 447.

³ Financial Ombudsman Service. (2009). *Adjudication 20293: Community Benefit Fund – Right of rescission*. Retrieved from <https://serviceo2.afca.org.au/CaseFiles/ILIS/20293.pdf>.

⁴ Chief Executive Centrelink v ACBF Pty Ltd [2016] FCAFC 153, [31].

⁵ Chief Executive Centrelink v ACBF Pty Ltd [2016] FCAFC 153, [31].

by working together with those communities in a meaningful and respectful way. We also note that a redress scheme would respond to a unique situation that requires this kind of one-off Government intervention.

The proposed commencement date

Given our concerns about the potential harm to existing policy holders, we have considered whether the commencement date of the Draft Bill and Draft Regulations be delayed to allow the Government a proper opportunity to consult with Aboriginal and Torres Strait Islander peoples impacted by ACBF's conduct so that a responsive scheme is in place by the time the legislation commences. We have considered arguments both in favour and against delay but, on balance, believe it is better for the Government to push ahead with its proposed commencement date of 1 April 2020. Our greatest concern is the potential harm that could be caused by further delay to the removal of the exemption, that is, the continued promotion and sale of funeral expenses benefit policies in absence of an effective regulatory regime. However, we urge the Government to take immediate action to plan for redress or remediation for Aboriginal and Torres Strait Islander peoples that might be impacted by the legislative amendments.

The ASIC Act

Our view is that funeral expenses only policies are currently regulated by ASIC under the consumer protection provisions of the ASIC Act. However, given Commissioner Hayne's findings on this point, we support the proposed legislative amendments to ensure clarity.

As a matter of completeness, we submit that further clarity would be provided by adding a definition of 'funeral expenses facility' in the ASIC Act. The definition could simply refer to the definition under the Corporations Act.

RECOMMENDATION 1. Add a definition of *funeral expenses facility* to the ASIC Act along the lines of 'funeral expenses facility has the same meaning as in section 761A of the Corporations Act.'

The proposed funeral services entity exemption under Item 3, Schedule 1 of the Draft Regulations

We understand that the intention of the proposed exemption created by Item 3 of Schedule 1 of the Draft Regulations is to allow funeral directors to offer or provide advice about friendly society funeral bonds, in addition to the purchase of pre-paid funerals, as this ostensibly supports consumer choice. We note that this proposed exemption and its justifications raise complex issues. We also note the short turn-around time permitted for providing submissions in relation to the Exposure Draft Material.

Having considered these issues in the limited time available, we do not support the proposed exemption for funeral service entities (essentially, funeral directors) dealing in friendly society funeral products (essentially, funeral bonds). Funeral directors providing prepaid funerals and funeral bonds are providing financial product advice to clients, dealing in a financial product, and make a market for a financial product. In principle, then, they should be regulated as financial service providers. This is especially critical considering CHOICE'S recent investigation⁶ illustrating that, often, the prime targets of this financial service advice are grieving people who are in a vulnerable state. CHOICE's investigation also found that funeral directors push prepaid funerals, usually in conjunction with funeral bonds, not because they are in consumers' best interests, but to lock in business.

⁶ Choice. (2019). *Funerals Investigation Part 3: Should you get a prepaid funeral?* Retrieved from <https://www.choice.com.au/health-and-body/healthy-ageing/ageing-and-retirement/articles/funerals-investigation-should-you-get-a-prepaid-funeral>

In addition, because of the sensitivities around, and significance of, sorry business, it is unlikely that an Aboriginal and/or Torres Strait Islander person would seek the advice of funeral directors. Generally speaking, funeral directors have not built relationships, rapport and trust within Aboriginal and Torres Strait Islander communities, undermining the likelihood that an Aboriginal and Torres Strait Islander person would seek their advice. Therefore, the consumer choices of Aboriginal and Torres Strait Islander peoples are unlikely to improve because of the proposed exemption.

Furthermore, the proposed exemption is inconsistent with FSRC Recommendation 7.3, that exceptions and loopholes be minimised.

This proposal is therefore at serious risk of creating further harmful loopholes. We suggest that caution be exercised and the exemption be removed from the Draft Bill and Draft Regulations. There may be scope for ASIC to provide relief to funeral directors in the future if their financial service licence obligations prove unjustifiably onerous. However, the opportunity to amend laws presents rarely.

RECOMMENDATION 2. Remove the funeral service entity exemption from Item 3 of Schedule 1 of the Draft Regulations. Also, amend the Explanatory Statement accordingly.

In the alternative, should the Government decline to follow Recommendation 3, then we suggest that the wording of Item 3 of Schedule 1 of the Draft Regulations be amended to make clear that sub-items (i), (ii) and (iii) are essential conditions.

Attachment A of the Explanatory Statement will also need to be amended. Currently it reads: *Item 3 of Schedule 1 creates a new provision to give funeral service entities an exemption from needing to hold and [sic] Australian financial services licence when providing financial services advice or dealing in a friendly society funeral product* (our emphasis).

To achieve what we understand the Government is trying to achieve, the attachment to the Explanatory Statement should read either:

- ... give funeral service entities an exemption from needing to hold an Australian financial services licence when providing financial services advice **and** dealing in a friendly society funeral product; **or**
- ... give funeral service entities an exemption from needing to hold an Australian financial services licence when providing financial services advice **in relation to a friendly society funeral product** or dealing in a friendly society funeral product.

RECOMMENDATION 3. If Recommendation 3 is not followed, add an 'and' between sub-items (ii) and (iii) of Item 3(ta) of Schedule 1 of the Draft Regulations. Also, amend the Explanatory Statement accordingly.

Failure to take action to remove the LIA and ICA Exemptions

Generally speaking, life insurance is regulated by a number of laws including:⁷

- The LIA which provides prudential regulation;
- The ICA which regulates insurance contracts; and

⁷ FSRC. (2018). *Background Paper 29: Life Insurance*, p.7. Retrieved from: <https://financialservices.royalcommission.gov.au/publications/Documents/life-insurance-background-paper-29.PDF>.

- The Corporations Act which provides regulation of financial products in relation to licencing, disclosure and some conduct matters.

As set out above, in the background section of this submission, funeral expenses policies are currently exempted from each of these laws. It is clear from the FSRC Final Report that, but for these exemptions, Commissioner Hayne considered funeral expenses policies to be a kind of funeral insurance product. Commissioner Hayne compared and contrasted funeral life policies, which are regulated under the LIA and ICA, with funeral expenses policies before commenting that 'all forms of funeral insurance should be subject to the same regulatory regime and supervision.'⁸

The Government has committed to taking action on all 76 recommendations made by Commissioner Hayne in the FSRC. While the Treasurer has previously indicated that the Government will be going further than these recommendations 'in a number of important areas'⁹ and that the Government's 'principal focus is on restoring trust in our financial system and delivering better consumer outcomes'¹⁰, we understand that the Government's current focus is on strictly implementing Commissioner Hayne's recommendations and no more.

In the Explanatory Materials, it states that 'Commissioner Hayne recommended the removal of the exclusion of funeral expenses policies from the definition of financial products under the *Corporations Act 2001*,'¹¹ we respectfully submit that this interpretation of Commissioner Hayne's recommendations is too strict, if not incorrect, and in any case goes against the spirit of Commissioner Hayne's recommendations.

The exact wording of recommendation 4.2 was as follows:

Recommendation 4.2 – Removing the exemptions for funeral expenses policies

The law should be amended to:

- remove the exclusion of funeral expenses policies from the definition of 'financial product'; and
- put beyond doubt that the consumer protection provisions of the ASIC Act apply to funeral expenses policies.

We note the use of the plural 'exemptions' and the fact that Commissioner Hayne did not in fact mention the Corporations Act.

We also note the following comments and recommendations made by Commissioner Hayne:

- 'All forms of funeral insurance should be subject to the same regulatory regime and supervision';¹²
- Recommendation 7.3 that exemptions and qualifications should be removed as far as possible;¹³ and

⁸ FSRC. (2019). Final Report: Volume 1, p. 286. Retrieved from <https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf> (hereafter, **FSRC Final Report**).

⁹ The Australian Government the Treasury. (2019). *Restoring Trust In Australia's Financial System: Financial Services Royal Commission Implementation Roadmap*, p. iv. Retrieved from http://www.treasury.gov.au/sites/default/files/2019-08/399667_Implementation_Roadmap_final.pdf (hereafter, **Treasury's Roadmap**).

¹⁰ Treasury's Roadmap, p. iv.

¹¹ Explanatory Materials, 1.7.

¹² FSRC Final Report, p. 287.

¹³ FSRC, p. 496.

- 'eliminating exceptions and qualifications is the first step towards a simpler and more readily understood body of law.'¹⁴

We do not know why Commissioner Hayne did not explicitly include in his recommendations the need to remove the exemptions from the LIA and ICA. It may be because his understanding was that 'both funeral life policies and funeral expenses policies are life policies under the Life Insurance Act and contracts of life insurance under the Insurance Contracts Act.'¹⁵

Given the removal of exemptions from the ICA and LIA are not explicitly referenced or addressed by the FSRC Report, Treasury must make a decision imputing the Commissioner's intentions on this point. Either Treasury impute that the Commissioner intended to maintain the exemptions under the ICA and LIA for significant reasons unstated, or the Commissioner intended all exemptions to be removed but the Commissioner was either not aware of the existence of these exemptions or they were not addressed for an unknown reason. Treasury has decided to impute the former.

From our perspective this is unrealistic. Given the critical tenor of the Commissioner's approach to the matter of exemptions throughout the Report and, as detailed above, to funeral expenses, it is highly unlikely that the Commissioner intended the exemptions to remain and be silent on this view. If he did want them to remain, he would have stated as such and provided clear reasons for these exemptions. The Commissioner does this in the case of exempting comprehensive motor vehicle insurance from the recommended deferred sales model under recommendation 4.3, for example.

In any case, restricting Government action to removing only the exemption from the Corporations Act goes against the general spirit and intent of Commissioner Hayne's recommendations. There is no principled reason why the exemptions in the LIA and ICA should remain and, in fact, the lack of prudential regulation that the LIA would otherwise provide is one of the greatest risks of harm that consumers of ACBF products now face.

RECOMMENDATION 4. The legislative changes should also remove the funeral expenses only exemptions in the LIA and ICA.

RECOMMENDATION 5. In the alternative to Recommendation 4, the exemptions in the LIA and ICA should be considered for removal in the broader review arising out of FSRC Recommendation 7.3. We understand that this will occur after the implementation of the other FSRC recommendations.

Further information

Please contact Policy Officer, Claire Deane, at **Consumer Action Law Centre** on 03 9670 5088 or at claire.deane@consumeraction.org.au if you have any questions about this letter.

Yours Sincerely



Gerard Brody | Chief Executive Officer
CONSUMER ACTION LAW CENTRE



Alexandra Kelly | Director of Casework
FINANCIAL RIGHTS LEGAL CENTRE

¹⁴ FSRC, p. 494.

¹⁵ FSRC, p. 286.



Nerita Waight | Chief Executive Officer
VICTORIA ABORIGINAL LEGAL SERVICE



Erin Turner | Director of Campaigns and Communications
CHOICE



Fiona Guthrie | Chief Executive Officer
FINANCIAL COUNSELLING AUSTRALIA



Appendix A: About our organisations

Consumer Action Law Centre

Consumer Action is an independent, not-for profit consumer organisation with deep expertise in consumer and consumer credit laws, policy and direct knowledge of people's experience of modern markets. We work for a just marketplace, where people have power and business plays fair. We make life easier for people experiencing vulnerability and disadvantage in Australia, through financial counselling, legal advice, legal representation, policy work and campaigns. Based in Melbourne, our direct services assist Victorians and our advocacy supports a just marketplace for all Australians.

Financial Rights Legal Centre

The Financial Rights Legal Centre is a community legal centre that specialises in helping consumers understand and enforce their financial rights, especially low income and otherwise marginalised or vulnerable consumers. We provide free and independent financial counselling, legal advice and representation to individuals about a broad range of financial issues. Financial Rights operates the National Debt Helpline, which helps NSW consumers experiencing financial difficulties. We also operate the Insurance Law Service which provides advice nationally to consumers about insurance claims and debts to insurance companies, and the Mob Strong Debt Help services which assist Aboriginal and Torres Strait Islander peoples with credit, debt and insurance matters. Financial Rights took close to 25,000 calls for advice or assistance during the 2017/2018 financial year.

Financial Counselling Australia (FCA)

FCA is the peak body for financial counsellors. Financial counsellors provide information, support and advocacy for people in financial difficulty. They work in not-for-profit community organisations and their services are free, independent and confidential. FCA is the national voice for the financial counselling profession, providing resources and support for financial counsellors and advocating for people who are financially vulnerable.

The Victorian Aboriginal Legal Service

The Victorian Aboriginal Legal Service Co-operative Limited (**VALS**) was established as a community controlled Co-operative Society in 1973. VALS plays an important role in providing referrals, advice, information, duty work or case work assistance to Aboriginal and Torres Strait Islander peoples in Victoria. Solicitors at VALS specialise in one of three areas of law, being Criminal Law, Family Law and Civil Law. VALS maintains a strong client service focus which is achieved through the role of Client Service Officers (CSOs) who act as a bridge between the legal system and the Aboriginal and Torres Strait Islander community.

CHOICE

Set up by consumers for consumers, CHOICE is the consumer advocate that provides Australians with information and advice, free from commercial bias. CHOICE fights to hold industry and government accountable and achieve real change on the issues that matter most. To find out more about CHOICE's campaign work visit www.choice.com.au/campaigns

Appendix B: Case studies

Case study 1

Sally is a 60-year-old Aboriginal woman who lives in rural Victoria. Sally's sole source of income is the Aged Pension. Sally signed up to the Aboriginal Community Benefit Fund (ACBF) in 2003 when Sally was visiting her sister in Queensland. A salesperson from ACBF came to the family home. Sally thought ACBF was an Aboriginal company. Sally signed an ACBF contract with a benefit amount of around \$10,000. Sally is currently paying a premium of \$21 per fortnight and, to date, has paid around \$7,500 in premiums. In 5 years' time (when Sally is only 65 years old) she will have paid more in premiums than her benefit amount.

Case study 2

Linda is a 56-year-old Aboriginal woman and mother of 7 children who lives in a small rural Victorian town. In 1999, a salesperson from the Aboriginal Community Benefit Fund (ACBF) knocked on Linda's door selling their funeral fund product. As a mother of young children, Linda was concerned about the future and how she would pay for her funeral. Money was always tight, and she did not have any savings. Linda did not want to burden her family, who were also earning low incomes, with the cost of a funeral. When Linda signed up to ACBF she also signed up her 5 children, the youngest being 4 months old. Linda later signed up her other two children. Linda thought ACBF was an Aboriginal company that offered a type of savings plan so people could pay for their funerals. Linda now knows that is not the case.

Linda's sole source of income is Centrelink. She pays all the premiums on her and her children's policies which amounts to over \$60 per fortnight. Linda has paid over \$26,000 in premiums to ACBF. In another 10 years time, if the ACBF premiums stayed at their current rate, Linda would have paid over \$40,000.