



Head of Secretariat
AFCA Transition Team
Financial Services Unit
The Treasury
Langton Crescent
PARKES ACT 2600

Submitted by email: afca@treasury.gov.au

20 November 2017

Dear Sir/Madam

Establishment of the Australian Financial Complaints Authority

Thank you for providing the Insurance Council of Australia (ICA) with the opportunity to provide feedback on the Establishment of the Australian Financial Complaints Authority (AFCA) Consultation Paper.

The ICA is the representative body of the general insurance industry in Australia. Our members represent more than 90 per cent of total premium income written by general insurers. ICA members, both insurers and reinsurers, are a significant part of the financial services system.

ICA members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property and directors and officers insurance).

We welcome consultation on AFCA's terms of reference, governance and funding arrangements. These areas are of utmost importance to our members and will be critical in determining AFCA's success. To support a constructive start to the new scheme, the ICA will continue to work with the AFCA Transition Team and, once established, with the AFCA Board.

We have provided a response to the Consultation Paper questions that relate to our members and consumers of general insurance products. If you wish to discuss any of the matters we have raised further, please do not hesitate to contact Fiona Cameron, General Manager Policy, Consumer Outcomes on 02 9253 5132 or fcameron@insurancecouncil.com.au

Yours sincerely

A handwritten signature in black ink, appearing to be "R Whelan", written over a thin horizontal line.

Robert Whelan
Executive Director & CEO

Part 1 – Terms of Reference

Guiding principles

Q1: In addition to the guiding principles detailed in the Consultation Paper, the ICA would recommend a specific principle with regards to cost and efficiency. This should promote the efficient management of resources along with accountability to scheme members.

We note that cost saving was one of the reasons why the Ramsay Review supported a move to a single financial service external dispute resolution (EDR) scheme. This policy intent should be reflected as a guiding principle.

Monetary limits

Q2: The ICA supports maintaining these specific sub-limits.

Q3: The ICA does not support an increase in these specific limits. As is commented later in the Consultation Paper, a review of monetary limits and caps will take place 18 months after AFCA has commenced. At such a time, the efficacy of these specific sub-limits can be determined in light of actual disputes received by AFCA and in consultation with stakeholders.

With regards to third party motor vehicle property claims, clear reasoning needs to be provided as to why the current limits are unsatisfactory. Without this, decisions on increasing limits will become arbitrary.

It is the ICA's view that while some third party disputes do not fall within the current monetary amount of \$5,000, this is not a strong enough argument, in and of itself, to increase the limit.

One of the basis for accessing EDR in relation to an insurance dispute is that an individual has purchased the insurance product under which the dispute arises. This is not the case with uninsured motorists. AFCA will need to take care to ensure that increased limits do not act as a disincentive to taking out appropriate insurance. This could result in increased premiums for those that do insure, in order to absorb the additional AFCA case fees which will be incurred as additional uninsured third party claims fall within a higher monetary award amount.

Q4: As we have detailed in previous submissions, while it is ultimately the decision of individual professional indemnity (PI) insurers to determine how best to respond to an increase in the specific limits, there remains a risk that an increase could impact the affordability and availability of PI insurance. The current caps and limits are a product of careful consideration and consultation over many years. We suggest that once established, the AFCA Board seek to meet with representatives from the PI industry to determine any impacts that increases may have.

Potential responses to an increase in these specific limits could include:

- Offering cover to the new limit but increasing premiums to account for the increased exposure to AFCA jurisdiction and the uncertainty of claim outcomes. Insurers may also look to increase the policy excess applicable to AFCA matters.
- Continuing to offer cover to the current limit but considering cover to the increased limit on a case by case basis (with or without additional premium).

Enhanced decision making

Q5: To support the principle of consistent decision making, we suggest that all AFCA decisions be made in accordance with the law. This is particularly important as AFCA's increased jurisdiction, as a result of higher monetary limits, will result in a greater number of disputes proceeding to EDR. Decisions made in accordance with the rule of law offer insurers, and ultimately consumers, more certainty of outcome.

It would assist insurers if AFCA could consider the application of precedent by relevant decision-makers and make those precedents available to the industry. This will help inform and improve internal dispute resolution (IDR) processes. The insurance industry requires certainty in the claims determination process. Divergence between Ombudsman decisions and established court precedent can add to uncertainty and have potential pricing implications.

Q6: FOS terms of reference state at section 8.1 that FOS is not bound by any legal rules of evidence. We believe that AFCA should have regard to legal rules of evidence and, in particular, legal principles and legal privilege. It is important that the scheme is not used, prior to legal action, as a means of accessing privileged documents which would have otherwise been excluded under normal legal processes.

We consider that a principle that requires AFCA's decisions to be "fair and reasonable" is a more robust principle than decisions made on "good insurance practice" which is what FOS currently relies on. It is critical that the rationale behind each principle, and how it is expected that each principle will operate, is made clear to all parties under the new scheme.

Q7: The ICA supports all principles being reflected in the terms of reference. Where substantial detail is required, operational guidelines can be used to provide further information and support flexibility.

Use of panels

Q8: The ICA supports the use of panels for extremely complex cases that may also be of significant financial value.

Nonetheless, AFCA processes should ensure that only a small percentage of disputes need to proceed for a panel determination. ICA members have advised that some disputes, which have progressed to a panel, have taken over a year before a final decision is provided. The majority of this time is attributable to the wait-time before the panel can actually commence its review of the dispute.

There is a risk that the use of panels may become more necessary if, as is probable, AFCA will need to resolve more complex and higher value disputes. In order to balance the necessity of panels with timeliness considerations, AFCA may need to establish a larger pool

of panel members than currently exists under FOS, or develop alternative processes for complex dispute resolution.

Q9: Currently, it is FOS protocol that a panel is used for all medical indemnity disputes, this is because a medical expert may be required. AFCA may wish to consider the efficacy of this going forward as many medical indemnity policies now have broad covers that include matters such as employment disputes. Such disputes may not require specific medical input; therefore, the blanket rule that a panel is always used may not be necessary.

Independent reviews

Q11: The ICA suggests it would be sensible if, within the first three years of AFCA's commencement, a full review of the scheme's operations takes place.

AFCA will be an amalgamation of three very different EDR structures, with a broad membership base and jurisdiction. For such a new and important organisation, a comprehensive review within three years will be needed to carefully assess what is working and what needs to change.

The review should not be limited to matters of compensation caps and monetary limits. There is a risk that comprehensive reviews every 5 years, with targeted reviews in between, will likely lead to more resources and time from both industry and AFCA as the reviews undertaken and changes have to be implemented.

Independent assessor

Q12: The charter of the independent assessor should form part of AFCA's governance documentation and could sit as an attachment to the scheme's terms of reference.

All scheme stakeholders, i.e. consumers and financial service providers, should be able to make a complaint to the independent assessor.

Q13: To provide for independence, the decisions of an independent assessor should be free from influence by the Board. This is similar to the separation between the Board and Ombudsman decisions.

Q14: The ICA supports the independent assessor having direct access to the AFCA Board for the purpose of reporting on the number and nature of complaints received and the course of action that needs to be taken to remedy issues identified.

Q15: The independent assessor should be able to refer systemic concerns that the Board has not addressed to ASIC.

Q16: The independent assessor should publish their findings in each case on an anonymised basis.

Q17: Just as financial service providers are bound by the decision of the Ombudsman, AFCA should be bound to the decision of the independent assessor.

Q18: A review of the functions of the independent assessor should take place as part of a comprehensive review into AFCA, which we suggest occurs within the first three years of AFCA's establishment.

Exclusions from AFCA's jurisdiction

Q19: The ICA does not believe that the existing exclusions from FOS' jurisdiction present any unreasonable barriers to access for consumers of general insurance products.

Q20: As is practice at FOS, AFCA should maintain a policy whereby all disputes must have proceeded through a firm's internal dispute resolution process (IDR) before being accepted by AFCA. This will provide firms with the opportunity to resolve disputes and should help minimise complaints lacking substance from progressing to AFCA.

In addition to this, we also recommend that AFCA has robust processes in place to ensure that complaints made by third-parties on behalf of consumers are authorised by the consumer and the organisation has been appointed by the consumer to represent their complaint. Insurers are seeing a rise in businesses that are including claims management as part of the repair service they offer. AFCA should seek to discourage any inappropriate conduct by excluding particular agents who have consistently acted inappropriately. Such agents should be reported to ASIC and the customers should be directly informed.

Q21: A dispute resolution system that encourages early engagement with the financial service provider to obtain as much information about the dispute as possible will help to ensure that complaints not appropriate for consideration by the scheme are excluded.

Other issues to be addressed in the terms of reference

Q22: The ICA supports accessibility and suggests that the principle of accessibility could be included in AFCA's terms of reference. With regards to how accessibility requirements are fulfilled, an accessibility factsheet or guidance note could be developed that details the specific steps AFCA will take to meet this principle.

Q23: The ICA considers that all subjects covered in the existing FOS terms of reference should also be detailed in AFCA's terms of reference. This would include specifying its jurisdiction by detailing disputes within and outside of scope, and key matters relating to the dispute resolution process. It may be that initially, a transitional terms of reference is required that specifies how AFCA will handle disputes that have been lodged under a former EDR scheme.

In addition to this, we note that FOS terms of reference require consultation with stakeholders, including financial service providers, before any changes in monetary limits can be made. The ICA would like to see a similar provision in AFCA's terms of reference.

Q24: As mentioned above, AFCA's terms of reference will need to make specific reference to disputes that have commenced in an existing EDR scheme and have transferred to AFCA, or disputes that have already been determined by an EDR scheme. The terms of reference should detail how such disputes will be managed.

AFCA's terms of reference should also make specific reference to the AFCA decision-making process, including how decisions are to be made with regards to current law and industry codes of practice and how principles of procedural fairness will be applied.

Part 3 – Governance

Ensuring that Directors have appropriate skills and experience without being simply representative of sectional interests

Q28: The Board of FOS currently operates with an equal number of directors with consumer and industry experience. At the same time, they are required under RG139 to ensure that: *‘the decision-making process and administration of the office are independent from participating organisations’* and *‘the processes and decisions of the office are objective and unbiased and are seen to be objective and unbiased.’*

FOS has been able to operate with a Board consisting of financial services representation while at the same time fulfilling its obligations under RG139. It is therefore possible, and appropriate, to appoint directors with appropriate industry skills and experience while also retaining the independence of the Board. In addition to RG139 requirements, AFCA will also be subject to enhanced ASIC oversight.

It is currently a requirement that FOS consults with stakeholders before a Board member is appointed. We believe that this requirements should also be adopted by AFCA to ensure stakeholders of the scheme are appropriately represented at Board level. Other ways to ensure that the Board maintains up-to-date and appropriate industry representation is by adhering to fixed-term appointments.

Q30: The role of the Board should be to monitor the performance of AFCA, provide direction to the Ombudsman on policy matters, set the budget, and establish and review the scheme’s terms of reference.

All operational requirements must be governed by the terms of reference which should clearly stipulate AFCA’s rules and processes. Industry sector advisory panels may be useful to discuss trends and emerging issues within certain financial service sectors. However, while advisory panels can be useful for obtaining a greater level of understanding about specific issues, they can not substitute Board governing arrangements.

Board responsibilities

Q31: In addition to what has been outlined, robust financial reporting standards should also be included as part of the responsibilities of the AFCA Board. This will facilitate accountability for costs and efficiency. Included in reporting requirements should be overheads, remuneration and administrative costs.

Q32: The ICA suggests that AFCA adopt the ASX corporate governance principles as the benchmark to determine all its corporate governance requirements. If there are any areas where AFCA departs from the ASX corporate governance requirements this should be clearly explained.

Q33: The ICA supports the governing rules stipulating that neither the Board nor individual directors can direct a decision-maker with regard to the outcome of a particular dispute. This will preserve the independence of AFCA’s dispute resolution process.

Part 4 – Funding

Funding matters for consideration as part of authorisation

Q35: Adequate consultation with scheme members should be one of the core principles that underpin AFCA's funding model. The ICA understands that while the Minister will consider draft arrangements as part of the authorisation process, funding arrangements will ultimately be decided by the AFCA Board. This must be carried out in close consultation with industry. It is critical that the funding arrangements do not facilitate firms with fewer disputes cross-subsidising those with higher dispute numbers.

Interim funding arrangements

Q37: Interim funding arrangements must ensure that financial service providers are not paying membership fees to two EDR schemes, or paying for the same dispute more than once.

It is also imperative that sufficient notice is given to financial service providers as budgets are set in advance. It may be appropriate to transition to a long-term funding model once all disputes from the existing EDR scheme have been resolved and AFCA is solely resolving disputes that have been lodged under its own terms of reference.

Q38: A review of interim funding arrangements after 12 months could help to ascertain whether the correct balance between accuracy and certainty has been established. Funding arrangements more broadly should also be part of the comprehensive review which we suggest takes place within three years of AFCA's commencement.

Transparency and accountability

Q39: AFCA is ultimately accountable to financial services consumers and financial service providers who are members of the scheme. With regards to insurers, key measures of importance will be:

- how the scheme is managing membership fees,
- adequacy of the scheme's dispute resolution process including ease of use,
- ongoing engagement with AFCA with the ability to communicate processes that are not working as intended; and
- sound and fair ombudsman determinations that are made in accordance with the law and are consistent.

Q40: Regular engagement and consultation with industry will ensure AFCA remains accountable to its members. All changes of significance, including changes to monetary limits, compensation caps, terms of reference and funding arrangements should be submitted to AFCA members for consultation and input before being finalised by the AFCA Board.

In addition, it would be useful if AFCA could adopt the FOS practice of sending out newsletters to stakeholders and running industry specific open forums and quarterly liaison meetings around the country. These provide members with the opportunity to openly discuss emerging issues, determinations and share industry insights with the EDR scheme.

Other matters

In addition to the issues detailed above, the ICA would like to note that the *Privacy Act 1988* gives the Information Commissioner the discretion to recognise EDR schemes to handle privacy-related complaints. The Office of the Australian Information Commissioner (OAIC) has provided guidelines that outline the conditions that must be met by EDR schemes in order to be recognised.¹

AFCA will need to be recognised by OAIC by 1 July 2018 otherwise it will not be able to hear privacy-related disputes as is current practice by FOS.

Furthermore, privacy breach mandatory reporting will be introduced next year. All financial service providers will need to understand how these requirements will interact with AFCA and the OAIC.

¹ <https://www.oaic.gov.au/agencies-and-organisations/advisory-guidelines/guidelines-for-recognising-external-dispute-resolution-schemes>