NIBA
National Insurance Brokers Association.

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EDR Review Secretariat
Financial System Division
Markets Group
The Treasury
Langton Crescent
Parkes ACT 2600

Submission in response to the Supplementary Issues Paper – Review of the financial system external dispute resolution framework

Please accept this late submission to the EDR Review in response to the Supplementary Issues Paper dealing with a compensation scheme of last resort, and with providing access to redress for past disputes.

NIBA would like to offer the following comments on behalf of our 350 member firms and over 4,000 insurance brokers operating in the cities, towns and regions across Australia.

1. **Disputes in relation to general insurance brokers**

In the 12 months ending 30 June 2016,the Financial Ombudsman Scheme accepted 6,858 disputes in relation to general insurance. During the same period, FOS accepted 344 disputes in relation to general insurance brokers and their clients.

There is not a high level of disputation between insurance brokers and their clients.

However, insurance brokers occasionally make mistakes. They maintain substantial professional indemnity insurance, which includes cover for any award made by FOS against the insurance broker. Professional indemnity insurance for insurance brokers is currently readily available, provides broad cover, and is reasonably priced.

There are no unpaid FOS awards against insurance brokers.

Informal feedback from our members indicates that by and large, disputes involving insurance brokers are well within the current jurisdiction of FOS. Whilst there has been no detailed review of the adequacy of the FOS jurisdiction in relation to insurance broking disputes, there have been no indications that the current jurisdiction is inadequate in any material aspect.

Where complaints and disputes involving insurance brokers fall outside the jurisdiction of FOS, clients are able to pursue their claims against the broker in the normal court system. In those circumstances, any case with reasonable chances of success will receive support from a "no win, no fee" plaintiff law firm, and in cases of clear breach of duty or other wrongdoing by the insurance broker the matter will be settled out of court.

Very few claims against insurance brokers proceed to trial in the civil courts. The legal duties and responsibilities on insurance brokers towards their clients have long been established in statute and case law. Where any breach of duty to the client is clear, the claim inevitably proceeds to settlement relatively quickly.

2. Richard St John Report

The Supplementary Issues Paper notes the work undertaken by Richard St John and his report *Compensation arrangements for consumers of financial services*, published in April 2012.

The report was thorough and comprehensive. Very sensible recommendations were made to improve the position and ensure the availability of compensation for losses in financial services. While the Government at the time accepted the recommendations, it is not clear whether they have been fully implemented and applied during the 5 years since the report was released.

NIBA urges a clear examination of the St John recommendations, and the extent to which they have been implemented and applied in the financial services system. There should be no further reforms until those recommendations have been shown to be insufficient or ineffective. NIBA is not aware of any research or analysis to that effect.

3. Compensation scheme of last resort

As noted above, there are currently no unpaid FOS awards against insurance brokers.

Professional indemnity claims against insurance brokers are assessed, negotiated and settled where appropriate.

This no evidence of clients of insurance brokers sustaining serious financial losses as a result of poor advice or other poor or illegal conduct.

The primary reason for this is the existence of section 985B of the Corporations Act. This provision has been a critically important consumer protection provision in the insurance law of Australia.

The section provides that where a contract of insurance is arranged by an insurance broker, payment of the premium to the broker discharges the liability of the insured client to the insurance company. In other words, payment of the premium to the broker is deemed to be payment to the insurance company. If the insurance broker misappropriates the premium, the insurance company is deemed to have received the premium, and cannot cancel the policy on the basis of non-payment of the premium.

There have been examples of misappropriation of funds and of the failure of insurance broking businesses in recent years. There is no evidence of widespread losses sustained by clients of insurance brokers as a result of those activity. Section 985B is achieving its intended outcome.

NIBA therefore firmly submits that unless and until there is clear evidence of a need for a last resort compensation scheme in relation to insurance brokers – we are not aware of any such evidence – there is no basis for devising a last resort compensation scheme for this sector.

4. Providing access to redress for past disputes

Once again, **NIBA is not aware of any instances of past disputes where clients have failed to receive due and appropriate redress**. We would be pleased to examine and discuss any evidence that may exist of concerns of this nature.

Unless and until there is clear evidence of a failure of existing laws and regulations in this area, NIBA firmly submits that there is no basis for devising a scheme to provide access to redress for past disputes involving insurance brokers.

We wish to offer the following observations on two schemes the writer has had first hand experience with.

Asbestos Injuries Compensation Fund

This trust fund was established as a result of a formal agreement between the NSW Government and James Hardie Industries NV (as the company then was called).

Under the agreement, the “new” James Hardie company undertook to provide funds, on an agreed basis, to the trust fund in order to facilitate the payment of compensation claims arising as a result of the use of or exposure to

products manufactured by former James Hardie companies that contained asbestos. The key features of the arrangements were –

- The original James Hardies companies were maintained in existence under special NSW legislation, in order to maintain a proper defendant to be sued by those seeking compensation;

- The normal rules of civil liability continued to apply – the plaintiff had to demonstrate exposure to the product, and a medically diagnosed injury or disease resulting from that exposure;

- Where liability was determined or agreed, damages were assessed in accordance with the normal rules for the assessment of personal injury damages;

- Any award or settlement was paid from the funds held by the AICF Trust.

Importantly, for current purposes, it was clear that the arrangements maintained the normal rules for assessing liability and damages. The main purpose of the arrangement was to provide a trust fund, supported by ongoing contributions from the new James Hardie company, which facilitated the payment of damages awards and settlements against companies that were and continue to be hopelessly insolvent.

HIH Claims Support Trust

This trust fund was another example of arrangements being put in place to ensure funds were available to meet certain claims against the HIH insurance companies, following the failure of that group in March 2001.

The trust was established and funded by the Commonwealth Government, and operated by the insurance industry. Key features of the arrangements were –

- The HIH or associated insurance companies remained in existence, albeit in administration or liquidation;

- Claims were assessed and resolved in accordance with the terms of the insurance policy and the usual rules of insurance and insurance law;

- Valid claims that satisfied the criteria for support by the HCS Trust were paid using HCS Trust funds;

- Other claimants with valid claims against the collapsed insurer became creditors in the liquidation.

Once again, the scheme took careful steps to ensure that the basis of the claim was the entitlement that was available under the relevant insurance contract, and claims were assessed and determined in accordance with the terms of the contract and the applicable rules and laws of insurance relevant to that contract.

Claimants who were dissatisfied with decisions in relation to their claims had access to the Financial Ombudsman Service (decisions of FOS were accepted as binding by the HCS Trust), or they could take their claims to the usual civil courts.

Conclusion

These schemes indicate the importance of ensuring there is a sound basis for determining the validity of the claim. In each case, the usual laws for determining compensation for personal injury damages arising from exposure to asbestos, and the usual laws for determining the validity of a claim against a HIH insurance policy, continued to operate.

These schemes are very relevant to the discussion regarding the provision of access to redress for past disputes.

5. Conclusion

NIBA is sympathetic to the position of thousands of Australians who have lost significant sums as a result of poor financial planning and investment advice or other inappropriate behavior by financial advisers.

However, there is no evidence of ongoing, systemic or indeed any losses being sustained by clients of insurance brokers in Australia.

NIBA strongly submits that any last resort compensation scheme or any scheme for redress for past disputes should not apply to insurance brokers unless and until that evidence is available and has been thoroughly examined and assessed.

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