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The Manager
Financial Services Unit
The Treasury
Langton Crescent
Parkes ACT 2600

NIBA Submission in response to the Treasury Consultation Paper – Improving dispute resolution in the financial system

Thank you for the opportunity to make this submission in response to the Consultation Paper *Improving dispute resolution in the financial system*.

We make this submission on behalf of over 3,500 insurance brokers who provide risk management and risk transfer advice to individuals, businesses and corporations across Australia. Insurance brokers process over $18 billion in insurance premiums each year, according to APRA data.

At the outset, we would like to record some key statistics in relation to recent experience for the resolution of disputes involving general insurance. According to the Financial Ombudsman Service Annual Review for the 12 months ending 30 June 2016 –

- FOS accepted 6,858 general insurance disputes in 2015-2016;
- Of these, 6,411 disputes (or 93%) related to domestic insurance; and
- There were 344 disputes accepted by FOS in 2015-2016 between insurance brokers and their customers.

NIBA and insurance brokers in Australia have been strong supporters of the current framework for the resolution of disputes with clients. Insurance brokers generally have strong internal review processes to review client complaints and disputes, and are backed up to comprehensive professional indemnity insurance cover.

Professional indemnity insurance cover for insurance brokers usually includes coverage of FOS awards against an insurance broker. There are no unpaid FOS awards against insurance brokers.

The Financial Ombudsman Service also plays an important role as the external, independent, administrator of the Insurance Brokers Code of Practice[1].

[1] See: http://www.fos.org.au/about-us/codes-of-practice/insurance-brokers-code/

NIBA is concerned the role of FOS as Code Administrator has not been examined in recent discussions regarding the potential amalgamation of EDR schemes in Australia.

We would like the opportunity to discuss the impact of these reforms on the role of FOS as administrator of the Insurance Brokers Code of Practice.

A new dispute resolution framework

The Consultation Paper notes the Government's decision to implement a new framework for dispute resolution in the financial system, with the formation of a single external dispute resolution scheme to be known as the Australian Financial Complaints Authority (AFCA).

NIBA notes that all insurance broking firms in Australia are currently members of FOS. Hence there is already a single EDR scheme for complaints and disputes involving insurance brokers.

We therefore see little or no benefit, for insurance brokers and their clients, arising from the amalgamation of FOS, the Credit and Investments Ombudsman and the Superannuation Complaints Tribunal.

NIBA is concerned that the amalgamation of the three EDR bodies, and the formation of a new body AFCA –

1. Should not result in higher membership fees payable by insurance broking firms as a result of the merger of the three schemes – in fact, with the potential for savings arising from greater cost efficiencies in overhead and related expenses, there should be the potential for lower membership fees under the new arrangements; and

2. Should not result in any diminution in the knowledge, skill and expertise of people working within the new AFCA in their handling and resolution of insurance disputes generally and disputes involving insurance brokers in particular.

If the amalgamation of the three bodies results in the need for higher membership fees, those higher fees should be paid by the sectors that give rise to the need for resources to manage and resolve those disputes. However, the Consultation Paper (paragraph 6, first dot point) notes that multiple schemes result in duplicative costs for industry and for the regulator, so we look forward to a lower membership fee than has recently been the case.

NIBA would like much greater clarity on the formation and operation of AFCA, and on the financial arrangements that will provide the necessary resources for AFCA operations.

Ministerial authorisation

The Consultation Paper and the draft legislation indicate that in order to designate a scheme as an authorised EDR scheme, the Minister will have regard to a number of matters.

We note that one of the guiding principles of the EDR Review Panel was:

> **"Users should be provided with unbiased decision making and fair treatment, including procedural fairness."[2]**

While the matters listed in the Consultation Paper for Ministerial consideration are important, it is critical that the AFCA maintains the confidence of all parties, and to do so it is critical that fair and unbiased decision making and procedural fairness is a fundamental component of any new body. These concepts must be built into the core framework of AFCA.

Strengthened regulatory oversight

The Consultation Paper notes the draft legislation will provide ASIC with a general directions power that can be used in a number of circumstances.

AFCA will have jurisdiction to make binding orders involving significant sums of money. As such it will have quasi-judicial authority – in fact, commencement of a dispute at AFCA will remove the right of a financial services provider to utilize the civil court system to determine and enforce their legal rights.

In these circumstances, it is critical that the dispute resolution functions of AFCA are strong and independent, not subject to executive or regulatory direction or interference, but with strong accountability to all stakeholders.

> **NIBA has strong reservations in relation to the regulator (or the Government for that matter) having a general directions power that could affect the fair and just determination and resolution of disputes.**

[2] EDR Review Panel Final Report, page 21.

Extreme care must be taken to ensure the resolution of disputes is undertaken in a fair and just manner, having regard to the relevant law and the particular circumstances of the dispute.

Enhanced internal dispute resolution reporting

The Consultation Paper indicates members of the EDR scheme will be required to report to ASIC in a standardized form (as determined by ASIC) on their IDR activity.

No information is provided on the nature and extent of IDR reporting that will be required. It is not clear what is meant by standardized reporting to ASIC – does this mean that banks, direct insurance companies and insurance brokers will all have to report the same information to ASIC, even though their businesses and their relationships with their clients are very different?

> **It must be appreciated that any new reporting obligation will add costs to the business operations of insurance brokers. The extent of this cost burden will be determined by the nature and level of reporting that will be required. Clients will inevitably pay for these additional costs.**

The current Government has had a strong commitment to "red tape reduction". The reporting of information to the regulator will constitute "red tape" unless there is a clearly demonstrated need for the information, and a clear process for review of the data followed by specific action.

NIBA strongly recommends that no action be taken in relation to IDR data reporting until these matters have been clarified, and full consultation has been undertaken with all relevant stakeholders.

Terms of reference

The jurisdictional limits of the civil courts are determined by Acts of Parliament. The rights and responsibilities of parties involved in the civil courts are also clearly set out in statute law and in court rules.

AFCA will have the power to determine significant disputes, to the exclusion of the civil courts system. As proposed, there will be no rights of appeal or review for most disputes – superannuation disputes being the exception in certain circumstances.

NIBA is concerned that a dispute resolution body such as AFCA is being established with substantial power and authority, but with few of the checks and balances that apply in the civil justice arena. AFCA will have jurisdiction

similar to the mid tier courts in the Australian States, but financial services providers will be bound by AFCA decisions with no rights of review or appeal.

NIBA believes the core power and authority of AFCA should be stated in legislation, and should not be subject to executive or regulatory discretion.

NIBA also requests full consultation on the proposed Terms of Reference for AFCA.

Transitional arrangements – FOS/CIO

NIBA is extremely concerned about the proposed transition from current FOS arrangements to the new AFCA.

It would appear that having built up substantial expertise and capacity to handle large volumes of complaints and disputes, there is no guarantee that FOS (or its staff) will have an ongoing role under AFCA. This has the potential to create serious disruption and confusion in relation to the handling of complaints and disputes lodged with FOS prior to 1 July 2018.

> **NIBA strongly believes it is in the interest of consumers and clients, and financial services providers, that there is a very carefully managed transition from current arrangements to the new AFCA. It will be critical that consumers, providers, FOS/CIO and AFCA know exactly how the transition is going to occur.**

The transition process must be discussed and resolved as quickly as possible.

Monetary Limits

As noted in the Consultation Paper, the Ramsay review recommended that consultation should be undertaken -

1. As to whether AFCA should have jurisdiction to award compensation in relation to general insurance complaints up to a cap of $1 million; and

2. As to whether there are compelling reasons to retain the current sub-limits applying to different insurance products.

No evidence has been provided, either by the Ramsay review panel, or by ASIC or the Government, for very significant changes of this nature.

NIBA believes the Consultation Paper asks the wrong question. The correct questions are:

- Are there any issues or concerns with the current monetary limits and compensation caps relating to disputes arising under general insurance products or in relation to general insurance brokers?

- What is the evidence supporting those issues or concerns?

- What are the options for addressing those issues or concerns, either through higher compensation caps at FOS or AFCA, or by way of other mechanisms to promote the fair and effective resolution of disputes?

- If there are to be higher compensation limits at FOS or AFCA, what will be the rights and obligations of the parties to the dispute in terms of fairness and justice, rights of review and appeal, and ultimately, the rule of law?

As noted above, a financial services provider is bound by a decision of FOS, and will be bound to honour a decision of AFCA. Very significant increases in jurisdictional limits are proposed. There will be no rights of appeal or review in relation to these decisions.

> **The financial services provider will forfeit their civil law rights and remedies under this process.**
>
> **NIBA believes there have to be very strong, evidence based, reasons for changes of this nature. Rather than seeking compelling reasons to retain current sub-limits, there should be compelling reasons to change those sub-limits. Those reasons have not been demonstrated to date.**

We wish to make clear that NIBA is very happy to participate in any review of the adequacy or otherwise of the existing jurisdictional limits of FOS in relation to broker disputes. So far as we are aware, there has been no review of that nature – either by the Ramsay review panel, by FOS, by ASIC, by NIBA or by any other party.

NIBA has discussed the issue of jurisdictional limits with members, and the following appears to be the case.

1. FOS appears to have had ample capacity to determine and resolve complaints and disputes against insurance brokers to date. FOS has not expressed any concern to NIBA about the adequacy or otherwise of the current jurisdictional limit relating to insurance brokers.

2. NIBA members have undertaken informal reviews of claims and disputes that were not referred to FOS but were either resolved through internal dispute resolution processes or were referred to professional indemnity insurers. Information available to NIBA in relation to these matters indicates that the great majority of these matters are within the current jurisdiction of FOS.

The major concern of insurance brokers in relation to any increase in the compensation cap is the removal of matters falling within the limits of the higher cap from the civil justice system. This will see the loss of the following:

- The rules of evidence, which have been developed over hundreds of years to determine what can be taken into account and what cannot be taken into account when resolving a dispute;

- The capacity to formally examine and cross-examine parties and their witnesses;

- The need for the decision to be based on precedent and all relevant law;

- The decision is made by a fully qualified legal professional with qualifications and experience in applying the law to the available facts;

- The requirement to give clear reasons for the decision; and

- Rights of review and appeal.

The proposed compensation cap of $1 million for general insurance products is beyond the jurisdiction of the District Court of New South Wales, and would allow AFCA to hear disputes that would otherwise be taken to the Supreme Court of that State.

We do note that very few claims against insurance brokers actually make it to court, as clear evidence of breach of the insurance broker's duty to the client inevitably results in an out of court settlement in favour of the client, paid by the broker's professional indemnity insurer.

If there is evidence of a need to increase the compensation cap relating to disputes involving insurance brokers, NIBA would be prepared to consider a higher compensation cap for those disputes. However, before doing so, we would want to ensure –

1. There is evidence to support the need for a higher limit;

2. Disputes involving amounts higher than the current compensation cap would be determined by people with extensive experience in insurance

law and the rights and obligations of parties to insurance contracts; and

3. For disputes involving amounts over the current compensation cap, a mechanism is developed for the independent review of AFCA decisions if either party so requires, with the independent review process to be undertaken by a senior and respected professional such as a chartered accountant or lawyer with industry experience arranged by AFCA, who would be funded through AFCA by industry.

As noted above, NIBA believes the core role and jurisdiction should be entrenched in legislation. **We strongly object to the suggestion that ASIC should have the power to issue a direction to increase the monetary limits of AFCA.**

Regulatory Impact

On the information currently available, it is difficult to measure costs and benefits from these reforms.

If AFCA is able to achieve economies of scale and operational efficiencies as a result of the merger of FOS with CIO and SCT, there may be a saving for insurance broking firms in their EDR scheme membership fee.

> **However, if the net result of the amalgamation and all resulting changes is a higher membership fee, that will clearly be an additional cost for insurance broking firms, imposed at the same time as the new industry levy for funding the regulatory costs of ASIC.**

The provision of IDR data and reports to ASIC will come at an additional cost for insurance brokers. The extent of the cost burden will depend on the nature and extent of reports that will need to be generated by broking firms. We cannot quantify this cost at the present time.

The implementation of AFCA, and any changes to compensation caps, could well have an impact on the cost of professional indemnity insurance for brokers. At this time, with so much uncertainty about the new compensation caps (if any), and the operational features arising out of the Terms of Reference for AFCA, it is difficult to assess the extent to which the number, nature and cost of claims and disputes against insurance brokers will change.

Complaints currently outside FOS jurisdiction are subject to the rules and requirements of the civil justice system. A strong case will succeed, but a weak case or a fabricated case will be at risk of losing, with consequences in terms of legal costs. If these changes result in any increase in the number of weak or fabricated claims against insurance brokers being taken to AFCA,

and AFCA rulings in favour of these complainants, there will inevitably be an impact on the cost and coverage of professional indemnity insurance for insurance brokers.

NIBA would appreciate (and would prefer) the opportunity to meet and discuss these matters with Treasury in person or by telephone.

Yours sincerely,

Dallas Booth
Chief Executive Officer

Email: dbooth@niba.com.au
Tel: 0488 088 478