NIBA
National Insurance Brokers Association.

29 September 2017

The Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary,

Inquiry into the Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017

Thank you for the opportunity to provide this submission to the Senate Committee's Inquiry into the Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017 (the Bill).

Background

The National Insurance Brokers Association of Australia (NIBA) represents around 350 insurance broking firms in the cities, regions and towns across Australia, including around 7,000 insurance brokers working in those firms and providing advice and assistance to their clients on their risk and insurance needs.

NIBA members predominantly operate in the area of general insurance, which covers the risk of damage to or loss of property, liability risks faced by organisations and their directors, officers and managers, and losses arising from new and emerging risks such as cyber threats and attacks, losses arising from terror related events and so on.

Insurance brokers predominantly advise and assist small, medium and large businesses, large commercial organisations, governments and other institutions with the –

- Assessment and management of risk;
- Financing of risk through insurance or other risk financing mechanisms; and
- Pursuit and resolution of claims where an insured event has occurred.

Insurance brokers also advise and assist individuals with their domestic insurance needs, but the majority of domestic insurance policies are arranged directly by consumers with insurance companies or their distribution agencies.

Insurance brokers place over $18 billion in premium with Australian authorised and overseas based insurance companies each year – around half of the total premium for general insurance in Australia.

Insurance brokers almost always act for and on behalf of their client, and they owe professional, statutory and fiduciary duties to their clients for the advice they offer and the services they provide. This means that the primary role of the insurance broker is BUYING insurance on behalf of its client. If an insurance broker acts on occasion for and on behalf of the insurer, the client will be fully advised of the position.

Insurance brokers operate under an Australian Financial Services Licence issued by the Australian Securities and Investments Commission (ASIC), and are subject to the full range of statutory, regulatory and licensing requirements that apply in relation to firms giving financial advice.

NIBA's Submission on the Bill

On behalf of its members, NIBA firmly submits that the Bill should not be passed in its present form and at this point in time.

The reasons for this position are as follows.

FOS is working well for insurance broking disputes

In accordance with their AFS licensing requirements, insurance broking firms are all members of the Financial Ombudsman Service (FOS).

According to the FOS 2015-2016 Annual Review, there were 6,858 general insurance disputes in the 12 months to 30 June 2016. The same report indicates that in the same period there were **344** disputes between insurance brokers and their clients.

The General Insurance Ombudsman, Mr John Price, has recently advised the number of disputes involving insurance brokers in the 12 months to 30 June 2017 are **less than 240**.

There are relatively few formal FOS determinations in relation to disputes involving insurance brokers. Almost all disputes are resolved between the parties without the need for formal determinations.

All existing professional indemnity insurance schemes covering insurance brokers in Australia include coverage for FOS awards and determinations. This cover is readily available at reasonable premiums at the present time.

There are no unpaid FOS awards against insurance brokers.

There is no evidence of serious or systemic issues or concerns in relation to the resolution of dispute between insurance brokers and their clients.

There is no evidence indicating the jurisdiction of FOS in relation to insurance broking disputes is inadequate or unreasonable. No such evidence emerged during the Federal Government's recent review of external dispute resolution schemes by Professor Ian Ramsay and the review panel.

NIBA and its members have confidence in the operation and expertise of FOS. We believe FOS is providing an important service to clients of insurance brokers, which has developed over the years and is working well.

We do not know how AFCA will work

The Terms of Reference for AFCA have not yet been resolved. We do not know whether the operation of AFCA will be similar to or different from current FOS arrangements.

It is not clear what the jurisdiction of AFCA will be in relation to general insurance and insurance broking disputes. The Treasury Fact Sheet states that, at commencement, AFCA will have a monetary limit of $1 million and a compensation cap of $500,000 for "most" non-superannuation disputes. It is not clear whether this will apply to insurance broking disputes.

We do not know if AFCA will be based in Melbourne. If so, many of the current staff could no doubt transfer to the new body. If located elsewhere, the staff of AFCA may have little or no experience or involvement in the resolution of insurance disputes.

It seems financial services providers will need to pay double fees for 2018-2019 – fees to FOS while it deals with the run off of outstanding claims and fees to AFCA as it raises funds to establish its business and commence operations. Overall, the transition process from FOS to AFCA has not been fully and completely described.

We do not know whether professional indemnity insurers will cover AFCA awards against insurance brokers if the jurisdiction is increased

As noted above, currently professional indemnity insurers cover FOS awards against insurance brokers. If the jurisdiction of AFCA is increased, it is not

clear whether insurance broking firms and their clients will have the benefit of this insurance protection in the future.

NIBA and its members have discussed this issue with professional indemnity insurers, but they are unable to offer any views on the availability or affordability of such cover while the jurisdiction of AFCA, and the attitude and approach of AFCA to the resolution of claims, is unknown.

NIBA strongly believes it is of strong benefit for the clients of insurance brokers to have in place arrangements where the determinations of the external dispute resolution body are covered by professional indemnity insurance. As noted above, one of the benefits of this situation is that there are and never have been any unpaid FOS determinations against insurance brokers.

NIBA has strongly submitted to the Ramsay Review and to the Government that there should be no changes to the jurisdiction of AFCA in relation to insurance broking disputes until –

1. The need for any such change has been assessed and demonstrated,

2. The availability and cost of professional indemnity insurance to cover higher levels of awards has been discussed and agreed with professional indemnity insurers, and

3. It has been clearly demonstrated that any changes to the jurisdiction would operate as a net benefit to the insurance process, and not merely become an additional cost for participants in the insurance industry – and their clients.

What happened to the rule of law?

Proposed section 1051 contains mandatory requirements for AFCA:

- Complaints against members must be resolved “in a way that is fair, efficient, timely and independent” (clause 1051 (4)(b)) – there is no requirement for procedural fairness or the rules of natural justice, and there is no apparent mechanism for assertions of one party to be properly tested via processes such as cross-examination;

- Determinations made by AFCA are to be binding on members of the scheme, and not binding on complainants under the scheme (clause 1051 (4)(e)).

Further, the Treasury Fact Sheet states “AFCA’s decision making criteria for non-superannuation disputes will be based on achieving “fairness in all the circumstances” “.

Australia has a substantial body of law relating to the operation of insurance contracts and insurance policies. Insurance law in Australia was thoroughly reviewed by the Australian Law Reform Commission in the early 1980's, a result of which was the enactment of the *Insurance Contracts Act 1984*. Since that time, further substantial statutory requirements and protections have been enacted in the *Corporations Act 2001*, the ASIC Act and in other legislation.

There is no requirement on AFCA to determine disputes having regard to the terms of the contract and the law relating to that contract.

Currently, the FOS Terms of Reference[1] indicate that FOS will do what in its opinion is fair in all the circumstances, but it must have regard to the following:

- Legal principles;
- Applicable industry codes or guidance as to practice;
- Good industry practice; and
- Previous relevant decisions of FOS (although FOS will not be bound by these).

There is currently no requirement for AFCA to be bound by these considerations.

There are no rights of appeal from AFCA determinations

As noted above, clause 1051 (4)(e) states that determinations by AFCA will be binding on members of the scheme. There is no provision for any form of appeal or external judicial review, including on points of law (appeals on points of law are permitted in superannuation disputes).

It is true that there are currently no appeal rights from decisions of FOS. The insurance industry agreed to this position, in return for the jurisdiction of FOS being kept at levels relevant to routine consumer claims.

The Treasury Fact Sheet indicates that for "most non-superannuation disputes" AFCA will have the capacity to make compensation awards of $500,000.

NIBA strongly objects to a body having powers to make awards of this size and nature with no requirements to abide by the rules of law and no capacity to have the decision reviewed by an external judicial process, including on a point of law.

[1] FOS Terms of Reference clause 8.2, available at: https://www.fos.org.au/custom/files/docs/fos-terms-of-reference-1-january-2010-as-amended-1-january-2015.pdf

Disputes of a value of $300,000 - $500,000 would normally be heard in the mid-tier courts in Australia – the District Court of NSW, the County Court of Victoria, and similar courts elsewhere. In those courts, full legal processes apply, and full rights of appeal are accorded to the parties to disputes before the courts.

AFCA is not a truly independent dispute resolution body

In the traditional legal system, dispute resolution bodies (courts) are given strong statutory protections and operate independently from the executive government. This is because the government is itself a party to proceedings before the courts from time to time, and the courts must have the capacity to deal with matters truly in accordance with the law, even if this means finding against the wishes of the government of the day on occasion.

In the case of AFCA, the body will be subject to regulatory requirements issued by ASIC (section 1052A) and the jurisdiction of AFCA can be changed by written direction from ASIC (section 1052B). A direction in relation to the jurisdiction of AFCA is not a legislative instrument (section 1052B (5).

Further, ASIC is to be given the power to make directions to AFCA on a number of matters (section 1052C), and again any such direction is not a legislative instrument and hence is not reviewable by the Parliament.

Finally, ASIC has the authority to approve a material change to the AFCA scheme (section 1052D).

ASIC plays an important role as the regulator of financial services markets and firms in Australia. ASIC itself is from time to time a prosecutor and a litigator, and can be a defendant in proceedings brought against it if firms allege ASIC has breached its regulatory or statutory powers.

However, NIBA is firmly of the view that it is not appropriate for ASIC to be the body which determines the jurisdiction, and operating requirements of an external dispute resolution body of the nature being proposed for AFCA. Normally, these types of matters are the responsibility of the Parliament, acting on the advice and recommendations of the Attorney General. No government agency has the power to give directions relating to the jurisdiction and operations of any of the courts of Australia, and AFCA should be in no different position.

It is true that ASIC currently has powers to approve the FOS scheme, but again we emphasise the fact that the jurisdiction of AFCA is proposed to be considerably higher than the existing FOS jurisdiction, with no rights of review or appeal and no requirement to observe the rule of law.

Internal Dispute Resolution

NIBA notes that the Government proposes to require financial firms to report their Internal Dispute Resolution (IDR) activities in accordance with ASIC requirements, and allow ASIC to publish reports following the collection and collation of that data.

It is not yet clear what information is expected to be collected by ASIC, how that information will be used and what is likely to be published. The collection and submission of reports on these matters to ASIC will be an added burden and cost for financial services firms, at a time when the Government is committed to reducing "red tape".

It is not at all clear that imposing new reporting obligations on financial firms will provide a net benefit for financial services and their customers in Australia. NIBA cannot support these proposals unless and until the actual processes and procedures have been determined, and a clear benefit is able to be demonstrated.

Conclusion

NIBA strongly submits that the Treasury Laws Amendment (Putting Consumers First – Establishment of the Australian Financial Complaints Authority) Bill 2017 should not proceed at the present time.

- It is not at all clear that the clients of insurance brokers will be in a better position once AFCA is implemented.

- It is not at all clear that important features of the current arrangements, including professional indemnity insurance covering FOS determinations, will continue into the AFCA scheme.

- Disputes regarding significant sums will be assessed and determined without the need to apply relevant law or legal principles, and without any capacity for the financial firm to have the decision reviewed.

- It is not appropriate for a regulatory agency to have powers of direction and control over a dispute resolution body with significant jurisdictional powers and authority.

- Additional reporting obligations in relation to internal dispute resolution are likely to add additional cost for financial firms, with little or no net benefit for clients and consumers.

We would be pleased to have the opportunity to discuss these matters with the Senate Economics Legislation Committee.

Yours sincerely,

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