NIBA
National Insurance Brokers Association.

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

Submission in response to the Treasury Consultation Paper
Establishment of the Australian Financial Complaints Authority

Thank you for the opportunity to make this submission in response to the Consultation Paper – Establishment of the Australian Financial Complaints Authority.

NIBA is the industry association for insurance brokers across Australia. The association has around 350 member firms, employing over 4,000 insurance brokers in all States and Territories, in the cities, towns and regions of Australia.

About Insurance Brokers

Insurance brokers work with their clients to assist them –

- understand and manage their risks, including the risk of loss of or damage to property as a result of adverse weather or other climate related events;
- obtain appropriate insurance cover for their risks and their property; and
- pursue claims under their policies when an insured event occurs, in which case the insurance broker becomes the advocate for the client during the assessment and resolution of the claim.

Insurance brokers act primarily for and on behalf of their client, and they owe legal duties to their clients for the nature and quality of the work they perform on their behalf. When acting for and on behalf of the client, insurance brokers do not SELL insurance policies – they PURCHASE insurance policies on behalf of their clients from the markets available to them.

National Insurance Brokers Association of Australia
ABN 940 0609 3849
Level 11, 20 Berry Street, North Sydney NSW 2060, Australia | T +61 2 9459 4300 | F +61 2 9964 9332 | www.niba.com.au

Insurance brokers work predominantly in the area of commercial insurance, assisting the small, medium, large and multinational companies operating in Australia manage and finance their risks. Insurance brokers place in excess of $18 billion in insurance premiums each year, around half of the total general insurance premium pool in Australia.

Many insurance brokers also provide advice and assistance to retail customers in relation to their domestic insurance needs.

All insurance brokers are members of the Financial Ombudsman Service (FOS). NIBA works closely with FOS and the General Insurance Ombudsman to minimise the number of complaints being submitted to FOS for determination, and to assist with the efficient operation of FOS dispute resolution processes.

In 2016/2017, FOS received 8,756 general insurance disputes (2015-16: 6,858 general insurance disputes).

In 2016/2017, there were 208 disputes between insurance brokers and their clients.

There are no unpaid FOS awards against insurance brokers.

Shared Concerns

NIBA has had the benefit or reading draft submissions on the Consultation Paper from Australian Collectors & Debt Buyers Association (ACDBA), Australian Finance Industry Association (AFIA), and the Australian Retail Credit Association (ARCA). All four industry associations (the Joint Associations) share common significant concerns in relation to AFCA's implementation. These shared significant concerns are summarised in the Attachment to this submission.

Submission

Reform of the External Dispute Resolution Framework

We would like to record our strong concern in relation to the process being adopted to reform External Dispute Resolution processes. We do not understand why the Government, which has decided to implement major reform, and create a single dispute resolution body operating under statute and regulatory oversight, is not taking responsibility for determining the terms of reference, funding or governance arrangements for the new body.

FOS resulted from the amalgamation of a number of industry created dispute bodies, including Insurance Broker Disputes Limited. AFCA is not being created by industry, and will essentially operate as a quasi-judicial but non-governmental organisation.

With the legislation allowing for the creation of AFCA not having passed the Parliament, and with key operational matters not having been determined, it is not at all clear how the new AFCA can be properly established and operating by 1 July 2018.

NIBA is extremely concerned that a process that is operating well for insurance brokers **and their clients** may well be seriously disrupted by these reforms, to the detriment for all concerned. For that reason, NIBA recommended to the Senate Committee that passage of the legislation be deferred until such a time that it is clear that the reforms will improve, and not jeopardise, dispute resolution in the Australian financial services industry.

AFCA's Accountability Framework

Insurance brokers who provide advice and assistance to clients for general insurance and life risk insurance products and services operate within the framework of existing relevant Australian law including, but not limited to Chapter 7 of the Corporations Act, the Insurance Contracts Act, the ASIC Act and the common law.

The law of Australia relevant to insurance brokers has developed over many years, and is working well. There is no evidence that it is not.

NIBA is seriously concerned that the proposed guiding principles for the establishment of AFCA do not include a need to apply and observe relevant legal principles for the products and services that are the subject of disputes. The end result will effectively come down to a subjective view of "fairness" by AFCA, even where the insurance broker has complied with all relevant law. This will create compliance uncertainty which will also be of concern to the professional indemnity insurers of insurance brokers.

NIBA also notes that in the traditional area of dispute resolution (the civil and criminal courts of Australia), genuine accountability operates through rights of review and appeal. NIBA is seriously concerned that AFCA may well be given jurisdiction to determine matters which would otherwise fall within the jurisdiction of the superior courts of Australia, with no rights of review or appeal if the determination is made against a financial services provider. We note that the client/consumer retains their full legal rights and entitlements at all times.

Monetary Limits

As noted in the Consultation Paper, the current monetary limit for FOS when dealing with disputes involving insurance brokers is $166,000.

There is no evidence that this monetary limit is insufficient. There have been no complaints from ASIC, FOS, or clients of brokers to the effect that the monetary limit for insurance brokers is inadequate.

Insurance brokers have arranged professional indemnity insurance which includes coverage for FOS awards and determinations. Professional indemnity insurers are clearly comfortable with the current maximum award available at FOS, and have provided coverage for this amount at reasonable premium levels.

Because of this, there are no unpaid FOS determinations or awards.
The dispute resolution system is working appropriately, in the interests of clients and of insurance brokers.

NIBA has had discussions with professional indemnity insurers who have reserved their position in respect of potentially higher awards being permitted at AFCA. NIBA is seriously concerned that any increase in compensation limits for insurance brokers (the great majority of whom are small and medium businesses in their own right) could well jeopardise the ability of broking firms to obtain full cover and protection via their professional indemnity insurance, at affordable premiums. If this does not occur, an important protection mechanism for clients could well disappear.

NIBA strongly submits that there should be no change to the limits for general insurance disputes unless and until –

1. there has been proper analysis of the adequacy or otherwise of current limits, and a proper case for higher limits has been clearly demonstrated; and

2. insurance brokers and their clients can be sure that they will be fully protected by their professional indemnity insurance programs for any higher level of determination or award from AFCA; and

3. the cost impact on professional indemnity insurance is understood and is not going to have an impact on the affordability of that cover.

Enhanced Decision Making

NIBA has previously expressed concern about the fact that proposed section 1051(4) makes no mention of the need to apply relevant legal principles.

Broad use of the concept of "fairness" could effectively ignore the law that insurance brokers are bound to comply with. It also allows AFCA to apply a higher standard than the law provides for, given its subjective nature. This will most likely create compliance uncertainty for insurance brokers and their professional indemnity insurers. This increases compliance costs and ultimately this can be passed on to consumers for little real value given the low numbers of disputes that currently apply in insurance broking. Clear guidance on the approach that will be taken by AFCA will be required to manage this issue, especially as there is no right of review or appeal by the insurance broker.

Fairness should be clearly expressed to work in both ways.

NIBA has also previously expressed concern in relation to the expressions used by the Government in describing what it regards as "enhanced decision making".

NIBA firmly submits that at the very least the Terms of Reference contain provisions identical to clauses 8.1, 8.2 and 8.3 of the FOS Terms of Reference. The provisions of clauses 12.1 and 12.3 of the CIO Rules are also relevant and appropriate in this regard.

There have been decisions and determinations by FOS that NIBA regards as having been made in error. There are determinations by FOS that FOS itself regards as having been made in error. The FOS Terms of Reference currently acknowledge that it is appropriate to have regard to "previous relevant decisions of FOS", but FOS is not bound by these previous decisions.

With this principle having been stated in the Terms of Reference, it is then up to each decision maker to address each dispute having regard to the facts and circumstances of the dispute, and the various matters set out in the Terms of Reference. We do not believe it is feasible to specify measures to better promote consistency while deciding each case on its merits, beyond the provisions such as those of the FOS Terms of Reference.

NIBA firmly believes these matters should be formally set out in the AFCA Terms of Reference. We believe the FOS Terms of Reference currently provide sound guidance on fairness and consistency, while allowing sufficient capacity to let FOS decision makers adapt to changed circumstances and new developments in products and circumstances in the market place.

Of course, it is of critical importance that AFCA have staff, and senior decision makers, who are experienced, knowledgeable and skilled in the relevant industry sectors in which they will be resolving disputes. NIBA will be extremely concerned if AFCA does not make use of the knowledge, skills and competencies currently built up by FOS over a number of years.

Use of Panels

NIBA strongly supports the current practice and procedures of FOS in relation to the use of expert panels. We believe the FOS approach should be replicated in AFCA Terms of Reference.

It is appropriate to let the EDR managers determine when expert panels should be used, in accordance with high level guidance. The managers will always be mindful of the time, cost and complexity of involving an expert panel, but will balance that against the need to provide fairness to all parties in the resolution of especially complex disputes.

Independent Reviews

NIBA strongly supports the existing requirements for independent reviews of the operations and procedures of the EDR scheme as required by ASIC's RG 139.

NIBA submits that the first independent review of AFCA should take place 2 years after AFCA commences operations. The review should carefully examine the costs and benefits of the AFCA reform program, for both consumers and financial services providers (bearing in mind that a higher cost EDR framework adds costs to the financial services industry which are highly likely to be paid by the whole community in the future).

NIBA supports the ongoing collection and publication of data which explains the experience and trends in the EDR scheme.

NIBA also supports a clear process by which members can on an ongoing basis raise concerns regarding what members believe are inappropriate decisions by AFCA – in other words a formal complaints process. This will help ensure the ongoing quality and fairness of the decision making processes within AFCA.

Independent Assessor

NIBA fully supports the steps taken by FOS to appoint an independent assessor. These policies and procedures should be replicated in the AFCA Terms of Reference.

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NIBA supports the publication of the independent assessor's annual report, and the capacity of the independent assessor to refer matters to ASIC if the AFCA Board disagrees with the assessor's findings or recommendations.

NIBA notes that FOS already has existing obligations to report systemic issues to ASIC. We expect these obligations will continue.

Exclusions from AFCA's Jurisdiction

NIBA fully supports the existing FOS rules and requirements which allow the exclusion of certain matters from FOS EDR processes. NIBA believes these provisions are reasonable and appropriate, and should be adopted and applied within AFCA.

Other issues to be addressed in the AFCA Terms of Reference

NIBA strongly supports the ongoing use of the FOS Terms of Reference as a starting point for AFCA. NIBA submits that if there are to be any changes to the current FOS Terms of Reference, there should be a clearly demonstrated need for change, and an examination of the potential cost of the change on financial services providers.

NIBA notes that financial services providers are currently required to provide full information to their clients about the existence and procedures for internal dispute resolution and external dispute resolution. It seems to us that the primary responsibility for providing information about IDR and EDR rests with the financial services provider. We acknowledge that the information should be provided to the client in a clear and timely manner, in a form that would be easily understood by the client.

The AFCA Board

AFCA will play a critical role in the operation of the financial system in Australia.

The organisation will be a company limited by guarantee, but the usual mechanisms for accountability as between the Board and management, on the one hand, and the owners of the company (the members) on the other hand, will not apply. As proposed in the Consultation Paper, the Board will not be accountable to its members, and members will not be able to chose, or replace, Directors of the company.

This Board will need very high standards of governance. A number of industry associations have strongly submitted that the Board should adopt and apply the ASX Corporate Governance Principles and Recommendations, on an “if not, why not” basis. NIBA strongly supports this position.

Ensuring Directors have appropriate skills and experience without being representative

The existing Board of FOS has Directors who are directly associated with, and who clearly represent, the interests of consumers and a number of consumer organisations. NIBA does not object to this – in fact we believe it is entirely appropriate that this expertise is available on the FOS Board.

NIBA submits that it is entirely appropriate that industry representatives on the AFCA Board also have strong links to the wide range of sectors whose members will be utilizing the AFCA dispute resolution processes, are widely respected by those members, and whose professionalism and integrity is such that they would it could be assumed they will always act in an appropriate manner, having regard to real or perceived conflicts of interest.

It should not matter that an industry representative on the AFCA Board is directly connected with a member of AFCA. Conflicts of interest will need to be managed, and this can be done by the appointment of alternate directors who are unlikely to have a similar conflict to the main director.

AFCA Directors should be encouraged to meet regularly with their various sectoral interests, and there should be a strong two-way communication between industry sectors and industry directors on AFCA on operational and policy matters.

If industry directors on the AFCA Board do not have current or very recent experience in the senior management of financial services providers, they will not be able to bring strong expertise, guidance and advice to the AFCA Board table. They would not be aware of current developments in the provision of financial services products and advice, and would be unlikely to appreciate important changes in the market place as a result of digital innovation, the changing nature of competition and other factors.

The AFCA Board should have the ability to form consultative or advisory panels if the Board feels this would be a useful and valuable contribution to the Board’s operations and deliberations.

Of course, all members of the AFCA Board should (and no doubt would) apply the obligation to act in the interests of the company when meeting as a Board.

Board responsibilities

As noted above, NIBA joins with a number of financial services associations in calling for the AFCA Board to be required to adopt and apply the ASX corporate governance principles. This is particularly important as the Board will not be directly accountable to its members (as other Boards are).

The Board should not have the power to direct decision makers in relation to the outcomes of particular disputes.

Funding matters

AFCA will no doubt prepare a funding model for its operations in the 2018/2019 financial year and beyond.

It is not at all clear what establishment costs will be needed – if any.

If, for example, AFCA becomes and expanded organisation based on the existing FOS, substantial operational, system and people resources already exist. (If this does not occur, we cannot envisage AFCA being operational by 1 July 2018.)

We also note that both FOS and CIO would be likely to have substantial net assets as at 30 June 2018, which would be no longer required and which would not be returned to members in the normal course of operations. These net assets could well form the basis of any interim funding needs of AFCA.

If these net assets are not able to be made available to AFCA, NIBA believes the Government should provide any funding necessary to establish AFCA operations, on the basis that AFCA is being established as a matter of Government initiative rather than as an initiative of the financial services industry.

NIBA would like to suggest that as soon as the legislation has been passed and it is reasonably clear when AFCA is likely to start, Treasury convenes a working party consisting of Treasury, FOS, CIO, SCT, ASIC and industry representatives to discuss and determine the most appropriate approach to the initial and ongoing funding of AFCA. There are simply too many uncertainties at the present time to allow a definite financial plan to be developed. The biggest uncertainty is: who will form the basis of AFCA? Will it be FOS or CIO, and if not, who will have the capacity to implement and operate AFCA from 1 July 2018?

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Transparency and accountability

The Consultation Paper states: "it is also critical that there is adequate transparency and accountability to members for fees charged" (page 28).

With great respect, this is a very narrow view of transparency and accountability.

AFCA needs to be clearly accountable to its key stakeholders (consumers, financial services providers) for both operational efficiency and effectiveness (including ensuring complaints are resolved in a way that is fair, efficient, timely and independent), and for ensuring that decisions are proper and appropriate, having regard to the facts, circumstances, relevant legal principles and any other important considerations.

NIBA and a number of other financial services associations are very concerned about the lack of true accountability to members of AFCA. If AFCA is not operating in a manner that is fair to consumers, it is highly likely that ASIC would intervene and issue guidance and directions to remedy the situation. If AFCA is not operating in a manner that is fair to financial services providers, what is the capacity of financial services providers to demand appropriate action and remedies to resolve the issue? It is not at all clear that there is proper and sufficient accountability in this regard.

NIBA remains extremely concerned that AFCA could well have substantially increased jurisdiction, compared to the current jurisdiction and award limits of FOS. These higher levels of jurisdiction could, in some circumstances, mirror the jurisdictions of the superior courts of the States and Territories.

In the civil courts, accountability for judicial decision making is undertaken by way of rights of appeal and review. Financial services providers have no rights of appeal under AFCA. This position was accepted by industry when the amounts in question were relatively small, focusing on largely domestic insurance policies and claims. The proposals for a much higher jurisdiction for AFCA raises serious issues of fairness, equity and lack of proper process for appeal and review.

Finally, the Consultation Paper indicates AFCA will be accountable to members in relation to fees. It is not at all clear how this accountability mechanism is intended to work. If the fee structure approved by the AFCA Board is regarded by members as being unnecessarily expensive and inefficient, what rights will those members have to have the situation reviewed and, where appropriate, changed? We would like much greater clarification of how this accountability process is intended to work in practice.

Transitional arrangements

NIBA supports action being taken, after the passage of the legislation and at a time when the commencement date has been confirmed, for full consultation on the management of legacy disputes.

The Role of ASIC

NIBA would like to understand in more detail how AFCA, the Government and ASIC proposes to manage what will be significant ASIC powers that can affect the operation of the scheme once finalized, as these can have an impact many of the areas of concern expressed above. Receiving the guidance after the fact is not appropriate. The position of AFCA, the Government and ASIC needs to be made clear now.

NIBA is in particular wanting to understand:

- the proposed notification procedures to ASIC, which could create a backdoor mechanism by which AISC gets breach reporting that goes above and beyond the significant breach reporting requirements of section 912D of the Corporations Act;
- in what example circumstances it is envisaged that ASIC should be able to use its broad powers to have AFCA comply with any regulatory requirements or directions issued by ASIC relating to the performance of the scheme functions. There is no requirement for any consultation in this respect, only prior notice to AFCA. Given the broad subjective "fairness" decision making that can be applied by AFCA, the capacity of ASIC to intervene by issuing directions or otherwise is of real concern to NIBA and our members.

We would be pleased to discuss this matter further with the AFCA Transition Team.

Yours sincerely,

Dallas Booth
Chief Executive Officer

NIBA
National Insurance Brokers Association.

Attachment

Issue	ACDBA	AFIA	ARCA	NIBA
1. Truly Independent Reviews True independence requires that reviews be independent in appearance and actuality. True independence requires that an entity separate from, and not subordinate to, AFCA commission the independent reviews of AFCA. The Joint Associations recommend that the terms of reference require AFCA to grant full and irrevocable authority to the independent assessor appointed by the Minister as its agent to commission independent reviews on its behalf.	√	√	√	√
2. Truly Independent Assessor True independence requires that the assessor be independent in appearance and actuality. True independence requires that an entity separate from, and not subordinate to, AFCA appoint the independent assessor. The Joint Associations recommend that the Minister appoint the independent assessor and that its charter be established via a separate consultation process with relevant stakeholders including industry.	√	√	√	√
3. Best Practice Governance AFCA will be a large institution with likely revenue of between $75 to $100 million per annum. The Joint Associations recommend that the Minister require AFCA as a condition of its appointment to adhere to the best practice governance requirements of an equivalent ASX-listed organisation and that any departures from those standards be publicly stated with supporting reasons and approved by ASIC.	√	√	√	√
4. Genuine Industry Representation on the Board Compliance with best practice governance principles requires all directors upon appointment to the Board to act in the best interests of direct stakeholders, both consumers and members. Members operate in a diverse range of industry sub-sectors. The Joint Associations recommend that all directors be chosen based on competence and knowledge and that industry-based directors be persons with current, or near current, industry experience in the types of businesses operated by members of the scheme.	√	√	√	√