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Financial System Division
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Submission in response to the Interim Report of the Review of the financial system external dispute resolution and complaints framework

The National Insurance Brokers Association of Australia appreciates the opportunity to provide these submissions in response to the Interim Report of the Review of financial system external dispute resolution and complaints framework.

Preliminary Comment

The interim report contains numerous references to “financial, credit and investment disputes”. There is very little reference to life insurance, general insurance, life risk brokers and general insurance brokers. Virtually all the discussion relates to areas of the financial services industry other than general insurance and life insurance.

The Interim Report appears to proceed on the basis that the findings and the recommendations are relevant and appropriate to all areas of the financial services industry. NIBA questions the relevance and appropriateness of most of the interim findings as they apply to life insurance and general insurance, and insurance broking in particular. NIBA submits there is little or no evidence indicating the need for change to external dispute resolution frameworks for general insurance, life insurance or insurance broking.

Further, it is important to note that rather than dealing with “financial, credit and investment disputes”, FOS deals with disputes in the following areas¹:

Credit

- Business finance
- Consumer credit
- Guarantees

¹ Taken from FOS Annual Report for 2015 – 2016, page 42: An overview of how we classify financial products

- Margin loans

General Insurance

- Domestic insurance
- Extended warranty
- Professional indemnity insurance
- Small business/farm insurance

Payment Systems

- Direct transfer
- Non-cash

Deposit Taking

- Current accounts
- Safe custody
- Savings accounts

Investments and Advice

- Derivatives/hedging
- Managed investments
- Real property securities
- Superannuation

Life Insurance

- Income stream risk
- Non-income stream risk

Traditional trustee services

- Estate management
- Estate planning
- Trusts.

The classification of financial products by FOS in this manner indicates the breadth and diversity of products and services in the Australian financial system. NIBA has argued on many occasions that across these various sectors the:

- products are different;
- financial objectives are different, the client risks are different;
- ways in which the various sectors operate and serve their clients are different; and
- nature of advice – when given by advice professionals – is different, depending on the financial objectives and the circumstances of the client/consumer.

NIBA is concerned that the Interim Report appears to proceed on the basis that the financial system can be neatly classified into “financial, credit and investment” and “superannuation”. By doing this, the findings and draft recommendations do not take account of the wide variety of products and services, and the wide variety of circumstances in which those products and services are delivered to the community.

NIBA acknowledges that in some areas of the financial services system, there may well be a need for reform, and improvements in the operation of external dispute resolution schemes.

NIBA does not accept that problems identified in one area of the system justify “reform” and changes across all areas of the system, without thorough investigation and analysis of the genuine need for reform in other, unrelated, sectors and the costs and benefits of applying those reforms to the other sectors of the financial services industry. In particular, consumers have the benefit of the *Insurance Contracts Act*, which through section 54 and otherwise, provides a level of protection unique to insurance compared to other financial products.

Finally, NIBA believes it is critically important that the knowledge and expertise that has been developed (particularly by FOS) to investigate and determine the wide variety of disputes mentioned above is maintained and preserved, and is not diminished in any way by any recommendations that may be made in the final report of the Review panel.

Insurance operates within a complex framework of statutory, contract and common law rules and procedures, and it is critically important for the external resolution of insurance disputes that those involved have the technical qualifications and experience to properly resolve matters with full knowledge and regard for the legal and other requirements applicable to those disputes.

Multiple schemes with overlapping jurisdictions

The Draft Panel Finding on page 98 of the Interim Report expresses concern that the existence of multiple schemes that have overlapping jurisdictions contributes to consumer confusion and makes it more challenging to achieve and be seen to achieve comparable outcomes for consumers with similar complaints.

NIBA wishes to point out that all general insurance and general insurance broking disputes are referred to FOS. Multiple EDR schemes do not exist for this sector.

.Accordingly, the suggested benefits of a single ombudsman scheme do not apply in the area of general insurance and general insurance broking.

NIBA submits that if there are to be changes to the operation of EDR schemes because of issues and concerns outside the general insurance sector, any resulting reforms should have no impact on the cost and the effectiveness of FOS in undertaking its role as the EDR scheme for general insurance and general insurance broking.

It also is critically important, in our view, that qualified and experienced staff to handle and resolve insurance disputes be maintained, and any changes to the structure and operation of an EDR scheme should not diminish this capacity to handle insurance disputes efficiently, effectively, and with fairness and justice to all parties to the dispute.

Monetary limits for consumers

The Draft Panel Finding on page 105 of the Interim Report states “The current monetary limits for consumers are inadequate.”

There is no discussion in the Interim Report of the monetary limits that apply in respect of general insurance broking disputes. There is no evidence cited in the Interim Report that monetary limits in this sector are inadequate.

NIBA firmly believes there should be no changes to monetary limits for general insurance broking disputes unless and until a clear examination of the nature, level and outcomes of these types of disputes is undertaken by FOS, in consultation with all relevant parties, and a clear picture is developed as to whether or not current monetary limits are adequate or otherwise.

This is important as:

- Firstly, financial service providers have little or no rights of appeal, and are already potentially subject to monetary awards equivalent to those available in the mid-tier courts of Australia (where full legal rights of review exist). FOS has no procedures for applying the rules of evidence, or for testing the veracity of assertions put to it, other than by reviewing documentary evidence that might be available.
- Secondly, and perhaps more importantly, professional indemnity insurance schemes available to insurance brokers in Australia include coverage of FOS awards against the broker. This has meant there are no unpaid awards against insurance brokers, and the issue of unpaid awards has never been relevant in the insurance broking sector. This provides security for brokers (who have the protection of the professional indemnity insurance cover) and for their clients, who have a high degree of confidence that any FOS award will be met and paid.

NIBA is concerned that unjustified increases in the monetary jurisdiction of FOS could well place insurance brokers in a position where they are not insured for their exposure to FOS awards, if professional indemnity insurers do not agree to offer increased cover to match the higher monetary limits. This has the potential, at least, of leaving brokers exposed to a lack of cover and as a result clients exposed to the non-payment of FOS awards (in the absence of any broad based compensation scheme).

NIBA firmly believes there should be no change to the monetary limits applicable to this sector until there has been a clearly demonstrated need for change.

Dispute resolution arrangements for small business

The Interim Report contains discussion on the resolution of disputes relating to small businesses, primarily in the area of credit and lending. There is no discussion on the experience of small business in relation to insurance broking disputes.

One important role played by insurance brokers is that when acting on behalf of the client (which is the case in the great majority of engagements) the insurance broker becomes the client's advocate at the time of a claim. They assist the client pursue the claim against the insurer, and are often actively involved in the assessment and resolution of the claim. Where the insurer questions or challenges the claim, the broker is able to represent the client's interests and argue the position on their behalf.

However, it is not clear to NIBA or our Members that small business jurisdictional limits are indeed currently inadequate. NIBA is not aware of the nature and extent of insurance disputes affecting small businesses that fall outside the jurisdiction of FOS, and whether those disputes should have access to FOS or should remain in the traditional civil litigation systems.

NIBA therefore repeats the comments above in relation to monetary limits at FOS: there should be no change to the monetary limits until there has been a careful analysis of the nature of insurance broking disputes that FOS does and is not able to handle, and whether it is appropriate for the FOS jurisdiction to be extended in relation to disputes that currently do not fall within its jurisdiction.

In relation to the proposed extension of the FOS jurisdiction to \$2 million, NIBA notes that the jurisdiction of the District Court of New South Wales is \$750,000², and that civil/commercial disputes for amounts greater than this fall within the jurisdiction of the Supreme Court.

² Section 4 (1), *District Court Act 1973* (NSW)

NIBA questions the equity of substantially increasing the jurisdiction of FOS when one party to the dispute has limited or no rights of appeal. Such a change runs a real risk of not being supported by professional indemnity insurers, potentially making the exercise pointless in the insurance space.

Compensation scheme of last resort

The Interim Report states the Panel is of the view that there is merit in introducing an industry-funded compensation scheme of last resort.

At the present time, general insurance brokers have access to comprehensive professional indemnity insurance, where policies invariably include cover for awards made by FOS. There are no unpaid FOS awards against insurance brokers, and this has not been an issue in this sector.

NIBA submits if any action is taken to introduce an industry-funded compensation scheme, there should be no impact on those sectors of the financial services industry – including insurance broking – where the issue of unpaid FOS awards do not arise.

Powers of the EDR scheme

The Interim Report (at page 131) requests information on the suggestion that schemes be provided with additional powers.

NIBA is not aware of any issues or concerns in relation to the capacity of FOS to properly investigate and determine disputes relating to insurance brokers. NIBA is very happy to discuss any such issues or concerns with FOS or any other relevant party.

In the meantime, in the absence of any clear need for change, NIBA does not believe there should be any change that might affect insurance brokers.

Comments on Draft Recommendations

This submission will now provide comments on the specific draft Recommendations set out in the Interim Report.

Recommendation 1 – a new industry ombudsman scheme for financial, credit and investment disputes

The issues and concerns relating to the operation of the current EDR schemes do not apply to general insurance or to general insurance broking, because all disputes from these sectors are handled by FOS. Accordingly, the suggested benefits of a single ombudsman scheme do not apply in the area of general insurance and general insurance broking.

NIBA submits that if there are to be changes to the operation of EDR schemes because of issues and concerns outside the general insurance sector, any resulting reforms should have no impact on the cost and the effectiveness of FOS in undertaking its role as the EDR scheme for general insurance and general insurance broking.

Earlier in our submission we have pointed out the wide variety of disputes currently handled by FOS. It is critically important, in our view, that FOS maintain qualified and experienced staff to handle and resolve insurance disputes, and any changes to the structure and operation of FOS should not diminish their capacity to handle insurance disputes efficiently, effectively, and with fairness and justice to all parties to the dispute.

Draft recommendation 2: Consumer monetary limits and compensation caps

NIBA is not aware of any detailed analysis of the adequacy and appropriateness of monetary limits and caps as they affect general insurance broking disputes currently handled by FOS.

Accordingly, NIBA submits that there should be no changes to monetary limits and compensation caps until that detailed analysis has been undertaken. NIBA would be pleased to participate in a project to review the adequacy of limits for general insurance broking disputes.

As noted above, our concerns in relation to monetary limits relates to –

- Our desire to maintain professional indemnity insurance cover for FOS awards, in the interests of protecting insurance brokers and their clients and effectively guaranteeing the payment of FOS awards as and when appropriate; and

- Our concern that proposed higher limits will give FOS jurisdiction over matters that would otherwise be handled in the Supreme Courts of the States and Territories, with all due legal process and protections for the parties to those disputes. Those processes and protections (especially the ability to properly test assertions, and the right of review and appeal) often do not exist within FOS.

NIBA submits that monetary limits and compensation caps should be reviewed from time to time, but should not be indexed as to do so could result in unintended outcomes in the area of professional indemnity insurance coverage or other areas of potential concern.

Draft recommendation 3: Small business monetary limits and compensation caps

NIBA repeats our submission in relation to Consumer monetary limits and compensation caps. We would be pleased to participate in any review of the adequacy of limits for general insurance broking disputes.

Draft recommendation 4: A new industry ombudsman scheme for superannuation disputes

NIBA does not wish to offer a view on the need for a new industry ombudsman scheme for superannuation disputes.

However, paragraph 6.23 of the Interim Report (page 149) indicates that the new scheme for superannuation disputes would include disputes relating to life insurance within superannuation.

Currently, FOS handles disputes in relation to life insurance – in 2015/2016 FOS accepted 1,095 life insurance disputes³.

NIBA believes care needs to be taken in relation to the external resolution of life insurance disputes, to ensure the problems of overlap, duplication and confusion do not occur by having both FOS and the proposed new superannuation EDR scheme handling disputes of this nature.

Draft recommendation 5: A superannuation code of practice

NIBA offers no comments in relation to this draft recommendation.

³ FOS Annual Report, 2015 – 2016, page 90.

Draft recommendation 6: Ensuring schemes are accountable to their users

NIBA has occasional reservations, but no serious concerns about the level of accountability of FOS to the insurance broking sector of financial services.

We are grateful for the level of engagement and interaction with the Chief Ombudsman and the General Insurance Ombudsman, and for their preparedness to meet with NIBA from time to time as required.

NIBA believes that any new regulatory guidance from ASIC on the operation of EDR schemes should be subject to thorough consultation with all relevant parties.

Finally, NIBA repeats our earlier comments in relation to the monetary limits and compensation caps of EDR schemes.

Draft recommendation 7: Increased ASIC oversight of industry ombudsman schemes

NIBA does not support this draft recommendation.

The Panel has stated -

“ASIC is unable to take appropriate action to address a specific problem with a scheme, where it fails to comply with the relevant legislation or regulatory guidance.....the Panel considers it necessary to provide ASIC with more specific powers to enable ASIC to give directions to schemes as appropriate to comply with the relevant standards. These could include providing ASIC with powers to require schemes to undertake targeted reviews of particular types of disputes or more frequent independent reviews.”⁴

NIBA believes ASIC should set out its expectations and guidance in a Regulatory Guide, after full consultation with all relevant parties. Once this occurs, it is up to the Board of each EDR scheme to ensure the scheme operates in accordance with ASIC requirements and the Regulatory Guide. If this is not occurring, ASIC has the power to vary or revoke its approval of the EDR scheme.

NIBA believes it is important to put the onus on meeting regulatory expectations on the Board of the EDR scheme, where consumers and industry are represented, rather than giving ASIC power to intervene and “take appropriate action to address a specific problem with a scheme”.

⁴ Interim Report paragraphs 6.65, 6.66, page 160.

The other issue of note is the need to avoid any unnecessary practical duplication between the activities of the EDR scheme and ASIC.

Draft recommendation 8: Use of panels

NIBA has no serious issues or concerns with the current use of industry panels by FOS, and has no difficulties with that process continuing.

Draft recommendation 9: Internal dispute resolution

NIBA does not support this recommendation.

The collection, collation and publication of data on IDR activities and outcomes will add to the cost of business operations. Before any steps are taken in this area, the information intended to be gleaned from any reporting of these matters should be clearly identified, and the benefit to consumers of the provision of this information should be carefully assessed.

At the same time, the cost and administrative burden of collecting, collating and publishing this information should also be assessed, so a proper cost/benefit analysis can be undertaken.

NIBA believes it is important to note that where IDR is unsuccessful, clients and consumers have full access to external dispute resolution, in the case of insurance broking clients via FOS. At the present time, we do not see how the publication of IDR information actually assists consumers with the resolution of their disputes.

Draft recommendation 10: Schemes to monitor IDR

NIBA has no issues or concerns with the manner in which FOS currently manages disputes that are lodged with it before having been through IDR. NIBA supports the reference of disputes back to the insurance broker before formal EDR processes commence.

NIBA does not see the need for change in this area at the present time.

Draft recommendation 11: Debt management firms

NIBA has no comments in relation to this draft recommendation.

Thank you for the opportunity to provide these comments and submissions in response to the Interim Report.

We would be pleased to discuss any aspect of this submission with members of the Panel.

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