

5 July 2018

Mr Mike D'Argaville
Legal Counsel
Australian Financial Complaints Authority
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MELBOURNE VIC 3001

Email: submissions@afc.org.au

Dear Mr D'Argaville

Consultation on proposed AFCA Rules

The Insurance Council of Australia (ICA) welcomes the release of the proposed Rules governing the jurisdiction and processes of the Australian Financial Complaints Authority (draft AFCA Rules), and the opportunity to provide a submission to the consultation.

The ICA is the representative body of the general insurance industry in Australia. Our members represent about 95 percent of total premium income written by private sector general insurers. ICA members, both insurers and reinsurers, are a significant part of the financial services system.

The ICA appreciates that the scope of consultation on the draft AFCA Rules focuses on a number of issues, principally the incorporation of superannuation rules and reporting obligations into the scheme while ensuring the Rules meet with the Minister's requirements pertaining to the scheme's authorisation; ASIC's requirements including current and proposed obligations under RG 139/267 and RG 165; and that there is no reduction in scope from predecessor schemes.

The consultation details the high-level objectives of the proposed AFCA Rules while leaving much of the operational details to the AFCA Operational Guidelines. The ICA understands that AFCA will consult further on its transitional funding arrangements and other specific issues will be dealt with separately in the Operational Guidelines. The ICA looks forward to participating in these future consultation processes.

The ICA is broadly supportive of the draft Rules which seek to strike a balance between user-friendliness, including the use of language that is accessible and in plain English, and a sufficient level of detail to allow for an effective set of rules.

AFCA will provide a single ombudsman scheme to deliver a more streamlined consumer experience. Given the challenges of harmonising different schemes into one coherent set of rules, we are encouraged that the proposed AFCA Rules seek to incorporate higher standards where there are differences between the predecessor schemes.

The mapping document provided on the draft Rules against existing FOS Terms of Reference (and CIO Rules) is useful, although there are instances where additional

commentary detailing how the proposed AFCA Rules align with, vary or differ from the existing approach under the Corporations Act and predecessor schemes could assist.

The attached ICA responses to the Consultation Paper are restricted to general insurance issues.

We would also like to thank AFCA for the briefing in which issues raised by members were explored in discussions with senior AFCA management as part of the consultation.

If you would like to discuss any of the issues raised further, please contact Fiona Cameron, General Manager Policy, Consumer Outcomes, on (02) 9253 5100 or by email at fcameron@insurancecouncil.com.au.

Yours sincerely



Robert Whelan
Executive Director & CEO

ICA responses to the consultation questions

Structure and ordering of the AFCA Rules

Question 1:

Do the AFCA Rules achieve a good balance between user-friendliness and detail?

The ICA is broadly supportive of the proposed AFCA Rules which strike a balance between user-friendliness, including the use of language that is accessible and in plain English, and a sufficient level of detail to allow for an effective set of rules.

Question 2:

Before the Table of Contents is a “quick guide” summarising the key aspects of the Rules and their location. Is this helpful?

The quick guide provides an easy to understand schematic diagram on the different sections of the Rules. Noting there are known differences in decision-making and timeframe provisions between superannuation and other complaints, a quick view of the guide may instinctively and unintentionally draw the reader to look for such differences where there are two options.

As a result, the row detailing sections C.1 and C.2 could be designed in such a way as to make clear the intended distinction under the Rules is between mandatory exclusions and AFCA's discretion not to handle a complaint, and not between superannuation and other disputes.

Question 3:

The Rules contain a number of tables (for example, summary tables of the time limits to submit a complaint to AFCA and of the monetary restrictions on AFCA's jurisdiction and compensation powers). Are the tables helpful in explaining these areas? How could they be improved?

The ICA suggests that using different colours in the rows may improve delineation between the data.

Reporting obligations

Question 5:

Do the AFCA Rules adequately provide for AFCA to meet its reporting obligations under the Corporations Act?

The ICA would welcome greater clarity in regard to the definition of a systemic issue, serious contravention and serious breach. We acknowledge AFCA's advice during the consultation that these definitions are proposed to be dealt with in the development of the Operational Guidelines, although it is expected they will be largely based on the FOS Terms of Reference and practices.

Further, where the reporting of a serious contravention or other breach occurs, AFCA should ensure the particulars being reported are disclosed to financial firms, including the specific details of the serious contravention or breach.

Draft Rule A.17.2 (a) enables AFCA to raise a potential systemic issue with a financial firm and to give it an opportunity to respond. Furthermore, draft Rule A.17.2 (b) enables AFCA to require a financial firm to provide any information and documents it considers necessary to investigate a systemic issue.

The ICA suggests a reasonable timeframe should be set out to enable the firm to investigate the issue internally and to respond to systemic issues, given the complexities involved in such investigations. Further details in the Operational Guidelines would assist insurers to understand the processes intended to be followed in relation to systemic issues.

The ICA recommends that the processes in draft Rule A.17.2 (b) around the requirement for firms to provide information or documents, should reflect those relating to a complaint under draft Rule A.9.1 (a), (b) and (c). In doing so, AFCA should take into account instances when providing such information would breach Court orders or relates to commercially sensitive or privileged information to a current investigation by police or law enforcement.

The ICA notes also a new provision under draft Rule A.17.4 which allows AFCA “to require [a] financial firm to do or refrain from doing any act which AFCA considers necessary to achieve any one or more... objectives”, including its investigation and referral of a systemic issue for remedial action. While the ICA recognises the need to strengthen the current FOS Terms of Reference in preparation for the commencement of AFCA and to accommodate new members, the breadth of the expansion under draft Rule A.17.4 goes significantly beyond what could reasonably be regarded as necessary for a dispute resolution body such as AFCA. The powers are akin to those held by a regulatory body, such as ASIC under RG 256. The breadth of the rule is also of concern given AFCA’s determination powers are not bound by the usual rules of evidence or subject to review.

The ICA therefore queries the need for the broad nature of this rule and strongly suggests it be omitted.

General

Question 6:

Are there any other issues that require consideration?

Members have raised a number of issues on the operation of the proposed Rules and we welcome AFCA’s advice in a consultation meeting with the ICA that many of these issues would be dealt with in the Operational Guidelines. The ICA looks forward to participating in this future consultation process.

We do, however, take the opportunity to flag some key issues below.

Legal precedent

Professional Indemnity (PI) insurers have highlighted the uncertainty created by draft Rule A.14.3, whereby AFCA “is not bound by rules of evidence or previous AFCA or Predecessor Scheme decisions”.

The existing FOS process, in which legal precedent is not binding, already poses significant challenges for PI insurers and for general insurers more broadly. This is particularly the case because of the uncertainty whether claims will be decided in accordance with the

Ombudsman's decision in previous individual claims, or established court precedent. Insurers must decide how the possibility of legal precedent not being followed should be factored into premium pricing.

The increase in monetary limits and compensation caps will magnify the potential financial consequences of this uncertainty. Consideration of claims of undeniably high value now within AFCA's jurisdiction will not be bound by the same rules and procedures that previously applied in the courts, nor governed by standard court practices. For example, there will be no right to appeal a determination; determinations will not be binding on the consumer; the AFCA Ombudsman will not be bound by rules of evidence or legal precedent; and there is no facility for witnesses to be cross-examined under oath.

The ICA urges AFCA to take into account the need to manage and minimise this uncertainty when designing its Operational Guidelines. We look forward to consultation on the Operational Guidelines in the coming months.

Independent Assessor

Clause 2 of the Independent Assessor draft Terms of Reference provides that *"any person or business directly affected by how AFCA deals with a complaint can complain to the Independent Assessor"*.

The phrasing in Clause 2 is not sufficiently clear to confirm that AFCA's intention is for all users, including financial firms, to have access to the Independent Assessor. Clarification of the applicability of Clause 2 to financial firms would be useful.

It is also noted that under draft Rule A.16.5 an Independent Assessor's recommendation is not binding on AFCA. Further, under Clause 16 of the draft Terms of Reference, the Chair of the AFCA Board may make a final decision or alternatively refer the matter to the Board for a final decision. The ICA would urge AFCA to provide greater certainty in such cases when designing the Operational Guidelines for the Independent Assessor.

Gathering relevant information

The new requirement for a statutory declaration in draft Rule A.9.2, which sets out the reasons for a party to a complaint to refuse an AFCA requirement for information, appears to create an unnecessary administrative burden where there is no dispute over the party's reliance on draft Rule A.9.1.

The ICA urges an amendment to draft Rule A.9.2 whereby a statutory declaration would only be required if there is an issue in dispute or one is specifically requested by AFCA, and not in matters of common cause. In circumstances where there is no dispute involved, a written explanation may be acceptable to all parties, thereby obviating the need for a statutory declaration in all cases.