

2 July 2018

Australian Financial Complaints Authority (AFCA)

Attention: Mike D'Argaville

By email submissions@afc.org.au

**NIBA SUBMISSION IN RESPONSE TO AUSTRALIAN FINANCIAL COMPLAINTS
AUTHORITY (AFCA) DRAFT RULES OF COMPLAINT RESOLUTION SCHEME
JUNE 2018**

The National Insurance Brokers Association of Australia (**NIBA**) appreciated the opportunity to meet with AFCA to discuss the draft Rules. Following from the discussions, NIBA make this submission setting out its comments for further consideration.

ABOUT NIBA AND INSURANCE BROKERS

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.

Insurance brokers work with their clients to assist them to:

- 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.

OUR RESPONSE

NIBA has reviewed the proposed AFCA Rules against the existing Financial Ombudsman Service (FOS) Terms of Reference (TOR) to identify any issues that may be of concern to members.

The following provide NIBA's comments for AFCA consideration, adopting the referencing used in the draft rules.

A4.3

Whilst only a summary, concern was raised that unless better clarified as a "summary" or "overview", it may cause confusion as words use are not the actual requirements in Section B.

A.10 Information sharing and opportunity to make submissions

A.10.1 is in NIBA's view too general and unclear and needs to be qualified by reference to the following paragraphs.

A.10.2 Before a complaint is determined by an AFCA Decision Maker, AFCA must provide the parties to the complaint:

- a) with access to relevant information, unless special circumstances apply such as health and safety issues, and
- b) an opportunity to make submissions.

NIBA assumes relevant information is information upon which AFCA proposes to rely in its decision. This should be clarified in guidance.

The old TOR qualification in 8.4(b)(ii) has been removed.

NIBA believes more detail should be included in "special circumstances" such as sensitive commercial information.

A.11.2

The parties must maintain the confidentiality of all information provided to them through the course of a complaint except:

- a) to the extent reasonably necessary to resolve the complaint
- b) to the extent reasonably necessary to discuss the complaint with their lawyer, adviser, accountant or insurer, or
- c) as required by law.

Both (a) and (b) need to be more clearly limited to resolution of a complaint using the AFCA process or it may be too broad.

A.13.3

When allocating an Ombudsman or Adjudicator to determine a complaint, AFCA's Chief Ombudsman or his or her delegate must consider the Ombudsman's or Adjudicator's expertise and experience and whether they will be able to determine the complaint fairly and impartially.

NIBA notes that the requirement is to only "consider" not satisfy themselves that they have the requisite experience.

A.14.2

When determining any other complaint, the AFCA Decision Maker must do what the AFCA Decision Maker considers is fair in all the circumstances having regard to:

- a) legal principles
- b) applicable industry codes or guidance
- c) good industry practice, and
- d) previous relevant Determinations of AFCA or Predecessor Schemes.

NIBA understand the reference to "guidance" in (b) is intended to be broader than the Code and the AFCA guidance will clarify this.

A.15.3

In the case of any other complaint, a Determination by an AFCA Decision Maker is binding on the Financial Firm if accepted by the Complainant within 30 days of the Complainant's receipt of the Determination. The Financial Firm may ask the Complainant to provide it with a binding release from liability in respect of the matters resolved by the Determination, provided the release:

- a) is limited to the matters dealt with in the Determination, and
- b) is consistent with the Determination.

NIBA notes that it is binding from the date of acceptance which needs to be changed to "written" acceptance.

NIBA notes that the complainant cannot be required by AFCA to enter into a deed of release.

FOS TOR 8.8 Applicant acceptance of a Recommendation or Determination
Provided [our bold]:

“In order to accept a Recommendation or a Determination, the Applicant **must** provide the Financial Services Provider (if the Financial Services Provider so requests) with a binding release of the Financial Services Provider from liability in respect of the matters resolved by the Recommendation or Determination. The release must be for the full value of the claim the subject of the Dispute, even if this amount exceeds the amount of the remedy decided upon by FOS. The release shall be effective from the date on which the Financial Services Provider fulfils all of its obligations under the Recommendation or Determination.”

NIBA notes that with the higher jurisdictional limits this release requirement is of real importance and a Determination should not be binding if a complainant refuses to sign one. Otherwise the issues will be reopened, and the purpose of AFCA thwarted.

We are yet to see the standard form of AFCA document that the complainant is to sign. If that is of equivalent effect, there may be no issue.

A.16.5

An Independent Assessor’s recommendation is not binding on AFCA.

NIBA believes it should at least be taken into account by AFCA in some form and that this be recorded as part of AFCA process, if not already done.

A.17.2

AFCA will investigate potential systemic issues. In doing so, it:

- a) must raise the potential systemic issue with the relevant Financial Firm and give it an opportunity to respond
- b) can require the Financial Firm to provide any information and documents AFCA considers necessary to investigate the issue.

NIBA believe a “reasonably necessary” test is fairer in (b).

A.17.4

As part of investigating and referring a systemic issue to the Financial Firm for remedial action, AFCA can require the Financial Firm to do or refrain from doing any act which AFCA considers necessary to achieve any one or more of the following objectives:

- a) facilitating AFCA’s investigation of the systemic issue
- b) improving industry practice and communication
- c) remedying loss or disadvantage suffered by consumers or Small Businesses (whether or not they have complained about the systemic issue)

- d) preventing foreseeable loss or disadvantage to consumers or Small Businesses
- e) minimising the risk of the systemic issue recurring
- f) efficiently dealing with multiple complaints related to the systemic issue.

This is a change to the FOS TOR 11.2 where FOS did not have such an express power to restrict the conduct of the member:

11.2 “b) FOS must identify systemic issues and refer these to the relevant Financial Services Provider for remedial action. In each case, FOS must obtain a report from the Financial Services Provider as to the remedial action undertaken and continue to monitor the matter until a resolution has been achieved that is acceptable to FOS.”

Practically speaking if resolution is not reached that is acceptable to FOS/AFCA it will be notified to ASIC, but AFCA could seek to remove membership for breach.

It is important that comprehensive guidance be provided on when and how AFCA would propose to use such power to ensure consistency of approach within AFCA and clear industry understanding.

FOS TOR 8.9 - Consequences of an Applicant refusing to accept a Recommendation or Determination

If an Applicant does not accept a Recommendation or Determination in relation to the Applicant’s Dispute, the Applicant is not bound by the Recommendation or Determination and may bring an action in the courts or take any other available action against the Financial Services Provider.

NIBA could not identify an equivalent provision in the AFCA rules and suggests it be included.

A.17.5

The obligation on AFCA in clause A.17.5 to “report the issue to any body” is very broad.

It could be amended to read:

A.17.5 In accordance with the Corporations Act, the Privacy Act and any other relevant obligations, after identifying a systemic issue AFCA must report the issue to:

- a) ASIC;
- b) the Australian Prudential Regulation Authority;
- c) the Commissioner of Taxation;
- d) the Office of the Australian Information Commissioner; and
- e) any other relevant person AFCA believes should be advised of the systemic issue.

A.18.1

In accordance with the Corporations Act and any other relevant obligations, AFCA must refer certain matters to any body (including ASIC, the Australian Prudential Regulation Authority, or the Commissioner of Taxation), such as:

- a) the particulars of a settlement under section 1052E(3) of the Corporations Act if AFCA thinks the settlement may require investigation
- b) serious contraventions by Financial Firms.

The concept of “relevant obligations” is not entirely clear in this context. Guidance should be provided.

A.19.1

AFCA must collect and record comprehensive information about its complaint resolution. It is important that industry see the proposed breakdown to ensure accurate information can ultimately be reported on and appropriate and fair costing of AFCA services can be determined.

A20.1

NIBA notes it will be important to fairly present such figures to avoid misleading consumers. E.g AFCA may need to seek to qualify number of complaints against business size as large businesses will have a larger number of complaints by reason of their size alone.

Title Insurance Policy

means an indemnity insurance product that manages financial risk or loss arising from defects in the title of real property

To avoid catching other types of cover the word “principally” should be included in the definition before “manages”.

Uninsured Motor Vehicle

means a motor vehicle that is not covered by current comprehensive insurance.

Should this be extended to include Third party, fire and theft cover as well, as these types of policy have elements of first party cover?

Financial service

We note the introductory words of the FOS TOR definition of financial service have been omitted and assume the potential impact of this change has been considered by AFCA.

Once again, thank you for the opportunity to provide these comments on this important issue.

If you have any questions in relation to this submission, please do not hesitate to contact me.

Dallas Booth
Chief Executive Officer