

26 March 2021

National Insurance Brokers Association of Australia

Submission to the Review of the Australian Financial Complaints Authority

The National Insurance Brokers Association of Australia (NIBA) welcomes the opportunity to provide the following comments to the review of the Australian Financial Complaints Authority (AFCA).

As the peak industry association for insurance intermediaries, NIBA represents approximately 15,000 insurance brokers all round Australia. Insurance brokers operate under an Australian Financial Service Licence issued by ASIC, and are members of AFCA.

NIBA also liaises regularly with the General Insurance Ombudsman, and endeavours to maintain close relationships with both the AFCA Chief Executive Officer and the General Insurance Ombudsman. Feedback from the Chief Executive Officer and the Ombudsman to date is that insurance broking disputes do not raise significant issues or concerns for AFCA.

About Insurance Broking

While brokers may act as agents of insurers, they overwhelmingly represent the interest of their clients.

Brokers perform a number of valuable services for their clients including:

- Helping clients to understand, manage and minimise their risk exposure.
- Identifying and arranging appropriate insurance or other risk financing mechanisms.
- Helping clients to meet statutory obligations surrounding mandatory insurance types.
- Acting as the client's advocate when an insured event occurs and a claim is made for losses arising out of that event.

In performing these duties, brokers act as agents of their client and have statutory, common law and professional obligations to act in the best interests of their clients at all times.

Triage of complaints prior to acceptance

NIBA notes that the discussion paper makes no mention of an effective triage system to reduce costs associated with reviewing complaints and improving response timeframes.

NIBA members have indicated the need for a more robust system of triage to be adopted by AFCA to determine at a preliminary stage the exact nature of the complaint, the parties against who the complaint should be directed (the broker, the insurer, or both) and to determine the basis of the complaint.

This is important because the broking firm bears the cost of AFCA's complaint, even when there is no real basis for the complaint against the broker. If the broking firm needs to take the matter to a decision stage in order to obtain an appropriate decision in their favour, the cost of the process is substantial, and is often disproportionate to amount in dispute.

The following example, highlighting this issue has been provided by a NIBA member.

Example 1:

A client lodged a complaint against a broker with AFCA in which the complainant demanded compensation of \$50,000. On the facts presented there was no plausible reasoning behind the request and no quantified loss which would justify the sum. In their submission to AFCA, the broker highlighted that there was no basis to the sum demanded – but was advised that because of the sum requested AFCA had no choice but to refer the matter to the ombudsman as a “complicated” complaint, which carries a higher fee than the standard case management.

AFCA confirmed there had been a breach of duty on our brokers part, but this breach didn't lead to any loss suffered by the client. And therefore, no compensation awarded.

The broker then received a bill for \$8,800 from AFCA for case management. If the compensation requested by the complainant had been less the bill would have only been \$3,000.

Concerningly, NIBA has also received anecdotal evidence that complainants are becoming aware of the AFCA fee structure, and are starting to “game the system” in order to achieve a payment to which they are not entitled, simply because it is far simpler and cheaper for the broking firm to make a payment and not face the cost of a formal decision.

It is NIBA's view that while industry remains required to fund AFCA, there must be robust systems and processes to ensure that disputes are genuine and are not simply pursued in an attempt to strong-arm fs into submitting to complainants demands.

In this regard, NIBA believes it would be useful for AFCA to provide clearer information on its web site, for both consumers and financial services providers, in relation to matters that are within and outside of the AFCA jurisdiction.

AFCA Data Cube data in relation to insurance brokers indicates that a significant proportion of broker disputes are outside the AFCA jurisdiction, and this needs to be made as clear as possible for the benefit of all concerned.

NIBA would be pleased to consider an options paper from AFCA which sets out potential mechanisms and procedures which would provide a proper triage process, in a manner that was fair to all parties.

Terms of Reference

1. Delivering against statutory objectives

NIBA members have voiced serious concerns about the AFCA fee structures specifically, that the fee structures are being used by disingenuous complainants to obtain an outcome in their favour regardless of the validity of their complaint.

As noted in the example above, complaints resolved by AFCA can be extremely costly for the financial firm irregardless of the outcome or validity of the original complaint.

While AFCA states that their fee structure encourages firms to resolves issues through internal dispute resolution processes, the experience of members is that the fee structure encourages firms to settle with complainants for a relatively small sum to avoid paying higher AFCA fees.

NIBA would like welcome any efforts by AFCA to develop and consult on alternative options for funding of the Ombudsman service that would encourage better internal dispute resolution processes without providing incentives for firms to settle disingenuous claims.

2. Monetary jurisdiction in relation to primary production businesses

NIBA has no specific comments in relation to the monetary jurisdiction for primary production businesses. We would like to point out, however, that AFCA has the power to make determinations that are binding on the financial services provider, but not the consumer, and the financial services provider has no rights of appeal or

any ability to legally challenge the determination. In some cases, the jurisdiction of AFCA is in the realm of the superior courts of the States and Territories.

It is NIBA's strong view that any further changes to AFCA monetary jurisdiction should only occur in conjunction with the ability of the financial services provider to have the determination reviewed by a competent appellant body.

Financial Ombudsman schemes were established in Australia on the basis that industry accepted there would be no appeal rights for financial firms (consumers would be able to retain full legal rights at all times), and that industry would fund the Ombudsman schemes, in return for the jurisdiction of the schemes being limited to those of the lower courts.

Recent reforms associated with the creation of AFCA have fundamentally changed that position, and serious injustices can arise when legal principles are not paramount, there is no requirement to observe the rules of evidence, and there are no appeal or review mechanisms available to the financial services firm.

3. Internal review mechanism

NIBA Members have voiced concerns around the lack of publicly available information on the existence and role of the Independent Assessor. While NIBA notes the Public Report by the Independent Assessor for the period July – December 2020 on the AFCA web site, there is no comprehensive outline of the role of the Independent Assessor and the manner in which the Assessor is able to recommend improvements to AFCA processes and procedures in the interests of fairness for all parties.

NIBA strongly supports the implementation of a procedure of internal review. Since 1 January 2021, AFCA has jurisdiction to consider a complaint against an insurance broker where the amount claimed is less than \$1,085,000 (this amount exceeds the jurisdiction of the mid-tier District Court of New South Wales). AFCA has power to award compensation of up to \$271,500.

As noted above, insurance broking firms have no ability to appeal AFCA determinations. This has the potential to lead to very real injustice, especially when it has been publicly stated that subjective notions of "fairness" will take priority over well accepted legal obligations and professional duties.

NIBA would appreciate the opportunity to consider a discussion paper on this topic, prepared by experienced legal professionals, setting out the options for introducing a regime that would be efficient, cost effective, and would include concepts of fairness for all parties.

Please do not hesitate to contact me if you would like to discuss any aspect of this submission

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