

6 April 2018

Ms Clare McCarthy
Behavioural Research & Policy Unit
Australian Securities and Investments Commission
GPO Box 9827
MELBOURNE VIC 3001

By email: policy.submission@asic.gov.au

Dear Ms McCarthy

**Oversight of the Australian Financial Complaints Authority: Update to RG 139
ASIC Consultation Paper 298**

The Insurance Council of Australia (the Insurance Council) welcomes the opportunity to comment on Consultation Paper 298 and the draft updated version of Regulatory Guide 139 *Oversight of the Australian Financial Complaints Authority* (the draft updated RG 139).

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

ICA members provide insurance products ranging from those usually purchased by individuals (such as home and contents, travel and motor vehicle insurance) to those purchased by smaller businesses and larger organisations (such as product and public liability, professional indemnity, commercial property, and directors and officers insurance).

We welcome consultation on the draft updated RG 139 which sets out the proposed approach which ASIC may take in its oversight of the Australian Financial Complaints Authority (AFCA), when it is established and commences operation no later than 1 November 2018.

The ICA has previously provided submissions on the review of dispute resolution in the financial system and more specifically on AFCA's terms of reference, and governance and funding arrangements, as part of Treasury's consultation on the establishment of AFCA.

The insurance industry is supportive of a streamlined single ombudsman for financial, credit and investment disputes to simplify the process for individual and small business consumers.

The effective transition to a new external dispute and complaints resolution scheme is essential to both our members and consumers.

The ICA strongly supports every effort to minimise any overlap in the period between the passing of the legislation on 14 February 2018, the expected authorisation of the scheme by the Minister for Revenue and Financial Services, and the commencement of AFCA.

The current Consultation Paper seeks views on a limited number of issues. The industry is generally supportive of draft updated RG 139, noting its concerns about undefined terms such as “reasonable belief” and “reasonable person”, and consultation with the general insurance industry on the need for agreed industry standards for reporting.

The ICA supports the proposed role for the independent assessor and reaffirms the view that its decisions should be free from Board influence. The ICA believes the independent assessor should have direct access to the Board for the purpose of reporting and proposed course of action to remedy any issues identified.

The Consultation Paper notes a 30-day maximum timeframe for AFCA to report serious contraventions or systemic issues to ASIC. However, it is silent on the need to consult financial firms prior to an identified report being made. ICA members are concerned by this oversight and would urge AFCA to advise firms of its intention to make such a report on a serious contravention. Furthermore, ICA members recommend a longer timeframe of no longer than 90 days to allow for any issues or complexities relating to a contravention or possible systemic issue to be clarified and reviewed with the firm before AFCA must make its identified report to ASIC.

The ICA is supportive of transitional relief arrangements for member firms, particularly given the lack of certainty on the commencement date for the scheme. Members will be required to update a considerable amount of information to meet their legal disclosure requirements and these may not be completed in time unless a firm date is known well in advance.

The ICA is keen to ensure that an enhanced dispute resolution process is in place for consumers and the industry, and that its establishment is achieved with minimal disruption and confusion.

Please find attached detailed responses to the questions raised in the Consultation Paper. If you would like to discuss further any of the of the issues raised, please contact Fiona Cameron, General Manager Policy, Consumer Outcomes, on (02) 9253 5100 or fcameron@insurancecouncil.com.au.

Yours sincerely



Robert Whelan
Executive Director & CEO

ASIC Consultation Paper 298		
<i>Oversight of the Australian Financial Complaints Authority: Update to RG 139</i>		
Reference	CP 298 Question	Members' comments and recommendations
Referring matters to appropriate authorities		
<i>Proposal B1 B1Q1</i>	<i>Do you agree with our proposed timeframe for AFCA to report serious contraventions or systemic issues? If not, why not?</i>	<p>The proposal will require AFCA to report to ASIC 'serious contraventions' by a financial firm, including a licensee, a representative or an employee, no later than 30 days of becoming aware that a serious contravention has or may have occurred, or of identifying a systemic issue.</p> <p>It is unclear whether AFCA proposes to consult with the financial firm on becoming aware that a serious breach has or may have occurred, prior to reporting the contravention to ASIC within the stipulated timeframe, ie. within a reasonable time not exceeding 30 days.</p> <p>Financial firms should be advised of a suspected serious contravention or systemic issue and given a reasonable opportunity to respond to any concerns or suspicions, as currently takes place through the existing EDR schemes.</p> <p>Given the complexities of what may constitute a serious contravention, a 30-day timeframe may not be achievable, particularly as firms should be consulted prior to any report being made to ASIC. Note further comments in B2Q1 below.</p>
<i>Proposal B2 B2Q1</i>	<i>Do you agree with our broad approach for AFCA reporting? If not, why not?</i>	<p>While acknowledging that 'serious contraventions' should be reported, ICA members are concerned that such contraventions are not adequately defined for the purpose of identified reporting, notwithstanding paragraph 1.87 of the Explanatory Memorandum to Treasury Laws Amendment (Putting Consumer First – Establishment of the Australian Financial Complaints Authority) Bill 2017.</p> <p>It is also unclear whether 'serious contraventions' are intended to be a narrower or broader reporting requirement compared to 'serious misconduct' under existing requirements. For example, 'serious misconduct' includes wilful or flagrant breaches of relevant laws, while 'serious contraventions' may apply to a contravention of <i>any</i></p>

	<p>law. However, ‘serious misconduct’ also included behaviour outside of breaches or relevant laws, eg. non-compliance with scheme decisions or processes.</p> <p>The ICA submits that consultation with member firms should take place prior to any report to ASIC, given that the ‘particulars’ of a contravention for the purposes of reporting under s1052E of the Corporations Act will include the details of financial firms or individuals that are the subject of the report. These principles of natural justice should be clearly enshrined in RG 139 to ensure entities which are the subject of a suspected ‘serious contravention’ are notified of and afforded a reasonable opportunity to respond to AFCA’s concerns.</p> <p>A distinction should be made between reporting on <i>possible</i> systemic issues and <i>definite</i> systemic issues. Currently EDR schemes report possible systemic issues on a deidentified basis, and on an identified basis when requested to do so by ASIC. As Clause 139.181 defines a systemic issue broadly, it may not be appropriate for every possible systemic issue to be reported on an identified basis. Therefore identified reporting should not occur until such time as AFCA has appropriately reviewed the issue and determined that it is in fact a systemic issue.</p> <p>In addition, the test that an unsubstantiated issue that may affect more than one complainant is insufficient to justify identified reporting to ASIC, or likely to increase the effectiveness of reporting to ASIC per paragraph 28.</p> <p>RG 139.57 acknowledges that AFCA may identify a possible systemic issue which after investigation AFCA determines is not systemic. However, this is the only distinguishing reference to possible systemic or definite systemic issues. Noting that determining the concern is not in fact a systemic issue within 30 days would require AFCA to identify and refer the possible systemic issue to the firm, before the firm can review, investigate and respond to AFCA, then allowing AFCA sufficient time to determine that the concern is in fact not a systemic issue. The proposed timeframe of 30 days is clearly insufficient for this process to occur.</p> <p>Therefore ICA members propose a distinction be made between identified reporting of systemic issues and reporting of possible systemic issues. Alternatively, a longer</p>
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		timeframe of no less than 90 days is suggested to allow for adequate consultation with firms before AFCA must report systemic issues to ASIC.
<i>Role of the independent assessor</i>		
<i>Proposal B3 B3Q1</i>	<i>Do you agree with our proposed guidance on the primary role of the independent assessor? If not, why not?</i>	<p>The ICA supports the intended primary role of the independent assessor being to assess the handling of a complaint, and not the merits of an AFCA decision.</p> <p>The ICA supports ASIC guidance to clarify the independent assessor’s role in identifying errors, recommending certain actions and systems changes to complaints handling, and informing the need for a future review.</p>
<i>Proposal B4 B4Q1</i>	<i>Do you agree with our proposed guidance on what is outside the role of the independent assessor? If not, why not?</i>	<p>Similarly, the ICA supports ASIC guidance to clarify certain functions which fall outside the remit of the independent assessor, viz. to undertake a merits review of an AFCA decision, including a jurisdictional decision, and to reopen a complaint or the outcome of a complaint. For example, guidance is required on whether the independent assessor will be able to recommend a particular complaint be reopened if a ‘serious error’ in the handling of that complaint is identified during a review.</p>
<i>Proposal B5 B5Q1</i>	<i>Do you agree with our proposed requirements for the independent assessor? If not, why not?</i>	<p>The ICA has previously advocated that all stakeholders, ie. consumers and financial service providers, should be able to make a complaint to the independent assessor. The ICA supports the requirement in section (d) for the independent assessor to accept service complaints from <i>all</i> users of the scheme. Guidance would be helpful on whether section (d) will include reviewing AFCA’s handling of a serious contravention investigation or report to ASIC.</p> <p>The ICA has also advocated for the independent assessor to have direct access to the AFCA Board for the purpose of reporting on the number and nature of complaints received and the course of action that needs to be taken to remedy issues identified. The decisions of the independent assessor should be free from influence by the Board. Furthermore, the independent assessor should be able to refer to ASIC systemic concerns that the Board has not appropriately addressed. These principles appear to be adequately covered in sections (f) and (h).</p>

<i>EDR disclosure obligations</i>		
<p><i>Proposal B6 B6Q1</i></p>	<p><i>Is this a sufficient timeframe for the financial firms to update all of their legal disclosures (as set out in paragraph 35) and other consumer communications? If not, why not? Please provide specific detail in your response.</i></p>	<p>The ICA is concerned that members may not be able to meet the timeframe in the absence of a firm date for the commencement of AFCA. ICA members will be required to update all of their legal disclosures, not simply their Product Disclosure Statements and Financial Service Guides. In addition, communications such as Credit Guides, Short-form PDSs, periodic and exit statements for all products, customer brochures, electronic brochures and extensive online content need to be considered. Completing these changes in the absence of a confirmed precise commencement date will be difficult to achieve given many products are of long duration.</p> <p>A large member firm with several separate brands has indicated it would require a two-year transitional timeframe for all disclosure references to AFCA to be completed. An extension to a later date would minimise the need for multiple updates to disclosure documents.</p> <p>A longer timeframe must also allow for sufficient flexibility on how any additional information is to be communicated to consumers, to make it easier to comply with all requirements during the transitional period.</p>
<p><i>Proposal B6 B6Q2</i></p>	<p><i>Should we provide transitional relief from external dispute resolution disclosure obligations in the lead up to AFCA commencement? If so, please provide reasons.</i></p>	<p>The ICA supports transitional relief being made available to financial firms for mandatory disclosure documents. ICA members have noted the difficulty in quantifying the costs and time required to make all necessary changes prior to the precise commencement date being announced.</p> <p>In addition to a longer transitional period discussed in B6Q1, it would be useful if FOS contact details (email addresses and phone numbers) currently in use were maintained or redirected to AFCA on commencement of the scheme, in order to minimise the need for multiple updates and transitional costs.</p> <p>Members would also appreciate further information on any additional transitional relief being considered.</p>