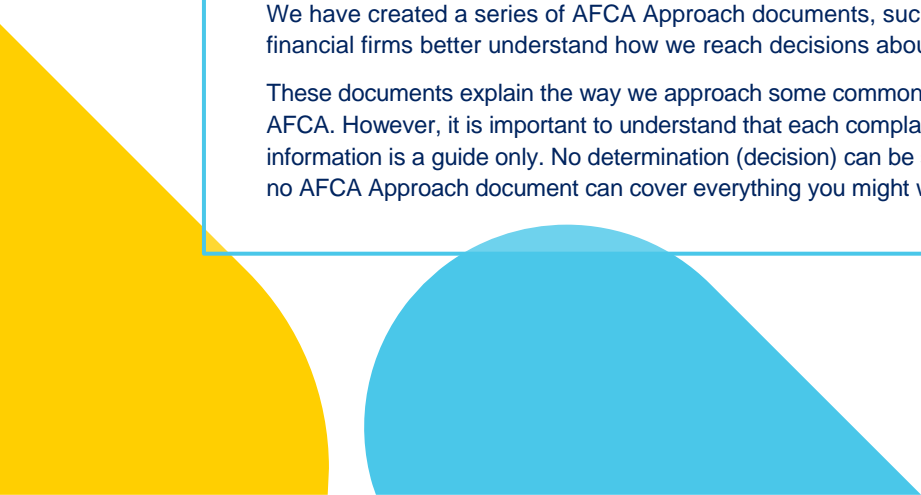


The AFCA Approach to cancellation of insurance policies for non-payment of premiums

April 2021

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We have created a series of AFCA Approach documents, such as this one, to help consumers and financial firms better understand how we reach decisions about key issues.

These documents explain the way we approach some common issues and complaint types that we see at AFCA. However, it is important to understand that each complaint that comes to us is unique, so this information is a guide only. No determination (decision) can be seen as a precedent for future cases, and no AFCA Approach document can cover everything you might want to know about key issues.

1 Purpose of this approach

1.1 Scope

The purpose of AFCA's approach documents is to explain how we look at common issues and complaint types. This approach outlines how AFCA investigates and resolves complaints when an insurer cancels a policy due to non-payment of an insurance premium.

This approach is consistent with AFCA's obligation to deal with complaints in a cooperative, efficient and timely way and to make decisions that are fair in all the circumstances. It is important to understand that each complaint that comes to us has a unique set of facts and this information is a guide only.

1.2 Who should read this document?

- Financial firms, consumers and consumer representatives who have a complaint at AFCA that involves an insurer cancelling a policy due to non-payment of an insurance premium.
- Anyone who wants to understand AFCA's approach to these types of disputes.

1.3 Summary

AFCA approaches complaints about cancellation of insurance policies for non-payment on the basis that section 210(5) of the Life Insurance Act applies to the cancellation of all life insurance policies.

A life policy can only be cancelled due to non-payment of the premium if the insurer provides notice following section 210(5) of the *Life Insurance Act 1995* (Cth) (Life Insurance Act).

A general insurance policy can only be cancelled due to non-payment of the premium if the insurer provides notice following section 59 of the *Insurance Contracts Act 1984* (Cth) (ICA). An exception to this is if the premium is payable in seven or more instalments in a year and the insurer cancels the policy in a way that complies with section 62 of the ICA.

If there is a hybrid policy (i.e. a general insurance policy and a life insurance policy bundled together), then notice must be given in a way that satisfies both section 210(5) of the Life Insurance Act and section 59 of the ICA.

Helpful examples of compliant notices are included in Appendix A.

AFCA's approach however is to do what is fair in all the circumstances. This means that AFCA may decide the outcome differently to the strict application of the relevant law. For example:

- If a consumer has made all reasonable efforts to pay the premium, but has not done so, we may decide that it would be unfair to cancel the policy
- If the insurer's notice is clear and unambiguous but contains a small error (e.g. the date of cancellation is wrong), we may decide that the notice is effective.

2 Jurisdiction

2.1 AFCA's purpose

AFCA is the independent external dispute resolution (**EDR**) scheme for the financial services sector. AFCA's purpose is to provide fair, independent and effective solutions for financial disputes. We do this by providing fair dispute resolution services. We also work with financial firms to improve their processes and standards of service to minimise future complaints. In addition to resolving financial complaints, AFCA identifies, resolves and reports on systemic issues and serious contraventions of the law.

2.2 AFCA's jurisdiction

AFCA can consider complaints against financial firms that are members of AFCA.

When a complaint is not resolved by agreement, negotiation or conciliation, we make a decision. Our decision reflects what is fair in all the circumstances having regard to legal principles, applicable industry codes or guidance, good industry practice and previous decisions of AFCA or predecessor schemes (which are not binding).¹

When assessing conduct of a financial firm, we have regard to the law, codes, and standards of industry practice that were in place at the time of the conduct.

We may decide that a financial firm must compensate a consumer for direct financial loss, indirect financial loss or non-financial loss.² We may also decide that a financial firm is required to take, or refrain from taking, particular actions. If a consumer accepts our decision, the financial firm is bound by that decision.³

Fair in all the circumstances

Our decisions are intended to reflect what is fair in the circumstances of each complaint. This includes providing a fair outcome in cases where we find an error or breach has occurred.

In assessing what is fair, we apply a standard of fairness which focuses on concepts such as fair dealing, fair treatment and fair service. This allows us to assess the

¹ See AFCA Rule A.14.2.

² See AFCA Rule D.3.

³ See AFCA Rule A.15.3.

conduct of a financial firm over the life cycle of the firm's relationship with its customer.

The primary focus of our investigation is to assess whether the financial firm breached its obligations to the consumer. However, we also consider the conduct of the consumer when determining a fair outcome.

3 In detail

3.1 How should insurers cancel life insurance policies?

Background

Life insurance policies include income protection policies, total and permanent disability (TPD) policies, trauma policies (often called critical illness or crisis policies) and life (i.e. death) policies.

The law governing cancellation of life insurance policies is unclear. There are two possibilities:

- Section 210(5) of the Life Insurance Act governs the cancellation of all life insurance policies
- Section 210(5) only governs the cancellation of life insurance policies with a surrender value, and s59 of the ICA governs the cancellation of all other life insurance policies.

AFCA's approach

AFCA will proceed on the basis that s210(5) of the Life Insurance Act applies to the cancellation of all life insurance policies.

Why does AFCA consider this approach is fair?

AFCA must do what is fair in all the circumstances after having regard to relevant legal principles, good industry practice, industry codes and previous decisions.

Arguments can be made that section 210(5) applies to *all* life insurance policies. Arguments can also be made that section 210(5) *only* applies to life policies with a surrender value. Experienced insurance lawyers agree that the law is unclear and disagree on which interpretation is better.

A notice given under section 210(5) provides the insured with an opportunity to maintain their policy by paying the premium before the policy is cancelled. In contrast, a notice given under section 59 states that the policy will be cancelled and does not give the insured an opportunity to prevent the cancellation.

Life insurance is usually a medium to long term product. As a person gets older, their medical history is likely to become more extensive, and it becomes harder to obtain a new life insurance policy.

Why is section 210(5) better suited to life insurance policies?

Existing life insurance policies – even those without a surrender value – may have significant value to customers and it is not fair for that value to be easily lost. For this reason, AFCA considers that the cancellation procedure set out in section 210(5) is better suited to life insurance than the cancellation procedure set out in section 59.

Section 210(5) provides greater flexibility for insurers to keep customers by giving them a final opportunity to pay the premium.

To maintain consistent decision-making, AFCA will uphold the approach (and previous decisions) of predecessor schemes, by agreeing that section 210(5) applies to all life insurance policies, and that compliance should not be difficult.

How can insurers comply with section 210(5)?

Section 210(5) says an insurer can cancel a policy for non-payment of a premium by giving a written notice to the policy owner. The notice must state:

- The premium amount and due date
- That the policy will be cancelled 28 days after the notice is given (if the premium is not paid) or 28 days after the premium due date, whichever is later. See below on when the notice is given.

In most cases, if this is done, AFCA will consider the insurer has fairly cancelled the policy.

AFCA may still say it is fair to consider the policy cancelled, even if an insurer has not strictly complied with all these requirements. For example, the insurer may have sent a clear notice but nominated the wrong date as to when the policy was cancelled. AFCA may consider the policy to be cancelled on the correct date if the insured has made no effort to pay the premium before then.

Examples of compliant s210(5) notices

See Appendix A for examples of notices AFCA considers compliant with section 210(5).

3.2 How should insurers cancel general insurance policies?

There are two ways available to an insurer

An insurer can cancel a general insurance policy due to non-payment of premium in two ways under the ICA. The insurer can either follow the process set out in section 59 or following a policy provision consistent with section 62. However, the second option only applies if the premium is paid by seven or more instalments in a year.

How can an insurer comply with section 59?

An insurer must give notice in writing of any proposed cancellation. This notice should clearly set out the insurer's intention to cancel the policy.

The notice should include the date of the proposed cancellation and the reasons for it as a matter of good industry practice.

Once the notice is given, the policy is then cancelled at the latest of the following times:

- Three business days after the notice is given
- If a time is specified in the contract – that time
- If a time is specified in the notice – that time.

Can the section 59 notice allow an insured to pay the overdue premium?

Insurers sometimes provide the insured with a final opportunity to pay the premium in the section 59 notice. This may not comply with section 59.

AFCA's approach is to do what is fair in all the circumstances, going beyond strict compliance with the law, if its application would mean the outcome is unfair.

If an insurer sends a section 59 notice that gives an insured a final opportunity to pay the premium, AFCA may accept this if:

- AFCA is satisfied the notice was given
- The notice clearly explains that if the premium is not paid by the final due date, the insurer will cancel the policy
- The date of the policy cancellation is not before the final due date.

AFCA considers this is fair because:

- It provides an insured with a final opportunity to keep their policy
- The insurer can retain their customer
- The insured retains the protection of receiving the minimum notice allowed under section 59.

This approach keeps consumer protections in place and allows insureds to maintain their loyalty and relationship with the insurer. It also protects insureds from having to disclose to another insurer that they had a policy cancelled.

It is important to note however that if the insurer wants to cancel the policy in strict compliance with section 59 – without giving the customer a final chance to pay the premium – it can still do so.

How does section 62 apply?

Section 62 allows an insurer to cancel a general insurance contract without notice if:

- A policy provision is inconsistent with sections 59 and 72A
- The insurer is relying on this provision when exercising a right to cancel
- An instalment premium has remained unpaid for at least a month
- The insurer clearly informed the insured of the effect of the provision before the contract started.

This only applies when the premium is payable in seven or more instalments in a year.

AFCA will also consider the General Insurance Code of Practice. This says insurers will send written notice of:

- Non-payment at least 14 days before cancellation; and
- The policy cancellation. This may be sent before the policy is cancelled or within 14 days afterwards.

3.3 How should insurers cancel hybrid policies?

Notice must comply with section 210(5) and s59

Some policies are underwritten by both a general and life insurer. AFCA has seen this in consumer credit insurance products. Even though these products are sold as one policy, it is clear a life policy and a general insurance policy have been bundled together, creating a 'hybrid policy'.

When an insurer wants to cancel a hybrid policy, it may not be clear whether section 210(5) or section 59 applies.

A determination made by a predecessor scheme said⁴ it is fair to treat these as hybrid policies covering both life and general insurance products. That determination also said it is fair that when cancelling such a hybrid policy, insurers should send a notice that complies with both section 210(5) and section 59.

AFCA considers it is fair to follow this determination. It was a decision made by a panel. It provides certainty and consistency as to how these hybrid policies should be cancelled.

Therefore, insurers should use a notice that complies with both sections. Example 4 in Appendix A provides sample wording.

⁴ Determination 495829

3.4 Matters that AFCA takes into consideration

When is the notice given?

The notice is not 'given', for the purposes of either s210(5) or s59, on the date it issued.

If the notice is sent by email, then the notice will be given on the day the email is sent (assuming it does not bounce back). This is presuming the insurer has otherwise complied with the requirements under the *Electronic Transactions Act 1999* (Cth).

If the notice is sent by post, AFCA will follow the approach in section 160 of the *Evidence Act 1995* (Cth). Under the current terms of section 160, we will deem the notice to have been received (and therefore 'given' for the purposes of section 210(5)) on the seventh working day after it was posted. This is unless the insurer can show the notice was delivered earlier.

Some insurers use multiple communication methods to inform a customer about the impending cancellation, for example, text and email. This is best practice and is encouraged. However, AFCA will normally consider it sufficient if the insurer can show it has given notice following the relevant law.

The [AFCA Approach to proof of despatch](#) provides further guidance on dealing with these issues.

What if the insured is no longer at the address?

Under section 72A of the ICA, an insurer can give notice by sending a document to the person's last known address. This applies to s59 notices. For s210(5) notices, section 28A of the Acts Interpretation Act 1901 contains similar wording.

Therefore, if an insurer has sent the document to the person's last known address, this would normally be sufficient. There may be exceptions to this though.

For example, if the insurer was aware the document was not going to be received. This may include when the document has been returned or the insured had previously informed the insurer they were no longer at that address.

In those cases, AFCA may consider it unfair for the policy to be cancelled unless the insurer can show it took all reasonable efforts to inform the insured through other ways. This may include contacting them by phone or email.

What if the insured tries but fails to make a payment?

If it appears that an insured took reasonable steps to pay the premiums, but for some reason the premiums remained unpaid, AFCA may find it unfair for the insurer to treat the policy as being cancelled, even if the notice otherwise complies with section 59 or section 210(5).

For example, if an insured makes a mistake about which amount in an insurer's notice needs to be paid, and then does not pay the amount needed to avoid cancellation, AFCA may find it is unfair for the insurer not to allow their customer to fix the mistake and put the policy back in place.

Another example is when the insured had funds in an account, the account could be debited, but for some reason the insurer has been unable to debit the account.

By contrast, if an insured has not made sure there were enough funds, or taken any steps to pay the required premiums, AFCA is likely to find it is fair for the insurer to cancel the policy.

If a customer has told the insurer that they are experiencing financial hardship, but the insurer chose to cancel the policy without attempting to explore other arrangements, AFCA is unlikely to consider the cancellation as fair.

What happens to the outstanding premiums?

If AFCA finds the policy was not correctly cancelled, then the customer must pay any outstanding premiums.

There may be cases when an insured cannot pay the premium. For example, if premiums had not been paid for a long time and the insured is unable to pay the whole amount, a reasonable repayment plan should be put in place. This should not stop the insurer from assessing any claim in the meantime.

4 Context

4.1 Case studies

Case study 1 – Life insurance policy (650217)

On 13 September 2017, the insurer sent a notice headed, in large bold font, 'Approaching Cancellation Advice', and it said:

| | |
|-----------------------|-------------------|
| Premium amount | \$591.45 |
| Plus overdue amount | \$591.45 |
| Billing amount | \$1,191.54 |

Your policy will lapse if the premium is not paid

Our records indicate that we have still not received your premium. The premium is now one month overdue and the policy lapse effective 13 October 2017 if the total amount due is not paid in the next 30 days.

On 16 October 2017, the insurer sent another notice. It was headed, in large bold font, 'Cancellation Notice', and it said:

Lapsed cover

Your valuable insurance benefits have now been cancelled.

The policy lapsed on 13 October 2017. **It is no longer in force and you cannot make a claim on it.**

The insurer sent its Approaching Cancellation Advice notice of 13 September 2017 by prepaid post. AFCA had regard to the principle in section 160 of the Evidence Act, which said (at the time) that a letter is deemed to be have been received by post on the fourth working day after it has been sent (although the Act now says seven days). That meant the complainant was deemed to have received the letter on Tuesday, 19 September 2017. AFCA found that it was fair to treat the notice as having been 'given', for the purposes of section 210(5) of the Life Insurance Act, on the date it was received by the complainant.

There are only 25 days between 19 September 2017 and the cancellation on 13 October 2017. That is less than the 28 days' notice required. AFCA found on that basis that the cancellation did not comply with section 210(5) of the Life Insurance Act.

Case study 2 – General insurance policies (662128)

In 2011, the complainant took out a pet insurance policy for her two-year-old dog. In 2018 she was hospitalised for a month. While she was in hospital, the insurer cancelled the policy for non-payment of premiums.

When the complainant left hospital, she asked the insurer to reinstate the policy, but the insurer refused.

AFCA determined that it was unfair for the insurer to refuse to reinstate the policy, even though it was effectively cancelled in accordance with section 59. In determining the fairness of the outcome AFCA considered it relevant that the complainant:

- asked the insurer to reinstate the policy shortly after it was cancelled
- did not appear to have suffered a claimable loss between the cancellation of the policy and her request to reinstate it
- had a good reason for not paying the premium instalments or responding to the insurer's correspondence
- had maintained cover under the policy for a long time
- was substantially disadvantaged by the cancellation of the policy because she could not get a new policy with similar cover because her dog was now much older.

AFCA said the complainant needed to pay all missed premiums.

AFCA said the insurer was entitled to deny cover for any loss that occurred between the cancellation of the policy and the request to reinstate it.

Case study 3 – Hybrid policies (495829)

The complainant held two mortgage protection policies for two loans. The hybrid policy provided benefits for life, disability and involuntary unemployment. The life benefit was payable by a life insurer. The other benefits were paid by a general insurer. The general insurer also administered the policy.

The complainant lodged a disability claim, that at first was accepted in part by the general insurer. However, benefits ceased to be paid because of non-payment of the premium and the general insurer saying it had cancelled the whole policy as a result.

The complainant disputed this saying he had not received the letters.

The panel considered the letters, as well as the policy, to determine whether the insurer could deny the claim on this basis.

The panel found there was both a life policy and a general insurance policy bundled together in this product. Further:

- A life policy can only be cancelled for non-payment of a premium pursuant to section 210(5)

- A general insurance policy can only be cancelled due to non-payment of a premium under section 59 (section 62 was not relied on, or applicable in this case)

The panel then looked at the letters sent by the general insurer. The panel was not satisfied it complied with either provision.

The panel made the following comments about these types of policies:

The structure of the policy was such that it is fair to treat them as hybrid policies covering both life and general insurance products. Therefore, it is fair that when a financial firm is seeking to cancel a hybrid policy, it should provide a notice that complies with both s210(5) and s59.

In this case, the insurer's letter did not comply with either provision, either individual or collectively. Therefore, it was not fair for the insurer to deny the claim on this basis.

5 References

5.1 Definitions

| Term | Definition |
|-----------------|--|
| Complainant | a person who has lodged a complaint with AFCA |
| Insured | a person or organisation covered by insurance |
| Surrender value | the amount the insured will get from the life insurance company after leaving the policy early |

5.2 Useful links

| Document type | Title / Link |
|----------------------------|--|
| AFCA Rules | afca.org.au/rules |
| Act | <i>Life Insurance Act 1995</i> (Cth) www.legislation.gov.au/Details/C2017C00057 |
| Act | <i>Insurance Contracts Act 1984</i> (Cth) www.legislation.gov.au/Details/C2019C00115 |
| Act | <i>Evidence Act 1995</i> (Cth) www.legislation.gov.au/Details/C2018C00433 |
| Code | <i>Life Insurance Code of Practice</i> www.fsc.org.au/policy/life-insurance/code-of-practice |

Appendix A – Example notices

Example 1 – section 210(5) notice where one premium overdue

[Customer name]

[Customer postal address]

1 January 2021

Dear Customer

Cancellation of your insurance policy

You have not paid the premium for your [insert product name] policy. Your policy will be cancelled if you do not take action soon.

| Premium due date | Premium amount | Action required |
|------------------|----------------|--|
| 31 December 2020 | \$100.00 | Your policy will be cancelled if we do not receive the premium before 9 February 2021 |

Example 2 – section 210(5) notice where one premium overdue and another due soon

[Customer name]

[Customer postal address]

1 January 2021

Dear Customer

Cancellation of your insurance policy

You have not paid the premium for your [insert product name] policy. Your policy will be cancelled if you do not take action soon.

| Premium due date | Premium amount | Action required |
|-------------------------|-----------------------|--|
| 31 December 2020 | \$100.00 | Your policy will be cancelled if we do not receive the premium before 9 February 2021 |
| 31 January 2021 | \$100.00 | Pay the premium by the due date |

[Note that if this customer pays \$100.00, but not \$200.00 before 9 February 2020, the policy cannot be cancelled]

Example 3 – section 210(5) notice where two premiums overdue and another due soon

[Customer name]

[Customer postal address]

1 January 2021

Dear Customer

Cancellation of your insurance policy

You have not paid the premium for your [insert product name] policy. Your policy will be cancelled if you do not take action soon.

| Premium due date | Premium amount | Action required |
|-------------------------|-----------------------|--|
| 30 November 2020 | \$100.00 | Your policy will be cancelled if we do not receive the premium before 9 February 2021 |
| 31 December 2020 | \$100.00 | Your policy will be cancelled if we do not receive the premium before 9 February 2021 |
| 31 January 2021 | \$100.00 | Pay the premium by the due date |

[Note that if the complainant pays \$200 (but not \$300) by 9 February the policy cannot be cancelled]

Example 4 – sample wording for hybrid policies and/or section 59

[Customer name]

[Customer postal address]

1 January 2021

Dear Customer

Cancellation of your insurance policy

Your premium of \$XXX due on Y has not been paid.

If you do not pay this premium by 15 February 2021, we will cancel your policy the following day.

If you would like to pay this premium, you can do so in the following ways: ...

[Note: We have allowed about 45 days between the date of the letter and the proposed date of cancellation. This accounts for the following:

- six weekends, and public holidays, that may need to be included when counting the 20 business days allowed in s59 and the 7 business days under the Evidence Act
- any potential delays between when the letter is issued to when it is posted]

Example 5 – section 59 notice with a final chance to pay premium

[Customer name]

[Customer postal address]

1 January 2021

Dear Customer

Cancellation of your insurance policy

Recently, you received a notice about a failed deduction of your monthly premium. A second attempt to deduct this payment was unsuccessful and we haven't heard from you.

As a result, if we do not receive the amount of \$XXX by 15 February 2021, we will cancel your policy the following day. This means you will have no active policy from 17 February 2021 onwards.

If you would like to keep your policy active and avoid it being cancelled, please make sure you pay the premium on or before 15 February 2021. You can do so in the following ways: ...