


# The AFCA Approach to motor vehicle total loss complaints

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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 At a glance

## 1.1 Scope

The purpose of AFCA's approach documents is to explain the way we look at some common issues and complaint types. This approach outlines how AFCA will investigate and resolve disputes about whether a vehicle should be treated as a total loss (or written-off).

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

Who should read this document?

This document is intended to help:

- Financial firms who provide general insurance
- Consumers and consumer representatives who have a complaint involving the extent of damage or the total loss of a vehicle
- Anyone else who wants to understand how AFCA approaches this issue.

## 1.2 Summary

Complaints are often lodged with AFCA where the complainant and the insurer disagree about whether a vehicle should be considered a total loss.

This document explains AFCA's approach to resolving total loss complaints. It sets out the factors we consider and outlines how AFCA will determine a fair outcome for consumers where we find a claim should be paid.

## 1.3 AFCA's purpose

AFCA is the independent external dispute resolution 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.

## 1.4 AFCA's jurisdiction

### AFCA can consider complaints against member financial firms

When a complaint is not resolved by agreement, negotiation or conciliation, we make a decision about the outcome of the complaint. 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).<sup>1</sup>

When assessing the 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.<sup>2</sup> 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.<sup>3</sup>

### 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 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.

## 2 In detail

### 2.1 How will AFCA determine if the insurer's decision is fair?

Complaints are often lodged with AFCA where the complainant and the insurer disagree about whether a vehicle should be considered a total loss (or written off). The terms 'total loss' and 'written-off' are used interchangeably.

Insurance policies often provide the insurer with discretion to settle the claim by:

- repairing the vehicle
- paying the cost to repair the vehicle; or

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<sup>1</sup> See AFCA Rule A.14.2.

<sup>2</sup> See AFCA Rule D.3.

<sup>3</sup> See AFCA Rule A.15.3.

- declaring the vehicle a total loss.

AFCA will consider if the insurer has exercised its discretion under the policy fairly and consistent with the duty of utmost good faith.

Utmost good faith includes notions of fairness and reasonableness and acting in line with community standards of decency and fair dealing. The duty of utmost good faith is a mutual duty and is also owed by an insured to the insurer.

In general, a decision to repair a vehicle (rather than declaring it a write-off) is fair if it is both safe and economical to do so.

When considering whether the insurer's decision is fair, there are several factors we will consider, including:

- Whether the vehicle is economical to repair – this is generally based on whether the market (or agreed) value is greater than the cost of repairs, plus salvage
  - > the cost of repairs does not include the cost of rectifying poorly executed repairs
- The relevant state or territory legislation that determines when a vehicle is a total loss can also be relevant
  - > if the legislative position is inconsistent with the policy, then the position under the legislation will generally prevail
- Whether the vehicle will be safe if it is repaired
- Whether the vehicle should be repaired or written-off. For example, if the insurer has been unable to properly repair the vehicle after multiple attempts.

If AFCA is not satisfied that the insurer has exercised its discretion fairly, then we will generally award a different outcome. For instance, AFCA may decide that:

- The vehicle should not have been written-off, but should have been repaired
- The vehicle should not have been repaired, but should have been written-off
- The insurer should pay compensation for non-financial loss.

## 2.2 The factors AFCA will consider

### Is it economical to repair the vehicle?

Disputes can arise as to whether it is economical to repair a vehicle. This can arise in the following scenarios:

- Both parties provide different quotes for the repairs, or have different assessments about the vehicle's salvage and pre-accident value (if relevant); or
- Repairs have been, or are being, conducted and due to additional costs, it becomes clear the vehicle was uneconomical to repair.

In the first scenario, AFCA will consider which documents reflect the fairest assessment of the repairs, salvage and the pre-accident market value (if relevant). AFCA will then assess whether the insurer's assessment was fair.

In the second scenario, AFCA will consider whether the vehicle has been properly repaired.

### Was the vehicle properly repaired?

If the vehicle has been properly repaired, then it is unlikely AFCA will consider that the vehicle is a total loss. This is because the vehicle has been restored to its pre-accident condition. This is consistent with the purpose of most comprehensive policies.

If the vehicle has not been properly repaired, AFCA will not always decide that the insurer should declare that the vehicle is a total loss. AFCA will generally assess the fairness of the insurer's decision at the time it decided to repair the vehicle, rather than making a retrospective assessment.

If AFCA finds that it was reasonable for the insurer to have relied on its initial estimates, then it is unlikely that AFCA will agree that the vehicle can later be declared a total loss, merely because the repair costs will now exceed the initial estimates.

However, if AFCA finds that the insurer's decision to rely on initial estimates was unreasonable, then it is likely that the insurer's decision to repair the vehicle will be unfair. In those situations, AFCA will likely consider that the vehicle should be a total loss.

### How does relevant state legislation apply?

Legislation in each Australian state and territory provides that when certain types of vehicles (usually vehicles less than 15 years old) are a total loss, then they must be registered on a Written Off Vehicle Register (WOVR).

The obligation to place the vehicle on the WOVR usually arises when an insurer, or its assessor, has decided the vehicle is a total loss. The legislation generally defines what a total loss is. Generally, a vehicle is a total loss if the cost of repairs and the salvage value exceed either the vehicle's pre-accident market value or the agreed value.

There can be inconsistencies between the definition in the legislation and the insurer's policy. For example:

- Under the complainant's policy the vehicle is insured for an agreed value (or sum insured or similar term)
- The agreed value is higher than the vehicle's pre-accident market value

- The vehicle may be economical to repair based on the agreed value but not on the market value
- The relevant legislation provides that the vehicle is uneconomical to repair based on the market value.

Most legislation requires the insurer to first determine if the vehicle is a total loss. Once the insurer has determined this, the vehicle will then be placed on the WOVV either as a repairable or statutory write off.

AFCA considers that in most cases it is fair that the insurer applies the relevant legislative definition when considering whether the vehicle is economical to repair. This allows for consistency between the legislation and the policy and would ensure vehicles are appropriately placed on the WOVV.

### When is a vehicle unsafe to repair?

If a vehicle is unsafe to repair, then the only fair decision is for the vehicle to be declared a total loss. AFCA will generally be guided by experts' opinions about this.

It will not generally be sufficient for a party to say the vehicle is unsafe to repair. The party will need to provide a written expert's opinion (e.g. an assessor or repairer) that the vehicle is unsafe to repair and the reasons why, together with any supporting documents.

Under the WOVV legislation, certain vehicles that are written-off can never be repaired. These are generally vehicles with damage which meets the criteria set out in the 'Damage Assessment Criteria for the Classification of Statutory Write-Offs' (DAC) that is issued by the National Motor Vehicle Theft Reduction Council (NMVTR).

AFCA's view is that if a vehicle's damage meets the DAC criteria, then there is a legitimate concern that the vehicle is unsafe to repair regardless of whether the vehicle needs to be put on the WOVV or not.

The DAC provides that:

The new criteria are designed to consistently identify and appropriately classify those [written off vehicles] that should not be repaired on safety grounds and are suitable only for dismantling or scrap.

If an insurer decides to repair a vehicle with damage that falls within the DAC criteria, it must be able to adequately explain why this decision is fair. This will generally require:

- An expert opinion explaining why the expert considers that the vehicle is safe to repair despite its meeting the DAC criteria
- Documents to support this position – this may include manufacturer, or industry, guidelines setting out an acceptable method of repair.

If the insurer is unable to demonstrate that the vehicle can be safely repaired, then AFCA will consider its decision to be unfair and that the vehicle should be a total loss.

### **What if the insurer has tried to repair the vehicle but there are outstanding issues?**

Sometimes an insurer has made multiple attempts to repair a vehicle but there are still outstanding issues.

AFCA may decide it is fair that the vehicle should be a total loss, and will consider:

- If the vehicle can be safely repaired
- How many attempts were made to repair the vehicle – the more attempts, the more likely AFCA will consider that the vehicle should be a total loss
- The likelihood that the vehicle can be properly repaired, particularly if there have been multiple unsuccessful attempts and no certainty that a proper repair outcome can be reached
- If the complainant had use of the vehicle for a significant period of time after the incident or not
- If all the rectification issues can be identified and, if so, the extent of them (e.g. if there is one minor issue outstanding, it is less likely that AFCA will consider it fair to declare the vehicle a total loss).

If AFCA decides that the vehicle is a total loss, then the amount payable will generally be based on the agreed value, or market value as at when the event occurred. This is because:

- There is a connection between the event and the fact the vehicle is a total loss
- The claims experience shows the insurer's decision to attempt to repair the damage was unfair
- The complainant has not had the use of a properly repaired vehicle since the claimed event.

### **2.3 What information does AFCA need?**

When deciding if a vehicle is a total loss, AFCA will consider:

- Whether the repair quotes provided include all damage
- Whether the damage is structural / mechanical, or more cosmetic
- Whether any of the vehicle's safety features have activated (e.g. airbags)
- The type of parts that the insurer will use in the vehicle repair
- If providing market value cover, how the policy defines market value
- How many attempts the insurer has made to repair the vehicle.

AFCA will ask for information from both parties to investigate the dispute.



### From the complainant

- What they consider the pre-accident value of their vehicle was, with any supporting information (this may include assessor reports, valuations or sale advertisements)
- What they consider is the fair salvage value (after the accident) of their vehicle with supporting information (e.g. An estimate from a salvage yard)
- Any quotations they have to repair their vehicle
- Information in support of any safety concerns they have about the vehicle
- Any expert reports in their possession (e.g. assessor report or valuations).

### From the insurer

- Copy of certificate of insurance and relevant product disclosure statement
- Assessment report(s) and photographs of the damage
- Assessment of the vehicle's pre-accident value
- If an assessor has changed the quote, an explanation as to why the change was made
- Assessor comments about the safety of the repair (if this method is chosen)
- Salvage valuation report
- Quote for repairs
- Application of relevant legislation to the loss circumstances.

### Determining value of non-standard vehicles

Where a vehicle was of a non-standard type (such as a showroom or classic car or a specific industrial vehicle) a valuation may be required to determine its value.

Valuers consider the specific value of unusual vehicles and factor in bespoke adjustments. A vehicle valuation can be very different to an assessment (and usually more accurate). This should generally be done by the insurer if it is required to assess the vehicle's market value.

## 2.4 Other issues involving motor vehicle total loss

### Written off value register (WOVR) disputes

The WOVR is a national database of written-off vehicles. Insurers are legally required to register written-off vehicles of a specific age (which differs by state), to help minimise vehicle rebirthing

Disputes sometimes occur where complainants do not want the insurer to place a vehicle on the WOVR after assessing a vehicle as a total loss

Insurers have a legal obligation to do this and we consider this practice acceptable when consistent with the legislation

If an insurer places a vehicle on the WOVR in error, we may decide that the insurer should ask the relevant state or transport authority responsible for the WOVR, to amend this and / or compensate the complainant.

### **Vehicle identification number (VIN) plate disputes**

The VIN is a vehicle-specific identifier in addition to the engine number and the registration details. All vehicles generally have VIN plates attached to the vehicle, often in and around the door pillars.

If a VIN plate has been removed to facilitate a repair, it may not be able to be replaced – this is because manufacturers often don't issue a second plate.

We accept that this is not the insurer's responsibility to compensate if the work was necessary as a result of accident damage.

If the removal occurred due to the insurer's error (e.g. poor repairs), we may find that the insurer is responsible for any loss that is sustained (e.g. loss of value) and may also award the complainant non-financial loss.

### **Where the vehicle has two quotes – one to repair and one to write off**

We will generally consider that a motor vehicle assessor is the appropriate person to decide whether a vehicle can be repaired or should be written off.

When the cost of each option is similar, the assessor may make a recommendation to the insurer, and the insurer must exercise this discretion fairly.

### **Significant differences between the market value and the agreed value of a vehicle<sup>4</sup>**

In these circumstances, it would be generally fair to assess the vehicle as a write-off based on its market value, rather than the agreed value.

Otherwise, this could lead to unfair outcomes where the insurer retains the salvage having paid significantly less than the market value even though the vehicle is economical to repair on a market value basis.

However, the insurer's liability would not generally exceed the agreed value unless it made an error (e.g. if the insurer incorrectly wrote off the vehicle). This means if the cost of repairs exceeds the agreed value, the insurer's liability would be to pay the agreed value only.

### **Rectification disputes**

Where the cost of total repairs (i.e. the cost of the original repairs plus the cost of rectification) exceeds the market value:

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<sup>4</sup> For example, as a result of COVID-19, the second-hand vehicle market improved for many vehicles

- This issue arises if a vehicle is not repaired effectively on the first attempt and further repairs are required
- The cost of rectification is not added to the cost of repairs when considering whether a vehicle is economical to repair
- In resolving these issues, we will be guided by expert opinions, relevant legislation, the individual circumstances of the case and what is fair in all the circumstances, as to whether the vehicle is still repairable or not.

### Showroom or specialised vehicles

Claims involving these vehicles are relatively rare, however the insurer should provide a valuer's assessment of the market value of the vehicle, including the expert valuer's opinion about the unique or unusual value of the vehicle.

### Salvage retention

Disputes can arise when the insurer and the complainant do not agree about whether a complainant is entitled to retain the salvage (wreck) after the vehicle is declared a total loss.

A complainant may want to keep the wreck to rebuild the vehicle, or for sentimental reasons, however, most policies allow the insurer to retain the wreck and sell it (although not all).

The resolution of these claims will depend on the policy wording. As well as the policy wording, AFCA will also consider the complainant's position and what is fair in the circumstances.

## 3 Application

### 3.1 Case studies

The case studies below are based on AFCA decisions. While previous determinations (by AFCA or a predecessor scheme) are not binding precedents, they will inform our approach to an issue where relevant.

#### Case study 1 – Vehicle not a total loss under relevant legislation (806263)

The insurer accepted a claim after a motor vehicle accident and assessed the vehicle as a total loss. It did so based on the agreed value (\$11,600), the cost of repairs (\$9,880.98) and the salvage estimate (\$3,203).

The vehicle was registered in Victoria where, under the legislation, a vehicle is only a total loss when:

the vehicle's fair salvage value plus the cost of repairing it for use on a road or road related area would be more than its fair market

value immediately before the event or circumstances that caused the damage.

The vehicle's pre-accident market value was \$13,600. Based on this, the vehicle was not a total loss according to Victorian legislation.

Therefore, the Adjudicator found the insurer did not exercise its discretion fairly or reasonably in declaring the vehicle a total loss.

### **Case study 2 – Vehicle was economical to repair (853601)**

A claim was lodged after a vehicle was damaged. The insurer assessed the vehicle as a total loss because it was uneconomical to repair. The complainant disputed this.

The adjudicator found the insurer's decision (to declare the vehicle a total loss) was not fair; the adjudicator disagreed with the insurer's pre-accident market value assessment of \$20,865.

This was mainly based on the fact Glass's Guide / AutoEdge – which the insurer relied on – did not fairly reflect the insured vehicle's pre-accident market value. It was \$10,900 lower than the Redbook average retail figure and significantly lower than other car sales listings.

The adjudicator concluded a fair pre-accident market value was \$27,560 after considering all the relevant information. Further, based on this figure, the vehicle was economical to repair, even based on the highest repair estimate.

### **Case study 3 – Decision to write-off the vehicle was fair (793892)**

A claim was lodged following an accident.

The vehicle was insured for an agreed value of \$5,400. The insurer assessed the vehicle as a total loss because the cost of repairs (\$6,852.08) and salvage (\$750) exceeded both the agreed value and the market value (\$4,710).

This assessment also took into consideration a second quote for the repairs (\$5,800.88) and the relevant state legislation (Qld), which says:

total loss means a notifiable vehicle –

(b) damaged by accident, collision, demolition, dismantling, fire, flood, trespass or other event to the extent that the vehicle's fair salvage value, when added to the cost of repairing the vehicle for use on a road or road-related area, would be more than the vehicle's fair market value immediately before the event that caused the damage.

The adjudicator was satisfied the insurer exercised its discretion fairly and reasonably in declaring the vehicle a total loss.

## Case study 4 – Analysis of fair market value (700687)

Following a motor vehicle accident, the complainant disputed the amount offered to him by the insurer after his vehicle was declared a total loss.

The complainant considered the vehicle should have been insured for agreed value (and not market value) and was unhappy the vehicle was determined to be a total loss without being consulted. The complainant also disagreed with the insurer's valuation.

The determination analyses the decision to write the vehicle off, the relevant policy definitions and the state legislative requirements. It reviews industry guides and how these should be used to assist in such circumstances to achieve a fair outcome.

## 4 References

### 4.1 Definitions

Term	Definition
Complainant	An individual or small business who has lodged a complaint with AFCA.
Financial firm	A financial firm, such as an insurer, who is a member of AFCA.
Agreed value	Also referred to as 'Sum Insured', 'Amount Covered' – generally a fixed amount the parties have agreed to insure the vehicle for at the start of a policy period. The term is usually specifically defined in the insurance policy.
Market value	The average value of vehicles of a similar make and model, taking into account the age and condition of the vehicle. Can fluctuate, depending on individual factors such as lower usage and the way in which the vehicle has been looked after. The term is usually specifically defined in an insurer's policy.
Economic write-off	Also referred to as an 'Economic Total Loss', a 'Repairable Write Off' or similar – generally refers to a repairable vehicle which is deemed a total loss as the cost to repair it exceeds its market or agreed value (depending on the requirements of the relevant state legislation).
Salvage	The fair market value of a vehicle after it has been written-off.
Statutory write-off	Typically, where a vehicle that has been declared a write-off and is unsafe to repair and / or cannot be re-registered due to state requirements. For example: <ul style="list-style-type: none"><li>• an assessor has determined the vehicle cannot safely be repaired</li><li>• there are 3+ key damage points as referred to in the Damage Assessment Criteria for the Classification of Statutory Write-Offs</li><li>• water has entered the vehicle above the door sill</li></ul>

Term	Definition
	<ul style="list-style-type: none"> <li>the vehicle has entered salt water</li> </ul>

## 4.2 Useful links

Document type	Title / Link
<a href="#">AFCA Rules</a>	AFCA Complaint Resolution Scheme Rules <a href="http://afca.org.au/rules">afca.org.au/rules</a>
<a href="#">Austlii</a>	Austlii is a free resource that contains a full extract of most of the judgments issued in Australia over the past 20 years. <a href="http://austlii.edu.au">austlii.edu.au</a>
<a href="#">Guide</a>	Damage Assessment Criteria for the Classification of Statutory Write-Offs' (DAC) that is issued by National Motor Vehicle Theft Reduction Council <a href="#">AP-G89-19   Austroads</a>
Case studies	<a href="#">806263</a> <a href="#">853601</a> <a href="#">793892</a> <a href="#">700687</a>

## 4.3 Legislation

Relevant Act / Regulations (at the time of writing):

State/Territory	Legislative instrument
ACT	<i>Road Transport (General) Act 1999</i> (ACT) – s 83C - Market Value <a href="#">ROAD TRANSPORT (GENERAL) ACT 1999 - SECT 83C When a vehicle is a total loss (austlii.edu.au)</a> <i>Road Transport (General) Regulation 2000</i> – Reg 22 – definitions <a href="#">Road Transport (General) Regulation 2000   HTML view (act.gov.au)</a>
NSW	<i>Road Transport Act 2013</i> (NSW) – ss 83 & 89 <a href="#">ROAD TRANSPORT ACT 2013 - SECT 83 NSW written-off light vehicles register (austlii.edu.au)</a> <a href="#">ROAD TRANSPORT ACT 2013 - SECT 89 Light vehicles that are a total loss (austlii.edu.au)</a> Sum insured or Market Value
NT	<i>Motor Vehicles Regulations 1977</i> (NT) – Reg 4A – Market Value <a href="#">MOTOR VEHICLES REGULATIONS 1977 - REG 4A Definitions (austlii.edu.au)</a>
QLD	<i>Transport Operations (Road Use Management--Vehicle Registration) Regulation 2021</i> (QLD) – Schedule 8 – Market Value

State/Territory	Legislative instrument
	<a href="#">TRANSPORT OPERATIONS (ROAD USE MANAGEMENT--VEHICLE REGISTRATION) REGULATION 2021 - SCHEDULE 8 (austlii.edu.au)</a>
SA	<i>Motor Vehicles Regulations 2010 (SA)</i> – Reg 71 – Market Value <a href="#">MOTOR VEHICLES REGULATIONS 2010 - REG 71 (austlii.edu.au)</a>
TAS	<i>Vehicle and Traffic Act 1999 (TAS)</i> – s 3A – Market Value <a href="#">VEHICLE AND TRAFFIC ACT 1999 - SECT 3A Repairable and statutory write-offs (austlii.edu.au)</a>
VIC	<i>Road Safety Act 1986 (VIC)</i> – ss 16B, 16BA, 16C – Market Value <a href="#">ROAD SAFETY ACT 1986 - SECT 16B Definitions (austlii.edu.au)</a> <a href="#">ROAD SAFETY ACT 1986 - SECT 16BA Statutory write-offs (austlii.edu.au)</a> <a href="#">ROAD SAFETY ACT 1986 - SECT 16C When is a vehicle written off? (austlii.edu.au)</a>
WA	<i>Road Traffic (Vehicles) Regulations 2014 (WA)</i> – Regs 147, 148 & 150 Sum insured or Market Value <a href="#">ROAD TRAFFIC (VEHICLES) REGULATIONS 2014 - REG 147 (austlii.edu.au)</a> <a href="#">ROAD TRAFFIC (VEHICLES) REGULATIONS 2014 - REG 148 (austlii.edu.au)</a> <a href="#">ROAD TRAFFIC (VEHICLES) REGULATIONS 2014 - REG 150 (austlii.edu.au)</a>