Law Council
OF AUSTRALIA

Legal Practice Section

11 October 2024

Mr David Locke
Chief Ombudsman and Chief Executive Officer
Australian Financial Complaints Authority
GPO Box 3
MELBOURNE VIC 3001

By email: consultation@afca.org.au

Dear Mr Locke

Joint Consultation on Superannuation Approaches

1. The Law Council of Australia's Legal Practice Section welcomes the opportunity to contribute to the joint consultation on superannuation approaches by the Australian Financial Complaints Authority (**AFCA**).

2. This submission is informed by the Legal Practice Section's Australian Consumer Law Committee (**ACLC**) and Superannuation Committee and provides feedback on the following draft Approach Documents:

   (a) the draft document titled *The AFCA Approach to sections 29(6) and 29(7) of the Insurance Contracts Act 1984* (**ICA Approach Document**); and

   (b) the draft document titled *The AFCA Approach to delayed insurance claims in superannuation* (**Delayed Claims Approach Document**).

ICA Approach Document

Background to Insurance Contracts Act subsections 29(6) and (7)

3. Subsections 29(6) and (7) of the *Insurance Contracts Act 1984* (Cth) (**ICA**) were inserted into the ICA by the *Insurance Contracts Amendment Act 2013* (Cth) (**IC Amendment Act**). These subsections were required to make a system that was fairer for consumers and the insurance industry more broadly.

4. The reason these subsections were introduced is that, prior to these amendments coming into effect, the only remedy that was effectively available in the event that a 'relevant failure' occurred was the retrospective avoidance of the policy. This was not a desirable outcome for consumers, nor insurers, because:

   - consumers would lose valuable insurance cover and would be unable to claim on the policies; and

- insurers would lose valuable insurance premiums, in circumstances where a person could have had insurance cover, but with, for example, an exclusion for certain conditions.

5. Since subsections 29(6) and (7) were inserted into the ICA, if a 'relevant failure' occurs in relation to life insurance, an insurer may be able to use a remedy available under subsection 29(6) to vary the terms of that contract. However, in engaging any such remedy, an insurer is required to act in a manner that is not inconsistent with what other reasonable and prudent insurers would do. This is a critical consumer protection mechanism, which functions to ensure that:

   - consumers are treated fairly; and
   - insurers engaging in such a remedy do so in a way that is consistent with what other insurers (who do not have liability for the claim) would do.

Comments on draft ICA Approach Document

6. Overall, we consider that the draft ICA Approach Document is helpful and will be of assistance to superannuation trustees, insurers, insured members, and their advisers.

7. We note that the draft ICA Approach Document states (at page 4) that AFCA intends to apply the ICA as it is written—that no variation of the contract will be allowed under subsection 29(6) of the ICA, if the contract provides cover for a death benefit, pursuant to subsection 29(10) of the ICA. The ACLC agrees that this approach is appropriate.

8. We have the following comments, which we suggest will improve the utility and clarity of the ICA Approach Document.

Referencing subsection 29(4) of the ICA

9. We recognise that the ICA Approach Document is not about subsection 29(4) of the ICA. However, we suggest it would nonetheless be helpful to include a reference to this subsection, to the extent that it provides context to the commentary on subsection 29(6) in the ICA Approach Document.

10. The Superannuation Committee suggests the following addition (underlined) to the paragraph at the top of page 3 of the ICA Approach Document:

> *Section 29(6) of the ICA does not allow an insurer to vary a contract with a surrender value, or a contract that provides insurance cover in respect of the death of the life insured—see section 29(10) of the ICA. (The insurer's remedy for these contracts is limited to substitution for the sum insured under section 29(4) of the ICA.)*

When AFCA will treat complaints as non-superannuation

11. We note the following paragraph on page 3 of the draft ICA Approach Document, below the heading 'AFCA's treatment of this type of complaint' (emphasis added):

> *Generally, AFCA will treat complaints about the application of the remedy to superannuation insurance cover as superannuation complaints. We will join the insurer to the complaint and consider the superannuation trustee and insurer's decisions about the cover.* ***In some instances, AFCA will***

consider complaints about superannuation insurance cover as non-superannuation complaints if a complaint is not lodged within the timeframes set out in the AFCA Rules that apply to superannuation complaints.

12. We suggest that further commentary in the ICA Approach Document would be helpful, explaining the criteria for where AFCA will treat complaints about superannuation insurance cover as non-superannuation complaints. The emphasised sentence referred to in paragraph 11 comments on circumstances where superannuation insurance complaints may be treated as non-superannuation complaints, but is unclear as to whether:

    - AFCA would always consider a complaint about superannuation insurance cover that is lodged out of time as a non-superannuation complaint (where lodging out of time is the only reason the complaint does not qualify as a superannuation complaint); or

    - lodging out of time is the only circumstance where AFCA would treat a complaint about superannuation insurance cover as a non-superannuation complaint.

13. We note that the example of an out-of-time lodgement (referred to in paragraph 11) references the fact scenario in *MetLife Insurance Limited v AFCA Limited*.[1] Further, the insertion of section 1053B in the *Corporations Act 2001* (Cth) by the *Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Act 2024* (Cth) was intended to ensure that, in this fact situation, a complaint would not be excluded from AFCA's jurisdiction. The approach adopted in the draft ICA Approach Document appears to be consistent with that intention, and we support AFCA taking that approach.

14. Nonetheless, we submit that it would be helpful to include some further commentary in the ICA Approach Document about AFCA's views on the scope of section 1053B of the Corporations Act, or, at a minimum, clarifying the issues referred to in paragraph 11.

Relevant failures—tests before and from 5 October 2021

15. The paragraphs on page 4 of the draft ICA Approach Document, under the heading 'Relevant failures' refer to the different tests that apply for cover that 'started or was varied on or after 5 October 2021' and cover that 'started before 5 October 2021'.

16. For clarity, the Superannuation Committee suggests the following changes to those paragraphs (additions underlined, deletions struck though):

    If AFCA receives a complaint involving an insurer applying the remedy in section 29(6) of the ICA on cover that started ~~or was varied~~ on or after 5 October 2021, then AFCA will consider if a relevant failure has occurred. If an insurer cannot show that a relevant failure occurred, then it cannot use section 29(6) of the ICA.

[1] [2022] FCAFC 173.

If AFCA receives a complaint involving cover that started before 5 October 2021, then AFCA will examine whether the complainant has failed to comply with the duty of disclosure or made a misrepresentation, as relevantly expressed in the ICA, as at the relevant time. An insurer must show either of these occurred to use section 29(6) of the ICA.

The different formulations of the test reflect amendments to the ICA that came into effect on 5 October 2021.

For contracts that were entered into before 5 October 2021, and were varied on or after that date to increase a sum insured or to provide one or more additional kinds of insurance cover, where the variation was not an automatic renewal but was required to be expressly agreed between the insurer and insured, then the formulation for cover that started on or after 5 October 2021 applies to the extent of the variation.

17. More broadly, we note that the approach to superannuation complaints is inextricably linked to AFCA's other Approach Documents as to what constitutes a 'relevant failure' in the context of non-disclosure or misrepresentation.[2] The ACLC suggests that other relevant Approach Documents should be cross-referenced in the ICA Approach Document, to ensure that consumers have a complete understanding.

Underwriting information

18. Page 5 of the draft ICA Approach Document provides as follows:

> *… AFCA expects the insurer to provide a copy of the underwriting guidelines in effect at the relevant time, together with a statutory declaration from an underwriter that sets out how those guidelines would have been applied*.

19. The ACLC suggests that this section should also make reference to the insurer providing the actuarial or statistical data upon which the underwriting was based, consistent with section 46 of the *Disability Discrimination Act 1992* (Cth). The ACLC observes that most consumers will not know to ask for this information, and it is relevant to ensuring that the underwriting is in accordance with the obligations on insurers to have this information when making variations or exclusions.

Evidence to support comparative analysis

20. An important aspect of subsection 29(7) of the ICA is that it refers to 'other reasonable and prudent insurers'. The intention of this subsection, as indicated in the Explanatory Memorandum to the Insurance Contracts Amendment Bill 2013 (Cth) (**ICA Bill**), is that an insurer exercising a remedy would generally be required to obtain a view from 'one or more third parties'.[3] We consider that the policy rationale for including such a requirement is to ensure that self-serving evidence is not produced by individuals who work for an insurer that will bear liability for the claim.

[2] Australian Financial Complaints Authority, *AFCA approach documents* (Web Page, 2024) <https://www.afca.org.au/what-to-expect/how-we-make-decisions/afca-approaches>.
[3] Explanatory Memorandum, Insurance Contracts Amendment Bill 2023 (Cth) 37.

21. Page 6 of the draft ICA Approach Document states that:

> *… to demonstrate the requirement in section 29(7) of the ICA has been met, an insurer needs to provide evidence that will allow AFCA to compare the proposed variation to what other 'reasonable and prudent insurers' would have done for similar contracts …*
>
> *Evidence to support comparative analysis can be:*
>
> - *a statement from an external consultant underwriter*
> - *s statement from a person working at a reinsurer; or*
> - *a statutory declaration from a person working for the insurer who has sufficient experience with other insurers to comment on what other reasonable and prudent insurers would have done.*

22. In the view of the ACLC, allowing an insurer to rely on a statutory declaration of an internal underwriter is not consistent with the legislation as it is written, and is not consistent with the Parliament's intention, as expressed in the Explanatory Memorandum to the ICA Bill. Noting that this issue arises in the context of both superannuation complaints and non-superannuation complaints, the ACLC considers that such an approach may constitute an error of law, and therefore invite review by the Federal Court of Australia.

23. In considering how AFCA may approach this issue, and bearing in mind AFCA's principles of fairness, we note that a consumer will not be able to produce evidence about the internal underwriting practices of an insurer. Accordingly, any evidence produced by an insurer is likely to be the only evidence that is considered on the issue. As such, if an insurer is permitted to produce evidence created by its own employees that would enable them to avoid liability for a claim, it is very difficult for a consumer to have confidence in that process.

24. Further, we note that Courts have traditionally treated self-serving evidence of internal underwriters with caution, given that the evidence is produced by staff employed by the insurer with liability for the claim. For example, in the matter of *Stealth Enterprises Pty Limited t/as The Gentlemen's Club v Calliden Insurance Limited*,[4] Sackville AJA said as follows at [87] in respect of an internal underwriter who was giving evidence for her employer (Calliden Insurance):

> *It was evidence given in the interests of her employer with the benefit of knowledge that the insured risk had eventuated and that information had come to light which, if known at the time, might have justified Calliden in declining the risk. Evidence of this kind needs to be assessed not simply on the basis of the credit of the witness but also by reference to the objective probabilities.*

[4] [2017] NSWCA 71.

25. The ACLC is of the view that the evidence that AFCA ought to allow—on the question of what other reasonable and prudent insurers would have done—should be:

    (a) a statement of an external consultant underwriter, who does not work for the insurer; and/or

    (b) a statement from a person working for a reinsurer, so long as that reinsurer does not bear any liability in respect of the subject claim.

Case studies and examples

26. The case studies in section 3.3 of the draft ICA Approach Document do not include any examples in respect of 'insurance in super'. The ACLC recommends including superannuation examples in this section.

27. The ACLC also suggests that examples be provided in the draft ICA Approach Document to assist consumers. For example, it would be helpful to reference some of the key concepts from other sections of the ICA, in addition to case law, that are relevant to what will be considered a non-disclosure or misrepresentation (both before and after the 5 October 2021 changes commenced).

28. To defend the allegation of a relevant failure, misrepresentation, or non-disclosure, complainants may assert:

    (a) they were not aware of the diagnosis or condition;

    (b) their doctor did not tell them about the condition, or they had not received a diagnosis; or

    (c) the questions in the application were broad and vague.

29. The ACLC recommends that the draft ICA Approach Document should provide information about AFCA's approach to the common sets of circumstances referred to in paragraphs 27 and 28. For example:

    - further information about AFCA's approach to common grounds, such as 'generalised stress' and 'anxiety' that were not disclosed;
    - where a consumer relied on the advice of a third party, such as a financial adviser or agent of the insurer, when completing forms; and
    - the differences between fraudulent and innocent non-disclosure or misrepresentation, as it may be that there is a contentious allegation of fraud that is underpinning the insurer's proposal to vary a contract of insurance.

Delayed Claims Approach Document

<u>Comments on Delayed Claims Approach Document</u>

30. Overall, we support the amendments to AFCA's guidance proposed in the draft Delayed Claims Approach Document.

31. We have the following comments which we suggest will improve the utility and clarity of the Delayed Claims Approach Document.

Expectations regarding timeframes for insurers

32. Section 3.1.1 of the draft Delayed Claims Approach Document states that:

> *AFCA expects insurers to act as quickly as possible in assessing claims and that there may be some instances where fairness and reasonableness requires insurers to progress claims more swiftly than the minimum timeframes set out in the [Life Insurance] Code [of Practice]. This may be because of a particular vulnerability or urgency faced by the complainant. AFCA notes this is consistent with the Code, which recognises claims may need to be prioritised if urgency is identified*.[5]

33. We do not consider that stating an expectation that insurers 'act as quickly as possible' is helpful. The timeframes in the Life Insurance Code of Practice (**Code**) are the industry benchmarks, and insurers and trustees can be expected to resource their claims-handling teams to meet the benchmarks for the number of claims that they typically handle. We respectfully submit that 'as quickly as possible' is not a benchmark. We do however agree that there is merit in including a reference to circumstances where claims should be prioritised under the Code. The Superannuation Committee suggests the following alternative drafting of the paragraph extracted in paragraph 32:

> *Insurers are also expected to adhere to the requirements of the Code for supporting customers experiencing vulnerability or financial hardship, including assessment of customers who may urgently need the benefits of their insurance. There may be instances where fairness and reasonableness require a claim to be progressed in a shorter timeframe than the minimum set out in the Code, having regard to those requirements*.

Expectations regarding timeframes for trustees

34. Section 3.1.1 of the draft Delayed Claims Approach Document states that:

> *Further, AFCA expects trustees to bring claims to the attention of their insurer quickly so that assessment can begin, even where a complete set of documents and evidence has yet to be provided.*

35. The ACLC suggests that it would be helpful to include guidance as to what 'quickly' means in this context. This is particularly so given the number of life insurance cases that include super fund trustees.

36. We note that this statement is in the current Delayed Claims Approach Document, but suggest that this revision of this Approach Document is an opportunity to provide more detailed guidance on this point.

Compensation

37. We note that, at section 3.3 of the draft Delayed Claims Approach Document, AFCA proposes to remove the sentence that '*AFCA cannot award non-financial loss to complainants in the superannuation jurisdiction*'.[6] This means that AFCA cannot award compensation for a complainant's stress, or inconvenience, caused by unreasonable delay. The ACLC suggests that, rather than deleting this sentence

[5] Draft Claims Approach Document, 4.
[6] Ibid 7.

altogether, the Delayed Claims Approach Document includes an explanation of why such compensation is not payable, and some examples of the circumstances where AFCA would award compensation.

Contact

38. Thank you again for the opportunity to contribute to this consultation. The Law Council's Legal Practice Section would be pleased to discuss any aspect of this submission with AFCA. In the first instance, please contact [redacted], Senior Policy Lawyer, on [redacted] or at [redacted].

Yours sincerely

Geoff Provis
Section Chair