

Unsolicited telephone sales of direct life insurance and consumer credit insurance

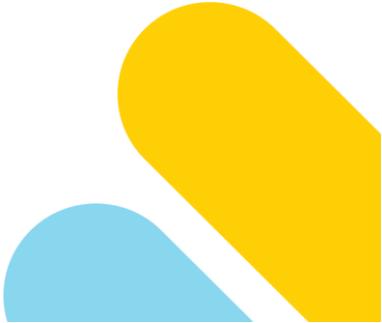
Submission to ASIC's consultation paper 317

Australian Financial Complaints Authority

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Introduction

The Australian Financial Complaints Authority (**AFCA**) is the independent external dispute resolution (**EDR**) scheme for the financial sector. AFCA's purpose is to provide fair, independent and effective solutions for financial disputes. It does this not only by providing fair dispute resolution services, but also by working with financial firms to improve their processes and improve industry standards of service, thereby minimising complaints.

In addition to providing solutions for financial complaints, AFCA has responsibilities¹ to identify, resolve and report on systemic issues and to notify the Australian Securities and Investments Commission (**ASIC**), and other regulators, of serious contraventions of the law. More broadly, AFCA plays a key role in restoring trust in the financial services sector.

AFCA welcomes the opportunity to provide a submission² in response to the consultation by ASIC on its proposed ban of unsolicited telephone sales of direct³ life insurance⁴ and consumer credit insurance⁵ (**CCI**).

This submission is informed by the experience of AFCA and its predecessor schemes. It focuses on issues that go to the effectiveness of EDR as a mechanism of redress for consumers, both individual and small business.

Key points

- We welcome the proposed ban and we consider the proposal should go further to prohibit unsolicited sales altogether of any financial product to consumers.
- Unsolicited sales tactics:
 - > enable financial firms to take unfair advantage of consumers
 - > do not consider consumers' specific requirements or vulnerabilities
 - > do not promote ethical dealings in good faith.
- Life insurance products are complex, and acquiring such products requires consumers give genuine consideration which is not consistent with unsolicited sales.
- CCI products offer little to no value for consumers and more often than not, a consumer would never be able to make a claim under their policy.

¹ Refer to Part C, Reporting Requirements, of [ASIC Regulatory Guide 267: Oversight of the Australian Financial Complaints Authority](#).

² This submission has been prepared by the staff of AFCA and does not necessarily represent the views of individual directors of AFCA.

³ Direct life insurance is life insurance purchased directly through an insurer or their distributor with either no advice or only general advice.

⁴ Life insurance means a 'life risk insurance product' as defined by s761A and s764A(1)(e) of the *Corporations Act 2001*.

⁵ Consumer credit insurance is a form of add-on insurance which is sold supplementary to the primary purchase, such as credit cards, personal loans, car loans and home loans.

1 Overview

ASIC is proposing to ban the unsolicited telephone sale of direct life insurance and CCI products when only general advice, or no advice, is given to consumers at the point of sale by using its modification power to extend the application of the anti-hawking provisions in the Corporations Act⁶ so that they would apply to these sales with no exceptions.

Extending the application of the anti-hawking provisions to insurance products was a recommendation made by Commissioner Kenneth Hayne (**Commissioner Hayne**) in his final report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (**Royal Commission**).

AFCA strongly supports ASIC's proposal and welcomes it as a starting point to protecting consumers against predatory sales tactics and being sold unsuitable and inappropriate financial products.

We note that the proposal only captures unsolicited telephone sales made when general advice or no advice is given. We believe that the proposal should go further and prohibit all unsolicited attempts to sell to a consumer, not just telephone sales, and this should apply to all financial products.

We consider that a financial firm should not be permitted to attempt to sell a consumer a financial product if that consumer has not taken positive action to enquire about the product or initiate the contact.

Financial products are complicated. To ensure a financial product has the best chance of delivering a good consumer outcome, at the time of acquiring the financial product, a consumer needs to have regard to if they actually need it. As a first step, consumers should make a positive decision to seek out the product. If a consumer decides they do actually need the product, it is then essential they understand how it works.

This is crucial as it will enable the consumer to determine if it meets their specific needs. This includes understanding how the financial product operates, its features, the terms and conditions including any exclusions or qualifications. A consumer will then be able use this information and apply it to their circumstances to assess how they intersect.

In our view, we do not consider that the above consideration can be achieved through unsolicited sales. The unpreparedness of the consumer, together with high-pressure and unethical sales tactics, does not create an even playing field. We do not consider that financial firms who engage in this conduct are acting reasonably and in good faith in their dealings with consumers.

⁶ Section 992A(3) of the *Corporations Act 2001*

2 Financial services must be provided fairly

AFCA's fairness jurisdiction requires all the circumstances to be considered

Financial firms have an obligation to provide financial services covered by their licence 'efficiently, honestly and fairly'⁷. Fairness is also one of the underlying principles for an industry-based customer dispute resolution scheme and requires both procedures and decision-making to be fair and to be seen to be fair. When AFCA investigates complaints, we have a jurisdiction that requires us to make decisions based on what is fair in all of the circumstances, taking into account the law; industry codes or guidance; good industry practice and previous decisions.

In assessing what is fair in all the circumstances, AFCA will investigate a dispute having regard to some key questions which enunciate the essential principles of fairness. These include:

- Did the parties obey the law?
- Did the parties make promises or representations they did not meet?
- Did the parties act honestly, reasonably and in good faith with their dealings with each other?
- Did one party take unfair advantage of another? Were specific circumstances or vulnerabilities considered?
- Did the financial firm provide the product or service ethically, with reasonable care and skill and in accordance with industry and professional practice?
- Did the financial firm meet the consumer's reasonable expectations about the product or service?
- Did the product or service perform as expected and provide a fair value or benefit?
- When acting for a consumer, did the financial firm act in the interests of the consumer or group of consumers as a whole?
- How did the parties treat each other during their relationship or after concerns were raised?
- What was the impact on the consumer and their experience of the service?

We do not consider that the unsolicited sale of financial products is aligned with these principles of fairness. There is a significant unfair advantage, detrimental to the consumer, when they are approached unannounced and unprepared. This is then compounded when financial firms engage in predatory sales tactics, such as placing undue pressure on the consumer to make a decision or misrepresenting the features of the product. In our view, this behaviour is unethical and unprofessional and falls well below the communities expectations. The case studies set out in this submission show that there are significant issues with these methods and reveals issues similar to those identified by ASIC.

⁷ Section 912A *Corporations Act 2001*

3 Banning unsolicited sales of financial products to consumers

Proposal should go further and prohibit any unsolicited sale of all financial products

AFCA strongly believes that the proposal to ban the unsolicited telephone sales of direct life insurance and CCI should be extended to all methods of unsolicited contact and apply to all financial products.

If a consumer is not expecting to be approached by a financial firm about a potential financial transaction, then they cannot be prepared for the interactions that follow. They will not have turned their mind to if they really need the product, or if the product offered meets their specific requirements. They won't know what to ask, or what to look for.

This was confirmed by Commissioner Hayne who said:

Most, if not all, of the case studies examined by the Commission involving the unsolicited sale of insurance pertained to hawking that occurred in a telephone call. When the offeror called to offer their insurance product, the potential acquirer had little or no notice that an offer was likely to be made. The potential acquirer was therefore unlikely to have considered seriously whether they needed the product that was being offered. Further, the potential acquirer was unlikely to be armed with the information that they needed to allow them to assess critically the features of the (usually complex) product that was being offered. Without this information, the potential acquirer did not know what questions they needed to ask to test the truth of what was being said or to request the details necessary to assess the suitability of the product for their circumstances.

We consider that unsolicited contact creates an uneven relationship which favours the financial firm. It significantly increases the vulnerability of consumers and exposes them to potential exploitation by the financial firm.

Further, Commissioner Hayne recommended:

The law should be amended to make clear that contact with a person during which one kind of product is offered is unsolicited unless the person attended the meeting, made or received the telephone call, or initiated the contact for the express purpose of inquiring about, discussing or entering into negotiations in relation to the offer of that kind of product.⁸

This recommendation contemplated scenarios beyond telephone sales, and captured all potential channels of communication. We submit that ASIC's proposal should adopt the recommendation made by Commission Hayne.

⁸ *Final Report, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, pg. 29 and 31

4 Life insurance products are complex

Life insurance products require genuine consideration to ensure they are appropriate

There are many different forms of life insurance products available in Australia. They include:

- term life insurance
- accidental death insurance
- trauma insurance
- total and permanent disability (TPD) insurance
- funeral insurance⁹
- income protection insurance.

The policies offered by insurers who offer life insurance products vary significantly, including definitions within the policy, what is covered, what is not and how the policy will respond to an insured event. Understanding and interpreting the terms and how a policy responds can be complex.

In a complaint AFCA considered, the interpretation of 'own occupation' by the insurer under an own occupation TPD insurance policy was inconsistent with the interpretation by the consumer. This was complicated by the fact that 'own occupation' was not defined under the TPD policy.

Case study 1

The complainant had an 'own occupation' total and permanent disability (TPD) insurance policy with the insurer, which commenced in 2012. The complainant became unable to work in her own occupation due to sickness and lodged a claim under her TPD policy in October 2017. The complainant states her own occupation prior to sickness was a home-visiting locum general practitioner GP. The complainant ceased working in her own occupation as a home-visiting locum GP due to her sickness and started in an alternate occupation as a family and sex-therapist/couples counsellor in late 2015. The insurer declined the claim on 10 July 2018 on the grounds the complainant had not met the TPD definition under the policy. The insurer said that the complainant's 'own occupation' is a general practitioner (GP) and she continued to work as a GP 'with a special interest in therapy'. AFCA found that the policy did not define 'own occupation' and the insurer's interpretation of occupation was inconsistent with the principles derived from court cases which suggest an occupation is a wider concept than a job (e.g. working as a roofing plumber for XYZ Pty Ltd) but narrower than a profession or trade (e.g. accountant or carpenter); an occupation takes into account the work done (e.g. a *roofing* carpenter, or an accountant *in a one-person practice doing mostly tax returns and a little audit work*).

⁹ In this submission, funeral insurance does not include funeral benefit policies.

AFCA concluded that the insurer's interpretation of 'occupation' was too broad (very close or equivalent to 'profession') and, leaves little distinction between the 'any occupation' and 'own occupation' definitions. The insurer did not contest that the complainant was permanently unfit for work as a locum GP doing home visits, and this was confirmed by their own medico-legal expert. AFCA determined that the insurer must pay the complainant the benefit amount under the policy, refund all PTD premiums from the end of the waiting period (being 25 April 2016) and pay interest from 10 July 2018 until the date that payment is made to the complainant.

This case study demonstrates that, even though the complainant was aware they had an 'own occupation' TPD insurance policy, the operation of that policy and how it would respond in her specific circumstances was complicated. If the policy did not respond as expected and as AFCA determined, then the policy would have, in effect, been of little value to the complainant.

In another case study, the complainant held an insurance policy which did not meet their needs, as it did not operate as they thought it would. When the financial firm became aware of this, they did not suggest the complainant cancel the policy or look for a more suitable product with another financial firm, as they did not offer a product with the feature the complainant was seeking.

Case study 2

The complainant purchased an insurance policy from the financial firm on 13 January 2010 after they contacted her following completion of a survey for a funeral plan. Information provided by the complainant suggests that she intended to purchase a funeral (savings) plan. During the call, the financial firm confirmed the policy features and what it covers. The financial firm sent the complainant a welcome pack the following day, with all relevant policy documents. The information provided by the financial firm confirmed that during the call, the complainant was informed the policy was an insurance policy. This was also confirmed by the policy documents sent to the complainant the day after the call. More than 6 years later, on 22 April 2016, the complainant contacted the financial firm with some concerns. One of those concerns was that the premiums had increased, and the complainant was finding it difficult to manage on a disability pension. The other was confirmation as to whether the policy was a funeral (savings) plan or an insurance policy. On 30 May 2016, the financial firm offered the complainant an alternative policy or a change in premium structure. The complainant confirmed during the conversation that she thought she had purchased a funeral plan with a savings feature. The financial firm advised that they do not offer a product which provides this feature. At no point did the financial firm state that the complainant should consider cancelling the insurance and take out a product more appropriate to her needs.

While such a discussion is not strictly required by law, it would have been an appropriate response to the complainant's concern that she had bought a policy that was not what she thought she was buying. To act otherwise was not fair in all the circumstances. The financial firm's failure to engage in this discussion contributed to the complainant maintaining the policy from 30 May 2016, despite not having the features she thought it did. The Financial Ombudsman Service (FOS) considered that because the financial firm did not have that discussion, it was not fair that the complainant held an insurance policy which did not meet her needs. FOS made a determination on 12 October 2018 requiring the financial firm to cancel the policy and refund all premiums paid by the complainant from 30 May 2016 to the date of the determination.

Understanding the details of any insurance policy and how it will respond, in your specific circumstances, to an insured event is crucial for a consumer to determine if the policy will be suitable for their needs. More broadly, understanding how any financial product operates is essential in understanding if it is appropriate or not.

A consumers' ability to give genuine consideration about whether a financial product meets their needs is severely compromised, and can be eliminated altogether, when they are exposed to the unsolicited sales efforts of financial firms.

When these efforts are coupled with predatory sales tactics, or the poor sales conduct identified by ASIC¹⁰ including pressure selling, misrepresentations or omissions and exploiting consumers' vulnerabilities, then there is an even greater chance that the consumer will end up with a product they don't need, can't afford or that does not meet their needs.

These case studies also demonstrate that the financial products provided to the complainants did not perform as they expected. It also suggests that the financial firms did not provide financial products that were fit for purpose, in the context of the individual complainants. These issues form part of the key considerations that we apply to an investigation in determining what fairness in the circumstances looks like.

¹⁰ [ASIC Report 587](#): *The sale of direct life insurance*

5 Consumer credit insurance products are poor value for consumers

Consumer credit insurance products represent extremely poor value

CCI products are a form of add-on insurance which are typically sold with credit cards, personal loans (such as car loans) and home loans. They are considered to be an add-on product as they are sold as an extra to a main purchase, for example a personal loan.

They are marketed and sold as a form of insurance designed to cover situations where a consumer is unable to meet their repayment obligations under their contract because of sickness, injury, disability, death or unemployment.

However, CCI products often have many carve-outs. The regulations¹¹ set out several mandatory exclusions including deliberate injuries or voluntary unemployment. In addition, policies themselves often have further exclusions such as age-related exclusions, pre-existing illnesses or disabilities and categories of employment.

In our experience, CCI products often have many exclusions, which can be complex to interpret or understand. We consider these products represent very poor value as they rarely respond when a consumer needs to make a claim.

In the case study below, the consumer had so many medical conditions that the mortgage protection insurance policy he was sold was essentially of no benefit to him.

Case study 3

The complainant migrated to Australia in 2005 and English was his second language. The complainant obtained a mortgage protection insurance policy through his bank in March 2011. This policy was renewed in 2016. The complainant made two claims under the policy in 2017, both for incapacity relating to medical conditions. The financial firm rejected both claims saying that the medical conditions were pre-existing, therefore excluded from cover under the policy. The complainant does not dispute that the medical conditions were pre-existing, but says he informed the insurer that he had these pre-existing medical conditions when he took out the loan through his bank. AFCA concluded that there was no evidence to suggest that the complainant had been misled however, based on his limited English language abilities, may have misunderstood the cover being offered. AFCA further concluded that based on the complainants' extensive medical history, the policy was clearly of limited value and it is difficult to see how there would be any benefit under the policy for him. AFCA determined in favour of the complainant and said it is fair in the circumstances that the insurer refund the complainant premiums paid from March 2011 to date.

¹¹ R23 of the *Insurance Contracts Regulations 1985*.

ASIC has also identified significant problems with how CCI policies have been sold to consumers¹². Surveillances undertaken revealed:

- CCI products being sold to consumers without their consent or knowledge
- representations made to consumers were potentially misleading
- inducing consumers to purchase of CCI products by using pressure tactics and harassment
- deficiencies in scripts used to sell and promote CCI products

In case study 4, the consumer was not even aware that their mortgage broker had applied for mortgage protection insurance and it wasn't until they received their annual renewal notice that they knew of its existence.

Case study 4

The complainant obtained a home loan through a broker, who was an authorised representative of the financial firm. An insurance application form was submitted electronically by the broker for mortgage protection insurance, however the complainant said that he was not aware that the policy had been applied for, he did not require it and was not aware that it had started. The complainant lodged a complaint with the Financial Ombudsman Service (FOS) asked for a refund of the premium paid for policy. FOS was satisfied based on the information available that the complainant was unaware that the policy had started until he received the annual renewal notice. FOS found that the complainant wanted to cancel the policy as soon as he became aware of it, and based on the information available, had he been aware of it earlier, would have cancelled the policy within the cooling off period. FOS determined in favour of the complainant and said he was entitled to a refund of the premiums paid as it is fair in the circumstances that he be returned to the position he would have been in had he been clearly notified the policy had started.

ASIC's work on CCI found that CCI is poor value for money and CCI sales practices cause consumer harm¹³. This is consistent with our experience in dealing with complaints raised by consumers who have been sold CCI products. More often than not, we find consumers have been sold a CCI product which did not meet their needs, would not have enabled them to claim under the policy and were essentially of no value. We also consider that this approach is inconsistent with the principle of fairness. Financial firms making promises or representations they did not meet or keep, acting dishonestly or unethically. This must be addressed to stop the significant harm posed to consumer.

¹² [ASIC Report 256](#): *Consumer credit insurance: A review of sales practices by authorised-deposit taking institutions.*

¹³ [ASIC Report 622](#): *Consumer credit insurance: Poor value products and harmful sales practices.*

Appendix A – About AFCA

AFCA is a free, fair and independent dispute resolution scheme. AFCA's service is offered as an alternative to tribunals and courts to resolve complaints that individual and small business consumers have with their financial firms. We consider complaints about:

- credit, finance and loans
- insurance
- banking deposits and payments
- investments and financial advice
- superannuation

AFCA's role is to assist consumers to reach agreements with financial firms about how to resolve their complaints. We are impartial and independent. We do not act for either party to advocate their position. If a complaint does not resolve between the parties, we will decide an appropriate outcome.

Decisions made by AFCA can be binding on the financial firm involved in a complaint. We can award compensation for losses suffered because of a financial firm's error or inappropriate conduct. There are other remedies we can also provide for superannuation complaints.