Financial Rights LEGAL CENTRE

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AFCA Approach Consultation Superannuation jurisdiction

Thank you for the opportunity to comment on AFCA's Approach Consultation Superannuation jurisdiction. We support AFCA:

- introducing an Approach to sections 29(6) and 29(7) of the Insurance Contracts Act 1984 (Superannuation) and
- updating its Approach to delayed insurance claims in superannuation.

This submission provides a small number of comments and recommendations on the proposed wording for each of these Approaches.

Approach to sections 29(6) and 29(7) of the Insurance Contracts Act 1984 (Superannuation)

AFCA's treatment of this type of complaint

At page 3, the draft Approach states that:

> *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.*

We support AFCA taking a flexible approach to extending time limits for superannuation complaints, by treating them as non-super complaints. It would be useful for the approach to further clarify the language as to whether this will be in all cases that are outside of the

time frame or whether it is only some instances. If it is the latter, AFCA should set out the criteria for when AFCA will treat super complaints as non-super complaints in this context.

Reviewing the trustee's decision

The draft Approach refers to "applicable Codes of Practice or industry guidance" in its list of what it will look at, at page 3. It would be useful for this section to reference or link to an unlimited list of the Codes and guidance being referred to here. We understand that links can expire over time but it is important for plain English purposes for readers (especially unrepresented readers) be able to more easily understand what is being referenced here.

Relevant failures

If a "relevant failure" occurs in relation to life insurance, an insurer may be able to use a remedy available to the insurer in section 29(6) of the ICA to vary the terms of that contract. These can include misrepresentations made by the insured under the current duty to take reasonable care or a failure to comply with the duty of disclosure, as previously formulated.

The section at page 4 providing further information on what a relevant failure in these two contexts is essentially a reiteration of the legislation, rather than an elaboration on AFCA's approach to determining what is a relevant failure. Whether a relevant failure has occurred is a key area of focus for consumers in their submissions to AFCA. While Financial Rights acknowledges AFCA has an Approach to nondisclosure and misrepresentation it is not clear to what extent that Approach is applicable to superannuation complaints and the matters discussed in this draft approach. Further, that Approach is not cross-referenced in the draft Approach here, nor is it linked to or otherwise made readily available to consumers in this document, and hat Approach contains no examples taken from the insurance-in-superannuation context.

Additional guidance about what would amount to a relevant failure, misrepresentation or non-disclosure is warranted. At a minimum, it would be helpful to reference some of the key concepts from other sections of the *Insurance Contracts Act 1984* and case law that are relevant to what will be considered a misrepresentation or non-disclosure (both before and after the 5 October 2021 reforms commenced). To defend the allegation of a relevant failure, misrepresentation or non-disclosure, complainants may assert:

- they were not aware of the diagnosis or condition;
- their doctor did not tell them about the condition or they had not received a diagnosis; and
- the questions in the application form were broad and vague.

It would be helpful to provide information regarding AFCA's approach to the above common sets of circumstances.

Often the finding of 'stress' or other elements of poor 'mental health' are reasons that an insurer may seek to avoid a policy. Again, further information regarding AFCA's approach to generalised stress and anxiety being a basis for avoiding an insurance policy, would be helpful.

There is also the circumstance where a third party had provided advice to the insured and they relied on this when filling in the form. Consumers may not be aware that assistance or information provided by treating medical professionals regarding their conditions, or advice from financial advisors or insurance brokers when completing applications can be highly relevant to such cases.

Finally, it would be useful to provide information regarding the differences between fraudulent and innocent non-disclosure or misrepresentation as it may be that there is a contentious allegation of fraud underpinning the insurer's proposal to vary a contract of insurance. It is useful to consumers to be aware of the essential requirements needing to be met to make an allegation of fraud. Again, it may be possible to do this by referring and linking to AFCA's existing Approach to nondisclosure and misrepresentation.

The language, scope and effect of the insurer's variation to the contract

We note that the AFCA approach details what an insurer's notice should specify when varying a contract, including when a variation applies a mental health exclusion. The approach references the insurer providing a copy of the underwriting guidelines. This should also include the actuarial or statistical data upon which the underwriting was based, in line with the *Disability Discrimination Act 1992*.

Not inconsistent with other reasonable and prudent insurers

AFCA asserts that the insurer must provide evidence that will allow AFCA to compare the proposed variation to what other 'reasonable and prudent insurers' would have done for similar contracts. The evidence suggested by the approach includes:

- *a statement from an external consultant underwriter*
- *a 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*

First, we would recommend AFCA remove the final point. The requirement in section 29(7) is that the insurer's varied contract position must not be inconsistent with what *other* reasonable and prudent insurers would have done. In our view, the effect of section 29(7) (particularly when read in light of the reference to opinions of "third parties" in the Explanatory Memorandum, as quoted in AFCA's draft approach) is that the insurer must get an opinion from two or more *other* insurers, underwriters or reinsurer. It is unclear how AFCA could ever be satisfied that the statutory criteria in relation to the position of "other" insurers could be met in reliance on a statutory declaration from an employee of the insurer the subject of complaint. The risk of self-serving statements, which AFCA has no power to test under cross-examination or otherwise, is too great.

Secondly, if the insurer provides evidence in line with the above list, it will be effectively impossible for the consumer to challenge the insurer's evidence on these points.

Insurers have the in-house expertise and the resources to obtain this type of evidence easily. In contrast, consumers find it very difficult, if not impossible to obtain this type of evidence. It is hard to find someone with the relevant background and experience who is willing to provide an independent report, and these reports can be very expensive. It is not clear what AFCA's approach to leveling the playing field here is for consumers and ensure that complainants have the opportunity to seek independent expert advice from an underwriter. We would recommend AFCA updates draft this approach to reference its powers to direct financial firms to pay for or contribute to the cost of an independent expert engaged by AFCA to provide advice on this point and provide some guidance as to when this would be required.

The conduct of the insurer and the trustee

The draft Approach states at page 7 that AFCA expects that if insurers are contemplating exercising a remedy under section 29(6) they will need to be transparent with the insured and give them a genuine opportunity to address any allegations before a decision is made.

It is important that the Approach also details that AFCA consider what information was provided to the complainant during the claims process, including the underwriting guidelines and opinion. This should be provided with the procedural fairness letter as a matter of principle. A failure to do so is a breach of procedural fairness.

Case studies

It may be worth including further examples, where the insurer was not able to use section 29(6) and (7), especially ones that align to the issues outlined above under Relevant failures section.

Approach to delayed insurance claims in superannuation

2.2.1 Fair and reasonable

The draft updated Approach states that:

> *Our superannuation complaint determinations address whether the financial firm's decision was fair and reasonable in its operation in relation to the complainant in all the circumstances of the complaint.*

The use of the term "financial firm" makes it unclear if this section is directed to the insurer, fund or both. It may be worth clarifying this.

3.1.1 Delays caused by a financial firm

The draft updated Approach states that:

> *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*

What does AFCA consider to be "quickly"? Does there need to be further guidance here? Realistically, bringing a claim to the attention of the insurer should be done almost immediately upon receiving the claim from the insured.

3.3 Consequences for unreasonable delay

We note that AFCA are proposing to delete the following sentences from the Approach:

> *AFCA cannot award non-financial loss to complainants in the superannuation jurisdiction. This means AFCA cannot award compensation for a complainant's stress or inconvenience caused by unreasonable delay.*

It is not clear why this is being removed. We believe this should remain and a further explanation be provided as to why AFCA cannot award non-financial loss to complaints in the superannuation jurisdiction.

Further, explanation should be provided whether non-financial loss can or cannot be awarded when the fault lies with the insurer not with the trustee.

Kind Regards,

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