

Lead Ombudsman – General Insurance
Australian Financial Complaints Authority
GPO Box 3
Melbourne VIC 3001
by email: consultation@afca.org.au

AFCA Approach Consultation – General Insurance

Thank you for the opportunity to comment on AFCA's Approaches to:

- the duty to take reasonable care not to make a misrepresentation (the **Duty Approach**), and
- non-disclosure and misrepresentation (the **Updated Approach**).

We support AFCA introducing both the Duty Approach and the Updated Approach. This submission provides a small number of recommendations to clarify some of the concepts addressed.

Duty Approach – specific comments

4.2 Certain factors are likely to be relevant in most cases

Expanding upon the burden on insurers and insureds

We support the Duty Approach highlighting two factors listed in section 20B(3) namely:

- how clear and specific the insurer's questions are
- how clearly the insurer communicated to the insured the importance of answering the questions and the possible consequences of failing to do so

This is entirely appropriate given the objective of the duty was to shift the onus on to insurers to be more precise when inducing appropriate information from insureds. As the Explanatory Memorandum highlighted:

Commissioner Hayne noted [the new duty] placed the burden on an insurer to elicit the information that it needs and does not require the consumer to surmise or guess what information might be important to an insurer.¹

We would recommend including a reference in the first paragraph at the top of page 9 to the nature of the burden not requiring the consumer to surmise or guess the information that may be important. This is particularly important in the context of concurrently fulfilling the requirements of section 20B(4) – where for example an insurer is aware or ought to have been aware of particular characteristics or circumstances of the insured such as an insured’s poor understanding of English. Insurers must be confident that customers in these circumstances have understood the question being asked or preferably encouraging insurers avoid use words that may not necessarily be understood or accessible by significant cohorts of Australians.

Type of question

We note that the Explanatory Memorandum also provides examples to support examining the *type* of questions asked

For example, it may generally be more difficult for an insured to

- *compound questions that are open-ended, general or long; or*
- *questions that are difficult to understand or interpret.²*

We therefore recommend AFCA include specific reference to the *type* of question asked as a factor that is expected to be considered in order to provide more specific guidance to readers of the Approach. We note for example that compound questions are used in the case studies in both the updated and new Approach documents – but their compound nature is not explicitly referenced in the document. Doing so would assist the industry, insureds and consumer representatives.

Spelling out expectations of insurers

Further we note that the Approach states at page 9 that:

¹ Para. 2.15 [Explanatory Memorandum, Financial Sector Reform \(Hayne Royal Commission Response\) Bill 2020](#). Also see paras 15.42-44.

² 2.61, [Explanatory Memorandum, Financial Sector Reform \(Hayne Royal Commission Response\) Bill 2020](#)

This is because a consumer should clearly understand the Duty, the consequences of failing to comply with that Duty and the information the insurer requires to assess the risk.

The Explanatory Memorandum states that:

an insurer should give a clear explanation of the duty to take reasonable care not to make a misrepresentation and the consequences of a misrepresentation (including the remedies available to the insurer if the insured fails to take reasonable care) to the insured. This explanation can be given to the insured in the form that the insurer considers to be effective.

While this amounts to much the same thing by implication, we recommend AFCA redraft this paragraph to include wording that refers explicitly (not implicitly) to what the insurer should actually do. This will assist insurers to meet the expectations of the Duty and potentially assist in lowering the number of complaints reaching AFCA.

Case studies

Additional case studies

In 2021, Financial Rights examined 186 decisions from three years of non-disclosure disputes that reached a decision at AFCA and its predecessor the Financial Ombudsman Service (FOS) from 2018 to 2020. We also identified and analysed the instructions of 190 general insurance clients who called our specialist Insurance Law Service regarding non-disclosure disputes over the same period.³

One of the key reasons for doing so was to analyse the issues surrounding the preponderance of claims denials on the basis of non-disclosure. There were a number of clear patterns in the circumstances that kept arising, and the reasons given for non-disclosure.

The number one reason given by AFCA claimants for not disclosing information was a technicality or ambiguously worded question. It is therefore appropriate given this and the new onus being placed on insurers that two of the three case studies in the new Approach centre on the question being asked.

It is also appropriate that a renewal scenario forms one of the case studies. We note this may have to be updated (or not) depending on the outcome of ASIC's appeal against the decision in [Australian Securities & Investments Commission v Auto & General Insurance](#)

³ [AutomatingDisclosure Report FINAL.pdf](#).

[Company Limited \[2024\] FCA 272](#), which centres on the unfair nature of unclear obligations and broad language used in renewal disclosure questions.⁴

It would be also useful to include case studies relating to three further very common scenarios that arise:

- where the timeframe in a question is central to the dispute including where the insured asserts that they believed that their offence, or other event, occurred outside the relevant timeframe;
- where the insured was unaware that there was information that needed to be disclosed including being unaware of existing damage, the condition of a vehicle or property, a licence suspension or medical condition; and
- where insureds who purchased the insurance policy were unaware of information known to a related party, in other words the policyholder's husband, wife or child's driving, insurance claim or criminal history.

Specific comments on case study 1

Case study 1 at page 13 reads:

The insurer had sent a renewal offer. The renewal notice asked if any drivers of the insured vehicle had claims, accidents, thefts or losses in the last 5 years.

The answers to this, and other questions, were pre-completed by the insurer. This was based on information previously provided by the complainant. There were three claims disclosed in a box headed "Claims/Loss".

Following the claim, the insurer identified further claims that were not disclosed. This included two that had occurred in the preceding 12 months.

Based on this, AFCA concluded that it was reasonable for the insurer to decline the consumer's claim.

We are concerned that this case study suggests it is appropriate for an insurer to pre-fill disclosure information with answers which, by definition, are out of date. The insurer is asking a question about claims in a set time period ("the last 5 years") from the renewal disclosure date, which is by definition a different time period than that the subject of the previous disclosure (which was the last 5 years from that date). Financial Rights would argue that the insurer should *not* have pre-filled this answer without specifically asking the

⁴ [24-079MR ASIC appeals Federal Court findings relating to unfair contract term in insurance contracts by Auto & General | ASIC](#).

complainant to update the response to reflect any claims *since* that earlier answer was provided. Pre-filling suggested the insurer already had information about the most recent year, which it in fact did not.

If this case study is to remain unchanged, it would be helpful if AFCA could provide a bit more detail to assist us in understanding AFCA's reasoning. For example, when did the consumer provide the information that the insurer relied on to pre-fill the answers? – were the undisclosed claims made to another insurer or the same insurer? – did the consumer have any vulnerabilities that meant they could not read the pre-completed renewal offer that the insurer was (or should have been) aware of?

Both Duty Approach and Updated Approach

Referencing

The case studies included in both Approaches seem to be related to specific cases – Case Study 1 for example in the Updated Approach includes specific dates, as does Case study 3 in the Duty Approach. If these are in fact referencing specific cases it would be appropriate to provide the case reference number and link for users to more easily find the determinations these decisions are based on.

It would also help if AFCA included references to any case law (if any) it may be relying on or may be of relevance to help inform its approach.

Kind Regards,



Drew MacRae
Senior Policy and Advocacy Officer
Financial Rights Legal Centre