Financial Rights
LEGAL CENTRE

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AFCA Approach to the duty to take reasonable care not to make a misrepresentation – life insurance Consultation

Thank you for the opportunity to comment on the Australian Financial Complaint's Authority's (**AFCA's**) draft Approach to the duty to take reasonable care not to make a misrepresentation – life insurance.

We have had the opportunity to read the submission from the Australian Law Council and support the positions expressed therein. This submission provides comments and recommendations on the proposed wording for this Approach.

3.1 Duty only applies to consumer insurance contracts

Heading

We note that the equivalent heading of the recently finalised General Insurance Approach to the duty to take reasonable care not to make a misrepresentation includes inverted commas around the phrase 'consumer insurance contracts' in the heading to relay the fact that this is a defined term. While a minor issue, it may be useful to ensure consistency to avoid any confusion that may arise from differences between the two documents.

Application to varied etc contracts

We would recommend the following slight amendments to the third paragraph in this section, to more precisely reflect the transitional arrangements in item 37 of Sched 2 to the *Financial Sector Reform (Hayne Royal Commission Response) Act 2020* (Cth) and avoid confusion:

If a contract of insurance entered into before 5 October 2021 is varied on or after that date, the Duty only applies:

- where the variation is by prior express agreement between the insurer and the insured to:
  - increase a sum insured under the contract in respect of one or more of the life insureds or
  - provide one or more additional kinds of insurance cover, and
- to the extent of the expressly agreed variation.

4.2 How does AFCA assess 'taking reasonable care'?

Factors which can be considered in assessing 'taking reasonable care'

We note the reference to "agent" on page 10 in the list of factors of the draft Approach which can be considered in assessing 'taking reasonable care.' While we appreciate this is taken directly from section 20B(3)(e), we recommend AFCA consider inserting "(for example., a broker or financial adviser)" after the word "agent", as these are the terms more commonly used and understood.

Further we note that the final paragraph of this section on page 10 has an equivalent paragraph in the General Insurance Approach but with the noted issues reversed and in a different combination. Our view is that the drafting in this life insurance approach is preferable, because it combines the concept that the list in the Act is not exhaustive with the concept that other factors can (as a logical corollary) be taken into account. At the next update of the General Insurance Approach, we would recommend aligning the two to avoid anybody inadvertently importing any meaning into the difference.

Certain factors are likely to be relevant in most cases

We note that the draft Approach states at page 10:

> *Further, the consumer should not have to guess what is important to the insurer's assessment of the risk.*

The Explanatory Memorandum uses the phrase "guess or surmise":

> *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]

The finalised equivalent General Insurance Approach uses the word "surmise". While neither are incorrect but ideally both would use the phrase "guess or surmise." The different phrasing in the similar Approaches has the potential to suggest a different meaning - which we don't believe is the intent.

4.3 What other things may be relevant?

Overly broad and catch-all questions

With respect to the questions used, the Explanatory Memorandum[2] provides examples to support examining the type of questions asked

> *For example, it may generally be more difficult for an insured to answer:*
>
> - *compound questions that are open-ended, general or long; or*
> - *questions that are difficult to understand or interpret.*

We recommend AFCA also include specific reference to the issue of "compound questions that are open-ended, general or long," as well as other forms of questions that "may be difficult to understand or interpret". This could be included either in this section about overly broad or catch-all questions, or in section 4.2 under the sub-heading "Certain factors are likely to be relevant in most cases".

An example of a compound, complicated and long question that may be difficult to understand is presented in the case study at 6.1: "*Are you experiencing any unexplained symptoms, or are you currently undergoing or waiting for the results of any health-related tests or investigations, or been diagnosed as having 12 months or less to live?*". Below we recommend reconsidering inclusion of this as a case study, given the problematic nature of this question.

[1] 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

5.2 How AFCA decides remedies in complaints about a breach of the Duty

Variation of the contract in another way from the contract start date

The draft Approach details the ability under the Act for an insurer to provide written notice to unilaterally retrospectively vary a contract in another way for a breach of the duty but that this does not apply to:

> *"• a contract with a surrender value (section 29(6))*
>
> *• a contract which provides death benefit cover to an insured (section 29(10)).*"

The relevant language of section 29(10) of *Insurance Contracts Act* is:

> *"a contract with a surrender value, or a contract that provides insurance cover in respect of the death of a life insured".*

First, we note that the reference to section 29(6) in the first dot point should be a reference to section 29(10).

Secondly, we are concerned that using the shorthand "a contract with provides death benefit cover to an insured" rather than the statutory language of "a contract that provides insurance cover in respect of the death of a life insured" may lead to confusion. AFCA has acknowledged that the section 29(10) is not designed to only apply in relation to standalone death cover but applies more broadly to policies that provide death cover "in respect of" the insured even if the policy was not a death benefit policy.[3]

While we accept that this position is reflected in section 6.4, example 3, we nonetheless recommend for clarity that the second dot point be amended in line with section 29(10) to state:

> *"a contract which provides cover in respect of the death of the insured".*

Loss may be recovered in limited cases for fraudulent misrepresentation

The draft Approach states that AFCA will consider whether it is fair in all the circumstances for the claim to be denied in limited cases for fraudulent misrepresentation. The draft notes

[3] See AFCA determination 848983 (31 October 2023).

the three factors referenced in section 31 of the *Insurance Contracts Act*. The draft Approach states that it will consider "at least" these factors, to presumably capture the ability to consider "other relevant matters" as referenced in section 31, we recommend that AFCA reference a further common factor that needs to be considered: the relationship between the claimed condition and the alleged non-disclosed matter. We see matters where the relationship is tenuous to non-existent where say a client has not disclosed mental health issues but is claiming on a heart condition. While this may be picked up in an analysis of the extent of the prejudice the misrepresentation had on the insurer's position, we consider there is value in being more specific.

We therefore recommend a reference to a further factor:

> *"The relationship between any alleged non-disclosed medical condition and the claimed condition."*

6.1 Case study:[4] Duty breached when answering questions about medical investigations and waiting for test result

As noted above, we consider the question posed in this case study is an example of a compound, complicated and long question that may be difficult to understand:[5]

"*Are you experiencing any unexplained symptoms, or are you currently undergoing or waiting for the results of any health-related tests or investigations, or been diagnosed as having 12 months or less to live?*".

This question is long, and it combines at least two quite unrelated topics: unexplained symptoms and health tests and investigations, on the one hand, and a terminal diagnosis on the other; that is, it is a classic (and we would say confusing) compound question. We are concerned that including this as a case study where a breach of the Duty was found incorrectly suggests such a question is not problematic. This issue is exacerbated because the summary of the Ombudsman's findings states that the "insurer's question was clear and unambiguous".

To be clear, we are not here challenging the Ombudsman's determination in this matter per se. We note that the Ombudsman had the advantage of listening to the call recordings, of which they observed "The insurer asked the question clearly. There is no suggestion that the

[4] AFCA Determination 12-25-214381 (11 July 2025).
[5] Cf. 2.61, Explanatory Memorandum, Financial Sector Reform (Hayne Royal Commission Response) Bill 2020.

complainant did not understand the question." Our concern is that the inclusion of this specific question in a general guidance document as an example of a "clear and unambiguous question" may be misleading.

We request AFCA consider either:

1. Expanding the case study slightly to:
    a. Acknowledge the issues with the question (i.e. that it is a compound question and therefore may be confusing to some consumers);
    b. Note that the complainant did not submit to AFCA that she did not understand the question;
    c. Note that the ombudsman, having listened to the call recordings where the question was asked, found it was asked clearly and that the complainant did understand the question, notwithstanding its compound form; and
    d. Qualify the statement that the question was "clear and unambiguous" so that it relates only to the specific findings in this matter (not a general finding about that question in all cases);
2. Turning this from a case study into an example, with the compound question removed and replaced with a more general statement that the insurer asked a question about whether tests were being undertaken; or
3. Removing or replacing this case study altogether.

6.2 to 6.4 - Examples 1, 2 and 3

We note all three examples relate to mental health issues. They both reference AFCA considering the insurer's underwriting guideline but neither references section 46 of the *Disability Discrimination Act* and the need to ensure that the discrimination is "based upon actuarial or statistical data on which it is reasonable" for the insurer to rely on. Further we note that section 46 is not mentioned anywhere in the draft Approach, despite its direct relevance to the issue of disclosure and underwriting.

The recent report from the Life Insurance Compliance Committee Keeping the Promise: Mental Health and Life Insurance Commitments found that life insurers continue to use blanket exclusions or denials when applicants disclose a mental health condition. Almost all relied solely on exclusions rather than exploring alternative ways to manage risk, such as higher premiums, limits, or caps. To be able to rely on the section 46 exclusion from disability discrimination rules, life insurance underwriting must be based on actuarial or statistical data on which it is reasonable rely on. This is an important consumer protection and one highly relevant to matters of disclosure and the duty to not make a misrepresentation.

We recommend that AFCA include a reference to the requirements of section 46 and whether and if so how AFCA considers these requirements in either these examples or elsewhere in the document.

7.2 Useful links

While the Insurance Contracts Act is linked to in this section it would be worth linking the *Explanatory Memorandum to the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020* that introduced these changes, to provide further assistance to readers.

Kind Regards,

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