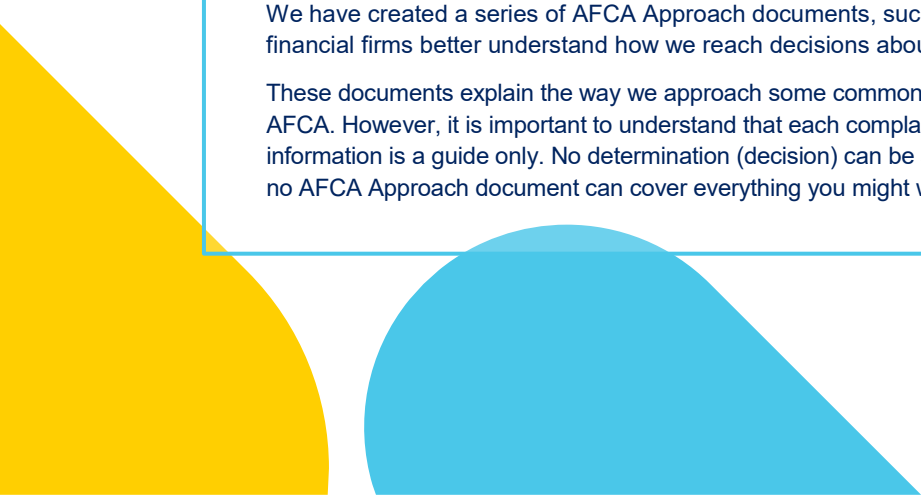


The AFCA Approach to proximate cause of damage

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We have created a series of AFCA Approach documents, such as this one, to help consumers and financial firms better understand how we reach decisions about key issues.

These documents explain the way we approach some common issues and complaint types that we see at AFCA. However, it is important to understand that each complaint that comes to us is unique, so this information is a guide only. No determination (decision) can be seen as a precedent for future cases, and no AFCA Approach document can cover everything you might want to know about key issues.

1. Purpose of this approach

1.1. Scope

The purpose of AFCA's Approach documents is to explain the way we approach common issues and complaint types. This document sets out our approach to assessing the proximate cause of damage in a general insurance claim. We have included examples in relation to ground movement claims as this is a common type of dispute at AFCA.

This approach is designed to be consistent with AFCA's obligation to deal with complaints in an independent, efficient, and timely way and to make decisions that are fair in all the circumstances. Importantly each complaint that comes to us has a unique set of facts and this document is only a guide to how we will approach this issue.

1.2. Who should read this document?

This document is intended to assist:

- financial firms, consumers and consumer representatives who have an insurance complaint at AFCA that involves issues of proximate cause
- anyone who wants to understand how AFCA applies legal principles, industry codes and good industry practice when considering complaints where the issue of proximate cause is raised.

1.3. Summary

In a claim under a general insurance policy, the term 'proximate cause' is used to describe whether an event is the cause of the loss or damage. For example, if a tree branch falls during a storm and causes damage to a house roof and water then enters the house and causes further damage, the proximate cause of the damage is the storm.

Many insurance complaints lodged with AFCA are in relation to an insurer declining a claim because the insurer says the cause of the loss was not an insured event under the policy. This approach document explains how AFCA assesses the proximate cause of loss. This approach document includes some examples; however, the principles are applicable to a range of complaints about insurance claims that AFCA considers. The decision tree set out in section 6 shows how decisions involving proximate cause are made.

2. Jurisdiction

2.1. AFCA's purpose

AFCA is the independent external dispute resolution (EDR) scheme for the financial services sector. AFCA's purpose is to provide fair, independent and effective solutions for financial disputes. We do this by providing fair dispute resolution services. We also work with financial firms to improve their processes and standards of service to minimise future complaints. In addition to resolving financial complaints, AFCA identifies, resolves and reports on systemic issues and serious contraventions of the law.

2.2. AFCA's jurisdiction

AFCA can consider complaints against financial firms that are members of AFCA.

When a complaint is not resolved by agreement, negotiation or conciliation, AFCA will make a decision. Our decision reflects what is fair in all the circumstances having regard to legal principles, applicable industry codes or guidance, good industry practice and previous decisions of AFCA or predecessor schemes (which are not binding).¹

When assessing the conduct of a financial firm we have regard to the law, codes, and standards of industry practice that were in place at the time of the conduct. For general insurance complaints, we will generally have close regard to the terms and conditions of the policy.

We may decide that a financial firm must compensate a consumer for direct financial loss, indirect financial loss or non-financial loss.² We may also decide that a financial firm is required to take, or refrain from taking, particular actions. If a consumer accepts our decision, the financial firm is bound by that decision.³

Fair in all the circumstances

Our decisions are intended to reflect what is fair in the circumstances of each complaint. This includes providing a fair outcome in cases where we find an error or breach of the law has occurred.

In assessing what is fair, we apply a standard of fairness which focuses on fair dealing, fair treatment and fair service. This allows us to assess the conduct of a financial firm over the life cycle of the firm's relationship with its customer.

¹ See AFCA Rule A.14.2.

² See AFCA Rule D.3.

³ See AFCA Rule A.15.3.

The primary focus of our investigation is to assess whether the financial firm breached its obligations to the consumer. However, we also consider the conduct of the consumer when determining a fair outcome.

3. In detail

3.1. When is the 'proximate cause' of a loss relevant?

A complainant must generally be able to show the loss they suffered was caused by an event they are covered for under the policy (insured event).

This is commonly described by AFCA as establishing a valid claim.

In reviewing this issue, AFCA will consider whether the loss was proximately caused by an insured event. This means a complainant must show an insured event was the proximate cause of the claimed loss.

There may be cases where the complainant has established a valid claim but the insurer says the loss was caused by an event which is excluded under the policy. In that case, the insurer must show the proximate cause of the loss was the excluded event.

Many insurance disputes lodged with AFCA raise this issue and in resolving the dispute AFCA must determine the proximate cause of the loss. This often requires the consideration of expert evidence, which is commonly provided by insurers, and sometimes by complainants. AFCA will ensure that all expert evidence submitted is exchanged with the other party, and will critically review the expert evidence, in making a decision about what is fair in the circumstances.

3.2. What is 'proximate cause'?

In a claim under a general insurance policy, the term 'proximate cause' is used to describe whether an event is the cause of the loss or damage. The proximate cause of a loss is the *dominant, effective or operative cause*. It does not have to be the first, the last or the only cause.

It is a question of fact that depends on the circumstances of each case. It requires a common-sense evaluation of the evidence.

If there are several causes, each should be examined to determine whether it is a dominant, effective or operative cause of the loss. For example, if one cause would have caused the loss on its own, and the other cause would not have caused the loss without the first, then the first is the proximate cause.

It is possible to have more than one proximate cause of a loss. However, in most cases, there will be one proximate cause.

3.3. What if there are multiple proximate causes?

In some cases, there is more than one proximate cause of a loss. This is when more than one cause is identified, and each cause contributed nearly equally to the loss. In these cases, the proximate causes are often interdependent.

If one cause clearly had a greater influence on the loss than the other, then it is the proximate cause.

When there are multiple proximate causes of a loss, the outcome of the dispute will depend on the policy wording. For instance:

- if one of the proximate causes is an excluded event under the policy (e.g. wear and tear) – the insurer can deny the claim regardless of whether the other proximate cause is an insured event under the policy (e.g. storm)
- if one of the proximate causes is an insured event under the policy and the other proximate cause is not excluded under the policy – the insurer is liable for the claim.

The first example above is commonly referred to as the *Wayne Tank* principle. This refers to an English court case that examined this issue. This principle applies in Australia and has been referred to in Australian cases.

However, AFCA will **only** apply the *Wayne Tank* principle if:

- we are satisfied there are multiple proximate causes to a loss, and
- one of the causes of the loss falls within an exclusion in the policy that applies to the insured event.

If we apply the *Wayne Tank* principle we would find that the insurer need not pay the claim.

Example

A policy holder lodges a claim with their insurer for water inundation damage to their home. This water included an almost equal combination of:

- stormwater run-off (which is covered under the insured event of storm), and
- water that escaped from the nearby river (which is floodwater and is a general exclusion under the policy).

This means there were two proximate causes of the loss:

- the stormwater run-off, which is insured, and
- the floodwater, which is excluded under all sections of the policy.

The *Wayne Tank* principle applies to this example. There are two proximate causes of the loss which are interdependent. One of them (floodwater) engages an exclusion that applies to the covered event (storm). This means the insurer can deny the claim.

We consider that this is a fair outcome because the policy has been designed specifically to exclude damage caused by floodwater.

3.4. What if there are independent proximate causes?

There may be situations when there is more than one type of loss claimed following an event, and the losses have independent proximate causes. In these situations, the losses are treated separately, and the approach is to identify the proximate cause of each type of loss.

The following example shows how this was applied in a court case.

Example⁴

The insured property was inundated with water twice. The first was by an insured event (storm water run-off) which inundated the property up to a certain level. The property was then inundated by an excluded event (flood) which caused further damage as the water in the property reached a higher level.

The damage caused by the initial storm water run-off was covered. This is because that water inundation caused a certain amount of loss independent of the subsequent flood. Therefore, it was the only proximate cause of that loss.

The further damage that occurred by the floodwater was not covered. This is because the proximate cause of that further loss was flood, which was an excluded event.

3.5. How is our approach fair?

AFCA's approach has regard to relevant legal principles. When determining insurance disputes we must do what is fair in all the circumstances. AFCA considers this is fair because:

- the meaning of proximate cause is well settled in law
- the interaction between proximate cause and insurance policies has been in place for a long time
- the meaning of proximate cause should be clear and transparent to the parties
- the application of the proximate cause principles to each case will be a question of fact – this provides sufficient flexibility as the application of the principles will be based on the individual circumstances of a case.

3.6. Claims involving ground movement or wear and tear

AFCA often considers disputes involving the proximate cause of loss where ground movement or wear and tear are a factor. A common issue in dispute is whether the

⁴ *Elilade Pty Ltd v Nonpareil Pty Ltd* [2002] FCA 909

proximate cause is an insured event (e.g. a leaking pipe or a storm) or normal ground movement or wear and tear (which are generally excluded).

While expert evidence is often provided in these disputes, it is not always consistent. AFCA will critically analyse the expert reports, along with all the other information, to identify which information (if any) is persuasive.

For example, in ground movement complaints, the following facts will be relevant to consider when evaluating any conflicting expert evidence, and an expert who has considered most of these factors is likely to be more persuasive:

- the age of the property
- the type of soil
- whether the property has a history of movement damage (e.g. previous repaired cracks)
- the surface drainage and vegetation
- the event in question (i.e. the location of any leak, its volume and its proximity to the damage)
- the extent of damage.

4. Context

4.1. Case studies

The case studies below are based on determinations by an AFCA predecessor scheme, the Financial Ombudsman Service (FOS). While previous determinations (by AFCA or by its predecessor schemes) are not binding precedents, where relevant they will inform AFCA's approach to an issue.

Case study 1 – Wear and tear caused by vibrations from an external source (Case number: 456177)

The property was damaged by vibrations from nearby major roadworks. The insurer sought to rely on exclusions in the policy for wear and tear and inherent defects. The decision maker found that the external vibrations were the proximate cause of the damage and the wear and tear exclusion did not apply.

[You can read the full determination here](#)

Case study 2 – Policy required loss to occur within 72 hours of an insured event (Case number: 675713)

The policy provided coverage for accidental loss and leaking pipes, as long as the loss occurred within 72 hours of the "event". The proximate cause was confirmed to be leaking pipes. The insurer did not meet the required onus to establish the loss did

not occur within the 72-hour period. AFCA made a determination in favour of the complainant and required the insurer to accept the claim.

[You can read the full determination here](#)

Case study 3 – Proximate cause of the loss was impact and not ammonia contamination (Case number: 688073)

The policy provided accidental damage cover with a general exclusion for ammonia contamination. A pipe carrying ammonia was struck and damaged by a forklift, releasing ammonia onto produce, causing loss and damage. The proximate cause of the loss was found to be the impact from the forklift, not the ammonia contamination. The insurer was liable for the claim subject to the policy limits.

[You can read the full determination here](#)

Case study 4 – Proximate cause of the loss was storm and the exclusions for lack of maintenance, gradual deterioration and defects, did not apply (Case number: 723365)

The policy provided cover for accidental damage with specific exclusions for lack of maintenance, gradual deterioration and defects. Expert evidence was that a storm contributed to the loss. The insurer did not meet its onus to show that other factors were the proximate cause of loss and damage. The insurer was liable for the claim.

[You can read the full determination here](#)

Case study 5 – Proximate cause of the damage was a leaking pipe so the ground movement exclusion did not apply (Case number: 707124)

The policy covered accidental damage, and excluded cover for damage caused by ground movement. The complainant's claim was for damage caused by ground movement, which was caused by water leaking from pipes.

This determination sets out AFCA's approach to ground movement exclusions which apply to ordinary ground movement. It does not apply to ground movement caused by an insured event (such as water leaking from pipes). The insurer cited a court judgment (*Guastalegname v Australian Associated Motor Insurers Limited* [2017] VSC 420) which found that ground movement exclusions apply to any ground movement, even if it is caused by an insured event.

AFCA's rules require us to do what is fair in all the circumstances, having regard to legal principles and previous relevant determinations. In this case, the fairest outcome was to apply AFCA's approach because:

- the policy covered damage caused by leaking pipes. Damage caused by leaking pipes often involves ground movement. If the ground movement

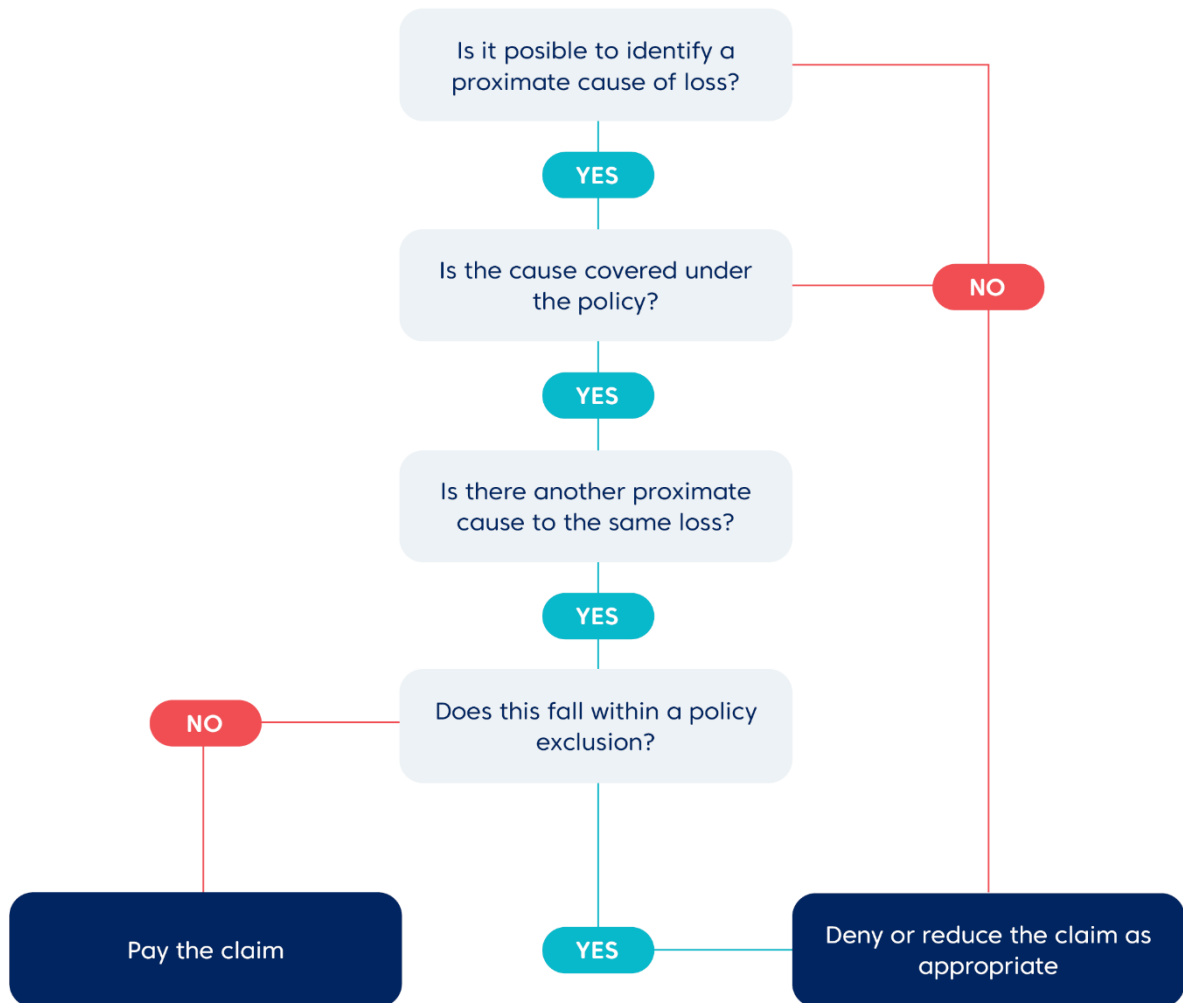
exclusion applied to ground movement caused by leaking pipes, it would severely limit the policy's cover for damage caused by leaking pipes.

- the policy covered some damage caused by landslide and subsidence, which are types of ground movement. This was inconsistent with the insurer's argument that the ground movement exclusion applied to all types of ground movement.
- the insurer's position was that if water leaking into soil caused it to contract, collapse, or be washed away, the resulting damage would be covered. However, if water leaking into soil caused it to expand, the resulting damage would be excluded from cover. This would lead to unfair and arbitrary outcomes.

AFCA decided that the insurer was not entitled to apply the exclusion for ground movement and was required to accept the claim.

[You can read the full determination here](#)

5. Decision tree



6. References

6.1. Definitions

Term	Definition
Consumer/ complainant	An individual or small business that has lodged a complaint with AFCA
Financial firm	An organisation or individual member of AFCA
AFCA	Australian Financial Complaints Authority

6.2. External resources

Document	Link
Rules	http://www.afca.org.au/rules
Austlii	www.austlii.edu.au
<i>Wayne Tank and Pump Co Ltd v Employers Liability Assurance Group</i>	Not available
<i>Elilade -v- Nonpariel Pty Ltd (2002) FCA 909</i>	Available on the Austlii website here