

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

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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 At a glance

1.1 Scope

This document sets out how AFCA approaches life insurance complaints that involve sections 29(6) and 29(7) of the *Insurance Contracts Act 1984* (Cth) (ICA).

There are some important differences between how AFCA approaches superannuation complaints and non-superannuation complaints.

This document covers only superannuation complaints.

Appendix A sets out more general guidance about how AFCA determines superannuation complaints.

1.2 Summary

If a relevant failure occurs in relation to a contract of 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. 'Relevant failure' is defined in section 27AA of the ICA and broadly covers:

- a misrepresentation made by the insured where they have breached their duty to take reasonable care not to make a misrepresentation (for consumer insurance contracts)
- a failure by the life insured to comply with the duty of disclosure
- a misrepresentation made by the insured or life insured to the insurer before the contract was entered into.

The remedy in section 29(6) of the ICA allows the insurer to retrospectively vary the contract from the date the contract was entered into to place the insurer in the position they would have been in if the relevant failure had not occurred— see section 29(9) of the ICA. For example, an insurer might vary a contract of insurance by placing an exclusion on the cover from the start of the contract. This can be significant, because a variation might mean that an insured member, who thought they held life insurance cover without any exclusions, may have an exclusion retrospectively imposed on their cover.

Section 29(7) of the ICA places a restriction on an insurer exercising this remedy. It says that the position of the insurer under the varied contract '*must not be inconsistent with the position*' of other reasonable and prudent insurers had they entered into a similar contract. Section 29(8) sets out when a contract is similar to another contract of life insurance.

The onus is on the insurer exercising the remedy to show it has met this requirement. AFCA expects the insurer to provide clear evidence about how it has met the requirements of sections 29(7) and (8) of the ICA.

Section 29(6) of the ICA does not allow an insurer to vary a contract with a surrender value, or a contract that provides insurance cover in respect of the death of the life insured – see section 29(10) of the ICA.

AFCA's treatment of this type of complaint

Generally, AFCA will treat complaints about the application of the remedy to superannuation insurance cover as superannuation complaints. We will join the insurer to the complaint and consider the superannuation trustee and insurer's decisions about the cover. 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.

Reviewing the insurer's decision

In reviewing the insurer's decision and conduct, AFCA may consider whether the insurer unfairly and/or unreasonably:

- decided to exercise the remedy under section 29(6) of the ICA
- applied a variation inconsistent with other reasonable and prudent insurers
- declined a claim on the basis of the varied contract
- did not act in good faith when investigating whether the insured member complied with their duty to take reasonable care not to make a misrepresentation / duty of disclosure / made a misrepresentation
- did not act in accordance with the law, applicable Codes of Practice or other industry standards and guidance.

Reviewing the trustee's decision

AFCA will also look at the decisions and conduct of the trustee and whether they have unfairly and / or unreasonably:

- agreed with the position of the insurer
- not done everything that is reasonable to pursue an insurance claim for the benefit of the insured member, if the claim has a reasonable prospect of success
- not complied with applicable Codes of Practice or industry guidance.

2 In detail

2.1 Assessing complaints involving section 29(6) of the ICA

When assessing complaints involving section 29(6) of the ICA, AFCA generally conducts its investigation by reviewing:

- whether there been a relevant failure

- whether the insurer has acted in accordance with the other provisions of section 29 of the ICA
- the language, scope and effect of the insurer's proposed variation to the contract
- whether the proposed varied position is consistent with the insurer's own underwriting guidelines and practices
- whether the proposed variation is inconsistent with what other reasonable and prudent insurers would have done for similar contracts
- whether the proposed varied position allows the insurer to decline a claim
- the conduct of the insurer in investigating any relevant failure and exercising the remedy in section 29(6) of the ICA
- the decision and conduct of the superannuation trustee in relation to the insurer's exercise of the remedy

Relevant failures

If AFCA receives a complaint involving an insurer applying the remedy in section 29(6) of the ICA on cover that started or was varied on or after 5 October 2021, then AFCA will consider if a relevant failure has occurred. If an insurer cannot show that a relevant failure occurred, then it cannot use section 29(6) of the ICA.

If AFCA receives a complaint involving cover that started before 5 October 2021, then AFCA will examine whether the complainant has failed to comply with the duty of disclosure or made a misrepresentation, as relevantly expressed in the ICA, as at the relevant time. An insurer must show either of these occurred to use section 29(6) of the ICA.

Consistent with the rest of section 29 of the ICA

Section 29(1) of the ICA says the remedies in that section, including section 29(6), does not apply if the insurer would have entered into the contract even if the failure had not occurred or if the failure was in respect of the date of birth of one or more of the life insureds.

Section 29(6) of the ICA can only be used '*if the insurer has not avoided the contract or has not varied the contract under subsection (4)*'. This means that if the insurer has used another remedy in section 29 of the ICA, it cannot vary the contract under section 29(6) of the ICA.

For example, if an insurer determines there has been a relevant failure, it cannot apply section 29(4) of the ICA to reduce the sum insured and also apply section 29(6) of the ICA to vary the terms of the same contract. It must elect one remedy.

An example of this is set out in case study 1 below.

Additionally, an insurer cannot use section 29(6) to vary an insurance contract that provides cover for death or a contract with a surrender value – see section 29(10) of the ICA.

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

Section 29(6) of the ICA requires an insurer to give the insured written notice of its variation to the contract.

AFCA expects this written notice to clearly specify the language, scope and effect of the insurer's variation to the contract. This means that the reader should understand:

- which cover the variation applies to (in the event of multiple covers)
- the effect of the variation
- the language of the variation to the contract.

For example, if an insurer exercises a remedy to vary a contract under section 29(6) of the ICA to apply a mental health exclusion, the insurer's notice should specify:

- whether the variation applies to total and permanent disability (TPD) cover and income protection (IP) cover, or whether it just applies to one or the other
- that the variation to the contract to apply a mental health exclusion takes effect from the start of the contract; and
- the exact language of the mental health exclusion so the life insured can reasonably know which conditions are and are not covered.

AFCA expects insurers to clearly communicate the above to the life insured, in writing. We also expect insurers to be able to prove this in line with our [Approach to proof of despatch](#).

Section 29(6) of the ICA also anticipates that the remedy will only be exercised *'in such a way as to place the insurer in the position (subject to subsection (7)) in which the insurer would have been **if the relevant failure had not occurred**'* (emphasis added by AFCA).

This means that the variation should reflect the position the insurer would have been in had the relevant failure not occurred. AFCA will require an insurer to explain this position in a statutory declaration from an appropriately qualified person.

For example, an insurer says there was a relevant failure because an insured member made a misrepresentation about their previous mental health history. The insurer applies section 29(6) of the ICA to impose a mental health exclusion on the insurance cover. In these circumstances, AFCA expects the insurer to provide a copy of the underwriting guidelines in effect at the relevant time, together with a statutory declaration from an underwriter that sets out how those guidelines would have been applied.

This also means that an insurer's variation must be connected to the relevant failure. For example, if an insured member failed to disclose a previous neck injury, then the insurer cannot vary the contract to apply a mental health exclusion if there is no connection between the neck injury and the mental health exclusion.

Not inconsistent with other reasonable and prudent insurers

The remedy in section 29(6) of the ICA can only be exercised to the extent it complies with section 29(7) of the ICA which states:

- (7) The position of the insurer under a contract (the relevant contract) that is varied under subsection (6) must not be inconsistent with the position in which other reasonable and prudent insurers would have been if:
 - (a) they had entered into similar contracts of life insurance to the relevant contract; and
 - (b) there had been no relevant failure in relation to the similar contracts.

Section 29(8) of the ICA also provides some relevant guidance on the phrase 'similar contract' used in section 29(7):

- (8) For the purposes of subsection (7), a contract of life insurance (the similar contract) is similar to another contract of life insurance (the relevant contract) if:
 - (a) the similar contract provides insurance cover that is the same as, or similar to, the kind of insurance cover provided by the relevant contract; and
 - (b) the similar contract was entered into at, or close to, the time the relevant contract was entered into.

Therefore, to demonstrate the requirement in section 29(7) of the ICA has been met, an insurer needs to provide evidence that will allow AFCA to compare the proposed variation to what other 'reasonable and prudent insurers' would have done for similar contracts. This comparative analysis does not require the proposed variation to be the same as other insurers, because the standard is 'not inconsistent', which is a lower threshold than 'same'.

Evidence to support comparative analysis can be:

- 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.

Such a statement or declaration should outline the person's experience, knowledge and / or training, and explain why they have the relevant expertise and knowledge to

comment on what *other* reasonable and prudent insurers would have done at the time the contract started.

In the case of a variation to impose an exclusion, AFCA requires evidence of the specific wording which would have been applied by other reasonable and prudent insurers.

This expectation is consistent with paragraph 1.118 of the explanatory memorandum to the ICA:

When an insurer is endeavouring to establish whether the variation is or is not inconsistent with how other reasonable prudent insurers would have varied a similar contract, an insurer would generally be required to seek a view from one or more third parties as to what (sic) other reasonable or prudent insurers would have acted. These third parties may include but would not be limited to underwriters.

- Underwriters normally have a good understanding of the development of life insurance products in the market place, this understanding would enable them to make judgments and decisions based on what a reasonable and prudent insurer would have been likely to have done at the time the relevant contract was entered into.

An example of how this applies in practice is set out in case study 2 below.

Claim declines

If an insurer has been able to demonstrate that it is entitled to vary a contract of insurance under section 29(6) of the ICA, AFCA will examine whether this allows an insurer to decline a claim (if the insurer has decided to do so).

Often the decision to decline a claim may follow the decision to exercise the remedy under section 29(6) of the ICA; however, this is not necessarily the case. An insurer may decide to exercise a remedy under section 29(6) of the ICA to apply an exclusion retrospectively but the relevant claimed condition does not fall within the scope of that exclusion.

The conduct of the insurer and the trustee

AFCA expects that if insurers are contemplating exercising a remedy under section 29(6) of the ICA, they will be transparent with the insured member about any investigation about a relevant failure and give them a genuine opportunity to address any allegations before a decision is made.

AFCA expects that trustees will exercise sufficient review of their insurer's actions to be satisfied they are treating insured members fairly and reasonably and are providing members with substantive procedural fairness.

2.2 AFCA's decision-making powers

AFCA's decision-making framework for superannuation complaints is set out in Appendix A. This framework applies to complaints about section 29(6) of the ICA, where insurance cover is provided through a superannuation fund.

Broadly speaking, AFCA may vary or set aside a decision if it finds the insurer has:

- incorrectly applied section 29(6) of the ICA; or
- not shown it is entitled to apply the remedy in section 29(6) of the ICA.

Examples of how this might apply in practice include:

- AFCA *varying* the terms of a retrospective exclusion applied if AFCA determines that the exclusion applied is inconsistent with the position of other reasonable and prudent insurers
- AFCA *setting aside* the insurer's decision to retrospectively apply an exclusion and substituting its own decision to not retrospectively apply an exclusion if the insurer cannot show it would have applied an exclusion had a misrepresentation not been made to it
- AFCA *setting aside* the insurer's decision to decline a claim based on a complainant's claimed condition falling within the scope of a retrospective exclusion and remitting the matter to the insurer to reconsider if AFCA finds the retrospective exclusion did not cover the claimed condition.

AFCA will also examine the trustee's decision in relation to the insurer's decision to apply section 29(6) of the ICA. Most commonly this will be the trustee's decision to either agree or disagree with the insurer's decision to apply section 29(6) of the ICA. However, AFCA can also examine the conduct of the trustee in relation to its decision.

3 Context

3.1 Case studies

Case study 1 – inconsistent remedies

AFCA received a superannuation complaint about an insurer applying section 29(4) and section 29(6) of the ICA. The insurer said the complainant failed to declare a history of living with mental health issues.

The insurer sought to apply section 29(4) to reduce the sum insured under the life insurance contract. It also sought to apply section 29(6) to vary the contract by retrospectively placing a mental health exclusion on the life insurance contract from the beginning of the contract.

AFCA issued a preliminary assessment, which identified the insurer could only apply section 29(6) or section 29(4) of the ICA. In the circumstances of this complaint, this

meant the insurer could reduce the sum insured but that it could not also apply the retrospective mental health exclusion.

Case study 2 – section 29(7) of the ICA satisfied

A complainant lodged a superannuation complaint with AFCA about an insurer applying section 29(6) of the ICA. The complainant had lodged IP and TPD claims with the insurer. The IP claim was made based on the complainant living with depression. The TPD claim was based on the complainant living with depression, anxiety and chronic fatigue.

During the claim investigation, the insurer decided the complainant misrepresented their mental health history when they applied for cover and decided to vary the contract by applying a retrospective mental health exclusion under section 29(6) of the ICA. The insurer said this retrospective exclusion effectively defeated the TPD and IP claims and denied the claims on this basis. The trustee agreed with the insurer's decision. These were the decisions under review in these joined complaints.

Having accepted the complainant had misrepresented their mental health, the AFCA decision maker was satisfied the insurer had met the requirements under section 29(7) of the ICA, to support the retrospective application of the exclusion.

The insurer provided significant evidence in support of its position in this complaint.

This evidence was a statutory declaration from the insurer's head of underwriting risk and strategy, setting out their research into mental health exclusions in the life insurance market. It included the language used in mental health exclusions by four insurers and six reinsurers. The insurer also provided a letter from a head of underwriting at a reinsurer, which set out the language used in mental health exclusions by five difference insurers.

Based on this evidence, the AFCA decision maker was satisfied that the language of the mental health exclusion sought to be applied by the insurer was not inconsistent with other reasonable and prudent insurers. Therefore, the AFCA decision maker was satisfied with the application of section 29(6) and section 29(7) of the ICA.

3.2 References

Definitions

Term	Definition
complainant	A person who has lodged a complaint with AFCA
insured or life insured	A person whose life is insured under a contract of life insurance
relevant failure	A defined term under section 27AA of the ICA

Term	Definition
IP claim	A claim for income protection insurance benefits
TPD claim	A claim for total and permanent disability insurance benefits

Useful links

Document type	Title / Link
AFCA Rules	www.afca.org.au/about-afca/rules-and-guidelines
Act	<i>Superannuation Industry (Supervision) Act 1993</i> (Cth) https://www.legislation.gov.au/Details/C2023C00363
Act	<i>Insurance Contracts Act 1984</i> (Cth) https://www.legislation.gov.au/Details/C2022C00015
Explanatory Memorandum	<i>Insurance Contracts Amendment Bill 2013 – Explanatory Memorandum</i> https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2F4984_ems_95fdc46f-4ee2-4dd1-8357-bac9536f7b5b%22

Appendix A – AFCA’s superannuation jurisdiction

What are AFCA’s remedial powers for superannuation complaints?

Division 3 of the *Corporations Act 2001* (Cth) sets out additional provisions which relate to AFCA’s superannuation jurisdiction. These provisions impact the way AFCA determines superannuation complaints and the remedial powers it exercises.

When an AFCA decision maker determines a superannuation complaint, they have all the same powers, obligations and discretions of the trustee (or other decision maker, including an insurer) whose decision or conduct is being reviewed.

An AFCA decision maker can only make a determination to place the complainant (as nearly as practicable) in a position where the unfairness and / or unreasonableness no longer exists.

In addition, an AFCA decision maker must not do anything contrary to law, the insurance contract or the governing rules of the fund.

When an AFCA decision maker determines a superannuation complaint, they step into the shoes of the superannuation trustee, with the benefit of all the information provided.

Reviewing decisions (and related conduct)

If the AFCA decision maker is satisfied that the superannuation trustee or insurer’s decision (or related conduct) operated fairly and reasonably in relation to the complainant in the circumstances, the AFCA decision maker must affirm it.

However, if the AFCA decision maker is not satisfied and considers there is some unfairness or unreasonableness in the operation of the superannuation trustee or insurer’s decision, then the AFCA decision-maker can take one of the following remedial actions:

- vary the decision
- set aside the decision and substitute their own decision; or
- set aside the decision and send the matter back (remit it) to the trustee and insurer to make a new decision in accordance with AFCA’s directions.