



Insurance Council  
of Australia

22 May 2023

**Attention:** Emma Curtis  
Lead Ombudsman - Insurance  
Australian Financial Complaints Authority  
GPO Box 3  
Melbourne VIC 3001

Sent by email: [REDACTED],

cc: [consultation@afca.org.au](mailto:consultation@afca.org.au), [REDACTED], [REDACTED],  
[REDACTED]

Dear Emma,

## AFCA – CONSULTATION ON CHANGES TO AFCA RULES AND OPERATIONAL GUIDELINES

Thank you for inviting the Insurance Council of Australia (Insurance Council) and its members to comment on proposed updates to AFCA Rules and Operational Guidelines. We also appreciated AFCA's presentation on the consultation to run through the proposed changes prior to submissions being due.

Our members support refinement to AFCA Rules and Operational Guidelines to bring to life a number of the recommendations from the 2021 Independent Review of AFCA. We are pleased to see an independent consultant has been engaged to assist AFCA with the technical drafting aspects of this work.

Our members welcome an updated AFCA forward-looking review mechanism that achieves the Independent Reviewer's ambition of enhancing the mechanism's visibility, accessibility and independence, as well as operating as an integrated process that allows for an informal review before any escalation to a formal review.

Our members also welcome AFCA's remit being adjusted to improve overall efficiencies while also maintaining a consumer's ability to access AFCA.

We provide our detailed comments and suggestions in the **Attachment** to this letter. Our feedback is focused on the proposed adjustments of significance to general insurers.

We would welcome the opportunity to discuss our feedback with you. We would also be happy to assist with coordinating a discussion between AFCA, AFCA's independent consultant, the Insurance Council and a smaller group of members.

If you have any queries, please feel free to contact me or Ai-Lin Lee, Senior Policy Advisor, Consumer Outcomes at [REDACTED] or [REDACTED].

Yours sincerely

**Andrew Hall**

CEO and Executive Director

## ATTACHMENT: INSURANCE COUNCIL OF AUSTRALIA FEEDBACK TO AFCA – CONSULTATION ON CHANGES TO AFCA RULES AND OPERATIONAL GUIDANCE

### 1. Excluding paid representatives and complainants who engage in unreasonable conduct (Proposals 1 and 2)

- 1.1 AFCA proposes to amend Rule A.4.1 and introduce new Rules A.8.4-A.8.6 and B.6 to exclude for up to 12 months:
- (a) complainants who engage in unreasonable complainant conduct; and
  - (b) paid representatives when the paid representative is operating unlawfully without a licence or engaging with AFCA in a way that does not facilitate the resolution of a complaint. This seeks to implement Independent Review recommendation 2.

Supporting commentary is provided by AFCA in the draft updated Operational Guidelines.

#### Definition of Paid representative

- 1.2 Operational Guideline A.8.4 (page 47) states ‘A Paid representative is defined as a person (other than an accountant who is a member of a specified accounting body or a lawyer with a current practising certificate) who may receive financial remuneration for acting for the complainant in relation to their AFCA complaint. (This doesn’t apply to some accountants and lawyers because they are subject to professional standards that are monitored by a professional body.)’
- 1.3 Our members welcome consideration of whether the definition of ‘paid representative’ is sufficiently broad for the range of parties who might not act ‘in the best interests of a complainant’ for the reasons described in the proposed updated Rules.
- 1.4 For example, our members would welcome confirmation the definition captures the conduct of representatives who might not receive a direct payment to act on behalf of the complainant - for instance claims recovery agents, disaster chasers, etc – who may receive a percentage cut of any compensation awarded by AFCA or some other financial benefit if a complaint is lodged at AFCA against the insurer.

#### Paid representatives who might phoenix

- 1.5 Our members are interested in whether AFCA has contemplated scenarios when a paid representative might phoenix. For example, our members anticipate there might be individuals who set up a new corporate entity to be able to gain access to AFCA while an exclusion is in place.
- 1.6 We welcome AFCA reviewing its proposed Rules to ensure they are capable of responding to this type of scenario.

#### Duration of the ban for paid representatives

- 1.7 Our members note an exclusion period of up to 12 months is being proposed by the updated AFCA Rules.
- 1.8 Our members are interested in whether AFCA has explored the possibility of an exclusion mechanism that is sufficiently scaled to allow for greater flexibility and discretion to respond to different situations involving the conduct of paid representatives.
- 1.9 For example, might there be an option to permanently exclude a paid representative who seriously takes advantage of a vulnerable customer and this significantly impacts their situation, or to respond to repeated behaviour and exclusions from AFCA (e.g. a third strike out rule).

### Complainants who might be vulnerable

- 1.10 While we acknowledge the utmost importance of safeguarding the occupational health and safety of AFCA staff, our members wish to draw to AFCA's attention, some potential considerations especially involving vulnerable customers. For example, vulnerable customers who might be experiencing a mental health condition or other circumstances, who in some instances, might come across as potentially threatening or intimidating.
- 1.11 We wish to highlight the potential unintended consequences of excluding a vulnerable customer from the scheme under this proposed Rule and whether there might be some safeguards to ensure that these customers do not fall through the cracks and are sufficiently supported to be able to access AFCA.
- 1.12 For example, might it be possible for AFCA to explore whether the customer might be assisted by a representative (whether family member, friend or consumer advocate) who might be able to engage directly with AFCA to progress the complaint before initiating the AFCA exclusion. We recognise this might not be a viable solution if it might place the family member, friend or consumer advocate in an unsafe situation, but hopefully AFCA might be able to at least make an enquiry about this, especially if it would facilitate the customer's retained access to AFCA.
- 1.13 Like AFCA, our members also have a shared purpose of creating a healthy and safe working environment for their complaints handling staff. Our members would welcome flexibility in the AFCA Rules so a financial firm like a general insurer may raise concerns with AFCA if a customer might be engaging in unreasonable conduct towards a general insurer's staff. This information might assist AFCA with considering whether to exclude a complainant.

### How will a financial firm know when a paid representative or complainant has been excluded by AFCA

- 1.14 Our members are interested in how they might become aware that AFCA has excluded a paid representative or complainant from the AFCA scheme and the duration of that exclusion.
- 1.15 For example, if a complainant is not their customer or the paid representative is not acting on behalf of their customer, our members may be unaware AFCA has excluded the paid representative or complainant, especially if the exclusion was with respect to a complaint against another financial firm (whether another general insurer, or a financial firm in another sector, such as banking or investments).
- 1.16 Notification might be relevant to the resolution pathway for other complaints made with our members, as well as any protective measures our members might wish to put in place to ensure the safety and well-being of their staff.
- 1.17 To support this Rule change and provide for financial firm notification, our members are interested in whether AFCA might consider maintaining a register of excluded paid representatives and customers and updating it regularly, with members able to access the register and updates through AFCA's website or the new member portal AFCA is developing.
- 1.18 We appreciate that while a Register for paid representatives might be able to be made publicly available on AFCA's website, in line with public announcements AFCA has previously made about exclusions for certain paid representatives<sup>1</sup>, we consider this might not be so appropriate for excluded complainants given privacy and other customer-inclusion protections. We wonder whether it might be possible for AFCA to explore whether an excluded complainant register and relevant updates might be able to be shared with all financial firms who are members of AFCA. As

---

<sup>1</sup> AFCA Media Release [AFCA bans paid representative from lodging complaints](#) (1 April 2022)

we are unsure of the feasibility of this approach, we encourage AFCA to undertake a possible privacy impact assessment as part of exploring this option.

- 1.19 Our members consider a notification system important for the coherence of the overall complaints resolution eco-system.

## 2. **Appropriate settlement offers (Proposal 3)**

- 2.1 AFCA proposes to amend Rule A.8.3(b) and introduce a new Rule A.8.3(d) to provide AFCA with a discretion to close a complaint if an 'appropriate settlement offer' has already been made by the financial firm, whether accepted by the complainant.

### Appropriateness of a settlement offer and general insurance complaints

- 2.2 While we understand from our AFCA consultation briefing that members should have regard to other AFCA determinations to inform this, our members identify this proposed Rule change will likely generate a significant degree of uncertainty for our sector across each general insurer's complaint caseloads, particularly where there is complexity. For example, this might be because the dispute might be about whether the claim was appropriately settled in its entirety or partially in the customer's favour.
- 2.3 For visibility and a shared understanding amongst all stakeholders, our members suggest the Rules could provide more information about how AFCA will determine 'appropriateness'.
- 2.4 Certainty about how AFCA decides the appropriateness of a cash settlement amount in response to a complaint about a general insurance claim is an area of particular interest.
- 2.5 Our members inform us they have experienced wide variance in AFCA Determinations providing an uplift on cash settlement amounts (ranging between 10-15%, 20% -25%, to 35% and even as high as 50% on rare occasions). We understand AFCA is preparing an approach document to cash settlements and this will assist to facilitate consistency across AFCA decision-making, and to also provide the general insurance industry with greater predictability as to AFCA's likely approach to an 'appropriate offer of settlement'. We would be happy to collaborate closely with AFCA and our members as a priority to develop AFCA's proposed approach to determining appropriate general insurance settlement amounts.
- 2.6 We have also recently provided AFCA with feedback to its consultation on proposed updates to AFCA's Approach to awarding non-financial loss. We consider there may be some time needed for AFCA's updated Approach to embed so general insurers have a sufficient degree of predictability regarding how AFCA will likely approach an appropriate settlement offer for non-financial loss.
- 2.7 We draw to AFCA's attention the Independent Reviewer's observations<sup>2</sup> that in relation to AFCA fairness decision-making it is not surprising that financial firms have concerns when, for example, AFCA might award a 15% uplift on a sum insured home building policy, based on fairness considerations that are not based on any provision in the policy documents, legal principles or industry codes. The Independent Reviewer also expressed the view that AFCA's application of broad notions of fairness makes it difficult for firms to have a clear basis for AFCA's future decision making and to establish the necessary processes and systems to ensure compliance<sup>3</sup>.

### Supporting procedures for appropriate settlement offers

- 2.8 If AFCA proceeds with this Rule change, our members suggest it would assist them if:

---

<sup>2</sup> Report [Review of the Australian Financial Complaints Authority](#) (August 2021), paragraphs 4.47 – 4.48 (page 40)

<sup>3</sup> As above for note 2

- (a) AFCA could introduce supporting procedures to confirm the information AFCA would expect to receive from general insurers to assist AFCA decide whether an appropriate settlement offer has been made;
- (b) AFCA could provide written reasons to explain a remit decision for appropriate offers of settlement. This would especially be of assistance when AFCA decides a complaint is within remit because AFCA forms the view the settlement offer is inappropriate;
- (c) AFCA could provide further information about how it will count and cost-recover for 'appropriate settlement offer' remit decisions under AFCA's recently introduced new funding model;
- (d) Given this proposed Rule change represents a significant change in AFCA's operations, we welcome an early review of this aspect of its remit within the first 6-12 months of the Rule change taking effect. This could ensure it is working as intended, and to allow for any necessary refinements to the Rules in consultation with all stakeholders.

### 3. AFCA's forward-looking review mechanism (Proposal 6)

- 3.1 AFCA proposes to update its forward-looking review mechanism in Operational Guideline A.15 at pages 83-84 to implement AFCA Independent Review recommendation 9.
- 3.2 Our members wish to provide some general observations and suggestions for how the overall mechanism might achieve the Independent Reviewer's ambition of enhancing the mechanism's visibility, accessibility and independence, and so the mechanism operates as an integrated process that allows for an informal review before any escalation to a formal review.
- 3.3 We draw AFCA's attention to the Independent Reviewer's analysis and findings<sup>4</sup> that the intended operation of the mechanism allow for the informal process to be accessed first, before attempting to use the formal process.

#### *Informal review process*

- 3.4 Currently, Operational Guideline A.15 provides for an informal review process whereby a stakeholder may raise a concern about an AFCA determination directly with an AFCA Lead Ombudsman or the Chief Ombudsman. AFCA will then internally review whether it should change its approach for future complaints and explain (if necessary, in writing) the basis for AFCA's views once the review is completed.
- 3.5 Our members note that while Operational Guideline A.15 provides the alternative for an informal review process concern to be raised with AFCA's Chief Ombudsman, it is accepted business as usual practice that AFCA's Lead Ombudsman - Insurance is responsible for the informal review process for general insurance Determinations.
- 3.6 Our members see considerable value in having an informal review process as part of AFCA's forward-looking review mechanism. Our members suggest the process could set out that the reviewer be independent of the AFCA decision-making process. Our members suggest as a possible option, AFCA's Independent Assessor<sup>5</sup>. For transparency and insights into whether the informal review process is working as intended, there could also be a requirement for the Independent Assessor to report on the number of informal review matters they have handled for our sector and whether the AFCA approach changed for future complaints.

---

<sup>4</sup> As above for note 2, paragraph 7.42 (page 74)

<sup>5</sup> AFCA [Independent Assessor](#)

- 3.7 We would welcome the opportunity to further discuss this suggestion with AFCA and our members, and to also consider other possible ways in which the informal process might be updated to enhance accessibility and independence.

#### *Formal review process*

- 3.8 AFCA proposes to update the formal review process in Operational Guideline A.15 by removing the need for a requestor to provide external legal advice that AFCA has made an 'error of law'. AFCA proposes that this be replaced by a threshold requirement that the requestor demonstrate 'an AFCA Determination has raised an issue that is likely to have a significant impact across a class of consumers, businesses or transactions'.
- 3.9 For enhanced visibility, we would welcome more detail on the key features of the formal review process as suggested by the Independent Reviewer. This will provide not only AFCA staff, but also all AFCA stakeholders, with greater certainty and clarity about how this aspect of the forward-looking review mechanism is intended to work.
- 3.10 We would welcome the opportunity to discuss with AFCA and our members, our below suggestions for how the formal review process might be enhanced.

#### *Stakeholders who can request a formal review process*

- 3.11 We notice the proposed drafting of Operational Guideline A.15 limits who might request a formal review to an industry association like the ICA or a consumer organisation.
- 3.12 We suggest the Operational Guideline A.15 be updated to also permit financial firms like a general insurer to request a formal review. This would enhance accessibility, as well as bringing to life the vision of the Independent Reviewer that the formal review process be available to financial firms as an escalation from an informal review<sup>6</sup>.

#### *The meaning of 'significant impact'*

- 3.13 While our members support the change in threshold requirement for accessing the formal review process, greater visibility and a shared understanding of when the formal process might be used would bring to life the Independent Reviewer's vision.
- 3.14 We suggest this could be achieved if Operational Guideline A.15 were to include a definition and some possible illustrative examples to clarify the meaning of 'significant impact'.
- 3.15 For example, it seems the Independent Reviewer<sup>7</sup> had in mind 'significant impact' could include both direct financial impacts and indirect impacts. With indirect impacts possibly in relation to an ability to obtain professional indemnity insurance or on a consumers' ability to access credit or other financial services<sup>8</sup>.
- 3.16 Our members are supportive of the Independent Reviewer's definition of 'significant impact' being included in Operational Guideline A.15.

#### *Who at AFCA will consider a request and undertake the formal review*

- 3.17 Operational Guideline A.15 appears to be silent on who at AFCA has responsibility for considering a request for a formal review and undertaking it. Without this information, it is not entirely clear to us who stakeholders might approach at AFCA to commence the process for a formal review.

---

<sup>6</sup> As above for note 3

<sup>7</sup> As above for note 2, paragraph 7.41 (pages 73-74)

<sup>8</sup> As above for note 7

- 3.18 We draw AFCA's attention to the Independent Reviewer's suggestion that to achieve independence, the formal review process could be undertaken by an AFCA Panel formed along similar lines to AFCA Panels regularly convened to make Determinations<sup>9</sup>. The Independent Reviewer seemed to have in mind that adopting a panel model could bring in an external perspective to the final decision about AFCA's forward-looking approach<sup>10</sup>.
- 3.19 We welcome consideration of an AFCA Panel being formed to consider a request for a formal review and undertake the formal review, however for procedural fairness and independence, we suggest it would be desirable that the AFCA Panel for the formal review be a different composition to the AFCA Panel who made the original Determination.

#### Cost-recovery

- 3.20 We note the proposed changes to the formal review process includes a broad cost-recovery power so AFCA can pass on the costs of the formal review to the person requesting it.
- 3.21 We suggest that AFCA costs might be able to be better contained and managed within business-as-usual operations if the Independent Reviewer's suggestion to adopt an AFCA Panel model is implemented.
- 3.22 We draw AFCA's attention to the Independent Reviewer's views that *'Requiring a fee from the applicant seeking the formal review may well be appropriate, including to discourage misuse of the mechanism. However, it would not be appropriate to recover the full cost from the applicant'*<sup>11</sup>.
- 3.23 We welcome insights into the rationale for a broad cost-recovery approach. We have some concerns it could potentially impact accessibility, by posing a possible deterrent to smaller financial firms and consumer organisations applying for a formal review, especially if they are unable to afford it. Our members are interested in AFCA's rationale for not proceeding with this being absorbed into business as usual as a fairer alternative for the formal review process. Our members are of the view this could have the most contained impact on accessibility.
- 3.24 If AFCA includes a cost-recovery power in Operational Guideline A.15, we suggest it involve that AFCA consults the requestor before incurring any costs, and that the cost-recovery be appropriately limited to recovering costs for clearly defined specific purposes, such as if there is a need for AFCA to obtain independent external advice.

#### **4. Accidental error in a Determination – slip rule (Proposal 8)**

- 4.1 AFCA proposes to update Rule A14.6 to support the fair, efficient and timely resolution of complaints and AFCA's continued improvement of its fairness remit, by allowing for a Determination to be re-issued when there is an accidental slip or omission. Examples of when there might be an error or mistake requiring correction might be in relation to a miscalculation of figures or a mistake in the description of a person, thing or matter.
- 4.2 To complement this proposed Rule change, AFCA proposes to update its Operational Guideline A.14.6 to provide a process whereby a party can make a written request for a correction within 30 days of the date the AFCA Determination is issued.
- 4.3 We note this Rule change seeks to support Independent Review recommendation 2 that: *In making its decisions, AFCA should consider what is 'fair in all the circumstances' having primary*

---

<sup>9</sup> As above for note 2, paragraph 7.44 (page 74)

<sup>10</sup> As above for note 8

<sup>11</sup> As above for note 2, paragraph 7.46 (page 74)

*regard to the four factors identified in its Rules - legal principles, industry codes, good industry practice and previous decisions.*

- 4.4 Our members would welcome an expansion of the proposed Rule to allow a financial firm like a general insurer to request further information from AFCA, especially if a Determination does not appear to have considered the limits of the customer's general insurance policy or is silent on the key steps AFCA expects an insurer take to fully resolve the complaint.
- 4.5 For example, an AFCA Determination might state the general insurer cash settle the complaint, in circumstances where there is faulty workmanship (an exclusion from cover under the customer's policy), although AFCA determines there is accidental damage which is covered by the policy, and the AFCA Determination is silent on the extent of the general insurer's liability.
- 4.6 We welcome Rule A.14 being updated to allow for a general insurer to request more information about AFCA's reasoning for a fairness Determination and to clarify the key steps AFCA expects a party take. This would formalise an already informal process in place whereby general insurers may approach AFCA's Lead Ombudsman – Insurance with any queries about the fairness principle not being adequately explained in an AFCA Determination. An update to AFCA's Rules along these lines would also enhance transparency as a corrected Determination with the further information could be published on AFCA's website in line with the updated Operational Guideline.