



Law Council  
OF AUSTRALIA

*Legal Practice Section*

10 October 2025

Lead Ombudsman – Life Insurance  
Australian Financial Complaints Authority  
GPO Box 3  
Melbourne VIC 3001

By email: [consultation@afca.org.au](mailto:consultation@afca.org.au)

Dear Lead Ombudsman,

**AFCA's approach to the duty to take reasonable care not to make a misrepresentation**

**AFCA's approach to non-disclosure and misrepresentation – life insurance**

1. This submission has been prepared by the Australian Consumer Law Committee of the Law Council of Australia's Legal Practice Section, with some input from the Superannuation Committee and from the National Insurance Law Group.
2. The Committees welcome the opportunity to make a submission to the Australian Financial Complaints Authority in relation to the Consultation on AFCA's draft Approach Documents: Approach to the duty to take reasonable care not to make a misrepresentation – life insurance (**Consumer Contracts Approach**), and Approach to non-disclosure and misrepresentation – life insurance (**Non-Consumer Contracts Approach**).
3. The Australian Consumer Law Committee believes that the Approach Documents in their existing form have done well to communicate what can be a complicated issue in a digestible form for consumers. Accordingly, we make minor suggestions for amendment to the content of the Approach Documents.
4. The Superannuation Committee suggests additional guidance relevant to superannuation trustees and members.

**Commentary in respect of section 29(6) and section 29(10)**

5. In the Consumer Contracts Approach, the reference at the bottom of page 14 states that section 29(6) does not apply where “a contract with a surrender value” and cites section 29(6) ICA. However, the relevant provision is section 29(10) ICA. In the Non-Consumer Contracts Approach, the equivalent guidance is on page 17 and there is no legislative reference. Accordingly, the Consumer Contracts Approach should be amended to refer to section 29(10) ICA or to delete the legislative reference altogether.
6. Page 14 of the Consumer Contracts Approach and page 17 of the Non-Consumer Contracts Approach include a statement that section 29(6) ICA does not apply to “a contract which provides death benefit cover to an insured (section 29(10))”. However,

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the wording of section 29(10) states that section 29(6) does not apply where the policy “provides cover in respect of the death” of the insured (our emphasis). Whilst it may seem like a minor grammatical point, it is submitted that the language contained in the Act is important.

7. For example, in AFCA determination 848983 it was held that an income protection policy could not have been retrospectively varied because the policy included a built-in ancillary benefit which was a “Limited Death Benefit”. That is, the operation of section 29(10) is such that it prevents retrospective variations where the policy includes cover “in respect of” the death of the insured. The operation of section 29(10) is not designed to only operate in relation to death cover and has broader operation such that it operates if the policy provided death cover “in respect of the insured” even if the policy was not itself a death benefit policy.
8. Given this, we respectfully suggest that the Approach Documents ought to be amended to say:

“This does not apply to:

- a contract with a surrender value (section 29(10))
- a contract which provides cover in respect of the death of the insured (section 29(10)”

#### **Commentary on evidence supporting comparative analysis**

9. Page 15 of the Consumer Contracts Approach and page 17 of the Non-Consumer Contracts Approach include a reference to the evidence which AFCA expects an insurer to provide which supports a comparative analysis of the underwriting. In particular the Approach Document states:

*Such a statement or declaration should outline the person’s prior 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. [Emphasis added]*

10. We would add that it is not sufficient for an insurer to have an internal employee of the insurer provide an opinion unless the person was actually working in the industry as a life insurance underwriter. Whilst it may be inferred that is the case from what had been written in the Approach Document, it is preferable to make it clear that evidence of this kind will only be accepted if it is provided by someone who is able to give evidence as to what was actually done at the relevant time. Accordingly, we recommend amending that paragraph to say:

“Such a statement or declaration should outline the person’s prior 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; for example, the statement or declaration could confirm that they worked as a life insurance underwriter, life insurance broker or other relevant occupation at the relevant time.”

### **Loss may be recovered in limited cases for fraudulent misrepresentation (s.31 ICA)**

11. At the bottom of page 15 and on page 16 of the Consumer Contracts Approach and on page 16 of the Non-Consumer Contracts Approach, there are three dot points listing relevant matters which AFCA can consider. Each of those three dot points are matters expressly referenced in the Act. We note that the Act also states that the court may have regard to “any relevant matter”. In our view, one obvious example in a life insurance contract is the relationship between the alleged non-disclosed matter, and the claimed condition.
12. That is, if a consumer had failed to disclose a mental health condition which would have caused the insurer to have applied a mental health exclusion, but now claims for an unrelated Cancer, it could be unfair to allow an avoidance of the policy.
13. We suggest that a fourth dot point be included as something that requires consideration as follows:
  - The relationship (if any) between any alleged non-disclosed medical condition and the claimed condition

### **Disability Discrimination Act**

14. It is noted that the AFCA Approach document, whilst thorough in relation to the duty to take reasonable care, and the relevant remedies, is silent as to other relevant consumer protections.
15. Section 46 of the *Disability Discrimination Act 1992* (**Disability Discrimination Act**) allows an insurer to discriminate against a person in the offer of insurance or in the terms and conditions of insurance on the grounds of a “disability”, only where:
  - (i) the discrimination is based on actuarial or statistical data on which it is reasonable to rely, and is reasonable having regard to the data and other relevant factors; or
  - (ii) if no such actuarial or statistical data is available and cannot reasonably be obtained – the discrimination is reasonable having regard to any other relevant factors.
16. The Consumer Law Committee suggests that some content could be included commenting on an insurer’s obligations under the Disability Discrimination Act, and how they might apply where an insurer proposes to refuse or limit any insurance payment because of a medical condition that the insured person had not disclosed (where the medical condition may be a “disability” as defined).
17. In our view and noting the importance of anti-discrimination law as a consumer protection mechanism there should be, at the very least, a basic explanation confirming that consumers have rights under the Disability Discrimination Act.

### **Complaints about life insurance in superannuation**

18. The Approach Documents note that as part of AFCA’s non-superannuation jurisdiction, AFCA can review:
  - complaints about life insurance policies held by a SMSF

- in some instances, complaints from AFCA's superannuation jurisdiction which were ineligible for not being lodged within the timeframes set out in the AFCA Rules for superannuation complaints.
19. The Superannuation Committee considers that complaints about life insurance policies held by a SMSF would be generally similar to complaints brought by an individual life insured, as the members/trustees are the same individuals who would be complaining about a decision of the life insurance company. However, complaints by a member of an APRA regulated superannuation fund about the member's benefits under a life insurance policy within the fund will involve a complaint against the trustee of the fund as well as the life insurance company.
  20. The Approach Documents do not provide any guidance on complaints against APRA regulated superannuation funds that AFCA would review under AFCA's non-superannuation jurisdiction.
  21. We suggest that it would be helpful to trustees and members if the Approach Documents include some additional guidance on the following matters:
    - (i) When a complaint relating to an APRA regulated superannuation fund will be dealt with under the non-superannuation jurisdiction (ie an explanation of the relevant time limits, or reference to the relevant AFCA rules).
    - (ii) When the relevant Approach will apply, noting that: for consumer insurance contracts, the Consumer Contract Approach applies; and for contracts that are not consumer insurance contracts, the Non-Consumer Contracts Approach applies. Our understanding is that superannuation policies would **not** be consumer insurance contracts as the policy owner is the fund trustee. If there are circumstances where AFCA envisages a superannuation policy could be a consumer insurance contract, an explanation of those circumstances would be useful. And we suggest that each Approach Document identifies the types of superannuation policies that the Approach Document will apply to (where the complaint is ineligible to be considered under the superannuation jurisdiction).
    - (iii) AFCA's view on the duties of trustees in managing these complaints, and comments on the information that AFCA may ask the trustee to provide.

We otherwise congratulate the AFCA on the Approach Document. [REDACTED]

Yours sincerely



**Greg McIntrye SC**  
**Section Chair**