



**AIG Australia Limited**  
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14 April 2021

[REDACTED]  
Director, AFCA Review  
Financial System Division, Treasury  
Langton Crescent,  
Parkes ACT 2600

Via email: [AFCAreview@treasury.gov.au](mailto:AFCAreview@treasury.gov.au)

Dear [REDACTED]

### **Review of the Australian Financial Complaints Authority - Terms of Reference**

AIG Australia Ltd (**AIGAL**) welcomes the opportunity to provide a submission to Treasury regarding its review of the Australian Financial Complaints Authority (**AFCA**).

Addressing these issues will result in our view in a more balanced approach to dispute resolution which will ensure that both private and public interests in general insurance matters can be better advanced.

We set out our response to the issues raised by Treasury.

#### **1. Is AFCA meeting its statutory objective of resolving complaints in a way that is fair, efficient, timely and independent?**

We set out below some of the issues we have identified which we believe impacts the ability of AFCA to meet the above statutory obligation.

#### **Jurisdiction**

The Rules of AFCA (**AFCA Rules**) are prepared by the Australian Financial Complaints Authority Limited in order to establish, maintain and promote the external dispute resolution scheme for financial service providers.

AFCA's Rules set out what complaints AFCA can consider, the procedures they can use to resolve those complaints, remedies it can provide and related matters, including its reporting obligations. ASIC approved AFCA's Rules on 6 September 2018. Since then, ASIC has approved further changes to AFCA's Rules. The current version of the Rules was issued effective 13 January 2021.

This version did not alter any appeal rights and its jurisdiction.

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AFCA's jurisdiction is predicated upon the presumption that a financial complaint (including a general insurance complaint) is within jurisdiction unless otherwise excluded. Exclusions under Part C of the Rules particularly feature exclusions in the context of this submission for the following:

**1. Rule C.1.2(e) — Complaints greater than \$1M.**

AFCA also has a discretion to exclude complaints, but that discretion is seldom exercised against the complainant.

Relevant to general insurance, the discretion to exclude may apply where:

- 1. Rule C.2.2(a) — there is a more appropriate place to deal with the complaint, such as a court, tribunal, another dispute resolution scheme, or the Office of the Australian Information Commissioner;**
- 2. Rule C.2.2(c) — the complaint relates to a Financial Firm's practice or policy and does not involve any allegation of either Maladministration or inappropriate application of the practice or policy;**
- 3. Rule C.2.2(f) — AFCA agrees to allow a Financial Firm to treat the complaint as a test case (subject to conditions).**

In relation to Rule C.1.2 (e), we do not consider a monetary limit as the perfect proxy for determining legal technicalities. A legal technicality under an insurance policy may arise on matters of little to no financial impact, but nevertheless require judicial construction.

Further, AFCA's Rules call for a distinction between simple matters of process that are clearly suitable for resolution through AFCA and those more complex matters which warrant determination by a competent court. As noted further below, Rule C.2.2(a) allows AFCA a discretion to exclude a matter if there is a more appropriate place to deal with the dispute, but AFCA's operational guidelines note that complexity of the matter is a relevant but not sufficient reason alone to exclude any complaint. We consider AFCA's operational guidelines should be amended to give effect to a more mandatory approach to Rule C.2.2(a).

### **Effect of Determination**

AFCA's final determinations are binding on an insurer if accepted by the complainant (Rule A.15.3). However, the complainant does not have to accept the determination. Insurers however have no recourse to an appeal process following an AFCA determination. Given AFCA's \$1M jurisdictional limit, it is effectively entitled to make an award which would be greater than the jurisdictional limit of the District Court of NSW (currently \$750,000). Technically speaking, AFCA's monetary limit of \$1M is within the jurisdictional range of most Supreme Courts of the States and Territories (ordinarily \$750,000+).

While the purpose of AFCA's Rules is clearly to alleviate the burden of cases which would otherwise be dealt with by the court system, nevertheless the monetary limit, and the rather broad discretion

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for AFCA to exclude or include complaints (see above Rules), amounts to an exercise of powers which rivals the courts, but which is not governed by the rules of evidence (Rule 14.3).

### Principles of Law

AFCA makes determinations in line with concepts of fairness (akin to equity) rather than according to law. Since AFCA's determinations encompass matters other than legal principles, they cannot be treated as authoritative statements of legal principle. The laws of insurance, and the determinations of policy considerations and contract construction, are however matters of law.

The determination of complex policy questions relating, amongst other things, to the above issues should most appropriately be made by the courts rather than AFCA. In this regard AFCA's Rules recognise the importance of the *forum non conveniens* rule, and whether there is a more appropriate location for determination of legal issues – see Rule C.2.2(a). Accordingly, once a court's final determination on such issues is resolved, AFCA may be able to use that guidance to assist with its understanding of policy disputes.

### Appeals

AFCA does not have an 'appeal' process, save for superannuation complaints (due to AFCA's powers flowing from the predecessor SCT powers).

The basis for this is that AFCA is a no-costs jurisdiction and imposing a court appeals process could be adverse to impecunious complainants. However, while this may be the case, it is incongruent that the appeals process which exists for superannuation complaints should not be equally allowed or applied to other disputes which are equally technical, including general insurance complaints.

The AFCA appeals process appears to be based on the UK Financial Ombudsman Service (**UK FOS**) powers (Part XVI and Schedule 17 of the *Financial Services and Markets Act 2000* (UK)). However, the UK FOS is a public entity and subject therefore to review by competent courts in respect of the determinations made by UK FOS. Such process is not available in respect of AFCA given its private entity status. It would not be unreasonable to allow an exception to that – like the Superannuation appellate process – for non-superannuation complaints.

While AFCA is subject to ASIC review, ASIC has no role in resolving individual complaints or in AFCA's decision making. ASIC's powers are explained under Regulatory Guide 267. If AFCA fails to comply with any regulatory requirement, ASIC may issue specific directions (under s1052B or s1052BA) or a general direction (under s1052C) requiring it to comply. This does not afford sufficient jurisdictional or procedural fairness to both complainant and financial services company.

### Public Interest

Private interests are generally advanced and addressed through AFCA. However, AFCA's purpose – to decongest courts and address factually determinable complaints – is not, with respect, geared towards advancement of legal doctrine to the public interest. AFCA determinations are restricted to private determinations and do not produce authoritative statements of law.

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AFCA matters may, however, involve a convergence of regulatory, legal and contractual issues within a dispute or complaint between the consumer and the financial organisation. These matters themselves may raise matters of public interest or legal precedent which ought to be determined by a court. In line with AFCA's arbitral and consumer protection-type role, there is a public interest in ensuring that such matters are public and adoptable for all parties suffering the same circumstances. AFCA recognises these as 'systemic' but not in the sense that they are publicly systemic – only to the extent there are multiple instances from one financial services provider.

Allowing AFCA decisions to be appealed to the courts on a question of law will facilitate that public interest avenue. It will aid the creation of authoritative positions in law. As noted, this currently exists for superannuation complaints and should be expanded to include insurance complaints. This will facilitate the development of the common law around insurance while still allowing consumers the first-instance access to AFCA as a no-costs jurisdiction.

### 1.1. Is AFCA's dispute resolution approach and capability producing consistent, predictable, and quality outcomes?

#### Complex Legal Matters and the Need for Consistency

AFCA in its newsletter of 18 July 2019 stated, *“black letter law arguments that are legally sound and well-articulated will not succeed if they deliver fundamentally unfair outcomes for consumers.”* Such statements raise concerns regarding consistency and predictability where sound legal principles drive transparency and provide certainty in the course of parties dealing with each other. Fairness on the other hand is an arbitrary concept. This concern is exacerbated in areas of higher complexity where recovery focuses on more esoteric concepts such as a pure economic loss or other legal concepts that form the basis of recovery. This seeming “disregard” to black letter legal arguments can lead to outcomes which are not consistent. This in turn further emphasises the need for some form of appeal process as further outlined above.

#### Small Business and Wholesale Client

Another area of concern is the operation of the Eligible and Discretionary Complaints Jurisdiction of AFCA in respect of Small Business Insurance Products. Under its Rules, AFCA has a discretion to hear complaints where the complainant is a wholesale client within the meaning of the *Corporations Act 2001*, but the complainant is not a 'Small Business' (i.e. less than 100 employees). We understand this to mean that where the complainant is a Small Business as defined by AFCA and satisfies the wholesale client test under the *Corporations Act 2001*, it could be subject to AFCA's discretion to hear the matter.

However, we submit that where a complainant has fewer than 100 employees but has a turnover in excess of \$250,000 and/or assets in excess of \$2.5M (as specified under the wholesale client definition in the *Corporations Act 2001*), then such complainant should not be considered a 'Small Business' and AFCA should have no discretion to hear the complaint.

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**1.2. Are AFCA’s processes for the identification and appropriate response to systemic issues arising from complaints effective?**

No Comment.

**1.3. Do AFCA’s funding and fee structures impact competition? Are there enhancements to the funding model that should be considered by AFCA to alleviate any impacts on competition while balancing the need for a sustainable fee-for-service model?**

No Comment.

**2. Do the monetary limits on claims that may be made to, and remedies that may be determined by, AFCA in relation to disputes about credit facilities provided to primary production businesses, including agriculture, fisheries and forestry businesses remain adequate?**

No Comment.

**3. AFCA’s Independent Assessor has the ability to review complaints about the standard of service provided by AFCA in resolving complaints. The Independent Assessor does not have the power to review the merits or substance of an AFCA decision.**

**Is the scope, remit and operation of AFCA’s Independent Assessor function appropriate and effective?**

An Independent Assessor could play a useful role in making an assessment on jurisdiction when such disputes arise.

**4. Is there a need for AFCA to have an internal mechanism where the substance of its decision can be reviewed? How should any such mechanism operate to ensure that consumers and small businesses have access to timely decisions by AFCA?**

It would be helpful if there was some “appeal process” to an Independent Assessor who will conduct reviews of substance or merits of determinations. This is especially so where a particular AFCA determination does not in an insurers opinion adequately address all legal issues or has not fully taken into account the facts of a particular matter.

However, we are mindful that this may result in an increase in the cost of service and a delay in case outcomes. To counter that, the Independent Assessor should have the ability to decline permission to appeal. In arriving at this decision, the Independent Assessor must however provide full reasons why this is the case. In this way, insurers would be in a position to make a more educated decision as to when future matters should or should not proceed to the “appeal stage”.

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It would also be helpful if AFCA could publish more guidance documents on its website as to how they would deal with matters which are contentious or require insight as to AFCA's interpretation of particular legislation such as the Insurance Contracts Act 1984.

If you have any questions or comments in relation to our submission, please feel free to raise such issues with the undersigned.

Yours faithfully,



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