CALI Council of Australian Life Insurers

24 24 October 2025

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

Via email: consultation@afca.org.au

Dear Ms Curtis

Joint consultation on life insurance Approach documents

The Council of Australian Life Insurers (**CALI**) is the trusted voice of life insurance in Australia. We support Australians to make informed choices about their future and help them live in a healthy, confident, and secure way on their best and worst days.

Our mission is to ensure Australians view life insurance and the industry as accessible, understandable, and trusted. We do this by supporting our members to deliver the protection and certainty Australians need on their worst day.

We acknowledge the important role of AFCA's Approach documents in supporting more efficient, predictable and timely resolution outcomes, and we welcome the opportunity to provide feedback on AFCA's joint consultation on the following Approach documents:

- Approach to Non-Disclosure and Misrepresentation (**DOD**)
- Approach to the Duty to Take Reasonable Care Not to Make a Misrepresentation (**DTTRC**)

The DOD and DTTRC (**the Duties**) are a fundamental pillar of the life insurance underwriting process and ensure that cover remains accessible, affordable and sustainable for all Australians.

Following the Financial Services Royal Commission, Parliament enacted changes to the Insurance Contracts Act 1984 (**ICA**) to address systemic consumer harm including:

- Replacing the DOD with DTTRC to recognising the information imbalance between insurers and consumers; and
- Restricting insurer avoidance rights under section 29(3) of the ICA, requiring insurers to demonstrate that they would not have entered into the contract on any terms had the relevant information been disclosed.

These changes were designed to support good customer outcomes and reflect a deliberate policy shift toward fairness, transparency, and proportionality. Given the significance of these reforms, it is critical that AFCA's Approach documents align with the updated legislation and its intent. Any departure from the legislative framework could create uncertainty for insurers and customers alike.

To support AFCA's objective of predictable and efficient resolution processes, CALI has identified several issues with the current drafts, summarised below and discussed in further detail in our submission:

- **Inconsistencies between the DOD and DTTRC Approaches**, particularly in the interpretation and application of section 29 of the ICA.
- **Mischaracterisation of evidentiary expectations** under section 29(6) of the ICA including the requirement for insurers to obtain specific exclusion wordings from other insurers.
- **Mischaracterisation of the legal test for section 29 of the ICA in the DOD Approach**, particularly the reference to an insurer having to show "prejudice".
- **Apparent conflation of legal concepts** relating to contract avoidance and claim denial, and misinterpretation of section 31 of the ICA.
- **Premium refunds in cases of fraud**, which CALI believes undermines deterrence and imposes unfair costs on honest customers.
- **Record-keeping obligations**, where CALI seeks clarification on AFCA's expectations regarding the removal of fraud-related records.
- **Inclusion of case studies where the life insurance industry does not agree with AFCA's position** such as the example involving the variation of cover that contains ancillary death benefits under section 29(6) of the ICA.

To resolve these, we have proposed targeted amendments, either clarifications or removals, as outlined in our submission. We have also included marked-up versions of the draft Approach papers to demonstrate our recommended changes.

Given the significance and complexity of these issues, CALI requests a meeting with AFCA to discuss the recommendations we have made in this submission. Please contact Prue Wilson (prue.wilson.@cali.org.au) with any other questions.

Kind regards

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Council of Australian Life Insurers

About the Council of Australian Life Insurers (CALI)

CALI is the leading voice of life insurance in Australia. We support Australians to make informed choices about their future and help them live in a healthy, confident and secure way over their lifetime.

Our members' products and services give people peace of mind when making important decisions and provide a financial safety net during life's biggest challenges.

We advocate for national policy settings that expand Australians' access to the life insurance protection that suits them when they need it most.

CALI represents all life insurers and reinsurers in Australia. The Australian life insurance industry is today a $26.4 billion industry, employing thousands of Australians and paying billions of dollars of benefits each year.

For more information, visit www.cali.org.au

Detailed response

AFCA Approach to the DTTRC

4.3 What other things may be relevant: misrepresentations about minor things

CALI submits that this paragraph does not accurately reflect the DTTRC. The obligation for consumers to know what is relevant to the insurers decisions was intentionally removed via the change from DOD to DTTRC. CALI recommends this paragraph be removed. The remaining paragraphs are sufficient in outlining other relevant factors.

Recommendation: Removal of the above mentioned paragraph.

5.2 How AFCA decides remedies in complaints about a breach of the Duty

"Section 29 of the Act provides remedies for life insurers"

CALI notes that there are inconsistencies between the DTTRC and DOD Approach documents approaches regarding remedies in section 29 of the ICA when in fact the Approach documents should be aligned. For example, the DTTRC Approach document:

- correctly references section 30 of the ICA about misrepresentations of age but the DTTRC Approach document does not. The DTTRC Approach document should be amended to reflect section 30 of the ICA in the same way as indicated in CALI's marked up attachment.
- refers to "*innocent non-disclosure or misrepresentation*" whereas the DTTRC Approach document refers to "*non-fraudulent misrepresentation*" when the two concepts are the same.

CALI is of the view that the various remedies available to an insurer under section 29 of the ICA could be more clearly explained in the DTTRC and DOD Approaches. For example, section 29(3) of the ICA has been limited in the Approaches to "innocent" or "non-fraudulent" misrepresentation. However, section 29(3) is a remedy that is limited to the first three years of the contract and can be utilised by an insurer for both innocent and fraudulent misrepresentation.

Recommendation: Clarification regarding the interpretation of section 29 remedies.

"Variation of the benefit sum insured from the contract start date"

This section implies that an insurer can only vary the sum insured by using the formula in section 29(4) of the ICA. CALI recommends this section be amended to reflect the optional nature of section 29(4) of the ICA and to clarify that an insurer has the choice of:

- reducing the sum insured using the formula in section 29(4) of the ICA; or

- reducing the sum insured under section 29(6) of the ICA to put the insurer in the position it would have been if the relevant failure had not occurred.

*Recommendation: C*larification of section 29(4) as optional and inclusion of insurer choice.

"Variation of the contract in another way from the contract start date"

On page 15, the DTTRC Approach document states "*In the case of a variation to impose an exclusion, AFCA will require evidence of specific wording which would have been applied by other reasonable and prudent insurers*".

In line with the concerns previously raised in CALI's submission to AFCA's consultation on the draft Approaches to section 29(6) and 29(7) of the ICA[1], we remain concerned that the current drafting appears to require an insurer to adopt the position of other insurers. This is inconsistent with the express limitations set out in section 29(6) of the ICA. In this regard, CALI notes that section 29(6) of the ICA refers to an insurer varying *'the contract in such a way as to place the insurer in the position (subject to subsection (7)) in which the insurer would have been'* (emphasis added) rather than the position other insurers' would have been in if the relevant failure had not occurred.

It is inappropriate for insurers to obtain specific exclusion wordings from other insurers that would have been in use at a particular point in time. Exclusion wordings are confidential to each insurer (and their reinsurer) and are not publicly available. Underwriters employed by an insurer are not permitted to disclose exclusion wordings of that insurer or their reinsurer to other insurers, nor can they take copies of such exclusions with them when they leave employment. This expectation is contrary to the principles of efficient, effective, and timely dispute resolution.

CALI is also concerned that this expectation works against the purpose and requirements of competition law that are intended to promote competition on the terms an insurance policy is provided, rather than see homogenised approaches to terms in the market. Moreover, any pressure to share exclusion terms could risk inappropriate information sharing between competitors, raising further compliance concerns under competition law.

We consider it sufficient for an insurer to lead evidence in general terms that other reasonable and prudent insurers would have applied a comparable exclusion, without being required to provide or undertake a line-by-line comparison of exclusion wordings.

We also note that the excerpts cited by AFCA in support of the draft Approaches do not include or support the requirement for insurers to obtain or compare specific exclusion wordings from other insurers.

[1] 11 October 2024

Further to this, in AFCA Determination 767395, the decision-maker accepted as sufficient evidence the insurer's internal underwriting guidelines, a statutory declaration from an underwriter, and a statement from a senior underwriter with relevant experience. Importantly, AFCA did not require the insurer to produce the specific exclusion wording used by another insurer to support the application of a variation under section 29(6) of the ICA. AFCA also adopted a similar approach in AFCA Determination 818374.

CALI does not agree with this shift in evidentiary expectations in the current draft AFCA Approaches, which now requires evidence of the specific exclusion wording that would have been applied by other reasonable and prudent insurers. CALI submits that this change may impose a higher evidentiary burden than has previously been applied in AFCA determinations.

CALI refers also to the decision in the County Court of Victoria – VCC 2024/1844 to support its position that insurers should not be required to provide exclusion wording from other insurers when applying a unilateral variation under section 29(6) of the ICA. Here, the Court accepted the insurer's application of an exclusion without requiring comparative evidence of another insurer's exclusion wording.

The Court's approach reflects a practical and legally sound interpretation of section 29(6) of the ICA, recognising that underwriting decisions are inherently insurer specific. Further, the Court permitted the insurer to rely in reinsurance guidelines in use across the industry to establish that the insurer's decision was not inconsistent with the position of other reasonable and prudent insurers.

Recommendation: Removal, from all relevant Approach documents, of the requirement to evidence specific exclusions wording form another insurer.

"Loss may be recovered in limited cases for fraudulent misrepresentation"

The current drafting in both the DTTRC and DOD Approach documents appears to combine two distinct legal concepts: the avoidance of a contract and the denial of a claim. These involve separate decisions, subject to different provisions of the ICA and should be treated accordingly.

The reference to section 31 of the ICA is also problematic. Section 31 empowers a court to disregard the avoidance of a contract due to fraudulent misrepresentation only in relation to the loss that is the subject of the proceedings. It does not reinstate the contract, which remains avoided. AFCA's suggestion that it may consider whether it is "*fair in all the circumstances for the claim to be denied*" is in our view inconsistent with this provision and risks exceeding AFCA's jurisdiction—particularly in the superannuation context, where AFCA cannot make determinations inconsistent with the law.

Additionally, the statement that an insurer may have "*simply charged a slightly higher premium or imposed a condition that made no difference to its liability to pay a particular claim*" undermines the seriousness of fraudulent conduct and is an

oversimplification of the insurers position. Premium loadings are typically applied at 50%, 100%, or 150% — none of which are "slight."

We seek to clarify if the phrase "*a condition that made no difference to its liability*" refers to an exclusion. If so, CALI submits that a person who fraudulently obtains a policy without exclusions should not benefit simply because the claim relates to a different condition. If a person fraudulently misrepresents information to obtain a lower premium or to obtain a policy without exclusions, the insurer should retain the right to apply the appropriate legal remedies, including avoidance.

Recommendation: Clarification of contract avoidance and claims denial as separate concepts is required.

'Premium refunds'

CALI recommends that AFCA clarify the wording of this section to make it clear that any decision about a premium refund should be assessed on the specific circumstances of each case to determine whether it is appropriate. We note that in some cases, refunding premiums may leave the customer in a better financial position than before committing fraud. This outcome may undermine the objective of deterrence and overlooks the legitimate costs incurred by insurers in distribution, underwriting, policy administration, claims handling, and fraud investigation.

We also recommend that AFCA acknowledge the public policy objective of deterring fraud, which justifies insurers avoiding contracts entered into fraudulently. This would provide a clearer and more principled foundation for decisions involving fraudulent conduct.

*Recommendation: C*larification of the circumstances where premium refunds may be considered and greater emphasis on deterring fraudulent behaviour.

"AFCA may require reinstatement of a contract"

AFCA states in this section that it may require an insurer *"…to remove any unfounded allegation of fraud or breach of duty from its records*."

CALI seeks clarification on the intent behind this requirement and whether the same objective could be met through alternative means that do not conflict with insurers' legal obligations.

Insurers are required to maintain accurate and complete business records, including documentation of investigations into non-disclosure, their outcomes, and the full details of any AFCA complaints. These records form part of the insurer's legal and compliance obligations and cannot simply be erased or removed. Requiring the removal of such records may place insurers at a disadvantage if they are later required to rely on this information, for example, in future claims or regulatory reviews. We therefore recommend that this requirement be clarified or limited in scope to avoid unintended consequences.

CALI recommends an alternative approach of ensuring an insurer's records clearly reflect that AFCA determined the allegation of fraud or breach of duty to be unfounded, and that the insurer's original decision was overturned. This achieves transparency and satisfies both legal and procedural requirements.

Recommendation: An alternative approach is proposed to avoid unintended consequences arising from record removal.

6.4 Example 3: Insurer could not vary part of the contract containing death cover

CALI notes the example provided in Section 6.4 of the Approach document references AFCA's finding that an insurer cannot vary Income Protection cover under section 29(6) of the ICA if that cover includes an ancillary death benefit.

This finding has significant implications for the life insurance industry. The industry does not agree with AFCA's position and to the best of our knowledge, AFCA's position is not settled. Industry has previously submitted challenges to this case study and CALI will continue to engage with AFCA on behalf of the industry in relation to our position on this issue.

Given the complexity and ongoing nature of this matter, CALI respectfully requests that this case study be removed from the guidance at this time. Inclusion of this example risks confusion or unintended consequences for consumers and insurers alike.

Recommendation: Removal of this case study from both Approaches.

AFCA Approach to the Duty of non-disclosure and misrepresentation (DOD)

4.1 Has there been an innocent non-disclosure?

The threshold question is whether or not there has been a misrepresentation. It is only relevant to consider fraud if an insurer has avoided cover under section 29(2) of the ICA. For this reason, CALI suggests amendments to this section of the Approach to remove the references to "innocent non-disclosure" and "fraud". As discussed above, section 29(3) of the ICA is a remedy that is limited to the first three years of the contract and can be utilised by an insurer for both innocent and fraudulent misrepresentation.

The Approach states that an insurer must show a number of things, including "the extent of the insurer's prejudice by the misrepresentation". However, this is not the test under section 29 of the ICA. Rather an insurer has to show that it would not have been prepared to enter into a contract of life insurance with the insured on the same terms (and for section 29(3) on "any terms").

Recommendation: Removal of "innocent non-disclosure" and "fraud" and clarification of section 29 test.

"Other considerations"

CALI is of the view the following paragraph is incorrectly situated in the DOD Approach document and should instead be included in the DTTRC approach.

" *AFCA may also consider other matters it believes are relevant. For example, if the complainant was in a vulnerable situation (e.g. had minimal literacy skills, or limited understanding of English) and the insurer was aware of this*."

We refer to section 20B(4) of the ICA which expressly says, "*any particular characteristics or circumstances of the insured which the insurer was aware of, or reasonably ought to be aware of, are to be taken into account whether someone took reasonable care not to make a misrepresentation*". As there are no equivalent requirements in section 21 of the ICA (or any other section that applies to the DOD), this paragraph moves beyond the requirements for the DOD and should be removed.

Further, we would appreciate clarification on how AFCA interprets and applies section 20B(4) of the ICA in practice, particularly in circumstances where the insurer deals primarily through an adviser, or other third party representative, and therefore has limited or no direct contact with the customer.

In such cases, the insurer may not be in a position to become aware of the customer's particular characteristics or circumstances unless such information is explicitly conveyed by the intermediary. This clarification is important to ensure consistent interpretation of the DTTRC and to understand the extent of an insurer's obligations in non-direct engagement models.

Recommendation: Removal of vulnerable circumstances section from the DOD and placement in the DTTRC.

5.2 How AFCA decides remedies in complaints about a breach of the Duty

"Section 29 of the Act provides remedies for life insurers"

Please refer to the feedback provided above under DTTRC, which reflects CALI's position on this matter. Our comments are applicable to the DOD Approach document in the same manner.

6.4 Case study 4: Insurer could not vary part of the contract containing death cover

Please refer to the feedback provided above under DTTRC, which reflects CALI's position on this matter. We request that this example be withheld from the DOD Approach document also.