

AILA GILL AWARD 2022 – CONSUMER PROTECTION & DISPUTE RESOLUTION

A fair go: What Insurance Ombudsman Schemes around the world can learn from the Australian experiment with fairness.

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I. INTRODUCTION

Fairness is a nebulous concept which lies at the heart of consumer protection laws and schemes around the world and has become a core principle in Australia's newly reformed Insurance Ombudsman Scheme, the Australian Financial Complaints Authority ('**AFCA**').¹ AFCA is a world leading Insurance Ombudsman Scheme with mandatory membership, significant monetary jurisdiction up to and beyond AUD\$1,000,000, extensive compensation powers, the discretion to depart from legal principles under its 'fair in all the circumstances' principle and it is not bound by prior decisions nor are its decisions subject to appeal.² This Australian fairness experiment has provided increased consumer protection and outcomes but has also resulted in a nebulous notion of *fairness as an outcome* not represented in law, contract or industry codes taking precedence over *procedural fairness*. This paper will look at the Australian general insurance regulatory landscape, the Australian experiment with AFCA's fairness jurisdiction and discuss key results from this experiment with fairness that Insurance Ombudsman Schemes around the world may consider in developing, improving or balancing their own scheme's incorporation of fairness.

II. THE AUSTRALIAN EXPERIMENT

A. The Australian General Insurance Regulatory Landscape

Under Australian Financial Services Law,³ there is a complex licencing, regulatory and dispute resolution framework that general insurers operating in Australia must comply with when selling retail general insurance products to consumers, deemed financial products under Financial Services Law (home, contents, motor, travel, consumer credit, sickness and accident & domestic property).⁴ Whilst presenting a challenging and tight regulatory environment for insurers this framework provides consumers with multiple layers of protection.⁵

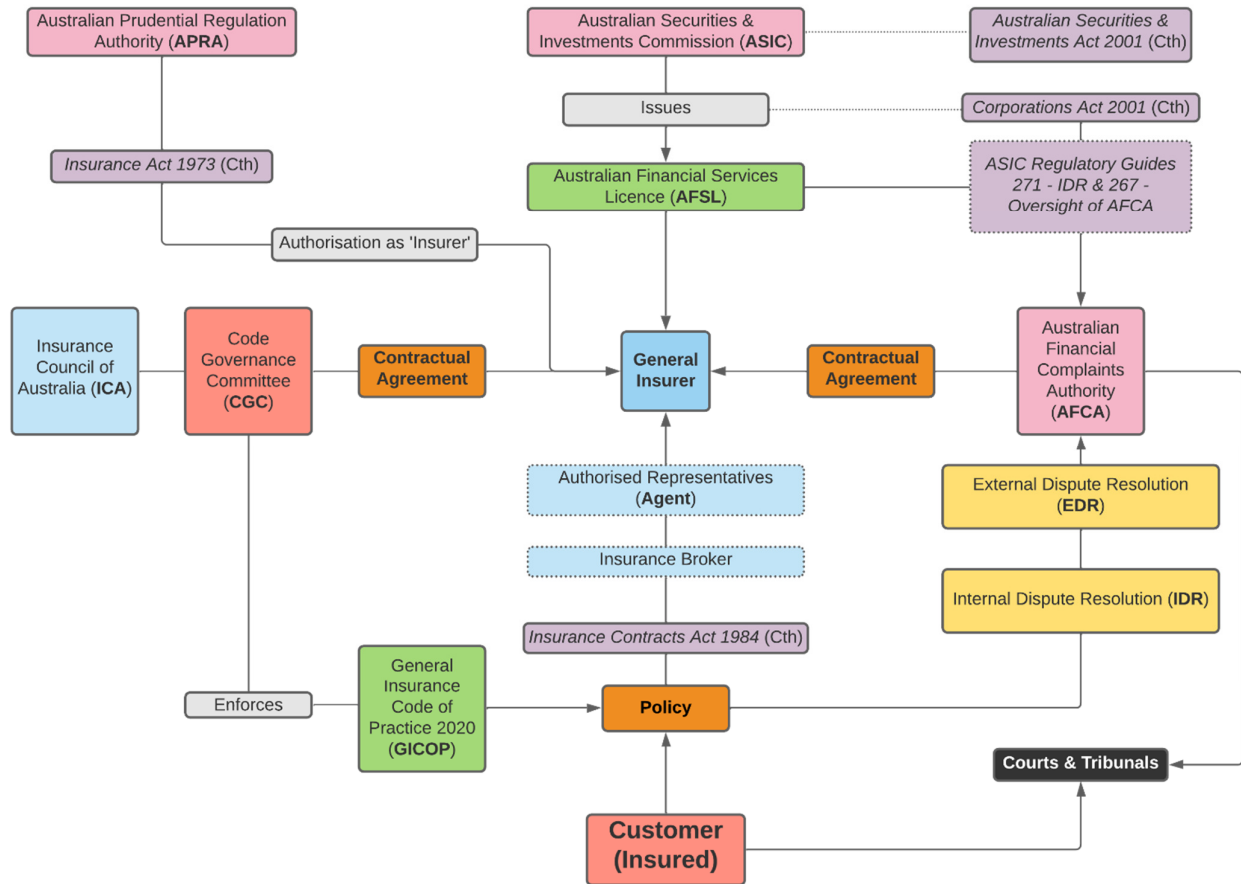
¹ For general information regarding Australia's Insurance Ombudsman Scheme visit: <https://www.afca.org.au/about-afca>.

² AFCA Rule A.14.2.

³ *Corporations Act 2001* (Cth) s 761A (definition of 'Financial Services Law').

⁴ *Ibid* s 761G(5)(b).

⁵ A summary of this landscape is provided in: Dr Ian Enright et al, 'General Insurance' (Background Paper 14, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, 12 June 2018).



The Australian General Insurance Landscape ('AGIRL').⁶

Consumer protection mechanisms within this landscape include:

- mandatory licencing for financial service providers and an obligation to do all things necessary to ensure financial services are provided '*efficiently, honestly and fairly*' with strict penalties for breaches, or likely breaches, of obligations;⁷
- compliance with a mandatory dispute resolution system comprising two stages:
 - internal dispute resolution ('IDR'), bound by strict regulatory guidance published by the Australian Securities and Investments Commission (the Australian corporate regulator, 'ASIC');⁸ and

⁶ Scott Breihl, *Australian General Insurance Landscape* (2022).

⁷ *Corporations Act 2001* (Cth) ss 911A, 912A(1)(a).

⁸ *Ibid* s 912A(1)(g)(i).

- external dispute resolution ('EDR'), which requires mandatory membership of the AFCA scheme – Australia's Insurance Ombudsman Scheme – for licence holders;⁹
- insurance contracts are also required to comply with the *Insurance Contracts Act 1984* (Cth) which prescribes strict limits on obligations, rights and remedies; and
- subscription to the Insurance Council of Australia's General Insurance Code of Practice 2020 ('GICOP'), a voluntary industry code that sets out day to day standards for insurers overseen by the Code Governance Committee.¹⁰

Notably whilst membership of AFCA is legislated, the specific rules that govern the operation and decision making process of AFCA – whilst requiring approval by ASIC and compliance with some legislated guiding principles – are enforced through a contractual framework between AFCA and members.

B. The Australian Financial Complaints Authority

AFCA was introduced in November 2018 following the completion of a 2017 review of the existing Australian financial system dispute resolution framework (the '**Ramsay Report**').¹¹

The Ramsay Report found, amongst other things, that Australia's predecessor Insurance Ombudsman Scheme, the Financial Ombudsman Service, should be merged with multiple other financial system ombudsman and EDR schemes to form a one stop shop as the predecessor framework gave rise to unnecessary duplication and increased consumer confusion being a product of history rather than design.¹²

The following general considerations for a single dispute resolution scheme for the Australian financial system were legislated:

- (a) the accessibility of the scheme;
- (b) the independence of the scheme;
- (c) the fairness of the scheme;
- (d) the accountability of the scheme;
- (e) the efficiency of the scheme;

⁹ Ibid s 912A(2)(c).

¹⁰ For general information regarding Australia's General Insurance Code of Practice visit: <https://insurancecouncil.com.au/cop/>.

¹¹ EDR Review Panel, *Review of the financial system external dispute resolution and complaints framework* (Final Report, April 2017).

¹² Treasury, *Report to the Minister for Superannuation, Financial Services and the Digital Economy, Minister for Women's Economic Security* (Review of the Australian Financial Complaints Authority, August 2021) 2 [1.10] <<https://treasury.gov.au/publication/p2021-219154>>.

(f) the effectiveness of the scheme.¹³

Additionally, the following key mandatory operational requirements of the dispute resolution scheme were legislated:

(b) complaints against members of the scheme are resolved (including by making determinations relating to such complaints) **in a way that is fair, efficient, timely and independent**; and

(c) appropriate expertise is available to deal with complaints; and

(d) reasonable steps are taken to ensure compliance by members of the scheme with those determinations; and

(e) under the scheme, determinations made by the operator of the scheme are:

(i) **binding on members** of the scheme; but

(ii) not binding on complainants under the scheme...¹⁴

Notably, the mandatory operational requirements of the scheme required that it resolve complaints ‘...**in a way** that is fair, efficient, timely and independent...’ and whilst several legislative powers are provided to ASIC to ensure the scheme meets its general considerations and complies with its mandatory requirements, the specific rules that govern **the way** the scheme fairly, efficiently, timely and independently operates and decides complaints were left to the design of the scheme itself.

AFCA’s introductory legislation set out an organisational structure for the scheme as a company limited by guarantee with equal representation between industry and consumer representatives in its board of directors to guide the scheme’s impartiality and independence.¹⁵

Little guidance was legislated as to the way in which complaints were to be fairly decided. Instead, the ultimate fairness of the AFCA scheme was to be considered against principles of natural justice and industry best practice when the scheme was authorised.¹⁶

Whilst its processes have been refined over time, AFCA triages complaints based on their complexity and attempts to guide parties towards resolution through case management before proceeding firstly to a preliminary assessment and finally to a determination if the preliminary assessment is rejected by either party:

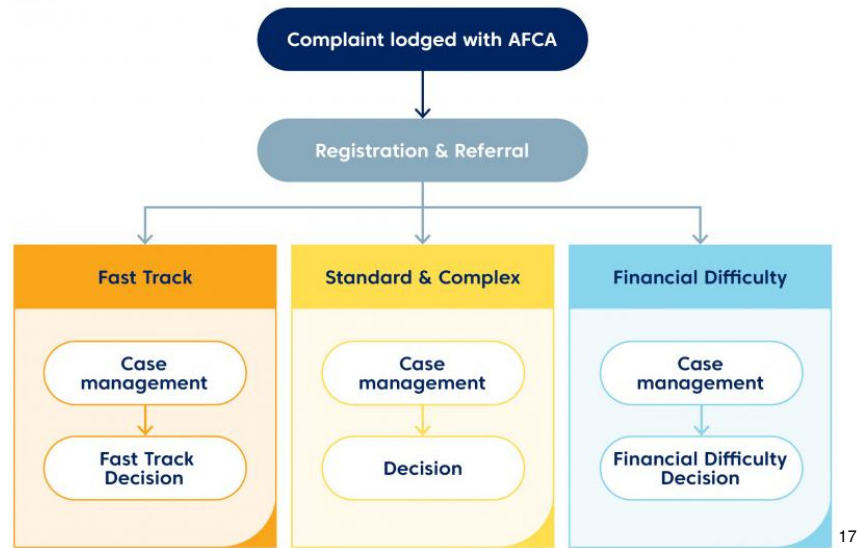
¹³ *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* (Cth) sch 1 pt 1 s 1051A.

¹⁴ *Corporations Act 2001* (Cth) s 1051(4) (**Emphasis** added).

¹⁵ *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* (Cth) sch 1 pt 1 s 1051(3).

¹⁶ Explanatory Memorandum, *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Bill 2017* (Cth) [1.55].

AFCA complaint resolution process



Within its first seven months of operation from November 2018 to June 2019 AFCA:

- received 9,171 general insurance complaints – 45% of which were resolved at referral;
- 4,897 of these complaints progressed to case management; and
- 1,034 of those complaints proceeded to determination by AFCA and of these determinations 26% were in favour of complainants and 74% in favour of insurers – these percentages do not reflect the total balance of decisions between insured and insurer.¹⁸

AFCA may consider complaints regarding insurance products up to AUD\$1,000,000, however this amount is adjusted every three years and currently sits at AUD\$1,085,000.¹⁹ AFCA may also award financial compensation up to AUD\$5,400 for indirect financial loss and a further AUD\$5,400 for non-financial loss, such as for humiliation, injury to feelings or unusual physical inconvenience or interference with a complainant’s enjoyment or peace of mind.²⁰

In February 2019, only three months after the AFCA scheme was introduced, a final report and set of recommendations was provided by Commissioner Hayne under the Royal Commission (a public enquiry with broad powers) into, amongst other financial areas, the insurance industry (the ‘**Hayne Report**’).²¹

¹⁷ AFCA, ‘The process we follow’ (Web Page) <<https://www.afca.org.au/what-to-expect/the-process-we-follow>>.

¹⁸ AFCA, ‘AFCA Datacube: Resolution Process’ (Web Page) <<https://data.afca.org.au/resolution-process>>.

¹⁹ AFCA, *Complaint Resolution Scheme Rules* (13 January 2021) 32 [C.1.2.e] & 39 [D.4.3] <<https://www.afca.org.au/about-afca/rules-and-guidelines>>.

²⁰ *Ibid* 38–39 [D.3].

²¹ *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019).

The Hayne Report brought about some of the most significant regulatory change to Australian Financial Services Law and the insurance industry and this period of change combined with the introduction of a single EDR body with the power to depart from the law was termed a 'fairness revolution' by AFCA.²²

C. 'Fair in all the circumstances'

The AFCA scheme is governed by the AFCA Rules and the AFCA Operational Guidelines which provide commentary on the Rules. AFCA's Rules set out the following principles underpinning the scheme:

A.2.1 AFCA will:

...

- c) consider complaints submitted to it in a way that is:
 - (i) independent, impartial, fair,
 - (ii) in a manner which provides procedural fairness to the parties
 - (iii) efficient, effective, timely, and
 - (iv) cooperative, with the minimum of formality;
- d) support consistency of decision-making, subject to its obligations both under section 1055 of the Corporations Act and to do what is **fair in all the circumstances**...²³

AFCA's Rules also set out the following considerations an AFCA decision maker **must take into account** when determining a complaint:

- A.14.2 When determining any other complaint, the AFCA Decision Maker **must do what** the AFCA Decision Maker considers **is fair in all the circumstances having regard to**:
 - a) legal principles,
 - b) applicable industry codes or guidance,
 - c) good industry practice and
 - d) previous relevant Determinations of AFCA or Predecessor Schemes.
- A.14.3 An AFCA Decision Maker is not bound by rules of evidence or previous AFCA or Predecessor Scheme decisions.
- A.14.4 A Determination must be in writing with reasons. Any remedy must be within AFCA's jurisdiction as set out in Section D [monetary and mandatory jurisdictional limits].

('AFCA's Decision Making Approach').²⁴

AFCA provides the following explanation of 'fairness' and guidance on what it considers 'fair in all the circumstances' under its Operational Guidelines:

Fairness requires complaints to be considered without bias and by staff and Decision Makers with appropriate expertise. **The Rules also explicitly require procedural fairness to be provided to the parties to a complaint.** This means that before we decide a complaint, the Complainant and the Financial

²² Helen Coonan (former AFCA Chair), 'Helen Coonan: AFCA is bringing a fairness revolution to the banks' (Media Release, AFCA, 9 December 2019) <<https://www.afca.org.au/news/media-releases/helen-coonan-afca-is-bringing-a-fairness-revolution-to-the-banks#>>.

²³ AFCA (n 19) 7 [A.2] (**emphasis added**).

²⁴ Ibid 17 [A.14] (**emphasis added**).

Firm must be provided with relevant information, and have an opportunity to provide their views and response. **Our decisions must fairly** reflect the information provided to us and **apply the decision making criteria in the Rules. While recognising that in each complaint we must take into account its particular facts, we are expected to achieve consistency in our decision making.**

...

What is the effect of doing what is fair in all the circumstances?

...

The effect of this is to move decisions away from relying strictly on a legal interpretation of the applicable legislation or the terms and conditions of the disputed financial product to a decision which also contemplates fairness. Setting out guidance as to how the principle of fairness can be applied is beyond the scope of these Operational Guidelines. Despite this, AFCA recognises that legal principles alone do not have the flexibility to allow a claim to be decided on other factors which are particular to a specific situation or which are subjective to a particular complainant.

...

AFCA must deliver not just procedural fairness but also substantive fairness. It is this substantive fairness that some might say is intangible. Despite this, **we can all recognise an unfair outcome because it offends our common set of basic values as to what is just and reasonable.** As a first step, AFCA must identify the existence and nature of any inherent unfairness.

...

An outcome that is disappointing to one of the parties does not mean it is unfair to that party. An essential feature of fairness is that it be applied equally to all the parties.²⁵

Whilst acknowledging that providing guidance on how the principle of fairness may be applied in the AFCA scheme is beyond the scope of the Operational Guidelines, the document regardless proceeds to provide commentary and general guidance on how an undefined notion of fairness will be applied in the scheme.

This guidance does not provide any grounding as to the process an AFCA decision maker will follow when seeking to determine what is fair in all the circumstances, either procedurally or substantively, and whether fairness, is solely concerned with procedural fairness of the complaint or also fairness of a complaint's outcome.

The guidance in these documents is binding on insurers through their mandatory membership of the AFCA scheme. There is no right of appeal for determinations as they are contractually agreed to be final and binding by insurers and this has been upheld by Australian courts.²⁶

In 2020, the Dispute Resolution Working Party of the International Insurance Law Association (AIDA) issued a questionnaire to AIDA Chapters around the world seeking information on their respective

²⁵ AFCA, *Operational Guidelines to the Rules* (1 April 2022) 10, 71–72 <<https://www.afca.org.au/about-afca/rules-and-guidelines>> (emphasis added).

²⁶ *Investors Exchange Limited v Australia Financial Complaints Authority Limited* [2020] QSC 74, [12]–[39].

Insurance Ombudsman Schemes.²⁷ Similarly, the Ramsay Report also considered dispute resolutions schemes in Singapore and Canada.²⁸ As of May 2022, AIDA Chapters from Chile, Hong Kong, Israel, New Zealand and the United Kingdom have responded and notably the Insurance Ombudsman Schemes and institutions in these countries do not appear to possess a similar power to AFCA which allows them to depart from the law, industry codes and practice under a broad notion of fairness.

Whilst some countries continued to operate multiple schemes, none of these foreign dispute resolution schemes possessed a monetary jurisdiction anywhere near to AFCA's and some countries maintained a right of appeal. The AFCA scheme is a unique world leading alternative dispute resolution body in terms of its jurisdiction and compensatory powers.

III. FAIRNESS

A. AFCA's Fairness Project & Focus on Fair Outcomes

So, what is meant by *fairness*?

Some people might say fairness is intangible. Nevertheless, through the lens of the Royal Commission it was very clear to the community, and even industry itself, that certain types of conduct was very clearly *unfair*.

The fact is 'fairness' is a concept we can all readily understand. Moreover, humans can clearly recognise *unfair* outcomes.

Fairness means doing what's right; it's the quality of being reasonable and just...²⁹

Despite the broader concept of fairness being a guiding principle of AFCA since November 2018, it remained undefined and without substantive guidance for AFCA decision makers, industry participants and complainants. To address this procedural gap, AFCA commenced a Fairness Project in 2019 to determine the way in which it would achieve what is fair in all the circumstances in determining a complaint – in essence, to distil notions of fairness into practical guidance for users of its scheme, contrary to the statement in its Operational Guidelines. This has culminated in the development of AFCA's 'Fairness Navigation Tool' released publically in May 2022 through a report on the outcome of the project.³⁰

²⁷ Chris Rodd (Chair, AIDA Dispute Resolution International Working Party), 'Dispute Resolution' (Web Page) <<https://aidainsurance.org/working-parties/international-working-parties/dispute-resolution>>.

²⁸ EDR Review Panel (n 11) 212.

²⁹ James Shipton (former ASIC Chair), 'The fairness imperative' (Speech, AFR Banking and Wealth Summit, 27 March 2019) <<https://asic.gov.au/about-asic/news-centre/speeches/the-fairness-imperative/>> (*emphasis* in original).

³⁰ AFCA, *Report on outcomes: Fairness Jurisdiction Project* (May 2022) 13 <<https://www.afca.org.au/about-afca/fairness/fairness-project>>.



Fairness Navigation Tool



This tool is a useful guide to users of the AFCA scheme and AFCA acknowledges that the tool is not intended to set new conduct standards or create behavioural onus requirements for parties. The project also produced guidance on how AFCA decision makers were to consider the fairness of outcomes:

- Were the relevant issues properly identified and assessed?
- Did the decision address the key assertions made by the parties?
- Did the decision clearly set out the relevant facts?
- Did the decision take into account relevant law, regulatory guidelines, industry practice, and AFCA's approach?
- Was the outcome fair in all the circumstances?
- Was the decision accessible, clear and persuasive?
- Was the decision one that a decision maker acting reasonably would make?
- Did the determination bring finality to the complaint?³¹

Additionally, on 21 September 2021 AFCA published an Engagement Charter setting out its expectations for parties:

³¹ Ibid 19.

To ensure a fair outcome is achieved in dispute resolution, all parties must engage in a fair process. This occurs when parties co-operate reasonably and genuinely with a common goal, to bring finality to the complaint.³²

The Operational Guidelines specifically comment that discussion on the notion of fairness is outside the scope of the document. The Fairness Project and the materials it has produced over its two year period attempt to distil fairness notions into non-binding guidance for AFCA decision makers. These fairness materials arguably introduce further considerations into AFCA's Decision Making Approach that will likely further broaden the notions of fairness in the scheme and prioritise focus on fair outcomes rather than fair processes.

B. AFCA's Indistinct Notion of Fairness

It is clear that AFCA has confronted difficulty in seeking to distil fairness into guidance materials during its two-year Fairness Project however, it is a misstep for a scheme to focus solely on an indistinct notion of fairness through the lens of the outcome of a complaint as this focus can affect the perceived fairness, independence and impartiality of the scheme.

Insurers are required to do all things necessary to ensure that their products and services are provided '*efficiently, honestly and fairly*'.³³ This obligation requires a focus not on the outcome but the process of compliance:

...The principal focus is on process, not outcomes. This is supported by a textual analysis of the provision. The obligation is an adverbial phrase focusing on how the financial services covered by the licence are to be provided. This focus on actions is reinforced by the phrase 'do all things necessary'. Noncompliance with other laws or a poor outcome in and of itself is not evidence that the duty has been breached...³⁴

Examining an outcome to identify an unfair result under broad notions of fairness is something that Australian courts have also cautioned against given its nebulous nature:

...in the *AGM Case* Beach J was firmly of the view that seeking to define the 'fairly' element through negative stipulations was an unproductive exercise. His Honour outlined his reasoning in the following passages:

Judges applying s 912A(1)(a) have usually not sought to define 'fairly' except to explain its structural setting in the composite phrase. This is unsurprising. And of course no dictionary definition could be adequate for the task given the intrinsic circularity with such definitions. For example, take the Macquarie Dictionary definition. First, the concept of 'free from injustice' is question begging and conclusionary. It adds little to elucidate 'fairly'. Second, the phrase 'that which is legitimately sought, pursued, done, given etc' is also question begging. No content is given to what is legitimate. There is irremediable circularity unless legitimacy simply incorporates other statutory or common law/equitable normative standards of behaviour. Third, the phrase 'proper under the rules' is also devoid of content unless 'proper' means 'in compliance with'.

³² AFCA *Engagement Charter* (21 September 2021) 2 <<https://www.afca.org.au/about-afca/engagement-charter>>.

³³ *Corporations Act 2001* (Cth) s 912A.

³⁴ Leif Gamertsfelder, 'Efficiently, honestly and fairly: A norm that applies in an infinite variety of circumstances' (2021) 50 *Australian Bar Review* 345, 350.

Fourth, if one construes 'fair' to include 'free from dishonesty', then this all just suggests that the phrase 'efficiently, honestly and fairly' should be read compendiously.

Could you convincingly define 'fairly' by what it lacks? To say that fairly means free from bias, free from dishonesty, etc, is to stipulate necessary negative conditions. And to do so may give you some boundary conditions. But no positive conditions are stipulated. No content is given, let alone sufficient conditions...³⁵

In the recent Australian Federal Court decision of *Sharma v H.E.S.T. Australia Ltd* an AFCA determination was overturned for the first time since the scheme commenced ('**Sharma**').³⁶ Notably, this case concerned a superannuation complaint and the rights of subsequent life insurers following transfer of an insurance book.

AFCA under section 1055(7) of the *Corporations Act 2001* (Cth), must not make a determination on a superannuation complaint that is contrary to law and this section operates alongside AFCA's Decision Making Approach. The Court in *Sharma* relevantly noted:

[95] A further error is that AFCA engaged in no more than pure speculation on a question central to the state of statutory satisfaction required by s 1055(3). As is well understood, where an administrative decision-maker is required to form an opinion or be satisfied "as a condition of the exercise of power," the decision must proceed upon a correct understanding of the law...To speculate as to what the law might be does not demonstrate that AFCA correctly understood the law that applies.

[96] Moreover, the statutory requirement not to make a determination of a superannuation complaint that would be contrary to law (s 1055(7)) implicitly requires that AFCA, where it considers a legal principle to be relevant to its decisional task, proceed by correctly identifying and stating the principle in order to comply with that obligation.

...

[108] For these reasons, I find that AFCA materially misdirected itself...which misunderstanding underpins its ultimate conclusion of fairness and reasonableness...It erred in law...³⁷

Sharma is an example of an AFCA determination where undue consideration on a broad notion of fairness from an outcome perspective resulted in the improper application of AFCA's Decision Making Approach. There is no legislative requirement similar to section 1055(7) that exists for general insurance complaints, these are solely determined under AFCA's Decision Making Approach through which **it must do** what is fair in all the circumstances having regard to:

- a) legal principles,
- b) applicable industry codes or guidance,
- c) good industry practice and

³⁵ Ibid 362.

³⁶ *Sharma v H.E.S.T. Australia Ltd* [2022] FCA 536.

³⁷ Ibid [95]—[96] & [108].

d) previous relevant Determinations of AFCA or Predecessor Schemes.³⁸

There is potential for a broad undefined notion of fairness and a focus on fair outcomes to cause tension with the process of evaluating what is fair in all the circumstances against these four considerations when a decision is being made by AFCA.

Similarly, it is not inconceivable that when a dispute resolution body with significant compensation jurisdiction and powers favours notions of fairness and a focus on fair outcomes above simply ensuring procedural fairness, that the impartiality of the body can be eroded as the New South Wales Supreme Court commented on in *D H Flinders Pty Ltd v AFCA*:

[135] This was hardly behaving in a manner procedurally fair to DH Flinders nor in a manner that was impartial. I think...AFCA had here “entered the fray” and was acting in an advisory relationship with the Complainants.

[136] However, having concluded that AFCA has no contractual authority, jurisdiction or power to deal with the Complaints, it is not necessary for me to say anything further about this.³⁹

In this case, AFCA assisted complainants in identifying a different financial firm to which their original complaint related, and subsequently advised it could open and join that financial firm and the Court commented that it was inclined to find this behaviour neither procedurally fair nor impartial.

C. AFCA’s Treasury Review

Under AFCA’s introductory legislation, an eighteen month review of the scheme was legislated and a final report published in August 2021 (the ‘**AFCA Review**’).⁴⁰

The AFCA Review made fourteen recommendations regarding the scheme highlighting areas for improvement in the Australian experiment with fairness; most notable were recommendations regarding operation and performance of the scheme:

- *Recommendation 2*, emphasised AFCA in making its determinations:

should consider what is ‘fair in all the circumstances’ having primary regard to the four factors identified in its Rules – legal principles, industry codes, good industry practice and previous decisions;

- *Recommendation 3*, confirmed AFCA:

should not advocate for, nor act in a manner that otherwise advantages, one party such that the impartiality of the complaints resolution process is compromised;

- *Recommendation 9*, confirmed:

³⁸ AFCA (n 19) 17 [A.14].

³⁹ *D H Flinders Pty Ltd v Australian Financial Complaints Authority Limited* [2020] NSWSC 1690 [135]–[136].

⁴⁰ Treasury (n 12) 11.

AFCA determinations should continue to not be subject to merits review, but the substance of a determination should be reviewable with respect to its application to future cases. To this end, AFCA should enhance the visibility, accessibility and independence of its existing forward-looking review mechanism.

AFCA should amend its Operational Guidelines to remove the requirement for an applicant to demonstrate an error of law to access the formal forward-looking review mechanism. Applicants should be able to access it if they are able to demonstrate that the AFCA determination adopts an approach that could have a significant impact across a class of consumers, businesses or transactions;

- *Recommendation 10*, outlined:

[c]omplaints about AFCA's service should remain the responsibility of the Independent Assessor. AFCA should improve the Independent Assessor's visibility as part of its communications with parties to a complaint.⁴¹

Principle concerns highlighted by the AFCA Review giving rise to these recommendations were submitted by members of the AFCA scheme:

- regarding consistency of decisions;⁴²
- that compensation for non-financial loss was perceived to be awarded in otherwise unmeritorious complaints;⁴³
- that remedies awarded went beyond AFCA's compensation caps, for example an award for indefinite temporary accommodation;⁴⁴ and
- that AFCA was holding members to a different standard to what law or contract required under broad notions of fairness – for example, a 15 per cent increase in a home insurance payout without basis under in contract, law or industry code but instead on the insurer's exercise of its discretion of the method of settlement under the contract.⁴⁵

⁴¹ Treasury (n 12) xi–xiii.

⁴² Ibid 37 [4.30].

⁴³ Ibid 39 [4.39].

⁴⁴ Ibid 39, [4.40].

⁴⁵ Ibid 40–41, [4.44]–[4.49].

The Australian Government in supporting Recommendation 2 'emphasise[d] that the characterisation of conduct as fair or unfair is evaluative, and therefore must be done by AFCA with close attention to the underpinning legal provisions.'⁴⁶

It also opened potential to introduce a mechanism for merits review of decisions in its response to Recommendation 10:

Going forward, an independent review of a sample of AFCA cases (including cases that have been referred to the forward-looking review mechanism, and the Independent Assessor) should be conducted to assess whether a merits review mechanism would be appropriate. This review will be conducted as soon as practicable after 18 months.⁴⁷

AFCA's current Independent Assessor and forward-looking review mechanism provide parties with the opportunity to express dissatisfaction regarding AFCA's service (however it does not have the power to alter a decision's outcome).⁴⁸ A merits review system would not be needed should Recommendations 2, 3 & 9 be properly implemented as a review system would only introduce further cost and legalese to the consumer scheme and accelerate the use of paid advocates by complainants.⁴⁹

IV. CONCLUSIONS FOR INSURANCE OMBUDSMAN SCHEMES

AFCA's ability to depart from legal principles differentiates it from Australian courts and tribunals as it allows the scheme to make 'decisions outside of a strict legalistic approach and facilitates a more expedient decision making process'.⁵⁰ This undoubtedly benefits all parties, however a focus on a broad nebulous notion of fairness, beyond what is required by law, contract or industry practice should be balanced against world leading compensatory powers of the AFCA scheme and its binding decisions.

Insurance Ombudsman Schemes in other countries should consider the Australian experiment with fairness against their own scheme and the following lessons:

- Adherence to stated decision making criteria equally in consideration of what is fair in all the circumstances, rather than allowing notions of fairness from an outcome perspective to override a scheme's rules, should act to limit cases where parties feel that a merits review of a decision is justified.
- It is critical for a scheme to have a framework to ensure consistency of decisions so that parties have confidence in decisions. Insurers take a scheme's approach into consideration when designing products and services and any uncertainty about this approach can negatively impact

⁴⁶ Australian Government, *Government Response to the Review of the Australian Financial Complaints Authority* (Review of the Australian Financial Complaints Authority, November 2021) 3–5 <<https://treasury.gov.au/publication/p2021-219154-gr>>.

⁴⁷ Ibid 5.

⁴⁸ AFCA (n 19) 19 [A.16].

⁴⁹ Treasury (n 12) 71 [7.23].

⁵⁰ Ibid 39 [4.43].

an insurer's business, particularly if the scheme has limited or no right of review or appeal. Any inconsistency, unless reasonably explained within a scheme's rules, may also undermine the perception of fairness of the scheme.

- Undue favour of notions of fairness may also erode the perceptions of independence and impartiality of a scheme as this may be seen as 'fairness advocacy' by the scheme on behalf of parties.
- While it is tempting to adopt a merits review, the paramount efficiency and consumer focus of any scheme would not benefit from such a legalistic and costly mechanism.
- To balance independence against any fairness powers of a scheme, the scheme should maintain a visible and independent forward-looking review mechanism accessible by insurers and consumer groups for review of reasonable concerns regarding decisions, even if fair in all the circumstances, that may have a significant impact across a class of consumers, businesses or financial transactions.

The Australian 'fairness revolution' resulting from the perfect timing of regulatory upheaval and introduction of the AFCA scheme, created an environment in which the newly formed insurance ombudsman has appeared to apply a broad unguided interpretation of this fairness power. A nebulous notion of fairness is not grounded in the four considerations under AFCA's Decision Making Approach and shifts beyond what is required under Australian Financial Services Law, insurance contracts and insurance industry standards and practices established by GICOP. The AFCA Review and Australian courts have both noted this drift in focus of the scheme and their commentary serves as a warning to AFCA in the Australian context and Insurance Ombudsman Schemes in other countries of the inherent danger in balancing the application of an undefined notion of fairness with fair process.