



A FAIR GO:

What Insurance Ombudsman Schemes around the world
can learn from the Australian experiment with fairness

SCOTT BREIHL
WICA AUGUST 2023

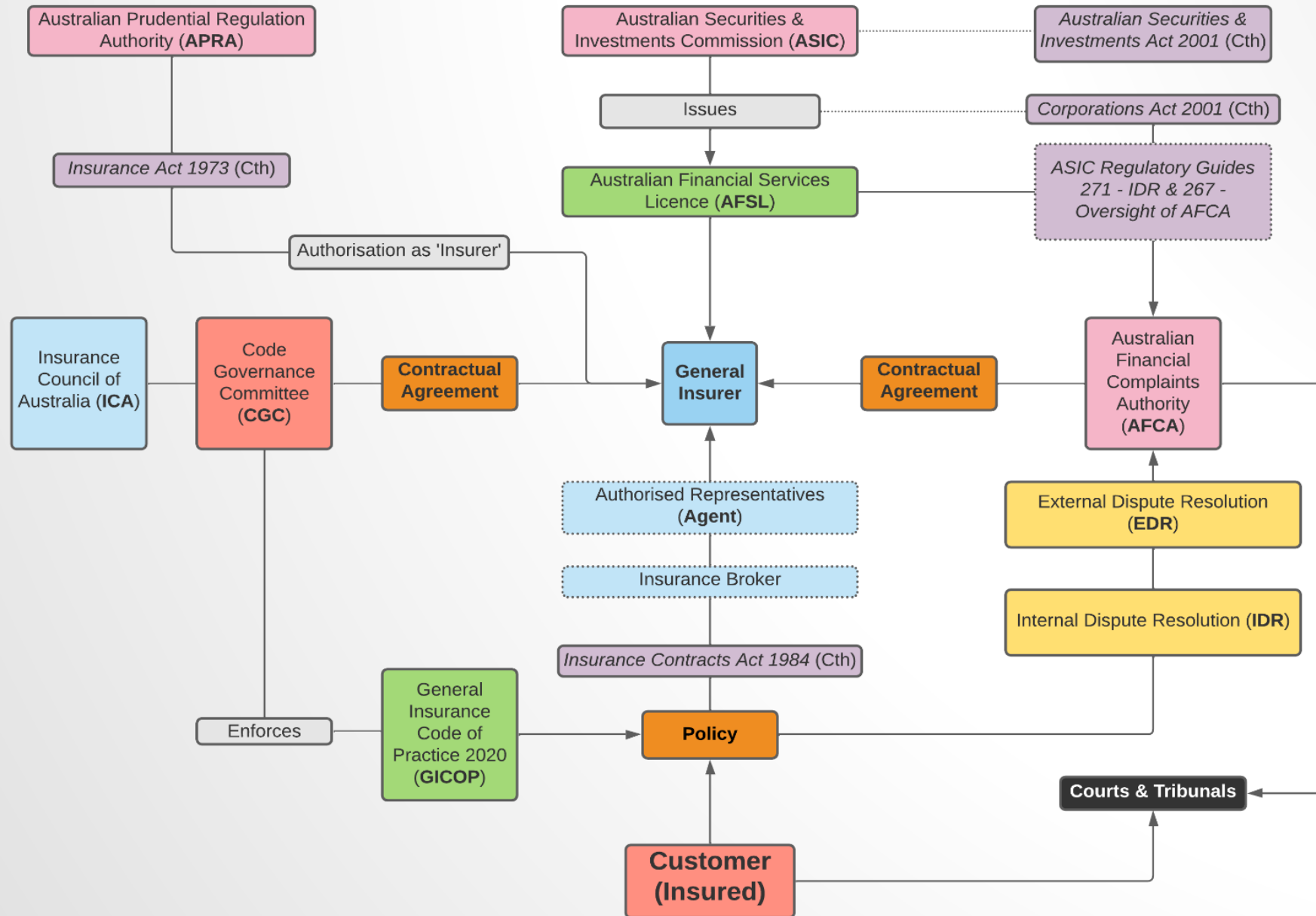
ACKNOWLEDGEMENT OF COUNTRY



THE AUSTRALIAN EXPERIMENT



THE AUSTRALIAN GENERAL INSURANCE REGULATORY LANDSCAPE (AGIRL)



THE AUSTRALIAN FINANCIAL COMPLAINTS AUTHORITY (AFCA)

- Commenced November 2018
- Equal representation on board of directors
- Legislated mandatory requirements
- Triage complaints based on complexity
- Monetary jurisdiction up to AUD\$1,085,000
 - May award AUD\$5,400 for indirect financial loss
 - May award AUD\$5,400 for non-financial loss
- 'Fairness Revolution'



AFCA 2021-2022 ANNUAL REVIEW



AFCA 2021-2022 ANNUAL REVIEW

18,563 complaints received

44% resolved at
Registration and Referral stage

Top five general insurance complaints received by product

Product	2018-19 ¹	2019-20	2020-21	2021-22
Home building	1,887	3,616	3,527	6,120
Motor vehicle-comprehensive	2,680	4,104	4,386	5,791
Home contents	478	946	1,079	1,289
Consumer credit insurance	96	723	506	951
Motor Vehicle-uninsured third party	798	1,189	934	891

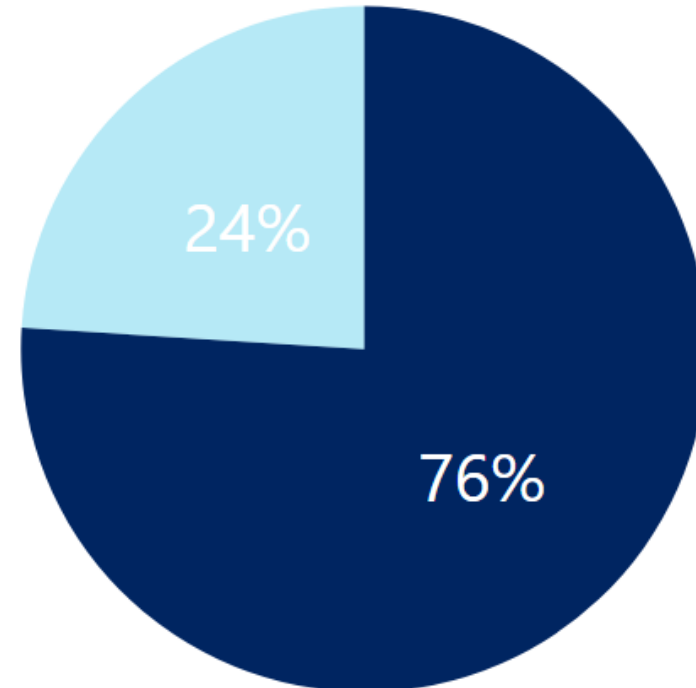
Top five general insurance complaints received by issue

Issue	2018-19 ¹	2019-20	2020-21	2021-22
Delay in claim handling	2,023	3,521	3,126	4,804
Claim amount	1,989	3,171	3,161	3,747
Denial of claim – exclusion/condition	1,667	3,032	3,146	3,111
Denial of claim	1,366	2,337	2,479	2,125
Service quality	666	1,353	1,164	1,503

AFCA 2021-2022 ANNUAL REVIEW

Outcomes for complaints closed after AFCA's decision

- In favour of Financial Firm
- In favour of complainant



'FAIR IN ALL THE CIRCUMSTANCES'

- AFCA Rules:

- 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...**

- ...

- 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,**

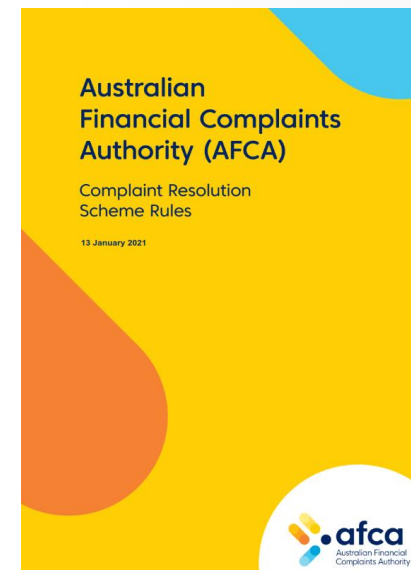
- b) **applicable industry codes or guidance,**

- 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].



‘FAIR IN ALL THE CIRCUMSTANCES’

- AFCA Operational Guidelines:

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

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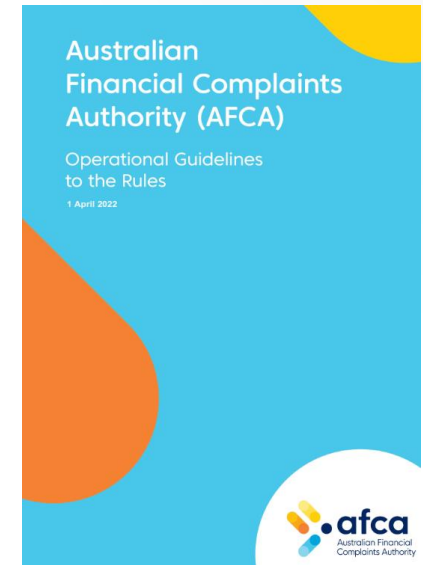
The effect of this is to move decisions away from relying strictly on a legal interpretation of the applicable legislation or the terms and conditions of the disputed financial product to a decision which also contemplates fairness. **Setting out guidance as to how the principle of fairness can be applied 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.

...

- World leading power, jurisdiction and compensation



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...

James Shipton, former ASIC Chair



AFCA'S FAIRNESS PROJECT & FOCUS ON FAIR OUTCOMES



Fairness Navigation Tool

The key obligations:

- Keep promises made
- Be open and honest
- Do not take unfair advantage
- Be ethical and professional
- Demonstrate reasonable care and skill
- Ensure services are fit for purpose
- Protect the money of others
- Provide value and benefit
- Serve the interests of others
- Consider consequences and impacts of actions

1. Did the parties obey the law?
2. Did the parties make promises or representations they did not meet?
3. Did the parties act honestly, reasonably and in good faith in their dealings with each other?
4. Did one party take unfair advantage of another?
5. Were specific circumstances or vulnerabilities considered?
6. Did the financial firm act with reasonable care and skill and in accordance with industry and professional practice?
7. Was the product or service fit for purpose and perform as expected?
8. When acting for a consumer, did the financial firm act in the interests of the consumer or group of consumers as a whole?
9. How did the parties treat each other during their relationship after concerns were raised?
10. What was the impact on the consumer and their experience of the service?

Fair dealing

Ensuring that one party does not take unfair advantage of another:

- in the nature of the bargain struck
- in the circumstances of entering that financial arrangement

Fair treatment

Ensuring that one party is not treated inequitably or in a way that is adverse to their interests

Fair service

Delivering quality, professional financial products and services in a manner that:

- is fit for purpose
- meets a consumer's legitimate interests and reasonable expectations

Fair remediation

A prompt and proportionate response when things go wrong

AFCA'S INDISTINCT NOTION OF FAIRNESS

- Focus on fairness through lens of a claim
- Insurer's already required to provide services, not outcomes, *'efficiently, honestly and fairly'*
- Courts have struggled with the concept of fairness:

[521] 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...

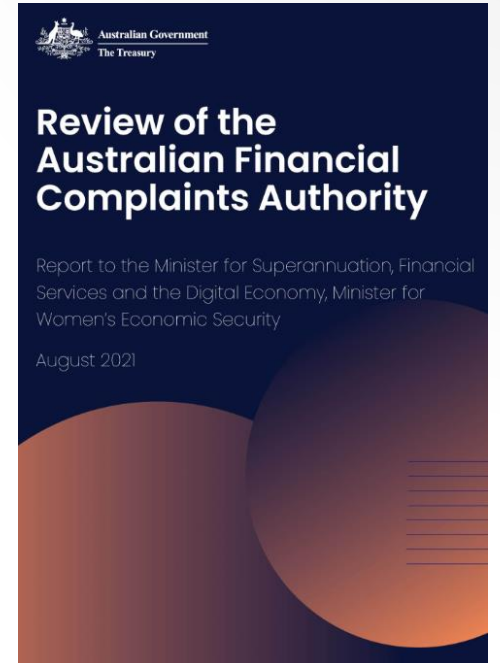
- ASIC v AGM Markets Pty Ltd 2020

AFCA'S INDISTINCT NOTION OF FAIRNESS

- *Sharma v H.E.S.T. Australia Ltd*:
 - Section 1055(7) Corporations Act 2001 requires AFCA not to make a determination on a superannuation complaint that is contrary to law
 - First AFCA decision overturned as it was contrary to law
 - Potential for broad undefined notions of fairness to affect AFCA's decision making approach
- *D H Flinders Pty Ltd v AFCA*:
 - Court commented that AFCA acted in manner neither procedurally fair nor impartial
 - Potential for preference for fair outcomes to affect impartiality

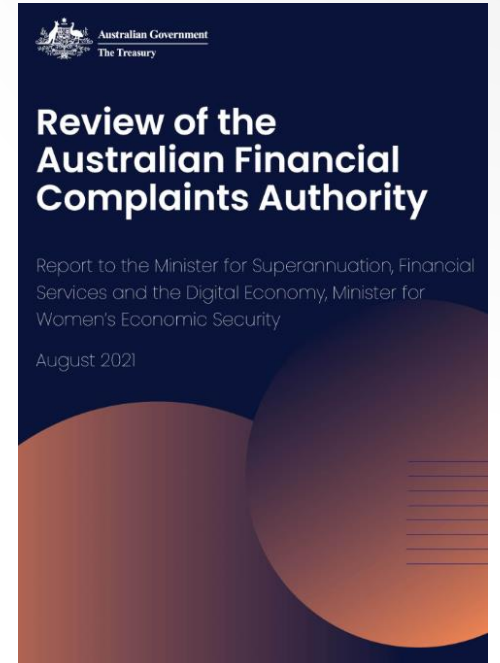
AFCA'S TREASURY REVIEW

- Legislated 18-month review
- Principal concerns identified by Treasury:
 - consistency of decisions
 - non-financial loss compensation awarded in unmeritorious complaints
 - awards beyond compensation caps
 - holding insurers to a different standard than that required by law, contract or industry code
- Raised potential for a merits review system



AFCA'S TREASURY REVIEW

- 14 recommendations, including:
 - **R2** – emphasised that AFCA when considering what is 'fair in all the circumstances' should have primary regard to legal principles, industry codes, good industry practice and previous decisions
 - **R3** – confirmed AFCA should not compromise its impartiality by advocating for or advantaging one party



AFCA'S TREASURY REVIEW

- 14 recommendations, including:
 - **R9** – confirmed an appeal system should be avoided and AFCA's forward-looking review mechanism promoted and made more accessible if a party can show a determination could have a significant impact across a class of consumers, businesses or transactions
 - **R10** – outlined complaints about AFCA's service should remain the responsibility of the Independent Assessor



AFCA'S TREASURY REVIEW

<p>2. Ensuring all AFCA decisions consider what is fair in all circumstances</p> <p>▶</p> <p>Status: Revised for completion in 2024</p> <p>Existing work underway</p>	<p>3. Not advocating or acting in a manner that compromises impartiality</p> <p>▶</p> <p>Status: On track for completion in 2024</p> <p>Existing work underway</p>	<p>9. Enhancing visibility, accessibility and independence of the forward-looking review mechanism</p> <p>▶</p> <p>Status: On track for completion in 2024</p> <p>New project</p>	<p>10. Improving visibility of the Independent Assessor to all parties to a complaint</p> <p>▶</p> <p>Status: Completed in 2022</p> <p>New project</p>
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RESULTS OF THE AUSTRALIAN EXPERIMENT



CONCLUSIONS FOR INSURANCE OMBUDSMAN SCHEMES

- Need to balance procedural fairness and notions of fairness in decision making criteria and rules to avoid need for a merits review system
- Frameworks to ensure decisions are consistent to provide certainty to parties and avoid perception the scheme is unfair
- Avoid undefined notions of fairness that may affect perceptions of independence and impartiality of scheme and 'fairness advocacy'
- Avoid a merits review system as this only increases legalese, inefficiency and costs – contrary to consumer focus
- Maintain a forward-looking review mechanism for review of decisions that may have significant impact across a class of consumers, businesses or transactions to improve consistency, independence and balance against any fairness powers of the scheme

QUESTIONS?



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