

Friday, 26 March 2021

**TO: DIRECTOR, AFCA REVIEW SECRETARIAT – FINANCIAL SYSTEM DIVISION**  
**SUBMISSION – REVIEW OF THE AUSTRALIAN FINANCIAL COMPLAINTS AUTHORITY**

**SUMMARY**

Claimo Pty Ltd (Claimo) makes the following submission in response Section 4 of the *Treasury Laws Amendment (Putting Consumers First—Establishment of the Australian Financial Complaints Authority) Act 2018* (the Act) which requires the Minister to establish an independent review of the operation of AFCA.

AFCA has welcomed the opportunity to make a submission and put forward views of how External Dispute Resolution (EDR) for the financial services industry can be further improved.

**COMPANY PROFILE**

Claimo is a claims management company or 'claimant intermediary'. Claimo advocates on behalf of consumers who wish to complain about the sale of an add-on insurance policy. Claimo has processed hundreds of claims for hundreds of Australian policy holders and has an impeccable success record.

Between December 2010 and June 2014, Claimo's Managing Director, Nathan Mortlock, led a team of 400 employees at Lloyds Banking Group<sup>1</sup> on the Payment Protection Insurance (PPI) project in the UK. The Group was responsible for refunds of £27 Billion.

**ISSUES RELATING TO THE AUSTRALIAN FINANCIAL COMPLAINTS AUTHORITY**

1. AFCA does not consider complaints for Group Members bound by a Class Action, even if the complainant did not receive a copy of the Opt Out notice and was unaware of the proceedings<sup>2</sup>
2. AFCA does not consider the Time Value of Money in accordance with AFCA's *Application of Interest* Guideline in accordance with *s.57 of the Insurance Contracts Act* and *Regulation 38 of the Insurance Contracts Regulations* for all complaints about add-on insurance
3. AFCA does not have a unified approach to investigating complaints about add-on insurance

---

<sup>1</sup> Akin to Westpac Banking Group, Lloyds Banking Group encompassed several major high street names including Lloyds; TSB; Halifax; Bank of Scotland; Scottish Widows; Black Horse

<sup>2</sup> Class actions affecting AFCA complaints PDF - <https://www.afca.org.au/media/731/download#:~:text=an%20AFCA%20complaint%20against%20them,those%20of%20the%20class%20action.&text=A%20person%20is%20automatically%20a,discretion%20to%20exclude%20their%20complaint.>

## RECOMMENDATIONS

The following recommendations are proposed:

1. AFCA to consider complaints for Group Members bound by a class action when a complainant was unaware of the proceedings and/or did not register for compensation
2. AFCA to consider the Time Value of Money in accordance with AFCA's *Application of Interest Guideline* in accordance with *s.57 of the Insurance Contracts Act and Regulation 38 of the Insurance Contracts Regulations* for all complaints about add-on insurance
3. AFCA to dedicate more training and staffing resources for complaints about add-on insurance.

### RECOMMENDATION 1: AFCA TO CONSIDER COMPLAINTS FOR GROUP MEMBERS BOUND BY A CLASS ACTION WHEN A COMPLAINANT WAS UNAWARE OF PROCEEDINGS AND/OR DID NOT REGISTER FOR COMPENSATION

#### 1.1 Class actions affecting Australian Financial Complaints Authority (AFCA) complaints

AFCA has the right to exclude a complaint at their discretion under their Rules. This includes excluding complaints which are subject (or have been subject) to a class action, even if the complainant did not receive a copy of the notice and unaware of the proceedings.<sup>3</sup>

Australian Financial Service (AFS) licensees have specific obligations relating to dispute resolution and compensation arrangements for policy holders.<sup>4</sup> Alternative dispute resolution channels provide consumers access to justice and remedies for free. These channels play an important social and economic role, but class actions override policyholder's right to such basic access to justice.

In 2020, Slater and Gordon settled a class action about Consumer Credit Insurance (CCI) against the National Australian Bank (NAB) and MLC Limited (MLC) for \$49.5 million for 50,000 members. Group members who did not register for compensation for the NAB CCI Class Action by 27 April 2020 did not receive compensation.<sup>5</sup>

Of the 350,000 NAB customers group members, only 45,000 registered for compensation<sup>6</sup> Therefore 87 per cent did not receive compensation from the settlement. Group members are now bound by the class action and unable to bring their own claim separately to AFCA.

Claimo has had to turn away many NAB customers who were unaware of the proceedings and did not register for compensation in time because they had changed addresses and did not receive any notices. These consumers are now bound by the outcome and cannot pursue any compensation.

---

<sup>3</sup> Class actions affecting AFCA complaints PDF -

<https://www.afca.org.au/media/731/download#:~:text=an%20AFCA%20complaint%20against%20them,those%20of%20the%20class%20action.&text=A%20person%20is%20automatically%20a,discretion%20to%20exclude%20their%20complaint.>

<sup>4</sup> Corporations Act 2001 (Cth) s 912A

<sup>5</sup> Amended Settlement Distribution Scheme - <https://assets.slatergordon.com.au/downloads/200304-Amended-Settlement-Distribution-Scheme.pdf?mtime=20200305093802&focal=none>

<sup>6</sup> Insurance Business News Magazine - <https://www.insurancebusinessmag.com/au/news/breaking-news/nab-customers-told-not-to-miss-out-on-compensation-216279.aspx>

In April 2019, law firm Johnson Winter & Slattery brought a class action against Swann Insurance (Aust) Pty Ltd and Insurance Australia Limited (IAL). IAL estimated the sale of its add-on insurance products could have been worth up to \$1 billion for the class action. The Swann Insurance class action included up to 673,000 policies sold to 'several hundred thousand policyholders.'<sup>7</sup>

The Swann Insurance class action settled for \$138 million on 17 December 2020 and \$90,147 million will be paid to group members.<sup>8</sup> Therefore, each member on average will receive \$451.<sup>9</sup> Claimo data shows the average cost of add-on insurance on Swann Insurance car loan policies is \$3,327 per client and \$1,779 per policy. Therefore, policy holders may have received 638 per cent more compensation for mis-sold 'add-on insurance' via alternative dispute resolution channels. The data also suggests the 673,000 policies could have totalled more than previously expected at \$1.2 billion in premiums.

In addition, the NAB and Swann Insurance class actions relate to policies financed into credit cards, loans and car finance under a single premium policy which incur significant interest charges. Often interest charges far outweigh the cost of premiums resulting in bigger refunds. However, the class actions did not compensate for the total charges of premiums and interest.

The above data indicates that it is not the policyholders' best interests to be bound by the outcome of class actions. Instead, the data suggests that law firms are settling for significantly less than what policy holders are entitled to and group members will only receive compensation if they register for compensation.

Claimo therefore recommends AFCA utilise its discretionary powers and consider consumers which have been subject to poor outcomes and procedural injustices that is outside the control of Complainants.

## **1.2. AFCA will not consider complaints that may fall within the class action even when no opt-out notice is available.**

AFCA will not consider complaints that may fall within the class action even when no opt-out notice is available. This includes complaints submitted before complainants have been notified of a class action by relevant parties. AFCA will only consider a complaint once the complainant has received confirmation from the Federal Court and they have opted-out of the class action.

Opt-out notices can take months and up to a year or more before they are available. Law firms do not consider the impact of class actions for policy holders who already have existing claims through alternative dispute resolution channels. This approach is manifestly unfair and causes an unnecessary delay that is outside of the control of the complainant.

AFCA has advised Claimo that it is not appropriate to consider a group of complaints that fall under the Allianz Class Action because the matter is raised in two different forums, and the Complainants may receive the same compensation through both forums.

However, under AFCA case number 733280, AFCA progressed a complaint in the ANZ CCI Class Action and decided not to exercise its discretion to exclude the complaint '*even though one of the policies listed about appears to be captured in the ANZ CCI Class Action as per Slater and Gordon's website*'. Therefore, AFCA's approach is inconsistent and subsequently treating Complainants unfairly.

---

<sup>7</sup> Insurance News - <https://www.insurancenews.com.au/daily/iag-to-pay-138-million-in-class-action-settlement>

<sup>8</sup> [Settlement Notice](#).

<sup>9</sup> Calculated as 90,147,000 (net settlement amount) divided by 200,000 (Swann Group Members)

www.claimo.com.au | 1300 879 071

If AFCA has concerns about Complainants having their matter heard twice, a viable solution is that the financial firm notifies the Court and/or the law firm when a matter is being handled.

Further, AFCA's decision to investigate matters is discretionary as per responses about the ANZ and Allianz class actions. Therefore, Claimo recommends that our proposed solution (or similar) be considered under AFCA's discretionary powers, when an Opt-Out Notice is unavailable. This approach is fair, consistent and does not prevent or delay Complainants exercising their rights to use an external dispute resolution scheme.

**RECOMMENDATION 2: AFCA TO CONSIDER THE TIME VALUE OF MONEY IN ACCORDANCE WITH AFCA'S APPLICATION OF INTEREST GUIDELINE, S.57 OF THE INSURANCE CONTRACTS ACT AND REGULATION 38 OF THE INSURANCE CONTRACTS REGULATIONS**

Claimo has considered the UK's 'General redress' scheme as an example on how refunds for add-on insurance should be calculated when a breach has been found and an uphold made in favour of the complainant.

The UK 'General redress' scheme includes:

- a refund of Payment Protection (PPI) premiums
- historic interest (interest paid by the customer on the PPI premium if it was added to the loan or credit card)
- simple interest at a rate of 8% per annum which is to compensate the customer for being deprived of the money they had paid to the firm for the PPI.

Under AFCA Determination 730742, AFCA determined the insurer was to pay interest in addition to premiums under rule D.6 of AFCA Rules, using the statutory rate under section 57 of the Insurance Contracts Act 1984 (Cth) from the date the lease ended until the date of payment of the claim.

However, this approach is not a unified approach made by AFCA and is the only Determination for a Claimo client to consider the additional interest payment under *section 57 of the Insurance Contracts Act 1984 (Cth)*.

Claimo recommend AFCA adopt a unified approach to compensate the customer for being deprived of the money and to provision for the Time Value of Money (TVOM). The formula prescribed by Claimo for the Time Value of Money is the 10 years Australian Government Bold Yield (published by the Reserve Bank of Australia) plus an additional 3%.

For the avoidance of any doubt, 'General redress' for add-on insurance complaints should include:

1. a refund of add-on insurance premiums
2. historic interest (interest paid by the customer on the if it was added to the loan or credit card)
3. Time Value of Money is the 10 years Australian Government Bold Yield (published by the Reserve Bank of Australia) plus 3%

This approach is consistent and fair to all Complainants wrongly sold an insurance policy.

### **RECOMMENDATION 3: AFCA TO DEDICATE MORE RESOURCES AND TRAINING FOR COMPLAINTS ABOUT ADD-ON INSURANCE**

If AFCA's decision to exclude the group of complaints against Allianz was made due to the high caseload of Allianz complaints submitted to AFCA by Claimo then we strongly recommend AFCA to dedicate extra resources and training to cope with demand.

The UK experience tells us that the caseloads will increase exponentially, especially now there are several competitors in the market and based on previously settled add-on insurance class actions, the complainant may receive a better outcome by removing themselves from the class action.

The UK and Australia have a lot of similarities; however, the UK did not rely on Class Actions to remedy PPI policy holders as they contacted the financial firm directly to resolve their dispute.

During the PPI era, Lloyds Banking Group received between 30,000-80,000 PPI complaints per week which were serviced by 400 case managers processing circa. 2,000 cases with multiple policies daily. Therefore, our UK experience tells us that it is possible to investigate the individual claims of each policyholder on its merits.

**CLAIMO PTY LTD**

**N W MORTLOCK**

**N ARAOUZOU**

Directors of Claimo

26 March 2021